

September 2015

Maximum Sustainable Yield in the Common Fisheries Policy

Contents

Key Recommendations	3
Executive Summary	4
Introduction	6
1 The MSY objective in Article 2(2) of the Basic Regulation	6
1.1 Article 2(2) sets a clear objective for the MSY exploitation rate	6
1.2 A timeframe for achieving MSY	8
1.3 The other fisheries management objectives of the Basic Regulation and their link to the MSY objective	10
1.3.1 The precautionary approach to fisheries management	11
1.3.2 The ecosystem-based approach to fisheries management	13
2 Other articles in the Basic Regulation referring to the Article 2 objectives	15
2.1 Provisions dealing with implementing measures in the Basic Regulation	15
2.1.1 Conservation measures	15
2.1.2 Regulation setting fishing opportunities	16
2.1.3 Case study: The 2015 TAC Regulation	17
2.1.4 Multiannual plans	18
2.1.5 Case study: The Baltic Sea Multiannual plan proposal	21
2.2 Provisions referring to actors and other legislative tools	22
2.2.1 Article 20: Member States' measures within the 12 nautical mile zone	22
2.2.2 Respecting Article 2 of the Basic Regulation in the international arena	23
2.2.3 Article 35 on the objectives of the Common Market Organisation	24
2.3 Provisions dealing with financial aid	25
Conclusion	26
Appendix	27

Key Recommendations

- The requirements and objectives of the CFP in relation to MSY (outlined in Article 2(2) of the Basic Regulation) need to be the basis for all relevant decisions taken at EU, national and regional level to properly implement the CFP and achieve its objectives. These decisions include discard plans, multiannual plans and the regulation of fishing opportunities.
- If ranges of exploitation rates are provided for in multiannual plans as suggested by the Inter-Institutional Task force on multiannual plans,¹ the point value of F_{MSY} must serve as the upper boundary of the range, with exploitation rates generally set below this upper limit, in order to be in compliance with Article 2(2) of the Basic Regulation.
- If there is any delay in meeting the 2015/2020 F_{MSY} requirement beyond 2015, the European Commission, Council of Ministers and national authorities (if appropriate) should give a concrete and evidence-based explanation as to why this is the case, and give a timeline showing how these exploitation rates will be achieved progressively and incrementally (by 2020 at the latest). The European Commission should play its role as guardian of the Treaties and request such additional justification from the European Parliament and Council of Ministers if not already supplied.
- The European Commission should issue guidelines regarding what reasons and evidence are adequate to justify a delay in meeting the 2015/2020 F_{MSY} requirement beyond 2015 (and by 2020 at the latest).
- The European Commission or the European Parliament should invoke the principle of sincere cooperation under the EU Treaty if the Council of Ministers sets fishing opportunities that are not in line with the requirements of Article 2(2) and Article 16 of the Basic Regulation.
- The Union acting at international level must respect and actively promote the achievement of the MSY objective.
- Actors under the Common Markets Organisation Regulation, in particular Producer Organisations, must promote sustainable fishing activities and fishery products in line with the objectives of the Basic Regulation, including the MSY objective and the 2015/2020 F_{MSY} requirement.
- The European Commission and Member States must ensure that EU financial assistance is only granted to measures or projects that will help achieve the objectives of the Basic Regulation.

¹ Available at <http://cfp-reformwatch.eu/2014/04/new-agreement-opens-up-for-progress-on-multiannual-fisheries-plans/>

Executive Summary

- The new Common Fisheries Policy (CFP) Basic Regulation (EU Regulation No 1380/2013; the Basic Regulation)² now incorporates the long-standing Union policy objective³ to manage fish stocks to achieve “*Maximum Sustainable Yield*” (MSY).⁴
- Article 2(2) of the Basic Regulation contains the fundamental objective that underlies the environmental, social and economic sustainability pillars of the EU – the aim to restore and maintain stocks above levels that can produce MSY (the MSY objective). In its second paragraph, Article 2(2) stipulates how this objective is to be achieved, namely by requiring the adoption of MSY-based exploitation rates (F_{MSY}), which are to be achieved by 2015 where possible and on a progressive, incremental basis by 2020 at the latest (the 2015/2020 F_{MSY} requirement).
- Fishing consistently at F_{MSY} will not fulfill the MSY objective in Article 2(2), because on average it will only result in stocks being above levels that can produce MSY half of the time.⁵ Therefore, and in line with the United Nations Fish Stocks Agreement⁶, which the EU is a signatory to, F_{MSY} must be implemented as a limit, not a target, exploitation rate.
- Any conservation measure proposed or adopted by the Union or a relevant authority – including multiannual plans, discard plans and the regulation of fishing opportunities – must deliver the MSY objective and the 2015/2020 F_{MSY} requirement (using precautionary proxies when MSY reference points are unavailable), and be in line with the precautionary approach also required by Article 2(2).
- There has been considerable progress in moving towards MSY-based exploitation rates and the recovery of fish stocks in many areas under EU management. However, fishing opportunities for a number of fish stocks have continued to be set above levels that scientific advice indicates would allow for the restoration and maintenance of stocks above levels capable of producing MSY.⁷ The EU institutions have not provided an explanation as to why these decisions, which contravene the CFP’s requirements regarding fishing opportunities, have been made. Article 16(4) of the Basic Regulation states that “*fishing opportunities shall be set in accordance with the objectives in Article 2(2)*”. Such decisions are also contrary to the principle of sincere cooperation between EU institutions and Member States under the EU Treaty on European Union.⁸
- The Regulation on the common organisation of the markets for fisheries and aquaculture products (the CMO Regulation, and its implementing measures) and the European Maritime and Fisheries Fund (the EMFF Regulation, and its implementing measures) must both contribute to the achievement of the MSY objective and the other objectives in Article 2 of the Basic Regulation.

2 Regulation 1380/2013/EU on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC.

3 Communication from the Commission to the Council and the European Parliament on implementing sustainability of EU fisheries through maximum sustainable yield.COM(2006) 360 (final); and Commission Decision 2010/477/EU (Annex Part B, Descriptor 3).

4 For introductory materials on MSY, please see <http://www.clientearth.org/reports/simply-msy.pdf>.

5 ICES Advice Basis 2015, ICES Advice 2015, Book 1

http://www.ices.dk/sites/pub/Publication%20Reports/Advice/2015/2015/General_context_of_ICES_advice_2015.pdf

6 Agreement for the Implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995.

7 The Pew Charitable Trusts’ Analysis of total allowable catches in Europe’s North-Western waters, 30 April 2015, p.3.

<http://www.pewtrusts.org/~media/Assets/2015/05/AllowableCatchesinEuropesNWWatersApril2015.pdf?la=en>

8 Article 4(3) and Article 13(2) of the Treaty of European Union.

In addition:

- Management authorities must apply the precautionary approach to fisheries management, and EU and national decision makers must adhere to the requirements of the UN Fish Stocks Agreement in their application of the precautionary approach to fisheries management.
- EU and national fisheries management authorities must continue developing tools for applying the ecosystem-based approach to fisheries management in line with the definition and requirements laid down in Article 4(9) of the Basic Regulation. This should include requesting scientific advice in line with these legal requirements.
- The Basic Regulation objectives also include coherence with EU environmental legislation, particularly the objective of achieving a good environmental status by 2020 as per the Marine Strategy Framework Directive. One of the criteria for assessing good environmental status is the reproductive capacity of the stock, i.e. whether it is capable of producing MSY. This introduces a deadline for achieving the MSY objective that is described in Article 2(2) of the Basic Regulation.

Introduction

The new Basic Regulation⁹ incorporates, for the first time, a longer-standing Union policy objective¹⁰ of managing fish stocks according to their “*Maximum Sustainable Yield*” (MSY).¹¹ This approach to exploitation should help deliver high, stable, long-term productivity for EU fish stocks and therefore prosperity for the businesses and communities that rely on them.

Inclusion of the MSY approach was one of the headline achievements of the CFP reform, reflecting public and political consensus that our fish stocks must be restored and managed sustainably and profitably. In May 2013, hailing the “*historical*” agreement of the new law, and in particular the resolution of disputes over how the text should deal with MSY, Commissioner Damanaki spoke of “*paving the way for a sustainable future for our fishermen and our industry... by bringing fish stocks above sustainable levels*”.¹²

The Basic Regulation brings EU fisheries law into line with both international law, where MSY has long been used as a key reference point,¹³ and with other EU legislation.¹⁴ As the new framework is implemented, it is imperative that the new rules and requirements on MSY are fully and appropriately applied (and confusion over their meaning avoided) to ensure that the CFP’s objectives are successfully achieved. It is also crucial that requirements for precautionary and ecosystem-based fisheries management under the Basic Regulation are complied with. This briefing explains the provisions in the Basic Regulation that impose these requirements.

