



October 2020

# Taking stock 2020 - are TACs set to achieve MSY?

A report on key areas where progress is still needed now that the 2020 MSY deadline has passed

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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. 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 six years after the 2013 reform, it is time to take stock: have the European Commission and the Council of European fisheries ministers kept their promise by setting TACs at sustainable levels for 2020, 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, will need to address as a priority in 2020 and beyond to allow all stocks to recover in line with the CFP's requirements – 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 2020 TACs, but otherwise following the same structure and methods. Based on a subset of the TACs agreed at the past six December Council meetings, it explores the following findings:

- **Progress since 2015 towards setting sustainable TACs in line with scientific advice and the law has been far too slow, and the 2020 deadline was missed.** The Commission's proposal usually follows the underlying scientific advice more consistently than the TACs agreed by the Council. However, many of the proposed TACs are already too high to begin with (for example, 45% in 2020). The Council rarely corrects this, and on the contrary frequently exceeds the proposal even further.
- **Progress has been particularly slow or non-existent for stocks with precautionary scientific advice.** Both the Commission and the Council 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 only minimal improvement: 75% of the 2020 TACs for MSY-assessed stocks follow scientific advice, compared to only 29% for stocks with precautionary advice. Importantly, the latter still account for a large proportion of stocks (26 out of 67 stocks included in the analysis, i.e. 39%).
- **Similarly, the Commission and the Council have followed scientific advice more frequently for target stocks, while continuing to exceed it for stocks primarily taken as bycatch in other fisheries.** This is particularly concerning in light of the increasing consideration given to certain approaches to avoid science-based TACs resulting in premature closure, or 'choking', of mixed fisheries. Options explored so far include the removal of TACs, and the setting of 'bycatch TACs' above scientifically advised levels based on the condition of 'bycatch reduction plans' being developed - without such plans or necessary control and monitoring measures having been implemented.
- **Even where TACs are agreed in line with the scientific advice, the Council mostly sets them at the maximum single stock advice rather than leaving a buffer by choosing a lower level.** This approach is not in line with the CFP's objective of restoring stocks *above* MSY biomass levels, which requires TACs to be set *below* the advised levels corresponding to the MSY-based fishing mortality ( $F_{MSY}$ ) under certain conditions. Moreover, it is not resilient to unexpected changes in the stock dynamics, ecosystem or fisheries, or updates in the scientific assessment, which might deteriorate the outlook, and can therefore jeopardise stock recovery and result in more painful cuts in the future.

- **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 done by the Commission 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.
- **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 ministers 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 a series of Access to Information Requests (AIRs) to the Council and the Commission regarding the December Councils in 2016, 2017 and 2018, the European Ombudsman launched an inquiry regarding the situation in response to ClientEarth's complaint. In October 2019, the Ombudsman confirmed ClientEarth's concerns and recommended that the Council should publish documents related to TAC-setting as soon as they are circulated to Member States, but to date the Council has failed to implement this recommendation.
- **Certain Member States, such as France, Ireland, Spain, the United Kingdom, Belgium and Portugal, have demonstrably been more vocal than others in pushing for TACs to be set above scientifically advised levels, mostly based on socio-economic claims without compelling, or often any, evidence to support them.** This report presents key findings from an analysis of comments made by Member State delegations in the lead-up to December Council. This information (which has not been updated for 2019) identifies the Member States that have been actively pushing for unsustainable TACs, and those that have largely remained silent despite the collective responsibility of the Council to set TACs in line with the CFP's requirements.
- **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.

The Commission will its proposal for next year's TACs this or next month, and discussions within and amongst the Member States, as well as between the EU and the United Kingdom, will soon be underway. At this crucial time, we therefore urge all of them to honour their commitments made during the 2013 CFP reform, by carefully reviewing the findings of this report and addressing all outstanding issues raised.

EU decision-makers have failed to meet the 2020 deadline, but this legal requirement still applies for 2021 and beyond. They must now make amends by setting sustainable TACs in line with scientific advice and the legal requirements in 2020 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 to focus their attention in this push towards ending overfishing, and to enable Members of the European Parliament to get involved in this crucial process.

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

The key decision-makers responsible for meeting the CFP's objectives and requirements, particularly the MSY objective, when setting TACs for 2021 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.

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 and the Council (e.g. regarding TAC-setting) or Member States (e.g. regarding the implementation of the landing obligation), all decision-makers share a joint responsibility for achieving the CFP's objectives by:

### Following scientific advice and restoring stocks in line with the CFP's requirements

- a) 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;
- b) 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;
- c) Setting certain TACs below the maximum single species advice in a mixed fisheries context in order to safeguard the most vulnerable stocks;
- d) Setting precautionary limits and putting in place enhanced monitoring and data collection for data-limited stocks without scientific advice on maximum catches;
- e) Adopting effective measures for non-TAC stocks to ensure stock recovery;
- f) Working with third countries, such as the UK or Norway, to end overfishing of shared stocks.

### 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 apply;
- d) Not removing TACs or adding species to the prohibited species list to circumvent the landing obligation;
- e) Rectifying shortcomings of the North Western Waters bycatch reduction plan; suspending access to any current or future bycatch TACs until robust full catch documentation and a bycatch reduction plan 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) Making all Member States' contributions used throughout the process and detailed minutes of the December Council and its preparatory meetings publicly available, without the need to request this information;
- e) Improving the Council's document register, e.g. regarding its searchability.

## Improving reporting on progress towards MSY and achieving the CFP's requirements

- a) Ensuring accurate, robust, reliable, comprehensive reporting, by
  - i. Covering all harvested stocks, not just MSY stocks;
  - 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 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. The core analysis presented focuses on a subset of the Total Allowable Catches (TACs) agreed for the years 2015 to 2020 at the yearly December Council meetings. It represents an update of last year's report, which includes the results of the analysis of the 2020 TACs, but follows the same structure and methods. On this basis, it identifies a number of key issues which the Commission and the Council, as well as individual Member States, will need to address as a priority to meet the 2020 MSY deadline and allow all stocks to recover in line with the CFP's requirements. In particular, this report sets out to:

- Assess the extent to which the proposed and agreed TACs follow the underlying scientific advice, and highlight any trends or patterns regarding areas where progress is still lacking;
- Assess the extent to which the TACs agreed by EU ministers follow those proposed by the Commission;
- Evaluate which Member States have demonstrably pushed for higher than scientifically advised TACs throughout the December Council processes in 2016, 2017 and 2018; and which arguments and evidence they have brought forward to justify this. This section has not been updated for the year 2019;
- Make recommendations for how decision-makers should address the outstanding issues identified by this report in order to ensure that their TAC decisions for 2020 and beyond are fully in line with the CFP's objectives and requirements.

