



Taking stock 2021 - 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, over eight years after the 2013 CFP reform and a year after the TCA came into force, with negotiations for 2022 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 2021, 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 2021 and beyond to allow all stocks to recover in line with the requirements of the CFP, the TCA and the UK's fisheries legislation – especially now that, as this report shows, they have missed the 2020 deadline. This report represents an update of last year's report, adding the results of ClientEarth's analysis of the 2021 TACs and for the first time also presenting the results for EU only and EU/UK shared stocks separately, but otherwise following mostly the same structure and methods. Based on a subset of the TACs agreed at the past seven December Council meetings and during the 2021 negotiations between the EU and the UK, it explores the following findings:

- **The first round of post-Brexit TACs set for 2021 are an improvement compared to 2020, but progress since 2015 towards setting sustainable TACs in line with scientific advice and the law has still been far too slow, and the 2020 deadline was missed.** The overall percentage of the number of TACs set above scientific advice decreased from 48% in 2020 to 42% in 2021 (36% for EU only stocks, 46% for EU/UK shared stocks) and the average percentage difference between TACs and advice dropped from 21% in 2020 to 4% in 2021. However, some of the assessed metrics went backwards, such as the tonnage of TACs exceeding the advice (almost a fifth of the total 2021 TAC tonnage), 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. However, the average 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 for 2021 and recent years. 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 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: 73% of the 2021 TACs for MSY-assessed stocks follow scientific advice (100% for EU only stocks and 64% for EU/UK shared stocks), compared to only 43% for stocks with precautionary advice (up from less than 20% throughout the bulk of the time series until 2019). Importantly, the latter still account for a large proportion of stocks (26 out of 76 stocks included in the analysis, i.e. 34%).

- **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.** This is particularly concerning in light of the dire state many bycatch stocks are in, and the increasing consideration given to 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 2021, the % undershoot tonnage was for the first time higher than the overshoot, both overall and for EU only stocks. 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 in a mixed fisheries setting, take into account ecosystem needs, such as predator-prey interactions, and protect ecosystem resilience.
- **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 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.
- **Despite some recent improvements, 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. 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 continues to be limited, and stakeholder engagement regarding the work of the newly established Specialised Committee on Fisheries (SCF) under the TCA remains uncertain at the point of writing of this report.
- **Certain elements of the Commission's reporting on progress towards MSY and on the situation of fish stocks remain potentially misleading, and the overly positive picture presented can leave key issues unaddressed.** This 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, but the UK's analysis was not yet public at the point of writing of this report.

- **The first 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. It 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 also 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, are already underway, with a view to concluding by the 10th 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 the requirements and objectives of the EU/UK-TCA and 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 still applies for 2022 and beyond. They must now make amends by setting sustainable TACs in line with scientific advice and the legal requirements in 2021 and the years to come, and implement the lessons learned also in the negotiations with the United Kingdom. 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.

Key recommendations for EU and UK decision-makers and EU Member States

The key decision-makers responsible for meeting the CFP's objectives and requirements, particularly the MSY objective, when setting TACs for 2022 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. 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:

Following scientific advice and restoring stocks in line with the CFP, the TCA and the UK's fisheries legislation

- 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 species advice in a mixed fisheries context in order to safeguard the most vulnerable stocks and factor in ecosystem needs;
- 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 10th 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 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 round of post-Brexit TACs for EU/UK shared stocks for 2021, 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 2021 at the yearly December Council meetings and through the TAC negotiations for shared stocks between the EU and the UK for 2021. It represents an update of last year's report,¹ which now includes the results of the analysis of the 2021 TACs and for the first time also presents the results for EU only and EU/UK shared stocks separately, but otherwise follows mostly the same structure and methods.² 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, 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 for 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 2022 and beyond are fully in line with the objectives and requirements of the CFP, the TCA and the UK's fisheries legislation.

This introduction 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.

¹ 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/>.

² Note that a couple of small errors in the present report were corrected when updating the report for 2022, however the analysis results and findings remain unchanged.

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,³ and the UK's domestic fisheries legislation such as the Fisheries Act.

2.1.1 Key provisions in the CFP

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)^{4,5}. 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.⁶ As further explained in ClientEarth's briefing series on sustainable TAC-setting in line with science and the law,⁷ the headline advice on fishing opportunities provided by the International Council for the Exploration of the Sea (ICES) constitutes the "*best available scientific advice*".^{8,9,10,11,12}

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. Effectively, this means that particularly in a mixed fisheries context certain TACs need to 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. In order for the 2022 TACs - most of which are to be set in November or December this year¹³ - to be in line with the CFP's objectives and requirements outlined above, they need to be proposed and set at levels which are

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

4 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/>

5 Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy

6 Article 3(c) of the CFP Basic Regulation

7 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.

8 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.

9 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 follow when setting TACs.

10 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.

11 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 being more, not less, cautious when information is more limited, and how this should work in practice.

12 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.

13 With the exception of Deep Sea TACs which were agreed in 2018 for both 2019 and 2020.

1) in line with MSY-based exploitation rates, and 2) in line with the precautionary approach where data are more limited and no MSY-based stock assessment is available.

The concepts and requirements above are also reflected both in the fisheries-related provisions of the TCA and in the UK's own fisheries legislation, such as the Fisheries Act, 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*”,¹⁴ 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*”¹⁵ (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,¹⁶ base conservation and management decisions on the best available scientific advice (with explicit reference to ICES advice),¹⁷ take account of and minimise harmful impacts of fishing on the marine ecosystem,¹⁸ and ensure compliance with fisheries conservation and management measures,¹⁹ amongst others. Key provisions on fishing opportunities are covered by Article 498, including a deadline of the 10th December for the conclusion of TAC negotiations between the two Parties²⁰ and another reference to the “*best available scientific advice*”²¹ (see section 2.1.1 above for further reflections and references on this).

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 10th December: in this case, both Parties have to “*immediately resume consultations with the continued aim of agreeing the TAC*”,²² and set a provisional TAC “*corresponding to the level advised by ICES*” if such a TAC has still not been agreed by the 20th December.²³ This essentially means that the default in the absence of an agreement on a specific TAC is to follow the ICES advice.²⁴ A derogation from this backup scenario applies for so-called “*special stocks*”,²⁵ 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*” which does not appear to have happened yet at the time of writing this report.²⁶ 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 2022. 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.

14 Article 494(1) of the TCA.

15 Article 494(2) of the TCA.

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

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

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

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

20 Article 498(2) of the TCA.

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

22 Article 499(1) of the TCA.

23 Article 499(2) of the TCA.

24 See ClientEarth's briefing “What is the ‘best available scientific advice’ for setting Total Allowable Catches (TACs)?”, full reference in footnote 8.

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

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

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.²⁷ 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);²⁸
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'.²⁹

The final result of this process is the annual TAC and Quota Regulation which specifies the agreed TACs.³⁰ 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 for the first time in 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 10th 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).

²⁷ 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 ca. 60 to 66% of the stocks or TACs previously under the December Council process.

²⁸ <https://www.ices.dk/advice/Pages/Latest-Advice.aspx>

²⁹ 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.

³⁰ 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>

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.³¹ 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),³² 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). The agreed written record on shared TACs adopted by the EU and the UK for 2021 specifies the pre-deduction TAC figures, and both Parties have subsequently made exemption deductions to their respective shares.

In light of serious concerns about the general lack of compliance with the landing obligation,³³ 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.^{34,35} ClientEarth's reports provide further details on serious shortcomings in the control of the landing obligation in France,³⁶ Spain³⁷ and Denmark.³⁸

31 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/setting-total-allowable-catches-tacs-in-the-context-of-the-landing-obligation/>

32 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/>

33 As highlighted for example at last year's seminar on the landing obligation on 14 June 2019, and recognised in the Commission's report on the implementation of the landing obligation presented in the Commission's communication on the state of play of the Common Fisheries Policy, COM(2020) 248 final, p. 5, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0248>. 16 June 2020.

34 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>.

35 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>

36 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/>

37 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/>

38 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/>

The Commission has also recently opened infringement proceedings against France and Spain due to their failure to properly control the implementation of the landing obligation.³⁹

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.⁴⁰

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. Comprehensive and accurate catch documentation also plays a key role in this context.⁴¹ 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.

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.⁴² 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,⁴³ 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.

