

## ClientEarth's response to the Commission's Communication concerning a consultation on fishing opportunities for 2018 under the CFP

ClientEarth is a public interest European environmental law organisation founded in 2006, with offices in London, Brussels and Warsaw. We aim to create practical solutions to key environmental challenges by supporting and promoting the development, implementation and enforcement of effective European Union (EU), and where appropriate international, regional or local environmental law and policy.

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ClientEarth welcomes the European Commission's Communication concerning a consultation on fishing opportunities for 2018 under the Common Fisheries Policy (CFP). We particularly support:

- The Commission's intention to propose Total Allowable Catches (TACs) in line with achieving maximum sustainable yield (MSY) for an increasing number of stocks in 2018;
- The Commission's intention to adopt proposals for TACs on the basis of MSY where multiannual plans have become incompatible with the CFP;
- The Commission's aspiration to follow the precautionary approach in a '*systematic, predefined and transparent way*' in the absence of MSY assessment and proxies;
- The Commission's recognition that fishing opportunities for stocks falling under the landing obligation are to be set taking into account catches rather than landings, based on biological advice and on the understanding that any increases in fishing opportunities as a result of this change should not jeopardise the achievement of the MSY objective<sup>1</sup> by setting exploitation rates above those consistent with MSY;
- Improvements in the Commission's report on the progress on achieving MSY and on the situation of fish stocks required under Article 50 of the CFP Basic Regulation<sup>2</sup>, including:
  - the inclusion of additional indicators, particularly with regards to biomass trends,
  - the consistent use of the most up-to-date time-series available,
  - the clear acknowledgement of the fast approaching 2019 landing obligation deadline and the need to progress its phasing in the 2018 discard plan joint recommendations
  - the recognition that progress towards achieving fishing levels in line with  $F_{MSY}$  will '*require a commitment by the Council to align its decisions to this approach*' (p. 9)

<sup>1</sup> The legal obligation set out in Article 2(2) of the CFP Basic Regulation (Regulation (EU) No 1380/2013) to progressively restore and maintain all 'populations of harvested species above levels which can produce the maximum sustainable yield' by achieving the MSY exploitation rate 'by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks'.

<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. We refer to this as the 'Basic Regulation' throughout the present document.

- The Commission's clear acknowledgement of the link between more sustainable fishing and economic benefits.

Despite a number of improvements compared to last year's Communication, several concerns we raised in our previous responses, and in our correspondence with the Commission in the lead-up to the present Communication, have still not been sufficiently addressed in the present Communication. A few new ones have also emerged. We have particular concerns about:

- The Commission's misleadingly positive account of the situation, based for example on a focus on positive long-term trends without recognising the recent slowing down and, in parts, even reversal of positive trends, as presented in the underlying STECF analysis<sup>3</sup>
- The  $F_{MSY}$  ranges contained within the Baltic multiannual plan. These risk TACs being set above the  $F_{MSY}$  point value in particular circumstances, which in turn puts the achievement of the MSY objective in jeopardy. This also has the potential to result in inconsistencies in reporting between years, with reporting in previous years having been against the  $F_{MSY}$  point values;
- The continuing lack of clarity about the Commission's intended approach for proposing TACs for stocks without MSY assessment;
- The continued shortcomings in the Commission's Art. 50 report, which we highlighted in previous years and which have not been addressed in this year's report. These include:
  - the limitations of reporting only on a relatively small fraction of harvested stocks subject to the MSY objective,
  - the lack of a comprehensive indicator (as recommended by STECF)<sup>4</sup> comparing Total Allowable Catches (TACs) to catch levels scientifically advised as sustainable,<sup>5</sup>
  - the often still selective and inconsistent presentation of information with partially insufficient referencing of sources,<sup>6</sup> and a lack of clarity in MSY- and sustainability-related wording. This means that the information can sometimes be misleading and difficult to assess;
- The Commission's apparent readiness to consider '*scrapping of TACs*' in certain situations, without explicit acknowledgment of the need for all harvested species to be managed in line with the MSY objective, whether through TACs or alternative measures;
- A continuing lack of detail in the report on the implementation of the landing obligation, in part based on inconsistent reporting from the Member States, as well as an unclear basis for data and percentages presented within this report.

## Key recommendations

In summary, we would like to highlight the following recommendations to help the Commission to improve its Communication on fishing opportunities and its report on the implementation of

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3 STECF (2017). Monitoring the performance of the Common Fisheries Policy (STECF-17-04). Publications Office of the European Union, Luxembourg; EUR 28359 EN; doi:10.2760/491411. See pp. 7 and 12. [https://stecf.jrc.ec.europa.eu/documents/43805/55543/2017-04\\_STECF+17-04+-+Monitoring+the+CFP\\_JRC106498.pdf](https://stecf.jrc.ec.europa.eu/documents/43805/55543/2017-04_STECF+17-04+-+Monitoring+the+CFP_JRC106498.pdf)

4 STECF (2014). Reporting needs under the new Common Fisheries Policy (STECF-14-32), p. 8.

[https://stecf.jrc.ec.europa.eu/documents/43805/850765/2014-12\\_STECF+14-23+-+Reporting+needs+under+new+CFP\\_JRC93936.pdf](https://stecf.jrc.ec.europa.eu/documents/43805/850765/2014-12_STECF+14-23+-+Reporting+needs+under+new+CFP_JRC93936.pdf)

5 Note that potentially relevant figures are presented in Tables 1 and 2 in the Annex of the Commission's Communication, but a reference to what these values are based on is lacking and they do not appear to originate from STECF's analysis presented in the STECF-17-04 report (see footnote 3).