1 The MSY objective in Article 2(2) of the Basic Regulation

Here we will explore the objectives of the CFP, with a particular focus on the management objectives that relate to the exploitation and conservation of stocks.

1.1 Article 2(2) sets a clear objective for the MSY exploitation rate

Article 2(2) of the Basic Regulation reads as follows:

"The Common Fisheries Policy shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.

In order to reach this objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum

9 Regulation 1380/2013/EU on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC.

10 Communication from the Commission to the Council and the European Parliament on implementing sustainability of EU fisheries through maximum sustainable yield.COM(2006) 360 (final); and Commission Decision 2010/477/EU (Annex Part B, Descriptor 3).

11 For introductory materials on MSY, please see <http://www.clientearth.org/reports/simply-msy.pdf>

12 http://europa.eu/rapid/press-release_IP-13-488_en.htm

13 For instance, in Article 61(3) of the 1982 United Nations Convention on the Law of the Sea; Article 7(2.1) of the 1995 FAO Code of Conduct for Responsible Fisheries; and Article 31(a) of the Implementation Plan of the World Summit on Sustainable Development 2002.

14 Directive 2008/56/EC (the Marine Strategy Framework Directive or ‘MSFD’) and its implementing measure, Commission Decision 2010/477/EU.

sustainable yield exploitation rate shall be achieved by 2015 where possible and on a progressive, incremental basis at the latest by 2020 for all stocks."

The first paragraph of this article is what we will refer to as the "*MSY objective*". This is a clear legal obligation for those acting under the Common Fisheries Policy framework as a whole: that fisheries management shall aim to restore and maintain fish populations above MSY levels.¹⁵ Such actors include the EU institutions and Member States.

MSY is a theoretical point of biomass equilibrium where a stock is capable of maximal production (B_{MSY}). Factors that increase stock levels will be the amount of reproduction and the amount of new fish joining the stock as a result of that reproductive cycle (called recruitment). Factors decreasing stock levels will be natural mortality (from predators, disease, etc.) and fishing mortality. Estimation and manipulation of fishing mortality is how fisheries managers aim to influence the size of the stock. The fishing mortality rate that should lead to B_{MSY} , on average (all other things being equal), is called F_{MSY} .

The second paragraph of Article 2(2) explains the tool through which the MSY objective is to be achieved: it is a requirement to adopt MSY-based exploitation rates, which are to be achieved by 2015 where possible and on a progressive, incremental basis by 2020 at the latest. We will refer to this either as "*MSY-based exploitation rates*" or as the "*2015/2020 F_{MSY} requirement*", as required by the context.

It must be recognised that setting fishing mortality rates **at** F_{MSY} would, as a matter of scientific reality, only lead to biomass levels being above B_{MSY} 50% of the time¹⁶ (and then only for stocks which have recovered to levels very close to B_{MSY}). Thus, fishing at F_{MSY} does not fulfil the MSY objective as required by Article 2(2) of the Basic Regulation.¹⁷ From a scientific perspective, in order to consistently achieve population levels above B_{MSY} , fishing mortality rates must be set below F_{MSY} . As set out in the United Nations Fish Stock Agreement (UNFSA),¹⁸ F_{MSY} is a limit, not a target.

In fact, the influence of external environmental factors (for example fluctuations in natural mortality, reproduction or recruitment) means that fishing at F_{MSY} consistently would be likely to result in biomass levels being consistently below B_{MSY} . If fishing consistently at F_{MSY} , stock levels above B_{MSY} might only be achieved if the influence of environmental factors was favourable (i.e. lower than expected natural mortality, higher than expected recruitment). Leaving the result to chance is not what is meant by the requirement in the CFP to aim at stock levels above MSY, and furthermore does not represent a precautionary approach, which Article 2(2) also requires.

¹⁵ Specifically, populations of "harvested" species, which according to our interpretation must mean those species that are removed from the sea by fishing gears (as opposed to 'managed' or 'regulated' species).

¹⁶ ICES Advice Basis 2015, ICES Advice 2015, Book 1

¹⁷ Further discussion related to this issue is reported in ClientEarth's blog, "Reforming the Common Fisheries Policy – Ending Overfishing and Discards", available at: <http://www.blog.clientearth.org/reforming-the-common-fisheries-policy-ending-overfishing-and-discards/>

¹⁸ Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks of 8 September 1995, http://www.un.org/depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm, Annex II, which states "*the fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points*"

In this context, it is therefore clear that the term “*maximum sustainable yield exploitation rate*” as used in the second paragraph of Article 2(2), cannot be interpreted to mean that exploitation rates should be set at F_{MSY} . This would represent a direct conflict with the clear primary objective of recovering and maintaining stocks above MSY (biomass) levels.

The decision by the legislators to fix the objective of aiming at biomass levels “*above*” MSY also reflects the practical impossibility of fishing mixed stocks simultaneously at their individual F_{MSY} levels – a reality which underscores the correct interpretation of Article 2(2) as requiring exploitation rates below F_{MSY} .

1.2 A timeframe for achieving MSY

Article 2(2) of the Basic Regulation does not mention a timeframe for achieving the MSY objective (to restore and maintain fish populations above MSY levels). However, the objective in Article 2(5)(j) of the Basic Regulation – that the CFP shall “*be coherent with the Union environmental legislation*” – imposes a mandatory timescale. This includes in particular coherence with the objective of achieving good environmental status by 2020 as set out in Article 1(1) of [the Marine Strategy Framework Directive]” (the MSFD).¹⁹ Commercial fishing is recognised under Descriptor 3 of the MSFD as a key pressure on the marine environment. One criterion for assessing progress towards good environmental status in this descriptor is the “*reproductive capacity of the stock*” i.e. whether it is capable of producing MSY.²⁰ This is in line with the MSY objective and introduces a requirement to achieve B_{MSY} by 2020.

The second sub-paragraph of Article 2(2) introduces a timeframe for setting exploitation rates at levels that will achieve the MSY objective.

The important sentence in this context is the following one:

“In order to reach this objective [...], the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and on a progressive, incremental basis at the latest by 2020 for all stocks.”

This sentence clearly stipulates the timeline that must be adhered to for setting exploitation rates that will achieve the MSY objective. This paragraph does not introduce any derogation in terms of the objective itself and indicates that the deadline for achieving the MSY exploitation rate is 2015. However, where achieving an MSY-based exploitation rate by 2015 is not possible, it must be achieved on a “*progressive and incremental basis*” by 2020 at the latest.

“*[W]here possible*” is not defined and there are no concrete indications in the legal text itself to identify the conditions under which it is or is not possible to fish at MSY-based (i.e. below F_{MSY}) levels by 2015.

¹⁹ Directive 2008/56/EC of The European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy

²⁰ Commission Decision of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters, Annex Part B, p20: “Where an analytical assessment allows the estimation of SSB, the reference value reflecting full reproductive capacity is SSB_{MSY}, i.e. the spawning stock biomass that would achieve MSY under a fishing mortality equal to F_{MSY} . Any observed SSB value equal to or greater than SSB_{MSY} is considered to meet this criterion”

However, this is alluded to in the recitals. The role of recitals is to explain the reasons for the adoption of a given provision. Recitals can offer guidance in the interpretation of provisions, but they are not legally binding.²¹ When deciding on the role of recitals, the European Court of Justice has clarified that: *“in the absence of working documents clearly expressing the intention of the authors of a provision, it can base itself only on the scope of the wording as it is and give to the text a meaning based on a literal and logical interpretation”*.²²

With this in mind, Recital 7 of the Basic Regulation states that *“if achieving the exploitation rates by 2015 would seriously jeopardise the social and economic sustainability of the fishing fleets involved” then using the MSY exploitation rate can be delayed beyond 2015 (but no later than 2020)*.

“[S]eriously jeopardise” implies a situation that goes beyond fluctuations in the social and economic conditions of the fishing fleet that could be expected to be associated with, at least initially, a shift to MSY-based exploitation rates. It requires, rather, a significant risk to the future of the fleet. This recital does not indicate that just any social or economic changes that might result from the adoption of MSY-based exploitation rates can be used to justify a delay to 2020.

Although this recital provides some indication of the thinking of the Council and the Parliament regarding the timeline for adopting MSY-based exploitation rates, the interpretation of the second sub-paragraph of Article 2(2) must still be interpreted (literally and logically) in the context of the whole Basic Regulation.