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 proposed and agreed TACs with scientific advice (see section 4);
- Identifying the Member States 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

The main instrument regulating fishing mortality in European fisheries management is 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.

The reformed Common Fisheries Policy (CFP) includes the fundamental objective to progressively restore and maintain fish stocks above biomass levels capable of producing the maximum sustainable yield (MSY;<sup>1</sup> Article 2(2) of the CFP Basic Regulation)<sup>2</sup>. For the purpose of achieving this 'MSY objective', the MSY exploitation rate shall be achieved on a progressive, incremental basis by 2020 at the latest for all stocks. Moreover, the CFP must apply the precautionary approach to fisheries management, and measures should be taken in accordance with the best available scientific advice (Article 3(c) of the CFP Basic Regulation).

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<sup>1</sup> ClientEarth (2015). Maximum Sustainable Yield in the Common Fisheries Policy, Legal briefing. September 2015.

<http://www.documents.clientearth.org/library/download-info/maximum-sustainable-yield-in-the-common-fisheries-policy/>

<sup>2</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy



The word 'above' in the objective is fundamental, since this means setting exploitation levels below  $F_{MSY}$ , the fishing mortality that should lead to the biomass that enables a stock to deliver the maximum sustainable yield ( $B_{MSY}$ ), including when ranges of exploitation ( $F_{MSY}$  ranges 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.

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 2021 TACs - most of which will be set later this year<sup>3</sup> - to be in line with the CFP's objectives and requirements outlined above, they need to be proposed and set at levels which are 1) in line with MSY-based exploitation rates, and 2) in line with the precautionary approach where data are more limited and no MSY-based stock assessment is available.

## 2.2 The TAC-setting process

There are a number of different processes for setting TACs which involve different decision-makers. The majority of the TACs are set by the Council of EU fisheries ministers, in October for the Baltic Sea, and in December for most TACs in the Northeast Atlantic and the North Sea. Note that due to the departure of the United Kingdom from the EU, close to two thirds of the stocks or TACs which used to fall under the December Council process will turn into EU/UK shared stocks from 2021 onwards.<sup>4</sup> The future framework for fisheries management of EU/UK shared stocks and the process for agreeing catch limits is uncertain at the time of writing of this report. The TAC-setting process for October and December Council comprises five key steps:

1. The publication of scientific advice on catches and landings (or 'wanted catch') by the International Council for the Exploration of the Sea (ICES);<sup>5</sup>
2. Discussions within Member State administrations regarding their positioning in the upcoming negotiations on the basis of this advice and other considerations;
3. The publication of the Commission's TAC proposal, and subsequent non-papers with updates or adjustments to the original proposal;
4. Discussions between Member State delegations and the Commission as part of meetings of the Council Working Party on Internal/External Fisheries Policy;
5. The Council meeting (in October or December, respectively) at which the EU fisheries ministers set the final TACs on the basis of the Commission's consolidated TAC proposal and the so-called 'Council bible'.<sup>6</sup>

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<sup>3</sup> With the exception of Deep Sea TACs which were agreed in 2018 for both 2019 and 2020.

<sup>4</sup> 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.

<sup>5</sup> <https://www.ices.dk/community/advisory-process/Pages/Latest-Advice.aspx>

<sup>6</sup> 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.

The final result of this process is the annual TAC and Quota Regulation which specifies the agreed TACs.<sup>7</sup> Aside from the TACs agreed through the above process, a range of TACs are subject to negotiations and agreements with third countries, such as Norway and the Faroe Islands, and for the first time in 2020, the United Kingdom (see above), which follow different processes. Moreover, some stocks are subject to 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 included in the Northeast Atlantic TAC and Quota Regulation. This report focuses on TACs agreed at December Council (see section 3.3 for further details on the scope of this report), still including those which will fall under the yet to be determined EU/UK process for 2021 and beyond.

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

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

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

Until December Council 2017, the Commission proposed such quota top-ups, which have subsequently been incorporated into the TACs adopted by the Council. For details on the implications of and challenges posed by quota top-ups for monitoring progress of TAC-setting towards MSY please refer to our briefing.<sup>8</sup> The landing obligation came fully into force in 2019, meaning that all catches of quota stocks in the Northeast Atlantic now have to be landed, unless exemptions apply. The Commission therefore changed its approach from proposing landings-TACs plus quota top-ups, to proposing catch-TACs, with deductions applied to TACs subject to certain exemptions, to reflect that certain discards may continue under these exemptions. In light of serious concerns about the general lack of compliance with the landing obligation,<sup>9</sup> this approach of granting full quota top-ups (albeit with deductions for exemption discards) poses a clear risk of overfishing, if unreported discards beyond the agreed limits continue, as illustrated in ClientEarth's recent briefing on this topic.<sup>10</sup> ClientEarth's recent reports provide further details on serious shortcomings in the control of the landing obligation in France<sup>11</sup>, Spain<sup>12</sup> and Denmark.<sup>13</sup>

While the agreed TACs frequently do not follow the proposed TACs (see section 4.1 for findings of the present report), the Council has in principle been applying the same approach as the Commission. 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

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7 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>

8 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/>

9 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.

10 ClientEarth (2020). Setting Total Allowable Catches (TACs) in the context of the Landing Obligation. July 2020. <https://www.documents.clientearth.org/library/download-info/setting-total-allowable-catches-tacs-in-the-context-of-the-landing-obligation/>

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

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

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

the above considerations (see section 3.3 for details). Access to information on the size of the adjustments made (either top-ups or deductions) and the data and calculations underpinning them is crucial in order to adequately account for these adjustments in comparisons between TACs and scientific advice. For further details on this topic and the information the Council and the Commission have (not) provided in response to ClientEarth's Access to Information Requests (see section 2.4), please refer to ClientEarth's complaint to the Ombudsman about a lack of transparency of the December Council decision-making process.<sup>14</sup>

## 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.<sup>15</sup> As the briefing shows, these transparency requirements must result in fisheries data and information on fisheries management being accessible to the public. 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 have advocated for unsustainable TACs, or hold them to account.