6 For example regarding statements about the percentage of TACs in line with scientific advice or of landings fished sustainably, see p. 4 and pp. 7/8 of the Annex, and Fig. 6 and Table 1.

the landing obligation in future, and to ensure that its forthcoming TAC proposal is in line with the CFP's requirements.

- The Commission should extend its reporting to all harvested stocks, which are all subject to the MSY objective, including by using appropriate proxies for those which currently lack full MSY-based stock assessments. Moreover, it should report not only on progress in terms of fishing mortality and safe biological limits, but also on progress in terms of biomass in relation to available reference points.<sup>7</sup>
- Where MSY estimates are not yet available, the Commission should report on progress in relation to other existing reference points, such as trends in relation to precautionary or limit reference points provided in the scientific advice published by ICES<sup>8</sup> (making clear which reference points are being used), or to the lowest value of the time-series.
- The Article 50 report should also include an indicator comparing TACs to the underlying scientific advice in order to monitor progress of TAC-setting towards achieving MSY-based exploitation rates in line with the timescales set out in Article 2(2) of the Basic Regulation.<sup>9</sup>
- While we welcome the Commission's attempt to quantify the extent to which TACs follow scientific advice as well as the current LO coverage, we strongly recommend that the basis of such information is clearly referenced in future reports, and that relevant indicators are calculated by STECF. Generally, the Commission should be more explicit about what indicators the values it presents are based on, and how these are to be interpreted, so that the situation is accurately represented.<sup>10</sup>
- The Commission should report explicitly both on long-term trends and changes in the most recent years, instead of selectively presenting information to support an unduly positive outlook.
- The Commission should strongly urge all Member States to provide information on implementation of the landing obligation in the format of the questionnaire it circulated this year. This would facilitate reporting in a more standardised way, allowing for improved comparison and analysis of the progress of landing obligation implementation.

Regarding the Commission's TAC proposals and the TACs then set by the Council for 2018, we have the following recommendations:

- $F_{MSY}$  must be the limit, not the target for the 2018 TACs and the Commission should follow the ICES MSY advice rule, proposing TACs not exceeding the  $F_{MSY}$  point estimates, urging the Council to follow suit when setting the TACs. This also applies to stocks subject to  $F_{MSY}$  ranges under the Baltic multiannual plan.
- We encourage the Commission to reiterate in the lead-up to the TAC decisions for 2018 that delays to the achievement of MSY-based exploitation rates should be the exception and only permitted where accompanied by a clear plan as to how these exploitation rates

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<sup>7</sup> For a detailed evaluation of reporting-related issues, please read our briefing: ClientEarth (2016). Reporting on progress of TAC decisions and the state of fish stocks towards MSY - Why reporting is important and how it can be improved. <https://www.documents.clientearth.org/library/download-info/reporting-on-progress-of-tac-decisions-and-the-state-of-fish-stocks-towards-msy-why-it-is-important-and-how-to-improve-it/>

<sup>8</sup> ICES advice can be found on <http://www.ices.dk/community/advisory-process/Pages/Latest-Advice.aspx>

<sup>9</sup> As noted above, the Annex to the Commission's Communication does present some relevant values, but it is unclear what they are based on, and we recommend that STECF is requested to calculate such an indicator for future reports.

<sup>10</sup> For example, the Commission's reference to the model-based indicator for  $F/F_{MSY}$  as the 'average intensity of fishing compared to  $F_{MSY}$ ' (p. 5 of the Communication's Annex) was misleading.

will be achieved by 2020 at the latest. Critically, the Commission should work with the Council to develop a concrete timetable to ensure this legal deadline is met.

- 'Combined' *de minimis* exemptions, which would apply to more than one species, allow for higher discards than if the *de minimis* percentage were applied to just one species. We therefore urge the Commission to follow STECF's recommendation to account for this in its TAC proposal, '*by discounting the maximum possible amount of de minimis for each species that could potentially be discarded*'<sup>11</sup> in each of the respective TACs.
- The Commission should not propose the removal of TACs unless a prior assessment of the situation and potential implications through ICES has concluded that this will not result in exploitation of the relevant stock at levels above those consistent with the MSY objective. If the Commission proposes the removal of a TAC based on ICES' evaluation, clear alternative measures must be put in place to ensure that the respective stock is still fished in line with the MSY objective.
- The outstanding issue of mismatch between the geographic areas for which scientific advice is provided and the areas for which the actual TACs are set means that the Commission is currently not comprehensively demonstrating that it is proposing all TACs at sustainable levels as scientifically advised by ICES.<sup>12</sup> We therefore call on the Commission to address the mismatch issue as a matter of urgency, and make its related considerations publicly available along with its TAC proposal.

We will discuss the issues outlined above, and a few others, in more detail below.

## State of stocks

We acknowledge the positive developments that have been made in some areas of fisheries management in the EU, with general progress towards MSY in the Northeast Atlantic, North Sea and Baltic Sea since the start of the time-series in 2003. Positive long-term trends include, for example, the increasing number of assessed stocks fished at or below  $F_{MSY}$  (from below 35% in 2003 to 59% in 2015),<sup>13</sup> and the decrease in the modelled value for  $F/F_{MSY}$  (from 1.58 in 2003 to 1.00 in 2015).<sup>14</sup> We are also pleased to see that the economic situation has been improving accordingly, while average biomass of fully assessed stocks has increased by 35%,<sup>15</sup> highlighting the benefits of more sustainable fisheries management.