The context in which the legislation has been adopted is described in the Green Paper on the reform of the CFP.²³ In the Green Paper it is stated for example that:

“Awareness of the prime importance of our oceans and seas is growing, as is the need to preserve them and exploit them sustainably. This has translated into much stronger emphasis on the ecological sustainability of fisheries worldwide. The World Summit on Sustainable Development in 2002 spelled out specific targets for fisheries management, including restoring fish stocks to Maximum Sustainable Yield (MSY) by 2015, which must be taken on board by all fishery managing authorities.”

The Green Paper then becomes more specific in terms of what it means for the EU fisheries sector:

“It is therefore crucial that any compromises made to cushion the immediate economic and social effects of reductions in fishing opportunities remain compatible with long term ecological sustainability, including a move to fishing within MSY, eliminating discards and ensuring a low ecological impact of fisheries.”

The context in which the Basic Regulation has been adopted shows a clear commitment to a strong MSY objective that is in line with the target of the World Summit on Sustainable Development, namely restoring fish stocks to MSY by 2015.²⁴ The clear wording of Article 2(2)

21 Guideline 10 of the Joint Practical Guide for persons involved in the drafting of European Union legislation, <http://eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf>; Decision of the Court of Justice, Case T-368/11, para. 101.

22 Judgment of the Court of 1 June 1961. Gabriel Simon v Court of Justice of the European Communities. Case 15-60.

23 Green Paper on the Reform of the Common Fisheries Policy, COM(2009)163 final, p.5, p.9, p.15 and p.25.

24 Plan of Implementation of the World Summit on Sustainable Development. United Nations, 2002.

and the similarly strong legal wording used in other articles in the Basic Regulation that refer to MSY indicates that achieving the MSY objective is a fundamental, binding commitment and a priority.

Having briefly covered the context and the literal and logical interpretation of the wording of Article 2(2) of the Basic Regulation, it is clear that any delay for achieving the MSY exploitation rate as set out in the second sub-paragraph of Article 2(2) can only be allowed in specific and particular circumstances.

The article stipulates that if the MSY-based exploitation rate is not achieved by 2015, it must be achieved “[...] *on a progressive, incremental basis at the latest by 2020*”. This sentence indicates that if EU decision makers do not set exploitation rates at the levels required under Article 2(2) in 2015, then there must be a clear plan for how they will be reached “*progressively and incrementally*” by 2020 at the latest.

This also means that for stocks that are still moving toward MSY-based exploitation rates after 2015, their exploitation rates must continue to decrease “*progressively*” to achieve this level before 2020. In terms of fishing opportunities, this means that from 2015 to 2020, TACs and quotas that cannot already be set at the correct MSY-based exploitation rate must be set closer and closer to MSY-based levels so that the requirement in the second subparagraph of Article 2(2) will be achieved by 2020 at the latest (see section 2.1.2 and 2.1.3 for a more detailed exploration of this).

Recommendations

All actors (e.g. the European Commission, Council of Ministers and national administrations) must make management decisions, and take management measures, on the basis of the MSY objective and the 2015/2020 F_{MSY} requirement.

If exploitation rates are not set by 2015 at the level required under Article 2(2), then decision makers must demonstrate how these will be achieved “*progressively and incrementally*” by 2020 at the latest.

1.3 The other fisheries management objectives of the Basic Regulation and their link to the MSY objective

The objectives of the CFP are set out in Article 2 of the Basic Regulation, and in addition to the MSY objective include:

- “*achieving economic, social and employment benefits*” (Article 2(1)),
- “*applying the precautionary approach to fisheries management*” (Article 2(2)),
- “*implementing the ecosystem-approach to fisheries management*” (Article 2(3)),

- “gradually eliminate discards” (Article 2(5)(a)),
- “provide conditions for economically viable and competitive fishing capture and processing industry and land-based fishing related activity” (Article 2(5)(c)),
- “provide for measures to adjust the fishing capacity of the fleets to levels of fishing opportunities consistent with paragraph 3” (Article 2(5)(d)),
- “contribute to a fair standard of living for those who depend on fishing activities” (Article 2(5)(f)), and
- “be coherent with the Union environmental legislation, in particular with the objective of achieving a good environmental status by 2020 as set out in Article 1(1) of Directive 2008/56/EC” [the Marine Strategy Framework Directive] (Article 2(5)(j)).

It’s clear from the excerpts above that the CFP includes social and economic objectives; which is unsurprising as the policy relates to the exploitation of resources as well as their conservation. However, the fact that the very first sentence of Article 2 is that “*The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term[...]*” indicates that the environmental objective is the primary objective of the CFP, which underlies the social and economic objectives.²⁵ This also makes sense logically, because if the resource (fish stocks) isn’t maintained at a productive and stable level, the ability of the CFP to deliver on the social, economic and employment benefits will be severely reduced. Additionally, a decrease in fishing mortality to MSY-based exploitation rates (if necessary) should deliver more social and economic benefits as a result of more stable and productive stocks.

Therefore, it is essential that the MSY objective is seen as a fundamental prerequisite for achieving the other objectives, and adherence to the MSY objective must be the first priority for decision makers. There will be no economic, social or employment benefits without healthy and productive fish stocks.

As outlined above, the Basic Regulation requires the development and application of two other management approaches to guide decision makers and fisheries managers: the precautionary approach to fisheries management²⁶ and the ecosystem-based approach to fisheries management.²⁷ Both are part of managing fisheries in order to achieve the MSY objective, and they are objectives to be pursued as much as the MSY objective itself.

1.3.1 The precautionary approach to fisheries management

Article 4(8) of the Basic Regulation defines the precautionary approach to fisheries management by reference to the international commitments set in Article 6 of the UN Fish Stocks Agreement and highlights that it is:

²⁵ For more details on prioritising the environmental pillar the CFP, see our briefing <http://www.clientearth.org/reports/technical-briefing-prioritising-environmental-objective-common-fisheries-reform.pdf>

²⁶ Article 2(2) of the Basic Regulation.

²⁷ Article 2(3) of the Basic Regulation.

“an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment.”

Article 6 of the UN Fish Stocks Agreement lays down a number of further rules and principles for applying the precautionary approach to fisheries management, such as that “[s]tates shall be more cautious when information is uncertain, unreliable or inadequate.” As the EU and EU Member States are signatories to the UN Fish Stocks Agreement,²⁸ based on Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), the rules and principles under the UN Fish Stocks Agreement are binding on the EU institutions and on the Member States, and as such are an integral part of EU law.²⁹ These rules and principles must also be complied with by European, national and regional authorities while implementing the Basic Regulation. Further guidelines on the application of this approach are described in Annex II of the UN Fish Stocks Agreement.

Here it is important to note the difference in the use of the precautionary approach in the legal and political commitments explained above, and the use of the term in scientific stock assessments. The International Council for the Exploration of the Seas (ICES), an intergovernmental organisation of scientists responsible for advising the Commission and Member States on fisheries management questions uses the term in both ways, yet as we will show, it does not mean the same thing in both cases.

ICES have developed several reference points for both stock status (biomass level) and exploitation rate (fishing mortality),³⁰ which we will discuss briefly here in the context of the precautionary approach.

When stock levels are low, there is a risk that reproduction will slow down and that the stock may not be able to replenish itself, eventually leading to a collapse of the stock. This has happened many times in the last 50 years, even to stocks that had been very productive and sustained a very large industry (such as the collapse of the Grand Bank cod stocks in Canada).³¹ ICES uses the term “ B_{lim} ” to mark this limit or boundary where the stock dynamics are likely to change, and the term “ F_{lim} ” to denote the exploitation rate that would, over time, lead to a stock decreasing to this level.

Because there is always going to be some level of uncertainty in stock assessments and natural fluctuations (for example in recruitment or natural mortality) that cannot be foreseen, ICES uses another pair of reference points that include a “buffer” to reduce the likelihood of the B_{lim} and F_{lim} being reached. These reference points are named after the precautionary approach: B_{pa} (set somewhere above B_{lim} , depending on the estimated degree of accuracy in the assessment and the risk of hitting B_{lim} that society is willing to accept) and F_{pa} (set lower than F_{lim} to ensure that actual fishing mortality is less than F_{lim}). While it’s true that these reference points are more precautionary than B_{lim} and F_{lim} because they give a lower probability of reduced stock recruitment and stock collapse, if used on their own for fisheries management they would not reflect the full requirements of the precautionary approach as outlined in the UN Fish Stocks Agreement, and they would not deliver sustainable fisheries. These reference points (B_{pa} and F_{pa}) are a necessary indicator to be used by stock assessment scientists and decision makers to

28 As of 13 December 2003.

29 Judgment of the ECJ of 30 April 1974, Haegeman, ECR1974 page 449

30 see for example Report of the ICES Advisory Committee, 2009. ICES Advice, 2009. Book 1: Introduction, Overviews and Special Requests.