Following a series of Access to Information Requests (AIRs) regarding the December Council processes in 2016, 2017 and 2018, ClientEarth submitted a complaint about this situation to the European Ombudsman.<sup>16</sup> The Ombudsman published her findings on this topic in 2019, confirming ClientEarth's concerns, and recommending that '*The Council should proactively make public documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter.*'<sup>17</sup> To date, the Council has failed to implement the Ombudsman's recommendations, leading her to confirm her finding of maladministration.<sup>18</sup> The Commission, in turn, has committed to increasing transparency on its proposals for fishing opportunities, as confirmed by Commissioner Sinkevičius in a press release in July 2020.<sup>19</sup> Meanwhile, this report 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 (see section 5).

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14 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.documents.clientearth.org/library/download-info/clientearth-complaint-to-the-european-ombudsman-about-the-lack-of-transparency-in-the-december-council-tac-setting-process/>

15 ClientEarth (2015). Transparency in the Common Fisheries Policy. Briefing, November 2014 (updated in August 2015). <http://www.documents.clientearth.org/library/download-info/transparency-in-the-common-fisheries-policy/>

16 See footnote 14.

17 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>

18 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>

19 [https://ec.europa.eu/fisheries/press/commissioner-sinkevi%C4%8Dius-announces-more-transparency-its-proposals-fishing-opportunities\\_en](https://ec.europa.eu/fisheries/press/commissioner-sinkevi%C4%8Dius-announces-more-transparency-its-proposals-fishing-opportunities_en)

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

As outlined in section 2.1, the CFP contains 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 and its implementation, b) highlight areas where progress is lacking, and c) trigger action to improve the situation. For detailed considerations and recommendations regarding reporting, please refer to our comprehensive briefing on this topic.<sup>20</sup>

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

### 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. 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.

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

By excluding certain stocks or choosing certain metrics over others, the resulting reports can generate a misleadingly positive or negative impression of the situation, which does not adequately reflect reality. Misleadingly positive reports are particularly problematic since they give decision-makers an excuse for not taking action to improve the situation. This poses a serious risk of greenwashing,<sup>21</sup> rather than clearly recognising and addressing the lack of progress in certain areas. This issue is apparent in the clear discrepancies between certain conclusions in the reporting 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 recent briefing for further details).<sup>22</sup>

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20 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.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/>

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

22 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/>

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

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

Importantly, as highlighted above, the CFP's MSY objective applies 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.<sup>23</sup>

On the other hand, the Commission's report,<sup>24</sup> 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 claims 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'*.<sup>25</sup>

Clearly, such statements made by the Commission's DG MARE (based on the volumes of landings allowed under the agreed TACs) generate an entirely different impression of the situation than the findings of the STECF (based on an assessment of fishing mortality and biomass levels). DG MARE's figures, particularly viewed in isolation and without further explanation, are misleadingly positive for a number of reasons, as explained below and in ClientEarth's recent briefing.<sup>26</sup>

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. Any conclusions drawn by the Commission's reporting regarding progress towards ending overfishing are therefore limited to a fraction of the stocks to which the CFP's requirements apply. Importantly, TACs for stocks without MSY-based advice are frequently set above the available precautionary scientific advice (see section 4.3 for details on our findings on this topic). 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,<sup>27</sup> so excluding these makes the situation look better than it is.

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.

23 Scientific, Technical and Economic Committee for Fisheries (STECF) (2020). STECF-Adhoc-01. Monitoring the performance of the Common Fisheries Policy. [file:///on-fp01/home\\$/jgrossmann/Downloads/STECF%2020-01%20adhoc%20-%20CFP%20monitoring.pdf](file:///on-fp01/home$/jgrossmann/Downloads/STECF%2020-01%20adhoc%20-%20CFP%20monitoring.pdf). As of 2018, the most recent year with the relevant data, 26 out of 68 assessed stocks (i.e. 38%) were still exploited above  $F_{MSY}$ , and 14 out of 44 assessed stocks (i.e. 32%) were still outside safe biological limits, see Tables 5-8.

24 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>

25 *Ibid.*, p. 2.

26 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/>

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

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

## 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, 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 (61% 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 CFP's MSY objective remain limited to that subset of stocks for which MSY-based advice is available for the whole time-series covered by the analysis.

### 3.2.2 Area mismatch between TACs and scientific advice

The fact that the management units for which the TACs are set do not always correspond to the stock units that ICES provides its scientific advice for presents a further challenge. In many cases, the TAC area is larger or smaller than the stock area covered by the scientific advice, or both the TAC and the advice area overlap only partially. As demonstrated in our briefing on this topic,<sup>28</sup> such 'mismatch' issues apply in fact to the majority of potential comparisons of TACs and scientific advice. Importantly, in many cases the mismatch cannot be resolved without additional information or assumptions, e.g. on the proportion of catches in those parts of the area where the TAC- and advice-units overlap. This means no robust conclusions can be drawn if the necessary additional information is not readily available or assumptions cannot be reliably validated. This makes it difficult for external stakeholders to monitor whether TACs subject to mismatch are being proposed and set in line with the legal requirements. As a result, the scope of reports on comparisons between TACs and scientific advice is further decreased when comparisons subject to such mismatch are excluded. For further details on this topic, please refer to the afore-mentioned briefing.<sup>29</sup>

### 3.2.3 Other complicating factors

The gradual **change in the purpose of TACs from regulating landings to regulating catches** due to the phasing in of the landing obligation between 2015 and 2019 (see section 2.3) poses a number of additional reporting challenges. The main difficulty lies in identifying which TACs or stocks are subject to the landing obligation, and to what extent, in a given year, and assessing whether any applied quota adjustments indeed accurately reflect previous discards that now have to be landed (re: top-ups),<sup>30</sup> or exemptions 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 are agreed by the Council of EU fisheries ministers during the December Council meeting – though close to two thirds of the stocks will turn into EU/UK shared stocks going forward.<sup>31</sup>

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28 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/>

29 *Ibid.*

30 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/>

31 See footnote 4 for details.

However, the Regulation also contains a number of TACs subject to negotiations or swaps with 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 multi-annual plans (MAPs)**, such as the North Sea and the Western Waters MAP, respectively. While these MAPs were adopted under the CFP, they contain a number of provisions which are not fully aligned with the CFP's Article 2(2) objective. In particular, they provide for the use of  $F_{MSY}$  ranges which go beyond the  $F_{MSY}$  point value,<sup>32</sup> and differentiate between target stocks and those which are primarily caught as bycatch, by applying  $F_{MSY}$  ranges to target stocks, while managing bycatch stocks using the precautionary approach. This makes reporting more difficult and risks inconsistencies across the years, for example when a stock previously subject to advice based on the  $F_{MSY}$  point value is now subject to  $F_{MSY}$  ranges specified in a MAP, meaning that the comparison baseline has shifted.