39 https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681

40 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/>

41 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/>

42 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/>

43 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>

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.⁴⁴ 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*".⁴⁵ To date, the Council has failed to implement the Ombudsman's recommendations, leading her to confirm her finding of maladministration.⁴⁶

Meanwhile, the 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 2016-2018.⁴⁷ ClientEarth has recently 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.⁴⁸

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 2020,⁴⁹ and since then has, for example, proactively published non-papers regarding TACs for 2021.⁵⁰

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. Following a joint NGO request for improved stakeholder engagement in international TAC negotiations such as the EU/UK TAC negotiations,⁵¹ 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.⁵²

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 (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.

However, 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.

44 See footnote 40.

45 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>

46 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>

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

48 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-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/>

49 https://ec.europa.eu/oceans-and-fisheries/news/commissioner-sinkevicius-announces-more-transparency-its-proposals-fishing-opportunities-2020_en

50 https://ec.europa.eu/oceans-and-fisheries/fisheries/rules/fishing-quotas/tacs-and-quotas-2021_en

51 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. 25th 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/>

52 Response from Commissioner Sinkevičius to joint NGO letter about transparency in EU-UK bilateral and EU-UK-Norway trilateral negotiations on fishing opportunities. 25th 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/>

Moreover, stakeholder engagement regarding the work of the newly established Specialised Committee on Fisheries (SCF) under the TCA remains uncertain at the point of writing of this report. The SCF is due to play an important role in the management of EU/UK shared stocks by dealing with a growing list of topics such as the development of guidelines for handling “special stocks” (see section 2.1.2) and many more, as specified in the TCA⁵³ and the agreed written record for the 2021 TACs.⁵⁴ However, delays in the TAC-setting process for 2021 and in the adoption of the Council mandate on the EU side, necessary before the SCF can properly begin to work, mean that the SCF is not yet fully operational, and many questions around its functioning remain. Detailed and comprehensive minutes of the meetings of the SCF and its working groups as well as effective stakeholder engagement will be crucial to ensure transparency of this new body.

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.⁵⁵

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 is now also further developing 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

⁵³ Article 508 of the TCA.

⁵⁴ Written record of fisheries consultations between the United Kingdom and the European Union for 2021. Adopted 11th June 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993155/written-record-fisheries-consultations-between-uk-eu-2021.pdf

⁵⁵ 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/>

1 provides an overview of different aspects and metrics that are commonly reported on when measuring progress towards ending overfishing.

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,⁵⁶ 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).⁵⁷ 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 2021.⁵⁸ 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.

Table 1. Overview of different sustainability aspects and metrics commonly covered by reports on progress towards ending overfishing.⁵⁹

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

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

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

<https://www.documents.clientearth.org/library/download-info/lets-get-the-numbers-right-what-proportion-of-fish-stocks-are-sustainably-managed-in-the-eu/>

58 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/>

59 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/>

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 many stocks remain overfished and/or outside safe biological limits, and in fact some previously positive trends reversed recently.⁶⁰

On the other hand, the Commission's reporting, while reflecting STECF's findings to some extent, places a strong emphasis on additional figures (not originating from STECF) based on volumes of landings under the agreed TACs, which create a much more positive impression of the situation: for example, it has previously repeatedly claimed that *'it is 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'*.⁶¹ NGOs have repeatedly complained about the misleading nature of such claims, most recently in a letter to Commissioner Sinkevičius,⁶² and the notorious 99% figure was no longer included in the Commission's 2021 report, possibly also reflecting the change in reporting scope due to Brexit.

However, this Box and ClientEarth's briefing⁶³ 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), 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 only consider 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,⁶⁴ so excluding these makes the situation look better than it is.

60 Scientific, Technical and Economic Committee for Fisheries Monitoring the performance of the Common Fisheries Policy (STECF-Adhoc-21-01).. EUR 28359 EN, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-36155-8, doi:10.2760/26195, JRC124906. As of 2019, the most recent year with the relevant data, 28 out of 65 assessed stocks (i.e. 43%) were still exploited above F_{MSY} (up from 42%), and 17 out of 44 assessed stocks (i.e. 38%) were still outside safe biological limits (up from 31%), see Tables 4-7.

61 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.

62 See footnote 58.

63 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/>

64 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 For the 2019 TACs, 32% of those subject to the coastal states agreement exceeded scientific advice, compared to 6% for EU-only stocks.

The Commission's 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). 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.

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 (66% of the stocks included in the analysis presented 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,⁶⁵ 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.⁶⁶ 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 TCA includes a commitment to request ICES to look into "*the alignment of the management areas and the assessment*

65 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/>

66 *Ibid.*

units used by ICES⁶⁷ for a number of stocks specified in Annex 35,⁶⁷ which however does not appear to have been taken forward at the time of writing this report.

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.⁶⁸ 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),⁶⁹ 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 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.⁷⁰ 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,⁷¹ 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.

67 Article 504 of the TCA.

68 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/>

69 For further details on the challenges posed by quota top-ups for monitoring progress of TAC decisions towards MSY, refer to our briefing: ClientEarth (2016).

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

70 See footnote 27 for details.

71 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.

Recommendations on reporting

The Commission, the UK's Defra 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 MSY stocks;
 - 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 CFP's objectives;
 - 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.

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 2021, as well as the EU/UK shared TACs set for 2021 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.⁷² 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).⁷³ All comparisons where the TAC area is smaller

⁷² 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.

⁷³ 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 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.

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 2021, the core analysis of the present report covers 51 comparisons between TACs and scientific advice, involving 57 TACs, and 76 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 2021, and the results are now for the first time 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, 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 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 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.⁷⁴ 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 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 2021;
- Non-papers from the Commission regarding quota adjustments such as top-ups or exemption deductions for 2015 to 2021;
- The agreed TACs as recorded in the TAC and Quota Regulations for 2015 to 2021;
- The agreed EU/UK shared TACs as recorded in the agreed written record for 2021;⁷⁵
- The most up-to-date discard plans valid in each of the years 2015 to 2021;
- The agreed multiannual plans for the North Sea and the Western Waters.

⁷⁴ See footnote 60.

⁷⁵ See footnote 54.

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.

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 advice as specified at the top of the respective ICES advice document,⁷⁶ 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).

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.⁷⁷ 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).⁷⁸ 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.

76 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/>

77 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.

78 *Ibid.*

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 record for 2021 were the pre-deduction values and were therefore used as specified and directly compared to the catch advice.

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,⁷⁹ and the fact that in a number of cases no deductions were applied even though the relevant TACs are subject to exemptions,⁸⁰ 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,⁸¹ and ClientEarth's reports provide further details on serious shortcomings in the control of the landing obligation in France,⁸² Spain⁸³ and Denmark.⁸⁴

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 and advised TACs, 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 final year of the time series, 2021, was the first post-Brexit year in which the EU/UK shared TACs 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

79 As highlighted for example at the seminar on the landing obligation on 14 June 2019, and recognised in the Commission's report on the implementation of the landing obligation presented in the Commission's communication on the state of play of the Common Fisheries Policy, COM(2020) 248 final, p. 5, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0248>. 16 June 2020. The Commission has also recently opened infringement proceedings against France and Spain due to their failure to properly control the implementation of the landing obligation. https://ec.europa.eu/commission/presscorner/detail/en/inf_21_4681

80 For example, 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.

81 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>.

82 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/>

83 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/>

84 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/>

analysis of the Commission’s December Council TAC proposals for 2015-2020 which is no longer included in this report, please refer to the previous “Taking stock” report.⁸⁵

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 2021 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.⁸⁶

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 73% in 2016 to 48% 2020 and 42% in 2021** (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 round of post-Brexit TACs for 2021 represents a small improvement.** Notably, the direction and extent of change between 2020 and 2021 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 almost 58% in 2020 to just over 42% in 2021, the improvement for EU/UK shared TACs was much less pronounced (43% in 2020 and 42% in 2021).⁸⁷

