

ClientEarth's response to the Commission's Communication concerning a consultation on fishing opportunities for 2019 under the CFP

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

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ClientEarth welcomes the European Commission's Communication concerning a consultation on fishing opportunities for 2019 under the Common Fisheries Policy (CFP). In previous years we have outlined concerns about the content of this Communication, a number of which still apply, as outlined below. Our 2017 response is attached (see Annex I) for further information and we outline a number of specific concerns below. However, we welcome the following elements of this year's Communication:

- The Commission's objective to achieve significant further progress towards reaching F_{MSY} in light of the upcoming 2020 deadline. This includes setting TACs in line with the achievement of MSY exploitation rates for those stocks with MSY advice and with F_{MSY} proxies.
- The Commission's report is less misleadingly positive this year. Previously the Commission focused on positive long-term trends without recognising the recent slowing down and, in parts, even reversal of positive trends, as presented in the underlying STECF analysis. The Commission has made steps to address this by instead incorporating and relying on graphs and tables taken directly from STECF reports, which paint a more accurate picture of the situation.
- The Commission has provided greater clarity as to the input it expects from the Member States prior to the TAC proposals, with a clear timeline. In particular, the Commission "*invites Member States and stakeholders to start their work early based on the ICES advice, which is publicly available, rather than waiting for the Commission's proposals*". As part of this, the Commission also requests that "*[f]or a meaningful assessment of socio-economic considerations, Member States should send their submissions to the Commission at the latest two months before the relevant Council meeting*". Early submission is to be welcomed, though we outline below our concerns about the submission of such information in relation to the 2019 TAC-setting process.

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- The Commission's intention to continue factoring *de minimis* allowances into their TAC proposal: this is crucial to ensure that continued discarding under such exemptions does not increase fishing mortality above the scientifically advised levels. We also welcome the Commission's decision not to add quota top-ups to their initial TAC proposal this year, but to propose TACs for the Baltic and the North Sea in line with the ICES landings advice. Granting top-ups based on an assumption of full compliance has the potential to increase the risk of fishing pressure above F_{MSY} where unreported discarding continues. While serious concerns remain about widespread non-compliance¹, TACs should therefore be based on landings advice, with quota top-ups only granted to fleets that demonstrate full compliance with the landing obligation.
- The Commission's intention to adopt proposals for TACs on the basis of MSY where multiannual plans have become incompatible with the CFP;
- The Commission's acknowledgement of the link between more sustainable fishing and economic benefits.

Despite these positive aspects, several concerns we raised in our previous responses, and in our correspondence with the Commission in the lead-up to the present Communication, have still not been sufficiently addressed. A few new ones have also emerged. We have particular concerns about:

- The F_{MSY} ranges contained within the Baltic and North Sea multiannual plans (MAPs), and the proposal for the Western Waters MAP. These risk TACs being set above the F_{MSY} point value in particular circumstances, which in turn puts the achievement of the MSY objective in jeopardy. This also has the potential to result in inconsistencies in reporting between years, with reporting in previous years having been against the F_{MSY} point values;
- The continuing lack of clarity about the Commission's intended approach for proposing TACs for stocks without MSY assessment, with indications that it is less inclined to consistently follow scientific advice for such stocks than for stocks with MSY-based advice, as has also been the case in previous years. While we acknowledge that information on stock status and trends is more limited for stocks without full analytical MSY-based assessment, 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. At the same time, efforts should continue to increase the number of stocks with MSY-based reference points.
- The Commission's categorisation of stocks as target and bycatch, which seems to be used to apply different measures and standards for stocks depending on which category they fall into. This could jeopardise the achievement of the MSY objective, which applies to all harvested species. We highlight our key concerns about this approach in more detail below.
- The continued shortcomings in the Commission's Art. 50 report, which we highlighted in previous years and which have not been addressed in this year's report. These include:
 - the limitations of reporting only on a relatively small fraction of harvested stocks subject to the MSY objective;

¹ European Commission, DG Mare, Towards [sic] new SCIPs, Advisory Council Consultation. 2018.