In conclusion, all the above-mentioned challenges mean that the scope of reporting on progress towards achieving the CFP's MSY objective may cover only a fraction of the scope of the CFP's MSY objective itself, which covers 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 CFP's requirements and b) the extent to which conclusions drawn on the basis of the presented analysis are applicable beyond its scope.

## Recommendations on reporting

The Commission and all others with the ambition of monitoring and reporting on progress towards MSY and achieving the CFP's requirements should

- Ensure accurate, robust, reliable, comprehensive reporting, by
  - Covering all harvested stocks, not just MSY stocks;
  - Reporting on progress regarding available reference points or trends re: timeseries 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 reports;
- Explicitly recognise limitations in scope and implications of the approach taken to avoid misrepresentation or misinterpretation of results.

<sup>32</sup> See section 2.1 for an explanation why  $F_{MSY}$  should be treated as a limit, not a target, meaning that it should not be exceeded.



### 3.3 Scope and approach used in this report

All of the above considerations clearly illustrate that reliable, comprehensive and unambiguous reporting on progress towards the CFP's MSY objective 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 2020. It does not cover those TACs agreed through other processes, such as October Council for the Baltic, the biannual setting of Deep Sea TACs, negotiations with third countries such as Norway, or shared stocks subject to unilateral quotas set by the EU and other countries.<sup>33</sup> The focus is thus on TACs for which responsibility lies exclusively with EU ministers and the Commission, regarding the corresponding proposals.

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 sections 3.2 and 3.2.2). Specifically, the core analysis includes only comparisons without mismatch, or cases where the TAC area is larger than the scientific stock advice area (for example to avoid misreporting).<sup>34</sup> All comparisons where the TAC area is smaller than the advice area (meaning that parts of the relevant stocks are not subject to a TAC), or where the TAC and advice areas overlap only partially (meaning that the TAC and advice figures are not directly comparable) were excluded from the core analysis. However, the report does present some observations and reflections on shared stocks subject to other TAC-setting processes and stocks subject to mismatch, which are outside the scope of the core analysis, in section 4.7.

The report covers all stocks subject to TACs that meet the above-mentioned criteria, i.e. stocks for which MSY-based advice was available and those where ICES instead provided precautionary advice or, in previous years, advice based on the ICES approach to data-limited stocks. The TACs and respective comparisons included and not included in the core analysis are listed in Annex II and III, respectively. Overall, based on TACs in place for 2020, the core analysis of the present report covers 50 comparisons between TACs and scientific advice, involving 56 TACs, and 64 stocks.

The main part of the report is a comparison of both the TACs proposed by the Commission and those agreed by EU ministers with the underlying scientific advice, as well as a comparison of the agreed and the proposed TACs with each other (section 4.1). This analysis was conducted for TACs agreed for 2015 to 2020, and an additional evaluation of Member State positions ahead of December Council is provided in section 5 for the December Council processes in 2016, 2017 and 2018 (this section was not updated for the year 2019).

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.<sup>35</sup> Therefore, the key emphasis is on assessing the extent to which the TAC-setting as such, i.e. the

<sup>33</sup> Since the UK was still an EU member during December Council 2019, the relevant TACs which will in future be subject to EU-UK negotiations are still included.

<sup>34</sup> Note that in a number of cases included in the core analysis the stocks covered occur also in waters of third countries, such as Norway. It is possible that these third countries set additional fishing quotas for these stocks in their own waters, which are not reflected in the EU TAC and Quota Regulation, or that further unregulated catches take place. If this is indeed the case, conclusions drawn based on the current report regarding the sustainability of the EU TACs may be too optimistic, since they essentially assume that no fishing is allowed or taking place beyond the TACs specified in the TAC and Quota Regulation. However, for the purposes of this report this possibility was not further investigated, i.e. the core analysis focuses on a comparison of the TACs (as specified in the relevant TAC and Quota Regulations) with the corresponding ICES advice.

<sup>35</sup> Scientific, Technical and Economic Committee for Fisheries (STECF) (2020). STECF-Adhoc-01. Monitoring the performance of the Common Fisheries Policy. [file:///on-fp01/home\\$/jgrossmann/Downloads/STECF%2020-01%20adhoc%20-%20CFP%20monitoring.pdf](file:///on-fp01/home$/jgrossmann/Downloads/STECF%2020-01%20adhoc%20-%20CFP%20monitoring.pdf).

management intention, is aligned with the CFP's sustainability requirements, 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

The present report uses seven 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 2020;
- The Commission's consolidated TAC proposals for 2015 to 2020;
- Non-papers from the Commission regarding updates to the initial TAC proposal as well as quota adjustments such as top-ups or exemption deductions for 2015 to 2020;
- The agreed TACs as recorded in the TAC and Quota Regulations for 2015 to 2020;
- The most up-to-date discard plans valid in each of the years 2015 to 2020;
- The agreed multiannual plans for the North Sea and the Western Waters;
- The files received in response to ClientEarth's series of AIRs to the Council and the Commission regarding the December Council processes in 2016, 2017 and 2018.

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 and proposed 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 (or the Commission's proposal) 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, 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, those involving stocks with precautionary advice, and those where the official advice is based on a management plan, were also analysed separately, in order to allow for more nuanced conclusions depending on the advice basis. Any comparisons involving **stocks subject to a multiannual plan (MAP)**, namely the North Sea MAP and the Western Waters MAP, were identified throughout the analysis. 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, although a number of reflections on this topic are presented in section 4.2.

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 Art. 15(1) of the CFP Basic Regulation and in the relevant discard plans.<sup>36</sup> In principle, TACs that were considered fully subject to the landing obligation were compared to ICES catch advice, and TACs that were considered only partially or not at all subject to the landing obligation were compared to the ICES advice on landings (or 'wanted catch'). Cases where the respective catch or landings advice was not available in a given year were removed from any calculations for that particular year, but still included for the remaining years for which the relevant advice was available.