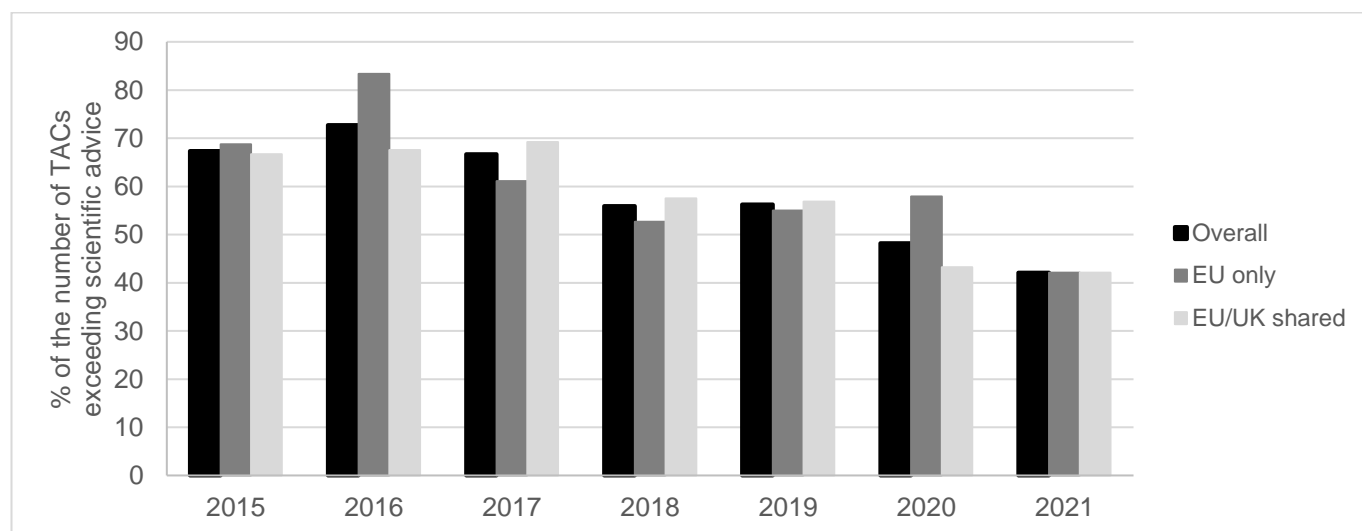


Figure 1. Time series of the percentage of the number of agreed TACs overall (black), for the EU only (dark grey) and shared between the EU and the UK (light grey) that exceeded the corresponding scientific advice.

⁸⁵ 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/>

⁸⁶ 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.

⁸⁷ Please note however the caveat regarding the impact of the exclusion of the sandeel TACs on the result presented later on in this section.

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 has been decreasing since** a high of 192166 t (or 54%) in **2016** to 58632 t (or 15%) in 2020. However, the declining trend reversed slightly for 2021 (18%), meaning that **almost one fifth of the overall TAC tonnage for 2021 still consisted of TACs set above scientific advice**. 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. At the same time this metric continued to improve for 2021 for the EU only TACs set by December Council, with only 7% of the overall EU only TAC tonnage consisting of TACs set above advice, compared to 26% for EU/UK shared stocks.

However, it is worth noting that the sandeel TACs, which were excluded from the analysis for 2021 for consistency across the years, have a big influence on the result both for the TAC volume- and TAC number-based metrics.⁸⁸ These TACs largely followed the scientific advice for 2021 and in some cases were even set far 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 for 2021, the reversal in progressive trends for the EU/UK shared stocks basically disappears. The above conclusions about an apparent deterioration of the situation from 2020 to 2021 for EU/UK shared stocks therefore need to be treated with caution.

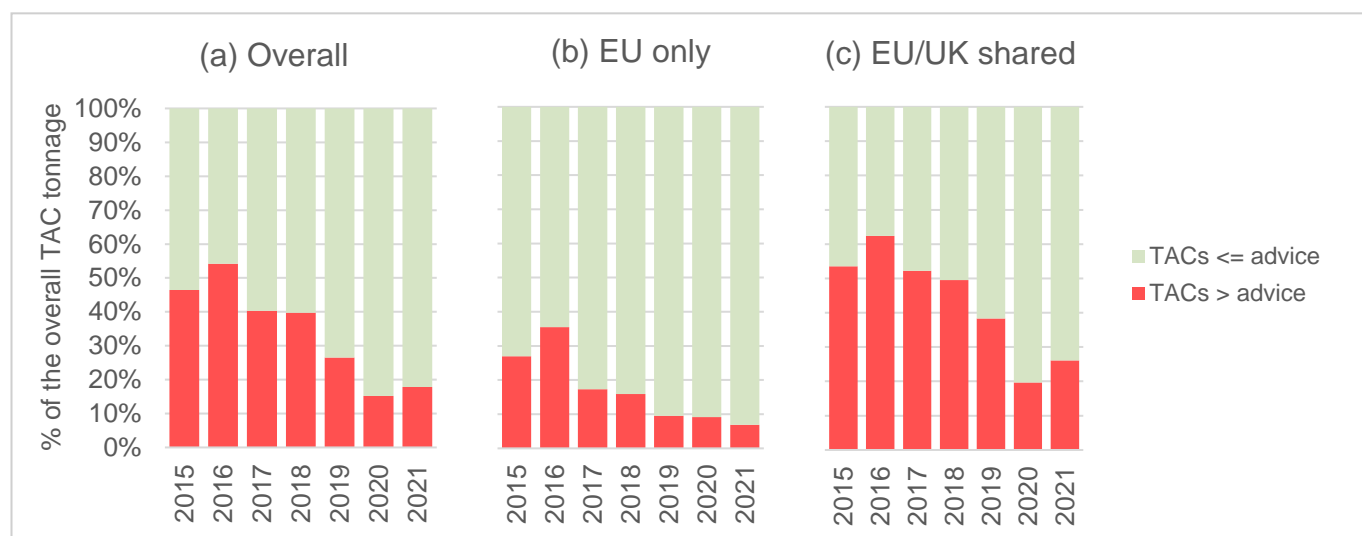


Figure 2. Time series of the tonnage of those TACs set above (red) versus in line with (green) the scientific advice, as a percentage of the total sum of TACs in tonnes per year, displayed for (a) all analysed TACs overall, (b) EU only TACs and (c) EU/UK shared TACs.

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 5% in 2021** (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 mostly 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

⁸⁸ The sandeel TACs have been excluded from the December Council analyses for previous years since the scientific advice for these stocks is usually only published in 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 10th of December of each year, in line with the TCA, the sandeel TACs were therefore not included for the 2021 analysis, but their impact on the results was reflected in the text to allow the reader to consider this aspect.

almost 12% in 2017 to close to -1% in 2021 (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) for the last three years, whereas for EU/UK shared stocks it has dropped to 1% (see Figure 3 b and c). 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.** Note that while this 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.

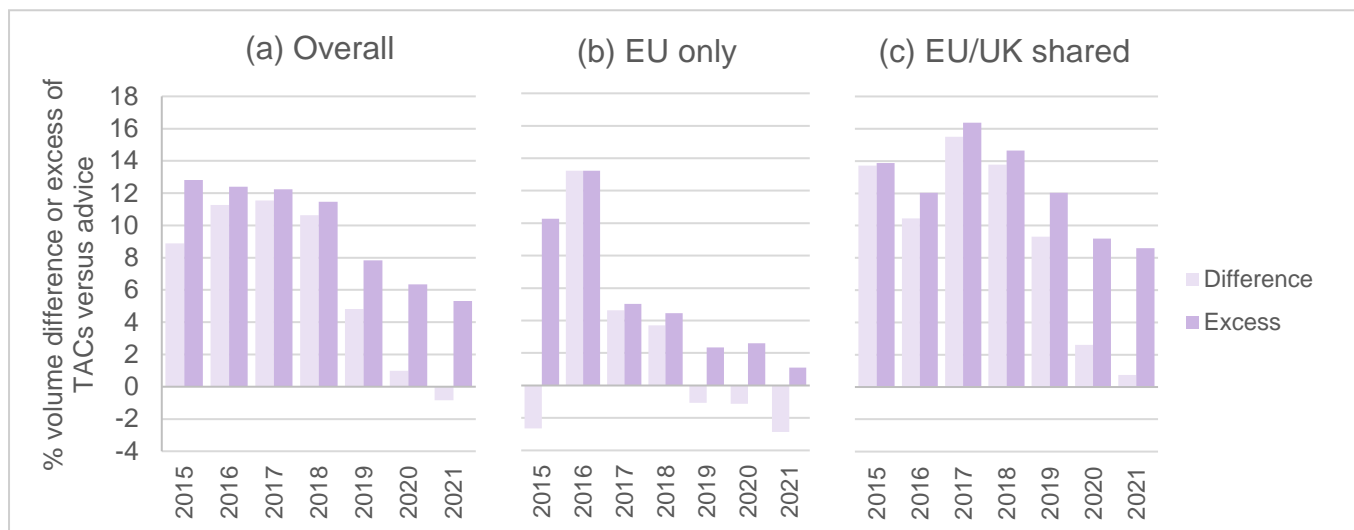


Figure 3. Time series of the percentage of the volume difference (light purple) and excess (darker purple) between the agreed TACs and the underlying scientific advice. The percentage is calculated in relation to the sum of the advice volume for each year, displayed for (a) all analysed TACs, (b) the 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.

