



November 2023

# Taking stock 2023 - are TACs set to achieve MSY?

A report on key areas to focus on now that the 2020 MSY deadline has passed and the UK has left the EU

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## 1 Executive Summary

In 2013, as part of the last reform of the Common Fisheries Policy (CFP), the European Union (EU) agreed to end overfishing by 2020 at the latest. Following the departure of the United Kingdom (UK) from the EU, a comprehensive Trade and Cooperation Agreement (TCA) was signed at the end of 2020, laying the groundwork for the first round of post-Brexit fisheries negotiations between the EU and the UK as an independent third country. For the majority of the Northeast Atlantic stocks, the key management tool to limit fishing levels is the setting of Total Allowable Catches (TACs). Now, ten years after the 2013 CFP reform and two years after the TCA came into force, with negotiations for 2024 already underway, it is time to take stock: have the European Commission, the Council of European fisheries ministers and the UK kept their promise by setting TACs at sustainable levels for 2023, in line with science and the law?

Importantly, significant efforts are still needed in several other (albeit closely linked) areas of fisheries management: for example, successful implementation of the landing obligation, effective fisheries control and robust data collection. However, this report focuses specifically on an assessment of the progress made to date regarding TAC-setting. It also takes a closer look at a number of key issues that the Commission and the Council, as well as individual Member States and the UK, will need to address as a priority in 2023 and beyond to allow all stocks to recover in line with the requirements of the CFP, the TCA and the UK's fisheries legislation – recognising that, as this report shows, they have missed the 2020 deadline, allowing overfishing to continue in the past four years. Setting TACs well below, rather than at, the advised level going forward will be crucial to invest in larger stocks as part of healthy, resilient and productive ecosystems in the face of mounting pressures like climate change. This report represents an update of last year's report, adding the results of ClientEarth's analysis of the 2023 TACs and reflecting some small changes to the historical time series and the addition of a new indicator of progress from year to year, but otherwise following mostly the same structure and methods. Based on a subset of the TACs agreed at the past nine December Council meetings and during the negotiations between the EU and the UK for 2021 to 2023, it explores the following findings:

- **The third round of post-Brexit TACs set for 2023 are an improvement compared to 2020, 2021 and 2022, but progress since 2015 towards setting sustainable TACs in line with scientific advice and the law has still been far too slow, and the EU's 2020 deadline was missed.** The overall percentage of the number of TACs set above scientific advice continued to steadily decrease from 48% in 2020 to 25% in 2023. However, while the average percentage difference between TACs and advice had dropped from 20% in 2020 to 1% in 2023, it remains at a higher level for EU only stocks (11% in 2022 and 7% in 2023), and the overall result is still far from following scientific advice across the board.
- **Some patterns and trends differ between EU only and EU/UK shared stocks, with more or less pronounced progress or backwards steps regarding certain metrics.** For example, the percentage of the tonnage of TACs set above advice and of the TAC excess were overall consistently larger for EU/UK shared stocks than for EU only stocks in most years. However, the average percentage difference per TAC/advice comparison was mostly bigger for EU only stocks, and those TACs set below the advice undershot the advice notably further for EU/UK shared stocks since 2020. Future updates of this analysis will help identify trends in ambition of the EU and the UK in tackling overfishing and aligning TACs with scientific advice compared to the pre-Brexit baseline presented in this report.
- **Despite a positive trend, progress has continued to be particularly slow and insufficient for stocks with precautionary scientific advice.** Both the EU and the UK have noticeably prioritised following scientific advice on catch limits in line with the Maximum Sustainable Yield (MSY), based on full analytical stock assessments. However, their track record of exceeding precautionary scientific advice, where such full assessments are not yet available, has continued with limited improvement: 88% of the 2023 TACs for MSY-assessed stocks follow scientific advice (92% for EU only and 87% for EU/UK shared stocks), compared to only 41% for stocks with precautionary

advice (up from less than 20% throughout the bulk of the time series until 2019). While the percentage of TACs set in line with precautionary advice increased from 33% to 50% for EU only stocks in 2023, recent progress was reversed for EU/UK shared stocks, with a decrease from 43% to 33%. Importantly, data-limited stocks still account for a large proportion of stocks (ranging between 15 out of 82 stocks included in the analysis, i.e. 18%, for 2023, and 30 out of 74, i.e. 41%, for 2015).

- **Similarly, the EU and the UK have exceeded scientific advice more frequently for stocks primarily taken as bycatch in other fisheries than for target stocks** (for example for 50% of the TACs in 2023 for bycatch stocks, compared to 11% for target stocks). This is particularly concerning in light of the dire state many bycatch stocks are in, and the routine use of certain approaches to avoid science-based TACs resulting in premature closure, or “choking”, of mixed fisheries. Options used so far include the removal of TACs, and the setting of “bycatch TACs” above scientifically advised levels, while effective bycatch reduction, control and monitoring measures are still lacking.
- **On a positive note, the EU and the UK have in recent years set TACs more frequently and by an increasing extent below the advice than previously.** For 2022, the % undershoot tonnage was for the first (and so far only) time bigger than the overshoot for both EU only and EU/UK shared stocks (-8% undershoot overall versus +4% overshoot). Particularly noteworthy is the UK’s push for a more ecosystem-based approach to industrial fisheries for forage fish like sandeel, by setting TACs below single stock advice. This is an important step in the right direction in order to safeguard vulnerable stocks, especially in a mixed fisheries setting, to take into account ecosystem needs, such as predator-prey interactions, and to protect ecosystem resilience.
- **Overall the majority of progress in terms of aligning TACs with scientific advice has been retained from year to year, but many TACs have remained above advice or even regressed throughout the time series.** The percentage of TACs for which progress between years (i.e. a change from above to in line with or below advice) has been retained has increased from 28% at the start of the time series to 70% for 2022-2023, and year-on-year progress has fluctuated between 6% and 17%, with a moderate 8% for 2022-2023. The bulk of TACs still set above advice are cases where no progress has been made (declined from 59% for 2015-2016 to 23% for 2022-2023), whereas the tendency to regress (i.e. a change from in line with or below to above advice) seems to have declined overall (fluctuating between 2% and 8%), with no regress identified at all for 2022-2023.
- **Since the landing obligation fully came into force in 2019, TACs are now in principle set based on scientific advice on catches, assuming that all catches (except exemption discards) will be landed. In combination with poor compliance and unreported discards beyond the agreed TACs, this leads to overfishing.** A failure to properly implement and control the landing obligation and to ensure accurate catch documentation, particularly while setting TACs based on total catch advice, also undermines the quality of future stock assessments and the resulting scientific advice. Moreover, the anticipated discards under landing obligation exemptions need to be deducted from the catch-based TACs to prevent an increase in fishing mortality. A lack of clarity about the underlying calculations, the robustness of the data used and the agreed deduction amounts continues to impede reliable comparisons of TACs with the underlying scientific advice, and thus conclusions on the sustainability of the TACs on the water and not just on paper.
- **The ongoing lack of transparency and accountability of the TAC-setting process prevents civil society from following and engaging properly in the process, making it easier for the EU and the UK to set unsustainable TACs behind closed doors.** Importantly, this lack of transparency is not compliant with international requirements. ClientEarth's work on this topic has highlighted some concerning systemic failures, such as the lack of detailed minutes to document how the decisions were reached, as well as serious shortcomings in the Council's document register. Following ClientEarth's official complaint about the lack of transparency in the December Council process, the European Ombudsman confirmed ClientEarth's concerns in 2019 with a

finding of maladministration. However, to date the Council has failed to implement the Ombudsman's recommendation to publish documents related to TAC-setting as soon as they are circulated to Member States. More recently, both the Council and the Commission have continued to refuse access to documents related to TAC-setting for shared stocks, for example, based on concerns about the potential impact on international relations and future negotiations. Importantly, the UK's proactive move to include NGOs in its delegation for plenary sessions of the EU/UK TAC negotiations from 2021 onwards represents an important step in the right direction and has triggered several EU Member States to follow suit. However, despite useful exchanges between stakeholders and representatives of both the EU and UK delegations, documentation (and its publication) of the TAC negotiations and detailed stock-specific positions continues to be limited.

- **Certain elements of the Commission's reporting on progress towards MSY and on the situation of fish stocks have in the past been potentially misleading, and the overly positive picture presented posed the risk of leaving key issues unaddressed, whereas the UK's latest report is an important step forward.** The present report provides an overview of the various ways in which progress towards ending overfishing can be monitored and reported on, and highlights key considerations to be taken to avoid misrepresentation or misinterpretation of the presented results. Brexit presents an opportunity for the UK to address shortcomings by developing its own reporting. The reports and methodology published by the UK's Centre for Environment, Fisheries and Aquaculture Science (Cefas) in 2022 and 2023, which compare the agreed TACs with the underlying scientific advice, following an objective and clearly explained methodology, represents a promising step in the right direction.
- **The third round of post-Brexit TAC negotiations between the EU and the UK shows that both Parties are still lagging behind on certain issues while being more environmentally progressive on others.** For example, the UK seems to have pushed for factoring ecosystem needs, such as food supply for seabirds and other wildlife, into the TAC-setting for forage fish like sandeels, and both the English and Scottish administrations have proposed a sandeel fishing closure in their waters. The UK has also put an emphasis on the increased use of mixed fisheries considerations and the need to set certain TACs below scientific advice so as to safeguard more vulnerable stocks. On the other hand, it has pushed for concerning approaches such as an increase in the inter-area flexibility into the West of Scotland which may pose a risk to vulnerable stocks in the area, and the continued rollover of bycatch TACs, which the EU appears to have been critical of.

Negotiations within and amongst the Member States and the Commission, as well as between the EU and the UK and amongst its devolved administrations, are already underway, with a view to setting fishing limits for 2023 by the 10<sup>th</sup> December deadline laid down in the TCA. At this crucial time, we therefore urge all of them to honour their commitments made during the 2013 CFP reform and respect the requirements and objectives of the EU/UK-TCA as well as the UK's own fisheries legislation, by carefully reviewing the findings of this report and addressing all outstanding issues raised.

EU decision-makers (then still including the UK) have failed to meet the 2020 deadline, but this legal requirement, which a recent opinion by Advocate General Ćapeta confirmed constituted a binding deadline, without exception, still applies for 2024 and beyond. They must now make amends by setting sustainable and ecosystem-based TACs in line with scientific advice and the legal requirements in 2024 and the years to come, and implement the lessons learned also in the negotiations with the United Kingdom. We strongly encourage decision-makers on both sides of the English Channel to raise the ambition beyond merely following the best available scientific advice, and to set fishing limits well below, to maximise the health, resilience and productivity of stocks and ecosystems and their capacity to mitigate mounting pressures like climate change. This report provides some key pointers to help the Commission, the Member States and the Council as a whole, as well as the UK as an independent third country, to focus their attention in this push towards ending overfishing and maximising ecosystem health.

## Key recommendations for EU and UK decision-makers

The key decision-makers responsible for meeting the CFP's objectives and requirements, particularly the MSY objective, when setting TACs for 2024 are the European Commission, the Council of European fisheries ministers and the individual Member States. However, the European Parliament played a crucial role throughout the 2013 CFP reform. Despite not having a formal role in the TAC-setting process, Members of the European Parliament can perform a key function in keeping the other decision-makers in check, to ensure that their TAC decisions, and the implementation of the CFP overall, deliver on the commitments made in 2013, and to step in when this is not the case. Following its departure from the EU, the UK must now play a crucial role as the EU's key negotiation partner regarding shared stocks, and must negotiate with other coastal states to ensure the sustainable management of shared stocks.

Based on the findings of this report, we outline below our key recommendations to all of the above decision-makers, including the UK's devolved administrations. While certain recommendations apply primarily to the Commission, the Council and UK negotiators (e.g. regarding TAC-setting) or Member States and the UK (e.g. regarding the implementation of the landing obligation), all decision-makers share a joint responsibility for achieving the objectives of the CFP, the TCA and UK law by:

### **Setting sustainable, ecosystem-based fishing limits not exceeding, and preferably well below, scientific advice and restoring stocks in line with the CFP, the TCA and the UK's fisheries legislation; this means:**

- a) Using MSY advice where available, i.e. not using advice based on Precautionary Approach reference points in order to allow for higher than MSY-based catch levels;
- b) Setting certain TACs below the maximum single stock advice, for example in order to safeguard the most vulnerable stocks in a mixed fisheries context, and to factor in and protect ecosystem needs and dynamics, as an investment in healthier, more resilient and more productive stocks and ecosystems in the face of climate change and other mounting pressures;
- c) Setting precautionary limits and putting in place enhanced monitoring and data collection for data-limited stocks without scientific advice on maximum catches;
- d) Adopting effective measures for non-TAC stocks to ensure stock recovery;
- e) Working with third countries, such as Norway, to end overfishing of shared stocks;
- f) For all stocks, regardless of the basis of the best available scientific advice (i.e. the ICES MSY or precautionary approach), and for both target and bycatch stocks; the default for EU/UK shared TACs if an agreement has not been reached by the 20<sup>th</sup> of December is to set provisional TACs following the scientific advice.

### **Properly implementing the landing obligation**

- a) Ensuring compliance with the landing obligation; setting TACs below the advised catch levels to account for non-compliance; granting access to quota top-ups only to vessels demonstrating compliance;
- b) Accounting for exemption discards in TAC-setting;
- c) Putting in place full catch documentation, especially where exemptions or bycatch TACs apply;

- d) Not removing TACs or adding species to the prohibited species list to circumvent the landing obligation;
- e) Developing and implementing effective bycatch reduction measures; suspending access to any current or future bycatch TACs until robust full catch documentation and bycatch reduction and/or recovery measures or plans that follow scientific recommendations are in place.

## Improving transparency

- a) In line with the recommendations of the European Ombudsman, making all information and considerations used throughout the TAC-setting process, for example to address area mismatch between TACs and scientific advice, publicly available;
- b) Making all proposed and agreed TAC adjustments to account for exemptions from the landing obligation (and proposed/agreed TACs before and after adjustments), including calculations and underlying data, publicly available;
- c) Making all decisions publicly available shortly after the meetings are completed;
- d) Proactively making all contributions from Member States, the Council as a whole and the Commission, as well as from the UK or its Devolved Administrations used throughout the process, and detailed minutes of the December Council, the EU/UK negotiations and their preparatory meetings, and discussions within the Specialised Committee on Fisheries and its working groups, publicly available, without the need to request this information;
- e) Improving the Council's document register, e.g. regarding its searchability, and ensuring a comprehensive and user-friendly equivalent is made available on the UK side.

## Improving reporting on progress towards MSY and achieving the requirements of the CFP, the TCA and the UK's fisheries legislation

- a) Ensuring accurate, robust, reliable and comprehensive reporting, by
  - i. Covering all harvested stocks, not just stocks with MSY advice;
  - ii. Reporting on progress regarding available reference points or trends regarding time series where MSY reference points are not available;
  - iii. Focusing not just on fishing mortality, but also including *inter alia* biomass trends and a comparison of TACs with scientific advice;
  - iv. Not including misleading wording or figures that paint an inaccurate picture of the situation and of progress towards achieving the CFP's and UK Fisheries Act's objectives;
  - v. Focusing on stock or TAC numbers rather than volumes of landings, and including clear caveats on the implications of volume-based statistics whenever these are presented.
- b) Including a clear explanation of the approach taken and data used for any figures not originating from the underlying STECF, Cefas or other referenced reports;
- c) Explicitly recognising limitations in scope and implications of the approach taken to avoid misrepresentation or misinterpretation of results.

## 2 Introduction

This report assesses the progress made to date towards ending overfishing in the EU by 2020 at the latest, as agreed in the last reform of the Common Fisheries Policy (CFP) in 2013, and the alignment with scientific advice of the first three rounds of post-Brexit TACs for EU/UK shared stocks for 2021, 2022 and 2023, following the adoption of the Trade and Cooperation Agreement (TCA) by the EU and UK at the end of 2020. The core analysis presented focuses on a subset of the Total Allowable Catches (TACs) agreed for the years 2015 to 2023 at the yearly December Council meetings and through the TAC negotiations for shared stocks between the EU and the UK for 2021-2023. It represents an update of last year's report,<sup>1</sup> which now includes the results of the analysis of the 2023 TACs, including some minor corrections for previous years,<sup>2</sup> but otherwise follows mostly the same structure and methods. On this basis, it identifies a number of key issues which the Commission and the Council, as well as individual Member States and the UK (including its devolved administrations), will need to address as a priority to make amends for the failure to meet 2020 MSY deadline and allow all stocks to recover in line with the requirements of the CFP, the TCA and the UK's own fisheries legislation. In particular, this report sets out to:

- Assess the extent to which the agreed TACs (both through the December Council and the EU/UK negotiations since 2021) follow the underlying scientific advice, and highlight any trends or patterns regarding areas where progress is still lacking;
- Evaluate trends and patterns over the years, particularly since the departure of the UK from the EU regarding progress towards ending overfishing; and provide a baseline for monitoring future developments in the ambition of both the EU and UK in meeting the requirements of the CFP, the TCA and the UK's fisheries legislation regarding sustainable TAC-setting;
- Make recommendations for how EU and UK decision-makers should address the outstanding issues identified by this report in order to ensure that their TAC decisions for 2024 and beyond are fully in line with the objectives and requirements of the CFP, the TCA and the UK's fisheries legislation.

This introduction, which is largely the same as in previous editions of this report, provides key background information as context for the findings of the report, covering the following topics:

- Reporting on progress towards MSY and the situation of fish stocks (see section 3);
- Comparing agreed TACs with scientific advice (see section 4);
- Identifying the culprits behind unsustainable TACs (see section 5).

A list of existing relevant ClientEarth briefings and reports with further background information on some of the topics covered in this report is available in Annex I.

### 2.1 The legal requirements

Up until 2020, the main instrument regulating fishing mortality in European fisheries management was the annual TAC and Quota Regulation, in which Total Allowable Catches (TACs) are set by the Council of Ministers following the publication of the European Commission's TAC proposals. Following the UK's departure from the EU, the majority of TACs which used to be set at the "December Council" meeting of EU fisheries ministers are now negotiated internationally between the EU and the UK, while a number of stocks, mostly in and around the Bay of Biscay, continue to be set through the December Council process.

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<sup>1</sup> ClientEarth (2022). Taking stock 2022 - are TACs set to achieve MSY? October 2022. <https://www.clientearth.org/latest/documents/taking-stock-2022-are-tacs-set-to-achieve-msy/>.

<sup>2</sup> See Annex V for a list of corrections made.



Importantly, EU and UK decision-makers involved in the setting of TACs need to meet several key legal requirements and objectives enshrined in different pieces of legislation, including the EU's Common Fisheries Policy (CFP), the Trade and Cooperation Agreement (TCA) between the EU and the UK,<sup>3</sup> and the UK's domestic fisheries legislation such as the Fisheries Act.<sup>4</sup>

### 2.1.1 Key provisions in the CFP and UK fisheries legislation

The reformed CFP includes the fundamental objective to progressively restore and maintain fish stocks above biomass levels capable of producing the maximum sustainable yield (MSY)<sup>5,6</sup>. For the purpose of achieving this "MSY objective", the MSY exploitation rate shall be achieved on a progressive, incremental basis by 2020 at the latest for all stocks. Moreover, the CFP must apply the precautionary approach and an ecosystem-based approach to fisheries management, and measures should be taken in accordance with the best available scientific advice.<sup>7</sup> As further explained in ClientEarth's briefing series on sustainable TAC-setting in line with science and the law,<sup>8</sup> the headline advice on fishing opportunities provided by the International Council for the Exploration of the Sea (ICES) constitutes the "*best available scientific advice*".<sup>9,10,11,12,13</sup>

The word "above" in the Article 2(2) 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 as provided for in multi-annual plans) are used. 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), meaning that  $F_{MSY}$  is a limit, not a target exploitation rate. This means that particularly in a mixed fisheries context certain TACs must be set below levels corresponding to the  $F_{MSY}$  point value in order to safeguard and restore vulnerable and/or depleted stocks and factor in ecosystem needs such as the importance of forage fish for seabirds and other species.

According to Recital 7 of the CFP Basic Regulation, delays beyond 2015 in achieving the MSY exploitation rate "*should be allowed only if achieving them by 2015 would seriously jeopardise the social and economic sustainability of the fishing fleets involved*". However, this possibility of delaying progress towards the CFP's MSY objective is no longer applicable, since the 2020 MSY deadline has now passed. While the judgement in Case-330/220<sup>14</sup> regarding the CFP's missed 2020 MSY deadline is yet to be delivered, the recent opinion by Advocate General Capeta concluded that indeed this deadline applies to all stocks,

3 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. In force since 1 January 2021. Fisheries-related provisions are included under Heading 5. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.2021.149.01.0010.01.ENG&toc=OJ%3AL%3A2021%3A149%3ATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.149.01.0010.01.ENG&toc=OJ%3AL%3A2021%3A149%3ATOC).

4 UK Fisheries Act (2020). <https://www.legislation.gov.uk/ukpga/2020/22/contents/enacted>.

5 ClientEarth (2015). Maximum Sustainable Yield in the Common Fisheries Policy, Legal briefing. September 2015.

<https://www.clientearth.org/latest/documents/maximum-sustainable-yield-in-the-common-fisheries-policy/>.

6 Article 2(2) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (referred to as "CFP Basic Regulation").

7 *Ibid.*, Article 3(c).

8 ClientEarth (2020). Sustainable fishing limits – a decision-maker's handbook on science and law. <https://www.clientearth.org/latest/latest-updates/news/sustainable-fishing-limits-a-decision-maker-s-handbook-on-science-and-law/>. 3 December 2020.

9 ClientEarth (2020). Linking the law to biological reference points used in scientific advice when setting Total Allowable Catches (TACs). December 2020. <https://www.clientearth.org/latest/documents/linking-the-law-to-biological-reference-points-used-in-scientific-advice-when-setting-total-allowable-catches-tacs/>. This briefing breaks down the various biological reference points scientists use to assess the state and exploitation of a stock so as to advise on sustainable fishing limits.

10 ClientEarth (2020). What is the 'best available scientific advice' for setting Total Allowable Catches (TACs)? December 2020.

<https://www.clientearth.org/latest/documents/what-is-the-best-available-scientific-advice-for-setting-total-allowable-catches-tacs/>. This briefing explains why the ICES headline advice is the best available guidance that decision-makers must not exceed when setting TACs.

11 ClientEarth (2020). Ask the right question, get the right answer: Scientific advice for bycatch or non-targeted stocks that have zero catch advice.

<https://www.clientearth.org/latest/documents/ask-the-right-question-get-the-right-answer-scientific-advice-for-bycatch-or-non-targeted-stocks-that-have-zero-catch-advice/>. This briefing provides a guide to navigating the minefield of different catch scenarios decision-makers request for bycatch stocks. It explains why the official ICES headline advice is the "best available scientific advice" for these vulnerable stocks and what decision-makers need to do to rebuild them.

12 ClientEarth (2020). Caution! A TAC-Setter's Guide to the 'Precautionary Approach'. December 2020. <https://www.clientearth.org/latest/documents/caution-a-tac-setter-s-guide-to-the-precautionary-approach/>. This briefing explains why following the CFP's precautionary approach when setting TACs means being more, not less, cautious when information is more limited, and how this should work in practice.

13 ClientEarth (2020). How (not) to implement the ecosystem-based approach when setting Total Allowable Catches (TACs). December 2020.

<https://www.clientearth.org/latest/documents/how-not-to-implement-the-ecosystem-based-approach-when-setting-total-allowable-catches-tacs/>. This briefing looks at how to take into account not just individual stocks, but the whole ecosystem they live in – including natural processes and human impacts – when setting TACs. It gives an overview of the types of information that should be used, and examples of management behaviour that violate the ecosystem-based approach.

14 Case C-330/220 Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine, Ireland, Attorney General EU:C:2023:487.

<https://curia.europa.eu/juris/documents.jsf?num=C-330/22>.

without exception, i.e. including stocks primarily caught as bycatch.<sup>15</sup> Specifically, she considered that “by setting a fixed deadline, the EU legislature aimed to prevent the Council from putting short-term economic interests before the overarching long-term goal of progressively restoring and maintaining populations of fish stock above biomass levels capable of producing MSY”.<sup>16</sup> She further argued that “Article 2(2) of the CFP Basic Regulation binds the Council in two ways. First, the MSY goal cannot be circumvented after the year 2020 (a). Second, that goal concerns all stocks, without distinction, whether or not in certain fishing operations they are referred to as ‘target stock’ or as ‘by-catch’ (b)”,<sup>17</sup> and ultimately concluded that “the CFP Basic Regulation did not leave any discretion to the Council to depart from the MSY obligation in relation to by-catch when setting fishing opportunities in mixed fisheries”.<sup>18</sup> In order for the 2024 TACs - most of which are to be set in November or December this year - to be in line with the CFP’s objectives and requirements outlined above, they need to be proposed and set at levels which are 1) in line with MSY-based exploitation rates, and 2) in line with the precautionary approach, particularly where data are more limited and no MSY-based stock assessment is available.

While the UK Fisheries Act itself does not contain an explicit MSY deadline, it specifies concrete fisheries objectives which are closely aligned with those of the CFP, such as the “sustainability objective” and the “precautionary objective”. The former aims for fish and aquaculture activities to be “environmentally sustainable in the long term”,<sup>19</sup> and the latter refers to “exploitation of marine stocks [which] restores and maintains populations of harvested species above biomass levels capable of producing maximum sustainable yield”,<sup>20</sup> mirroring the wording of the CFP’s MSY objective. The “scientific evidence objective” includes that “the management of fish and aquaculture activities is based on the best available scientific advice”.<sup>21</sup> The Joint Fisheries Statement (JFS) further “sets out the policies of the fisheries policy authorities (or any of them) for achieving, or contributing to the achievement of, the fisheries objectives”,<sup>22</sup> including the development of Fisheries Management Plans (FMPs), which is underway. The JFS specifies that the fisheries policy authorities will “seek to agree and set fishing opportunities that scientific advice indicates should provide progress towards restoring and maintaining all commercial stocks above biomass levels and which produce yields that are sustainable in the long term”.<sup>23</sup>

Both the CFP and the UK Fisheries Act also require the application of an ecosystem-based approach to fisheries management “so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised”.<sup>24,25</sup> The UK Fisheries Act further defines the “ecosystem-based approach” as “an approach which (a) ensures that the collective pressure of human activities is kept within levels compatible with the achievement of good environmental status (within the meaning of the Marine Strategy Regulations 2010 (S.I. 2010/1627)), and (b) does not compromise the capacity of marine ecosystems to respond to human-induced changes”.<sup>26</sup> Both the EU Member States and the UK were required, but failed, to achieve “Good Environmental Status” (GES) of marine waters by 2020, through the EU’s Marine Strategy Framework Directive<sup>27</sup> and the UK’s Marine Strategy Regulations 2010,<sup>28</sup> respectively.<sup>29,30</sup>

15 OPINION OF ADVOCATE GENERAL ČAPETA delivered on 15 June 2023, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=81605BAA9E74B5594BADE660A31A19DD?text=&docid=274653&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3017442>, see for example paragraphs 30, 31 and 42.

16 *Ibid.*, paragraph 30.

17 *Ibid.*, paragraph 31.

18 *Ibid.*, paragraph 42.

19 UK Fisheries Act (2020), Section 1(2)(a)(i).

20 *Ibid.*, Section 1(3)(b).

21 *Ibid.*, Section 1(5)(c).

22 *Ibid.*, Section 2(1)(a).

23 Joint Fisheries Statement. November 2022. <https://www.gov.uk/government/publications/joint-fisheries-statement-jfs>, Section 4.2.1.9.

24 CFP Basic Regulation, Article 2(3).

25 UK Fisheries Act (2020), Section 1(1)(c) and 1(1)(4). The wording differs slightly from that in Article 2(3) of the CFP Basic Regulation, referring to “fish and aquaculture activities” and adding the objective that their negative impacts are not only minimised but “where possible, reversed”.

26 *Ibid.*, Section 1(10).

27 Articles 1 and 3(5) of 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 (Marine Strategy Framework Directive). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0056>.

28 The Marine Strategy Regulations 2020. Section 4. <https://www.legislation.gov.uk/ukSI/2010/1627/regulation/4>.

29 For example, the MSFD implementation report produced by the European Commission in 2020 concludes that “Biodiversity loss was not halted in Europe’s seas during the first MSFD cycle” and that “The biodiversity of marine ecosystems is still vulnerable in Europe’s seas and the good state of habitats and species is not secured.” COM(2020) 259 final, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of the Marine Strategy Framework Directive (Directive 2008/56/EC), p. 16.

30 Office for Environmental Protection (2023). Progress in improving the natural environment in England, 2021/2022. 19 January 2023.

<https://www.theoep.org.uk/report/progress-improving-natural-environment-england-20212022>. Full report available:

[https://www.theoep.org.uk/sites/default/files/reports-files/Progress\\_in\\_improving\\_the\\_natural\\_environment\\_in\\_England\\_2021-2022.pdf](https://www.theoep.org.uk/sites/default/files/reports-files/Progress_in_improving_the_natural_environment_in_England_2021-2022.pdf).

The UK Fisheries Act also includes an explicit “climate change objective” specifying that “(a) *the adverse effect of fish and aquaculture activities on climate change is minimised, and (b) fish and aquaculture activities adapt to climate change*”.<sup>31</sup>

As explained in more detail in this year’s joint NGO recommendations on fishing opportunities for 2024,<sup>32</sup> ecosystem-based TACs should preferably be set well below the single-stock headline advice provided by ICES, in order to invest in larger fish populations and maximise population and ecosystem health, resilience and productivity in the face of mounting pressures like climate change, and the capacity to mitigate the latter.<sup>33</sup> Recent scientific research suggests that the “*biomass of fish stocks should be allowed to regenerate to a minimum of 120% of that which will achieve MSY to provide a buffer against the uncertainty in ecological response to climate change*”,<sup>34</sup> and that “*alleviating fishing effort is the only way to maintain a stable SSB when the environmental regime becomes less suitable*”.<sup>35</sup> In line with the EU’s Marine Strategy Framework Directive (MSFD) and the corresponding UK Marine Strategy Regulations, there also needs to be a focus on ensuring a healthy population age and size structure,<sup>36</sup> which fishing below  $F_{MSY}$  could contribute to and which is a key element of GES and should already have been achieved by 2020.<sup>37</sup> The concepts and requirements above are also reflected in the fisheries-related provisions of the TCA, as outlined below.

### 2.1.2 Key provisions in the Fisheries section of the TCA

The respective EU and UK percentage shares of the overall TACs agreed between both Parties are specified in Annexes 35 and 36 of the TCA, for the years 2021 to 2026 onwards. The TCA emphasises the need for both Parties to “*cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term*”,<sup>38</sup> and the “*objective of exploiting shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield*”<sup>39</sup> (emphasis added, see explanation on this point in section 2.1.1 above). It also reiterates the requirement for both Parties to apply the precautionary approach,<sup>40</sup> base conservation and management decisions on the best available scientific advice (with explicit reference to ICES advice),<sup>41</sup> take account of and minimise harmful impacts of fishing on the marine ecosystem,<sup>42</sup> and ensure compliance with fisheries conservation and management measures,<sup>43</sup> amongst others. Key provisions on fishing opportunities are covered by Article 498, including a deadline of the 10<sup>th</sup> December for the conclusion of TAC negotiations between the two Parties<sup>44</sup> and another reference to the “*best available scientific advice*”<sup>45</sup> (see section 2.1.1 above for further reflections and references on this).

31 UK Fisheries Act 2020, Section 1(9).

32 Joint NGO recommendations to the EU on fishing opportunities for 2024. September 2023. <https://www.clientearth.org/latest/documents/joint-ngo-recommendations-to-the-eu-on-fishing-opportunities-for-2024/>. See particularly Section 4.