31 Hutchings, J. A., and Myers, R. A. (1995). *The biological collapse of Atlantic cod off Newfoundland and Labrador*. The North Atlantic fisheries: successes, failures, and challenges. Island Institute Studies, Charlottetown, Prince Edward Island. Canada, 37-94.

achieve the MSY objective, but they do not fully reflect the rules and principles for applying the precautionary approach as outlined in the UNFSA, and they will not on their own deliver the MSY objective. It is important that stakeholders and decision makers are aware of this.

1.3.2 The ecosystem-based approach to fisheries management

The Union is committed to developing an ecosystem-based approach to fisheries management under a number of international agreements including the Reykjavik Declaration,³² the World Summit on Sustainable Development³³ and the Convention on Biological Diversity.³⁴

The ecosystem-based approach to fisheries management is defined in the Basic Regulation in Article 4(9) as the following:

“ecosystem-based approach to fisheries management” means an integrated approach to managing fisheries within ecologically meaningful boundaries which seeks to manage the use of natural resources, taking account of fishing and other human activities, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected, by taking into account the knowledge and uncertainties regarding biotic, abiotic and human components of ecosystems.”

Ecosystem-based fisheries management requires managers to take into account wider environmental and biological parameters than just exploitation rates for one single target species. These include food web considerations (e.g. predator/prey dynamics), impacts on by-catch or non-target species and marine habitats (such as the seafloor) and mixed fishery dynamics. An EU project that concluded in 2011 (Making the European Fisheries Ecosystem Plan Operational; MEFEPO)³⁵ assessed the degree to which ecosystem-based fisheries management had been developed and operationalised, and found it wanting when compared to every step of an 11-step test developed by ICES.³⁶ Since then, in response to specific requests from the European Commission, ICES have started producing mixed fishery advice that is based on single-stock assessment, but uses knowledge on species composition, fishing patterns and catchability to develop different management scenarios that include several species in a fishery.³⁷ So far, these mixed-fisheries analyses have not been used for management purposes. However, under the new Basic Regulation requirement for ecosystem-based fisheries management, the EU institutions are now effectively obliged to consider and act on this advice.

Another aspect of ecosystem-based fisheries management, the requirement to designate closed areas, has continued to be used in EU waters, although sometimes without adequate development or enforcement of management measures. Establishing protected areas for the conservation of specific species or habitats is required by EU environmental law (including the

32 The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem. Food and Agriculture Organisation of the United Nations document C200/INF/25, appendix I. 2001.

33 Plan of Implementation of the World Summit on Sustainable Development. United Nations, 2002.

34 Decision V/6 of the Conference of Parties to the Convention on Biological Diversity. UNEP/CBD/COP/5/23, annex III. 2000.

35 Bloomfield, H.J., Le Quesne, W.L.F., Piet, G.J., Raakjaer, J., Aanesen, M., Armstrong, C., Nolan, C., Borges, M.F., Riu Pinho, M., Porteiro, C., Rockman, C., Miller, D., Valsco, F., Van Hal, R., Van Hoof, L., Hegland, T., Christensen, A., Abreu, H., Ounanian, K., Mendes, H., Hily, C., Duchêne, J., Pastoors, M.A., Christie, S., Ramirez, P., Zetterholm, S., Paramor, O.A.L., Rogers, S.I., Connolly, P. and Frid, C.L.J. (2011). *Making the European Fisheries Ecosystem Plan Operational (MEFEPO): Synthesis and review of progress towards an ecosystem approach to fisheries management*. Making the European Fisheries Ecosystem Plan Operational (MEFEPO): Work Package 8 Report. <http://www.liv.ac.uk/mefepo/reports-and-outputs/wp8>

36 ICES (2005). Guidance on the Application of the Ecosystem Approach to Management of Human Activities in the European Marine Environment. ICES Cooperative Research Report No. 273. International Council for the Exploration of the Seas, Copenhagen.

37 For example, see *the Mixed-fisheries advice for Subarea IV (North Sea) and Divisions IIIa (Skagerrak) and VIId (Eastern Chanel)*. 30 June 2015. ICES Advice on fishing opportunities, catch, and effort in the Greater North Sea Ecoregion.

<http://ices.dk/sites/pub/Publication%20Reports/Advice/2015/2015/mix-nsea.pdf>

Birds³⁸ and Habitats Directives³⁹ and the MSFD⁴⁰), and the related conservation measures can include closures to fishing activities. Whilst the Basic Regulation includes processes for these closures⁴¹ and the closure of areas for fish stock recovery,⁴² there is little evidence at this stage to demonstrate uptake of this type of management measure by Member States in their own waters or shared EU waters. For example, the Dutch, German, Danish and UK governments have been discussing closures to specific fishing gear in an area of the North Sea around the Dogger Bank (in line with the Habitats Directive requirements) for around 6 years, with only recent preliminary agreement on management measures from the Member States involved.

ICES' strategic plan for 2014-2018 includes improving the scientific understanding of ecosystems so that ICES can start producing integrated ecosystem assessments and advice.⁴³ Requirements for this will include the collection of high quality data, ongoing monitoring and a transparent advisory process. EU, national and regional fisheries authorities need to invest the resources necessary to move towards more ecosystem-based fisheries management. Therefore, when making decisions with regard to fishing levels, in addition to the 2015/2020 F_{MSY} requirement itself, EU and national decision makers must fully adhere to the precautionary approach, while continuing to drive forward the development of an ecosystem-based fisheries management approach, both in order to meet the MSY objective and to meet wider objectives for the marine ecosystem.

Recommendations

EU and national decision makers must apply the precautionary approach to fisheries management as a *necessary (but on its own inadequate)* step in managing stocks to achieve the MSY objective.

The *rules and principles* for applying the precautionary approach are set in the UN Fish Stocks Agreement and are binding on EU and national decision makers, as they are signatories to the agreement. *The agreement, including the tools within it, is an integral part of EU law according to Article 216(2) of the TFEU.*

EU and national fisheries management authorities must develop tools for applying the ecosystem-based approach to fisheries management in line with the requirement in Article 2(3) of the CFP Regulation, and to be consistent with EU environmental requirements. This should include requesting scientific advice in line with this legal requirement, prioritising the collection of data needed to support such an approach, and managing the other impacts of human activities (such as underwater noise, pollution, dredging, and oil and gas exploration) in a holistic way.

38 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L20, 26.01.2010, p.9;

39 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L206, 22.07.1992, p.7.

40 Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L164, 25.06.2008, p.19.

41 Article 11 of the Basic Regulation

42 Article 8 of the Basic Regulation

43 ICES (2015). *ICES Annual Report 2014*. International Council for the Exploration of the Seas, Copenhagen.

2 Other articles in the Basic Regulation referring to the Article 2 objectives

Article 2 sets out the fundamental objectives of the CFP. All other provisions need to be interpreted in light of, and in line with, these objectives. They must be respected even if a particular article does not explicitly refer to Article 2. No derogation from these objectives is allowed, including from the MSY objective and the 2015/2020 F_{MSY} requirement.

Some articles in the Basic Regulation do however refer directly to Article 2 or even specifically to Article 2(2). These explicit references create an even clearer and direct link between the concrete actions referred to in those provisions and the objectives to be achieved. The provisions that contain a reference to Article 2 can be categorised in three ways:

- provisions dealing with subsequent legal acts that concretely implement the MSY objective and the 2015/2020 F_{MSY} requirement: discard plans, multiannual plans and other types of conservation measure;⁴⁴
- provisions mentioning actors involved in the implementation of Article 2: the European Union, Member States and other entities such as Advisory Councils;⁴⁵ and
- provisions regarding the financial aid framework: Union financial assistance can only be granted to contribute to achieving the objectives of Article 2 (including the MSY objective and the 2015/2020 F_{MSY} requirement).⁴⁶

In the following sections we will analyse the different types of provisions that refer to Article 2.

2.1 Provisions dealing with implementing measures in the Basic Regulation

The legal acts that will be adopted under the Basic Regulation to implement the MSY objective are all acts dealing directly with management of one or more fish stocks. These are multiannual plans (Article 9 and Article 10), discard plans (Article 15) and conservation measures (Article 6 and Article 7). The form of these legal acts can vary from regulations to delegated acts or implementing acts, but all of them need to be in line with the requirements of Article 2.