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 5% in 2021, **the percentage by which TACs not exceeding the advice undershot the advice has been increasing continuously from just below -1% in 2017 to -6% in 2021** (see Figure 4). This trend is consistent also for EU only and EU/UK shared TACs analysed separately, with a larger undershoot of almost -8% for the EU/UK shared stocks in 2021 compared to -4% for the EU only stocks. Hence, **while the % excess has improved to a lesser extent 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.** 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 since 2019.

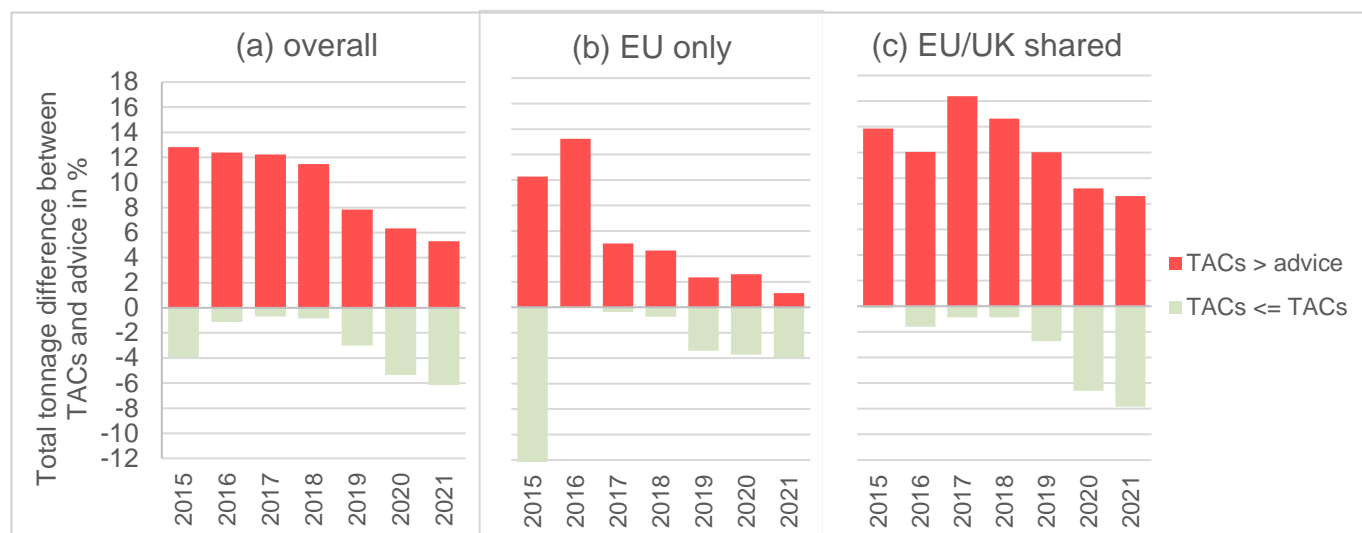


Figure 4. Time series of the difference between the total agreed TAC tonnage and the total tonnage of the scientific advice summed up across all TACs (percentage of the total advice sum), split by cases where the agreed TACs were set above (red) versus in line with or below (green) the scientific advice.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

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 44% to 21% in 2020, and then dropping substantially to 4% in 2021. This declining trend throughout the time series is also apparent when analysing the EU only and EU/UK shared TACs separately, with the drop between 2020 and 2021 being particularly steep for EU only stocks (38% to 11%).

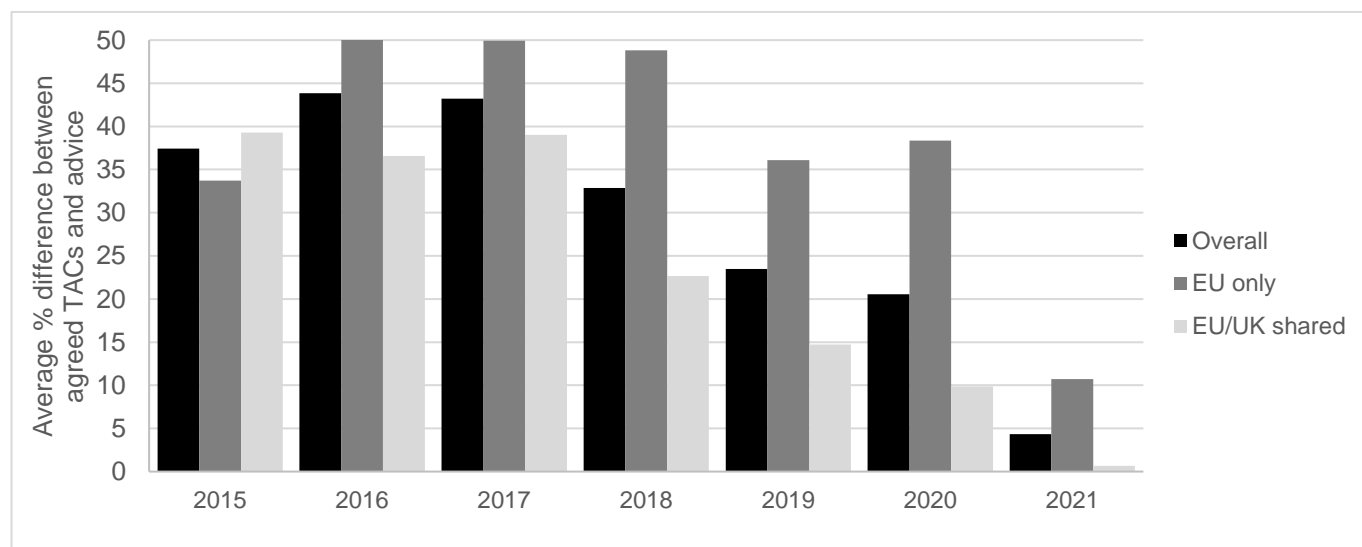


Figure 5. Time series of the average percentage difference per comparison between the agreed and advised TACs overall (black), for EU only TACs (dark grey) and EU/UK shared TACs (light grey), excluding outliers.

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). However, the average undershoot has been increasing since 2018 (see Figure 6 b). The average undershoot has been similar for EU only and EU/UK shared TACs, with **the drop in 2021 in the average overshoot being driven by the EU/UK shared TACs** (Figure 6 b and c).

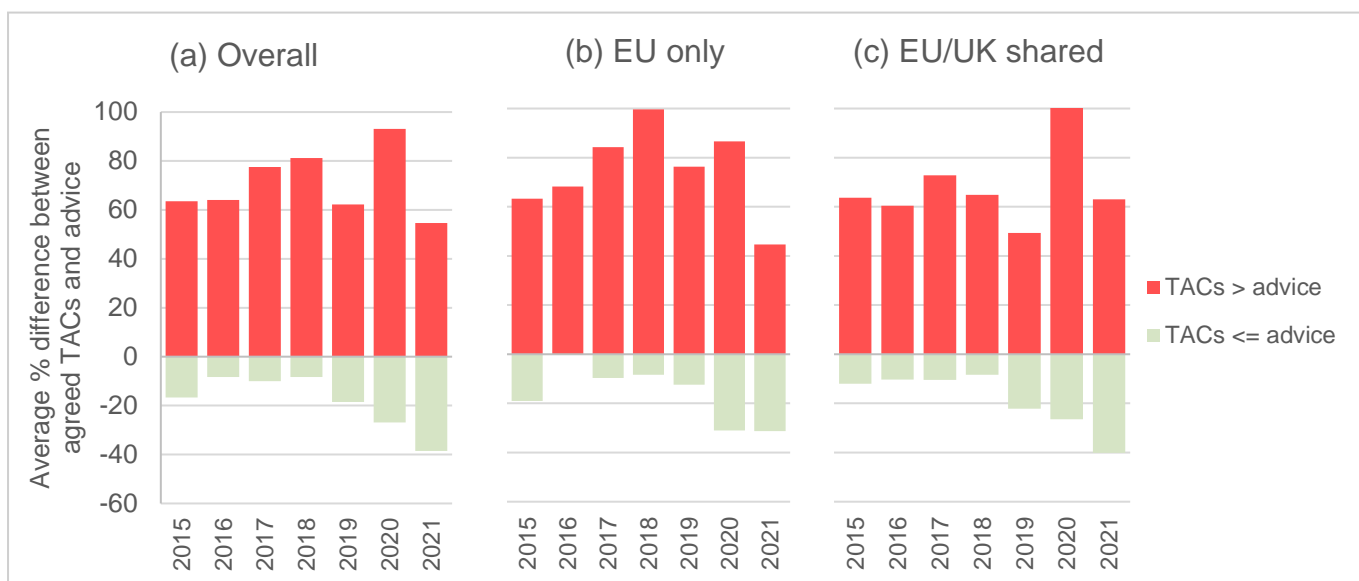


Figure 6. Time series of the average percentage difference per comparison between the agreed and advised TACs (a) overall, (b) for EU only TACs and (c) EU/UK shared TACs, split into those cases where TACs exceeded the advice (red) and those where they were set at or below the advice (light green).