Unfortunately, the most recent years' assessments by STECF (for 2013, 2014 and 2015) indicate that progress has recently slowed down, and in some cases even been reversed.<sup>16</sup> For example, the number of stocks fished in line with  $F_{MSY}$ ,<sup>17</sup> which had been increasing between 2008 and 2013, decreased in 2014 and the most recent value of 59% for 2015 is only marginally higher than the 58% reported for 2013. The model indicator for  $F/F_{MSY}$  has not decreased since

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11 STECF (2017). 55th Plenary Meeting Report (PLEN-17-02); Publications Office of the European Union, Luxembourg; EUR XXXXX EN; doi:XXXXXX. See p. 38. [https://stecf.jrc.ec.europa.eu/documents/43805/1780485/2017-07\\_STECF+PLEN+17-02\\_JRCxxx.pdf](https://stecf.jrc.ec.europa.eu/documents/43805/1780485/2017-07_STECF+PLEN+17-02_JRCxxx.pdf)

12 See our briefing on this topic: ClientEarth (2016). Mismatch between TACs and ICES advice - Why it is an issue and how to address it. <https://www.documents.clientearth.org/library/download-info/comparing-total-allowable-catch-decisions-and-ices-advice-areas-pdf/>

13 Based on Fig. 4 on p. 6 of the Annex to the Commission's Communication

14 Based on the 50% percentile values presented in Table 3.9 (p. 32) of the STECF 17-04 report (see footnote 3 for full reference), and referred to as '*fishing compared to  $F_{MSY}$* ' in the Commission's Communication, p. 3, and presented in Fig. 5 on p. 7 of its Annex

15 Based on the median biomass indicator presented in Fig. 3 (p. 9) of the STECF 17-04 report (see footnote 3 for full reference), and referred to in section 2.2, p. 6 of the Commission's Communication

16 STECF 17-04 report, see footnote 3 for full reference.

17 See Fig. 3 and 4 in the Annex to the Commission's Communication, and Fig. 3.6 and Table 3.3 in the STECF 17-04 report (reference in footnote 3)

2011 and even slightly increased since 2013.<sup>18</sup> Moreover, the number of TACs reported by the Commission as set in accordance with or lower than advice, which had increased continually since 2005, decreased from 2013 to 2016, and despite recent improvement in 2017, the reported value of 59% is still lower than the 61% reported for 2013.<sup>19</sup> STECF concluded *'that many stocks remain overfished and/or outside safe biological limits, and that progress achieved until 2015 seems too slow to ensure that all stocks will be rebuilt and managed according to FMSY by 2020'*.<sup>20</sup> This clearly demonstrates the need for the Commission and the Council to increase the rate of achievement of MSY exploitation rates to avoid breaching the CFP in 2020 - and there are only two years left.

We note that the presentation of information in the Communication that focuses on long-term progress does not accurately reflect these recent backwards steps and STECF's conclusion that progress so far has been too slow, as we discuss below in relation to the Commission's Article 50 report.

Like in previous years, it is evident from the Communication that the state of the stocks in the Mediterranean remains dire. The Commission states that, in the Mediterranean Sea, *'overfishing is broadly between 2 and 3 times  $F_{MSY}$ '*,<sup>21</sup> and that the number of stocks with assessment in this area has dropped considerably in 2015.<sup>22</sup> This demonstrates the need for further measures in this area, and we call on the Commission to work with Member States, the GFCM and other stakeholders to address this situation as a matter of urgency as outlined in the Communication.

## The European Commission's approach to MSY

Article 2(2) of the CFP Basic Regulation sets a clear objective for EU fisheries management.<sup>23</sup> The first paragraph of Article 2(2) contains a clear legal obligation for those acting under the CFP framework as a whole: that fisheries management shall aim to restore and maintain fish populations above biomass levels capable of producing MSY – what we refer to as the MSY objective. Such actors include the EU institutions. The second paragraph explains the tool through which the MSY objective is to be achieved: the 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. Articles 16(3) and 16(4) of the Basic Regulation establish a clear legal obligation to set fishing opportunities (TACs and effort limits) in line with Article 2(2). This means that the Commission's proposals for fishing opportunities must also be in line with Article 2(2).

We welcome the Commission's intention to propose TACs *'in line with achieving  $F_{MSY}$  in 2018'*, as well as its explicit recognition of the economic benefits of moving towards MSY. Unfortunately, despite improvements in this year's Communication, there is still a lack of clarity in some parts of it regarding the Commission's approach to the achievement of that objective and the accompanying requirement in Article 2(2). While the Commission's references to MSY have become clearer in many cases (as the respective reference points like  $F_{MSY}$  or MSY

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18 Based on Fig. 5 in the Annex to the Commission's Communication, which refers to this as *'average fishing mortality compared to FMSY values'*, and on p. 8 and Fig. 3.18 and Table 3.9 (p. 32) in the STECF 17-04 report (see footnote 3 for full reference)

19 See Table 2 in the Annex to the Commission's Communication.

20 STECF 17-04 report, p. 43; moreover, *'STECF notes that the recent slope of the three indicators suggests that progress until 2015 has been too slow to allow all stocks to be maintained or restored at the precautionary Bpa level or above, and managed according to FMSY by 2020.'* (p. 7)

21 See p. 5 of the Commission's Communication

22 See pp. 4/5 and Fig. 2 of the Annex to the Commission's Communication

23 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>

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Trigger are now mostly specified), some of them continue to be vague. For example, it is notable that the Commission refers to MSY '*targets*', wording which is not in line with the clear legal obligation contained in Article 2(2). The Commission should take into account that the lack of clarity regarding references to MSY inevitably poses difficulties in responding in a detailed way to the Commission's approach as outlined in the Communication.

We also highlight that the Commission's intention to generally propose TACs corresponding to the  $F_{MSY}$  point values in 2017 will not meet the requirements of Article 2(2). This is because Article 2(2) requires that the CFP '*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*' (emphasis added).