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- the lack of a comprehensive indicator (as recommended by STECF)² comparing Total Allowable Catches (TACs) to catch levels scientifically advised as sustainable.³ However, we welcome the Commission's recent request to STECF to develop two indicators - "*an indicator which compares the scientific advice for stocks with the Commission initial proposals and one that compares these proposals with the final agreed TACs*";⁴
- the continued misleading presentation of the average F/F_{MSY} indicator. This suggests that on average $F = F_{MSY}$ but in reality fishing mortality must not exceed F_{MSY} for all stocks individually, not just on average across all stocks;
- lack of clear indication as to where figures on the percentage of the number of TACs or TAC volumes 'in line with F_{MSY} ' or on the coverage of the landing obligation originated from⁵. These values appear to be based on an analysis conducted by the Commission rather than the relevant STECF report, but a clear reference to where this underlying analysis can be found is lacking. This means it is difficult to assess whether those figures are accurate, because it is unclear exactly how they were calculated. There has been an improvement in that the Commission has included a footnote indicating when they considered a TAC to be 'in line with MSY'⁶ but it remains the case that how this has been established is unclear, particularly in the cases of mismatches between areas for which advice is given and areas for which the TACs are set.
- While some progress has been made, there is a continuing lack of clarity in some MSY- and sustainability-related wording. For example, the purpose of the Commission's report is said to be to report on 'progress made on achieving maximum sustainable yield (F_{MSY})' (emphasis added). However, progress towards MSY extends beyond fishing mortality, applying also to the applicable biomass levels. Focusing only on the fishing mortality element, as the Commission appears to do, unduly narrows the scope of the report and impacts analysis of progress towards achieving the MSY objective.

Key recommendations

In summary, we would like to highlight the following recommendations to help the Commission to improve its Communication on fishing opportunities and its report on the implementation of the landing obligation in future, and to ensure that its forthcoming TAC proposal is in line with the CFP's requirements.

- The Commission should extend its reporting to all harvested stocks, which are all subject to the MSY objective, including by using appropriate proxies for those which currently lack full MSY-based stock assessments. Moreover, it should report not only on progress

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

https://stecf.jrc.ec.europa.eu/documents/43805/850765/2014-12_STECF+14-23+-+Reporting+needs+under+new+CFP_JRC93936.pdf

3 Note that potentially relevant figures are presented in Tables 4, 5 and 6 in the Annex of the Commission's Communication, but a reference to what analysis these values are based on is lacking and they do not appear to originate from STECF's analysis presented in the STECF-17-04 report (see footnote 3).

4 Scientific, Technical and Economic Committee for Fisheries (STECF) - 56th Plenary Meeting Report (PLEN-17-03); Publications Office of the European Union, Luxembourg; ISBN 978-92-79-77297-9; doi:10.2760/605712, JRC109344. (see request from DG Mare to STECF on p.. 97)

<https://stecf.jrc.ec.europa.eu/documents/43805/1919587/STECF+PLEN+17-03.pdf>

5 See for example Tables 4, 5, 6 (p. 1) and p. 35 onwards in the Annex to the Commission's communication

6 Footnote 5 on p. 10 of the Annex to the Commission's communication

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in terms of fishing mortality and safe biological limits, but also on progress in terms of biomass in relation to available reference points.⁷