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, as have the % TAC excess and the average % difference between TACs and advice. 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 round of post-Brexit TACs represent an improvement compared to 2020 both for EU only and EU/UK shared TACs. However, over 40% of the TACs were still set above scientific advice in 2021** (see Figure 1), TACs still exceed the advice on average by 5% (see Figure 3) and the average TAC overshoot remains larger than the average undershoot (see Figure 6). This shows that a lot of work remains to be done to ensure sustainable TAC-setting going forward now that the 2020 MSY deadline has passed and the UK has left the EU.

4.2 To cut or not to cut the TAC?

Similarly, 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 68% for 2016-2017 and 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 negative, meaning the agreed TACs were set below the advice on average), and showed a declining trend (i.e. becoming more negative) since 2016-2017. Notably, the % average difference between TAC advice in cases where a cut was advised dropped substantially to 17% for 2021, while at the same time the % average undershoot in cases where a rollover or increase was advised continued to increase to -17%. 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.**

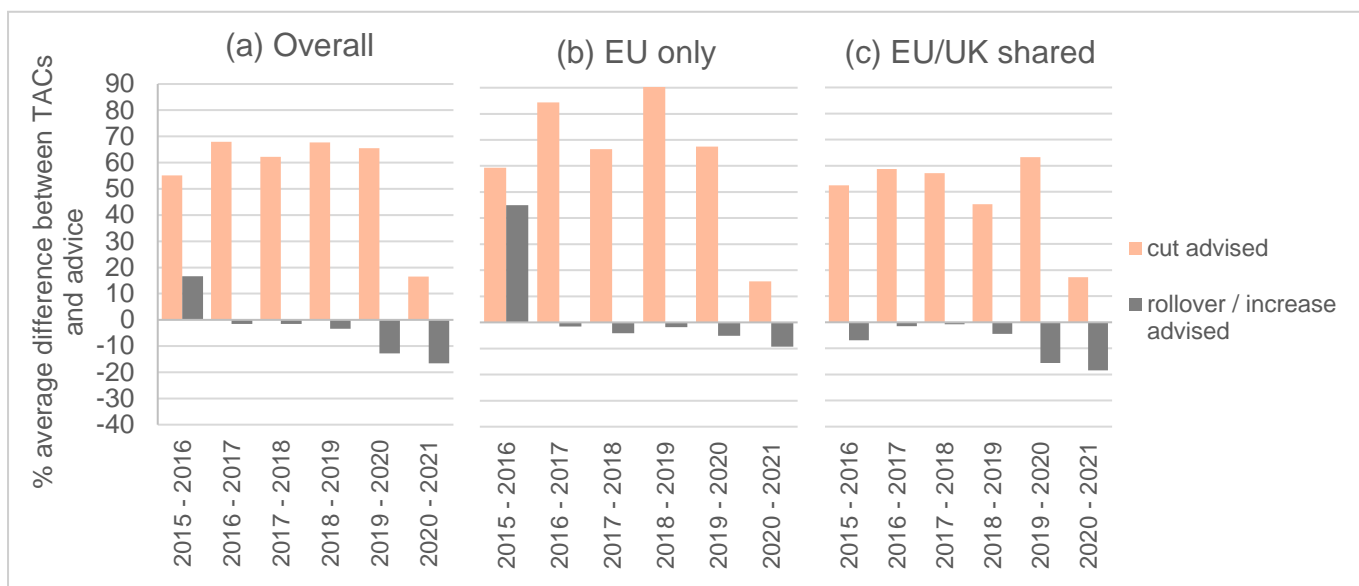


Figure 7. Time series of the percentage average difference between the agreed TACs and the underlying scientific advice per TAC/advice comparison, depending on whether a cut (orange) or a rollover or increase (dark grey) was advised, excluding outliers. The results are displayed for (a) all analysed 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 the time series** (89% for 2015-2016, to 81% for 2019-2020). Similar to the % average difference metric presented in Figure 7, there was a notable drop in 2021, but the majority of TACs for which a cut was advised (59%) was still set above advice. 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 all TACs followed the advice in such cases. The split results for EU only and EU/UK TACs are fairly similar and not displayed.

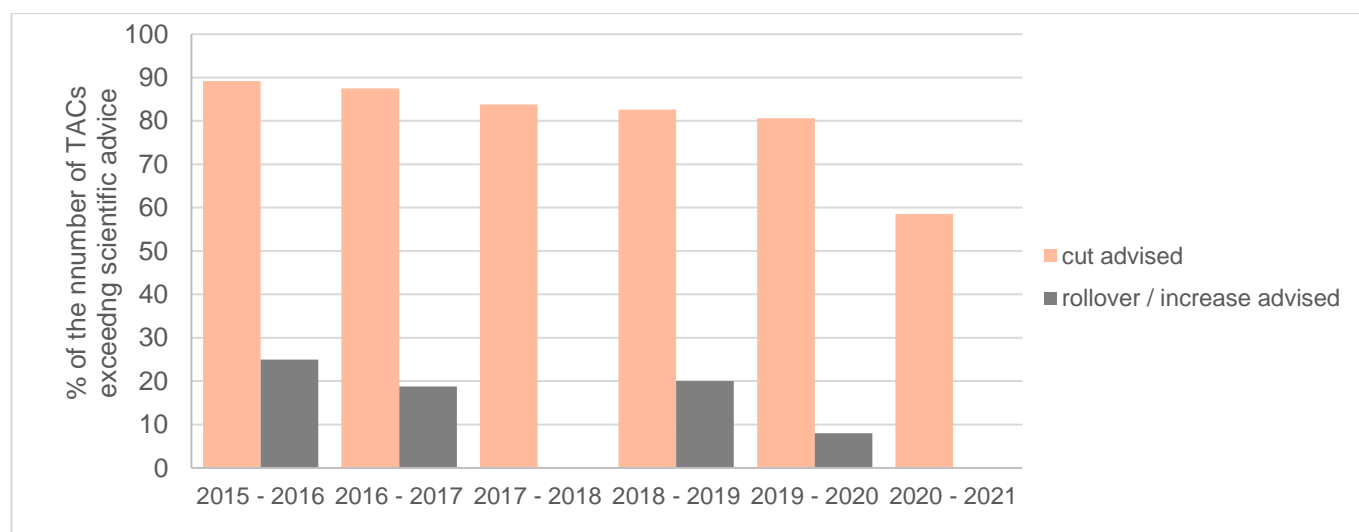


Figure 8. Time series of the percentage of the number of agreed TACs that exceeded the corresponding scientific advice, depending on whether the advice was for a cut (orange) or for a rollover or increase (dark grey).

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 more than half of the TACs (close to 52%, compared to 31% at the start of the time series) following the advice referred to cases where a cut was advised, potentially indicating progress towards following advised cuts more frequently, but this will need to be monitored in future years to see if it is an ongoing trend.