The word 'above' in the objective is fundamental, since this means setting exploitation levels **below**  $F_{MSY}$ , the fishing mortality that should lead to the biomass that enables a stock to deliver the maximum sustainable yield ( $B_{MSY}$ ), including when ranges of exploitation ( $F_{MSY}$  ranges) are used. Fishing **at**  $F_{MSY}$  would, as a matter of scientific reality, only lead to biomass being above  $B_{MSY}$  50% of the time<sup>24</sup> (and then only for stocks which have recovered to levels very close to  $B_{MSY}$ ). So, consistently fishing **at**  $F_{MSY}$  (or, above the  $F_{MSY}$  point value, where  $F_{MSY}$  ranges are used) will not fulfil the MSY objective in Article 2(2).  $F_{MSY}$  is a limit, not a target exploitation rate and the 2018 TACs must be set at levels corresponding to exploitation levels not exceeding  $F_{MSY}$ , including where  $F_{MSY}$  ranges are used (though note the potential for the time-related derogation and our associated recommendations considered below).

## The timeframe for achieving MSY

As the 2015 deadline set out in Article 2(2) has already passed there must be a clear focus on ensuring the 2018 TACs are set in line with MSY-based exploitation rates. The urgency of speeding up progress towards MSY is also highlighted by STECF's conclusion that progress until 2015 has been too slow (see section above on 'State of stocks').

Article 2(2) requires that in order to meet the objective set out in the first paragraph – that fisheries management shall aim to restore and maintain fish populations above MSY levels – '*the [MSY] exploitation rate shall be achieved by 2015 where possible and on a progressive, incremental basis at the latest by 2020 for all stocks*'. We reiterate that there are no biological or ecological 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 there may be short-term social and economic impacts in some fisheries. We would therefore recommend that the Commission commits to working with the Council of Ministers to agree a clear timeframe for achieving the MSY exploitation rates by the 2020 deadline stipulated by the Basic Regulation.

## Delaying the achievement of MSY-based exploitation rates

The Commission's Communication published last year stated that a delay in achieving the objective beyond 2017 would only be acceptable where achieving MSY-based exploitation rates in 2017 would imply '*very large*' annual reductions of fishing opportunities that '*seriously jeopardise the social and economic sustainability of the fleets involved*'.<sup>25</sup> We welcome that the

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<sup>24</sup> ICES (2016). ICES Advice Basis 2016, ICES Advice 2016, Book 1, February 2016.

[http://www.ices.dk/sites/pub/Publication%20Reports/Advice/2016/2016/Introduction\\_to\\_advice\\_2016.pdf](http://www.ices.dk/sites/pub/Publication%20Reports/Advice/2016/2016/Introduction_to_advice_2016.pdf)

<sup>25</sup> As per Recital 7 Regulation of the Basic Regulation

Commission no longer refers to this potential delay in its current Communication, as it '*intends to propose TACs in line with achieving  $F_{MSY}$  [...] in 2018*' and explicitly asks the Council to '*align its decisions with this approach*'.<sup>26</sup>

However, we note that in previous years several TACs were set above  $F_{MSY}$  levels, supposedly based on socio-economic arguments. However, the Council of Ministers' and the Commission's responses to our comprehensive access to information requests regarding December Council 2016<sup>27</sup> showed that where such arguments were presented by Member States, they were vague and lacked clear, strong supporting evidence.

At this stage of the CFP implementation any delays to the achievement of MSY-based exploitation rates should be the exception, not the rule. If as a last resort delays based on socio-economic arguments are to be sought, these arguments must show a significant risk to the future of the fleet, which a delay will help mitigate or prevent. This is in line with the language used in Recital 7 of the Basic Regulation, which implies a situation that goes beyond fluctuations in the social and economic conditions of the fishing fleet that could, at least initially, be expected to be associated with a shift to MSY-based exploitation rates. And, if a delay is to be accepted a clear plan must also be presented to show how the MSY-based exploitation rates will be achieved by the 2020 deadline. Both the socio-economic arguments, including clear, strong supporting evidence, and the plan must be made publically available.

In line with the above points, we recommend that the Commission produces guidance regarding the limited circumstances in which a delay would be acceptable, outlining the necessary socio-economic reasoning and who this should come from, the supporting evidence required and, crucially, the requirements for the plan for achieving MSY-based exploitation rates by the legal deadline. In doing so, the Commission should make clear that allowing for a delay is a last resort that should only be possible in exceptional circumstances.

### Progressive and incremental achievement of MSY-based exploitation rates

Article 2(2) 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*'. The 2015 deadline has already passed and, as noted, the Commission's general intention is now to propose TACs in line with achieving MSY in 2018. If the Commission is to propose fishing opportunities for 2018 that are not based on MSY-based exploitation rates, it should give a concrete and evidence-based explanation as to why it has done so and give a timeline showing how these exploitation rates will be achieved progressively and incrementally by 2020 at the latest. The explanation and timeline must show that the delay caused by the proposal will not result in a breach of Articles 2(2) and 16(4). This in turn would help to show that the Commission is respecting the principle of sincere cooperation, something it would fail to do if it proposed a Regulation that contravenes these articles. In addition to providing its own justification where proposing TACs that do not meet the required timescale, the Commission should also request justification from the Council should the 2018 fishing opportunities not meet this timescale (see discussion on the reasoning for delays above).

