May 2014

Article 2(2): Interpreting the MSY Objective in the CFP

And what it means for future catch limits

Summary

The main objective contained in Article 2(2) of the new CFP is the restoration and/or maintenance of populations of harvested species above MSY levels. This aim is to be achieved by setting the correct exploitation rate - the tool to achieve the objective - and allocating fishing opportunities for stocks below their corresponding $F_{MSY,}$ as no other approach would permit the objective to be reached. This approach is necessary to ensure fisheries are sustainable and profitable, and to comply with EU environmental legislation, as well as with international law principles.

All future fisheries measures, and all actions undertaken by EU and Member State institutions, must serve to deliver these objectives, complying with the requirement to set fishing levels below F_{MSY} and aimed at achieving stock levels above B_{MSY}. Any measures that take a different approach will be in breach of the CFP, i.e. unlawful.

Background

The reform of the EU's Common Fisheries Policy (CFP) concluded in 2013, yet almost a year later the interpretation of some of the most important provisions in the new legislation remains uncertain.

The new CFP[1] incorporates in its legal text, for the first time, a longer-standing Union policy objective[2] of managing fish stocks according to their 'Maximum Sustainable Yield' (MSY).[3] This approach to exploitation should help deliver long-term productivity for EU fish stocks and thereby prosperity for the businesses and communities that rely on them.

Inclusion of the Maximum Sustainable Yield 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

[1] 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 (the new CFP Basic Regulation).
[2] 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).
[3] For introductory materials on MSY, please see http://www.clientearth.org/reports/simply-msy.pdf. “B_{MSY}” means the population size at which growth rate is highest, “F_{MSY}” means the exploitation rate that is expected to lead to B_{MSY}.

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*".[4]

The new CFP brings EU fisheries law into line with both international law, where MSY has long been used as a key reference point,[5] and indeed with other EU legislation.[6] As implementation of the new framework begins, it is imperative that the MSY rules are properly applied, and confusion over their meaning avoided, in order to make sure the CFP's objectives are successfully achieved.

Recent discussions of representatives of the Council of Ministers have raised fears that by selecting some[7] parts of the legal text to inform decisions, while ignoring other parts, the Council and/or Commission could find themselves in breach of the new rules. Getting the interpretation right will have particular implications for the setting of fishing opportunities (Total Allowable Catches and effort limits) in EU waters, but will also have international consequences, as the EU government's understanding of MSY informs the Sustainable Fisheries Partnership Agreements it makes with countries across the globe.

Article 2(2): The MSY Objective

The final text of the new CFP Basic Regulation Article 2(2) 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 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 contains a clear and legally binding requirement – that fisheries management shall aim to restore and maintain fish populations[8] *above* MSY levels. The second paragraph explains that the tool by which this objective is to be achieved is the setting of fishing mortality rates at the commensurate level. Crucially, from a scientific perspective, in order to achieve population levels above B_{MSY}, this must mean setting fishing mortality rates *below* F_{MSY}.

[4] http://europa.eu/rapid/press-release_IP-13-488_en.htm
[5] 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.
[6] Directive 2008/56/EC (the Marine Strategy Framework Directive) and its implementing measure, Commission Decision 2010/477/EU.
[7] Article 4(1), point 37 of the new CFP Basic Regulation.
[8] 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).

It must be recognised that setting fishing mortality rates at F_{MSY} would, as a matter of scientific reality, not reliably permit the requirement in Article 2(2) to be achieved.[9]

MSY is a theoretical point of equilibrium associated with a particular biomass level and a particular fishing mortality rate, and as such, to set fishing mortality rates *at* the level of F_{MSY} would not produce the result of biomass levels *"above"* B_{MSY}. In fact, the influence of external environmental factors (leading to higher than expected natural mortality or lower than expected recruitment) may mean that fishing at F_{MSY} would actually result in biomass levels below B_{MSY}. If fishing at the estimated 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 text to aim at stock levels above MSY, and furthermore does not represent a precautionary approach, as Article 2(2) also requires.

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.