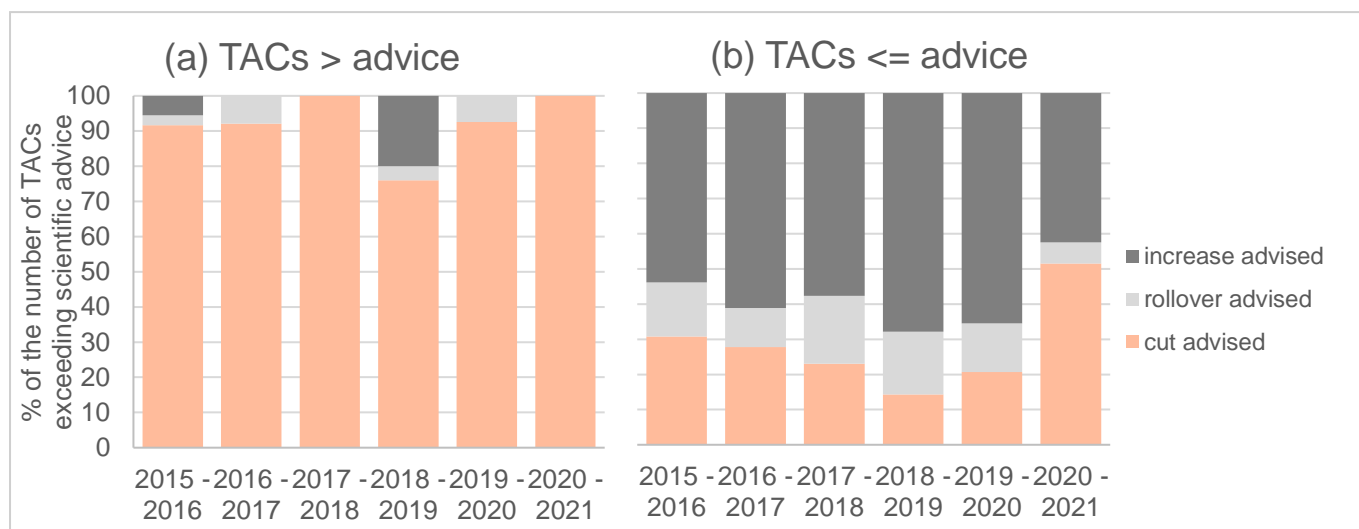


Figure 9. Time series of the percentage of (a) the TACs exceeding scientific advice, and (b) the TACs set in line with or below the advice, where a cut (orange), rollover (light grey) or increase (dark grey) was advised. These percentages are calculated in relation to the total number of TACs which were (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 round of post-Brexit TACs for 2021 represent notable progress in this regard compared to previous years, but advised cuts are 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 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 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 to 57% for 2021), 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 25% in 2020, the year of the 2020 MSY deadline, and has even increased slightly to 28% again for 2021.⁸⁹ Notably, **some (albeit insufficient) progress has been made for TACs based on MSY advice between 2016 and 2020, whereas the high percentage of TACs above precautionary scientific advice basically remained constant until 2019, and has only started improving since 2020.** 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, whereas the proportion of excessive MSY-based EU/UK shared TACs has remained higher. It is the increase in the EU/UK shared TACs exceeding MSY advice that drives the slight reversal of the overall positive trend. At the same time, the

⁸⁹ 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..

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.

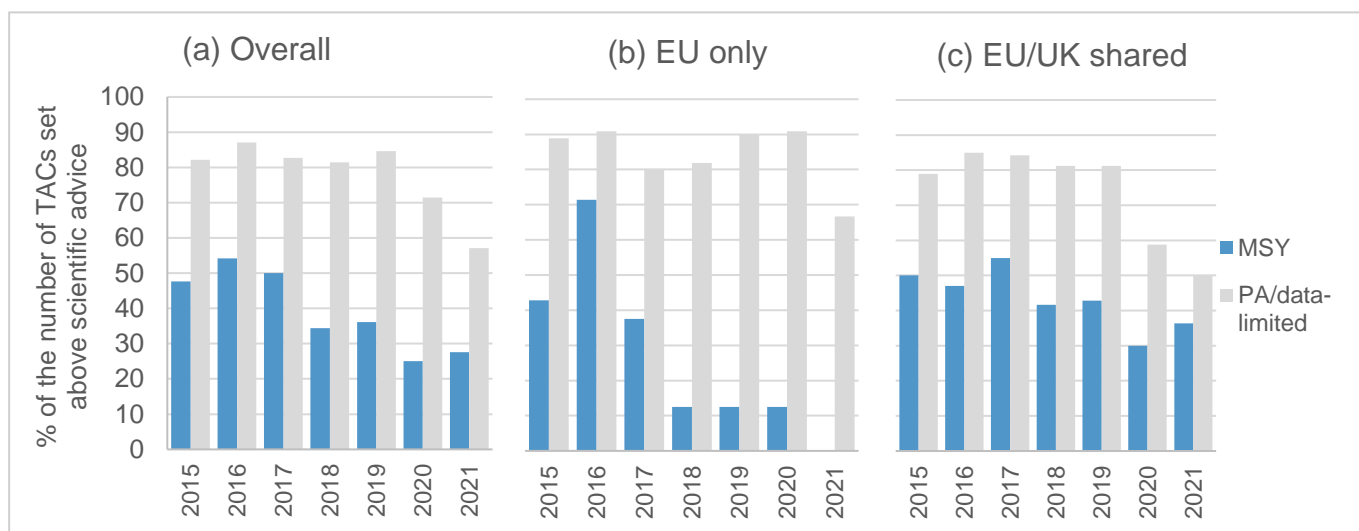


Figure 10. Time series of the percentage of the number of TACs set above scientific advice, depending on the basis of the advice, i.e. the ICES MSY approach (blue) or the ICES Precautionary Approach or approach for data-limited stocks without full analytical stock assessment (light grey). The results 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 17% in 2021.

In contrast to this, the average difference between agreed TACs and scientific advice based on MSY is relatively small (see Figure 11), even negative for 2020 and 2021, meaning that in those years the MSY-based TACs on average undershot the advice. 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).

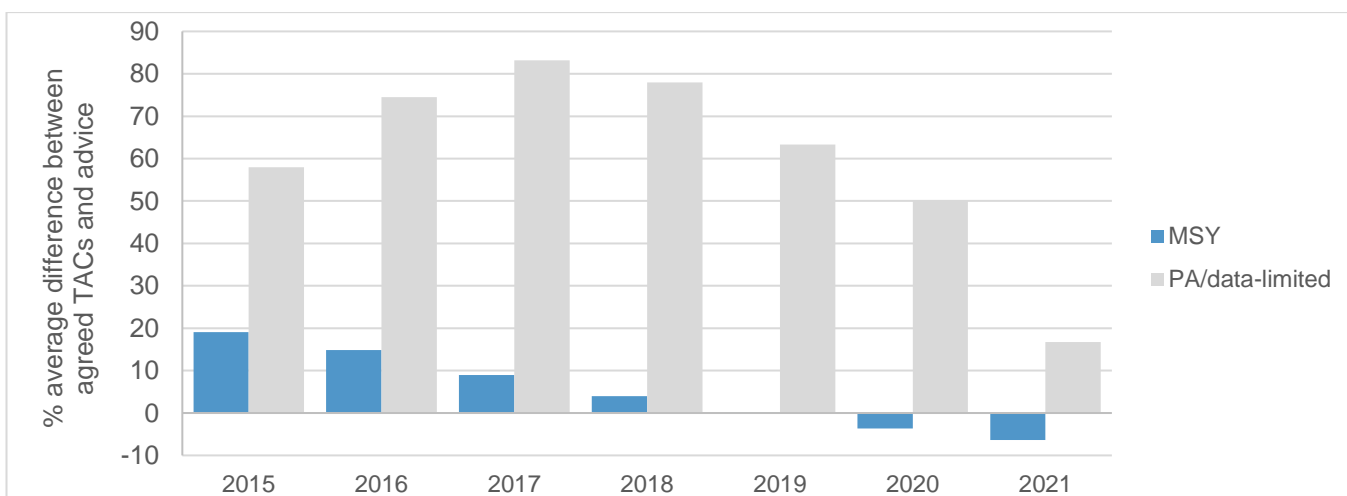


Figure 11. Time series of the average percentage difference per comparison between the agreed and advised TACs, depending on the basis of the scientific advice, i.e. ICES MSY approach (blue) or ICES Precautionary Approach or approach for data-limited stocks without full analytical stock assessment (light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

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 PA 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 (since all EU only TACs with MSY advice included in the analysis followed this advice), it increased from 14% in 2020 to 23% in 2021 for the EU/UK shared stocks. Conversely, **the progress for TACs with precautionary advice was much more pronounced for EU/UK TACs compared to EU only TACs and started a few years earlier**.