33 Also see Sumaila, UR, de Fontaubert, C, Palomares, MLD (2023). Editorial: How overfishing handicaps resilience of marine resources under climate change. *Front. Mar. Sci.*, 15 August 2023. Sec. Marine Fisheries, Aquaculture and Living Resources. Volume 10 – 2023, <https://www.frontiersin.org/articles/10.3389/fmars.2023.1250449/full>.

34 Kemp, PS, Subbiah, G, Barnes, R, Border, K, O’Leary, BC, Stewart, B, Williams, C (2023). The future of marine fisheries management and conservation in the United Kingdom: Lessons learnt from over 100 years of biased policy. *Marine Policy* 147 (2023) 105075, <https://www.sciencedirect.com/science/article/pii/S0308597X22001221?via%3DIihub>, p. 1 (abstract).

35 Beaugrand, G, Balembois, A, Kléparski, L, Kirby, RR (2022). Addressing the dichotomy of fishing and climate in fishery management with the FishClim model. *Communications Biology* 5, Article number: 1146 (2022). <https://www.nature.com/articles/s42003-022-04100-6>, p. 4. SSB = Spawning Stock Biomass.

36 As also advocated for at the recent event on “More big fish in the sea! Questioning the MSY paradigm for a sustainable long-term marine fisheries management” held by the European Parliament Forum on Recreational Fisheries and Aquatic Environment on 25 April 2023. Event report. <https://www.eaa-europe.org/news/17385/event-report-%E2%80%9393-more-big-fish-in-the-sea-questioning-the-msy-paradigm-for-a-sustainable-long-term-marine-fisheries-management.html>.

37 Descriptor 3: “Populations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size distribution that is indicative of a healthy stock.” 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 (Marine Strategy Framework Directive). Annex I.

38 Article 494(1) of the TCA.

39 Article 494(2) of the TCA.

40 Article 494(3)(a) of the TCA.

41 Article 494(3)(c) of the TCA.

42 Article 494(3)(e) of the TCA.

43 Article 494(3)(h) as well as Article 497 of the TCA.

44 Article 498(2) of the TCA.

45 Article 498(2)(a) of the TCA.

Importantly, Article 499 on provisional TACs provides for a very concrete backup scenario in case the EU and the UK have not agreed a TAC for a stock listed in Annex 35 or tables A or B of Annex 36 by the 10<sup>th</sup> December: in this case, both Parties have to “*immediately resume consultations with the continued aim of agreeing the TAC*”,<sup>46</sup> and set a provisional TAC “*corresponding to the level advised by ICES*” if such a TAC has still not been agreed by the 20<sup>th</sup> December.<sup>47</sup> This essentially means that the default in the absence of an agreement on a specific TAC is to follow the ICES advice.<sup>48</sup> A derogation from this backup scenario applies for so-called “*special stocks*”,<sup>49</sup> including stocks with “*ICES advice for a zero TAC*”, “*stocks caught in a mixed fishery, if that stock or another stock in the same fishery is vulnerable*” and “*other stocks which the Parties consider require special treatment*”.

It is worth noting that the Specialised Committee on Fisheries (SCF) provided for under the TCA was due to “*adopt guidelines by 1 July 2021 for the setting of provisional TACs for special stocks*”.<sup>50</sup> At the time of writing this report these guidelines have still not been finalised or adopted. In the absence of such guidelines it is currently unclear how such “special stocks” will be dealt with when setting TACs or provisional TACs for 2024. It is also worth noting that the overarching requirements and objectives of the TCA as well as the CFP and the UK Fisheries Act, regarding long-term sustainability and the application of the precautionary and ecosystem-based approaches, continue to apply.

## 2.2 The TAC-setting process

There are a number of different processes for setting TACs which involve different decision-makers. Up until 2020, the majority of the TACs were set by the Council of EU fisheries ministers, in October for the Baltic Sea, and in December for most TACs in the Northeast Atlantic. However, due to the departure of the UK from the EU, close to two thirds of the stocks or TACs which used to fall under the December Council process have now turned into EU/UK shared stocks subject to international negotiations from 2021 onwards.<sup>51</sup> Key provisions on the setting of fishing limits under the Trade and Cooperation Agreement (TCA) between the EU and the UK are outlined in section 2.1.2 above. The TAC-setting process for October and December Council comprises five key steps:

1. The publication of scientific advice on catches and landings (or “wanted catch”) by the International Council for the Exploration of the Sea (ICES);<sup>52</sup>
2. Discussions within Member State administrations regarding their position in the upcoming negotiations on the basis of this advice and other considerations;
3. The publication of the Commission's TAC proposal, and subsequent non-papers with updates or adjustments to the original proposal;
4. Discussions between Member State delegations and the Commission as part of meetings of the Council Working Party on Internal/External Fisheries Policy;
5. The Council meeting (in October or December, respectively) at which the EU fisheries ministers set the final TACs on the basis of the Commission's consolidated TAC proposal and the so-called “Council bible”.<sup>53</sup>

46 Article 499(1) of the TCA.

47 Article 499(2) of the TCA.

48 See ClientEarth's briefing “What is the ‘best available scientific advice’ for setting Total Allowable Catches (TACs)?”, full reference in footnote 10.

49 Article 499(3)(3)-(6) of the TCA.

50 Article 499(5) of the TCA, further details on the remit of the Specialised Committee on Fisheries in Article 508.

51 The exact figures and percentages depend on whether you look at stocks or TACs, and which ones are in- or excluded, but based on ClientEarth's analysis the percentage of stocks or TACs is somewhere in the region of around two thirds of the stocks or TACs previously under the December Council process.

52 <https://www.ices.dk/advice/Pages/Latest-Advice.aspx>.

53 This document produced by the General Secretariat of the Council summarises input received from the Member State delegations in the lead-up to the Council meeting, and, where applicable, responses and explanations from the Commission. Note that this document does not appear to have been produced in recent years.

The final result of this process is the annual TAC and Quota Regulation which specifies the agreed TACs.<sup>54</sup> Aside from the TACs agreed through the above process, a range of TACs are subject to negotiations and agreements with third countries, such as Norway and the Faroe Islands, and since 2020, the UK (see above), which follow different processes. The EU/UK shared TACs now fall under negotiations between the EU (represented by the European Commission, based on a mandate from the Council) and the UK, with the results laid down in an agreed written record (reflecting the percentage shares specified in Annexes 35 and 36 of the TCA), and a formal deadline of the 10<sup>th</sup> December.

A similar process, usually concluded in November, also involving Norway, applies to the setting of the majority of North Sea TACs. Moreover, some stocks are subject to negotiations between several Coastal States, or, in the absence of a sharing arrangement (as has been the case for example for mackerel in recent years), quotas unilaterally set by the EU and/or third countries without an agreement on an overall TAC. Regardless of the decision-making process, all of these TACs are in the end included in the Northeast Atlantic TAC and Quota Regulation. This report focuses on TACs agreed at December Council and those now covered by bilateral EU/UK negotiations for 2021 onwards (see section 3.3 for further details on the scope of this report).

## 2.3 The landing obligation and how it affects TAC-setting

Before the introduction of the landing obligation, TACs effectively were 'Total Allowable Landing' limits, since catches in excess of these TACs could be discarded. This means that when following scientific advice provided by ICES, TACs were based on the scientific advice on landings (or 'wanted catch') rather than advice on total catches.

As the landing obligation was gradually phased in between 2015 and 2019, the purpose of TACs changed from regulating landings to regulating catches. Within this timeframe, the catches of many stocks were partially subject to the landing obligation, meaning that a quota 'top-up' was added to what used to be 'Total Allowable Landing' limits, to account for that part of the catch that used to be discarded but now had to be landed.

Until December Council 2017, the Commission proposed such quota top-ups, which have subsequently been incorporated into the TACs adopted by the Council. For details on the implications of and challenges posed by quota top-ups for monitoring progress of TAC-setting towards MSY please refer to our briefing.<sup>55</sup> The landing obligation came fully into force in 2019, meaning that all catches of quota stocks in the Northeast Atlantic now have to be landed, unless exemptions apply. The Commission therefore changed its approach from proposing landings-TACs plus quota top-ups, to proposing catch-TACs, with deductions applied to TACs subject to certain exemptions, to reflect that certain discards may continue under these exemptions. While the agreed TACs frequently do not follow the proposed TACs (see section 4.1 of ClientEarth's "Taking stock" report for 2020),<sup>56</sup> the Council has in principle been applying the same approach as the Commission. Following its departure from the EU, the UK has retained the landing obligation (albeit with some changes to certain exemptions), although changes to it, for example regarding catch accounting, are currently being considered as part of a "discards reform" consultation.<sup>57</sup> The agreed written records on shared TACs adopted by the EU and the UK for 2021 onwards specify the pre-deduction TAC figures, and both Parties have subsequently applied exemption deductions to their respective shares.

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54 See for example Council Regulation (EU) 2019/124 of 30 January 2019 fixing for 2019 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0124>.

55 ClientEarth (2016). Quota top-ups and monitoring progress of TAC decisions towards MSY - Why top-up calculations are both crucial and challenging. [www.clientearth.org/latest/documents/quota-top-ups-and-monitoring-progress-of-tac-decisions-towards-msy-why-top-up-calculations-are-both-crucial-and-challenging/](http://www.clientearth.org/latest/documents/quota-top-ups-and-monitoring-progress-of-tac-decisions-towards-msy-why-top-up-calculations-are-both-crucial-and-challenging/).

56 ClientEarth (2020). Taking stock 2020 – are TACs set to achieve MSY?. October 2020. <https://www.clientearth.org/latest/documents/taking-stock-2020-are-tacs-set-to-achieve-msy/>.

57 Department for Environment, Food & Rural Affairs (DEFRA) (2023). Consultation on "discards reform". <https://www.gov.uk/government/consultations/discards-reform>. The consultation closed on 9 October 2023.

In light of serious concerns about the general lack of compliance with the landing obligation,<sup>58</sup> this approach of granting full quota top-ups (albeit with deductions for exemption discards) clearly risks overfishing, if unreported discards beyond the agreed limits continue, as illustrated previously by ClientEarth and others.<sup>59,60</sup> ClientEarth's reports provide further details on serious shortcomings in the control of the landing obligation in France,<sup>61</sup> Spain<sup>62</sup> and Denmark.<sup>63</sup> The Commission has also opened infringement proceedings against France and Spain,<sup>64</sup> as well as against Ireland, Belgium and the Netherlands,<sup>65</sup> due to their failure to properly control the implementation of the landing obligation.

When drawing conclusions about the extent to which TACs follow the scientific advice, it is important to ensure that TACs are compared to the right type of scientific advice, i.e. advice on catches or landings, reflecting the above considerations (see section 3.3 for details). Access to information on the size of the adjustments made (either top-ups or deductions) and the data and calculations underpinning them is crucial in order to adequately account for these adjustments in comparisons between TACs and scientific advice. For further details on this topic and the information the Council and the Commission have (not) provided in response to ClientEarth's Access to Information Requests (see section 2.4), please refer to ClientEarth's complaint to the Ombudsman about a lack of transparency of the December Council decision-making process.<sup>66</sup>

The bottom line is that while TACs that are set in line with ICES advice on catches may on paper look like they are in line with science and the law, their sustainability on the water heavily depends on the level of compliance with the landing obligation and the agreed TACs.<sup>67</sup> Comprehensive and accurate catch documentation also plays a key role in this context.<sup>68</sup> Note however, that an analysis of the actual catches or the impact on stocks is outside the scope of this report (see section 3.3 for more details), which focuses on a comparison of the agreed and advised figures.

## 2.4 Transparency and why it matters

Transparency is a fundamental component of democracy and good governance. It is essential for monitoring the implementation of legislation and ensuring compliance with it. Access to information, enabling the public (including civil society organisations) to follow and participate in the decision-making process, plays a key role in this context.

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58 As highlighted for example in the Commission's communication to the European Parliament and the Council regarding fishing opportunities for 2024, as well as the accompanying staff working document: COM(2023) 303 final, Sustainable fishing in the EU: state of play and orientations for 2024. 14.06.2023. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A303%3AFIN>, e.g. p. 2, 7 and 8; SWD(2023) 172 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2023%3A172%3AFIN>, e.g. p. 28 f.

59 ClientEarth (2020). Setting Total Allowable Catches (TACs) in the context of the Landing Obligation. July 2020.

<https://www.clientearth.org/latest/documents/setting-total-allowable-catches-tacs-in-the-context-of-the-landing-obligation/>. This briefing explains the risk posed by the combination of catch-based TACs and illegal discarding, also highlighted in this 5 minute presentation (starting at 15:30) which was part of an NGO press briefing ahead of December Council 2020: <https://youtu.be/Cw783NtRdCg?t=930>.

60 This key issue and its impact on the EU TAC system are also covered by a scientific paper by Dr Lisa Borges: Borges, L (2020). The unintended impact of the European discard ban. ICES Journal of Marine Science, Volume 78, Issue 1, January-February 2021, Pages 134–141. Published 8 December 2020.

<https://academic.oup.com/icesjms/article-abstract/78/1/134/6026103>. The key findings of this paper were presented at media briefing organised by Our Fish (<https://our.fish/press/blue-implosion-how-eu-failure-to-enforce-fish-discard-ban-could-drive-fisheries-management-system-to-collapse/>) and summarised in Our Fish's briefing "EU fisheries management system likely to implode: the unintended impact of not enforcing the ban on fish discards", <https://our.fish/wp-content/uploads/2020/11/Science-Briefing-EU-fisheries-management-system-likely-to-implode-the-unintended-impact-of-not-enforcing-the-ban-on-fish-discards-.pdf>.

61 ClientEarth (2019). The control of the landing obligation in France. October 2019. <https://www.clientearth.org/latest/documents/the-control-of-the-landing-obligation-in-france/>.

62 ClientEarth (2019). The control of the landing obligation in Spain. October 2019. <https://www.clientearth.org/latest/documents/the-control-of-the-landing-obligation-in-spain/>.

63 ClientEarth (2019). The control of the landing obligation in Denmark. October 2019. <https://www.clientearth.org/latest/documents/the-control-of-the-landing-obligation-in-denmark/>.

64 European Commission (2021). September infringement package: key decisions. [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_4681](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681).

65 European Commission (2021). October infringement package: key decisions [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_5342](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_5342).

66 ClientEarth's Complaint to the European Ombudsman - Lack of transparency in the Council decision-making process leading to its adoption of Regulations on the Total Allowable Catches in the Northeast Atlantic for 2017, 2018 and 2019. 5 April 2019. <https://www.clientearth.org/latest/documents/clientearth-s-complaint-to-the-european-ombudsman-regarding-the-lack-of-transparency-of-the-december-council-tac-setting-process/>.

67 The risk that "topped up" catch-based TACs pose in combination with illegal discards is illustrated by ClientEarth's short presentation titled "Fishing limits and illegal discards – Sustainability at risk" (starting at 15:30) in this youtube video: <https://youtu.be/Cw783NtRdCg?t=930>.

68 ClientEarth (2020). (Lack of) catch documentation and the landing obligation and how exemptions may defeat rather than prove the rule. December 2020. <https://www.clientearth.org/latest/documents/lack-of-catch-documentation-under-the-landing-obligation-and-how-exemptions-may-defeat-rather-than-prove-the-rule/>.

For an in-depth analysis of transparency requirements for European fisheries management with detailed consideration of applicable legislation, please read our briefing on transparency in the CFP.<sup>69</sup> As the briefing shows, these transparency requirements must result in fisheries data and information on fisheries management being accessible to the public. Both the EU and the UK are signatories to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,<sup>70</sup> and are thus both subject to the obligations and rights under this Convention.

TAC-setting is a prime example where a lack of transparency continues to make it easier for decision-makers to disregard the legal sustainability requirements unchallenged: the majority of the TAC-setting process, as outlined in section 2.2, takes place behind closed doors. Information on relevant discussions and details of considerations that form the basis of the agreed TACs are rarely made publicly available before the decision-making process has concluded, and in some cases not at all. This makes it difficult, if not impossible, for stakeholders to participate in the process, identify which Member States or other Parties have advocated for unsustainable TACs, or hold them to account.

### 2.4.1 Transparency around December Council

Following a series of Access to Information Requests (AIRs) regarding the December Council processes in 2016, 2017 and 2018, ClientEarth submitted a complaint about this situation to the European Ombudsman.<sup>71</sup> The Ombudsman published her findings on this topic in 2019, confirming ClientEarth's concerns, and recommending that "*The Council should proactively make public documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter*".<sup>72</sup> To date, the Council has failed to implement the Ombudsman's recommendations, leading her to confirm her finding of maladministration.<sup>73</sup>

Meanwhile, a previous version of this report published in 2020 presents a range of findings regarding the roles that various Member States appear to have played in pushing for unsustainable TACs and the arguments used, based on files received in response to ClientEarth's AIRs and confirmatory applications regarding the December Council processes 2016-2018.<sup>74</sup> ClientEarth has since then published a detailed directory of all the files received throughout this work (also covering December Councils 2019 and 2020), including some documents not previously available elsewhere.<sup>75</sup>

The Commission, in turn, has committed to increasing transparency on its proposals for fishing opportunities, as confirmed by Commissioner Sinkevičius in a press release in July 2020,<sup>76</sup> and since then has, proactively published certain non-papers regarding TACs for 2021.<sup>77</sup> A summary of ClientEarth's findings regarding culprits behind unsustainable TAC-setting is included in section 5.1 of this report.

### 2.4.2 Transparency around the EU/UK TAC negotiations

Importantly, the departure of the UK from the EU has added another level of complexity to the setting of TACs, and presents both challenges and opportunities in terms of transparency.

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69 ClientEarth (2015). Transparency in the Common Fisheries Policy. Briefing, November 2014 (updated in August 2015).

<https://www.clientearth.org/latest/documents/transparency-in-the-common-fisheries-policy/>.

70 UNECE, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

<https://unece.org/environment-policy/public-participation/aarhus-convention/introduction>.

71 See footnote 66.

72 Recommendation of the European Ombudsman in case 640/2019/FP on the transparency of the Council of the EU's decision-making process leading to the adoption of annual regulations setting fishing quotas (total allowable catches). 25 October 2019. <https://www.ombudsman.europa.eu/en/recommendation/en/120761>.

73 European Ombudsman (2020). Council fails to accept Ombudsman's recommendation for transparency in EU fishing quota decision-making process. Case 640/2019/TE. <https://www.ombudsman.europa.eu/en/case/en/54526>.

74 See footnote 1 for the full reference of the report, section 5.

75 ClientEarth (2021). Directory of files related to ClientEarth's AIRs regarding TACs set through the December Council processes 2016-2020. September 2021. <https://www.clientearth.org/latest/documents/directory-of-files-related-to-clientearth-s-air-requests-regarding-tacs-set-through-the-december-council-processes-2016-2020/>.

This directory was accompanied by a press release - Revealed: The culprits behind unsustainable fishing limits in the EU. <https://www.clientearth.org/latest/press-office/press/revealed-the-culprits-behind-unsustainable-fishing-limits-in-the-eu/>. The directory is yet to be updated for the years 2021 and 2022.

76 [https://ec.europa.eu/oceans-and-fisheries/news/commissioner-sinkevicius-announces-more-transparency-its-proposals-fishing-opportunities-2020\\_en](https://ec.europa.eu/oceans-and-fisheries/news/commissioner-sinkevicius-announces-more-transparency-its-proposals-fishing-opportunities-2020_en)

77 [https://ec.europa.eu/oceans-and-fisheries/fisheries/rules/fishing-quotas/tacs-and-quotas-2021\\_en](https://ec.europa.eu/oceans-and-fisheries/fisheries/rules/fishing-quotas/tacs-and-quotas-2021_en).

Following a joint NGO request for improved stakeholder engagement in international TAC negotiations such as the EU/UK TAC negotiations,<sup>78</sup> the EU Commissioner for Fisheries has also reiterated his commitment to transparency and expressed support for including NGOs in the plenary sessions, alongside industry stakeholders.<sup>79</sup>

The UK's proactive move to include NGOs in its delegation for plenary sessions of the EU/UK TAC negotiations from 2021 onwards represents an important step in the right direction and has since then triggered several EU Member States (including Ireland, France, Netherlands, Spain, Denmark, Germany) to follow suit. This is particularly significant given the past reluctance of most Member States to rectify the imbalance in stakeholder access to negotiations between industry and NGO representatives. Another useful development has been the improved and more frequent engagement on both sides of the Channel between officials and stakeholders via debriefing sessions throughout the year. It is worth noting though that while NGOs are now proactively invited on the UK side (both through DEFRA and Marine Scotland) to relevant plenary and debriefing sessions, engagement on the EU side remains more limited. Most recently, NGOs from several Member States have once again struggled to receive relevant invitations regarding the EU/UK bilateral negotiations for 2024 on time, with Member State representatives reverting to claims that such invitations should come from the Commission, even though it had previously been concluded that this is indeed at the Member States' discretion.

Moreover, despite useful exchanges between stakeholders and representatives of both the EU and UK delegations, documentation (and its publication) of the TAC negotiations (including negotiating positions, records of preparatory meetings and minutes of the negotiations themselves) continues to be limited. For example, relevant Commission non-papers are not yet automatically published,<sup>80</sup> and, in response to ClientEarth's AIRs, both the Council and the Commission have refused access to documents related to TAC-setting for shared stocks, for example, based on concerns about the potential impact on international relations and future negotiations.<sup>81, 82, 83, 84</sup> This includes, for example, meeting records as well as documents recording Member State and Council Presidency input on Commission non-papers regarding the EU/UK shared TACs set for 2022. At the time of writing this report, the final decision on the Commission AIR submitted in 2022 has still not been made, whereas the Council has disclosed a number of additional files following the submission of ClientEarth's confirmatory applications, while continuing to withhold several documents.<sup>85,86,87</sup>

78 Joint NGO letter to Commissioner Sinkevičius and the Portuguese Council Presidency about transparency in EU-UK bilateral and EU-UK-Norway trilateral negotiations on fishing opportunities. 25<sup>th</sup> January 2021. <https://www.clientearth.org/latest/documents/joint-ngo-letter-to-commissioner-sinkevicius-and-the-portuguese-council-presidency-about-transparency-in-eu-uk-bilateral-and-eu-uk-norway-trilateral-negotiations-on-fishing-opportunities/>.

79 Response from Commissioner Sinkevičius to joint NGO letter about transparency in EU-UK bilateral and EU-UK-Norway trilateral negotiations on fishing opportunities. 25<sup>th</sup> February 2021. <https://www.clientearth.org/latest/documents/response-from-commissioner-sinkevicius-to-joint-ngo-letter-about-transparency-in-eu-uk-bilateral-and-eu-uk-norway-trilateral-negotiations-on-fishing-opportunities/>.

80 For example, while the Commission does now publish non-papers related to the December Council and some other processes (see [https://oceans-and-fisheries.ec.europa.eu/fisheries/rules/fishing-quotas/tacs-and-quotas-2022\\_en](https://oceans-and-fisheries.ec.europa.eu/fisheries/rules/fishing-quotas/tacs-and-quotas-2022_en)), many non-papers related to TACs for EU/UK shared stocks which are registered (but not publicly available) in the Council's document register do not yet appear to be proactively published. As of 4 October 2022, this applies for example to the document registered as "ST 13883 2021 INIT – NOTE" in the Council's document register (<https://www.consilium.europa.eu/en/documents-publications/public-register/public-register-search/>), titled "BILATERAL EU-UK CONSULTATIONS ON FISHING OPPORTUNITIES FOR 2022 Commission non-paper".

81 ClientEarth submitted an AIR to the Council on 23 May 2022, which was registered under the reference "Ref. 22/1156-PRO-el". [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_3#outgoing-21624](https://www.asktheeu.org/en/request/request_for_access_to_documents_3#outgoing-21624). In its reply from 7 July, the Council disclosed a number of files, while refusing access to a large number of files containing information on 2022 TACs for shared stocks. [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_3#incoming-38397](https://www.asktheeu.org/en/request/request_for_access_to_documents_3#incoming-38397).

82 ClientEarth submitted an AIR to the Commission on 4 July 2022, which was registered under the reference "GESTDEM 2022/3819". [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_4#outgoing-22081](https://www.asktheeu.org/en/request/request_for_access_to_documents_4#outgoing-22081). In its reply from 19 August 2022, the Commission disclosed one document, but refused access to two files containing information on 2022 TACs for shared stocks. [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_4#incoming-39174](https://www.asktheeu.org/en/request/request_for_access_to_documents_4#incoming-39174).

83 ClientEarth submitted an AIR to the Council on 21 August 2023, which was registered under the reference "Ref. 23/2357-PRO-nb", [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_7#outgoing-25871](https://www.asktheeu.org/en/request/request_for_access_to_documents_7#outgoing-25871). In its reply from 29 September, the Council (partially) disclosed a number of files, while refusing access to those parts containing information on 2023 TACs for shared stocks.

84 ClientEarth submitted an AIR to the Council on 5 September 2023, which was registered under the reference "Ref. 23/2446-PRO-mf", [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_8#outgoing-26003](https://www.asktheeu.org/en/request/request_for_access_to_documents_8#outgoing-26003). In its reply from 13 October, the Council (partially) disclosed a number of files, while refusing access to a large number of files (or parts thereof) containing information on 2023 TACs for shared stocks.

85 ClientEarth submitted a confirmatory application to the Council regarding the AIR registered under the reference "Ref. 22/1156-PRO-el" on 29 July 2022. [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_3#outgoing-22326](https://www.asktheeu.org/en/request/request_for_access_to_documents_3#outgoing-22326).

86 ClientEarth submitted a confirmatory application to the Commission regarding the AIR registered under the reference "GESTDEM 2022/3819" on 9 September 2022. [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_4#outgoing-22652](https://www.asktheeu.org/en/request/request_for_access_to_documents_4#outgoing-22652). Despite two prompts on 3 November 2022 and 13 April 2023, ClientEarth still has not received the Commission's response to this confirmatory application as of November 2023, meaning it is now over a year overdue.

87 Given that the arguments used by the Council for refusing to disclose (parts of) files related to international negotiations remain the same in the AIR responses received in 2023, ClientEarth did not submit further confirmatory applications for this year, since a different outcome was not to be expected.



Since the last edition of this report, the Specialised Committee on Fisheries (SCF) under the TCA has been discussing a growing agenda of fisheries management issues, mostly derived from commitments in the EU/UK agreed written records on TACs. Detailed and comprehensive minutes of the meetings of the SCF and its working groups as well as effective stakeholder engagement and consultation on both sides of the Channel will be crucial to ensure transparency of this still relatively new body. A summary of ClientEarth's findings regarding transparency in the EU/UK negotiations, including the work of the SCF, is included in section 5.2 of this report.

## 3 Reporting on progress towards MSY and the situation of fish stocks

As outlined in section 2.1, the CFP as well as the TCA and the UK's fisheries legislation contain several important legal requirements and objectives to be met by European fisheries management. Reliable, comprehensive and unambiguous reporting on the situation of fish stocks and their exploitation therefore plays a crucial role in monitoring the extent to which European fisheries management is meeting these requirements and making the necessary progress towards achieving the MSY objective. This is essential to a) assess the effectiveness of the CFP, the fisheries provisions of the TCA and the UK's fisheries legislation, and their implementation, b) highlight areas where progress is lacking, and c) trigger action to improve the situation. For detailed considerations and recommendations regarding reporting, please refer to our comprehensive briefing on this topic.<sup>88</sup>

This section outlines different reporting approaches and their shortcomings, and explains how this report addresses a number of key challenges and limitations in order to draw robust conclusions about the progress of TAC decisions made to date towards meeting the sustainability requirements of the CFP, the TCA and the UK's fisheries legislation.

### 3.1 Different reporting approaches and why they can be misleading

Reports on both the level of TACs and the situation of stocks in terms of biomass and fishing mortality are regularly prepared by a range of stakeholders including the European Commission, NGOs and national administrations such as the UK's Department for Environment, Food & Rural Affairs (Defra). This includes the Commission's mandatory annual report on the situation of fish stocks and progress towards MSY as required by Article 50 of the CFP Basic Regulation and a range of other voluntary reports that vary in their approach and format, as well as scope, purpose and target audience. Following its departure from the EU, the UK continues to further develop its own monitoring and reporting, in cooperation with its national scientific institute, the Centre for Environment, Fisheries and Aquaculture Science (Cefas).

The diversity of assessment and reporting methods relying on different types or subsets of the available data sometimes causes different reports to come to different conclusions. As a result, the overall conclusion of the various reports about the actual situation of stocks and progress towards achieving the MSY objective can be unclear or ambiguous. It is therefore crucial to carefully consider the scope, methods and metrics used in a given report in order to assess which conclusions can be legitimately drawn. Table 1 provides an overview of different aspects and metrics that are commonly reported on when measuring progress towards ending overfishing.

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<sup>88</sup> 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. December 2016. <https://www.clientearth.org/latest/documents/reporting-on-progress-of-tac-decisions-and-the-state-of-fish-stocks-towards-msy-why-reporting-is-important-and-how-it-can-be-improved/>.

Table 1. Overview of different sustainability aspects and metrics commonly covered by reports on progress towards ending overfishing.<sup>89</sup>

Sustainability aspect	Metrics
Fishing mortality (F)	F compared to reference points ( $F_{MSY}$ , $F_{pa}$ , $F_{lim}$ ) <ul style="list-style-type: none"> <li>On average across all stocks covered in the report</li> <li>Number of stocks where <math>F \leq</math> or <math>&gt;</math> reference point</li> </ul>
Stock biomass (SSB)	SSB compared to reference points ( $B_{MSY}$ , $B_{trigger}$ , $B_{pa}$ , $B_{lim}$ ) <ul style="list-style-type: none"> <li>On average across all stocks covered in the report</li> <li>Number of stocks where <math>SSB \geq</math> or <math>&lt;</math> reference point</li> </ul>
Safe biological limits (SBL)	Number of stocks which are <ul style="list-style-type: none"> <li>Within SBL: <math>F \leq F_{pa}</math> and <math>SSB \geq B_{pa}</math></li> <li>Outside SBL: <math>F &gt; F_{pa}</math> or <math>SSB &lt; B_{pa}</math></li> </ul>
TACs	Proposed or agreed TACs compared to scientific advice <ul style="list-style-type: none"> <li>Average or overall difference between TACs and scientific advice across all stocks covered in the report</li> <li>Number of stocks where TAC <math>\leq</math> or <math>&gt;</math> scientific advice</li> <li>Volume of landings covered by TACs <math>\leq</math> or <math>&gt;</math> scientific advice</li> </ul>
Actual catches	Reported catches compared to scientific advice, or to TACs <ul style="list-style-type: none"> <li>Average or overall difference between catches and scientific advice (or TACs) across all stocks covered in the report</li> <li>Number of stocks where catches <math>\leq</math> or <math>&gt;</math> scientific advice (or TACs)</li> </ul>

By excluding certain stocks or choosing certain metrics over others, the resulting reports can generate a misleadingly positive or negative impression of the situation, which does not adequately reflect reality. Misleadingly positive reports are particularly problematic since they give decision-makers an excuse for not taking action to improve the situation. This poses a serious risk of greenwashing,<sup>90</sup> rather than clearly recognising and addressing the lack of progress in certain areas. This issue is apparent in the clear discrepancies between certain conclusions in the reporting over the years by the Commission's DG MARE and the findings of the official reports on monitoring the performance of the CFP produced by the Scientific, Technical and Economic Committee for Fisheries (STECF) (see Box 1 and ClientEarth's briefing for further details).<sup>91</sup>

Environmental NGOs have most recently brought their concerns about misleading reporting on progress towards ending overfishing to the attention of the Commissioner for the Environment, Oceans and Fisheries Virginijus Sinkevičius, the Director General of DG MARE and Members of the PECH Committee of the European Parliament, in May 2021.<sup>92</sup> The Commission appears to since then have refrained from reiterating past contentious statements (see Box 1), though this may also be related to the change in reporting scope due to Brexit which has turned most EU only stocks into shared stocks.