The decision by the legislators to fix the objective of aiming "*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}. It should be noted that the problem of "choke species" has nothing to do with setting catch limits on the basis of MSY, and does not therefore constitute a reason against setting exploitation levels below $F_{MSY.}$ Rather, the issue arises due to the way we manage our fisheries, using quota/effort limits for individual species in fisheries where gears are catching a range of species. Adapting our management tools (for example allocating vessel quotas that reflect their likely catch composition) and incentivising innovation in exploitation patterns (e.g. increasing gear selectivity) will contribute to reducing issues associated with such species.

International and wider EU law requirements

Article 2(2) reflects existing approaches to fisheries management in international law. For example, the United Nations Fish Stocks Agreement makes clear that F_{MSY} should be regarded as a *minimum* reference point for management;[10] meaning this level of fishing pressure is a limit reference point (i.e. fishing *below* F_{MSY}), and not a target (i.e. fishing *at* F_{MSY}). Thus, exploitation rates should be set lower than F_{MSY} in order to restore or maintain stocks above B_{MSY} levels.

[9] 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/

[10] Annex II.7 of the 1995 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, states "*The fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points*. For stocks which are not overfished, fishery management strategies shall ensure that fishing mortality does not exceed that which corresponds to maximum sustainable yield, and that the biomass does not fall below a predefined threshold. For overfished stocks, the biomass which would produce maximum sustainable yield can serve as a rebuilding target."

Article 2(2) also reflects existing EU law, including the Marine Strategy Framework Directive (MSFD), which requires Member States to ensure that, by 2020 at the latest, "*populations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size structure that is indicative of a healthy stock*".[11] One of the agreed indicators for this descriptor of 'good environmental status' is that stocks are being fished at levels equal to or lower than F_{MSY}, and the legislation expressly recognises that this may result in some stocks being fished more lightly, especially in mixed (multi-species) fisheries or in fisheries where predator/prey interactions are particularly significant.[12] By setting its objective as restoring stocks above MSY, the new CFP builds on this aspect of the MSFD, and supports its overall goals. It is a good example of putting into practice the EU Treaty requirements to integrate environmental protection and ensure coherence between Union policies.[13]

Implications for future fisheries management

For Article 2(2) of the new CFP to be effective, a correct understanding of its requirements must be translated into the actions of each of the EU and Member State institutions involved in fisheries management, and faithfully reflected in all further legal measures they adopt. Most obviously, Commission proposals and Council decisions on fishing opportunities must correctly comply with the Article 2(2) requirements, aiming to restore and maintain stocks above MSY by setting the appropriate exploitation rates (i.e. below F_{MSY}). The Commission, in preparing its proposals, must ensure that the scientific advice it requests from ICES is correctly aligned with this objective.

Similarly, it will be essential that multi-annual plans are drafted so as to be fully consistent with Article 2(2). The wording of the objectives, any sub-targets and timescales, and any safeguard trigger reference points that these contain, must accurately reflect the correct requirements. The same applies to all measures in joint recommendations or discard action plans developed by Member States, further delegated and implementing acts from the Commission, and to policy documents which may influence future measures (such as the Commission's Communication on the following year's fishing opportunities).

[11] Annex I, Part (3) of Directive 2008/56/EC establishing a framework for Community action in the field of marine environmental policy (Marine Strategy Framework Directive).
[12] Annex, Part B of Commission Decision of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters (2010/477/EU).
[13] Articles 7 and 11 of the Treaty on the Functioning of the European Union.

Sandy Luk
Senior Lawyer and Programme Leader, Biodiversity
t +44 207 749 5975
e sluk@clientearth.org
www.clientearth.org

Susie Wilks
Associate
Biodiversity
t +44 207 749 5975
e swilks@clientearth.org
www.clientearth.org

Flaminia Tacconi
Lawyer
Biodiversity
t +32 2 808 4322
e ftacconi@clientearth.org
www.clientearth.org

Liane Veitch
Science and Policy Advisor
Biodiversity
t +44 203 030 5956
e lveitch@clientearth.org
www.clientearth.org

Brussels
4ème Etage
36 Avenue de Tervueren
1040 Bruxelles 1
Belgium

London
274 Richmond Road
London
E8 3QW
UK

Warsaw
Aleje Ujazdowskie 39/4
00-540 Warszawa
Poland