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<sup>26</sup> See p. 9 of the Commission's Communication

<sup>27</sup> First Access to Information Request (AIR) submitted to the Council of the EU on 14 December 2016 requesting 'access to information regarding total allowable catches (TACs) of EU fish stocks in the Northeast Atlantic discussed and adopted on 12 and 13 December 2016'. Response received on 2 February 2017. Confirmatory application (Ref: 16/2430-Id/dm) sent on 24 February 2017, response received on 2 April 2017. Second AIR submitted to the European Commission on 26 June 2017 (GestDem 2017/3796- Ares (2017) 3211301), details and response available on [https://www.asktheeu.org/en/request/access\\_to\\_documents\\_related\\_to\\_t#outgoing-8779](https://www.asktheeu.org/en/request/access_to_documents_related_to_t#outgoing-8779)

Overall, the use of any derogation from the 2015 deadline should be limited so that the vast majority, if not all, of 2018 TACs are set in line with MSY.

### MSY and the interplay with multiannual plans

The points set out above apply whether the stock for which the TAC is proposed is covered by a multiannual plan or not. Where stocks are covered by existing management plans agreed under the previous CFP, the requirements of Article 2(2) must take precedence over any other objectives set out in those plans. These plans must not provide an obstacle to proposing TACs in line with MSY-based exploitation rates on the timescale set out in Article 2(2). On this basis ClientEarth welcomes the Commission's intention to adopt proposals for TACs on the basis of MSY where multiannual plans have become incompatible with the CFP.

However, the Commission refers in its Communication to the Baltic MAP, which it states '*specifies target fishing mortality ranges consistent with achieving MSY ( $F_{MSY}$ )*'. In fact, these ranges have the potential to conflict with the achievement of the MSY objective by allowing TACs to be set above the point value consistent with  $F_{MSY}$  and therefore we do not agree with the Commission's assessment of the ranges in the Baltic MAP. Unlike in last year's Communication, the Commission no longer includes a statement to the effect that under normal circumstances fishing opportunities should be fixed within the part of the range with the lower values of  $F_{MSY}$  and that scientific advice or evidence is needed to justify using the higher values of the range, which should only happen under specific circumstances. Particularly in light of the deadline for achieving MSY-based exploitation rates, we would have expected the Commission to be clearer that using the upper end of the range for TAC-setting remains the exception rather than the rule. As discussed above,  $F_{MSY}$  must be the limit, not the target and the Commission should follow the ICES MSY advice rule, proposing TACs not exceeding the  $F_{MSY}$  point estimates. In addition, reporting should still be against the  $F_{MSY}$  point value, even where TACs are proposed or set based on  $F_{MSY}$  ranges. This is important to ensure consistency and comparability with previous years, where reporting has been against this point value.

The Communication itself does not provide clarity regarding the criteria in the Baltic MAP for allowing TACs to be fixed in accordance with the higher ranges. It is clear that the stocks must be above the MSY  $B_{trigger}$  reference point, but it is unclear when setting TACs in line with the higher values will be '*necessary to achieve CFP objectives in mixed fisheries situations*' or '*necessary to avoid serious harm to a stock caused by intra- or inter-species stock dynamics*'. The Commission should request advice from STECF to confirm that at least one of these criteria is met before proposing TACs that are in line with the higher range values, and this evidence and analysis must be made publicly available.

Additionally, we welcome the Commission's intention to continue to seek agreement regarding stocks shared with non-EU countries based on the same MSY-based approach. Where plans covering these stocks fall short of the CFP's objectives the Commission should maintain its ambition in negotiations with the aim of ensuring that fishing mortality is consistent with  $F_{MSY}$  and with restoring and maintaining populations above levels capable of producing MSY.

### Stocks without an MSY assessment

It is important that where approximate parameters (proxies) are used the TAC proposals are still in line with Article 2(2). However, ClientEarth recommends that continued effort be made to

increase the number of stocks with MSY-based reference points as this will allow sustainable catch limits to be derived with a high level of certainty through quantitative assessments. This approach may require the expansion of data collection programmes, which is essential in order to achieve the MSY objective for all harvested stocks and not just for those stocks for which MSY-based reference points are currently available.

We again welcome the statement by the Commission that the precautionary approach will be applied for stocks where there is an absence of MSY assessment and proxies cannot be developed. In addition, the aspiration to follow the precautionary approach in a '*more systematic, predefined and transparent way*' in line with Article 2(2) of the Basic Regulation, where no biological advice is available, is something ClientEarth welcomes. However, the lack of definitions and information as to how this method will be developed, what it will be based on and when it will be available is a concern raised in our consultation responses in the two previous years, and one that still does not appear to have been addressed. We recommend that the Commission develops a communication or a guidance document on how to implement the precautionary approach to fisheries management in line with Article 4(1)(8) of the CFP Regulation and Article 6 and Annex II of the UN Fish Stocks Agreement.

Like in previous years, the Commission's Communication refers to an agreement in earlier years to maintain TACs unchanged for 26 stocks unless biological advice calls for adjustment, and the Commission's intention to continue with this approach. As we highlighted last year, this blanket approach is not in line with the MSY objective in the CFP or with the precautionary approach to fisheries management. Stocks with a presumption of stability should only have their TAC maintained at the level set in previous years if this is in accordance with the best available scientific advice. TACs for stocks in this category that had TACs set higher than scientific advice should be reduced so that they are in line with the best evidence of sustainable catch levels. Despite our concerns, we welcome the Commission's statement that it intends to consider adjustments to these TACs where ICES advice indicates a need for review. Furthermore, we recommend that the Commission include the list of stocks in this category in future Communications to allow stakeholders to better access this information.