2.1.1 Conservation measures⁴⁷

Article 6(1) of the Basic Regulation refers to Article 2 as follows:

“For the purpose of achieving the objectives of the CFP in respect of the conservation and sustainable exploitation of marine biological resources as set out in Article 2, the Union shall adopt conservation measures as set out in Article 7. [...]”

Article 7 of the Basic Regulation lists possible management measures that can be adopted under it, including multiannual plans, targets for the conservation and sustainable exploitation of

⁴⁴ Article 6, Article 7, Article 9, Article 10, Article 11, Article 13, Article 15, Article 16, Article 18, and Article 19 of the Basic Regulation.

⁴⁵ Article 20, Article 29, Article 33, Article 35 and Article 43 of the Basic Regulation.

⁴⁶ Article 40, Article 41 and Article 42 of the Basic Regulation.

⁴⁷ Article 6 of the Basic Regulation.

stocks, measures on the fixing and allocation of fishing opportunities and measures to implement the landing obligation. Read in combination, Articles 2, 6 and 7 reiterate that any measure adopted by the Union under the CFP must aim at achieving the objectives set out in Article 2 in relation to the conservation and sustainable exploitation of marine biological resources. The MSY objective in Article 2(2) is of primary relevance in this context, but other Article 2 objectives are also relevant, such as the objective to eliminate discards (Article 2(5)(a)).

The “*Union*”, as referred to in Article 6, includes the EU institutions - the Council of Ministers, the European Commission and the European Parliament - and any authority to which they delegate their powers to act.

This means that any conservation measures proposed or adopted by the Union or any relevant authority (such as multiannual plans, discard plans, and the setting of fishing opportunities – see also below) must deliver the MSY objective and the other objectives in Article 2 related to the conservation and sustainable exploitation of marine biological resources.

Recommendation

EU institutions must ensure that any conservation measures they propose and adopt under Article 6, including those listed under Article 7, ensure that they deliver the MSY objective and the 2015/2020 F_{MSY} requirement, as well as the other Article 2 objectives related to the conservation and sustainable exploitation of marine biological resources, e.g. eliminating discards.

2.1.2 Regulation setting fishing opportunities

Every year, the European Commission requests that ICES provide them with advice regarding a variety of exploitation options for stocks in the EU waters in the North East Atlantic and Baltic Sea areas.⁴⁸ Since 2006, the Commission has been requesting advice from ICES on catch levels that correspond to the MSY objective. ICES also provides safeguard reference points and other reference points that are needed, for example if the stock is subject to a management plan. Based on ICES’ advice, the Commission releases its proposal for a Regulation on total allowable catches (TACs) for stocks not shared with third countries (e.g. Norway) in the autumn of each year. In December, the Council formally meets and negotiates these catch limits, and adopts a regulation for the following year outlining the fishing opportunities (TACs) for each stock. The amount of those opportunities each Member State gets is then allocated based on relative stability; this then becomes national quota. Member States can then trade, buy or sell their national quota with other Member States, and distribute the resulting quota to their fleets and producer organisations.

Article 16 of the Basic Regulation, which outlines the requirements for the setting and distribution of fishing opportunities, states that:

“[...] 3. Where new scientific evidence shows that there is a significant disparity between the fishing opportunities that have been fixed for a specific stock and the actual state of that stock, Member States having a direct management interest may submit a reasoned request to the

⁴⁸ In the Mediterranean and Black Seas, where there are no catch limits except for a limited number of pelagic species (e.g. bluefin tuna), the Commission is advised by the General Fisheries Commission for the Mediterranean (GFCM).

Commission for it to submit a proposal to alleviate that disparity, while respecting the objectives set out in Article 2(2).

4. Fishing opportunities shall be fixed in accordance with the objectives set out in Article 2(2) and shall comply with quantifiable targets, time-frames and margins established in accordance with Article 9(2) and points (b) and (c) of Article 10(1).[...]"

Article 16(3) and Article 16(4) establish a clear legal obligation to set fishing opportunities in accordance with Article 2(2) of the Basic Regulation, both for stocks which are managed by multiannual plans and for those which are not. As explained in section 1.1 of this briefing, this means setting exploitation levels below F_{MSY} so as to deliver the MSY objective and the 2015/2020 F_{MSY} requirement. If MSY-based exploitation rates cannot be reached by 2015, there must be a clear time-frame to achieve them by 2020 at the latest to comply with Article 2(2). Over the years the exploitation rate should be set progressively closer to the MSY exploitation rate.

The Treaty on the Functioning of the European Union⁴⁹ empowers the Council to adopt measures on the fixing and allocation of fishing opportunities.⁵⁰ At the same time, the EU principle of sincere cooperation requires Member States to assist the Union in carrying out tasks that flow from the Treaties.⁵¹ It also requires Member States to adopt appropriate measures that ensure fulfilment of the obligations arising out of the Treaties, or from the acts adopted by the institutions of the Union.⁵² This principle also requires the EU institutions themselves, such as the European Commission and Council of Ministers, to ensure mutual sincere cooperation.⁵³

In cases where the Council sets TACs in contravention of Article 2(2) and Article 16(4) it is questionable whether the Council is respecting the principle of sincere cooperation. In addition, if the Council sets fishing opportunities that do not comply with the 2015/2020 F_{MSY} requirement by 2015 and do not follow scientific advice, as it did for many stocks in the 2015 TAC Regulation (see case study in section 2.1.3), it should at least provide an explanation why it did so and show that there is a plan for how and when the 2015/2020 F_{MSY} requirement will be met (by 2020 at the latest).

In the same way, it is also questionable whether the European Commission is respecting the principle of sincere cooperation in the implementation of secondary legislation if it proposes a Regulation that contravenes Article 2(2) and Article 16(4) of the Basic Regulation. Therefore, the Commission should similarly provide an equivalent explanation as referred to above, if its proposals do not comply with the 2015/2020 F_{MSY} requirement by 2015, and should demonstrate how it will be met by 2020 at the latest.

2.1.3 Case study: The 2015 TAC Regulation

Since the Basic Regulation came into force in January 2014, there have to date been two regulations setting fishing opportunities. Looking at the Regulation setting fishing opportunities

49 Consolidated version of the Treaty on the Functioning of the European Union, OJ C326, 26.10.2012, p.49.

50 Article 43(3) and Article 13(2) of the Treaty on European Union.

51 Article 4(3) and Article 13(2) on the Treaty on European Union.

52 Article 4(3) of the Treaty on European Union.

53 Article 13(2) of the Treaty on European Union and CJCE, 30 March 1995, European Parliament/Council, Case C-65/93.

for certain fish stocks in December 2014 for the year 2015 (the 2015 TAC Regulation),⁵⁴ an analysis by the Pew Charitable Trusts published in April 2015 shows that for a large number of fish stocks, in the Commission's proposal as well as in the Regulation adopted by Council, fishing opportunities were set at exploitation levels not consistent with restoring or maintaining stocks above levels capable of producing MSY.⁵⁵ Additionally, a number of catch limits (TACs) were set for stocks despite scientific advice that there should be no fishing at all.

In the 2015 TAC Regulation, no justification was given for the cases where the TACs were set at exploitation rates departing from the MSY objective and breaching the 2015/2020 F_{MSY} requirement, or where they were set not in line with scientific advice. Neither the recitals nor the legal text itself include any explanation. There is also no political document explaining the reasons why the Council set TACs in contravention of Article 2(2), despite a clear requirement in Article 16(4) of the Basic Regulation that “*fishing opportunities shall be set in accordance with the objectives in Article 2(2)*”. In this context, there is a lack of clarity as to what could constitute a sufficient justification, which demonstrates a clear need for further guidance on this topic.

Recommendations

In order to adhere to the principle of sincere cooperation under the Treaty on European Union, the European Commission must adopt proposals for regulation on fishing opportunities in line with the requirements of Article 2(2) and Article 16 of the Basic Regulation.

In order to adhere to the principle of sincere cooperation under the Treaty on European Union, the Council of Ministers must set fishing opportunities in line with the requirements of Article 2(2) and Article 16 of the Basic Regulation.

The European Commission, Council of Ministers and national authorities (if appropriate) need to duly justify any delay in meeting the 2015/2020 F_{MSY} requirement beyond 2015 and show how and when this requirement will be met by 2020 at the latest.

The European Commission should produce guidelines on the possible justifications for a delay in achieving the MSY-based exploitation rates by 2015.