<sup>89</sup> For an explanation of biological reference points and how they are reflected in the legal wording used for example in the Common Fisheries Policy, please refer to this briefing: ClientEarth (2020): Linking the law to biological reference points used in scientific advice when setting Total Allowable Catches (TACs). December 2020. <https://www.clientearth.org/latest/documents/linking-the-law-to-biological-reference-points-used-in-scientific-advice-when-setting-total-allowable-catches-tacs/>.

<sup>90</sup> Video #EndOverfishing Don't Greenwash It. June 2019. Available on <https://our.fish/news/video-endoverfishing-dont-greenwash-it/>.

<sup>91</sup> ClientEarth (2020). Let's get the numbers right: What proportion of fish stocks are sustainably managed in the EU? July 2020. <https://www.clientearth.org/latest/documents/let-s-get-the-numbers-right-what-proportion-of-fish-stocks-are-sustainably-managed-in-the-eu/>.

<sup>92</sup> Joint NGO letter to Commissioner Sinkevičius, the Director General of DG MARE and Members of the PECH Committee, regarding misleading reporting on progress towards ending overfishing. 12 May 2021. <https://our.fish/publications/letter-to-commissioner-sinkevicius-on-misleading-statements/>.

On the UK side, Cefas published its long-awaited report on “*Assessing the sustainability of fisheries catch limits negotiated by the UK for 2020 to 2022*” last year,<sup>93</sup> alongside a comprehensive methodology review,<sup>94</sup> which also addresses a number of key issues raised in the present report, such as the mismatch between TAC and advice areas (see section 3.2.2). An update regarding the 2023 TACs was published earlier this year.<sup>95</sup> Similar to ClientEarth’s report, these reports focus on a comparison of the agreed TACs to the underlying scientific advice from ICES, assessing which and how many TACs negotiated by the UK were set in line with the advice for 2020, 2021, 2022 and 2023 respectively.

Unlike the sometimes overly positive reporting by the European Commission (see Box 1), these reports present the rather sobering conclusion that only just over one third of the TACs in each of the years 2020-2022 followed scientific advice, with a small improvement (40% of assessed TACs following the advice) for 2023. Discrepancies between these findings and those of the present report (see section 4) are most likely due to differences in scope and parts of the methodology,<sup>96</sup> and have not been further investigated for the present report. Regardless of such differences, the Cefas report and methodology represent a key step in the official post-Brexit reporting on progress towards sustainable TAC-setting in a transparent manner that enables stakeholders to follow and scrutinise its findings and compare them to findings from other analyses like the present one.

Importantly, as highlighted above, the CFP’s MSY objective and the corresponding provisions in the TCA and the UK’s fisheries legislation apply to all harvested stocks, no matter how economically important or small they are or whether they are targeted or primarily taken as bycatch, and irrespective of the decision-making process through which the relevant TACs are adopted, or the basis of the available scientific advice. Reports on this topic should therefore aim to be comprehensive, or, where this is not the case, explicitly acknowledge the assumptions and limitations that any figures and conclusions they contain are subject to, in order to avoid misrepresentation or misinterpretation of the situation. To this end, the following sub-sections outline the choices made in the present report as well as their implications, and explain how certain challenges were dealt with.

### Box 1: Treat with caution: misleadingly positive reporting on progress towards MSY

The STECF has consistently concluded year after year that progress towards ending overfishing has been too slow to meet the 2020 deadline and restore all stocks above sustainable levels. The STECF’s latest report, which forms the basis of the Commission’s report under Article 50 of the CFP Basic Regulation, has confirmed this conclusion once again and showed that “*several stocks remain overfished and/or outside safe biological limits*” and the “*objective of the CFP, which aimed to ensure that all stocks are fished at or below  $F_{MSY}$  since 2020, has not been achieved for these stocks*”, with 26% of the assessed stocks still subject to overfishing and 38% outside safe biological limits.<sup>97</sup> Similarly, a recent audit of UK fisheries concluded that 34% of the analysed stocks are still being overfished, and 25% are in a critical condition.<sup>98</sup>

On the other hand, the Commission’s reporting, while reflecting STECF’s findings to some extent, has in the past often placed a strong emphasis on additional figures (not originating from STECF) based on volumes of landings

93 Bell, E., Nash, R., Garnacho, E., De Oliveira, J., O’Brien, C. (2022). Assessing the sustainability of fisheries catch limits negotiated by the UK for 2020 to 2022. Cefas. 38 pp. 2 January 2022.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1061261/Assessing\\_negotiated\\_catch\\_limits\\_2020\\_to\\_2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061261/Assessing_negotiated_catch_limits_2020_to_2022.pdf).

94 Nash, R., Garnacho, E., De Oliveira, J., Bell, E., O’Brien, C. (2021). Methodology review to assess sustainable quota setting. Cefas project report. 43 pp. 2 December 2021.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1061262/Methodology\\_Review\\_assess\\_sustainable\\_quota\\_setting.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061262/Methodology_Review_assess_sustainable_quota_setting.pdf).

95 Bell ED, Nash RMD, Garnacho E, De Oliveira J, Hanin M, Gilmour F, O’Brien CM (2023). Assessing the sustainability of negotiated fisheries catch limits by the UK for 2023. Cefas project report for Defra. Assessing the sustainability of negotiated fisheries catch limits for the UK in 2023. Cefas project report for Defra. 30 pp. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1143586/Assessing\\_the\\_sustainability\\_of\\_fisheries\\_catch\\_limits\\_negotiated\\_by\\_the\\_UK\\_for\\_2023.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1143586/Assessing_the_sustainability_of_fisheries_catch_limits_negotiated_by_the_UK_for_2023.pdf).

96 For example, the Cefas report covers many stocks not covered by the present report because they fall under different processes, such as Coastal States negotiations, whereas the present report focuses on EU only and EU/UK shared stocks. Moreover, the Cefas report uses a stricter distinction between “pass” (i.e. in line with the advice) and “fail”, whereas the present report for example considers TACs within the range of +/- 2.5% of the advice to be in line with the advice and is therefore a bit more ‘generous’ (see section 3.3.3).

97 Scientific, Technical and Economic Committee for Fisheries Monitoring the performance of the Common Fisheries Policy (STECF-adhoc-23-01). Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/361698, JRC133325. Quote from p. 9. As of 2021, the most recent year with the relevant data, 21 out of 81 assessed stocks (i.e. 26%) were still exploited above  $F_{MSY}$ , and 18 out of 47 assessed stocks (i.e. 38%) were still outside safe biological limits, see Tables 3-6, pp. 30-32.

98 Oceana (2023). Taking Stock: The State of UK Fish Populations 2023. September 2023. <https://uk.oceana.org/reports/taking-stock-2023/>.

under the agreed TACs, which create a much more positive impression of the situation: for example, it frequently used to make claims such as it being “*expected that in 2020 more than 99% of landings in the Baltic, North Sea and the Atlantic managed exclusively by the EU will come from sustainably managed fisheries*”.<sup>99</sup> NGOs have repeatedly complained about the misleading nature of such claims, most recently in a letter to Commissioner Sinkevičius,<sup>100</sup> and the notorious 99% figure was no longer included in the Commission’s reports from 2021 onwards, possibly also reflecting the change in reporting scope due to Brexit.

However, this box and ClientEarth’s briefing<sup>101</sup> explain why such statements previously made by the Commission’s DG MARE (based on the volumes of landings allowed under the agreed TACs) generate a misleadingly positive impression of the situation quite different from the findings of the STECF (based on an assessment of fishing mortality and biomass levels) or of the recent Cefas report (based on a comparison of TACs with scientific advice),<sup>102</sup> particularly if they are viewed in isolation and without further explanation.

First of all, they cover only stocks for which MSY-based scientific advice from ICES is available. This excludes the large proportion of stocks for which scientific advice is still based on the ICES precautionary approach due to data limitations. Importantly, TACs for stocks without MSY-based advice are frequently set above precautionary scientific advice (see section 4.3 for details). By excluding these stocks from its reporting, the Commission therefore paints a more positive picture. In addition, the Commission’s figures focus on EU-exclusively managed stocks, despite the fact that the EU negotiates many shared fishing limits with Coastal States like Norway. Quite often quotas for shared stocks are set even further above scientific advice,<sup>103</sup> so excluding these can make the situation look better than it is. It is worth noting that the UK’s reporting by Cefas addresses these shortcomings by covering a broad range of TACs agreed through various different negotiation processes, and explicitly includes both stocks with full MSY assessments and those subject to precautionary advice.

The Commission’s previously reported figures put a particular emphasis on progress in terms of the volume of landings (rather than the number of stocks), based on comparing agreed TACs to the underlying scientific advice. This approach gives stocks with large landings a disproportionately large influence on the result, while smaller stocks with smaller landings are essentially ignored. Importantly, the latter are often those stocks that are depleted and most in need of urgent action to allow for recovery. So, by giving such stocks less weight in reporting due to their low landings volumes, the resulting conclusion is more positive than if all stocks were weighted equally by reporting on the number of stocks instead (as done by STECF and Cefas). In/exclusion of certain stocks with large landings can also distort the results considerably, and can be used to make the results look better or worse. Finally, calling a fishery “*sustainable*” based on the target TACs following advice, while vulnerable bycatch stocks remain in a dire state is also clearly misleading. While some of these aspects have improved in more recent reports from the Commission, these principle points remain valid. The UK’s approach developed by Cefas represents an important step towards transparent, clear reporting that is not misleadingly positive and recognises shortcomings that are yet to be addressed. It could also serve as an important basis for further discussions between the UK and the EU to ensure a consistent reporting methodology on both sides of the Channel.

## 3.2 Challenges and limitations in reporting

As demonstrated in section 3.1, there are multiple approaches to reporting on progress towards the CFP’s MSY objective and the corresponding sustainability provisions in the TCA and UK law, all of which are subject to certain challenges and limitations. This section provides an overview of some of these aspects as a basis for an explanation of the choices made for this report and their implications in section 3.3.

### 3.2.1 Limitations of scientific advice

Despite improvements over the past years, scientific advice on catch levels that are in line with delivering MSY is only available for a fraction of all stocks (82% of the stocks included in the 2023 analysis presented

99 For example, European Commission (2020), Communication from the Commission to the European Parliament and the Council, Towards more sustainable fishing in the EU: state of play and orientation for 2021, COM (2020) 248 Final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:0248:FIN>, p. 2. A similar statement was repeated by a Commission representative at a PECH hearing on 10 May 2021.

100 See footnote 92.

101 ClientEarth (2020). Let’s get the numbers right: What proportion of fish stocks are sustainably managed in the EU? July 2020.

<https://www.clientearth.org/latest/documents/let-s-get-the-numbers-right-what-proportion-of-fish-stocks-are-sustainably-managed-in-the-eu/>.

102 Bell et al. (2022) and Bell et al. (2023), see footnotes 93 and 95.

103 New Economics Foundation (2020). Landing the blame: Overfishing in the Northeast Atlantic 2019, p. 7.

[https://neweconomics.org/uploads/files/NEF\\_LTB\\_ATLANTIC\\_2019.pdf](https://neweconomics.org/uploads/files/NEF_LTB_ATLANTIC_2019.pdf). For the 2019 TACs, 32% of those subject to the Coastal States agreement exceeded scientific advice, compared to 6% for EU-only stocks.

in this report), due to data limitations which prevent full stock assessments in many cases. While TACs can be compared to scientific advice irrespective of the advice basis, concrete conclusions regarding progress of TAC-setting specifically towards achieving the MSY objective remain limited to that subset of stocks for which MSY-based advice is available for the whole time-series covered by the analysis.

### 3.2.2 Area mismatch between TACs and scientific advice

The fact that the management units for which the TACs are set do not always correspond to the stock units that ICES provides its scientific advice for presents a further challenge. In many cases, the TAC area is larger or smaller than the stock area covered by the scientific advice, or both the TAC and the advice area overlap only partially. As demonstrated in our briefing on this topic,<sup>104</sup> such “mismatch” issues apply in fact to the majority of potential comparisons of TACs and scientific advice. Importantly, in many cases the mismatch cannot be resolved without additional information or assumptions, e.g. on the proportion of catches in those parts of the area where the TAC- and advice-units overlap. This means no robust conclusions can be drawn if the necessary additional information is not readily available or assumptions cannot be reliably validated. This makes it difficult for external stakeholders to monitor whether TACs subject to mismatch are being proposed and set in line with the legal requirements. As a result, the scope of reports on comparisons between TACs and scientific advice is further decreased when comparisons subject to such mismatch are excluded. For further details on this topic, please refer to the afore-mentioned briefing.<sup>105</sup>

It seems like the awareness of and interest in the mismatch issue have been growing within the scientific community and also amongst decision-makers over the years. For example, the issue is recognised by Cefas and reflected in the methodology developed for the UK’s reporting on the sustainability of catch limits negotiated by the UK,<sup>106</sup> and the TCA includes a commitment to request ICES to look into “*the alignment of the management areas and the assessment units used by ICES*” for a number of stocks specified in Annex 35.<sup>107</sup> More recently, this topic has been on the agenda of the SCF which released a recommendation regarding the alignment of management areas for lemon sole and witch as well as turbot and brill,<sup>108</sup> with a few other stocks like Celtic Sea whiting and plaice in the English Channel still under debate.<sup>109</sup>

### 3.2.3 Other complicating factors

The gradual **change in the purpose of TACs from regulating landings to regulating catches** due to the phasing in of the landing obligation between 2015 and 2019 (see section 2.3) poses a number of additional reporting challenges.<sup>110</sup> The main difficulty lies in identifying which TACs or stocks are subject to the landing obligation, and to what extent, in a given year, and assessing whether any applied quota adjustments indeed accurately reflect previous discards that now have to be landed (re: top-ups),<sup>111</sup> or exemption discards that continue to be allowed (re: deductions).

Furthermore, as indicated in section 2.2, there are **various different decision-making processes involving different actors**. The majority of TACs in the annual TAC and Quota Regulation for the

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104 ClientEarth (2016). Mismatch between TACs and ICES advice - Why it is an issue and how to address it. <https://www.clientearth.org/latest/documents/mismatch-between-tacs-and-ices-advice-why-it-is-an-issue-and-how-to-address-it/>.

105 *Ibid.*

106 This issue is also explicitly recognised by Cefas and reflected in the methodology it developed for the UK’s reporting on the sustainability of catch limits negotiated by the UK. Nash et al. (2021), see footnote 94.

107 Article 504 of the TCA.

108 Recommendation No 2/2023 of the Specialised Committee on Fisheries established by Article 8(1)(q) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of 24 July 2023, as regards the alignment of management areas for Lemon Sole, Witch, Turbot and Brill.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1176489/RECOMMENDATION\\_22023\\_alignment\\_of\\_management\\_areas\\_for\\_lemon\\_sole\\_witch\\_turbot\\_and\\_brill.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1176489/RECOMMENDATION_22023_alignment_of_management_areas_for_lemon_sole_witch_turbot_and_brill.pdf).

109 See item 2.d) b. in the minutes of the sixth meeting of the SCF on 27 June 2023.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1172310/SCF\\_6th\\_meeting\\_minutes\\_27\\_06\\_23.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1172310/SCF_6th_meeting_minutes_27_06_23.pdf).

110 See Figure 1 in ClientEarth’s briefing for an illustration of this change: ClientEarth (2020). Setting Total Allowable Catches (TACs) in the context of the Landing Obligation. July 2020. <https://www.clientearth.org/latest/documents/setting-total-allowable-catches-tacs-in-the-context-of-the-landing-obligation/>.

111 For further details on the challenges posed by quota top-ups for monitoring progress of TAC decisions towards MSY, refer to our briefing, see footnote 55.

Northeast Atlantic used to be agreed by the Council of EU fisheries ministers during the December Council meeting – but close to two thirds of the stocks have now turned into EU/UK shared stocks going forward.<sup>112</sup> However, the Regulation also contains a number of TACs subject to negotiations or swaps with other third countries such as Norway, as well as some cases where the EU and others set unilateral quotas. Since the respective decision-making process is not explicitly specified for each TAC, this adds a further layer of complexity in the analysis, if the intention of the resulting report is to distinguish between the different processes.

Finally, **many stocks now fall under EU multi-annual plans (MAPs)**, such as the North Sea and the Western Waters MAP, respectively. While these MAPs were adopted under the CFP, they contain a number of provisions which are not fully aligned with the CFP's Article 2(2) objective. In particular, they provide for the use of  $F_{MSY}$  ranges which go beyond the  $F_{MSY}$  point value,<sup>113</sup> and differentiate between target stocks and those which are primarily caught as bycatch, by applying  $F_{MSY}$  ranges to target stocks, while managing bycatch stocks using the precautionary approach. This makes reporting more difficult and risks inconsistencies across the years, for example when a stock previously subject to advice based on the  $F_{MSY}$  point value is now subject to  $F_{MSY}$  ranges specified in a MAP, meaning that the comparison baseline has shifted.

In conclusion, all the above-mentioned challenges mean that the scope of reporting on progress towards achieving the CFP's MSY objective and the corresponding sustainability provisions in the TCA and UK law may cover only a fraction of the scope of these requirements themselves, which cover all harvested stocks. This means that any report on this topic needs to be very clear about a) the limitations of its scope in relation to that of the requirements of the CFP, the TCA and UK law, and b) the extent to which conclusions drawn on the basis of the presented analysis are applicable beyond its scope.

## Recommendations on reporting

The Commission, the UK's Defra and Cefas and all others with the ambition of monitoring and reporting on progress towards MSY and achieving the requirements of the CFP, the TCA and UK law should:

- Ensure accurate, robust, reliable and comprehensive reporting, by
  - Covering all harvested stocks, not just stocks with MSY-based advice;
  - Reporting on progress regarding available reference points or trends regarding time series where MSY reference points are not available;
  - Focusing not just on fishing mortality, but *inter alia* also including biomass trends and a comparison of TACs with scientific advice;
  - Not including misleading wording or figures that paint an inaccurate picture of the situation and of progress towards achieving the objectives of the CFP and/or the UK's fisheries legislation;
  - Focusing on stock or TAC numbers rather than volumes of landings, and including clear caveats on the implications of volume-based statistics whenever these are presented.
- Include a clear explanation of the approach taken and data used for any figures not originating from the underlying STECF or Cefas reports;
- Explicitly recognise limitations in scope and implications of the approach taken to avoid misrepresentation or misinterpretation of results.

<sup>112</sup> See footnote 51 for details.

<sup>113</sup> See section 2.1 for an explanation why  $F_{MSY}$  should be treated as a limit, not a target, meaning that it should not be exceeded.

## 3.3 Scope and approach used in this report

All of the above considerations clearly illustrate that reliable, comprehensive and unambiguous reporting on progress towards the CFP's MSY objective and the corresponding sustainability provisions in the TCA and UK law is not a straightforward undertaking. This section therefore outlines the scope, metrics and methods used in this report to ensure that its findings can be interpreted in the right context.

### 3.3.1 Scope and metrics of the report

The core analysis of the present report focuses on the TACs agreed by EU ministers at December Council for the years 2015 to 2023, as well as the EU/UK shared TACs set for 2021 onwards under the new TCA. It does not cover those TACs agreed through other processes, such as October Council for the Baltic, the biannual setting of Deep Sea TACs, negotiations with third countries such as Norway, or shared stocks subject to unilateral quotas set by the EU and other countries.<sup>114</sup> The focus is thus on TACs for which responsibility lies with EU ministers, the Commission (regarding the corresponding proposals, and negotiations with the UK) and the UK as an independent Party from 2021 onwards.

It also excludes cases subject to certain types of mismatch between the area for which the TACs are set and the stock area for which scientific advice is provided, where this mismatch cannot be resolved without further information that is not readily publicly available (see section 3.2.2). Specifically, the core analysis includes only comparisons without mismatch, or cases where the TAC area is larger than the scientific stock advice area (for example to avoid misreporting).<sup>115</sup> All comparisons where the TAC area is smaller than the advice area (meaning that parts of the relevant stocks are not subject to a TAC), or where the TAC and advice areas overlap only partially (meaning that the TAC and advice figures are not directly comparable) were excluded from the core analysis. However, the report does present some observations and reflections on shared stocks subject to other TAC-setting processes and stocks subject to mismatch, which are outside the scope of the core analysis, in section 4.7.

The report covers all stocks subject to TACs that meet the above-mentioned criteria, i.e. stocks for which MSY-based advice was available and those where ICES instead provided precautionary advice or, in previous years, advice based on the ICES approach to data-limited stocks. The TACs and respective comparisons included and not included in the core analysis are listed in Annex II and III, respectively. Overall, based on TACs in place for 2022, the core analysis of the present report covers 53 comparisons between TACs and scientific advice, involving 59 TACs, and 82 stocks.

The main part of the report is a comparison of both the TACs agreed by EU ministers and those agreed between the EU and the UK with the underlying scientific advice (section 4.1). This analysis was conducted for TACs agreed for 2015 to 2023, and since 2021 the results are now also presented separately for TACs with and without a UK share, to identify potential patterns or trends regarding EU only versus EU/UK shared TACs and serve as a baseline for monitoring changes going forward. The additional evaluation of Member State positions ahead of December Council previously provided in section 5 of past versions of this report,<sup>116</sup> covering the December Council processes in 2016, 2017 and 2018, is no longer included. Previous versions of this report also contained an analysis of the Commission's proposal and a comparison of the agreed with the proposed TACs. Since the majority of the TACs previously agreed during December

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<sup>114</sup> Since the UK was still an EU member during December Council 2019, the relevant TACs which are now subject to EU-UK negotiations are still included.

<sup>115</sup> Note that in a number of cases included in the core analysis the stocks covered occur also in waters of third countries, such as Norway. It is possible that these third countries set additional fishing quotas for these stocks in their own waters, which are not reflected in the EU TAC and Quota Regulation, or that further unregulated catches take place. If this is indeed the case, conclusions drawn based on the current report regarding the sustainability of the EU or EU/UK shared TACs may be too optimistic, since they essentially assume that no fishing is allowed or taking place beyond the TACs specified in the TAC and Quota Regulation. However, for the purposes of this report this possibility was not further investigated, i.e. the core analysis focuses on a comparison of the TACs (as specified in the relevant TAC and Quota Regulations) with the corresponding ICES advice.

<sup>116</sup> Most recently included in the version published in 2020: ClientEarth (2020). Taking stock – are TACs set to achieve MSY? October 2020. <https://www.clientearth.org/latest/documents/taking-stock-2020-are-tacs-set-to-achieve-msy/>.

Council are now shared between the EU and the UK, without a concrete TAC proposal being published by the Commission ahead of the negotiations for these TACs, this part of the analysis was discontinued.

It is important to note that, like the Cefas report, this report focuses on TAC-setting, rather than on the situation of stocks in terms of levels of biomass or fishing mortality (see Table 1 in section 3.1 for an overview of different reporting options), which is covered for example by the aforementioned reports produced by the STECF.<sup>117</sup> Therefore, the key emphasis is on assessing the extent to which the TAC-setting as such, i.e. the management intention, is aligned with the sustainability requirements of the CFP, the TCA and UK law, rather than evaluating the resulting catch levels or stock situation. Some basic information on the latter is however partially incorporated into the analysis based on details on fishing mortality and biomass in relation to reference points as specified in the respective ICES advice (see section 3.3.3).

### 3.3.2 Data used

This report uses six key sources of information regarding the selected subset of stocks and TACs outlined in section 3.3.1:

- The scientific advice provided by ICES for 2015 to 2023;
- Non-papers from the Commission regarding quota adjustments such as top-ups or exemption deductions for 2015 to 2021;<sup>118</sup>
- The agreed TACs as recorded in the TAC and Quota Regulations for 2015 to 2023;
- The agreed EU/UK shared TACs as recorded in the agreed written records for 2021, 2022 and 2023;<sup>119,120,121</sup>
- The most up-to-date discard plans valid in each of the years 2015 to 2021;<sup>122</sup>
- The agreed multiannual plans for the North Sea and the Western Waters.

Multiple Excel spreadsheets were set up as a database to systematically store all the information from the above documents, which was needed for the analysis, for all stocks and TACs falling within the scope of this report. Further details on the information used and how it was processed for the purposes of this report can be found in Annex IV.

### 3.3.3 Methods and caveats

For the **comparison of agreed TACs with the underlying scientific advice**, the TACs were matched up with the corresponding stocks based on the descriptions of the species-area combinations specified in the TAC and Quota Regulation and the ICES advice, respectively. Where a TAC covers more than one stock, or vice versa, the respective advice or TACs were added up, respectively. Note that where more than one stock is covered by one TAC, no conclusion can be drawn regarding the sustainability of the TAC for each one of the stocks, but only regarding the alignment of the TAC with the sum of the advice for all stocks included in the comparison.

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117 See footnote 97 for the latest edition, STECF-Adhoc-23-01.

118 Since 2021 the TAC values specified in the TAC and Quota Regulation directly refer to the pre-deduction values, so a review of such Commission non-papers to reconstruct the TACs before deductions were applied is no longer necessary for recent years.

119 Written record of fisheries consultations between the United Kingdom and the European Union for 2021. Adopted 11<sup>th</sup> June 2021. [https://oceans-and-fisheries.ec.europa.eu/system/files/2021-06/2021-eu-uk-fisheries-consultations\\_en\\_0.pdf](https://oceans-and-fisheries.ec.europa.eu/system/files/2021-06/2021-eu-uk-fisheries-consultations_en_0.pdf).

120 Written record of fisheries consultations between the United Kingdom and the European Union for 2022. Adopted 21<sup>st</sup> December 2021. [https://oceans-and-fisheries.ec.europa.eu/system/files/2022-01/2022-eu-uk-fisheries-consultations\\_en.pdf](https://oceans-and-fisheries.ec.europa.eu/system/files/2022-01/2022-eu-uk-fisheries-consultations_en.pdf).

121 Written record of fisheries consultations between the United Kingdom and the European Union for 2024. Adopted 19 December 2022. [https://oceans-and-fisheries.ec.europa.eu/system/files/2022-12/2023-eu-uk-fisheries-consultations\\_en.pdf](https://oceans-and-fisheries.ec.europa.eu/system/files/2022-12/2023-eu-uk-fisheries-consultations_en.pdf).

122 These were primarily used to identify stocks subject to exemptions from the landing obligation to be reflected in the TAC analysis. This was necessary in order to calculate the relevant TAC value before any adjustments (top-ups until 2019 and deductions since then) had been applied to account for exemption discards. Note that since 2021 the TAC values specified in the TAC and Quota Regulation directly refer to the pre-deduction values, and this step is therefore no longer necessary.



Any **comparisons falling outside of the scope of this report** were removed from the core analysis in line with the criteria outlined in section 3.3.1. However, some observations on the comparisons not included in the core analysis are presented in section 4.7.

**All comparisons are based on the official ICES headline advice** as specified at the top of the respective ICES advice document,<sup>123</sup> and all stocks within the scope of this report were included, irrespective of the advice basis. However, comparisons involving only stocks for which MSY-based advice was available and those involving stocks with precautionary advice, were also analysed separately, in order to allow for more nuanced conclusions depending on the advice basis. Where the ICES advice is based on  $F_{MSY}$  ranges, the comparison is based on the  $F_{MSY}$  point value to ensure consistency throughout the analysis. The statistics were computed both for all included TACs in the scope of the report altogether, and separately for EU only and EU/UK shared stocks (both after the formal process change for 2021, and throughout the time series 2015-2020 when the UK was still an EU member, to serve as a baseline going forward).

This year's report includes **additional metrics regarding the extent to which progress made from year to year in aligning TACs with scientific advice was retained or lost again** (see section 4.7). This new part of the analysis is based on a comparison of the situation between consecutive years, and cases for which one of the two compared years was not included (e.g. due to lack of advice), were excluded from this part of the analysis.

The **change in the purpose of TACs from regulating landings to regulating catches** throughout the introduction of the landing obligation was reflected in the analysis as follows: whether or not a TAC was at least partially subject to the landing obligation in any given year was determined based on the specifications in Article 15(1) of the CFP Basic Regulation and in the relevant discard plans.<sup>124</sup> In principle, TACs that were considered fully subject to the landing obligation were compared to ICES catch advice, and TACs that were considered only partially or not at all subject to the landing obligation were compared to the ICES advice on landings (or "wanted catch"). Cases where the respective catch or landings advice was not available in a given year were removed from any calculations for that particular year, but still included for the remaining years for which the relevant advice was available.

As explained in section 2.3, **quota adjustments** have been applied since the introduction of the landing obligation in 2015 to reflect the change from regulating landings to regulating catches: top-ups during the phasing in from 2015 to 2018, and deductions since the landing obligation came fully into force from 2019 onwards. These quota adjustments add another level of complexity to comparisons of TACs with the underlying scientific advice (for further details on this topic, please refer to our briefing on quota top-ups).<sup>125</sup> An assessment of the extent to which the applied quota adjustments are appropriate, i.e. in line with previous discards (re: top-ups) or exemption discards (re: deductions), was outside the scope of this report. However, the application of such adjustments was reflected in the TAC analysis as follows, to make the proposed and agreed TACs comparable to the underlying ICES advice:

- For TACs applying from 2015 to 2018: quota top-ups were deducted from the agreed TACs before comparing the resulting values to the ICES advice for landings (or "wanted catch");
- For TACs applying from 2019 onwards: exemption deductions were added back on top of the agreed TACs before comparing the resulting values to the ICES advice for catches. Note that the figures presented in the EU/UK agreed written records for 2021 onwards were the pre-deduction values and were therefore used as specified and directly compared to the catch advice.

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<sup>123</sup> For further explanations on why this constitutes the best available scientific advice as referred to in the CFP and the TCA, please refer to our briefing: ClientEarth (2020). What is the 'best available scientific advice' for setting Total Allowable Catches (TACs)? December 2020.

<https://www.clientearth.org/latest/documents/what-is-the-best-available-scientific-advice-for-setting-total-allowable-catches-tacs/>.

<sup>124</sup> ClientEarth (2016). Quota top-ups and monitoring progress of TAC decisions towards MSY - Why top-up calculations are both crucial and challenging.

<https://www.clientearth.org/latest/documents/quota-top-ups-and-monitoring-progress-of-tac-decisions-towards-msy-why-top-up-calculations-are-both-crucial-and-challenging/>, particularly sections 3.1 and 3.2.

<sup>125</sup> *Ibid.*

The approach used for the TACs for 2019 onwards recognises that in principle all catches subject to TACs (unless under an exemption) now have to be landed. It is however important to note that this approach is based on the assumption that a) the landing obligation is fully complied with, without any illegal discards beyond the agreed catch limits, and b) that any dead discards allowed under exemptions have been deducted from the relevant TACs. Given severe concerns about the general lack of compliance with the landing obligation,<sup>126</sup> and the fact that in a number of cases no deductions were applied even though the relevant TACs are subject to exemptions,<sup>127</sup> the results of the analysis for TACs for 2019 onwards therefore need to be treated with caution: these are likely to over- rather than underestimate the sustainability of these TACs. ClientEarth's briefing on setting TACs in the context of the landing obligation and presentation of the risks associated with catch-based TACs in combination with illegal discards further illustrates this issue,<sup>128</sup> and ClientEarth's reports provide further details on serious shortcomings in the control of the landing obligation in France,<sup>129</sup> Spain<sup>130</sup> and Denmark.<sup>131</sup>

Finally, throughout the update of the analysis for the 2023 TACs **a number of small errors in the historical time series were discovered and corrected** (including some TAC/advice comparisons that were previously excluded for certain years now being included), resulting in slightly changed values for some of the metrics in some of the years. The changes made compared to previous editions of this report are listed in Annex V. Moreover, the categorisation into "target" and "bycatch" stocks for the analysis in section 4.4 was reviewed and partially updated in order to reflect for example that some stocks previously listed as "target" in one of the multi-annual plans are effectively now bycatch stocks and subject to bycatch TACs. However, the overall trends and conclusions remain unaffected by these corrections.