It is important to note that the requirements under Article 2(2) of the Basic Regulation apply to all harvested species. Where stocks are data-limited, the Commission needs to provide more information about what is being done to monitor these stocks. Greater transparency with regards to the steps that are being taken to ensure that the management of these stocks is in line with Article 2(2) is necessary to show that this legal obligation is being met for both data-limited and data-rich stocks. The opportunity to address this in detail in this year's Communication was not taken by the Commission (see comments on the report below). However, further information on this subject should be provided by the Commission, including in future Communications.

## TACs and the obligation to land all catches

ClientEarth wholly supports the Commission's recognition that TAC adjustments are needed to take into account the change from reflecting catches instead of landings, that this needs to remain compatible with achieving MSY and that these adjustments should not increase fishing mortality. However, we reiterate that TAC adjustments must be based on previous discards of only those parts of the fleet which will have to land their catches of the respective stocks in 2017, taking into account that discarding by some fleet segments will continue. There is a real risk that unless the entire stock is under the landing obligation, the combination of additional

quota (quota top-ups) and continued discarding could mean that fishing mortality is higher than that permitted by Article 2(2).

The risk of overfishing by giving quota top-ups to stocks not fully covered by the landing obligation could be compounded by the use of exemptions from the landing obligation.<sup>28</sup> We recommend that the Commission provides clarification on how these risks will be accounted for in its proposal for fishing opportunities. In this context, we note that, unlike last year, the Commission no longer appears to have the intention to submit the method used to calculate TAC adjustments for 2018 to STECF for advice. However, *'the Commission intends to extrapolate data to calculate the TAC adjustments where such methodology proves acceptable, on the basis of STECF advice'*, when *'no validated or complete discard data are available'*.

We therefore recommend that STECF evaluates the risk posed in such cases by proposing TAC adjustments on the basis of data extrapolations for increasing fishing mortality above the allowable threshold. Where this risk is considered high, a precautionary approach to proposing TAC adjustments should be taken, with smaller (or no) adjustments if there is a high level of uncertainty about discard rates.

We also highlight the risk of overfishing associated with a number of 'combined' *de minimis* exemptions requested for 2018, which would apply to and be quantified based on more than one species. Such combined exemptions would allow for higher discards than if the *de minimis* percentage were applied to just one species, and the Commission should account for this risk in its TAC proposal, and make clear to the Council of Ministers where it has been necessary to do so. As recommended by STECF, this should be done *'by discounting the maximum possible amount of de minimis for each species that could potentially be discarded'* in *'the respective stocks TACs'*.<sup>29</sup>

Finally, we are very concerned about the Commission's statement that it is *'ready for a dialogue to consider (subject to positive ICES assessment) other TACs which might be candidates for elimination in the future without risk of the conservation of the resources'*.<sup>30</sup> The removal of TACs should not be considered where this could lead to a deterioration in the state of the relevant stocks. Moreover, alternative management measures, with appropriate safeguards, need to be put in place for such stocks to ensure that they still meet the Article 2(2) MSY objective, which applies to all harvested species, whether they are subject to a TAC or not. We urge the Commission to consult ICES before considering TAC removal, focusing in particular on the potential to impact on achieving MSY-based exploitation rates. They should also make any relevant considerations regarding potential candidates publicly available.

## Report on the state of the stocks

ClientEarth welcomes the Commission's request to STECF to report on the performance of the CFP. This forms the basis of the Commission's report on the progress of achieving MSY and on

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<sup>28</sup> For a comprehensive discussion of considerations around quota top-ups, please read our briefing: ClientEarth (2016). Quota top-ups and monitoring progress of TAC decisions towards MSY – Why top-up calculations are both crucial and challenging.

<https://www.documents.clientearth.org/library/download-info/quota-top-ups-and-monitoring-progress-of-tac-decisions-towards-msy-why-top-up-calculations-are-both-crucial-and-challenging/>

<sup>29</sup> STECF-PLN-17-02 report (see footnote 11 for full reference), p. 38.

<sup>30</sup> See p. 11 of the Commission's Communication.

the situation of fish stocks, as required under Article 50 of the Basic Regulation.<sup>31</sup> We note several improvements in this report compared to that in last year's Communication, including the addition of a new biomass-related indicator and the use of less ambiguous MSY-related wording. However, the Communication in its present form is somewhat misleading at times and in our view is still not sufficient to qualify as a report on the progress of achieving MSY and on the situation of fish stocks.

Most strikingly, the report (like last year's report) generates a misleadingly positive impression of the situation, as it again focuses on long-term progress since the start of the time-series in 2003, while disregarding the recent slowing down or even reversal of positive trends.<sup>32</sup> The Commission's report does not acknowledge STECF's clear conclusion that *'the recent slope of the three indicators [of stock status] suggests that progress until 2015 has been too slow to allow all stocks to be maintained or restored at the precautionary Bpa level or above, and managed according to  $F_{MSY}$  by 2020'*.<sup>33</sup> Instead, the Commission merely states that *'[p]rogress towards fishing stocks at levels consistent with  $F_{MSY}$  has continued'*,<sup>34</sup> without reflecting the need to accelerate progress considerably compared to recent years in order to meet the 2020 deadline, which follows from STECF's assessment. We also note that the Communication's statement that *'10 additional stocks'* were included in STECF's assessment is misleading, as the net number actually decreased by three from 69 in 2013 and 2014 to 66 in 2015.

We recommend that in future Communications the Commission reports explicitly both on long-term trends and changes in the most recent years, instead of selectively presenting information to support an unduly positive outlook. This would avoid the presentation of individual values from specific years out of context, which runs the risk of misrepresenting the situation in relation to MSY.

There are a number of further shortcomings in the Commission's report, some of which we highlighted in our consultation response in previous years.