2.1.4 Multiannual plans⁵⁶

Article 9 of the Basic Regulation on the objectives of multiannual plans reads as follows:

*“1. Multiannual plans shall be adopted as a priority, based on scientific, technical and economic advice, and shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield **in accordance with Article 2(2)**.”*

⁵⁴ Council Regulation (EU) 2015/104 of 19 January 2015 fixing for 2015 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union vessels, in certain non-Union waters, amending Regulation (EU) No 43/2014 and repealing Regulation (EU) No 779/2014

⁵⁵ Analysis of total allowable catches in Europe's North-Western waters, 30 April 2015, p.3.

<http://www.pewtrusts.org/~media/Assets/2015/05/AllowableCatchesinEuropesNWWatersApril2015.pdf?la=en>

⁵⁶ Article 9 and Article 10 of the Basic Regulation.

2. Where targets relating to the maximum sustainable yield as referred to in Article 2(2) cannot be determined, owing to insufficient data, the multiannual plans shall provide for measures based on the precautionary approach, ensuring at least a comparable degree of conservation of the relevant stocks.[...]

5. Multiannual plans may contain specific conservation objectives and measures based on the ecosystem approach in order to address the specific problems of mixed fisheries in relation to the achievement of the objectives set out in Article 2(2) for the mixture of stocks covered by the plan in cases where scientific advice indicates that increases in selectivity cannot be achieved. Where necessary, the multiannual plan shall include specific alternative conservation measures, based on the ecosystem approach, for some of the stocks that it covers.”

(emphasis added)

This provision repeats much of the wording of Article 2(2), in particular that multiannual plans “shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2).” The fact that Article 9 not only explicitly refers to Article 2(2), but actually repeats the very same wording makes it very clear that the primary objective of multiannual plans is the adoption of conservation measures that will deliver the MSY objective and 2015/2020 F_{MSY} requirement set out in Article 2(2) where possible, using precautionary proxies when MSY references are unavailable. The concrete measures adopted under Article 9 are outlined in Article 10 (see below), and must be drafted, interpreted, and applied to achieve the objectives of Article 2(2) and the other objectives in Article 2 as relevant.

Article 10 on the content of multiannual plans refers to Article 2 in the following terms:

“1. As appropriate and without prejudice to the respective competences under the Treaty, a multiannual plan shall include:[...]

(b) objectives that are consistent with the objectives set out in Article 2 and with the relevant provisions of Articles 6 and 9;[...]

(e) conservation reference points consistent with the objectives set out in Article 2; [...]”

The drafting of Article 10 therefore confirms that the content of multiannual plans needs to be consistent with the objectives set out in Article 2, including the use of conservation reference points that will achieve the MSY objective and 2015/2020 F_{MSY} requirement. Additionally, since the MSY objective underpins the social and economic objectives of the Basic Regulation, it is a prerequisite for achieving the other objectives. There is no room for exceptions.

In April 2014, the Commission, Council and Parliament adopted an Inter-Institutional task force agreement on the practical implementation of Article 9 and Article 10 of the Basic Regulation - the so called Task Force Agreement on multiannual plans (referred to here as the Task Force Agreement).⁵⁷ This document has no legal standing but constitutes a working tool that could be used in line with the Basic Regulation. The Task Force Agreement mentions the possibility of asking scientific bodies for ranges of F_{MSY} , as opposed to the fixed F_{MSY} value which has commonly been used to date. The suggestion in the Task Force Agreement is that a range of

⁵⁷ The Task Force Agreement is available at <http://cfp-reformwatch.eu/2014/04/new-agreement-opens-up-for-progress-on-multiannual-fisheries-plans/>

exploitation rates associated with F_{MSY} are included in the multiannual plan (arrived at through co-decision), and then the Council sets annual fishing opportunities in accordance with a level of exploitation within this range.⁵⁸ While there are some sound scientific and legal reasons to do this, in order for this approach to be in line with the legal requirements of the Basic Regulation, and in particular Article 2(2), Article 9 and Article 10, the exploitation ranges referred to in the Task Force Agreement must be bound by the point value of F_{MSY} at their upper limit, with exploitation rates generally set below this limit. As explained in section 1.1, this is because F_{MSY} is a limit reference point under international law, and continuously exploiting stocks at F_{MSY} will not ensure that stocks will recover and be maintained above levels which can produce MSY as required by Article 2(2) of the Basic Regulation.

Once a multiannual plan has been adopted, Article 18 of the Basic Regulation foresees that the Commission may be granted the power in that multiannual plan to adopt conservation measures in a specific geographical area through delegated or implementing acts. These measures may be based on the submission of joint recommendations of Member States with a direct management interest (for example, fishing rights) or, after the deadline for submission of joint recommendations has passed, they may be independently proposed by the Commission. The measures implemented through these delegated or implementing acts must be coherent with the Basic Regulation and adhere to the same requirements as the measures outlined in multiannual plans. Their primary objective must also be to contribute to the achievement of the MSY objective and the fulfilment of the 2015/2020 F_{MSY} requirement.

Recommendations

The EU institutions must develop and implement multiannual plans (and related delegated or implementing acts) in line with Article 9 and 10 of the Basic Regulation. These provisions require multiannual plans to deliver the MSY objective and the 2015/2020 F_{MSY} requirement in Article 2(2) where possible, and to follow the precautionary approach to fisheries management in the absence of MSY targets.

If ranges of exploitation rates are used in multiannual plans as suggested in the Task Force Agreement, the ranges must be bounded at the upper limit by the point value of F_{MSY} , with values below this upper limit generally being used by the Commission and the Council as the basis for any proposal and setting of annual fishing opportunities.

When drafting joint recommendations for any delegated or implementing acts pursuant to multiannual plans, national administrations must ensure that the conservation and management measures, including target and limit exploitation rates, are in line with the MSY objective and the 2015/2020 F_{MSY} requirement in Article 2(2).

When drafting or implementing delegated or implementing acts, either on the basis of joint recommendations from national administrations or on their own initiative, the Commission must ensure that the conservation and management measures, including target and limit exploitation rates, are in line with the MSY objective and the 2015/2020 F_{MSY} requirement in Article 2(2).

⁵⁸ Paragraph 14 of the Task Force Agreement.

2.1.5 Case study: The Baltic Sea Multiannual plan proposal

At the time of publishing this briefing, no multiannual plans have yet been adopted under the reformed CFP.⁵⁹ However, the European Commission published a proposal for the Baltic Sea multiannual plan⁶⁰ in October 2014 (the Baltic Sea MAP proposal), and we will briefly analyse the wording of this proposal, which, as explained above, should deliver the MSY objective and the 2015/2020 F_{MSY} requirement, as well as take a precautionary and ecosystem-based approach to fisheries management.

Article 3 of the Baltic Sea MAP proposal states the objectives for the plan:

“1. The plan shall aim at contributing to the objectives of the common fisheries policy listed in Article 2 of Regulation (EU) No 1380/2013 and in particular:

(a) achieving and maintaining maximum sustainable yield for the stocks concerned, and

(b) ensuring the conservation of the stocks of plaice, brill, flounder and turbot in line with the precautionary approach.

2. The plan shall aim at contributing to the implementation of the landing obligation established in Article 15(1) of Regulation (EU) No 1380/2013 for the stocks concerned and for plaice.”

The wording in this article does not reflect the strong legal obligations in Article 2(2) and Article 9 of the Basic Regulation for the following reasons:

- The wording “*aim at contributing to the objectives*” implies that there is a tolerance for not achieving the objectives of the CFP. To compare, Article 9(1) of the Basic Regulation states that “*Multiannual plans[...] shall contain conservation measures[...] in accordance with Article 2(2).*” Clearly, the wording in the Baltic Sea MAP proposal is not in line with the MSY objective; the plan should achieve the objective of Article 2(2) and not just *aim at contributing* to achieving the objectives. This is particularly important since multiannual plans are the only long-term and comprehensive fisheries management tool foreseen in the Basic Regulation.
- The wording in Article 3(1)(a) of the proposal is also weaker than Article 2 and Article 9 of the Basic Regulation. It requires “*achieving and maintaining MSY for the stocks concerned*” while Article 2(2) and Article 9 of the Basic Regulation refer to “*restoring and maintaining fish stocks **above** levels capable of producing MSY*”. Achieving MSY is different from *maintaining fish stocks above levels capable of producing MSY*. As explained previously, the reference to the word “above” in relation to fish stock biomass is fundamental, since in order to ensure stock levels will be above MSY, exploitation rates must be set below F_{MSY} , including when F_{MSY} ranges are used. As drafted in the proposal, there is no requirement in the Baltic Sea MAP to this effect and the ranges of F_{MSY} in the Commission's proposal allow for overfishing because the ranges include values above the point value of F_{MSY} .