## 4 Analysis of agreed TACs

### 4.1 TACs overall, for the EU only and for EU/UK shared stocks

This section presents some overarching results of the comparison between the agreed TACs and the underlying ICES advice, looking at all analysed TACs overall as well as split into those referring to the EU only (without the UK) and those shared between the EU and the UK. The EU/UK shared TACs for 2021 onwards were set under the new negotiation process between the EU and the UK instead of the regular December Council process. However, the graphs presented in this report also present this split into EU only and EU/UK shared TACs for the years 2015-2020 in order to illustrate any potential patterns related to the UK's involvement predating Brexit. Going forward, this will also function as a baseline against which changes in the TAC-setting post-Brexit can be measured. For an analysis of the Commission's December Council TAC proposals for 2015-2020 which is no longer included in this report, please refer to the "Taking stock 2020" report.<sup>132</sup> The results presented in this section reflect some corrections made throughout the update of the underlying analysis (see Annex V), which have resulted in a number of small changes

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126 As highlighted for example in the Commission's communication to the European Parliament and the Council regarding fishing opportunities for 2024, as well as the accompanying staff working document, see footnote 58. The Commission has also opened infringement proceedings against France, Spain, Ireland, Belgium and the Netherlands due to their failure to properly control the implementation of the landing obligation.

[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_4681](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681); [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_5342](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_5342).

127 For example, for 2021 there were 12 TAC/advice comparisons involving TACs subject to a *de minimis* exemption for which no deductions appear to have been applied, including for example sole in the Kattegat and area 7h-k, as well as boarfish, southern horse mackerel and a few others, particularly in South Western Waters (e.g. whiting, pollack and plaice in areas 8 and 9). In several additional cases, high survival exemptions were granted without deductions being applied to account for residual mortality.

128 ClientEarth (2020). Setting Total Allowable Catches (TACs) in the context of the Landing Obligation. July 2020.

<https://www.clientearth.org/latest/documents/setting-total-allowable-catches-tacs-in-the-context-of-the-landing-obligation/>. This briefing explains the risk posed by the combination of catch-based TACs and illegal discarding, also highlighted in this 5 minute presentation (starting at 15:30) which was part of an NGO press briefing ahead of December Council 2020: <https://youtu.be/Cw783NtRdCg?t=930>.

129 ClientEarth (2019). The control of the landing obligation in France. October 2019. <https://www.clientearth.org/latest/documents/the-control-of-the-landing-obligation-in-france/>.

130 ClientEarth (2019). The control of the landing obligation in Spain. October 2019. <https://www.clientearth.org/latest/documents/the-control-of-the-landing-obligation-in-spain/>.

131 ClientEarth (2019). The control of the landing obligation in Denmark. October 2019. <https://www.clientearth.org/latest/documents/the-control-of-the-landing-obligation-in-denmark/>.

132 ClientEarth (2020). Taking stock 2020 – are TACs set to achieve MSY? October 2020. <https://www.clientearth.org/latest/documents/taking-stock-2020-are-tacs-set-to-achieve-msy/>.

regarding values presented for previous years but do not change the overall findings. These corrections were applied for the current report, but not retrospectively for previous reports.

The scientific advice to which the agreed TACs were compared was always the official headline ICES advice, or the advice corresponding to the  $F_{MSY}$  point value where the ICES advice is based on  $F_{MSY}$  ranges. The analysis covers the TACs for 2015 to 2023 within the core analysis subset as described in section 3.3.1. It looks at several metrics, including

- a) the number and percentage of TAC/advice comparisons where the advice was (not) followed;
- b) the volume in tonnes and percentage of the overall TACs where the advice was (not) followed;
- c) the volume in tonnes and percentage by which the agreed TACs differed from the advice; and
- d) the average percentage difference between the agreed and advised TACs per comparison.

All of these metrics tell a different part of the story and it is therefore important not to treat them in isolation of each other, in order to avoid misinterpretation. A more detailed analysis of TAC-setting in relation to scientific advice, depending on the basis of that advice (ICES MSY approach versus ICES precautionary approach), and depending on whether the stocks in question are considered bycatch or target stocks, is presented in sections 4.3 and 4.4, respectively. Note that throughout this analysis a TAC was considered to be in line with the scientific advice where it differed by less than 2.5% from the corresponding scientific advice.<sup>133</sup>

After a slight increase between 2015 and 2016, **the overall percentage of agreed TACs exceeding the advice** (not split into EU only and EU/UK shared stocks) **declined from almost 71% in 2016 to 48% in 2020** and further to **25% in 2023** (see Figure 1). Despite some progress in this regard, almost half of the agreed TACs were thus still set above scientific advice for 2020, the year of the 2020 MSY deadline to end overfishing. **The first three rounds of post-Brexit TACs for 2021, 2022 and 2023 represent an improvement, but a quarter of the TACs still exceeded the advice in 2023, three years after the 2020 MSY deadline.** Notably, the direction and extent of change between 2020 and 2021 and then again between 2021 and 2022 differed when looking separately at the EU only TACs set during December Council and the EU/UK shared TACs negotiated under the TCA: while the percentage of EU only TACs set above advice dropped from 55% in 2020 to 40% in 2021, progress for EU/UK shared TACs was actually slightly reversed (44% in 2020 and 46% in 2021).<sup>134</sup> However, there was no progress from 2021 to 2022 for EU only stocks (40% for both years), whereas the percentage of excessive TACs dropped from 46% to 31% for EU/UK shared stocks.

For 2023, the final year of the time series, progress was made both for EU only and EU/UK shared TACs, with a very similar result of 25% and 26% still exceeding the advice, respectively. This corresponds to **75% and 74% of the assessed 2023 TACs following scientific advice for EU only and EU/UK shared stocks, respectively.** It is worth noting that last year's Cefas analysis of TACs negotiated by the UK for 2020, 2021 and 2022, as well as its updated analysis for the 2023 TACs, present a much more pessimistic conclusion, finding that only just over a third of these TACs were set in line with scientific advice for each of the three years 2020-2022,<sup>135</sup> followed by a small improvement to 40% for 2023.<sup>136</sup> As outlined in section 3.1, any discrepancies between these findings and the present report are most likely due to differences in scope or parts of the methodology used.<sup>137</sup> However, the message that a substantial proportion of TACs continues to be set above scientific advice is consistent across both analyses.

133 Except in calculations (e.g. regarding average percentage difference between TACs and advice per TAC/advice comparison) with a differentiation between TACs higher vs. lower than the scientific advice. In such cases the split between > and < advice was made at 0.

134 Please note however the caveat regarding the impact of the exclusion of the sandeel TACs on the result presented later on in this section.

135 Bell, E., Nash, R., Garnacho, E., De Oliveira, J., O'Brien, C. (2022). Assessing the sustainability of fisheries catch limits negotiated by the UK for 2020 to 2022. Cefas. 38 pp. 2 January 2022.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1061261/Assessing\\_negotiated\\_catch\\_limits\\_2020\\_to\\_2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061261/Assessing_negotiated_catch_limits_2020_to_2022.pdf).

136 Bell ED, Nash RMD, Garnacho E, De Oliveira J, Hanin M, Gilmour F, O'Brien CM 2023. Assessing the sustainability of negotiated fisheries catch limits by the UK for 2023. Cefas project report for Defra. Assessing the sustainability of negotiated fisheries catch limits for the UK in 2023. Cefas project report for Defra. 30 pp.

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1143586/Assessing\\_the\\_sustainability\\_of\\_fisheries\\_catch\\_limits\\_negotiated\\_by\\_the\\_UK\\_for\\_2023.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1143586/Assessing_the_sustainability_of_fisheries_catch_limits_negotiated_by_the_UK_for_2023.pdf).

137 See footnote 96.

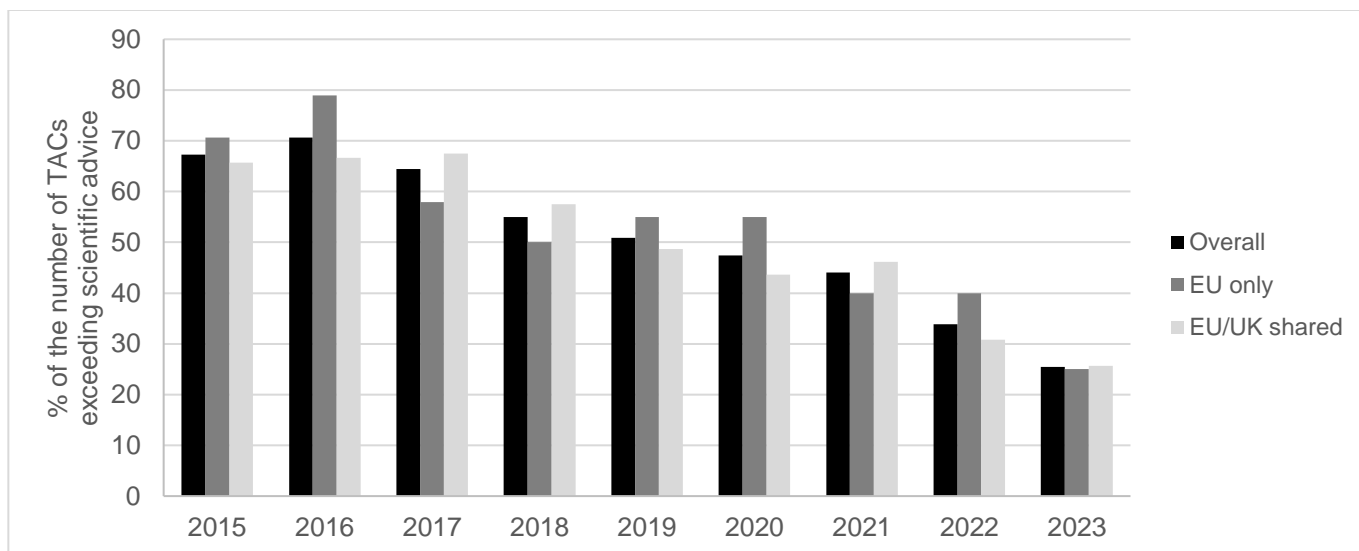


Figure 1. Time series of the percentage of the number of agreed TACs overall (black), for the EU only (dark grey) and shared between the EU and the UK (light grey) that exceeded the corresponding scientific advice.

The situation is very similar when looking at trends in the tonnage (rather than the number) of those TACs agreed above versus in line with the scientific advice (see Figure 2): following an increase from 2015 to 2016, **the percentage of the overall TAC tonnage accounted for by TACs set above scientific advice decreased since** a high of 51% (or 194612 t) in **2016** to 14% (or 59832 t) in 2020. The declining trend reversed slightly for 2021 (16% or 70800 t), before dropping again in 2022 to 7% (or 28016 t) and 6% (or 29131 t) in 2023, the lowest percentage in the time series. When looking at the EU only and EU/UK shared TACs separately (Figure 2 b and c) it is clear, that **the situation with regards to this volume-based metric has been consistently worse for EU/UK shared TACs throughout the time series**. The reversal in the progressive trend from 2020 to 2021 was driven by the increase in the percentage of the TAC volume accounted for by TACs exceeding advice for EU/UK shared stocks to over 25%. At the same time this metric continued to improve for 2021 for the EU only TACs set by December Council, and the percentage for the EU/UK shared stocks finally also dropped below 8% for the first time in 2022.

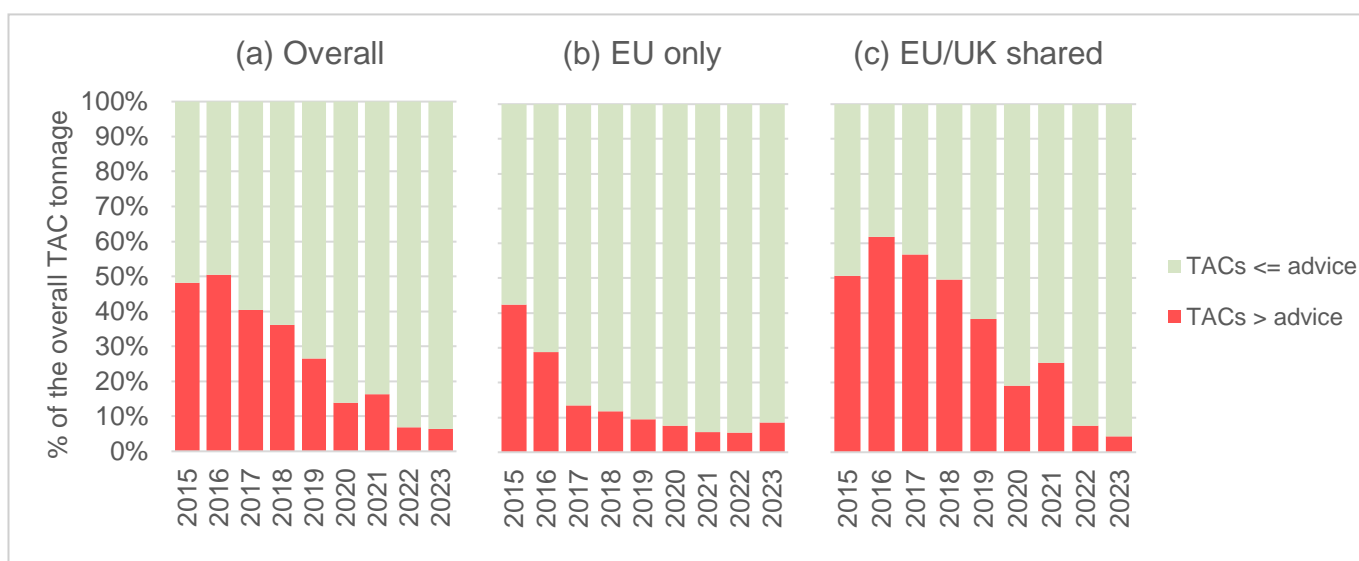


Figure 2. Time series of the tonnage of those TACs set above (red) versus in line with (green) the scientific advice, as a percentage of the total sum of TACs in tonnes per year, displayed for (a) all analysed TACs overall, (b) EU only TACs and (c) EU/UK shared TACs.

It is worth noting that the sandeel TACs, which were excluded from the analysis since they are not part of the regular winter TAC-setting cycle, have a big influence on the result both for the TAC volume- and TAC number-based metrics.<sup>138</sup> These TACs largely followed the scientific advice for 2021 and in some cases were even set below it due to the UK's push for an ecosystem-based approach to industrial fisheries for forage fish like sandeel. If they are included throughout the time series (based on the advice available at the time of TAC-setting in spring), the overall results for EU/UK shared stocks look more positive than presented here. However, the current report focuses on the decisions taken at December Council and as part of the main EU/UK negotiations which are usually completed by 20<sup>th</sup> of December and the sandeel results are therefore not included here.

**The overall excess volume of agreed TACs compared to scientific advice** (i.e. reflecting only those cases where the TACs were set above the advice) **has been continuously decreasing from 13% in 2015 to 3% in 2023** (see Figure 3 a and Figure 4 a). The patterns are slightly different when looking at EU only and EU/UK shared TACs separately (see Figure 3 b and c), with the % excess being larger for EU/UK shared TACs, and showing opposing trends between 2015 and 2017. However, the overall declining trend throughout much of the time series is apparent in both groups. The overall % difference (i.e. reflecting also cases where TACs were set in line with or below the advice) has been declining from 11% in 2016 to close to -4% in 2022, followed by an increase to -2% in 2023 (see Figure 3 a). For EU only stocks this metric has been negative (i.e. the total TAC volume was smaller than the total advice volume) from 2018 to 2022, whereas for EU/UK shared stocks it has dropped below 0 for the first time in 2022 (see Figure 3 b and c).

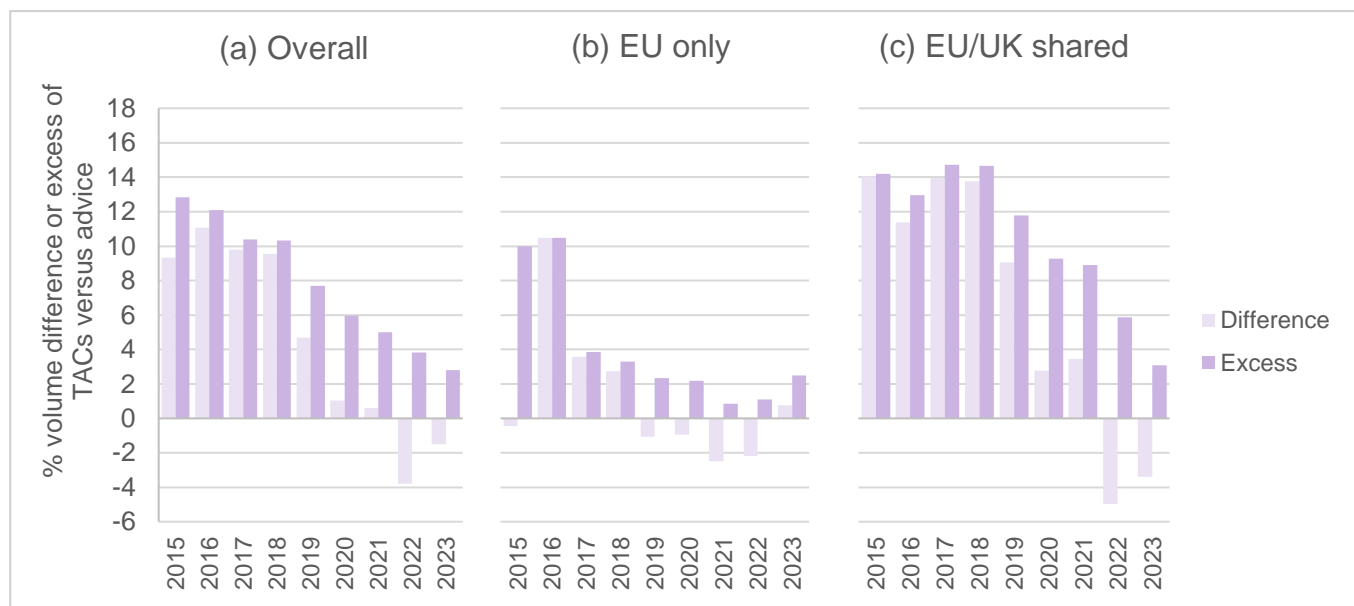


Figure 3. Time series of the percentage of the volume difference (light purple) and excess (darker purple) between the agreed TACs and the underlying scientific advice. The percentage is calculated in relation to the sum of the advice volume for each year, displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs. The “difference” figures refer to the overall difference between the agreed TAC volume and the advice volume (including both cases where TACs were set above the advice and cases where they were set in line with or below the advice, which is why these values are negative for some years). The “excess” figures cover only those cases where the agreed TAC exceeded the respective advice.

In summary, **there has been consistent progress overall as well as for EU only and EU/UK shared stocks separately, both in terms of the % volume difference and the % volume excess between TACs and advice.** The slight reversal of progress regarding the % difference in 2023 appears to be driven

<sup>138</sup> The sandeel TACs have been excluded from the December Council analyses for all years since the scientific advice for these stocks is usually only published at the start of the year following the December Council. The situation for 2021 was unique since the EU/UK TAC negotiations exceptionally continued until June 2021, so that the sandeel advice was already available at the time these TACs were finally agreed. For consistency with previous and future years in which the TAC negotiations will hopefully be concluded before the 10<sup>th</sup> of December of each year, in line with the TCA, the sandeel TACs were therefore not included for the 2021 analysis, like all other years, but their impact on the results was reflected in the text to allow the reader to consider this aspect.

by the increase in TAC excess for southern hake<sup>139</sup> and Irish Sea cod,<sup>140</sup> as well as a number of TACs previously set further below the advice moving back towards it.<sup>141</sup> Note that while the long-term progress is a step in the right direction, this metric does not reflect what happened on an individual TAC- or stock-level, and stocks with low advice and TAC volumes, such as depleted stocks, are underrepresented by volume-based metrics like this one.

While the overall percentage of the tonnage by which those TACs that were set above scientific advice exceeded the advice declined throughout the time series from around 13% in 2015 to 3% in 2023, **the percentage by which TACs not exceeding the advice undershot the advice has been mostly increasing from just below -1% in 2017 to -8% in 2022** (see Figure 4 a), with a backwards step in 2023 to -4%. A separate analysis for EU only and EU/UK shared TACs shows slightly different trends and results, with a larger undershoot in all years since 2020 for the EU/UK shared stocks compared to EU only stocks. Hence, **while the % excess has mostly been larger for EU/UK shared stocks, the percentage by which TACs have been set below the advice has improved more notably for EU/UK shared stocks than EU only stocks**. In fact, while the percentage TAC excess has been increasing again since the all-time low of 1% in 2021 for EU only stocks (to 3% in 2023), progress for EU/UK shared stocks has continued within the same timeframe (from 9% to 3%). **This might point towards a positive impact of the UK's departure on the alignment of TACs with scientific advice for EU/UK shared stocks, but whether this remains an ongoing trend remains to be seen in the coming years.**

Throughout most of the time series **when TACs were set above scientific advice, they usually exceeded it by a larger amount than the amount by which TACs that followed the advice undershot the advice**, indicating a bias towards exceeding the advice by a greater amount. This situation has become more balanced in recent years, and for the EU only stocks the % undershoot has even overtaken the % TAC excess between 2019 and 2022, and for the EU/UK shared stocks for 2022 and 2023. Note that the large undershoot for EU only stocks in 2015 is driven by the JAX/09.TAC for horse mackerel which was set at 59500 t, 12324 t below the ICES advice of 78124 t.

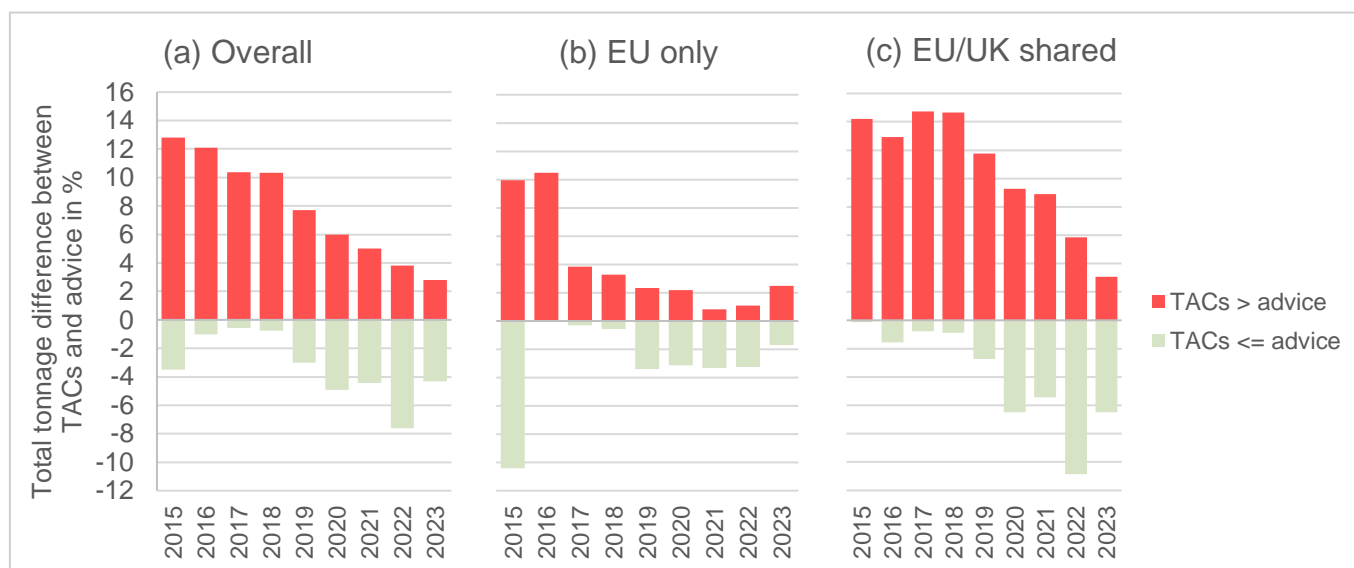


Figure 4. Time series of the difference between the total agreed TAC tonnage and the total tonnage of the scientific advice summed up across all TACs (percentage of the total advice sum), split by cases where the agreed TACs were set above (red) versus in line with or below (green) the scientific advice. The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs.

139 4134 tonnes above the advice of 11791 tonnes, up from above 889 tonnes above the advice of 6947 tonnes in 2022. Note that the advice was based on  $F_{MSY}$  ranges for both years and the TAC was set within the upper  $F_{MSY}$  range, but above the  $F_{MSY}$  point value, as specified here.

140 165 tonnes above the zero-catch advice, up from 132 tonnes above the advice of 74 tonnes in 2022.

141 This was the case for example for West of Scotland whiting, for which the TAC WHG/56-14 was set 2321 tonnes below the advice for 2022, but only 1526 tonnes below the advice for 2023.

The analysis of the average percentage difference between agreed and advised TACs per comparison shows a clear declining trend since 2016 (see Figure 5): **the agreed TACs have exceeded the advice by a decreasing amount on average since 2016**, declining from 42% to 20% in 2020, and then dropping substantially to 8% in 2021 and further to just over 1% in 2023. This declining trend throughout the time series is also apparent when analysing the EU only and EU/UK shared TACs separately (apart from a sort of stagnation for EU only stocks from 2019 to 2020, at 36%), with the drop between 2020 and 2021 being particularly steep for EU only stocks (36% to 8%). For EU/UK shared stocks, TACs on average undershot the advice for the first time in 2022, and again in 2023.

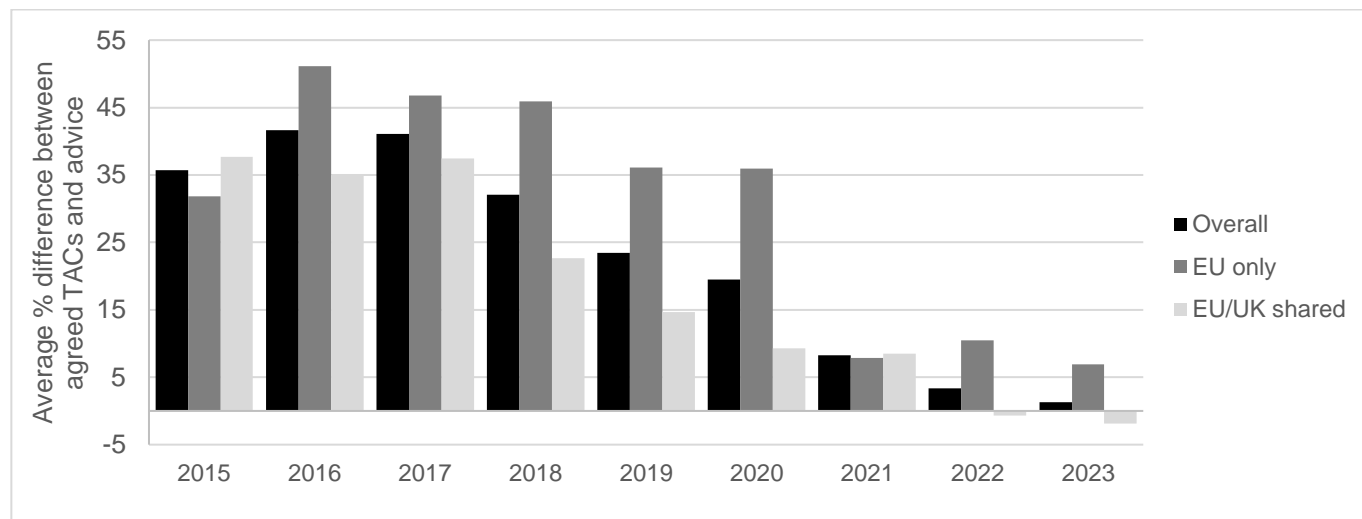


Figure 5. Time series of the average percentage difference per comparison between the agreed and advised TACs overall (black), for EU only TACs (dark grey) and EU/UK shared TACs (light grey), excluding outliers.

A split analysis looking at the average % difference between agreed TACs and advice for those cases where TACs were set above advice versus those where they were set at or below the advice, shows that **overall the average overshoot has been larger throughout the time series than the average undershoot** (see Figure 6 a).<sup>142</sup>

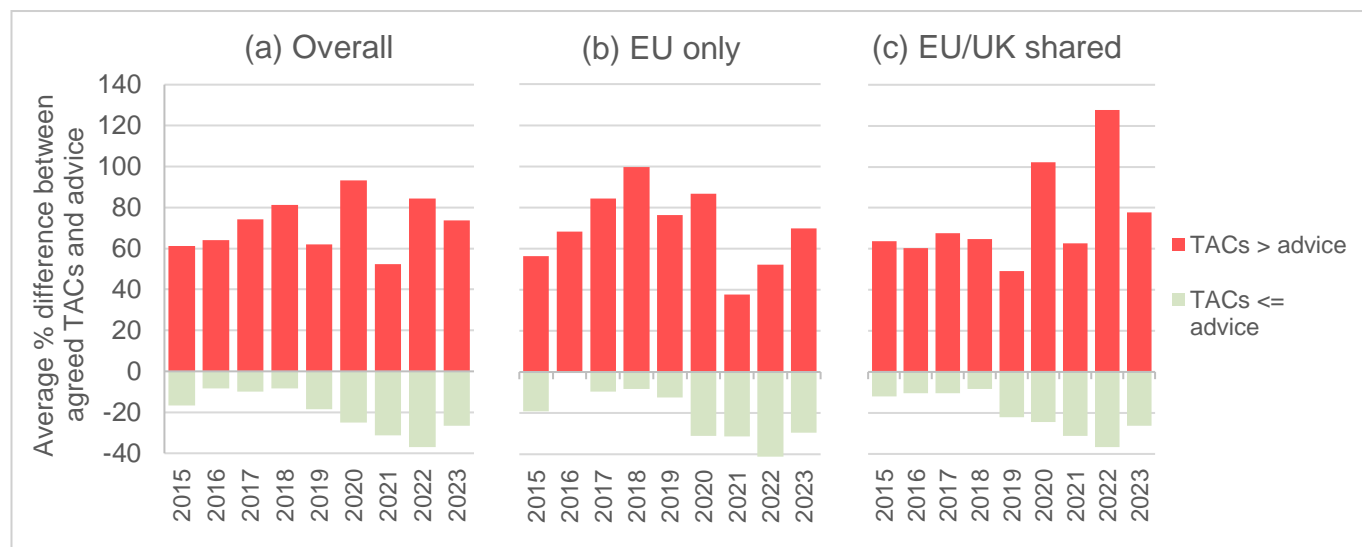


Figure 6. Time series of the average percentage difference per comparison between the agreed and advised TACs (a) overall, (b) for EU only TACs and (c) EU/UK shared TACs, split into those cases where TACs exceeded the advice (red) and those where they were set at or below the advice (light green).

<sup>142</sup> Note that cases where a non-zero TAC was set despite ICES advice for zero catch were not included in this metric, since no percentage could be computed.

