

The EU is at risk of violating its international obligations if efforts to reform the Common Fisheries Policy prove unsuccessful.

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Recent months have seen renewed efforts to reform the EU's Common Fisheries Policy. **Alexander Proelss** assesses the EU's track record, noting that 81 per cent of European fish stocks are currently overfished by the EU's own estimates, and that this figure may be even higher depending on the measurement used. A number of different obstacles will need to be overcome if the reform efforts are to be successful, not least finding a way around the significant political opposition within Member States to any reduction in fishing quotas.



According to the European Union's 2009 [green paper](#) on the reform of the Common Fisheries Policy (CFP), 81 per cent of European fish stocks are overfished. Some scientists argue that even this prediction is clearly underestimating the actual state of European fish stocks. Based on the notion that a fish stock is overfished if its biomass is too small to produce maximum sustainable yield (MSY), it has been argued that under a "business as usual" scenario, 91 per cent of European fish stocks will fail to meet the goal of the [Johannesburg Plan of Implementation](#) – according to which fish stocks are to be maintained at or restored to "levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015". While these figures are subject to a certain degree of controversy, as no sufficiently specific legal definitions exist of what MSY and "overfished" mean quantitatively, they demonstrate that little progress has been made in achieving the fundamental reforms necessary for a sustainable fisheries sector in Europe.

There are several reasons for the failure of the CFP, which range from biological, economical and legal factors, to political shortcomings. An ideal fisheries policy would foster the sustainable use of fish stocks, provide for coherent laws and regulations that yield adequate economic incentives, and guarantee consistent enforcement of the legal framework. Even though it is undeniable that some progress has been achieved concerning the restoration of certain fish stocks, none of these requirements has been fully met by the CFP as it stands today. Against this background, current attempts to reform the CFP will not only determine whether Europe will be capable of preserving and sustainably managing a finite natural resource, but will also affect the economic survival of the European fisheries industry.



Fishing boats, Tobermory, Scotland (Credit: BriYYZ, CC BY 2.0)

From a governance perspective, the political challenges involved in the matter are particularly relevant due to the fact that the conservation of marine biological resources under the CFP is one of the very few areas with regard to which the European Union (EU) exercises exclusive competence. The public disgrace attached to the potential failure to implement the necessary reforms will hopefully provide an incentive for the EU's institutions to agree on the required measures.

At the meeting of the Council on 28 January 2013, the Fisheries Ministers of the EU Member States stressed the

need to reach a political agreement on the CFP reform before mid-2013. Taking into account the imminent plenary vote of the European Parliament on the first reading of the proposals submitted by the Commission (of July 2011) and the Council (general approach of June 2012), the question arises as to what aspects of the CFP are in need of urgent reform. Leaving aside the debate on the future subsidisation of the CFP by way of establishing a new fund for the EU's maritime and fisheries policies, the duty to implement MSY (accompanied by the need for a general ban on discards, the effective enforcement of European fisheries law and the resolution of conflicts with the requirements of European nature conservation law) constitutes the central element of a truly sustainable CFP. Correspondingly, the [Commission has stated](#) that "long-term sustainable environmental conditions... are a prerequisite to reach an economically and socially sustainable fishing industry that contributes to the availability of food".

Contrary to what is often stated, the duty to maintain and restore European fish stocks to levels capable of producing MSY has been a legal obligation under public international law since the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS), to which the EU acceded in 1998. Article 2 of the [Commission draft](#) for the new Basic Regulation of the CFP now expressly emphasises and reinforces this international obligation by setting a final deadline of 2015, but its wording differs from that of the corresponding international legal obligations contained in the LOS Convention and the United Nations Fish Stocks Agreement (UNFSA). It is a matter of debate as to whether the phrase "shall aim to ensure, by 2015, that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the MSY" ought to be interpreted in a way under which the 'fishing mortality' and not the 'stock biomass' constitutes the crucial parameter of fisheries management. If this question is answered in the affirmative, the EU is at risk of violating its international obligations, which arguably refer to the stock biomass as the decisive criterion. The general approach of the Council on the one hand deserves approval for strengthening the MSY commitment by inserting the words "*at least at levels* which can produce MSY" (as does the recent outcome document of the Rio+20 summit), but must be criticised on the other for weakening the deadline by accepting that the duty to manage and restore fish stocks to MSY-producing levels shall be complied with until 2015 only "where possible" and for all stocks until 2020 "at the latest". Thus, insisting on the internationally accepted definition of MSY as well as on the final deadline of 2015 would be a strong political message in favour of sustainability on the part of the European Parliament.

The commitment to MSY should not obstruct the view on the fact that the concept of MSY accepts that even though stock biomass ought to be considered as the crucial parameter, other factors such as fishing patterns, the interdependence of stocks, economic needs of coastal fishing communities and social requirements can be taken into account. This can lawfully lead to economic and social objectives being given a higher weighting than environmental objectives depending on the individual circumstances. With that said, the scope of discretion of the EU is not unlimited. Repeated disregard for biomass development and other environmental factors cannot be held to be in accordance with the UNCLOS and the precautionary principle as a binding rule of European law. In order to safeguard that the management measures set by the EU do not significantly or repeatedly exceed levels that would allow overfished stocks to recover, or for stocks to be maintained at a level that can produce MSY respectively, the scope of discretion of the EU institutions in reaching MSY should be limited in the proposed Basic Regulation by the duty to impose safety margins that increase with the degree of scientific uncertainty on the status of the fish stocks concerned. As far as multiannual plans are concerned, such a limitation could be included in Article 9 (4) of the draft Basic Regulation.

Having said all this, the future of the CFP does not only depend on the implementation of the reform process itself. Rather, the fact that the EU is bound to the obligation to measure fish stocks at MSY-producing levels must imply that the Union can be held accountable for potential failures to implement the necessary measures. While according to Article 263 TFEU, the European Court of Justice (ECJ) is generally empowered to review the legality of acts of the European institutions, the politicised nature of fisheries and the economic interests at stake make it highly unlikely that an EU institution will challenge the acts of another institution in a way that would cause social and economic impacts in the Member States. Due to the collective allotment of fisheries quotas under the auspices of "relative stability", it is equally unlikely that an individual Member State would take up an action to reduce 'total allowable catches' as this would not only impact on its own fishing quota, but would also reduce the quotas of the other

Member States at the same time. The ECJ has also applied the procedural requirements governing legal standing of natural or legal persons in an unjustifiably strict manner. The necessary degree of legal control of the future CFP can thus only be safeguarded by way of providing extended access of natural and legal persons (such as NGOs) to the ECJ. In terms of law, leaving significant legal breaches (such as violations of the duty to manage fish stocks at MSY) potentially unaddressed, would arguably neither be compatible with the principle of the rule of law as embodied in Articles 2 and 19 (2) of the Treaty on the European Union (TEU), nor with the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, to which the EU is a party since 2005. Time will tell whether the institutions of the EU will be willing to address and effectively implement their obligations under international and their own (European) law.

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About the author

Alexander Proelss – *Universität Trier*

Alexander Proelss is Professor of Public Law at the University of Trier, Germany. His research interests include international and European law, particularly maritime and environmental law.



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