⁵⁹ September 2015.

⁶⁰ Proposal for a Regulation of the European Parliament and of the Council establishing a multiannual plan for the stocks of cod, herring and sprat in the Baltic Sea and the fisheries exploiting those stocks, amending Council Regulation (EC) No 2187/2005 and repealing Council Regulation (EC) No 1098/2007 of 6 October 2014, COM(2014) 614 final.

- The wording “*for the stocks concerned*” is also more restrictive than the wording of Article 2(2) which refers to “*harvested species*” and therefore covers any species caught, not only targeted species.

For these reasons, the drafting of the Baltic Sea MAP proposal does not ensure the sustainability of the relevant stocks at the level required by Article 2(2) of the Basic Regulation.

Recommendations

The Council of Ministers and European Parliament must amend the European Commission’s Baltic Sea MAP proposal so that its Article 3 is in line with the MSY objective and 2015/2020 F_{MSY} requirement in Article 2(2) of the Basic Regulation. This means ensuring that fish stocks will be maintained **above** MSY biomass levels, not **at** MSY biomass levels, and any ranges in exploitation rates have the point value of F_{MSY} as their upper limit.

Article 3 of the Baltic MAP proposal must also be amended so that the plan is required to contribute to the objectives of the CFP as listed in Article 2 (prioritising the objective in Article 2(2) since this is fundamental to the achievement of the other objectives), as per Article 9 of the Basic Regulation.

2.2 Provisions referring to actors and other legislative tools

In this section we will explore how the MSY objective and 2015/2020 F_{MSY} requirement apply to the management decisions taken by different actors and through different legislation.

2.2.1 Article 20: Member States’ measures within the 12 nautical mile zone

Article 20 of the Basic Regulation empowers Member States to adopt measures “*for the conservation and management of fish stocks and for the improvement of conservation status of marine ecosystems within 12 nautical miles*”, and requires that these measures are compatible with the objectives set out in Article 2 of the Basic Regulation.⁶¹ As explained above, although there are many objectives outlined in Article 2, it is essential that the MSY objective is seen as a fundamental prerequisite for achieving the other objectives. If the resource (fish stocks) isn’t maintained at a productive and stable level, the ability of the CFP to deliver on the social, economic and employment benefits will be severely reduced.

The marine environment is an open system with few physical barriers. Therefore, for effective management, it is fundamental that there is consistency in the decisions adopted at national level and at EU level.

⁶¹ Article 20 of the Basic Regulation.

2.2.2 Respecting Article 2 of the Basic Regulation in the international arena⁶²

Article 29 of the Basic Regulation regarding Union activities in international fisheries organisations requires that:

“The positions of the Union in international organisations dealing with fisheries and in RFMOs shall be based on the best available scientific advice so as to ensure that fishery resources are managed in accordance with the objectives laid down in Article 2, in particular paragraph 2 and point (c) of paragraph 5 thereof. The Union shall seek to lead the process of strengthening the performance of RFMOs so as to better enable them to conserve and manage marine living resources under their purview.”

Article 33 of the Basic Regulation regarding the principles and objectives of management of stocks of common interest to the Union and third countries also refers to the objective in Article 2(2):

“Where stocks of common interest are also exploited by third countries, the Union shall engage with those third countries with a view to ensuring that those stocks are managed in a sustainable manner that is consistent with this Regulation, and in particular with the objective laid down in Article 2(2). Where no formal agreement is reached, the Union shall make every effort to reach common arrangements for fishing of such stocks with a view to making the sustainable management possible, in particular, concerning the objective in Article 2(2), thereby promoting a level-playing field for Union operators.”

This article requires the application of the same standard for fish stocks of common interest exploited by third countries as for stocks solely exploited by the Union. It requires active engagement from the EU to make sure that Article 2(2) is implemented and respected.

Both provisions aim to ensure coherence of objectives for fish stocks management at EU level and international level where the EU has fishing interests. Both provisions require applying the same standards (i.e. the 2015/2020 F_{MSY} requirement) at international level as those that apply at Union level. As mentioned in the preceding paragraph, it is essential the same objectives apply both at EU and international level in relation to resources that do not respect borders, such as fish stocks, in order to ensure the EU is achieving its objective of sustainable management of harvested species.

Recommendation

The Union when acting at international level must promote the MSY objective and, as part of their negotiations with third countries, negotiate with a view to ensuring the MSY objective is achieved for shared stocks.

⁶² Article 29 and Article 33 of the Basic Regulation.

2.2.3 Article 35 on the objectives of the Common Market Organisation

Article 35 of the Basic Regulation sets out the objectives under which the Regulation on the common organisation of the markets in fishery and aquaculture products (the CMO Regulation)⁶³ should operate. The establishment of the common markets in fishery and aquaculture products, and the way those markets operate, form one of the core elements of the CFP.⁶⁴ The first objective listed for the organisation of the common markets in fishery and aquaculture products is for it to:

“(a) contribute to the achievement of the objectives set out in Article 2, and in particular to the sustainable exploitation of living marine biological resources; [..]”

This reinforces what is already a legal obligation anyway: that as an element of the CFP, the CMO Regulation is bound by the objectives of the Basic Regulation.⁶⁵ Singling out *“and in particular the sustainable exploitation of living marine resources”*, which is covered by Article 2(2) of the Basic Regulation, highlights that the CMO Regulation must help contribute to the achievement of the MSY objective and the 2015/2020 F_{MSY} requirement.

This requirement extends to the implementation of the CMO Regulation by other actors. For example, the CMO Regulation provides for the creation of fishery Producer Organisations (hereinafter referred to as POs), which represent organisations of fishers and fishing businesses. Under the CMO Regulation, POs have responsibility for contributing to the achievement of the CMO Regulation's objectives. In addition to this general responsibility, the CMO Regulation lists a number of specific responsibilities that POs must adhere to, including: *“promoting the viable and sustainable fishing activities of their members in full compliance with the conservation policy”* laid down in the Basic Regulation and environmental law;⁶⁶ *“avoiding and reducing as far as possible unwanted catches of commercial stocks”*;⁶⁷ *“contributing to the traceability of fishery products and access to clear and comprehensive information for consumers”*;⁶⁸ and *“contributing to the elimination of illegal, unreported and unregulated fishing”*.⁶⁹ POs also play a particularly important role in the bringing on the market, and the subsequent marketing, of fish caught under the CFP.

These are important responsibilities through which the POs, in line with the CMO, must contribute to the achievement of the objectives of the Basic Regulation, in particular the MSY objective in Article 2(2).⁷⁰ To do so they must use any of the means offered to them in the legal framework, such as increasing traceability of fishery products, using promotional and marketing means or developing measures to reduce the environmental impact of fishing for example through the development and promotion of measures to improve gear selectivity.⁷¹

In addition to POs, other actors in the seafood supply chain may have an indirect influence in the adoption and achievement of the MSY objective and the 2015/2020 F_{MSY} requirement, but they

63 Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, OJ L354, 28.12.2013, p.1.

64 Article 35 of the Basic Regulation.

65 Article 35(1)a) of the Basic Regulation.

66 Article 7(1)(a) of the CMO Regulation

67 Article 7(1)(b) of the CMO Regulation

68 Article 7(1)(c) of the CMO Regulation

69 Article 7(1)(d) of the CMO Regulation

70 As per Article 7(1)(a) of the CMO Regulation

71 Article 8 of the CMO Regulation.

still have a responsibility under the CMO and Basic Regulations to help achieve this objective. Responsible sourcing by seafood businesses, for example, can be a driver for sustainable fisheries through improved market access.

Recommendations

Measures implemented under the CMO must actively promote sustainable fishing activities in the EU and should ensure that only fishery products caught in line with the objectives of Article 2 of the Basic Regulation enter EU markets.

As required by the CMO, POs must actively promote viable and sustainable fishing activities in line with the MSY objective and the other objectives of Article 2 of the Basic Regulation.

2.3 Provisions dealing with financial aid

Article 40 of the Basic Regulation states that: *“Union financial assistance may be granted to contribute to the achievement of the objectives set out in Article 2.”*

This article asserts the principle that EU funding must only be used to finance projects that contribute to the achievement of the objectives of the Basic Regulation.

The detail for how Union financial assistance will help achieve this objective is given in Articles 41 and 42 of the Basic Regulation. Article 41 of the Basic Regulation lays down the principle that Union financial assistance for Member States is conditional upon their compliance with CFP rules. Article 42 of the Basic Regulation lays down a similar principle for operators in the fisheries sector applying for Union financial assistance. Both Member States and operators are already bound by the rules and requirements of the CFP, but this set of provisions reinforces the coherence between the Basic Regulation and the use of Union financial assistance by making compliance a required condition for receiving this assistance. Compliance with the CFP will include adhering to the MSY objective and the 2015/2020 F_{MSY} requirement enshrined in Article 2(2).