However, **the average undershoot increased between 2018 and 2022, with a slight backwards step in 2023**, overall as well as for EU only and EU/UK shared stocks analysed separately (see Figure 6 b and c). Meanwhile, there does not appear to be a consistent trend throughout the time series for the average % overshoot. The big increase in the average % overshoot from 2021 to 2022 is mostly driven by the EU/UK shared stocks (Figure 6 b and c).<sup>143</sup>

The above findings illustrated in this section indicate that **progress has been made over the past few years regarding aligning the agreed TACs with the advice in terms of the majority of the analysed metrics: The percentage of the overall number of TACs which were set above advice has been declining (see Figure 1), as have the % TAC excess (see Figure 2, Figure 3, Figure 4) and the average % difference between TACs and advice (see Figure 5). A separate look at EU only and EU/UK shared TACs shows that both the pre-Brexit situation and the direction and extent of certain changes differ between both groups for some metrics. Broadly speaking, the first three rounds of post-Brexit TACs represent an improvement compared to 2020 both for EU only and EU/UK shared TACs. However, progress for EU only stocks was reversed for a number of metrics in recent years, and a quarter of the analysed TACs were still set above scientific advice in 2023 (see Figure 1), TACs still exceed the advice by 3% in total (see Figure 3) and by 1% on average (and even 7% for EU only stocks, see Figure 5), with the average TAC overshoot remaining larger than the average undershoot (see Figure 6). It is also worth noting that the average-percentage-based metrics presented in this section do not include depleted stocks subject to non-zero TACs despite scientific zero-catch advice (see section 4.6). This shows that a lot of work remains to be done to ensure fully sustainable TAC-setting going forward now that the 2020 MSY deadline has passed and the EU and the UK continue to develop their management of shared stocks.**

## 4.2 To cut or not to cut the TAC?

**For the majority of the time series the average percentage difference between the agreed TACs and the corresponding advice per TAC/advice comparison was much larger in cases where a cut was advised**, ranging between 55% for 2015-2016 and 70% for 2018-2019 (see Figure 7). Meanwhile, where a TAC rollover or increase was advised, the average percentage difference was quite small (and since 2016-2017 has been negative, meaning the agreed TACs were set below the advice on average), and showed a declining trend (i.e. becoming more negative) from 2016-2017 until 2021-2022, with a backwards step again for 2022-2023. Notably, the % average difference between TAC advice in cases where a cut was advised dropped substantially to 23% for 2020-2021, while at the same time the % average undershoot in cases where a rollover or increase was advised continued to increase to -15% for the same period and -19% for 2021-2022, with a slight reversal of progress for 2022-2023 (see Figure 7). This trend for TACs with an advised rollover or increase was even more pronounced for EU/UK shared TACs, and the drop in the % average difference for TACs where a cut was advised is also visible for both EU only and EU/UK shared TACs analysed separately. In summary, these patterns indicate **progress both in terms of exceeding advice when a cut is advised to a lesser extent than previously, and setting TACs increasingly further below advice on average where a rollover or increase is advised**. It remains to be seen whether the overall reversal of progress in this regard for 2022-2023 will continue going forward or represents an exception.

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<sup>143</sup> It is worth noting that the value for EU/UK shared stocks for 2022 is based on only four stocks (Irish Sea cod, Rockall cod, Celtic Sea pollack and undulate ray in Atlantic Iberian waters) and therefore more dependent on individual figures than for other years for which more stocks fell under the average overshoot metric. While the sum of the Union (50 t) and UK (0 t) shares for undulate ray for 2022 was only 50 t, the official TAC was specified as 100 t, which is the value used in last year's analysis. However, the Council later clarified in paragraph 51 of its response to ClientEarth's request for internal review of the first amendment to the TAC and Quota Regulation for 2022, that this was "an error" and that the "overall TAC should read 50 tonnes, equal to the Union TAC". Council's reply 10616/2/22 REV 2 of 14 July 2022, to ClientEarth's Request for internal review of Council Regulation (EU) 2022/515 of 31 March 2022 amending Council Regulation (EU) 2022/109 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in certain non-Union waters. <https://data.consilium.europa.eu/doc/document/ST-10616-2022-REV-2/en/pdf>. Since this correction has now been formally adopted, this value was now updated in the present analysis, whereas in the previous version of this report the initial TAC value of 100 tonnes was used.



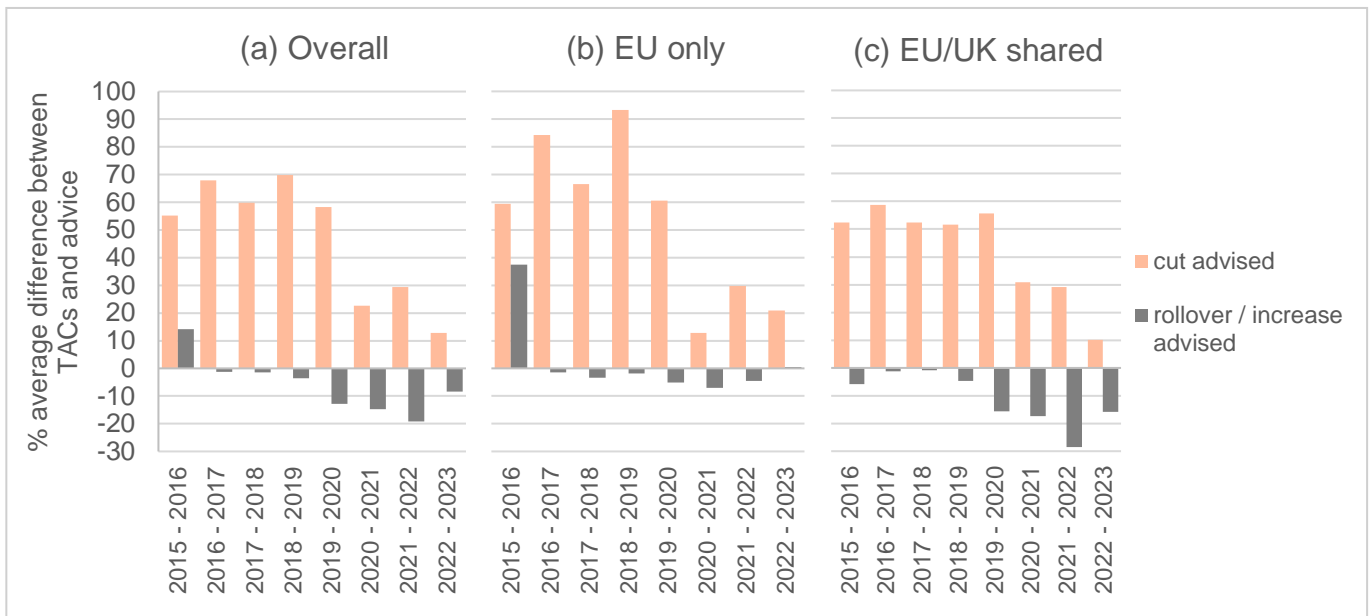


Figure 7. Time series of the percentage average difference between the agreed TACs and the underlying scientific advice per TAC/advice comparison, depending on whether a cut (orange) or a rollover or increase (dark grey) was advised, excluding outliers. The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs.

Meanwhile, as Figure 8 shows, **the agreed TACs exceeded the scientific advice in the vast majority of cases, where the advice was for a cut compared to the TAC of the previous year, with very little improvement throughout most of the time series** (between 85% and 88% between 2015-2016 and 2018-2019). Similar to the % average difference metric presented in Figure 7, there was a notable drop for 2020-2021 (from 76% to 62%), but the majority of TACs for which a cut was advised was still set above advice for 2021-2022 (61%), and still at 42% for 2022-2023. On the other side, **the advice was much less frequently exceeded where it was for a rollover or an increase** compared to the TAC of the previous year, and for 2021 and 2022 all TACs followed the advice in such cases, with a slight increase to 4% for 2023. The split results for EU only and EU/UK TACs are fairly similar and not displayed.

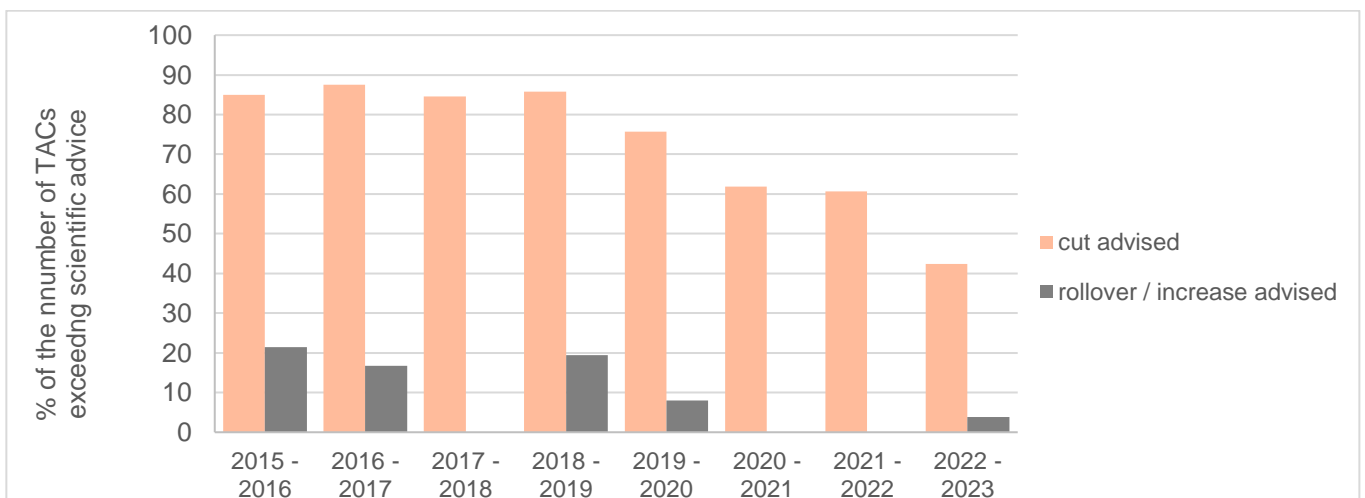


Figure 8. Time series of the percentage of the number of agreed TACs that exceeded the corresponding scientific advice, depending on whether the advice was for a cut (orange) or for a rollover or increase (dark grey).

**The vast majority of the TACs set above advice** (over 90% in all years except 2018-2019) **refer to cases where a cut was advised** (see Figure 9 a), and this is fairly consistent both for EU only and EU/UK shared stocks (results not displayed). Meanwhile most of those TACs that were set at or below advice refer to cases where an increase or rollover was advised until 2019-2020 (see Figure 9 b).

For 2020-2021, for the first time almost half of the TACs (compared to 35% at the start of the time series) following the advice referred to cases where a cut was advised. However, based on the 2022 and 2023 results (back down to 33% and 43%, respectively) this does not yet appear to be a continuous trend.

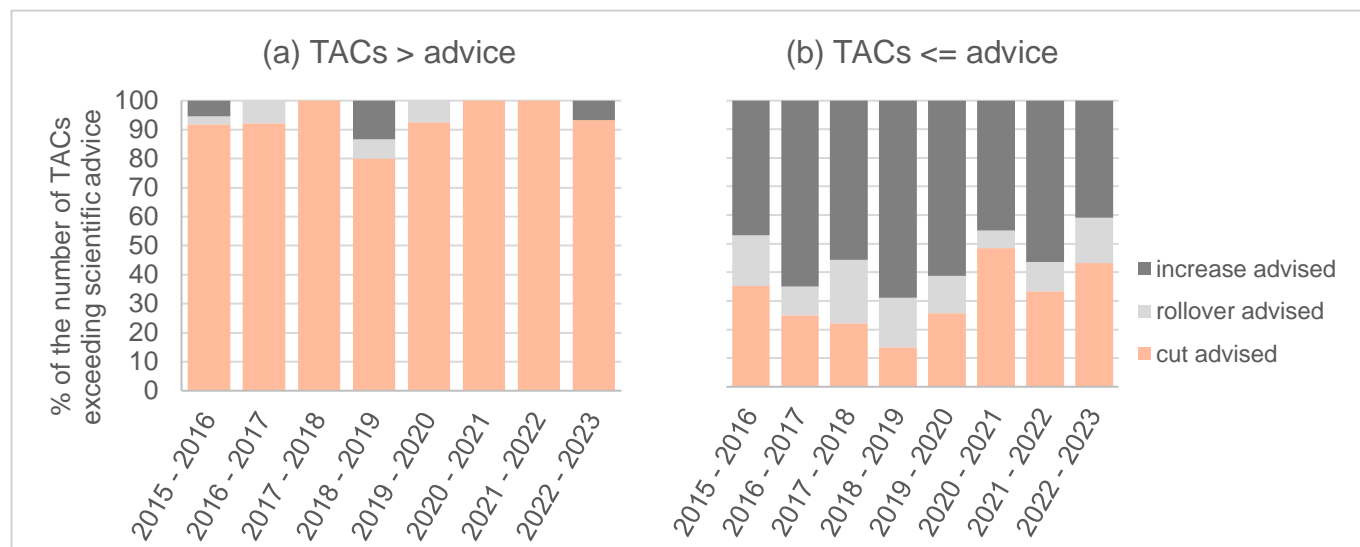


Figure 9. Time series of the percentage of (a) the TACs exceeding scientific advice, and (b) the TACs set in line with or below the advice, where a cut (orange), rollover (light grey) or increase (dark grey) was advised. These percentages are calculated in relation to the total number of TACs which were (a) set above the advice and (b) set at or below the advice. For example, the 100% orange bar in (a) for 2020-2021 means that all TACs set above advice were in cases where a cut was advised.

The results presented in Figure 7, Figure 8 and Figure 9 indicate a **tendency of the Council to follow scientific advice more stringently, where it is for a rollover or an increase, and exceed it most of the time (and by a larger amount on average), where the advice means a cut, by adopting either a smaller cut or a rollover. The first three rounds of post-Brexit TACs for 2021, 2022 and 2023 represent progress in this regard compared to previous years, but advised cuts were still not followed to the same degree as advised increases or rollovers.**

### 4.3 MSY versus precautionary advice - why the advice basis matters

Section 4.1 assessed the overall progress of the TACs agreed by the Council, and for 2021 onwards by the EU and the UK, towards following scientific advice. This section zooms in on an area of key concern, namely the lower ambition applied by decision-makers to data-limited stocks for which no full analytical stock assessments based on MSY are available yet.

As Figure 10 demonstrates, TACs have indeed continuously been set above scientific advice in the vast majority of the cases throughout most of the time series (fluctuating without trend between 82% and 87% until 2019, then dropping to 71% for 2020 and decreasing gradually to 59% for 2023), where the advice is based on the ICES precautionary approach or its approach to data-limited stocks. The percentage of TACs set above scientific advice where this is based on MSY is much lower, albeit still high at 24% in 2020, the year of the 2020 MSY deadline, and 12% for 2023.<sup>144</sup> Notably, **some (albeit insufficient) progress has been made for TACs based on MSY advice since 2016, whereas the high percentage of TACs above precautionary scientific advice basically remained constant until 2019, and has only started improving since 2020, but still remains close to 60% now.** A separate analysis of EU only and EU/UK shared TACs shows that for EU only stocks the percentage of TACs exceeding MSY advice already dropped to just below 13% in 2018, and down to 0% for 2021 (followed by an increase to 18% in 2022 and another drop to 8% in 2023), whereas the proportion of excessive MSY-based EU/UK shared TACs has remained higher in all years since 2017 (between 52% and 29%) except 2022 (16%).

<sup>144</sup> Note that, as explained in section 4.1, in the present analysis the  $F_{MSY}$  point value advice was used where  $F_{MSY}$  ranges are available, meaning that these 25% also include a number of stocks where the TAC was set above the  $F_{MSY}$  point value, but within the upper  $F_{MSY}$  range.

At the same time, the first-time improvement for TACs with precautionary scientific advice in 2020 was driven by the EU/UK shared TACs, whereas the improvement in 2021 was more pronounced for EU only TACs. However, since 2021 the proportion of TACs exceeding precautionary advice has been more similar for EU only and EU/UK shared stocks, albeit with a backwards step for EU/UK shared stocks in 2023 (57% to 67%) compared to progress for EU only stocks in the same year (67% to 50%).

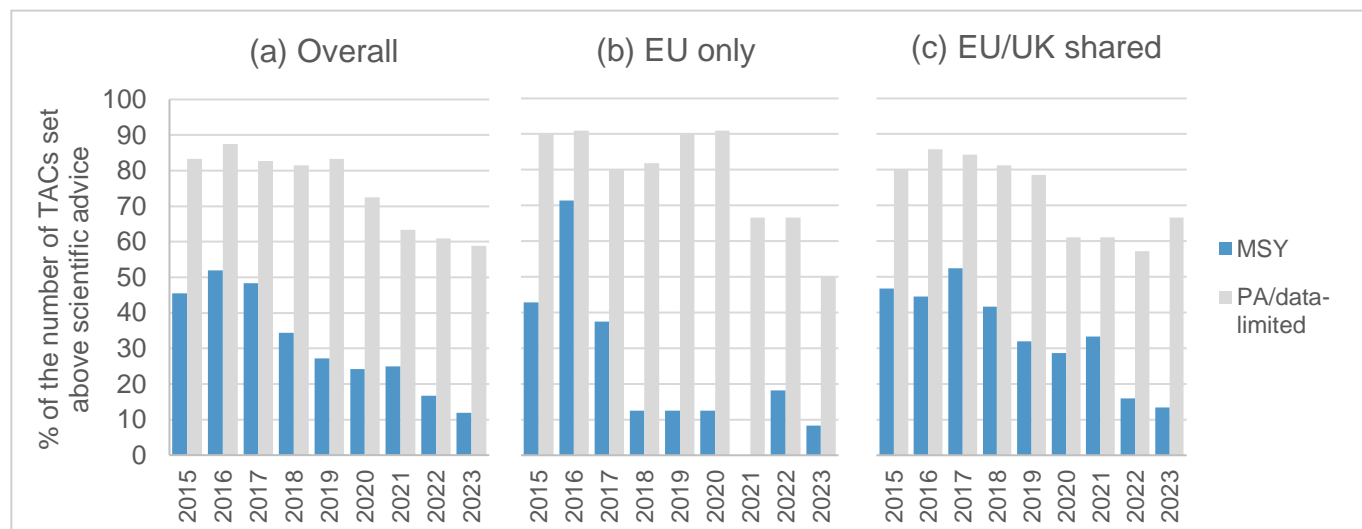


Figure 10. Time series of the percentage of the number of TACs set above scientific advice, depending on the basis of the advice, i.e. the ICES MSY approach (blue) or the ICES Precautionary Approach or approach for data-limited stocks without full analytical stock assessment (light grey). The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs.

The same differential treatment of stocks with precautionary advice compared to stocks with MSY-based advice is apparent when looking at the average percentage difference between the agreed TACs and the advice (see Figure 11): **the average TAC excess above precautionary scientific advice is high throughout most of the time series**, ranging from 50% to 83% up until 2020, albeit with a declining trend since 2017 and a more distinctive drop to 22% in 2021. However, 2022 represents a backwards step again, with an increase to 27%, before dropping again to 18% for 2023, the lowest value in the time series.

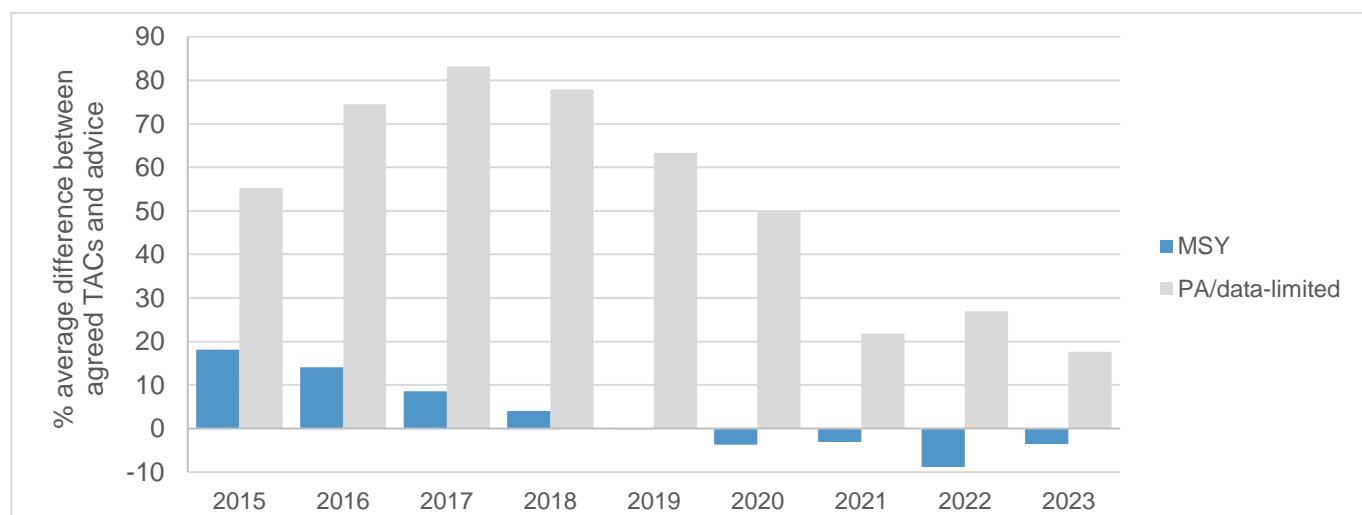


Figure 11. Time series of the average percentage difference per comparison between the agreed and advised TACs, depending on the basis of the scientific advice, i.e. ICES MSY approach (blue) or ICES Precautionary Approach or approach for data-limited stocks without full analytical stock assessment (light grey).

In contrast to this, the average difference between agreed TACs and scientific advice based on MSY is relatively small (see Figure 11), even negative since 2019, meaning that in those years the MSY-based TACs on average undershot the advice, most recently by -4% in 2023, following the biggest undershoot to date of -9% in 2022. The **clear declining trend in the average TAC excess for the TACs with MSY advice throughout the time series** (see Figure 11) and the **consistently higher (albeit declining) average TAC excess for stocks based on precautionary advice are fairly similar for EU only and EU/UK shared TACs** (data not shown).

The analysis by advice basis of the proportion of the TAC volume referring to TACs set above advice shows a similar pattern, with a **smaller percentage of the volume of TACs with MSY advice exceeding the advice throughout the time series than for TACs with precautionary advice** (see Figure 12 a). Notably, the situation looks a bit different for EU only and EU/UK shared TACs analysed separately: **the proportion of the TAC volume referring to TACs set above advice was generally much higher for TACs with precautionary advice and lower for TACs with MSY advice for the EU only TACs compared to the EU/UK shared TACs** (see Figure 12 b and c). While this metric decreased to 0% for EU only TACs in 2021 and 2022 (since all EU only TACs with MSY advice included in the analysis followed this advice), it increased from 13% in 2020 to 23% in 2021 for the EU/UK shared stocks, before dropping to 2% in 2022 and 2023. Conversely, **the progress for TACs with precautionary advice was much more pronounced for EU/UK TACs until 2021 compared to EU only TACs and started a few years earlier**: for EU only stocks the percentage of the agreed TAC volume exceeding precautionary advice was still at 80% for 2022 (and had been above 90% up until then) and only dropped to 44% in 2023. Meanwhile, for EU/UK shared stocks this metric already dropped below 49% in 2019 and has continued to decline since then fairly consistently to reach 25% in 2023.

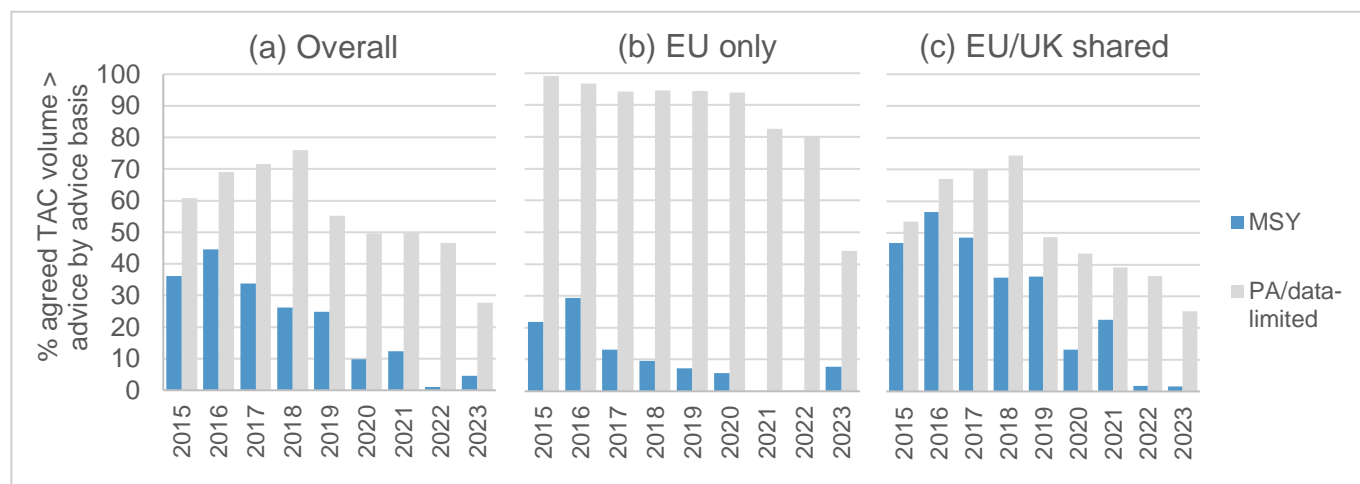


Figure 12. Time series of the proportion of the TAC volume referring to TACs set above advice, depending on the basis of the scientific advice, i.e. ICES MSY approach (blue) or ICES Precautionary Approach or approach for data-limited stocks without full analytical assessment (light grey). The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs.

**These findings demonstrate that not only is precautionary scientific advice exceeded more frequently, but also by a higher average amount and for a larger proportion of the TAC volume, than advice based on MSY.** This tendency of the Council, and for 2021 onwards of the EU and UK, to treat stocks that are subject to data-limited precautionary advice from ICES with lower ambition than those that are subject to MSY-based advice remains a major concern, especially since the MSY objective applies to all harvested species. This lack of ambition for stocks without MSY-based advice misconstrues the precautionary approach which is about being more, not less, cautious when information is more limited.<sup>145</sup>

<sup>145</sup> For a more elaborate explanation of how the precautionary approach should be applied when setting TACs, please refer to ClientEarth's briefing: ClientEarth (2020). Caution! A TAC-Setter's Guide to the 'Precautionary Approach'. December 2020. <https://www.clientearth.org/latest/documents/caution-a-tac-setter-s-guide-to-the-precautionary-approach/>.

It also goes against a key principle of good governance, namely the establishment of measures, including the setting of catch limits, in accordance with the best available scientific advice.<sup>146</sup> As already mentioned in section 2.1.1, in her opinion on the ongoing Case-330/220<sup>147</sup> about the CFP's missed 2020 MSY deadline, Advocate General Ćapeta concluded that indeed this deadline applied to all stocks.<sup>148</sup> While the final judgement in this case is yet to be delivered, the apparent lowering of ambition for stocks subject to precautionary advice, compared to stocks with MSY-based advice, is clearly contrary to the Advocate General's conclusion.

#### 4.4 Target versus bycatch stocks - where the priorities seem to lie

As mentioned in section 3.2.3, the North Sea and Western Waters MAPs contain a categorisation of stocks as "target" and "bycatch", with an accompanying lowering of ambition for those classed as bycatch. Specifically, both MAPs foresee that, while target stocks would fall under  $F_{MSY}$  ranges, bycatch stocks shall be managed under the precautionary approach, referring to the precautionary approach to fisheries management, as defined in the CFP. However, the use of precautionary reference points as management targets, rather than MSY reference points, will deliver a higher fishing pressure and lower biomass than the levels that are required by the CFP.<sup>149</sup> It is therefore concerning that the Commission has in the past explicitly requested ICES to provide advice based on precautionary reference points for certain stocks, even though MSY-based advice is available.<sup>150</sup>

Furthermore, there is a lack of transparency in the way the MAPs categorise "target" and "bycatch" stocks, in particular because a target or bycatch stock in one fishery may not be so in another. A definitive categorisation is therefore difficult, and the approach used for the current analysis was developed a bit further, to provide a more nuanced insight based on a year-specific categorisation, rather than the stock-level categorisation across the entire time series used in previous versions of this report.<sup>151</sup>

The objective in Article 2(2) of the CFP Basic Regulation to restore and maintain harvested species above biomass levels capable of producing MSY applies to all harvested stocks, with no differentiation between "target" and "bycatch". This means recovery objectives under a MAP should apply to all stocks without this differentiation, and the same level of ambition regarding setting sustainable TACs in line with scientific advice should be applied to all stocks as well. As already explained in more detail in section 2.1.1 and mentioned in section 4.3, **the opinion released this year by Advocate General Ćapeta confirmed that indeed the CFP's legal 2020 MSY deadline applies to all stocks, without exception, i.e. including stocks primarily caught as bycatch,<sup>152</sup> indicating that there is no legal basis for such a distinction between target and bycatch stocks.**

146 Art. 3(c) of the CFP Basic Regulation. For further explanations on what constitutes the "best available scientific advice" for the purposes of TAC-setting, please refer to ClientEarth's briefing: ClientEarth (2020). What is the 'best available scientific advice' for setting Total Allowable Catches (TACs)? December 2020.

<https://www.clientearth.org/latest/documents/what-is-the-best-available-scientific-advice-for-setting-total-allowable-catches-tacs/>.

147 Case C-330/220 Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine, Ireland, Attorney General EU:C:2023:487.

<https://curia.europa.eu/juris/documents.jsf?num=C-330/22>.

148 OPINION OF ADVOCATE GENERAL ĆAPETA delivered on 15 June 2023,

<https://curia.europa.eu/juris/document/document.jsf?isessionId=81605BAA9E74B5594BADE660A31A19DD?text=&docid=274653&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3017442>, see for example paragraphs 30, 31 and 42.

149 For further explanations about the various biological reference points used in scientific advice for TAC-setting, please refer to ClientEarth's briefing: ClientEarth (2020). Linking the law to biological reference points used in scientific advice when setting Total Allowable Catches (TACs). December 2020.

<https://www.clientearth.org/latest/documents/linking-the-law-to-biological-reference-points-used-in-scientific-advice-when-setting-total-allowable-catches-tacs/>.

150 For example, for plaice in the Kattegat, where the Commission requested advice for 2019 based on the precautionary approach. This corresponded to a larger catch than based on MSY (15237 t versus 9338 t). ICES (2018): Plaice (*Pleuronectes platessa*) in Subdivisions 21–23 (Kattegat, Belt Sea, Sound). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.pub.4385>.

151 Stocks explicitly referred to in Art. 1(1) as falling under the scope of the respective MAP and being subject to the use of  $F_{MSY}$  ranges were in principle considered 'target' for the purpose of this analysis. Other stocks occurring in the area covered by the MAP in question, but not specifically mentioned in Art. 1(1) were considered to fall under Art. 1(4) on bycatches in the fisheries for the stocks listed under Art. 1(1), and thus categorised as 'bycatch'. Note that indeed some stocks listed in Art. 1(1) and therefore treated as 'target' in the current analysis are currently effectively taken as bycatch and subject to bycatch TACs, such as Irish Sea and Celtic Sea cod, which fall under Art. 1(1)(6) and 1(1)(7) of the Western Waters MAP (Regulation (EU) 2019/472 of the European Parliament and of the Council of 19 March 2019). In previous iterations of this report, this aspect was not explicitly incorporated in the analysis. For the current report, the categorisation into 'target' and 'bycatch' stocks was done separately for each year (rather than per stock across the entire time series), with stocks explicitly subject to a 'bycatch TAC' now considered as 'bycatch', even if they were formally classified as 'target' in the relevant MAP. For stocks where the categorisation was unclear, a judgement call was made based on available indications in the ICES advice or underlying ICES Working Group reports regarding whether the catches in a given year were primarily targeted or taken as bycatch.