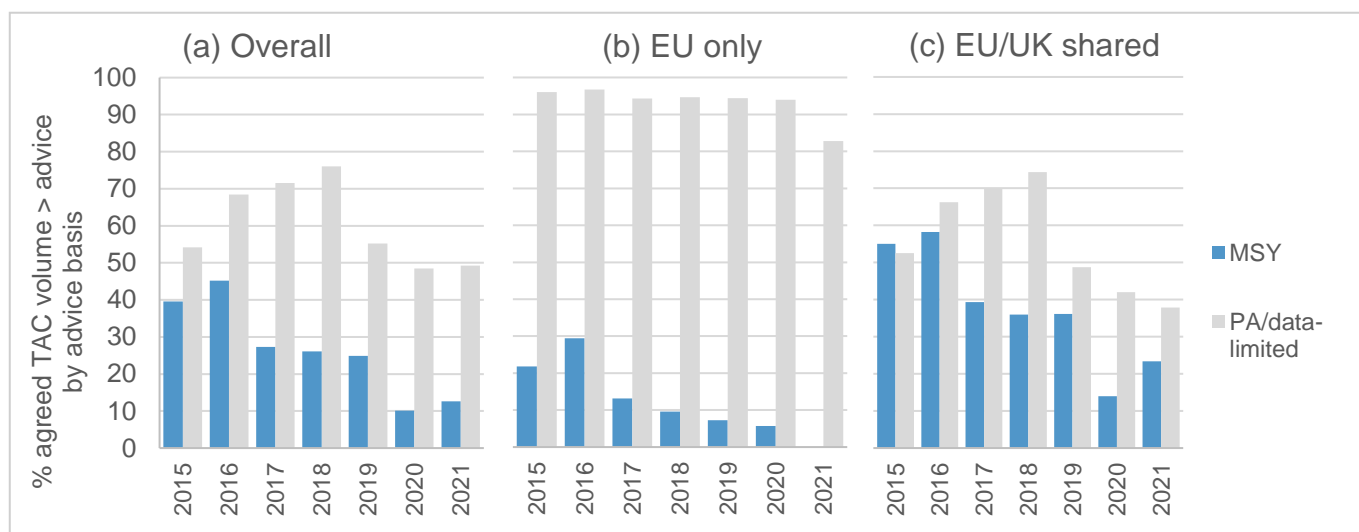


Figure 12. Time series of the proportion of the TAC volume referring to TACs set above advice, depending on the basis of the scientific advice, i.e. ICES MSY approach (blue) or ICES Precautionary Approach or approach for data-limited stocks without full analytical assessment (light grey). The results 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 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.⁹⁰ 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.⁹¹

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.

⁹⁰ 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/>

⁹¹ 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/>

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.⁹² It is therefore concerning that the Commission has explicitly requested ICES to provide advice based on precautionary reference points for certain stocks, even though MSY-based advice is available.⁹³ 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.

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.

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 progress has been made in aligning TACs with advice for target stocks since 2016 (the percentage of TACs above advice dropped from 79% in 2016 to 33% in 2021 overall), the percentage of TACs above scientific advice remained around 70% until 2019 and has only recently declined to 52% in 2021 (see Figure 13). This differential treatment for target and bycatch stocks is particularly pronounced for EU only stocks and has become less apparent for EU/UK shared stocks more recently (see Figure 13 b and c).

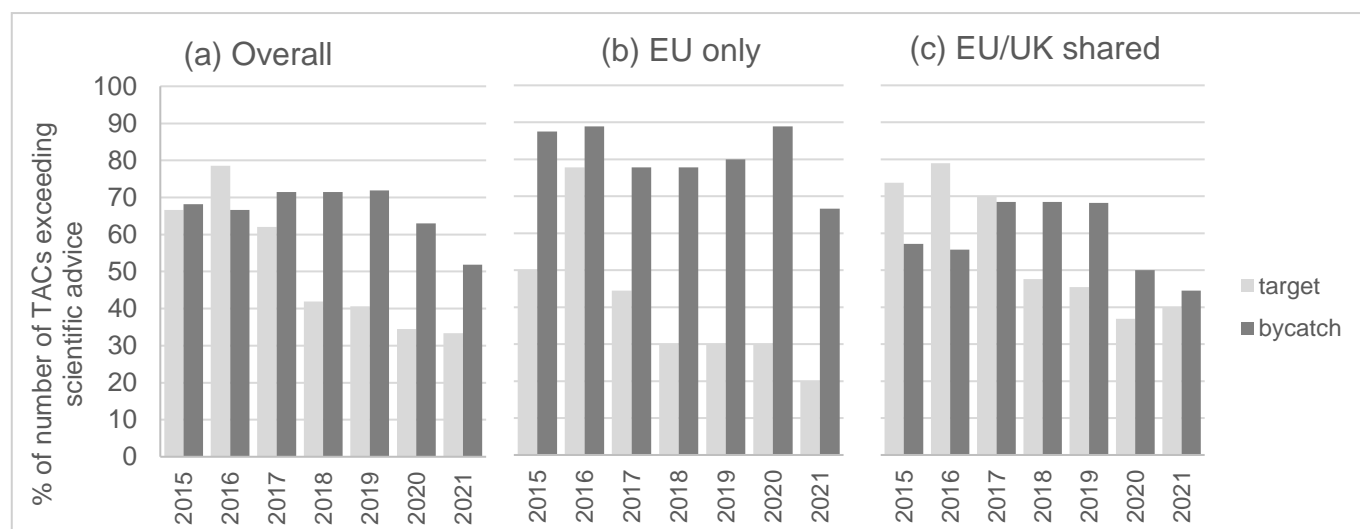


Figure 13. Time series of percentage of the number of TACs exceeding scientific advice for target (light grey) and bycatch (dark grey) stocks. The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK shared TACs.

Similarly, the average percentage difference between the TACs and the advice per TAC/advice comparison was higher for bycatch compared to target stocks for the majority of the time series (see Figure 14), meaning that **on average TACs exceeded the advice by a larger amount for bycatch than for target stocks**. Following an increase in this tendency for TACs for bycatch stocks to exceed the advice

92 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/>

93 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>

on average by a larger percentage than for target stocks until 2017, **this average overshoot for bycatch stocks declined** and even dropped to -12% for 2021. **The average overshoot for bycatch stocks was higher for EU only than for EU/UK shared TACs** (reaching a maximum of 107% for 2017) throughout the time series. Meanwhile, the figures for target stocks were relatively similar for EU only and EU/UK shared 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.

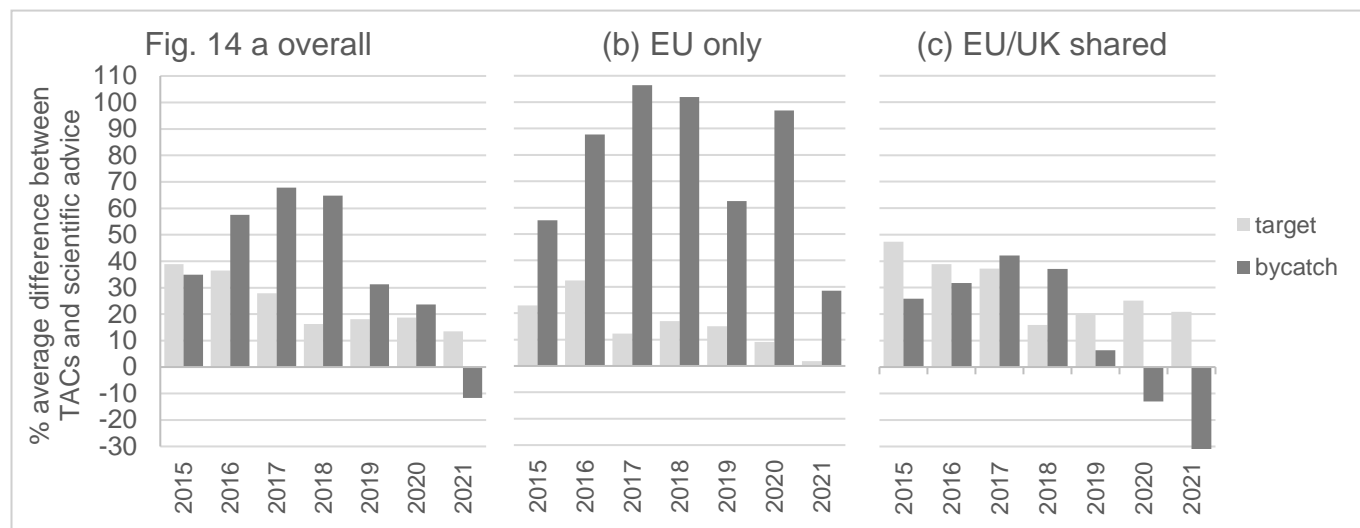


Figure 14. Time series of the average percentage difference per TAC/advice comparison (i.e. the average amount by which the TAC exceeded the advice) agreed for target (light grey) and bycatch (dark grey) stocks. The results are displayed for (a) all analysed TACs, (b) the EU only TACs and (c) the EU/UK 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 amount 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. 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.⁹⁴ However, these 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.⁹⁵ This request again suggests that the Commission has no ambition to adopt measures to restore bycatch stocks above biomass levels capable of producing MSY

⁹⁴ 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 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'.

