

# Legal briefing: Complying with Art 2(2) of the CFP basic regulation when setting TACs and quotas

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## Recommendations for complying with the MSY objective when proposing or deciding on fishing opportunities

- The European Commission and Council of Ministers should limit the use of any derogation from the achievement of MSY-based exploitation rates as soon as possible, so that the vast majority of 2016 TACs are set in line with the MSY objective.
- The Commission should provide concrete and evidence-based explanations if it proposes fishing opportunities that will not achieve MSY-based exploitation rates as soon as possible, and show how and when these will be achieved (by 2020 at the latest).
- The Council should provide concrete and evidence-based explanations if it adopts fishing opportunities that will not achieve MSY-based exploitation rates, and show how and when these will be achieved (by 2020 at the latest).
- The Commission should issue guidelines on the reasons that might justify a delay to achieving MSY-based exploitation rates, and should make clear who is to provide evidence in support of such arguments and in what form.

## Background

The reform of the Common Fisheries Policy (CFP), recently adopted by the Council and the European Parliament, introduced in 2014 a legal requirement to fulfil a long standing Union policy objective - to manage fish stocks to achieve maximum sustainable yield (MSY).<sup>1</sup> This briefing will focus on how this legal requirement must be incorporated in the annual fishing opportunity proposals and decisions.

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<sup>1</sup> 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).

## The CFP's MSY objective and Article 16 on fishing opportunities

Article 2(2) of the CFP's basic regulation (the "Basic Regulation")<sup>2</sup> stipulates that the CFP must "*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.*"<sup>3</sup>

This first paragraph of Article 2(2) contains a clear legal obligation: that fisheries management shall aim to restore and maintain fish populations above MSY levels – what we refer to as the MSY objective.

The word "above" in this objective is fundamental, since this means setting exploitation levels below  $F_{MSY}$ , the fishing mortality that should lead to the biomass at which a stock can produce maximum sustainable yield ( $B_{MSY}$ ), including when ranges of exploitation ( $F_{MSY}$  ranges) are allowed. Fishing **at** the average point value of  $F_{MSY}$  would, as a matter of scientific reality, only lead to biomass being above  $B_{MSY}$  50% of the time<sup>4</sup> (and then only for stocks which have recovered to levels very close to  $B_{MSY}$ ). So, fishing **at**  $F_{MSY}$  does not fulfil the MSY objective in Article 2(2).  $F_{MSY}$  is a limit exploitation rate, not a target exploitation rate, and only if the 2016 TACs are set **below**  $F_{MSY}$  can the requirements in Article 2(2) be met.

Following on from this requirement, Articles 16(3) and 16(4) of the Basic Regulation establish a clear legal obligation to set fishing opportunities (total allowable catches and effort limits) in line with Article 2(2). This means that the Commission's proposals and the Council's decisions on fishing opportunities must be in line with this provision.

## A timeline for achieving MSY-based exploitation rates

The second paragraph of Article 2(2) explains the tool through which the MSY objective is to be met and the associated timeframe: MSY-based exploitation rates are to be achieved "*by 2015 where possible and on a progressive, incremental basis by 2020 at the latest*".

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 between now and 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 each year so that the requirement in the second paragraph of Article 2(2) will be achieved by 2020 at the latest.

ClientEarth welcomes the progress made towards increasing the number of stocks fished at levels corresponding to the MSY objective and the Commission's intention to propose TACs in line with achieving MSY-based exploitation rates "*in the shortest feasible time frame*".<sup>5</sup> However, if for some stocks the Commission proposes fishing opportunities that will not achieve MSY-

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<sup>2</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 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, OJ L354, 28.12.2013, p.22.

<sup>3</sup> Emphasis added; see our legal briefing on MSY in the CFP for a detailed analysis <http://documents.clientearth.org/wp-content/uploads/library/2015-09-08-maximum-sustainable-yield-in-the-common-fisheries-policy-ce-en.pdf>

<sup>4</sup> ICES Advice Basis 2015, ICES Advice 2015, Book 1

<sup>5</sup> Communication from the Commission to the European Parliament and the Council concerning the Consultation on the fishing opportunities for 2016 under the Common Fisheries Policy, COM(2015) 239 final, p. 2.

based exploitation rates in 2016, the Commission should give a concrete and evidence-based explanation why, and demonstrate how and when these exploitation rates will be achieved, progressively and incrementally, by 2020 at the latest. The explanation and timeline for meeting the requirement must show that the delay in the proposal will not result in a breach of Articles 2(2) and 16(4). This would help to show that the Commission is respecting the EU principle of sincere cooperation,<sup>6</sup> something it would fail to do if it proposed a Regulation that contravenes these articles.

The Treaty on the Functioning of the European Union<sup>7</sup> empowers the Council to adopt measures on the fixing and allocation of fishing opportunities.<sup>8</sup> The principle of sincere cooperation also applies to the Council in that it requires Member States to assist the Union in carrying out tasks that flow from the Treaties and 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.<sup>9</sup>

In light of these responsibilities, in cases where the Council sets TACs in contravention of the requirements in Article 2(2) and Article 16(4) it is questionable whether the Council is respecting the principle of sincere cooperation. If this year the Council sets fishing opportunities that do not comply with the requirement to achieve MSY-based exploitation rates, it should at least provide an explanation of its reasons for doing so and provide a plan or roadmap for how and when this requirement will be met (by 2020 at the latest).

The Treaty on the European Union entrusts the Commission with the responsibility of ensuring the application of the Treaties and overseeing the application of Union law.<sup>10</sup> On the basis of this responsibility, and the principle of mutual sincere cooperation,<sup>11</sup> the Commission should request justification from the Council if they set fishing opportunities in 2016 that are not in line with the timeframe in Article 2(2).

## Reasons for delay to the timeframe in Article 2(2)

The “*where possible*” in Article 2(2) in relation to the achievement of MSY-based exploitation rates is not defined in the Basic Regulation, and there are no provisions in the legal text 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. In terms of what is biologically or ecologically possible, there are no reasons that exploitation rates that would put stocks on the path to recovery could not be achieved almost immediately with the adjustment of fishing mortality, although this may entail social and economic impacts in some fisheries.

However, a possible justification for delay is alluded to in the recitals of the Basic Regulation. While recitals are not legal text (i.e. they are not legally binding), they can provide insight into the reasons for the adoption of a given provision and can be used to offer guidance in the interpretation of provisions.<sup>12</sup>

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<sup>6</sup> Article 4(3) and Article 13(2) on the Treaty on European Union.

<sup>7</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C326, 26.10.2012, p.49.

<sup>8</sup> Article 43(3) and Article 13(2) of the Treaty on European Union

<sup>9</sup> Article 4(3) of the Treaty on European Union

<sup>10</sup> Article 17(1) of the Treaty on the European Union.

<sup>11</sup> Article 13(2) of the Treaty on European Union and CJCE, 30 March 1995, European Parliament/Council, Case C-65/93.

<sup>12</sup> Guideline 10 of the Joint Practical Guide for persons involved in the drafting of European Union legislation, <http://eurlex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf>; Decision of the Court of Justice, Case T-368/11, para. 101.

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 (although no later than 2020 as that is the deadline given in Article 2(2)).

“*[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. Because of this, this recital does not indicate that **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. It requires, rather, a significant risk to the future of the fleet.

The Commission should issue guidelines on the reasons that might justify a delay to achieving MSY-based exploitation rates to address this lack of clarity, and should make clear who is to provide evidence in support of such arguments and in what form

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