152 See footnote 148, see for example paragraphs 30, 31 and 42 of the Advocate General's opinion.

Yet, an analysis of the number of TACs set above scientific advice, as well as the average percentage difference between those TACs and the advice, confirms the concern that, **contrary to the CFP's requirements, stocks classified as bycatch are treated with a lower ambition than target stocks**: while continuous progress has been made in aligning TACs with advice for target stocks since 2016 (the percentage of TACs above advice dropped from 61% in 2015 to 11% in 2023 overall), the percentage of TACs above scientific advice remained well above 70% until 2020 for bycatch stocks and has only recently declined to 50% in 2023 (see Figure 13). This differential treatment for target and bycatch stocks is particularly pronounced for EU only stocks, but remains apparent for EU/UK shared stocks (see Figure 13 b and c), with the gap actually widening for the latter in 2023. Note that any differences in the historical time series between the results presented in this section and in previous versions of this report are due to a change in categorisation approach.<sup>153</sup>

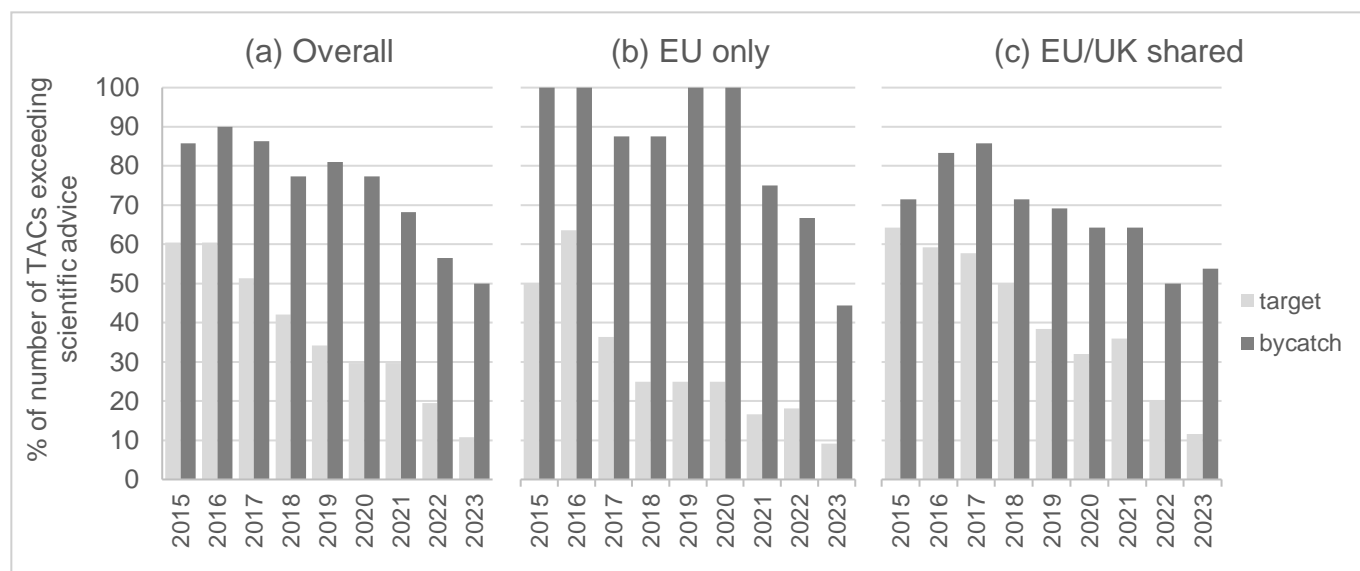


Figure 13. Time series of percentage of the number of TACs exceeding scientific advice for target (light grey) and bycatch (dark grey) stocks. The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs.

Similarly, the average percentage difference between the TACs and the advice per TAC/advice comparison was higher for bycatch compared to target stocks throughout the entire time series, when looking at both EU only and EU/UK shared stocks together (see Figure 14 a), meaning that **on average TACs exceeded the advice by a larger proportion for bycatch than for target stocks**. However, it is important to note that this metric excludes stocks with zero-catch advice.<sup>154</sup> As a result, the overall findings presented here look more positive than if such cases were included (see section 4.6 for further details) and therefore need to be treated with caution and viewed in relative rather than absolute terms. Following an increase in this tendency for TACs for bycatch stocks to exceed the advice on average by a larger percentage than for target stocks until 2017, **this average overshoot for bycatch stocks declined** and even dropped to 14% for 2021 and 2022 and 4% for 2023 overall, and even turned into an average undershoot for EU/UK shared stocks from 2020 onwards.<sup>155</sup>

<sup>153</sup> See footnote 151.

<sup>154</sup> This is because the metric requires the agreed TAC to be divided by the underlying advice for each stock, and where the advice is zero, this calculation cannot be made because you cannot divide by zero. One option could have been to consider every non-zero TAC to exceed the corresponding zero-catch advice by 100%, but this would distort the proportions compared to other cases where the percentage exceeds 100%. Therefore, for the present analysis it was decided to exclude these cases from this metric.

<sup>155</sup> The EU/UK shared TACs with an undershoot for 2020 were Irish Sea sole (SOL/07A.), Eastern Channel sole (SOL/07D.), Celtic Sea sole (SOL/7FG.), Celtic Sea haddock (HAD/7X7A34), various Norway lobster TACs (NEP/07., NEP/2AC4-C, NEP/5BC6.), Channel plaice (PLE/7DE.), two undulate ray TACs (RJU/7DE., RJU/8-C.) and Celtic Sea whiting (WHG/7X7A-C). For Celtic Sea haddock, the TAC was deliberately set below the ICES single-stock headline advice due to the impact on catches of the depleted Celtic Sea cod stock in the mixed fisheries (albeit not far enough below the advice to follow the zero-catch advice for the latter). Other reasons for the undershoot in other stocks are most likely the factoring in of high survival exemptions or a general mismatch between the TAC and advice areas (e.g. for Celtic Sea whiting, where the TAC, in addition to the vulnerable Celtic Sea whiting stock, also covers the Channel part of the more abundant North Sea whiting stock, for which the main TAC covering the North Sea was set below the single-stock headline advice in recognition of the impact on North Sea cod caught in the mixed fisheries).

The average overshoot for bycatch stocks was higher for EU only than for EU/UK shared TACs (reaching a maximum of 128% for 2017) throughout most of the time series. Meanwhile, the figures for target stocks were relatively similar for EU only and EU/UK stocks (albeit usually a bit higher for EU/UK shared stocks), also following an overall declining trend throughout the time series, albeit to a lesser extent than for bycatch stocks. There has been a (decreasing) average TAC undershoot for EU/UK shared stocks since 2020, but again this does not factor in stocks subject to zero-catch advice and should therefore be treated with caution.

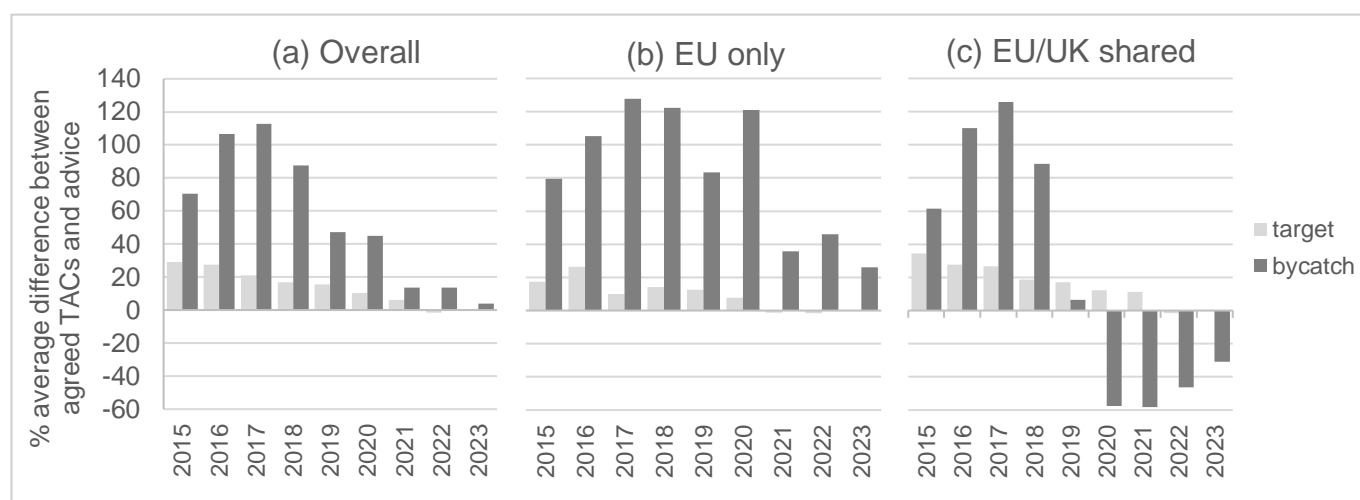


Figure 14. Time series of the average percentage difference per TAC/advice comparison (i.e. the average amount by which the TAC exceeded the advice) agreed for target (light grey) and bycatch (dark grey) stocks. The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs.

Overall, the results presented in this section indicate that there was a **tendency throughout most of the time series for TACs to exceed advice more frequently and by a larger average proportion for bycatch than for target stocks**. However, **both metrics indicate an improvement for both target and bycatch stocks in recent years**, which is more pronounced for target stocks in terms of the percentage of the number of TACs, and more pronounced for bycatch TACs in terms of the average % difference between TACs and advice. The progress for bycatch stocks in recent years seems to be more pronounced for EU/UK shared stocks. Note that the above results should be treated with caution, since an unambiguous categorisation of stocks into “target” and “bycatch” is difficult, as outlined above, and since a fairly constant number of TAC/advice comparisons with zero-catch advice (between 6 and 10 per year, see section 4.6) is not reflected in the “% average difference” metric. For the purposes of this analysis, a simplified categorisation was undertaken based on the specifications in the North Sea and Western Waters multi-annual plans, available information on whether TACs were exclusively set to cover bycatches, and indications from the relevant ICES advice or reports on whether the stocks in question were primarily targeted or caught as bycatch.<sup>156</sup> However, **the presented results provide a strong indication that indeed scientific advice has been followed more stringently for target than bycatch stocks, albeit with some improvements in recent years.**

## 4.5 Removal of TACs

The differentiation between “target” and “bycatch” stocks is not only an issue in the context of the MAPs, as demonstrated in the Commission's request to ICES in 2018 to provide advice on removing TAC management for several “bycatch” stocks.<sup>157</sup>

<sup>156</sup> See footnote 151 for details on the categorisation approach used for the present report.

<sup>157</sup> The Commission's request as quoted in the ICES Special Request Advice sr.2018.15 from 20 September 2018 referred to the 'requirement to ensure that the stock remains within safe biological limits in the short and middle term', which lowers the ambition below the CFP's MSY objective. ICES (2018): EU request for ICES to provide advice on a revision of the contribution of TACs to fisheries management and stock conservation. ICES Advice: Special Requests. Report. <https://doi.org/10.17895/ices.pub.4531>.

This request again suggests that the Commission – at least at that point – had no ambition to adopt measures to restore such bycatch stocks above biomass levels capable of producing MSY, but considered it sufficient to merely keep them within safe biological limits.<sup>158</sup> It also raises broader concerns about the focus on removal of TACs.

**Removing a TAC would remove a clear limit on fishing mortality. It changes the situation from one where the level of catches is more strictly regulated to one where there is potential for catches to be unlimited**, whatever the status of the stock at a particular point in time. This would jeopardise the achievement of the requirement in Article 2(2) of the CFP Basic Regulation to limit exploitation rates in order to restore stocks above levels capable of producing MSY. Importantly, removal of TACs for non-target or less commercially valuable fish stocks (and of the associated obligation to land catches of these species) will neither solve the discard problem, nor reduce the waste in fisheries or foster the further improvements in selectivity intended by the introduction of the landing obligation.

In light of this, it is concerning that for example during the 2018 December Council, Belgium and Ireland requested the removal of certain TACs in order to avoid choke issues under the full implementation of the landing obligation,<sup>159</sup> and similar requests continue to be put forward by industry representatives. Importantly, one of these stocks, Irish Sea whiting, has been far below the limit reference point for the biomass,  $B_{lim}$ , and subject to zero catch advice from ICES for many years. Therefore, such **attempts to remove TACs rather than implementing effective measures to restore these stocks are particularly worrying**. While none of these TACs were removed in the end, all of them were, and to date continue to be, set above the scientific advice, and bycatch TACs were introduced (see section 4.6 for further details on this topic).

## 4.6 Stocks of particular concern

**The fact that many stocks remain not only outside safe biological limits (i.e. subject to fishing mortality exceeding  $F_{pa}$ , and/or at biomass levels below  $B_{pa}$ ), but even beyond the more extreme limit reference points  $F_{lim}$  and/or  $B_{lim}$ , often without signs of recovery, is a major concern.**<sup>160</sup> In 2023, three years after the 2020 deadline to end overfishing, there are still 9 stocks within the core analysis of this report,<sup>161</sup> which, according to the ICES advice for 2024, were below  $B_{lim}$  or below possible reference points where  $B_{lim}$  is not defined. These include Irish Sea and Celtic Sea whiting; Kattegat and Celtic Sea cod;<sup>162</sup> herring in the Irish Sea, Celtic Sea and southwest of Ireland; Norway lobster in functional units 25 as well as 26-27; Irish Sea common sole and (following an upgrade from the previously data-limited situation with precautionary advice to an MSY-based stock assessment) Celtic Sea pollack. Irish Sea cod which was still below  $B_{lim}$  based on last year's advice is now estimated to be between  $B_{lim}$  and  $B_{pa}$ , albeit still very close to  $B_{lim}$ .

Likewise, based on the latest ICES advice 5 of the stocks included in the core analysis were still fished above  $F_{lim}$  or relevant reference points, including Irish Sea whiting and common sole and Celtic Sea cod, whiting and pollack. Celtic Sea cod and Irish Sea whiting have been fished above  $F_{lim}$  for almost the entire time series, whereas Irish Sea common sole and Celtic Sea whiting were for the first time estimated to be fished above  $F_{lim}$  based on this year's ICES advice. The fishing mortality for Celtic Sea pollack was

<sup>158</sup> Note however that this request is a few years old at the time of writing this report, and more recent trends in aligning TACs with scientific advice for bycatch stocks as outlined in section 4.4 indicate an improvement in this regard.

<sup>159</sup> This was the case for the TACs PLE/7HJK., PLE/7FG. (plaice in the Celtic Sea) and WHG/07A. (Irish Sea whiting), based on the files received through ClientEarth's series of AIR regarding the December Council 2018.

<sup>160</sup> For an explanation of the different biological reference points and how the CFP's requirements link to them, please refer to this briefing: ClientEarth (2020). Linking the law to biological reference points used in scientific advice when setting Total Allowable Catches (TACs). December 2020.

<https://www.clientearth.org/latest/documents/linking-the-law-to-biological-reference-points-used-in-scientific-advice-when-setting-total-allowable-catches-tacs/>. This briefing breaks down the various biological reference points scientists use to assess the state and exploitation of a stock so as to advise on sustainable fishing limits. <sup>161</sup> A list of all TACs and stocks included in the core analysis of this report can be found in Annex II, <https://www.clientearth.org/latest/documents/taking-stock-2023-are-tacs-set-to-achieve-msy-annex-ii/>.

<sup>162</sup> It is worth noting that the (zero-catch) advice for West of Scotland cod was provided in 2022 for 2023 and 2024, according to West of Scotland cod was below  $B_{lim}$ , but the latest Northern Shelf cod assessment now includes both what used to be 'North Sea cod' and West of Scotland cod as part of the northwestern sub-population. Therefore, no separate single-stock advice is provided anymore for West of Scotland cod, but since the 2022 advice for West of Scotland cod is still presented on the ICES website at the time of writing this report, it is still mentioned here, albeit not included in the 8 stocks below  $B_{lim}$ .



unknown for the bulk of the time series since it was a data-limited stock until this year. **The fact that all of the 9 stocks currently estimated to be below  $B_{lim}$  have been at this dangerously low level for at least half of the time series 2015-2023 highlights the lack of effective action so far to address this dire situation, and the new addition of Irish Sea common sole, Celtic Sea whiting and Celtic Sea pollack this year to the list of depleted stocks raises further alarm bells.**

A detailed analysis of the extent to which TAC-setting above scientific advice may have contributed to the dire situation of these stocks, or the extent to which TACs have (not) followed scientific advice for these vulnerable stocks in particular, was outside the scope of this analysis. However, these are important questions that should be looked at in more detail in future. In any case, **past inaction to recover these stocks above sustainable levels, as required by the CFP, now puts decision-makers in a difficult situation if they are to meet the sustainability requirements of the CFP, the TCA and UK law going forward, now that the 2020 MSY deadline has been missed.**

As mentioned in the previous section, bycatch TACs were introduced in 2019 for a number of stocks subject to zero catch advice from ICES, specifically four of the above-mentioned stocks (Irish Sea whiting, cod in the Celtic Sea and in the west of Scotland, plaice in the southern Celtic Sea southwest of Ireland), as well as whiting in the west of Scotland. This approach was linked to a commitment by the Member States of the regional North Western Waters (NWW) Member State group (back then still including the UK) at the 2018 December Council to develop bycatch reduction plans,<sup>163</sup> and to implement full catch documentation for these stocks from 2019.<sup>164</sup> This approach was introduced to avoid immediate choke situations arising from zero catch advice.

In its evaluation of the bycatch reduction plan developed by the NWW Member State Group, the STECF found that the bycatch reduction plan *“does not fulfil the commitments made by the Member States as it does not contain any elements to ensure reduced by-catches of the relevant stocks over and above the measures already included in the discard plan”*.<sup>165</sup>

**Setting bycatch TACs to address the choke risk in return for ineffective bycatch reduction plans, without the necessary measures to ensure that the bycatch TACs are respected, is inappropriate and counter-productive to the delivery of the objectives of the CFP, the TCA and the UK’s fisheries legislation.** The STECF’s evaluation of the NWW bycatch reduction plan<sup>166</sup> clearly confirms concerns that it was not fit for purpose. Since then, this work seems not to have been taken forward, while bycatch TACs have continued to be set since 2020 for several depleted stocks, without tangible efforts to ensure proper catch documentation or stock recovery.

**The recurring requests from the Commission to ICES for additional catch scenarios for these vulnerable bycatch stocks are another cause for concern, since they do not appear to be geared towards stock recovery, but primarily towards keeping target and mixed fisheries open at the expense of bycatch stocks,** contrary to the CFP’s sustainability objectives. ClientEarth’s briefing on this issue explains in more detail why this approach is problematic and how the requests would need to be reframed for the benefit of the bycatch stocks.<sup>167</sup> Allowing business as usual to continue in the absence of a clear, ambitious route towards bycatch minimisation and stock recovery while ensuring full catch documentation and compliance sets a dangerous precedent, endorsing inaction instead of honouring the commitments made at the 2018 December Council, and as part of the TAC and Quota Regulation for

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163 Statement of the North Western Waters regional group made at December Council 2018. Available on <http://data.consilium.europa.eu/doc/document/ST-5692-2019-INIT/en/pdf>.

164 *“all vessels benefitting from these specific TACs should implement full catch documentation as from 2019”* (Recital 8 of the TAC and Quota Regulation for 2019, Council Regulation (EU) 2019/124).

165 Scientific, Technical and Economic Committee for Fisheries (STECF) – 61st Plenary Meeting Report (PLEN-19-02), p. 102 onwards: <https://stecf.jrc.ec.europa.eu/documents/43805/2537709/STECF+PLEN+19-02.pdf>.

166 By-catch reduction plan (BCReP) in the North Western Waters. 2019-05-14 version. Draft received by the NWWAC on 15 May 2019.

167 ClientEarth (2020). Ask the right question, get the right answer: Scientific advice for bycatch or non-targeted stocks that have zero catch advice.

July 2020. <https://www.clientearth.org/latest/documents/ask-the-right-question-get-the-right-answer-scientific-advice-for-bycatch-or-non-targeted-stocks-that-have-zero-catch-advice/>.

2019. The SCF set up under the TCA between the EU and the UK provides a new forum for discussions between both Parties on how such depleted stocks and the fisheries they are caught in should be managed. However, at the point of writing this report, no tangible progress appears to have been published for example on the issue of “special stocks” as referred to in Article 499(4) of the TCA, even though guidelines for such stocks were supposed to already have been adopted by 1 July 2021 according to Article 499(5) of the TCA.

As already mentioned in section 2.1.1, while the judgement in Case-330/220 regarding the CFP’s missed 2020 MSY deadline is yet to be delivered, the recent opinion by Advocate General Ćapeta concluded that indeed this deadline applies to all stocks, without exception, i.e. including stocks primarily caught as bycatch.<sup>168</sup>

## 4.7 Progress vs. regress in terms of aligning TACs with scientific advice

This section includes a new part of the analysis added in 2023, which focuses on the extent to which progress made between years in terms of aligning TACs with scientific advice was retained or lost again, and to which a lack of progress in this regard has remained unaddressed. This analysis complements the overarching comparison of TACs and the underlying advice in section 4.1, by providing further insights, for example, regarding year-on-year progress both between and within the two main categories, “TAC(s) above advice” and “TACs in line with or below advice”, such as TACs moving further away from or towards the underlying advice. This is intended to give an idea of the direction of travel and to quantify and identify those cases where no progress has been made throughout (parts of) the time series (i.e. TACs continue to exceed advice, without movement towards the advice) or that have instead even been subject to regress (i.e. TACs that previously followed the advice later exceeded it again, or the gap between TACs set above advice and the advice widened further).

The metrics presented below were computed both for EU only and EU/UK shared TACs combined as well as for both groups separately. However, since no clear consistent differences or trends between EU only and EU/UK shared TACs could be identified at this stage, only the combined results are shown.

As already highlighted in section 4.1 and particularly Figure 1, the percentage of the number of TACs set in line with (i.e. at or below) the ICES advice has increased throughout the time series, whereas the percentage of TACs exceeding the advice has declined conversely. Overall, the picture appears to have more than reversed since the start of the time series (see Figure 15). A closer look at the year-on-year changes between the two main categories (TAC(s) above versus in line with/below advice) shows that **the bulk of progress made has been retained over the years** (see Figure 15).

A few new TAC/advice comparisons change from above to in line with advice every year, albeit with no consistent trend throughout the time series. Meanwhile, while the overall percentage of TAC/advice comparisons where TACs still exceed the advice without progress has declined from 59% for 2015-2016 to 23% for 2022-2023, **some cases have in fact relapsed again (i.e. changed from in line with to above advice) every year except for 2022-2023**. While there is no clear trend in this regard throughout the entire time series, the percentage of TAC/advice comparisons subject to such worrying regress has declined from a peak of 8% for 2018-2019 to 0% in 2022-2023.

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<sup>168</sup> See footnotes 14 to 18.

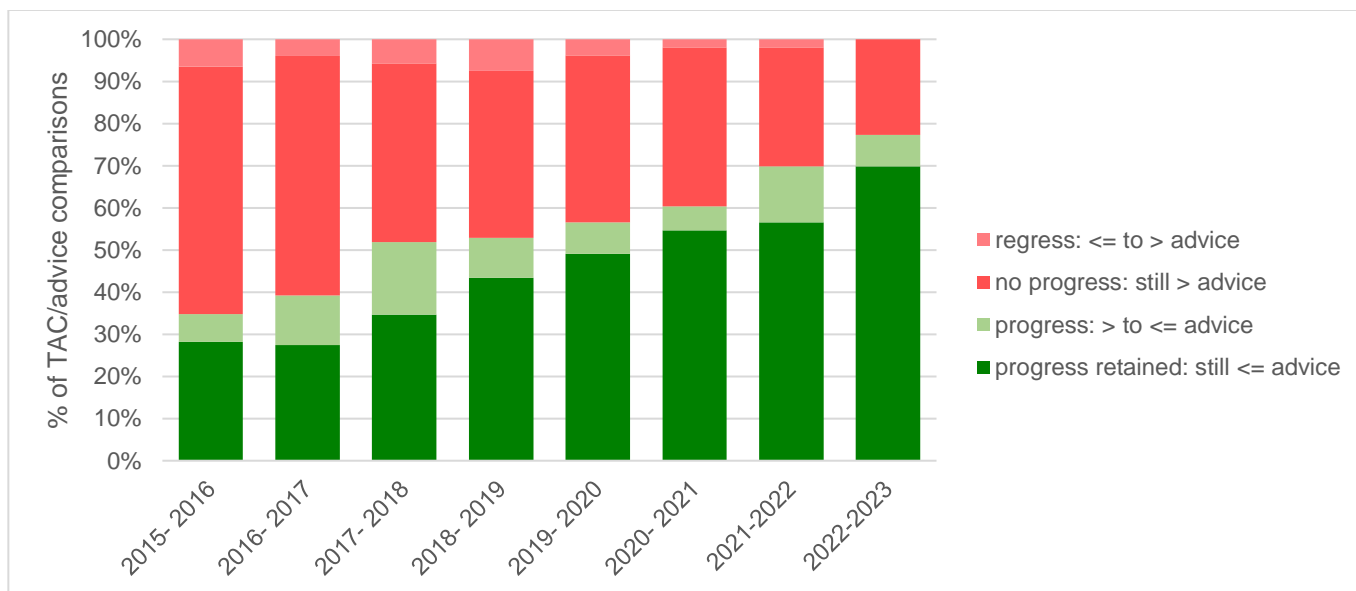


Figure 15. Time series of the percentage of TAC/advice comparisons for which a) year-on-year progress was made (i.e. a change from TAC(s) > advice to <= advice; lighter green), b) year-on-year progress was retained (i.e. TAC(s) remained <= advice; darker green), c) there was no year-on-year progress (i.e. TAC(s) remained > advice; darker red) and d) regress occurred (i.e. a change from TAC(s) <= advice to > advice; lighter red). This graph focuses on changes between the two main categories (TAC(s) > vs. <= advice), rather than changes within either category.

The TACs that have been set above advice throughout the entire time series (and included in the 23% presented for “no progress: still > advice” for 2022-2023 in Figure 15) are those referring to Kattegat cod (COD/03AS.), southern hake (HKE/8C3411), pollack in the Bay of Biscay and Iberian seas (POL/8ABDE.; POL/08C.; POL/9/3411), Rockall cod (COD/5W6-14), Northern prawn in the Fladen ground of the northern North Sea (PRA/2AC4-C), Celtic Sea pollack (POL/56-14; POL/07.), Undulate ray in Atlantic Iberian waters (RJU/9-C.) and Irish Sea whiting (WHG/07A.). An additional two have been set above advice since 2018 (West of Scotland cod (COD/5BE6A) and Celtic Sea cod (COD/7XAD34)), and another two since 2019 (Irish Sea cod (COD/07A.) and herring in the Irish Sea, Celtic Sea and Southwest of Ireland (HER/7G-K.)). **Most of these stocks for which TACs have been set above the advice for most or all of the time series are depleted bycatch stocks, as already mentioned in the previous section 4.6. This should not come as a surprise, as the consistent excessive TAC-setting for these stocks (and the failure to prioritise their recovery by setting the TACs for the more abundant stocks in the relevant mixed fisheries sufficiently low) has certainly contributed to perpetuating their dire state.**

A zoomed out look across the whole time series 2015-2023 (see Figure 16, bar on the right) shows that **TACs have been consistently set in line with the ICES advice throughout the entire time series for only 26% of the analysed TAC/advice comparisons**, with an additional 36% having progressed from above to in line with (or below) advice, and a further 11% without a clear trend, but with TACs following the advice for 2022-2023. Conversely, TACs have consistently exceeded the advice throughout the entire time series for 17% of the TAC/advice comparisons, with an additional 2% having regressed from in line with to above advice, and a further 8% without a clear trend, but with TACs exceeding the advice for 2022-2023. **Progress retention and to a lesser extent new progress made appear to have been higher in the second half of the time series (2019-2023) compared to the first half (2015-2019)**, with 44% progress retained and 27% new progress made from 2019-2023 versus only 19% progress retained and 26% new progress made from 2015-2019. However, this is most likely due to the fact that a large part of the progress retained throughout the second half of the time series from 2019 to 2023 was progress that was already made (and retained) in the first half of the time series from 2015 to 2019. The proportion of cases for which new progress was made (i.e. a change from above to in line with or below advice) was around the same for both halves of the time series, at 26% and 27%, respectively.

Conversely, the percentage of TAC/advice comparisons with TACs above advice without progress dropped from 33% for 2015-2019 to 21% for 2019-2023, whereas the percentage of cases with regress from in line with to above advice appears to have stayed the same (4%). Again, the drop in the “no progress” section in the second half of the time series is most likely due to the bulk of the progress made in the first half of the time series having been retained into the second, therefore constituting a larger overall “progress” proportion (and a smaller “no progress” proportion) from the start from 2019 to 2023.

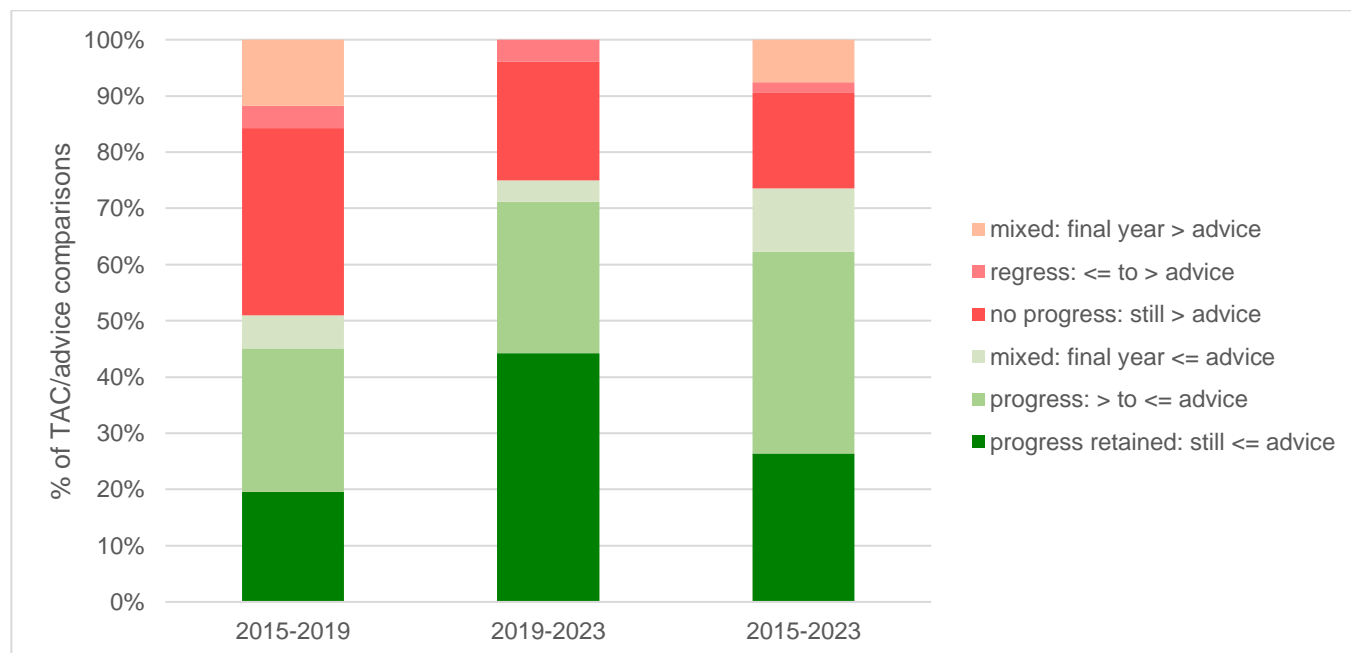


Figure 16. Summarised overview of progress versus regress throughout the first (2015-2019) and second (2019-2023) half of the time series, as well as the time series as a whole (2015-2023). This graph focuses on changes between the two main categories (TAC(s) > vs. <= advice), rather than changes within either category. The information presented is based on the same year-on-year data shown in Figure 15, but in order to provide a more overarching overview, the time series was split in two halves and the situation was summarised for each of these halves, and across the whole time series. Where the status changed consistently in one direction from the start to the end of the relevant timeframe, the status was specified as “progress: > to <= advice” or “regress <= to > advice”, respectively. Where the status remained the same for most of the relevant timeframe, this was used as status for the whole timeframe, i.e. “progress retained: still <= advice” or “no progress: still > advice”. Where the trend within the given timeframe was unclear, the status was specified as “mixed: final year <= advice” or “mixed: final year > advice”, depending on the status of the final year within the timeframe.