Firstly, while STECF in its 17-04 report<sup>35</sup> has explored a number of additional indicators applicable for data-poor stocks,<sup>36</sup> the overall sampling frame continues to be limited to data-rich stocks with MSY estimates. Whilst STECF clearly acknowledges this restriction of its analysis,<sup>37</sup> the Commission's Article 50 report does not explicitly clarify that the data presented are only based on less than 70 out of the over 180 harvested stocks, whereas the status of the majority of stocks remains unknown. However, as referred to above, Article 2(2) of the Basic Regulation covers all harvested species. The Commission's report should reflect this to the extent possible by reporting on progress in relation to other reference points, for example precautionary or limit reference points, where no MSY estimates are available.

In previous years, we have repeatedly urged the Commission to report on progress not only in terms of fishing mortality, but also in relation to biomass levels that can produce MSY. This

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31 For a detailed evaluation of reporting-related issues, please read our briefing: ClientEarth (2016) Reporting on progress of TAC decisions and the state of fish stocks towards MSY - Why reporting is important and how it can be improved. <https://www.documents.clientearth.org/library/download-info/reporting-on-progress-of-tac-decisions-and-the-state-of-fish-stocks-towards-msy-why-it-is-important-and-how-to-improve-it/>

32 For example, the new indicator of the percentage of 'stocks outside CFP requirements' (interpreted as  $F > F_{MSY}$  or  $B < B_{pa}$  by STECF) has actually increased from its lowest value of ca. 43% in 2013 to 49% in 2015 (see graphs and tables on p. 29 and 30 of the STECF 17-04 report, see footnote 3).

33 STECF 17-04 report, p. 7 (see footnote 3 for full reference)

34 See p. 3 of the Commission's Communication

35 See footnote 3 for full reference

36 STECF 17-04 report, p. 10 (see footnote 3 for full reference)

37 For example, the STECF 17-04 report states that *'the present CFP monitoring analysis is restricted to stocks with a TAC and for which estimates of fishing mortality, biomass and biological reference points are available'*, so that *'a large number of biological stocks present in EU waters are still not included in this CFP monitoring'*. (p. 10; see footnote 3 for full reference)

information is essential for assessing whether the Article 2(2) objective of restoring and maintaining populations of fish stocks above biomass levels capable of producing the MSY is being met and the evaluation is inherently incomplete without this. We therefore welcome the inclusion in this year's report of a new indicator of biomass trends, although we note that this is still only based on a fraction of stocks as outlined above. Whilst we acknowledge that  $B_{MSY}$  reference points are not available for most stocks, we recommend that progress of the spawning stock biomass (SSB) in relation to other relevant reference points such as MSY  $B_{trigger}$  or  $B_{pa}$ , are included in the Commission's report. Where no other reference points are available, the Commission should at least report on trends, for example in relation to  $B_{lim}$  or to the lowest recorded value of the time-series.

The Commission requested calculations based on only a limited selection of the indicators recommended by STECF as useful and/or necessary. In turn, the Commission then selected a further limited number of these indicators in its report. One particular indicator of note that was not reported upon by the Commission in previous years, although STECF had recommended it, was an *'indicator for the difference between agreed TACs and advised catches'*,<sup>38</sup> to show the overshoot (or undershoot) of agreed TACs compared to the best available scientific advice<sup>39</sup> regarding sustainable catch limits.

We note that this year's Communication and its Annex present several figures on the percentage of landings *'within sustainable limits'* or *'from sustainably managed stocks'*,<sup>40</sup> and data on the percent share of TACs *'in line with MSY advice'* and *'set in accordance with or lower than advice'*.<sup>41</sup> However, these data do not seem to originate from the STECF 17-04 report, and it is unclear what these values are based on or how they were calculated. The same applies to percentages of TACs under the Landing Obligation as reported in the Annex to the Commission's Communication.<sup>42</sup> While we welcome the Commission's attempt to quantify the extent to which TACs follow scientific advice as well as the current LO coverage, we strongly recommend that the basis of such information is clearly referenced in future reports, and that relevant indicators are calculated by STECF. We also highlight that the continuing mismatches between the geographic areas for which scientific advice is provided and the areas for which the actual TACs are set will need to be addressed,<sup>43</sup> in order for the relevant indicators to be comprehensively calculated. We urge the Commission to do so as a matter of priority.

Like last year, we welcome the Commission's decision to include the model-based mean of  $F/F_{MSY}$  in the Communication as an indicator of compliance with the requirement in paragraph 2 of Article 2(2). However, we highlight that a median exploitation rate close to  $F_{MSY}$  does not mean that  $F_{MSY}$  has been reached for all stocks,<sup>44</sup> and solely reporting on this model-based indicator could be misleading, particularly as the Communication refers to this as the *'average intensity of fishing compared to  $F_{MSY}$ '*.<sup>45</sup> We therefore recommend that the Commission also includes the arithmetic mean of  $F/F_{MSY}$  in future Communications and makes clearer what these indicators

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38 STECF-14-32 report, p. 7 (see footnote 4 for full reference)

39 A principle of good governance in the Basic Regulation Article 3(c)

40 See p. 4 of the Commission's Communication

41 See Table 1 and 2 and Fig. 6 and 7 in the Annex of the Commission's Communication, pp. 7 and 8

42 See pp. 18 to 20 in the Annex of the Commission's Communication, with reference to FIDES, but without any further detail to allow for an assessment of the validity of this information

43 For further details, please read our briefing on this topic: ClientEarth (2016). Mismatch between TACs and ICES advice - Why it is an issue and how to address it. <https://www.documents.clientearth.org/library/download-info/comparing-total-allowable-catch-decisions-and-ices-advice-areas-pdf/>

44 *'In the early 2000s, the median fishing mortality was more than 1.5 time larger than  $F_{MSY}$ , and is now stabilised around 1.0. This is to be interpreted as that around half of the stocks (median) have reached  $F_{MSY}$ . Reaching  $F_{MSY}$  for most stocks would require the upper bound of the confidence interval in figure 3.13 in the Expert Group to be around 1.'* (see p. 3 of the STECF 17-04 report, see footnote 3 for full reference)

45 See p. 5 of the Annex of the Commission's Communication

actually mean. This would allow for a more comprehensive assessment of progress towards the Article 2(2) requirement  $F_{MSY}$ .