As explained in section 2.3, **quota adjustments** have been applied since the introduction of the landing obligation in 2015 to reflect the change from regulating landings to regulating catches: top-ups during the phasing in from 2015 to 2018, and deductions since the landing obligation came fully into force from 2019 onwards. These quota adjustments add another level of complexity to comparisons of TACs with the underlying scientific advice (for further details on this topic, please refer to our briefing on quota top-ups).<sup>37</sup> An assessment of the extent to which the applied quota adjustments are appropriate, i.e. in line with previous discards (re: top-ups) or exemption discards (re: deductions), was outside the scope of this report. However, the application of such adjustments was reflected in the TAC analysis as follows, to make the proposed and agreed TACs comparable to the underlying ICES advice:

- For TACs applying from 2015 to 2018: quota top-ups were deducted from the proposed and agreed TACs before comparing the resulting values to the ICES advice for landings (or 'wanted catch');
- For TACs applying in 2019 and 2020: exemption deductions were added back on top of the proposed and agreed TACs before comparing the resulting values to the ICES advice for catches.

The approach used for the 2019 and 2020 TACs recognises that in principle all catches subject to TACs (unless under an exemption) now have to be landed. It is however important to note that this approach is based on the assumption that a) the landing obligation is fully complied with, without any illegal discards beyond the agreed catch limits, and b) that any dead discards allowed under exemptions have been deducted from the relevant TACs. Given severe concerns about the general lack of compliance with the landing obligation,<sup>38</sup> and the fact that in a number of cases no deductions were applied even though the relevant TACs are subject to exemptions,<sup>39</sup> the results of the analysis for 2019 and 2020 TACs therefore need to be treated with caution: these are likely to over- rather than underestimate the sustainability of these TACs. ClientEarth's recent briefing on setting TACs in the context of the landing obligation further illustrates this issue,<sup>40</sup> and ClientEarth's recent reports provide further details on serious shortcomings in the control of the landing obligation in France,<sup>41</sup> Spain<sup>42</sup> and Denmark.<sup>43</sup>

36 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/>, particularly sections 3.1 and 3.2.

37 *Ibid.*

38 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.

39 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.

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

<https://www.documents.clientearth.org/library/download-info/setting-total-allowable-catches-tacs-in-the-context-of-the-landing-obligation/>

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

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

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

**Positions of Member States regarding specific TACs** in the lead-up to the December Council meetings were identified based on the files received in response to ClientEarth's series of AIRs and confirmatory applications, as specified in sections 3.3.2 and 5.1. The information provided in these documents was matched to the relevant TACs based on the descriptions of the species-area combinations given in the respective documents. The result was a database of TAC-specific comments from Member States documented throughout the December Council processes in 2016, 2017 and 2018. In order to allow for a systematic and quantitative analysis of this information, it was categorised by different criteria, such as type of request (e.g. for a TAC increase or roll-over) and arguments used (e.g. socio-economic concerns or choke risks). Please note that this section was not updated for the year 2019.

## 4 Analysis of agreed and proposed TACs

### 4.1 The Commission's proposal and the agreed TACs overall

This section presents some overarching results of the comparison between the agreed, proposed and advised TACs. The scientific advice to which the agreed and proposed 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 2020 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 and proposed TACs differed from the advice and each other; and
- d) the average percentage difference between the agreed, proposed and advised TACs per comparison.

All of these metrics tell a different part of the story and it is therefore important not to treat them in isolation of each other, in order to avoid misinterpretation.

A more detailed analysis of TAC-setting in relation to scientific advice, depending on the basis of that advice (ICES MSY approach versus ICES precautionary approach), and depending on whether the stocks in question are considered bycatch or target stocks, is presented in sections 4.3 and 4.4, respectively. Note that throughout this analysis a TAC was considered to be in line with the scientific advice where it differed by less than 2.5% from the corresponding scientific advice.<sup>44</sup>

The percentage of TACs where the Commission's proposal exceeded the scientific advice has remained fairly stable throughout the time series, fluctuating between 41% and 47% (see Figure 1), indicating that no progress has been made in this regard. The percentage of TACs agreed by the Council that exceeded the scientific advice was considerably higher than the percentage of TACs proposed by the Commission every year, although the difference decreased since 2016. After a slight increase between 2015 and 2016, the percentage of agreed TACs exceeding the advice declined from almost 73% in 2016 to 48% 2020. 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.

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<sup>44</sup> 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.

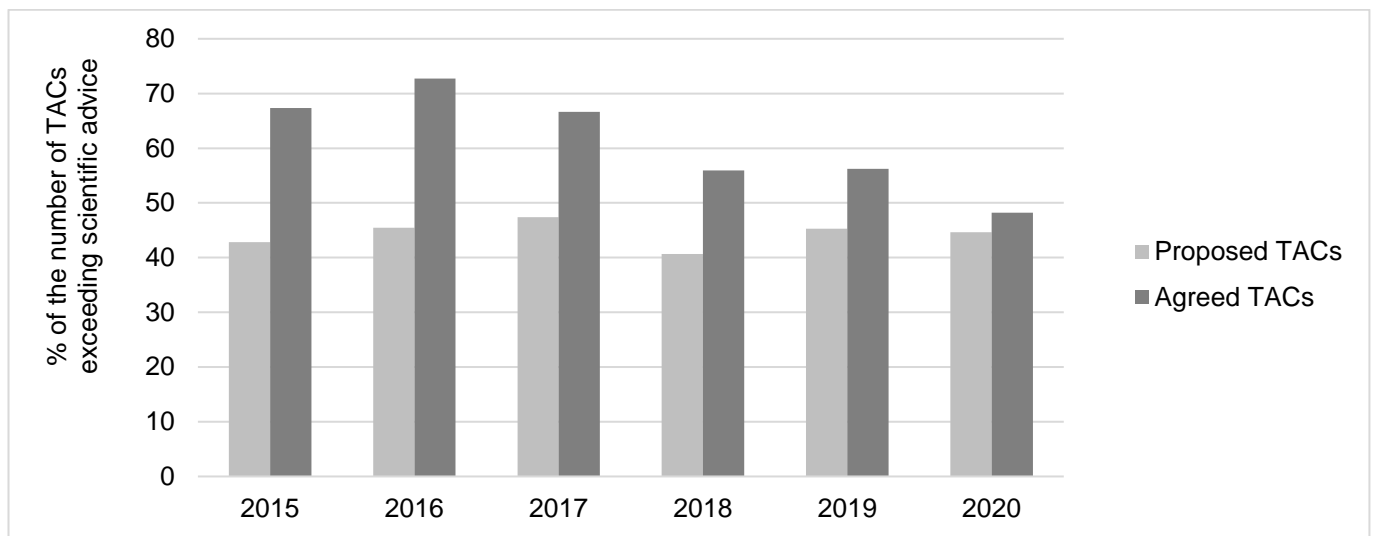


Figure 1. Time series of the percentage of the number of agreed (dark grey) and proposed (light grey) TACs that exceeded the corresponding scientific advice.