Further concrete measures and requirements are given in the text of the European and Maritime Fisheries Fund (EMFF);⁷² these are described in our briefing on the EMFF (May 2014).⁷³ They require that all actors involved respect all the legal requirements in the CFP in order to ensure EU funds promote sustainable fishing.⁷⁴

72 Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, OJ L149, 20.5.2014, p.1.

73 www.clientearth.org/reports/emff-summary-briefing-may-2014.pdf

74 For further details please read our briefing on the sustainability of the EMFF at www.clientearth.org/reports/emff-summary-briefing-may-2014.pdf

Recommendations

Member States must ensure that EU financial aid really contributes to achieving the objectives of Article 2 and is granted only where CFP rules are complied with, including in relation to the MSY objective.

The European Commission must put in place and perform the necessary checks to ensure that financial aid granted to Member States, fishermen or fishing businesses does actually contribute to achieving the objectives of Article 2, including particularly the MSY objective.

Conclusion

The Basic Regulation lays down the MSY objective and the 2015/2020 F_{MSY} requirement in Article 2(2) in very strong legal terms and with strong conditions. As demonstrated throughout this briefing, the text of the Basic Regulation is legally coherent throughout the different articles, referring both to the implementation of MSY in associated legal acts, as well as the requirements for those actors responsible for the achievement of the MSY objective. The objectives of the CFP, including the MSY objective, are also at the core of EU financing and the common market.

Under the CFP, the legally mandated objective for fisheries management is to manage stocks sustainably, meaning the impact of fishing needs to allow stocks to recover and be maintained above levels that can produce MSY. Healthy fisheries not only provide fishers and seafood businesses with the raw material they need, but they are the foundations of the economic and social pillars of sustainability for the fishing sector. Stable and productive fish stocks are also a fundamental element for a healthy and sustainable marine environment.

The CFP's legal requirements have been designed to achieve all these complementary and positive objectives from an environmental, economic and social point of view. All actors and authorities involved (EU, national and regional fishing authorities) must implement these legal requirements in order to achieve these expected positive results.

However, some practical examples show that implementation in practice is not always aligned with the strong wording of the Basic Regulation, such as the 2015 TAC Regulation or the Baltic Sea MAP proposal. Inadequate implementation of the MSY objective through measures such as these will not bring the win-win situation of having environmental, economic and social sustainability in the EU fishing sector.

Appendix

Throughout this briefing, we have identified a number of legally and scientifically sound recommendations for how measures that have legal requirements regarding Article 2(2) of the Basic Regulation can be better or more correctly implemented.

The following is a list of all our specific recommendations from each section:

- All actors (e.g. the European Commission, Council of Ministers and national administrations) must make management decisions, and take management measures, on the basis of the MSY objective and the 2015/2020 F_{MSY} requirement.
- If exploitation rates are not set by 2015 at the level required under Article 2(2), then decision makers must demonstrate how these will be achieved “*progressively and incrementally*” by 2020 at the latest.
- EU and national decision makers must apply the precautionary approach to fisheries management as a *necessary (but on its own inadequate)* step in managing stocks to achieve the MSY objective.
- The *rules and principles* for applying the precautionary approach are set in the UN Fish Stocks Agreement and are binding on EU and national decision makers, as they are signatories to the agreement. *The agreement, including the tools within it, is an integral part of EU law according to Article 216(2) of the TFEU.*
- EU and national fisheries management authorities must develop tools for applying the ecosystem-based approach to fisheries management in line with the requirement in Article 2(3) of the CFP Regulation, and to be consistent with EU environmental requirements. This should include requesting scientific advice in line with this legal requirement, prioritising the collection of data needed to support such an approach, and managing the other impacts of human activities (such as underwater noise, pollution, dredging, and oil and gas exploration) in a holistic way.
- EU institutions must ensure that any conservation measures they propose and adopt under Article 6, including those listed under Article 7, ensure that they deliver the MSY objective and the 2015/2020 F_{MSY} requirement, as well as the other Article 2 objectives related to the conservation and sustainable exploitation of marine biological resources, e.g. eliminating discards.
- In order to adhere to the principle of sincere cooperation under the Treaty on European Union, the European Commission must adopt proposals for regulation on fishing opportunities in line with the requirements of Article 2(2) and Article 16 of the Basic Regulation.

- In order to adhere to the principle of sincere cooperation under the Treaty on European Union, the Council of Ministers must set fishing opportunities in line with the requirements of Article 2(2) and Article 16 of the Basic Regulation.
- The European Commission, Council of Ministers and national authorities (if appropriate) need to duly justify any delay in meeting the 2015/2020 F_{MSY} requirement beyond 2015 and show how and when this requirement will be met by 2020 at the latest.
- The European Commission should produce guidelines on the possible justifications for a delay in achieving the MSY-based exploitation rates by 2015.
- The EU institutions must develop and implement multiannual plans (and related delegated or implementing acts) in line with Article 9 and 10 of the Basic Regulation. These provisions require multiannual plans to deliver the MSY objective and the 2015/2020 F_{MSY} requirement in Article 2(2) where possible, and to follow the precautionary approach to fisheries management in the absence of MSY targets.
- If ranges of exploitation rates are used in multiannual plans as suggested in the Task Force Agreement, the ranges must be bounded at the upper limit by the point value of F_{MSY} , with values below this upper limit generally being used by the Commission and the Council as the basis for any proposal and setting of annual fishing opportunities.
- When drafting joint recommendations for any delegated or implementing acts pursuant to multiannual plans, national administrations must ensure that the conservation and management measures, including target and limit exploitation rates, are in line with the MSY objective and the 2015/2020 F_{MSY} requirement in Article 2(2).
- When drafting or implementing delegated or implementing acts, either on the basis of joint recommendations from national administrations or on their own initiative, the Commission must ensure that the conservation and management measures, including target and limit exploitation rates, are in line with the MSY objective and the 2015/2020 F_{MSY} requirement in Article 2(2).
- The Council of Ministers and European Parliament must amend the European Commission's Baltic Sea MAP proposal so that its Article 3 is in line with the MSY objective and 2015/2020 F_{MSY} requirement in Article 2(2) of the Basic Regulation. This means ensuring that fish stocks will be maintained **above** MSY biomass levels, not **at** MSY biomass levels, and any ranges in exploitation rates have the point value of F_{MSY} as their upper limit.
- Article 3 of the Baltic MAP proposal must also be amended so that the plan is required to contribute to the objectives of the CFP as listed in Article 2 (prioritising the objective in Article 2(2) since this is fundamental to the achievement of the other objectives), as per Article 9 of the Basic Regulation.

- The Union when acting at international level must promote the MSY objective and, as part of their negotiations with third countries, negotiate with a view to ensuring the MSY objective is achieved for shared stocks.
- Measures implemented under the CMO must actively promote sustainable fishing activities in the EU and should ensure that only fishery products caught in line with the objectives of Article 2 of the Basic Regulation enter EU markets.
- As required by the CMO, POs must actively promote viable and sustainable fishing activities in line with the MSY objective and the other objectives of Article 2 of the Basic Regulation.
- Member States must ensure that EU financial aid really contributes to achieving the objectives of Article 2 and is granted only where CFP rules are complied with, including in relation to the MSY objective.
- The European Commission must put in place and perform the necessary checks to ensure that financial aid granted to Member States, fishermen or fishing businesses does actually contribute to achieving the objectives of Article 2, including particularly the MSY objective.

Liane Veitch
Fisheries Project Lead
+44 (0)20 3030 5956
lveitch@clientearth.org
www.clientearth.org

Sandy Luk
Senior Lawyer, Head of Biodiversity
Programme
+44 20 7749 5977
sluk@clientearth.org
www.clientearth.org

Flaminia Tacconi
EU Fisheries Lawyer
+32 (0)28084322
ftacconi@clientearth.org
www.clientearth.org

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations, engaged individuals and the UK Department for International Development.

Brussels

4ème Etage
36 Avenue de Tervueren
1040 Bruxelles
Belgium

London

274 Richmond Road
London
E8 3QW
UK

Warsaw

Aleje Ujazdowskie 39/4
00-540 Warszawa
Poland

ClientEarth is a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 2-6 Cannon Street, London EC4M 6YH, with a registered branch in Belgium, N° d'entreprise 0894.251.512, and with a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208