Additionally, as we highlighted last year, the information presented on the number of stocks inside/outside safe biological limits is insufficient to determine whether the objective in paragraph 1 of Article 2(2) is being met. '*Stocks within safe biological limits*', as defined in Article 4(1)(18) of the Basic Regulation, means a high probability that the stock's fishing mortality is below  $F_{lim}$  and the estimated stock biomass above  $B_{lim}$ . While a stock needs to satisfy both of these criteria to prevent recruitment failure, they are inadequate indicators for whether one of the main objectives of the CFP - to recover and maintain stocks above levels that can produce MSY - is being met. We note that the new indicator of stocks inside vs. outside 'CFP requirements' computed by STECF for this year's report does not address this issue. This is because the definition for '*inside CFP requirements*' used by STECF, namely that both  $F \leq F_{MSY}$  and  $B \geq B_{pa}$ ,<sup>46</sup> does not adequately reflect the biomass component of the MSY objective in Article 2(2) of the Basic Regulation. The precautionary reference point  $B_{pa}$  merely represents the level below which ICES considers the stock to be '*outside safe biological limits*',<sup>47</sup> and not necessarily the level '*which can produce the maximum sustainable yield*', as referred to in Art. 2(2). We recommend that in future reports the Commission instead provides a clearer indication as to whether the MSY objective is being met, using appropriate indicators that reflect the legal requirements.

The shortcomings discussed above mean that what is presented as an Article 50 report does not provide sufficiently detailed information to either constitute an adequate and comprehensive assessment under Article 50 or for stakeholders to evaluate themselves the progress towards achieving the CFP's objectives. Further, the way data have been used in the report to draw conclusions is not sufficiently transparent or easily understandable.

## Report on the implementation of the landing obligation

The report on the implementation of the landing obligation represents an improvement on last year's report. The detailed questionnaire provided by the Commission to Member States to feed into the reporting process appears to have led to the submission of more information by the Member States and in a more standardised manner. Positively, it appears that most Member States responded to the Commission and many showed they have taken some action to implement the landing obligation. However, the extent of these actions differs between Member States and we support the Commission's intention to address this, for example by pursuing '*efforts to discuss with Member States and the sector on how to make use of the available tools to mitigate choke effects and to address issues around the marketing of undersized catches*'. Notably, there continues to be a lack of evidence showing socio-economic impacts of the landing obligation so far, in contrast to concerns expressed by a range of stakeholders regarding such impacts. In fact, from the Commission's report it seems that most Member States have focused on the potential socio-economic impacts of the landing obligation, rather than presenting tangible evidence that the Member State has itself experienced these issues. The same applies to the question of safety issues in light of the landing obligation.

Despite improvements, there remain deficiencies which mean the Commission's report does not allow for thorough monitoring of the implementation of the landing obligation, including progress

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<sup>46</sup> See formula provided in section 3.6 on p. 64 of the STECF 17-04 report (see footnote 3 for full reference)

<sup>47</sup> <http://ices.dk/sites/pub/Publication%20Reports/Advice/2003shy/may/Reference%20points.pdf> (see p. 1)

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made and challenges encountered. The information provided in the report continues to lack detail, which appears to be due to a lack of clear, reliable information on the implementation of the landing obligation coming from Member States and other stakeholders. There also remain concerns about compliance. Observer coverage has not been increased, with indications it has actually fallen. We agree with the Commission's assessment that this is a worrying development, particularly as it could affect future scientific advice.

A key implementation issue is the piecemeal phasing of the landing obligation. This raises difficulties relating to the calculation of TAC adjustments, monitoring and enforcement issues. In addition, the delays risk a 'big bang' rather than the progressive phasing envisaged by the CFP. These issues continue not to be adequately reflected in the Commission's report. The Commission merely reflects that the CFP requires the gradual phasing in of stocks and highlights that catches in a number of fisheries are fully subject to the landing obligation. As above, we question the basis of the percentages provided by the Commission with regards to the TACs covered by the landing obligation. We recommend that the origin of these percentages and how they are calculated be made clearer in future reports. In addition, there continue to be outstanding questions regarding quota allocation and the use of swaps and transfers in implementing the landing obligation. These elements should also be reflected in this reporting process.

We note that the Commission's report shows landings of fish below MCRS reported by Member States are very low and there are doubts whether these '*reflect the quantities actually caught*'. This is contrary to the intention of catch documentation. There is also recognition that there is a '*lack of accurate reporting of fish discarded under the exemptions in place*'. Additionally, industry's reluctance to comply with the landing obligation is highlighted by the Commission as a significant issue raised in the Member State reports. This seems to be largely based on anticipated choke situations, despite '*very few concrete choking scenarios [having] been reported*'.

At present the use of the Commission's questionnaire is voluntary, meaning that some Member States may choose to submit information in a different format. This is likely to create additional difficulties for the Commission in producing its own report, which may in part explain the lack of detail that is evident. We recommend that in future the Commission strongly urges the Member States to respond using the questionnaire format so that the information submitted can be more easily analysed and compared, thereby allowing the Commission to more fully and accurately report on progress in implementing the landing obligation.

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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.

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