The previous two figures focused on progress and regress regarding changes between the “above advice” and “in line with/below advice” categories. However, **in most years the gap between the TACs and the underlying advice also narrowed or widened within the “above advice” vs. “in line with/below advice” categories**, with TACs moving closer towards or further away from the advice (see Figure 17). The majority of those TAC/advice comparisons with TACs in line with or below the advice were indeed those that stayed the same year-on-year (between 17% for 2015-2016 and 57% for 2022-2023). However, in most years some of the TACs that were already at or below the advice in the previous year also either moved further below the advice, constituting progress (between 0% for 2016-2017 and 2022-2023 and 9% for 2018-2019), or closer towards it, constituting regress (between 0% for 2017-2018 and 13% for 2022-2023), albeit remaining in line with or below the advice.

Within the group of TAC/advice comparisons where the TAC(s) exceeded the advice, the majority of cases (between 9% for 2019-2020 and 26% for 2015-2016) remained the same from year to year, i.e. the gap between the TAC(s) and the advice did not change. However, in a fluctuating proportion of cases (between 2% for 2022-2023 and 26% for 2015-2016) the gap between the TAC(s) and the advice at least decreased, constituting progress (albeit while continuing to exceed advice), whereas for others (between 2% for 2020-2021 and 12% for 2016-2017) the gap even widened further, constituting further regress. There does not appear to be a consistent trend in this regard, but it highlights that there has been some movement over

the years not only between the two “above advice” and “in line with/below advice” categories, but also within them. **While the overall increasing trend to follow advice and retain progress made along the way is encouraging, the continued lack of progress, and even worse, regress in a substantial number of cases, remains concerning.**

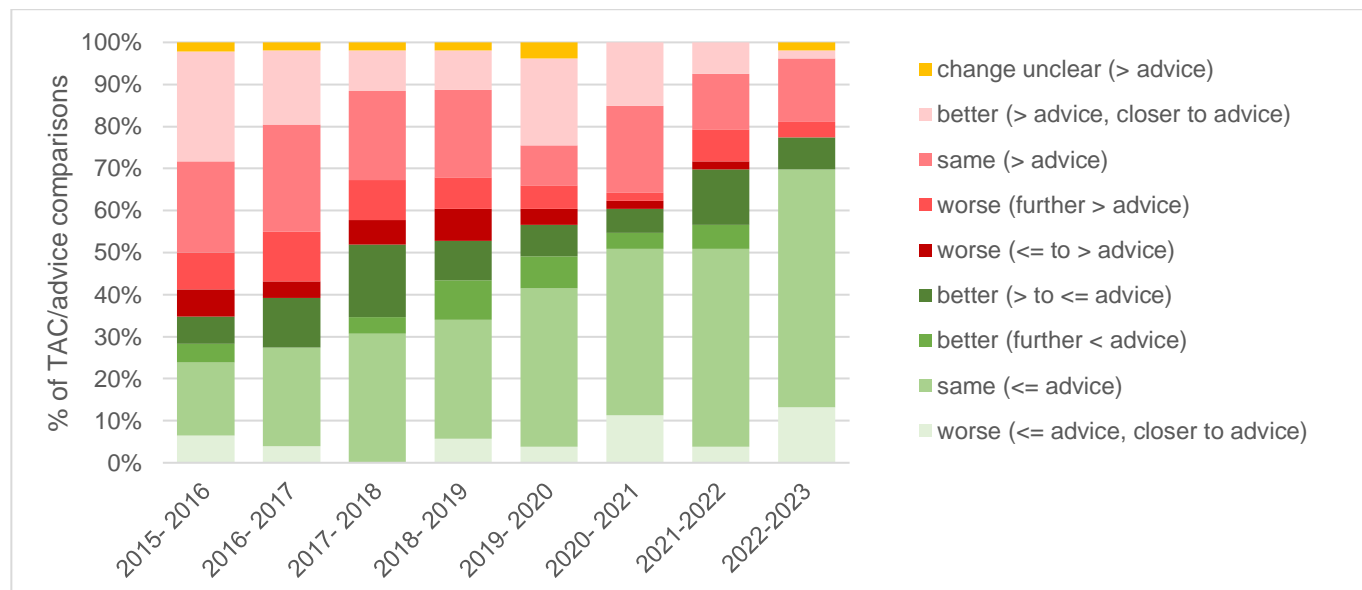


Figure 17. Time series of the percentage of TAC/advice comparisons for which progress or regress occurred both between and within the two main categories “above advice” (> advice) and “in line with/below advice” (<= advice). Progress includes a change from > to <= advice, as well as a TAC set in line with the advice moving further below the latter, or a TAC set above the advice moving closer towards the advice. Regress includes a change from <= advice to > advice, as well as a TAC set below the advice moving closer towards it, or a TAC set above the advice moving even further away from it. The yellow data series (“change unclear (> advice)”) refers to a limited number of cases where zero-catch advice was provided for one of the two years being compared, meaning there is no clear way of considering a change from a TAC exceeding zero catch advice to it exceeding non-zero catch advice (or vice versa) progress or regress. Such cases were therefore treated separately.

Overall, the results presented in this section suggest that **progress has been increasingly retained throughout the time series, but a substantial number of TACs, mostly for already depleted stocks, have been consistently set above the advice throughout all or most of the time series, without or with only little improvement.** Decision-makers should give particular attention to these cases, while continuing to retain any further progress made and avoiding backsliding going forward.

## 4.8 Comments on stocks not included in our core analysis

As explained in section 3.3, this report focuses on a particular subset of TACs and stocks falling under the December Council TAC-setting process, as well as EU/UK shared stocks from 2021 onwards, for a variety of reasons. This section presents some findings and comments on a number of stocks excluded from the core analysis conducted for this report, in order to provide as complete a picture as possible within the outlined constraints.

Based on the 2023 data, 11 TAC/advice comparisons were excluded from the core analysis due to area mismatch between the TACs and scientific advice involved, either because the TAC area did not cover all of the stock area, or because both only overlapped partially. These cases, covering 23 TACs and 53 stocks<sup>169</sup> are listed in Annex III of this report. A further two comparisons were excluded because the relevant TACs were removed at some point throughout the 2015-2023 period (including the dogfish and dab/flounder TACs). The sandeel TACs were excluded since the relevant advice usually only comes out in February and the TACs are not set at the same time as the other TACs covered by this report.

<sup>169</sup> Most of these are individual stocks of skates and rays.

Several TACs and stocks fell outside the scope of this report because the relevant TACs are not set during December Council (or the EU/UK process), including cases which fall under the EU/Norway (now EU/UK/Norway) negotiations or are subject to negotiations with other third countries or where the relevant process was unclear, as well as Deep Sea and Baltic TACs. These cases are listed in Annex III.

It is important to note that the findings presented in this report are based on and thus only apply to the subset included in the core analysis of this report, i.e. TACs agreed during December Council (and for 2021 onwards also those agreed between the EU and the UK which were previously covered by the December Council process), excluding those subject to mismatch as mentioned above. It is therefore possible or even likely that the situation might look different for TACs and stocks outside the scope of this report. Notably, the Commission's own reporting<sup>170</sup> as well as findings presented by the New Economics Foundation<sup>171</sup> suggest that indeed the situation regarding TAC-setting in line with scientific advice is often worse for stocks shared between the EU and third countries. A prominent example is the ongoing failure of the Coastal States to agree on a sharing arrangement for mackerel, resulting in the sum of unilateral TACs far exceeding the scientific advice year after year.<sup>172</sup> Based on the recently agreed written records of the Coastal States consultations on mackerel,<sup>173</sup> blue whiting<sup>174</sup> and Atlanto-Scandian herring,<sup>175</sup> this key issue is likely to continue in 2024. This is because once again the Coastal States agreed on overall catch limits in line with the respective ICES headline advice, but failed to factor in that – assuming Coastal States will claim similar (or higher) shares of overall catches as in previous years – the sum of unilateral TACs, and the resulting catches, will once again far exceed the scientific advice.

On this basis, **the findings presented in this report, albeit themselves not overly positive, may still be optimistic, considering that progress for shared stocks not included in the present analysis might have been even slower, and that the report focuses on the theoretical sustainability of the TACs, and not the sustainability of the actual catches.** This may also be part of the explanation as to why the findings of this year's Cefas report, which indeed include TACs for other processes, such as EU/UK/Norway trilateral negotiations and the Coastal States process, were more pessimistic than those presented in the current report (see section 3.1).<sup>176</sup> It is also worth noting that with the departure of the United Kingdom from the EU, the majority of the stocks covered by the analysis in this report have become EU/UK shared stocks, raising concerns about how to continue and improve the progress made so far and prevent a deterioration of the situation. The results presented in this report so far however suggest, that **progress since Brexit has at least continued and even improved for some metrics for EU/UK shared stocks, and future iterations of this analysis will help monitor if this trend continues.**

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170 COM(2019) 274 Final. Communication from the Commission to the European Parliament and the Council on the state of play of the Common Fisheries Policy and consultation on the fishing opportunities for 2020. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2019:274:FIN>, e.g. on p. 3, and the corresponding Commission Staff Working Document SWD/2019/205 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019SC0205>, e.g. on p. 11.

171 New Economics Foundation 2019: Landing the blame: Overfishing in the Northeast Atlantic 2019, Fig 4, p. 6. [https://neweconomics.org/uploads/files/NEF\\_LTB\\_ATLANTIC\\_2019.pdf](https://neweconomics.org/uploads/files/NEF_LTB_ATLANTIC_2019.pdf).

172 Based on the current ICES advice the overall sum of unilateral mackerel TACs for 2023 (1188265 t) exceeded the 2023 ICES advice (782066 t) by 52%. ICES (2023). Mackerel (*Scomber scombrus*) in subareas 1–8 and 14, and in Division 9.a (Northeast Atlantic and adjacent waters). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.21856533.v1>. This is not a new issue, and the sum of unilateral TACs, as well as the catches reported by ICES, far exceeded the underlying advice since 2009 (see Table 5 of the advice document, pp. 4f.). Based on preliminary information on the TAC negotiations for mackerel and other widely distributed stocks subject to Coastal States negotiations, the 2024 TACs will unfortunately not be an exception.

173 Agreed record of fisheries consultations between Iceland, the European Union, the Faroe Islands, Greenland, Norway and the United Kingdom on the management of mackerel in the North-East Atlantic for 2024. London, 17-18 October 2023. [https://oceans-and-fisheries.ec.europa.eu/system/files/2023-10/2024-coastal-states-fisheries-consultations-mackerel-north-east-atlantic\\_en.pdf](https://oceans-and-fisheries.ec.europa.eu/system/files/2023-10/2024-coastal-states-fisheries-consultations-mackerel-north-east-atlantic_en.pdf).

174 Agreed record of fisheries consultations between Iceland, the United Kingdom, the European Union, Faroe Islands, Iceland and Norway on the management of blue whiting in the North-East Atlantic for 2024. London, 18 October 2023. [https://oceans-and-fisheries.ec.europa.eu/system/files/2023-10/2024-coastal-states-fisheries-consultations-blue-whiting\\_en.pdf](https://oceans-and-fisheries.ec.europa.eu/system/files/2023-10/2024-coastal-states-fisheries-consultations-blue-whiting_en.pdf).

175 Agreed record of fisheries consultations between Iceland, the Faroe Islands, Norway, the Russian Federation and the United Kingdom on the management of Norwegian Spring-Spawning (Atlanto-Scandian) herring in the North-East Atlantic for 2024. London, 13 October 2023. [https://oceans-and-fisheries.ec.europa.eu/system/files/2023-10/2024-coastal-states-fisheries-consultations-herring\\_en\\_0.pdf](https://oceans-and-fisheries.ec.europa.eu/system/files/2023-10/2024-coastal-states-fisheries-consultations-herring_en_0.pdf).

176 Bell, E., Nash, R., Garnacho, E., De Oliveira, J., O'Brien, C. (2022). Assessing the sustainability of fisheries catch limits negotiated by the UK for 2020 to 2022. Cefas. 38 pp. 2 January 2022. This report concluded that only around one third of the TACs negotiated by the UK were set in line with scientific advice. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1061261/Assessing\\_negotiated\\_catch\\_limits\\_2020\\_to\\_2022.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061261/Assessing_negotiated_catch_limits_2020_to_2022.pdf).

## Key findings and recommendations

The core analysis of this report highlights that progress since 2015 towards setting TACs in line with scientific advice overall has been insufficient, with almost half of the TACs assessed still exceeding the advice for 2020, the year of the CFP's MSY deadline. **Overall, the third round of post-Brexit TACs set for 2023 are an improvement compared to previous years, but one quarter of the assessed TACs still exceeded the advice (Figure 1).** This shows that we are travelling in the right direction, but not doing so fast enough and the destination – sustainable fishing limits across the board – is still a long way away if we continue along the current trajectory. Moreover, this report explicitly focuses on the theoretical sustainability of the agreed TACs, and does not explicitly consider mixed fisheries or ecosystem impacts, since the analysis is based primarily on the single-stock headline advice provided by ICES. **The actual sustainability on the water, reflecting non-compliance with fisheries rules that often lead to TACs being overshoot, as well as mixed fisheries and ecosystem dynamics, is likely to be much lower than the sustainability on paper suggested by this report.**

The situation looks slightly better in terms of the overall volume of TACs set above advice, the extent of the excess and the average percentage difference per TAC/advice comparisons, than in terms of the percentage of the number of TACs. However, for 2023 just over 6% of the overall TAC tonnage was still made up of TACs set above advice (down from 16% in 2021 and 7% in 2022, Figure 2), the overall TAC excess above advice still accounted for 3% of the overall TAC volume (slightly down from 4% in 2022, Figure 3). Meanwhile the average percentage difference dropped to an all-time low of 1% in 2023 (down from 20% in 2020, 8% in 2021 and 3% in 2022, Figure 5).

This report also presents a **split analysis for EU only TACs and those shared between the EU and the UK which used to be set through the December Council process.** The data for 2015 to 2020 provide a baseline for future analyses of post-Brexit TAC decisions from 2021 onwards and show that certain patterns and trends differed between the two groups both in the years before Brexit and for 2021 onwards. For example, the percentage of the tonnage of TACs set above advice (Figure 2) and percentage of the TAC excess (Figure 3) were overall consistently larger throughout the time series (except for 2023) for EU/UK shared stocks than for EU only stocks. However, it was the other way round for the average percentage difference between TACs and advice per TAC/advice comparison (except for 2015 and 2021): the average difference was bigger for EU only stocks (Figure 5), and remained as high as 7% in 2023, whereas for EU/UK shared stocks it dropped just below 0% for both 2022 and 2023. For some metrics such as the percentage of the number (Figure 1) and tonnage (Figure 2) of TACs set above advice and the average percentage difference between TACs and advice (Figure 5), there was clear progress from 2020 to 2021 for EU only TACs set by December Council, whereas progress was less pronounced or even reversed for EU/UK shared TACs. On the other hand, some of these patterns were the other way round for 2021 onwards, with more progress on these metrics for EU/UK shared stocks than for EU only stocks. Moreover, those TACs which were set at or below the advice were overall set notably further below the advice for EU/UK shared stocks than for EU only stocks for 2023 and recent years (Figure 4). Updates of this analysis for the coming years will show if these trends and patterns will continue or change, giving an indication whether the EU or the UK show a different or similar level of ambition in tackling overfishing and aligning TACs with scientific advice.

It is worth noting that there is a **positive overall trend in recent years for TACs to be set more frequently and by an increasing extent below the advice than in previous years**, whereas previously the overshoot used to be substantially higher than the undershoot for TACs not exceeding the advice (Figure 4). For 2022, the undershoot was for the first time higher than the overshoot for both EU only and EU/UK shared stocks, whereas for the EU only stocks this was already the case from 2019 to 2021. This is an important step in the right direction since the scientific advice provided by ICES represents a maximum limit, and some TACs need to be set below this single stock advice in order to safeguard vulnerable stocks in a mixed fisheries setting and implement an ecosystem-based approach

that takes into account ecosystem needs, such as predator-prey interactions. Importantly, the UK has advocated for a more ecosystem-based way of managing industrial fisheries for forage fish, like sandeel and Norway pout, that represent an important food source for seabirds and other wildlife. Consequently, some of these TACs were set substantially below the single stock advice. Note that this is not reflected in the figures presented in this report since the sandeel TACs were excluded from the analysis to ensure consistency in the analysis across the years.

Despite recent improvements, **there is still a tendency to exceed scientific advice more frequently (Figure 8) and by a larger average proportion (Figure 7) when the advice is for a cut** than in cases where it is for a rollover or an increase. Throughout the whole time series the vast majority (and some years even 100%) of TACs exceeding scientific advice refer to cases where a cut was advised (Figure 9). **This is concerning since it shows a bias in TAC-setting that puts stocks that are in bad and/or deteriorating shape, resulting in an advised decrease in catches, under additional strain by failing to respect scientific advice.**

The analysis also confirms concerns that despite some progress in recent years **the Council and EU and UK negotiators are still much less inclined to consistently follow scientific advice for such stocks for which the scientific advice is based on the ICES precautionary approach than for stocks with MSY-based advice**: the percentage of TACs set above advice decreased over time for MSY-based advice (albeit still at 12% for 2023, down from 17% for 2022), whereas it remained stable at over 80% throughout most of the time series for precautionary advice (Figure 10). More recently, this has been decreasing, but remains high, at 59% for 2023. Notably for EU only stocks all MSY-based TACs followed the advice in 2021, whereas 33% of the EU/UK shared TACs still exceeded MSY advice, although the results were closer together again for 2022 (18% and 16%, respectively), followed by a further small improvement to 8% for EU only stocks and 13% for EU/UK shared stocks for 2023. Similarly, the average percentage difference per TAC/advice comparison decreased continuously to close to just below 0% for MSY-based advice in 2019 (and has even been negative since then), but was still 22% for precautionary advice in 2021 (down from 50% in 2020) and even increased again to 27% in 2022, before dropping to 18% in 2023, the lowest value in the time series (Figure 11). The same differential treatment of MSY-based and precautionary advice is also apparent in the average proportion by which the agreed TAC volume exceeds the advice, which also shows that the tendency to exceed precautionary advice is much more pronounced for EU only stocks than for EU/UK shared stocks throughout the whole time series (Figure 12).

In a similar way, **both the Council and EU and UK negotiators seem to prioritise following scientific advice for target rather than bycatch stocks**, albeit with some progress in aligning TACs for bycatch stocks with advice in recent years (Figure 13). However, for 2023, 50% of TACs for stocks primarily caught as bycatch were still set above advice compared to just 11% for target stocks. On a positive note, the tendency throughout much of the time series to exceed advice for bycatch stocks on average by a larger percentage has decreased substantially from 113% in 2017 to 4% in 2023, and for EU/UK shared bycatch stocks the advice has even been on average undershot since 2020 (Figure 14). However, it is important to recognise that this metric excludes TAC/advice comparisons with zero-catch advice, the number of which has remained fairly stable between 6 and 10 throughout the time series. This highlights that **no or only insufficient progress has been made to recover and sustainably manage depleted bycatch stocks, and that TAC-setting has so far failed to respond to the increasingly loud scientific warning bells.**

More broadly speaking, **progress in terms of aligning TACs with scientific advice seems to have been mostly retained over time, but a substantial number of TACs have still been consistently set above the advice throughout all or most of the time series, without or with only little improvement** (Figure 15 and Figure 16). In most years, the gap between the TACs and the underlying advice also narrowed or widened within the “above advice” vs. “in line with/below advice” categories, without a clear trend over time (Figure 17). Decision-makers on both sides of the Channel should give



particular attention to those cases where progress has been lacking throughout the time series – which primarily includes depleted stocks – and continue to retain any further progress made while avoiding backsliding going forward.

Importantly, **the CFP's MSY objective and the legal 2020 deadline for ending overfishing, as well as the corresponding sustainability objectives and requirements in the TCA and UK law, apply to all harvested stocks, whether they are targeted or taken as bycatch, and irrespective of the type of scientific advice available.** While the final judgement by the CJEU is yet to be delivered, the opinion released by Advocate General Ćapeta on an ongoing legal case regarding the CFP's missed 2020 deadline supports the above interpretation. Merely aiming to prevent the collapse of bycatch stocks is insufficient to meet the CFP's requirements and objectives, as well as those contained in existing environmental legislation. So, where MSY-based assessments exist, whether for target or bycatch stocks, fishing opportunities must be set in line with, i.e. at or below, MSY levels. While indeed information on stock status and trends is more limited for stocks without full analytical MSY-based assessments, at present the precautionary approach catch limits advised by ICES still remain the best available scientific advice for such stocks and the relevant TACs should therefore be set in line with this advice. Moreover, **all decision-makers must ensure that the landing obligation is properly implemented and enforced, all catches are accurately documented and TACs are set and quotas distributed in a way that accounts for exemptions and non-compliance.**

In conclusion, in order to restore all stocks in line with the requirements of the CFP, the TCA and UK law, and in line with the recent joint NGO TAC recommendations for the EU and the UK,<sup>177,178,179</sup> the Commission, the Council, individual Member States as well as the UK, should:

- Agree on sustainable TACs in line with science and the law across the board, and – if an agreement on EU/UK shared TACs has not been reached by the 10<sup>th</sup> of December 2023 – default to the setting of provisional TACs based on the ICES advice, as required by the TCA.
- Follow scientific advice for all stocks, regardless of the basis of the best available scientific advice (i.e. the ICES MSY or precautionary approach), and for both target and bycatch stocks, with a particular emphasis on prioritising the recovery of vulnerable and/or depleted stocks;
- Use MSY advice where available, i.e. not using advice based on Precautionary Approach reference points in order to allow for higher than MSY-based catch levels;
- Invest in efforts to continue to increase the number of stocks with MSY-based reference points and stock assessments;
- As a default, invest in stock and ecosystem health, resilience and productivity in the face of mounting pressures like climate change, by setting TACs below the maximum single species advice, particularly in a mixed fisheries context and in relation to forage fish; this is crucial in order to safeguard the most vulnerable stocks and to implement an ecosystem-based approach which factors in ecosystem needs such as a sufficient food supply for seabirds and other wildlife. Both the EU and the UK should also work with ICES to develop and use mixed fisheries considerations more explicitly in TAC-setting going forward, and urgently advance the incorporation of ecosystem considerations into scientific advice on fishing opportunities, while in

177 Joint NGO recommendations to the EU on fishing opportunities for 2024. September 2023. <https://www.clientearth.org/latest/documents/joint-ngo-recommendations-to-the-eu-on-fishing-opportunities-for-2024/>.

178 Joint NGO recommendations to the UK on fishing opportunities for 2024. September 2023. <https://www.clientearth.org/latest/documents/joint-ngo-recommendations-to-the-uk-on-fishing-opportunities-for-2024/>.

179 The EU and UK NGO TAC recommendations for 2024 were accompanied by two cover letters: 1) Cover letter to the EU Commissioner and the UK Secretary of State: <https://www.clientearth.org/latest/documents/cover-letter-to-eu-commissioner-and-uk-secretary-of-state-regarding-the-joint-ngo-recommendations-to-the-eu-and-the-uk-on-fishing-opportunities-for-2024/>. 2) Cover letter to the Spanish Council Presidency: <https://www.clientearth.org/latest/documents/cover-letter-to-the-spanish-council-presidency-regarding-the-joint-ngo-recommendations-to-the-eu-and-the-uk-on-fishing-opportunities-for-2024/>.

the meantime applying a precautionary approach (i.e. setting lower TACs) where such information is not yet fully included or remains uncertain;

- Set precautionary limits and put in place enhanced monitoring and data collection for data-limited stocks without scientific advice on maximum catches; explicitly request and act on scientific advice on what concrete data collection is needed to address data gaps that currently prevent full stock assessments from being computed for data-limited stocks;
- Adopt effective measures for stocks that are not yet above biomass levels capable of producing the MSY, including stocks not currently managed using TACs, to ensure stock recovery;
- Ensure compliance with the landing obligation, for example through a swift, comprehensive and mandatory roll-out of Remote Electronic Monitoring (REM) throughout the EU and the UK, set TACs below the advised catch levels to account for non-compliance and grant quota top-ups and/or access to relevant quota shares only to vessels demonstrating compliance;
- Account for exemption discards in TAC-setting and put in place full catch documentation, particularly where exemptions apply;
- Refrain from granting bycatch TACs for 2024 unless and until the relevant Member States and the UK put in place bycatch reduction or recovery plans that effectively reduce bycatch, set the relevant stocks on a pathway to recovery above levels capable of producing MSY as soon as possible, and are closely monitored and enforced. Robust, full catch documentation through REM must be put in place in all fisheries with bycatches of stocks subject to bycatch TACs. Any requests to ICES for additional catch scenarios must be geared towards stock recovery rather than towards primarily keeping target or mixed fisheries open at the expense of bycatch stocks. If, in contradiction with legal requirements under the CFP, bycatch TACs are nonetheless adopted, they need to be set substantially below previous levels, and as a bare minimum below the  $F_{MSY}$ -based single stock advice, in order to achieve the much-needed reductions in fishing mortality;
- Treat TAC removal as a last resort that should only be considered following receipt of ICES advice on the potential implications of this approach for sustainable exploitation and conservation of the relevant stocks, confirming that the risks associated with TAC removal are negligible. In such advice, ICES should be requested to identify alternative management options and safeguards that will ensure fishing mortality does not exceed  $F_{MSY}$ . Should the Commission or the UK be resolved to remove the TAC, these alternative management measures and safeguards must be in place immediately following its removal. There should be a focus on further improving selectivity and the avoidance of unwanted catches. In addition, there should be enhanced monitoring of the alternative measures and safeguards, with regular review to ensure their effectiveness in line with the CFP's objectives. Continued monitoring and reporting on the state of the stock should feed into the ICES advice cycle and where scientific advice indicates that a stock is deteriorating following the removal of the TAC, mechanisms should be in place to quickly reintroduce the TAC or introduce emergency measures.
- Work with third countries such as the UK and Norway to end overfishing of shared stocks, and – where they continue to fail to reach sustainable sharing arrangements – account for the impact of this lack of joint management in TAC-setting, by setting the overall TAC low enough to ensure that actual catches will not exceed the scientific advice.

## 5 Identifying the culprits behind unsustainable TACs

As this report demonstrates, the EU has made some progress over the years towards aligning TACs with scientific advice, but has still missed its own legal deadline to end overfishing by 2020 by a big margin. The first three rounds of post-Brexit TACs agreed by the EU and the UK for 2021 to 2023, while continuing to head in the right direction, do not yet offer the quantum leap needed to ensure sustainable fishing limits across the board.

This inevitably raises the **question who is to blame for the continued setting of TACs above scientific advice, and the failure to set certain TACs well below single-stock advice to apply a genuine ecosystem-based approach geared towards boosting stock and ecosystem health, resilience and productivity in the face of mounting pressures like climate change.** A detailed analysis of negotiating positions of EU Member States within the December Council as well as the EU and the UK negotiating teams who agreed on the EU/UK shared TACs for 2021 onwards is outside the scope of this report. However, this section provides some findings and reflections on this topic based on past analyses and available information about the 2021, 2022 and 2023 EU/UK TAC-setting processes. The findings presented on the latter are primarily based on information received in various EU/UK plenary sessions and debriefs with both sides throughout the process, while publicly available written documentation of the positions and discussions still remains limited. This is because both Parties continue to hold their cards close to their chest, mostly based on arguments around not prejudicing or jeopardising future negotiations.

### 5.1 TACs agreed at December Council

Like the previous iterations of this report for 2021 and 2022, this report no longer includes an analysis of the Commission's TAC proposal, since most of the stocks previously falling under the December Council process are now covered by the EU/UK TAC negotiations for which no formal proposal is published. However, past findings for the years 2015-2020 highlight that the agreed TACs usually exceed scientific advice more frequently and by a larger amount both in total and on average than the proposed TACs.<sup>180</sup> This indicates that the Council is usually less inclined to follow scientific advice than the Commission whose proposals are often more ambitious – albeit still not fully in line with science and the law.

Previous editions of this report for 2019 and 2020 also contained a detailed analysis of Member State positions expressed throughout the December Council processes in 2016, 2017 and 2018, based on information received through a series of Access to Information Requests (AIRs) and confirmatory applications to both the Council and the Commission.<sup>181</sup> ClientEarth has published a detailed directory of all the files received throughout this work (also covering December Councils 2019 and 2020), including some documents not previously available elsewhere.<sup>182</sup> This analysis highlighted that **certain Member States have been more vocal than others in pushing for higher than scientifically advised TACs: France, the United Kingdom (back then still an EU member), Portugal, Ireland, Spain and Belgium have all repeatedly and successfully advocated for TACs above scientific advice, whereas Denmark has done so in one case (Kattegat cod) each year.** On the other end of the spectrum, the Netherlands, Germany and Sweden are not documented to have actively advocated for higher than advised TACs (regarding the subset of TACs covered in this analysis). Nevertheless, **all Member States have received shares of TACs in excess of the scientific advice, meaning they are all to blame for unsustainable TACs, either directly (if they actively pushed for it) or indirectly (if they failed to object to others doing so).**

<sup>180</sup> For further details and statistics on this, please refer to the 2020 version of this report: ClientEarth (2020). Taking stock 2020 – are TACs set to achieve MSY? October 2020. <https://www.clientearth.org/latest/documents/taking-stock-2020-are-tacs-set-to-achieve-msy/>. See section 4 of that report on p. 19 onwards.

<sup>181</sup> *Ibid.*: For details on this analysis please refer to section 5 (p. 34 onwards) of that report.

<sup>182</sup> ClientEarth (2021). Directory of files related to ClientEarth's AIRs regarding TACs set through the December Council processes 2016-2020. September 2021. <https://www.clientearth.org/latest/documents/directory-of-files-related-to-clientearth-s-air-s-regarding-tacs-set-through-the-december-council-processes-2016-2020/>. This directory was accompanied by a press release - Revealed: The culprits behind unsustainable fishing limits in the EU. <https://www.clientearth.org/latest/press-office/press/revealed-the-culprits-behind-unsustainable-fishing-limits-in-the-eu/>. The directory is yet to be updated to include files received through more recent AIRs regarding the 2021 and 2022 TAC-setting processes.

The arguments put forward to justify exceeding scientific advice appear to have frequently revolved around three main themes:

- a) Concerns related to the landing obligation, such as bycatch, discards and anticipated choke issues;
- b) Socio-economic concerns related to advised quota cuts; and
- c) Claims related to the state of the stock or the accuracy of the official scientific advice provided by ICES, leading the Member State in question to the conclusion that smaller cuts or larger increases, or a more gradual progress towards achieving the MSY objective may be possible.