- Where MSY estimates are not yet available, the Commission should report on progress in relation to other existing reference points, such as trends in relation to precautionary or limit reference points provided in the scientific advice published by ICES⁸ (making clear which reference points are being used), or to the lowest value of the time-series.
- The Article 50 report should also include an indicator comparing TACs to the underlying scientific advice in order to monitor progress of TAC-setting towards achieving MSY-based exploitation rates in line with the timescales set out in Article 2(2) of the Basic Regulation.⁹
- While we welcome the Commission's attempt to quantify the extent to which TACs follow scientific advice as well as the current LO coverage, we strongly recommend that the basis of such information is clearly referenced in future reports, and that relevant indicators are calculated by STECF. Generally, the Commission should be more explicit about what indicators the values it presents are based on, and how these are to be interpreted, so that the situation is accurately represented.¹⁰
- The Commission should strongly urge all Member States to submit their reports on the implementation of the landing obligation in a timely manner, preferably in the format of the questionnaire it circulated.¹¹ This would both allow the Commission to provide more detailed and representative reports and allow stakeholders to analyse the progress made in implementing the landing obligation as we approach the 2019 deadline.

Regarding the Commission's TAC proposals and the TACs then set by the Council for 2019, we have the following recommendations:

- F_{MSY} must be the limit, not the target for the 2019 TACs and the Commission should follow the ICES MSY advice rule, proposing TACs not exceeding the F_{MSY} point estimates and urging the Council to follow suit when setting the TACs. This also applies to stocks subject to F_{MSY} ranges under the Baltic and North Sea multiannual plans.
- Where MSY advice is not yet available, ICES precautionary advice represents the best available scientific advice and the relevant TACs must not exceed this. However, there must be increased efforts to expand the number of stocks with MSY-based reference points.
- We encourage the Commission to reiterate in the lead-up to the TAC decisions for 2019 that delays to the achievement of MSY-based exploitation rates are the exception, not the rule (and cannot apply for deep sea stocks, with 2020 TACs being set in 2018). Should further delays be introduced, they must be accompanied by a clear plan as to how MSY-based exploitation rates will be achieved by 2020 at the latest. Critically, the Commission should work with the Council to develop a concrete timetable to ensure this legal deadline is met.

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

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

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

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

11 We note that 8 Member States failed to submit these reports in 2018

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- As we have previously highlighted, 'combined' *de minimis* exemptions, which would apply to more than one species, allow for higher discards than if the *de minimis* percentage were applied to just one species. We therefore urge the Commission to follow STECF's recommendation to account for this in its TAC proposal, '*by discounting the maximum possible amount of de minimis for each species that could potentially be discarded*'¹² in each of the respective TACs.
- The Commission should not propose the removal of TACs unless a prior assessment of the situation and potential implications through ICES has concluded that this will not result in exploitation of the relevant stock at levels above those consistent with the MSY objective. If the Commission proposes the removal of a TAC based on ICES' evaluation, clear alternative measures must be put in place immediately following the removal of the TAC to ensure that the respective stock is still fished in line with the MSY objective. We consider this in more detail below.
- The outstanding issue of mismatch between the geographic areas for which scientific advice is provided and the areas for which the actual TACs are set means that the Commission is currently not comprehensively demonstrating that it is proposing all TACs at sustainable levels, as scientifically advised by ICES.¹³ We therefore call on the Commission to address the mismatch issue as a matter of urgency, and make its related considerations publicly available along with its TAC proposal.

Below we outline in more detail areas of specific concern as we approach the 2019 deadline for implementation of the landing obligation and the 2020 deadline for all stocks to be fished in line with MSY-based exploitation rates.

Delays to achieving MSY

Article 2(2) requires that in order to meet the objective set out in the first paragraph – that fisheries management shall aim to restore and maintain fish populations above MSY levels – '*the [MSY] exploitation rate shall be achieved by 2015 where possible and on a progressive, incremental basis at the latest by 2020 for all stocks*'. As the 2015 deadline has passed there must be a clear focus on ensuring the 2019 TACs are proposed and set in line with MSY-based exploitation rates, with derogations only possible in very limited circumstances. We welcome the main objective set out in the Commission's communication - "*to achieve significant further progress towards reaching F_{MSY} as this is the last year before the F_{MSY} objective of 2020*". However, we reiterate that in order to achieve this, fishing opportunities must be set in line with scientifically advised maximum catch levels. We are therefore concerned that the Commission now appears to see the advice as only one factor to be taken into account, weakening the commitment made in previous years to not exceeding scientifically advised maximum catch levels.