The situation is very similar when looking at trends in the tonnage (rather than the number) of those TACs agreed above versus in line with the scientific advice (see Figure 2): following an increase from 2015 to 2016, **the percentage of the overall TAC tonnage accounted for by TACs set above scientific advice has been decreasing since** a high of 192166 t (or 54%) in 2016 to 22259 t (or 19%) in 2020. However, this means that **almost one fifth of the overall TAC tonnage for 2020 still consisted of TACs set above scientific advice.**

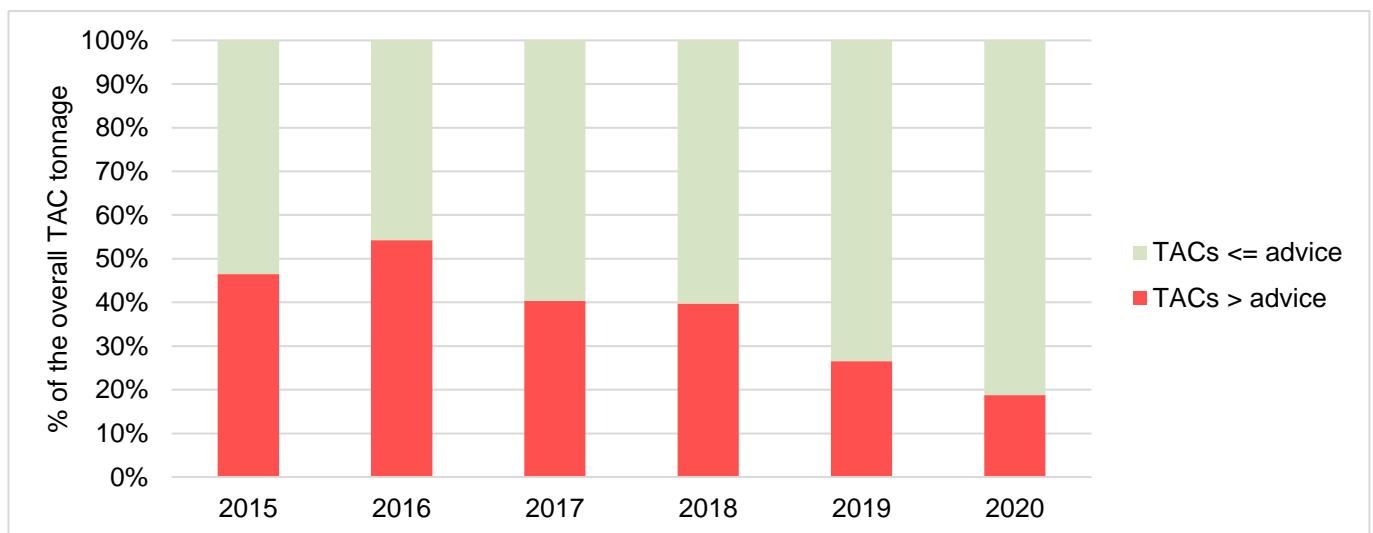


Figure 2. Time series of the tonnage of those TACs set above (red) versus in line with (green) the scientific advice, as a percentage of the total sum of TACs in tonnes per year.

The percentage of agreed TACs that exceeded the underlying proposal was fairly stable between 46% and 49% from 2015 to 2017 and dropped to between 24% and 28% from 2018 onwards (see Figure 3). This indicates that **the agreed TACs have followed the Commission's proposed TACs more frequently in recent years, though they still exceeded them in many cases.** The agreed TACs were set below the Commission's proposal in only two cases, once in 2016 and once in 2019.



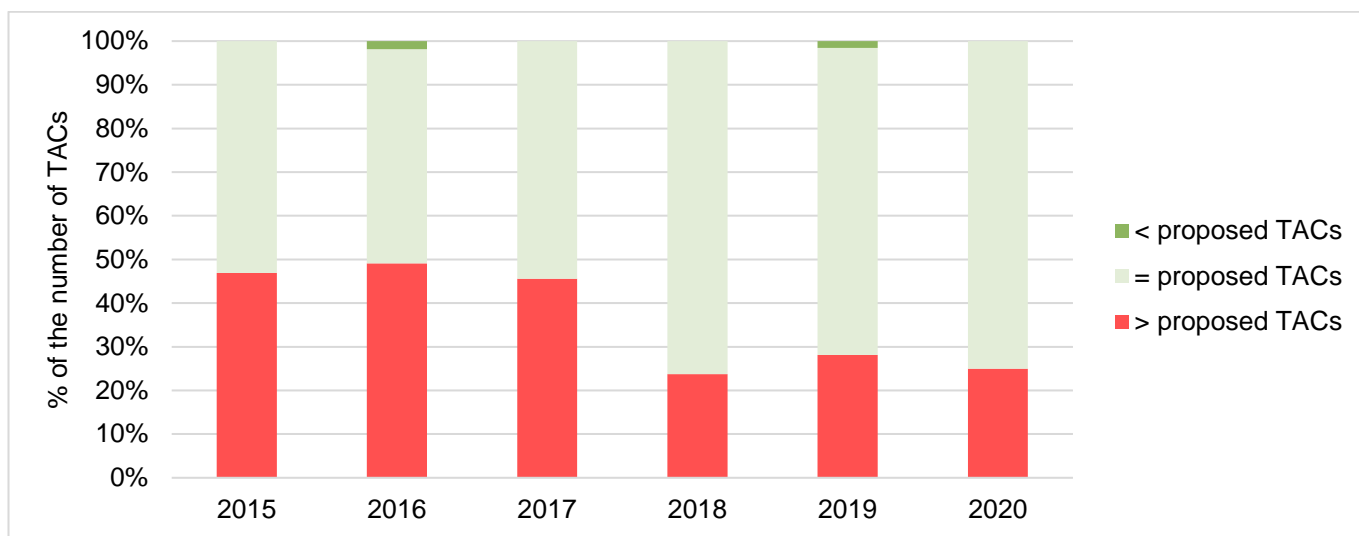


Figure 3. Time series of the percentage of the number of agreed TACs that were set above (red), in line with (light green) and below (darker green) the proposed TACs.