⁹⁵ 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>

but considers it sufficient to merely keep them within safe biological limits.⁹⁶ 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,⁹⁷ and similar requests continue to be put forward by industry representatives. Importantly, one of these stocks, Irish Sea whiting, is far below the limit reference point for the biomass, B_{lim} , and subject to zero catch advice from ICES. 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 set above the scientific advice, and bycatch TACs were introduced for the two above-mentioned stocks (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} , 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. In 2021, the year after the 2020 deadline to end overfishing, there are still 6 stocks which, according to the ICES advice for 2021, were below B_{lim} , and an additional 6 stocks below possible reference points where B_{lim} is not defined. These include Irish Sea, Celtic Sea and West of Scotland whiting, Celtic Sea, West of Scotland and Kattegat cod, plaice in the southern Celtic Sea southwest of Ireland, herring in the west of Scotland and Ireland, and three functional units (FUs) of Norway lobster in the southern Bay of Biscay and northern Galicia as well as Atlantic Iberian waters East, western Galicia and northern Portugal.

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 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,⁹⁸ and to implement full catch

⁹⁶ 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.

⁹⁷ 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.

⁹⁸ 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>

documentation for these stocks from 2019.⁹⁹ 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*”.¹⁰⁰

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 plan¹⁰¹ clearly confirms concerns that it is not fit for purpose. Since then, work on this plan seems to have stalled, while bycatch TACs have continued to be set for 2020 and 2021, without tangible efforts to ensure proper catch documentation. 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 recent 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.¹⁰² Allowing business as usual to continue in the absence of a clear, ambitious route towards bycatch minimisation and stock recovery 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 2019. The SCF could play an important role in agreeing ambitious guidelines for the management and recovery of these vulnerable stocks.

4.7 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 2021 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 stocks¹⁰³ are listed in Annex III. A further two comparisons were excluded because the relevant TACs were removed at some point throughout the 2015-2021 period (including the dogfish and dab/flounder TACs). 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 (8 cases) or are subject to negotiations with other third countries or where the relevant process was unclear (25 cases), as well as Deep Sea (9 comparisons) and Baltic TACs (9 comparisons). 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

⁹⁹ *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)

¹⁰⁰ 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>

¹⁰¹ By-catch reduction plan (BCReP) in the North Western Waters. 2019-05-14 version. Draft received by the NWWAC on 15 May 2019.

¹⁰² 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/>

¹⁰³ Most of these are individual stocks of skates and rays.

2021 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 reporting¹⁰⁴ as well as findings presented by the New Economics Foundation¹⁰⁵ 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.¹⁰⁶ On this basis, the findings presented in this report, albeit themselves not overly positive, may still be optimistic, considering that progress for shared stocks might have been even slower. 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.

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 first round of post-Brexit TACs set for 2021 are an improvement compared to 2020, but over 40% still exceeded the advice**, showing that we are travelling in the 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. 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. However, for 2021 almost one fifth of the overall TAC tonnage was still made up of TACs set above advice (slightly up from 15% in 2020), the overall TAC excess above advice still accounted for 5% of the overall TAC volume (slightly down from 6% in 2020), and the average percentage difference was still 4% (down from 21% in 2020).

For the first time, 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. For example, the percentage of the tonnage of TACs set above advice and percentage of the TAC excess were overall consistently larger throughout the time series 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), i.e. the average difference was bigger for EU only stocks. For some metrics such as the percentage of the number and tonnage of TACs set above advice and the average percentage difference between TACs and advice, there was clear progress from 2020 to 2021 for EU only TACs set by December Council, whereas recent progress was less pronounced or even reversed for EU/UK shared TACs. On the other hand, 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 2021 and recent years. 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.

104 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.

105 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

106 Based on the current ICES advice the overall sum of unilateral mackerel TACs for 2021 (1199103 t) exceeded the 2021 ICES advice (852284 t) by 41%. <https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2021/2021/mac.27.nea.pdf>

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. For 2021, the undershoot was for the first time higher than the overshoot, both overall and particularly for EU only stocks. 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 for 2021. 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 and by a larger average amount 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 for 2021 even 100%) of TACs exceeding scientific advice refer to cases where a cut was advised.

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 28% for 2021, slightly up from 25% for 2020), whereas it remained stable at over 80% throughout most of the time series for precautionary advice. More recently, this has been decreasing, but remains high, at 57% for 2021. Notably for EU-only stocks all MSY-based TACs followed the advice in 2021, whereas 36% of the EU/UK shared TACs still exceeded MSY advice. Similarly, the average percentage difference per TAC/advice comparison decreased continuously to close to 0% for MSY-based advice in 2019 (and has even been negative for 2020 and 2021), but was still 17% for precautionary advice in 2021 (down from 50% in 2020). 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. On a positive note, the tendency throughout much of the time series to exceed advice for bycatch stocks on average by a larger percentage was reversed in 2021 (and already in 2020 for EU/UK shared stocks, for which advice for bycatch stocks has since then been on average undershot).

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. Merely aiming to prevent the collapse of bycatch stocks is insufficient to meet these 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. 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, 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 10th of December 2021 – 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;
- 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;
- Set certain TACs below the maximum single species advice in a mixed fisheries context and in relation to forage fish, 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; work with ICES to develop and use mixed fisheries considerations more explicitly in TAC-setting going forward;
- Set precautionary limits and put in place enhanced monitoring and data collection for data-limited stocks without scientific advice on maximum catches;
- 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, set TACs below the advised catch levels to account for non-compliance and grant quota top-ups 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 2022 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 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. 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 Norway to end overfishing of shared stocks.

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 round of post-Brexit TACs agreed by the EU and the UK for 2021, while continuing to head in the right direction, is not yet 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. 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 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 EU/UK TAC-setting process. 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 remains limited at the time of writing this report.

5.1 TACs agreed at December Council

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.¹⁰⁷ 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 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.¹⁰⁸ ClientEarth has recently 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.¹⁰⁹ 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).

¹⁰⁷ 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.

¹⁰⁸ *Ibid.*: For details on this analysis please refer to section 5 (p. 34 onwards) of that report.

¹⁰⁹ 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-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 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 presented in the previous edition of this report 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. 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 previous edition of this report.¹¹⁰

5.2 TACs agreed between the EU and the UK

The new 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 process for 2021.

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. In these 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. It 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.¹¹¹

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,¹¹² which the EU appears to have been critical of. 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. The involvement of the devolved administrations (DAs) within the UK in

¹¹⁰ See footnote 1, "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/>).

¹¹¹ 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.).

¹¹² Foster, Peter, and Brunsden, 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>

forming the UK's negotiating position is another factor that will need further attention going forward, for example regarding the influence of the Scottish DA on the final UK position regarding certain stocks of primarily Scottish interest.

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 process for 2021, specific information on the positioning and priorities of individual Member States, and documentation of exchanges between the Commission and the Council, remains limited. 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.

In the end both Parties 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 new 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 analysis of Member State positions throughout the December Councils 2016-2018 and available information about the 2021 EU/UK TAC-setting process, 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 2022 and beyond meet the CFP's requirements and objectives, by setting them in line with 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 Slovenian Council Presidency, despite Slovenia otherwise not holding a particular stake in the discussions of Northeast Atlantic TACs, 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.
- 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. 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 in 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. The many remaining questions regarding how the SCF will operate and how stakeholders will be involved and consulted regarding its work and that of its working groups will have to be addressed as a priority in early 2022 once the TAC negotiations have been concluded.
- 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 2021 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 briefings and reports

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/>

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/>

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/>

ClientEarth (2020). (Lack of) catch documentation under 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/>

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/>

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/>

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/>

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/>

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/>

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/>

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/>

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/>

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/>

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/>

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/>

Annex II: TACs included in the core analysis

Annex II can be found here: <https://www.clientearth.org/latest/documents/taking-stock-2021-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-2021-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,¹¹³ 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 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);¹¹⁴ 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.

¹¹³ <https://www.ices.dk/advice/Pages/Latest-Advice.aspx>

¹¹⁴ ICES (2021): Advice on fishing opportunities (2021). ICES Technical Guidelines. Report. <https://doi.org/10.17895/ices.advice.7720>.

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 – 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.

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.

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ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.