We note that the Commission plans to assess, based on Member State analysis, "*whether or not achieving exploitation rates in line with F_{MSY} in 2019 would seriously jeopardise the social and economic sustainability of the fishing fleets involved*". We remain concerned that the prospect of further delays is envisaged so close to the 2020 deadline. At this stage of the CFP implementation, any delays to the achievement of MSY-based exploitation rates should be the

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

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

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exception, not the rule. If, as a last resort, delays based on socio-economic arguments are to be sought, these arguments must show a significant risk to the future of the fleet, which a delay will help mitigate or prevent. This is in line with the language used in Recital 7 of the Basic Regulation, which implies a situation that goes beyond fluctuations in the social and economic conditions of the fishing fleet that could, at least initially, be expected to be associated with a shift to MSY-based exploitation rates.

However, we are aware that there has previously been limited evidence provided to justify delays.¹⁴ On this basis, we welcome the Commission's request for "*solid economic analysis*" to be submitted by the Member States in a timely manner. However, if a delay based on socio-economics is to be accepted, a clear plan must also be presented to show how the MSY-based exploitation rates will be achieved by the 2020 deadline. Both the socio-economic arguments, including clear, strong supporting evidence, and the plan must be made publically available. The urgency of speeding up progress towards MSY is also highlighted by STECF's conclusion that progress until 2016 has been too slow¹⁵.

In line with the above points, we recommend that the Commission produces guidance regarding the limited circumstances in which a delay would be acceptable, outlining the necessary socio-economic reasoning and who this should come from, the supporting evidence required and, crucially, the requirements for the plan for achieving MSY-based exploitation rates by the legal deadline. In doing so, the Commission should make clear that allowing for a delay is a last resort that should only be possible in exceptional circumstances. The Commission should also make clear that no such delays can be considered for deep-sea stocks, for which 2020 TACs will be set in 2018.

Lower ambitions for "bycatch" stocks

ClientEarth has outlined above its concerns about the implications of fishing mortality ranges for the achievement of the MSY objective. However, a further concerning development in the North Sea MAP, and in the Western Waters MAP proposal, is the categorisation of stocks as 'target' and 'bycatch', with an accompanying lowering of ambition for those classed as bycatch.

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. The NSMAP and WWMAP proposal foresee that 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.

¹⁴ The Commission's responses to our comprehensive access to information requests regarding December Council 2016¹⁴ showed that where socio-economic arguments were presented by Member States, they were vague and lacked clear, strong supporting evidence: First Access to Information Request (AIR) submitted to the Council of the EU on 14 December 2016 requesting 'access to information regarding total allowable catches (TACs) of EU fish stocks in the Northeast Atlantic discussed and adopted on 12 and 13 December 2016'. Response received on 2 February 2017. Confirmatory application (Ref: 16/2430-Id/dm) sent on 24 February 2017, response received on 2 April 2017. Second AIR submitted to the European Commission on 26 June 2017 (GestDem 2017/3796- Ares (2017) 3211301), details and response available on https://www.asktheeu.org/en/request/access_to_documents_related_to_t#outgoing-8779

¹⁵ 'STECF observes that the recent slope of the indicators suggests that progress until 2016 has been too slow to allow all stocks to be maintained or restored to at least the precautionary Bpa, and managed according to FMSY by 2020.' (see p. 7 of the most recent STECF report on CFP monitoring: STECF - Monitoring the performance of the Common Fisheries Policy (STECF-Adhoc-18-01). Publications Office of the European Union, Luxembourg, 2018, ISBN 978-92-79-85802-4, doi:10.2760/329345, JRC111761; <https://stecf.jrc.ec.europa.eu/documents/43805/2092142/STECF+18-01+adhoc+-+CFP+Monitoring+2018.pdf>)