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 ca. 13% in 2015 to 6% in 2020 (see Figure 4). At the same time, the tonnage of those TACs that were set in line with (either at or below) the scientific advice, was only slightly below the tonnage of the overall advice from 2016 to 2018. Until 2019, the extent of the TAC excess was always multiple times higher than the extent of the 'undershoot' throughout the time series, whereas the situation was more balanced for 2020. This shows that 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. It is worth noting regarding the Commission's proposal, that while those proposed TACs which followed the scientific advice were only marginally below the relevant advice from 2015 to 2019 (between -1 and -4%), they undershot the advice by almost 24% for 2020 (data not displayed). This indicates an attempt by the Commission to propose TACs further below the relevant advice than usual, which however the Council did not take up to the same extent.

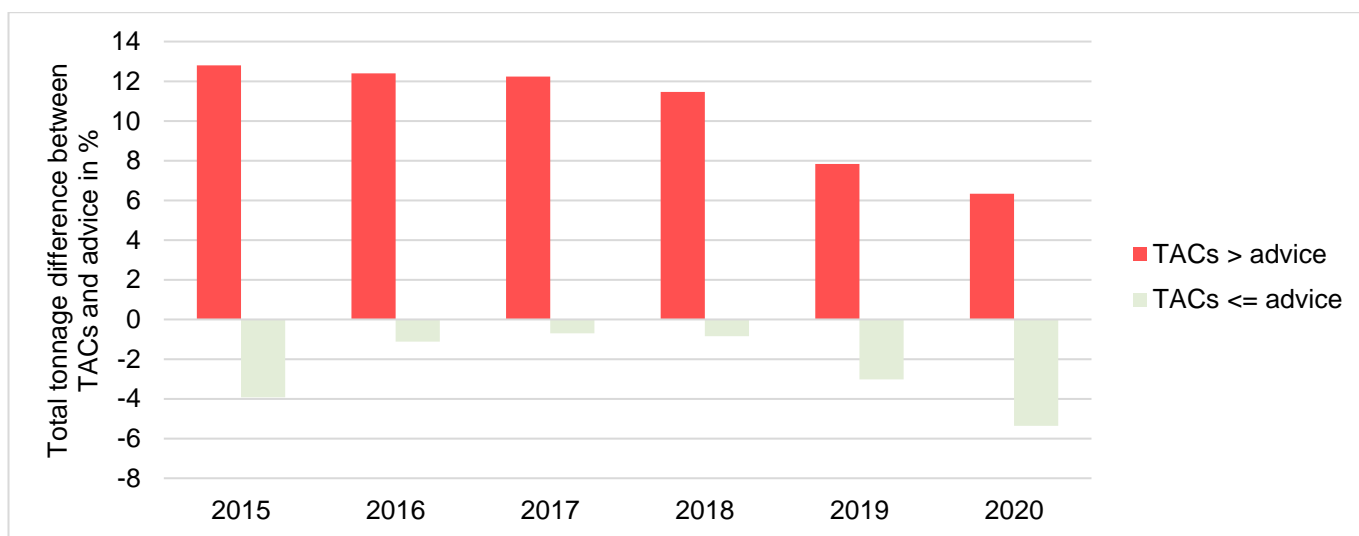


Figure 4. Time series of the difference between the total agreed TAC tonnage and the total tonnage of the scientific advice summed up across all TACs (percentage of the total advice sum), split by cases where the agreed TACs exceeded (red) versus followed (green) the scientific advice.

Similarly, 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 5). 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.

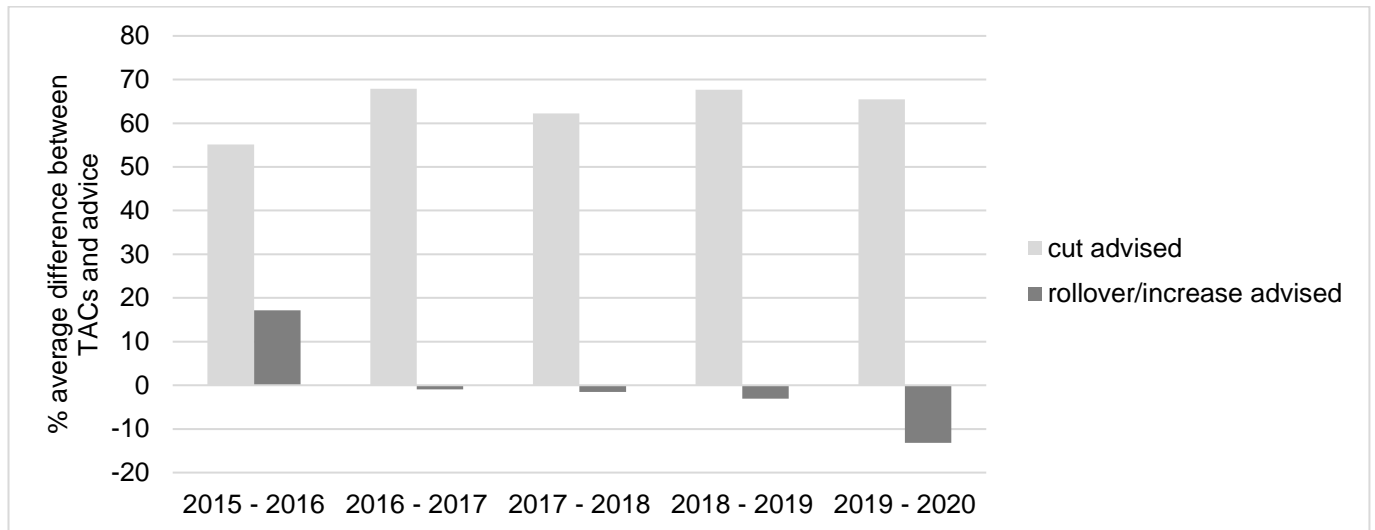


Figure 5. Time series of the percentage average difference between the agreed TACs and the underlying scientific advice per TAC/advice comparison, depending on whether a cut (light grey) or a rollover or increase (dark grey) was advised, excluding outliers.

Moreover, as Figure 6 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 (92% for 2015-2016, to 81% for 2019-2020). 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.