A partial review of all documents related to certain TACs, as received through ClientEarth's AIRs and consecutive confirmatory applications, demonstrated that indeed **Member States mostly did not provide compelling, or often any, evidence to support their claims and advocacy for higher than advised TACs.**

**Importantly, the ranking of Member States within the analysis differs considerably depending on the metric used (e.g. focusing on the frequency, volume or average percentage difference between TACs and advice) and the year in question.** Moreover, the results covered by this analysis are based on a subset of analysed TACs, meaning that the situation will look potentially quite different for other TACs outside of the scope of this report, e.g. regarding Baltic TACs, where different Member States are more vocal based on their interests. The results regarding different metrics should therefore not be treated in isolation of each other, or extrapolated to TACs outside the scope of this analysis. For further details on the findings of this analysis, including comprehensive Member State profiles with graphs illustrating the respective Member State's behaviour at the December Councils 2016, 2017 and 2018, please refer to the 2020 edition of this report.<sup>183</sup> This comprehensive analysis was not updated for more recent years. However, some files received in response to more recent AIRs regarding the 2021, 2022 and 2023 TAC-setting processes indicate that certain Member States continue to push for TACs to be set above scientific advice. For example, a letter regarding southern hake, sent to the Commission by the Spanish, Portuguese and French fisheries ministers and disclosed following a recent AIR,<sup>184</sup> confirms that on this occasion it was specifically these three Member States (Spain, Portugal and France) who pushed for the TAC to be set above the precautionary advice provided by ICES.<sup>185</sup> Similarly, for example France explicitly asked for a rollover of the 2022 pollack TACs (1851 tonnes) into 2023, while precautionary ICES advice for 2023 was only 905 tonnes, and that rollover, which was indeed adopted, was more than twice the advice.<sup>186,187</sup>

In the Council's response to ClientEarth's request for internal review regarding the 2022 TAC and Quota Regulation, the Council expressly disagrees with ClientEarth's position that "*The ICES headline advice represents the maximum catch level not to be exceeded*".<sup>188, 189</sup> Moreover, it claims that "*The more*

183 See footnote 132, "Taking stock 2020 – are TACs set to achieve MSY?", section 5.1 on the information used about position of Member States, section 5.2 with an overview of the findings regarding vocal versus quiet Member States, section 5.3 on the arguments used by Member States to justify unsustainable TACs, and section 5.4 for the more detailed Member State profiles. Statistics on the data presented are covered by Annex V of the report (<https://www.clientearth.org/latest/documents/taking-stock-2020-are-tacs-set-to-achieve-msy-annex-v/>).

184 ClientEarth's AIR to the Commission, submitted on 4 July 2022 via the ask-the-eu-portal and registered under the reference 'GESTDEM 2022/3819'. [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_4#outgoing-22081](https://www.asktheeu.org/en/request/request_for_access_to_documents_4#outgoing-22081) The letter was included in the Commission's response from 19 August 2022, [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_4#incoming-39174](https://www.asktheeu.org/en/request/request_for_access_to_documents_4#incoming-39174), [https://www.asktheeu.org/en/request/11527/response/39174/attach/3/Annex.pdf?cookie\\_passthrough=1](https://www.asktheeu.org/en/request/11527/response/39174/attach/3/Annex.pdf?cookie_passthrough=1).

185 Note that the southern hake stock assessment, which was previously data-limited, has since then been upgraded to a full MSY-based assessment, resulting in a more positive perception of the stock and corresponding higher ICES advice based on  $F_{MSY}$  ranges. However, in line with the CFP's rules and objectives, decision-makers must base TACs on the best available scientific advice available at the time of TAC-setting, and must not use new information that is only released after the TACs have been set, to retrospectively justify exceeding the best available scientific advice (which in the case of southern hake happened to be precautionary advice) available at the time of TAC-setting.

186 ST 14679 2022 ADD 15, partially accessible to the public as of 20 February 2023 in the Council's document register, <https://data.consilium.europa.eu/doc/document/ST-14679-2022-ADD-15/x/pdf>. This file contains written comments from France (in French) on the Commission's proposal for TACs for 2023. Regarding pollack, this document states on page 5: "*Sur le lieu jaune, les autorités françaises rappellent leur demande de maintenir le TAC 2022 en 2023.*" The concrete stock is not specified, but given the document primarily contains comments on the Commission's initial TAC proposal, it makes sense to assume it is referring to the EU only stock in the Bay of Biscay and Iberian waters, subject to the TACs POL/8ABDE., POL/08C. and POL/9/3411.

187 The file on which this information is based, as well as a range of other documents were covered by ClientEarth's AIR submitted via ask-the-eu on 21 August 2023, registered under Ref. 23/2357-PRO-nb: [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_7#outgoing-25871](https://www.asktheeu.org/en/request/request_for_access_to_documents_7#outgoing-25871).

188 ClientEarth's Request for internal review of Council Regulation (EU) 2022/109 of 27 January 2022 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters. <https://data.consilium.europa.eu/doc/document/ST-7725-2022-INIT/en/pdf>. Paragraph 133.

189 Council's reply: 9303/2/22 REV 2 from 10 June 2022 to ClientEarth's Request for internal review of Council Regulation (EU) 2022/109 of 27 January 2022 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters. <https://data.consilium.europa.eu/doc/document/ST-9303-2022-REV-2/en/pdf>. Paragraph 42.

*uncertain that advice is, the more reasonable it may be for the Council to not entirely follow the headline advice only and also to take into account other elements, including uncertainties identified in the advice itself*".<sup>190</sup> These statements by the Council confirm its openness to setting TACs above scientific advice, particularly where data are limited and ICES provides precautionary rather than MSY-based advice, which is blatantly disregarding the precautionary approach. While this does not allow any conclusions about which Member States this perspective originates from, it indicates that **the tendency to exceed precautionary advice is primarily driven by the Council, whereas the Commission appears to be more inclined to respect precautionary advice.**<sup>191</sup>

## 5.2 TACs agreed between the EU and the UK

**The evolving dynamic between the EU and the UK, with the UK as an independent Party, represents both challenges and opportunities, for example if the level of ambition diverges between both Parties** as seems to have been the case with regards to certain issues in the negotiation processes for 2021, 2022 and 2023. As mentioned in section 2.4.2, in response to several AIRs submitted in the last couple of years, both the Council and the Commission have refused access to documents related to TAC-setting for shared stocks, for example, based on concerns about the potential impact on international relations and future negotiations.<sup>192,193,194</sup> Similarly, the UK's Department for Environment, Food & Rural Affairs (DEFRA) refused access to information on the 2022 EU/UK TAC negotiations for 2023, as requested by the Blue Marine Foundation in December 2022.<sup>195</sup> In its response, DEFRA explicitly confirmed that it holds such information, but cannot release it so as not to "*undermine [the UK's] ability to engage and work with the EU in the future*".<sup>196</sup> **This continued lack of transparency around these negotiations, on both sides of the English Channel, makes it difficult to unambiguously identify who has pushed for TACs above scientific advice.** However, based on engagement with both EU and UK decision-makers throughout the TAC-setting processes for 2021 to 2023, a number of observations can be made.

**In some ways the UK seems to have been an environmentally progressive force, for example when it comes to the consideration of an ecosystem-based approach when setting TACs for forage fish like sandeel and Norway pout,<sup>197</sup> albeit it not necessarily consistently,<sup>198</sup> which is subject to criticism from the EU.** In some cases, it seems to have advocated for a more ecosystem-based way of managing industrial fisheries, including the setting of TACs below the single-stock advice, and its recent

<sup>190</sup> *Ibid.*

<sup>191</sup> For example, in its press release regarding its TAC proposal for 2022, the Commission explicitly stated: "*For stocks for which less data is available, the Commission proposal is based on precautionary advice*". Press release: Commission proposes fishing opportunities in the Atlantic, Kattegat and Skagerrak for 2022. 3 November 2021. Brussels. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_5660](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5660).

<sup>192</sup> ClientEarth submitted an AIR to the Council on 23 May 2022, which was registered under the reference "Ref. 22/1156-PRO-el". [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_3#outgoing-21624](https://www.asktheeu.org/en/request/request_for_access_to_documents_3#outgoing-21624). In its reply from 7 July, the Council disclosed a number of files, while refusing access to a large number of files containing information on 2022 TACs for shared stocks. [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_3#incoming-38397](https://www.asktheeu.org/en/request/request_for_access_to_documents_3#incoming-38397).

<sup>193</sup> ClientEarth submitted an AIR to the Commission on 4 July 2022, which was registered under the reference "GESTDEM 2022/3819". [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_4#outgoing-22081](https://www.asktheeu.org/en/request/request_for_access_to_documents_4#outgoing-22081). In its reply from 19 August 2022, the Commission disclosed one document, but refused access to two files containing information on 2022 TACs for shared stocks. [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_4#incoming-39174](https://www.asktheeu.org/en/request/request_for_access_to_documents_4#incoming-39174).

<sup>194</sup> ClientEarth submitted an AIR to the Council on 5 September 2023, which was registered under the reference "Ref. 23/2446-PRO-mf", [https://www.asktheeu.org/en/request/request\\_for\\_access\\_to\\_documents\\_8#outgoing-26003](https://www.asktheeu.org/en/request/request_for_access_to_documents_8#outgoing-26003). In its reply from 13 October, the Council (partially) disclosed a number of files, while refusing access to a large number of files (or parts thereof) containing information on 2023 TACs for shared stocks.

<sup>195</sup> Department for Environment, Food & Rural Affairs (DEFRA) (2022). Response to REQUEST FOR INFORMATION: Fisheries Negotiations – Total Allowable Catch (TAC), as submitted by Blue Marine Foundation on 28 November 2022. Reference EIR2022/24781.

<sup>196</sup> *Ibid.* The request asked for information on (i) the opening positions of the UK and the EU concerning the TAC for each stock, (ii) the TAC values, per stock, proposed by the UK Government in its opening position, and (iii) the TAC values, per stock, proposed by the EU in its opening position. In this response, DEFRA states "*We can confirm that we hold the information you requested. However, it is being withheld as it falls under the exception in regulation 12(5)(a) of the EIRs, which relates to international relations. The exception is engaged in this instance as the information relates to the disclosure of matters concerning negotiations with the EU.*"

<sup>197</sup> See for example a statement in a letter from (then) UK Secretary of State George Eustice to Commissioner Sinkevičius that while the UK has "*moved a long way from our starting point for industrial stocks to reach an agreement in principle on the TAC for sandeels, we are uncomfortable with proposals for the TAC on Norway Pout and retain our position on that stock*". WK 6529/2021 INIT, a working paper with the subject "UK letter to Commissioner Sinkevičius", dated 17 May 2021, and partially disclosed in response to ClientEarth's AIR to the Council from 14 October 2021, registered as "Ref. 21/1729-ADD2-aa/vk" as part of a wetransfer link: <https://we.tl/t-ZQI5XBmURg>. The quote can be found on p. 2.

<sup>198</sup> For example, while both DEFRA and the Scottish Government already proposed closing English and Scottish waters, respectively, to sandeel fishing (see footnotes 199 and 200), no equivalent action has yet materialised for Norway pout or other forage fish, and the recent agreed written record for the Norway pout TAC does not reference ecosystem-based management or forage fish issues at all, with the sum of the final EU/UK shared TAC and the Norwegian share adding up to the full ICES single-stock headline advice, rather than having been set below this level to reflect predator needs.

push through the English and Scottish Devolved Administrations for a closure of both English and Scottish waters to sandeel fishing.<sup>199,200</sup> **The UK also appears to support the increased development and use of mixed fisheries considerations in the discussions around TAC-setting, in some cases leading to the setting of TACs below the single stock advice to safeguard other more vulnerable stocks caught in the same fishery.** A comparison of the UK's provisional unilateral TACs that were set in the first half of 2021 before the final EU/UK shared TACs were agreed, and the final shared TACs also indicates that the UK was ready to set certain TACs at a lower level than that ultimately agreed with the EU.<sup>201</sup>

On the other hand, **the UK has pushed for an increased inter-area flexibility for example for haddock into the West of Scotland which may pose a risk to vulnerable bycatch stocks in the area** such as West of Scotland cod,<sup>202,203</sup> **which the EU appears to have been critical of.** For example, in a letter to the (then) UK Secretary of State George Eustice, Commissioner Sinkevičius raised explicit “*sustainability concerns regarding the impact of increased flexibility you are asking for stocks, which ICES is warning us about, since many years, as these stocks are at the brink of collapsing in the West of Scotland*” and states that “*Increasing the fishing pressure on severely depleted stocks of cod and whiting in the West of Scotland, for which ICES has advised zero catch advice, is not sustainable. Any increase in fishing opportunities from the North Sea to the West of Scotland that would result from this flexibility will lead to additional pressure on these very vulnerable stocks*”.<sup>204</sup>

Moreover, **it seems like the UK may have resisted attempts by the EU to decrease certain bycatch TACs for vulnerable stocks below the previous level which would have promoted the recovery of these stocks.** For example, the explanatory memorandum of the Commission's proposal for the first amendment of the TAC and Quota Regulation for 2022 (essentially transposing the final agreed TACs for EU/UK shared stocks into EU law),<sup>205</sup> indicates that the 2022 TACs for West of Scotland cod and Irish Sea whiting were set above levels preferred by the Commission, upon the UK's request.<sup>206</sup> Moreover, the Commission states that “*For a limited number of stocks (Rockall, West of Scotland, Irish Sea and Celtic Sea cod; Irish Sea whiting; Pollack 6 and 7), TACs were agreed with the United Kingdom at a level above that proposed by the Union in order to achieve an overall outcome considered necessary and desirable in terms of sustainability and socio-economic considerations, including the need to promote a level playing field*”.<sup>207</sup> By reverse logic, this indicates that for all other shared TACs set above advice that are not specified here, this was done either on the EU's initiative or in agreement between both the EU and the UK.

199 DEFRA's consultation on “spatial management measures for industrial sandeel fishing” ran from 7 March to 30 May 2023, and the summary of responses was published on 17 July 2023: <https://www.gov.uk/government/consultations/consultation-on-spatial-management-measures-for-industrial-sandeel-fishing/outcome/summary-of-responses>. An overwhelming 95.5% of responses supported the preferred option of a full spatial closure of industrial sandeel fishing within the North Sea.

200 The Scottish Government consultation on “Proposals to close fishing for sandeel in all Scottish waters” ran from 21 July to 13 October 2023: <https://consult.gov.scot/marine-scotland/consultation-on-proposals-to-close-fishing/>. It essentially proposed one option, namely a full closure of Scottish waters to sandeel fishing. The results of the consultation have not been published yet at the time of writing this report.

201 The results of this comparison are not presented in detail in this report but can be provided upon request. In this analysis, the theoretical total provisional TAC was calculated based on the UK provisional TAC and the UK's % share of the overall TAC as specified in the TCA. The final agreed TACs exceeded the theoretical provisional TAC based on the UK provisional TACs for Celtic Sea haddock (HAD/7X7A34), Celtic Sea herring (HER/7G-K.), pollack (POL/56-14 and POL/07.) and undulate ray (RJU/7DE.).

202 Foster, Peter, and Brunson, Jim (2021). UK accused of reneging on sustainable fishing pledge. Financial Times. 2 May 2021. <https://www.ft.com/content/02fa9714-b766-4db0-a13a-ab64d9d6127e>.

203 Note that based on the latest benchmark and scientific advice for Northern Shelf cod in 2023, West of Scotland cod is now considered part of the Northwestern sub-population of the Northern Shelf cod stock which also includes what used to be ‘North Sea cod’. However, it is important to note that at the time the UK pushed for inter-area flexibility into the West of Scotland, West of Scotland cod was still assessed as a standalone stock which indeed was considered severely depleted and overfished. The latest advice for Northern Shelf cod no longer makes a distinction between the West of Scotland part and the rest of the wider Northwestern sub-population and does not state whether local depletion in the West of Scotland remains an issue.

204 WK 6606/2021 INIT, a working paper with the subject “EU-UK: Reply of Commissioner Sinkevičius to Secretary of State Eustice”, dated 20 May 2021, and partially disclosed in response to ClientEarth's AIR to the Council from 14 October 2021, registered as “Ref. 21/1729-ADD2-aa/vk” as part of a wetransfer link: <https://we.tl/t-ZQi5XBmURg>. The quotes can be found on pp. 2 and 3.

205 COM(2022) 54 final. Proposal for a COUNCIL REGULATION amending Regulation (EU) 2022/109 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0054>.

206 *Ibid.*, p. 4. For example, the explanatory memorandum states that the TACs for West of Scotland cod and Irish Sea whiting (both subject to zero catch advice from ICES) were “*agreed, with the United Kingdom based on a rollover, as requested by the United Kingdom above the ICES determined FMSY and above the upper FMSY ICES advice rule*”.

207 *Ibid.*, p. 5.

**The involvement of the devolved administrations (DAs) within the UK in forming the UK's negotiating position is another factor that will need further attention going forward.** This includes, for example, the influence of the Scottish and Northern Irish DAs on the final UK position regarding certain stocks of primarily Scottish or Northern Irish interest, such as stocks in the West of Scotland and the Irish Sea, respectively.

An added layer of complexity on the EU side is the need for the Commission, who is leading the negotiations on behalf of the EU, to consult the Member States throughout the TAC-setting process, also acting in accordance with the mandate provided by the Council. While there has been fairly regular engagement between Commission representatives and stakeholders throughout the TAC-setting processes for 2021, 2022 and 2023, **specific information on the positioning and priorities of individual Member States, and documentation of exchanges between the Commission and the Council, remains limited, not least due to the recurring refusal of the Council to release relevant information.**<sup>208</sup> This continues to make it difficult to identify the driving forces both for TACs exceeding scientific advice and for positions or decisions that are more environmentally progressive.

It is worth noting that, similar to the situation for EU only stocks, **the Commission's initial position appears to be closer to the scientific advice than the final EU position following consultation with the Council:** for example, a Commission non-paper disclosed in response to an AIR regarding the 2022 TAC-setting process indicates that the Commission considered that the TACs for Celtic Sea cod, West of Scotland cod and Irish Sea whiting would have to be decreased to 134 tonnes, 1124 tonnes and 498 tonnes, respectively (corresponding to proposed provisional TACs of 40 tonnes, 320 tonnes and 180 tonnes, respectively), to bring them "*in line with scientific advice*".<sup>209</sup> Notably, the provisional TACs as adopted by the Council were higher than this in two cases, namely for Celtic Sea cod (202 tonnes) and Irish Sea whiting (289 tonnes),<sup>210</sup> indicating that the Council pushed these provisional TACs up.

**Compared to 2021 and 2022, the Specialised Committee in Fisheries (SCF) set up under the TCA appears to have picked up momentum throughout 2023, with a backlog of issues, mostly derived from past agreed written records, being addressed or discussions at least being initiated between both Parties.** While proactive, regular stakeholder engagement has so far been limited on the EU side, the UK negotiation team has set up a series of recurring meetings, to a) debrief stakeholders (including both NGOs and industry) ahead of and following SCF meetings, and b) gather stakeholder input on the various agenda points (which is mostly done separately for NGOs and industry representatives). This type of engagement, accompanied by the publication of agendas, minutes and decisions or recommendations produced by the SCF,<sup>211,212</sup> constitutes a positive step towards increased transparency regarding key issues of debate between both Parties. However, stakeholders are not invited to the actual meetings of the SCF and its Working Groups. **Concrete outcomes remain limited at this point, but tangible progress seems to have been made for example on addressing the long-standing issue of**

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208 See footnote 194.

209 ST 14766 2021 INIT, disclosed in response to ClientEarth's AIR to the Council from 23 March 2022, registered as "Ref. 22/0630-PRO-ns" and submitted via the ask-the-eu-portal. [https://www.asktheeu.org/en/request/concerning\\_the\\_fishing\\_opportuni#outgoing-20976](https://www.asktheeu.org/en/request/concerning_the_fishing_opportuni#outgoing-20976). The Council's response can be found here: [https://www.asktheeu.org/en/request/concerning\\_the\\_fishing\\_opportuni?nocache=incoming-37024#incoming-37024](https://www.asktheeu.org/en/request/concerning_the_fishing_opportuni?nocache=incoming-37024#incoming-37024). The file is now public in the Council's document register: <https://data.consilium.europa.eu/doc/document/ST-14766-2021-INIT/en/pdf>. The tonnages are presented in the table on page 5. The reference to "scientific advice" is presumably referring to the respective  $F_{MSY}$  upper catch scenarios, rather than the ICES headline advice for zero catches. The figures for the provisional TACs are included in the Annex for COD/7XAD34 (p. 21), COD/5BE6A (p. 21) and WHG/07A. (p. 27).

210 See the TAC and Quota Regulation for 2022, Council Regulation (EU) 2022/109 of 27 January 2022 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0109&print=true>. The provisional TACs for Celtic Sea cod (COD/7XAD34) and Irish Sea whiting (WHG/07A.) are specified on p. 60 and p. 68 respectively.

211 On the UK side, SCF meeting agendas, minutes and outputs are published on the following website: DEFRA (2021). Transparency data. Specialised Committee on Fisheries. <https://www.gov.uk/government/publications/specialised-committee-on-fisheries>.

212 On the EU side, SCF agendas and minutes are published on the following website: European Commission, Meetings of the EU-UK Partnership Council and Specialised Committees under the Trade and Cooperation Agreement. Specialised Committee on Fisheries. [https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement/specialised-committee-fisheries\\_en](https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement/meetings-eu-uk-partnership-council-and-specialised-committees-under-trade-and-cooperation-agreement/specialised-committee-fisheries_en). There is a separate website for decisions and recommendations of the Specialised Committees and Trade Specialised Committees, but this does not appear to contain the recommendations and decisions already published on the UK website (see footnote 211) at the time of writing this report: [https://commission.europa.eu/content/decisions-and-recommendations-specialised-committees-and-trade-specialised-committees\\_en](https://commission.europa.eu/content/decisions-and-recommendations-specialised-committees-and-trade-specialised-committees_en).

**mismatch between TAC and advice areas for a number of stocks,**<sup>213</sup> such as lemon sole and witch, as well as turbot and brill.<sup>214</sup> **Other issues however, such as the development of guidelines for provisional TAC-setting for “special stocks”, which was supposed to have been completed by mid-July 2021, are still under debate. How decisions and recommendations coming out of the SCF process will be implemented in practise remains to be seen.** It will be important to continue monitoring this process closely to optimise it over the coming years, including exploring options for reflecting stakeholder input on new priority agenda items that are not derived from agreed written records.

In the end both the EU and the UK, including the individual EU Member States and UK DAs, are bound by their respective domestic legislation as well as the TCA, while aiming to consider the concerns, needs and priorities of their respective stakeholders. **It therefore remains to be seen whether this evolving dynamic between the EU and the UK will lead to a race to the top or the bottom, or ultimately gravitate towards business as usual.** The split between EU only and EU/UK shared stocks in the analysis presented in this record will serve as a baseline to monitor the situation and direction of travel in the years ahead.

## Key findings and recommendations

The continued lack of transparency around the setting of TACs, both within the December Council process and as part of the negotiations between the EU and the UK on shared TACs, makes it difficult to draw definite conclusions about who pushed for unsustainable TACs above scientific advice – and likewise, who deserves the credit for environmentally progressive decisions geared towards stock recovery and ecosystem protection. The fact that the majority of TACs previously covered by the December Council process are now subject to negotiations between the EU and the UK, presents both challenges and opportunities in terms of transparency and sustainable fisheries management. Based on past analyses of Member State positions throughout the December Councils 2016-2018 and available information about the 2021, 2022 and 2023 EU/UK TAC-setting processes, the following conclusions and recommendations apply:

- All EU Member States are individually and collectively responsible for the outcome of the Council meeting. They must therefore ensure that EU only TACs for 2024 and beyond meet the CFP's requirements and objectives, by setting them in line with (i.e. at or, in line with a genuine ecosystem-based approach, below) the best available scientific advice. This means that Member States that have previously been actively advocating for higher than advised TACs must now instead push for TACs in line with scientific advice. Member States that have previously remained quiet, in turn, must speak up against attempts by other Member States to push for higher than advised TACs in order to cease being complicit in unsustainable TAC-setting.
- Similarly, the Commission must ensure that its TAC proposals are in line with the CFP's requirements and objectives, by following scientific advice, and strongly defend this against any attempts from Member States to set TACs above sustainable levels.
- The Spanish Council Presidency plays an important role in overseeing the process and reminding the Member States of their individual and joint responsibility to set TACs in line with the CFP's requirements and objectives.

<sup>213</sup> ClientEarth (2016). Mismatch between TACs and ICES advice - Why it is an issue and how to address it.

<https://www.clientearth.org/latest/documents/mismatch-between-tacs-and-ices-advice-why-it-is-an-issue-and-how-to-address-it/>. Also see section 3.2.2 of this report.  
<sup>214</sup> Recommendation No 2/2023 of the Specialised Committee on Fisheries established by Article 8(1)(q) of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, of 24 July 2023, as regards the alignment of management areas for Lemon Sole, Witch, Turbot and Brill.



- In line with the findings of the European Ombudsman, all files relating to the TAC-setting process in the lead-up to this year's and any future December Council should be made publicly available ahead of December Council, at the time when they are circulated to the Member State delegations. This should include all information and considerations used throughout the TAC-setting process to address area mismatch between TACs and scientific advice. This also applies to all proposed and agreed TAC adjustments to account for exemptions from the landing obligation (and proposed/agreed TACs before and after adjustments), as well as calculations and underlying data. Moreover, records of relevant meetings ahead of December Council, as well as the December Council meeting itself, should be produced and made publicly available shortly after the meetings are completed, to allow for meaningful engagement of civil society in the process.
- The same transparency recommendations apply regarding the setting of EU/UK shared TACs and the work of the Specialised Committee on Fisheries (SCF). This includes the proactive publication of all contributions from Member States, the Council as a whole and the Commission, as well as representatives of the UK or its Devolved Administrations used throughout the process, as well as detailed minutes of the EU/UK negotiations, their preparatory meetings and discussions within the SCF and its working groups. All of this information should be made available proactively, and in an easily accessible manner, for example through a searchable public database or document register.
- The progress made since 2021 in terms of granting access to negotiations for stakeholders including NGOs, for example through participation in plenary sessions and more detailed engagement via debriefs between both EU and UK officials and stakeholders needs to be continued and further developed. As the SCF continues to work its way through a number of key issues, some of which (like guidelines for "special stocks") are closely linked to TAC-setting, it will remain important to ensure effective stakeholder involvement and consultation as well as robust documentation of relevant discussions, recommendations and decisions, and their effective implementation.
- In light of the UK's departure from the EU, resulting in the majority of stocks or TACs previously falling under the December Council process now having become shared stocks, a commitment of all involved parties to sustainability and greater transparency will be crucial for 2024 and beyond. The years ahead will show whether the new dynamic between both Parties will result in a race to the bottom or the top, or whether business as usual, with slow and limited progress, will continue.

## Annexes

### Annex I: Relevant ClientEarth and NGO recommendations, briefings and reports

ClientEarth and other NGOs (2014-2023). Files related to negotiations on fishing opportunities. A directory of various ClientEarth and joint NGO recommendations regarding TAC-setting for 2015 onwards. <https://www.clientearth.org/latest/documents/files-related-to-negotiations-on-fishing-opportunities/>

ClientEarth and other EU NGOs (2023). Joint NGO recommendations to the EU on fishing opportunities for 2024. <https://www.clientearth.org/latest/documents/joint-ngo-recommendations-to-the-eu-on-fishing-opportunities-for-2024/>

ClientEarth and other UK NGOs (2023). Joint NGO recommendations to the UK on fishing opportunities for 2024. <https://www.clientearth.org/latest/documents/joint-ngo-recommendations-to-the-uk-on-fishing-opportunities-for-2024/>

ClientEarth (2022). Taking stock 2022 – are TACs set to achieve MSY? October 2022. <https://www.clientearth.org/latest/documents/taking-stock-2022-are-tacs-set-to-achieve-msy/>

ClientEarth (2021). Taking stock 2021 – are TACs set to achieve MSY? November 2021. <https://www.clientearth.org/latest/documents/taking-stock-2021-are-tacs-set-to-achieve-msy/>

ClientEarth (2020). Taking stock 2020 – are TACs set to achieve MSY? October 2020. <https://www.clientearth.org/latest/documents/taking-stock-2020-are-tacs-set-to-achieve-msy/>

ClientEarth (2020). What is the ‘best available scientific advice’ for setting Total Allowable Catches (TACs)? December 2020. <https://www.clientearth.org/latest/documents/what-is-the-best-available-scientific-advice-for-setting-total-allowable-catches-tacs/>

ClientEarth (2020). Linking the law to biological reference points used in scientific advice when setting Total Allowable Catches (TACs). December 2020. <https://www.clientearth.org/latest/documents/linking-the-law-to-biological-reference-points-used-in-scientific-advice-when-setting-total-allowable-catches-tacs/>

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## Annex II: TACs included in the core analysis

Annex II can be found here: <https://www.clientearth.org/latest/documents/taking-stock-2023-are-tacs-set-to-achieve-msy-annex-ii/>

## Annex III: TACs excluded from the core analysis

Annex III can be found here: <https://www.clientearth.org/latest/documents/taking-stock-2023-are-tacs-set-to-achieve-msy-annex-iii/>

## Annex IV: Data used in the core analysis

The **ICES advice** was downloaded from the ICES website,<sup>215</sup> and where the initial advice was subsequently updated, the most up-to-date figures available at the time of the respective December Council meeting, and for 2021, 2022 and 2023 at the time when the EU/UK shared TAC negotiations were concluded, were used. The official advice figures for catch and landings (or 'wanted catch') were taken from the top of the individual advice documents. Whenever the 'wanted catch' figure was not provided at the top of the advice, the relevant figures were taken from the catch options tables. Further information extracted from the ICES advice to allow for a differentiated analysis by these criteria include: the advice basis (e.g. ICES MSY approach or ICES precautionary approach); the ICES stock data category (i.e. 1 to 6);<sup>216</sup> and the availability of catch options a) for a management plan, b) for  $F_{MSY}$  ranges and c) for mixed fisheries scenarios is available, although some of this information was in the end not presented in this report. Basic information on the current stock status regarding fishing mortality and spawning stock biomass in relation to available reference points was also extracted based on the table presented in the 'Stock and exploitation status' section.

The **agreed TACs** (as well as details of the area covered and information on whether the figures refer to the EU alone or include other countries) were taken from the TAC and Quota Regulation published following the conclusion of the respective December Council meetings, and – for the EU/UK shared TACs for 2021, 2022 and 2023 – from the agreed written record between both Parties. Updates to agreed TACs throughout the year were not considered, since the focus of this report is to evaluate the decisions taken at December Council and through the EU/UK TAC negotiations.

The final proposed **quota adjustments** were identified based on the relevant Commission non-papers and included in the same spreadsheet. Where available, information on agreed quota adjustments was extracted from documents regarding the outcome of the Council meeting as well as relevant Commission non-papers. Where explicit information on agreed quota adjustments was not available, it was assumed that the Council adopted the same quota adjustment percentages as proposed by the Commission. For recent years, no quota adjustment information was needed, since the relevant pre-adjustment figures were included in the relevant TAC and Quota Regulations and EU/UK agreed written records, respectively.

Information on **de minimis and high survival exemptions** applicable to the TACs included in the core analysis of this report was taken from the relevant discard plans, by matching up the descriptions of the species-area combinations specified in the latter with the scope of the relevant TACs. Again, this information was not necessary for recent years, since the pre-adjustment figures were more readily available.

## Annex V: Historical changes to the TAC analysis

Annex V can be found here: <https://www.clientearth.org/latest/documents/taking-stock-2023-are-tacs-set-to-achieve-msy-annex-v/>

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<sup>215</sup> <https://www.ices.dk/advice/Pages/Latest-Advice.aspx>.

<sup>216</sup> ICES (2022): Advice on fishing opportunities (2022). General ICES Advice guidelines. Report. <https://doi.org/10.17895/ices.advice.19928060.v1>.

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