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Merely aiming to prevent the collapse of bycatch stocks is therefore insufficient to meet the requirements of the CFP, as well as existing environmental legislation. So, where MSY-based assessment exists, whether for target or bycatch stocks, fishing opportunities must be proposed and set in line with MSY. However, there are stocks for which MSY-based assessments do not currently exist. The Commission's ambition should be to increase the coverage of stocks with such assessments or develop proxies that ensure a comparable degree of conservation, in line with requirements in the CFP. However, the differentiated approach outlined in the jeopardises this. This is a key concern, as is the lack of transparency in the way the Commission categorises 'target' and 'bycatch' stocks, in particular because a target or bycatch stock in one fishery may not be so in another. A definitive categorisation may therefore be difficult.

The differentiation between 'target' and 'bycatch' stocks is not only an issue in the context of the MAPs. We are aware of the Commission's recent request to ICES to provide advice on removing TAC management for several 'bycatch' stocks. This request again indicates that the Commission has no ambition to restore 'bycatch stocks' above biomass levels capable of producing MSY but considers it sufficient to merely keep them within safe biological limits. It also raises broader concerns about the focus on removal of TACs. We consider this issue in more detail below.

At this stage, we would also draw the Commission's attention to our previous recommendation that the Commission develops a communication or a guidance document on how to implement the precautionary approach to fisheries management in line with Article 4(1)(8) of the CFP Regulation and Article 6 and Annex II of the UN Fish Stocks Agreement.

TACs and the landing obligation

In light of the full implementation of the landing obligation in 2019, ClientEarth welcomes the Commission's intention to no longer propose top-ups, proposing TACs based on ICES landings advice rather than total catch advice. As issues may arise in 2019 with landing obligation implementation, in particular with levels of compliance, setting TACs in line with landings advice is an approach that demonstrates an appropriate level of precaution.

In mixed fisheries, it is inevitable that different stocks will have divergent levels of abundance. In certain cases, this may mean that setting the TAC at the maximum advice level for one of the stocks in the mixed fishery might result in either exceeding the maximum advised TAC level for another stock (or stocks), or in choking the fishery, if changes in fishing behaviour or selectivity are insufficient to alter catch composition. In order to safeguard the most vulnerable stock(s) in such scenarios, and to avoid choking, the TACs for the most abundant stocks in the mixed fishery should be set at a level lower than the maximum advised in the single species advice for those stocks.

The Commission's report on the implementation of the landing obligation highlights a number of issues. In particular, the Commission itself refers to the limited data on discard quantities, making it difficult to assess whether there has been a change in these quantities. It also highlights a key issue that ClientEarth has outlined in previous correspondence - "*uncertainty over the reporting by fishermen of fish discarded under exemptions (i.e. de minimis and high survivability), discards of fish currently not subject to the landing obligation and catches of fish below MCRS*".¹⁶ The Commission also notes, based on the reports received, an apparent

¹⁶ Commission staff working document accompanying communication from the Commission on the State of Play of the Common Fisheries Policy and Consultation on the Fishing Opportunities for 2019, p.38

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ongoing reluctance of the industry to implement the landing obligation. This is concerning as we approach the 2019 deadline for full implementation. One key problem is the failure of a number of Member States to submit their reports on landing obligation implementation. This creates difficulties both for the Commission in its reporting but also for stakeholders looking to analyse the progress made. We therefore recommend that the Commission urges any Member States that have not yet submitted the relevant reports to do so as a matter of urgency and to push for next year's reports to be treated as a priority.

Removal of TACs

As we approach the 2019 deadline for full implementation of the landing obligation, a number of solutions are being put forward for addressing the challenges of this obligation, particularly the issue of choke species. ClientEarth is concerned that an option that the Commission appears to be considering is the 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, we await the ICES response to the Commission's request for advice on the subject of TAC removal with interest.

TAC removal should be seen as a last resort and 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 its 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 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.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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