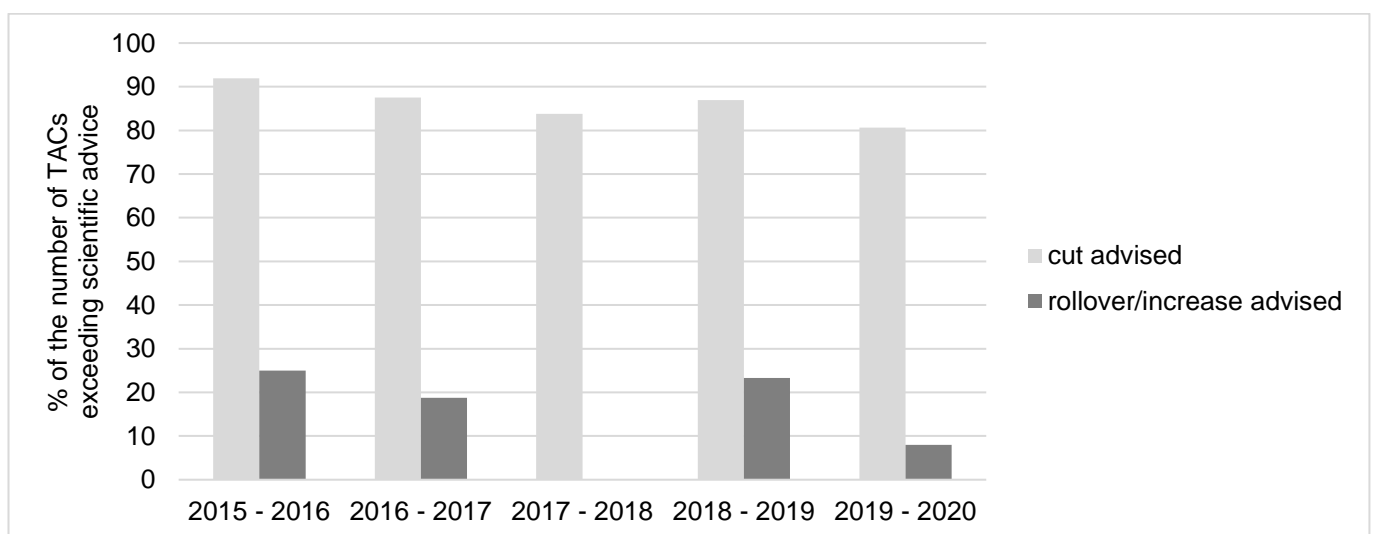


Figure 6. Time series of the percentage of the number of agreed TACs that exceeded the corresponding scientific advice, depending on whether the advice was for a cut (light grey) or for a rollover or increase (dark grey).

This indicates 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.**

**In terms of the absolute level of the TAC excess above scientific advice, there has been no improvement until 2019 for the Commission's proposal, with the percentage by which the proposal exceeded the advice fluctuating between ca. 6% and 7% of the advice, and dropping only slightly to 4% for 2020 (see Figure 7). The agreed TAC excess in turn has been decreasing from almost 13% in 2016 to just above 6% in 2020. A similar declining trend is apparent for the comparison of agreed and proposed TACs until 2019, where the percentage TAC excess above the proposal decreased from ca. 8% of the proposal in 2016 to ca. 1% in 2019. The big jump up to almost 26% in 2020 is most likely driven by those TACs, which the Commission proposed below the relevant scientific advice, whereas the corresponding agreed TACs were set at or above the advice.**

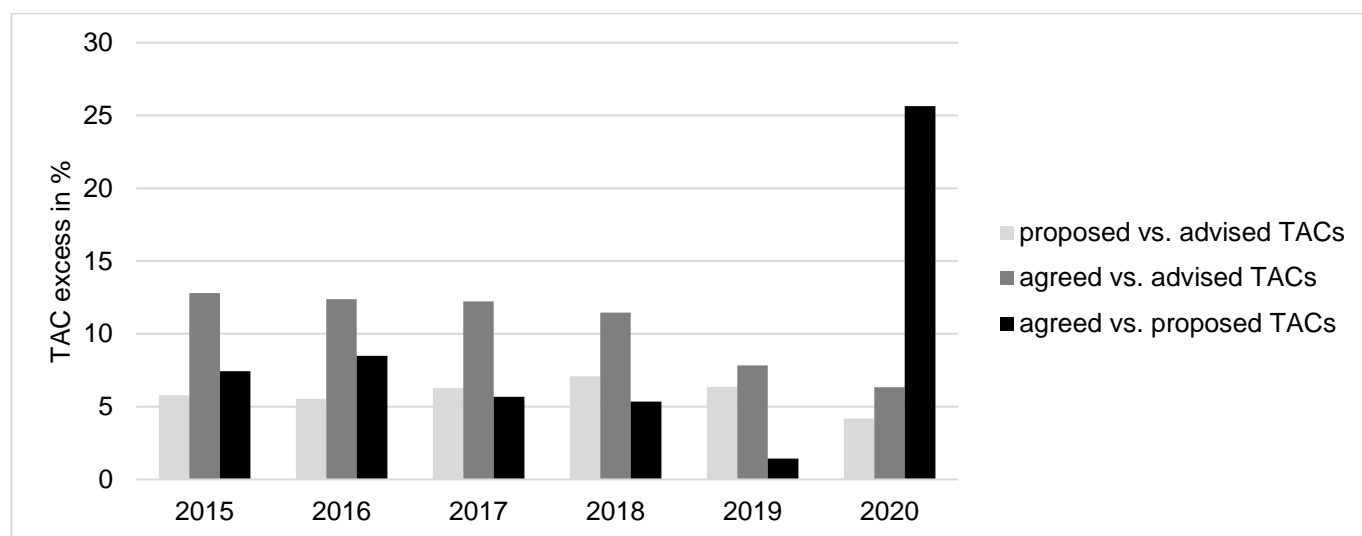


Figure 7. Time series of the tonnage of the TAC excess above scientific advice, for the comparison of proposed vs. advised TACs (light grey), agreed vs. advised TACs (dark grey) and agreed vs. proposed TACs (black). The results are presented as a percentage of the advice for the former two scenarios, and as a percentage of the proposal for the third scenario.

The analysis of the average percentage difference between agreed, proposed and advised TACs per comparison shows a similar declining trend since 2016 (see Figure 8): **both the Commission's proposal and the agreed TACs have exceeded the advice by a decreasing amount on average since 2017**, declining from 30% to 11% in 2020 for the proposal, and from 43% to 21% for the agreed TACs. The agreed TACs have also been set at levels closer to the Commission's proposal on average throughout this period, although there was a slight uptick again for 2020 in line with the above observations, albeit less pronounced than in Figure 7. For 2020, the average excess above the advice for the agreed TACs was almost twice as high as for the Commission's proposal.



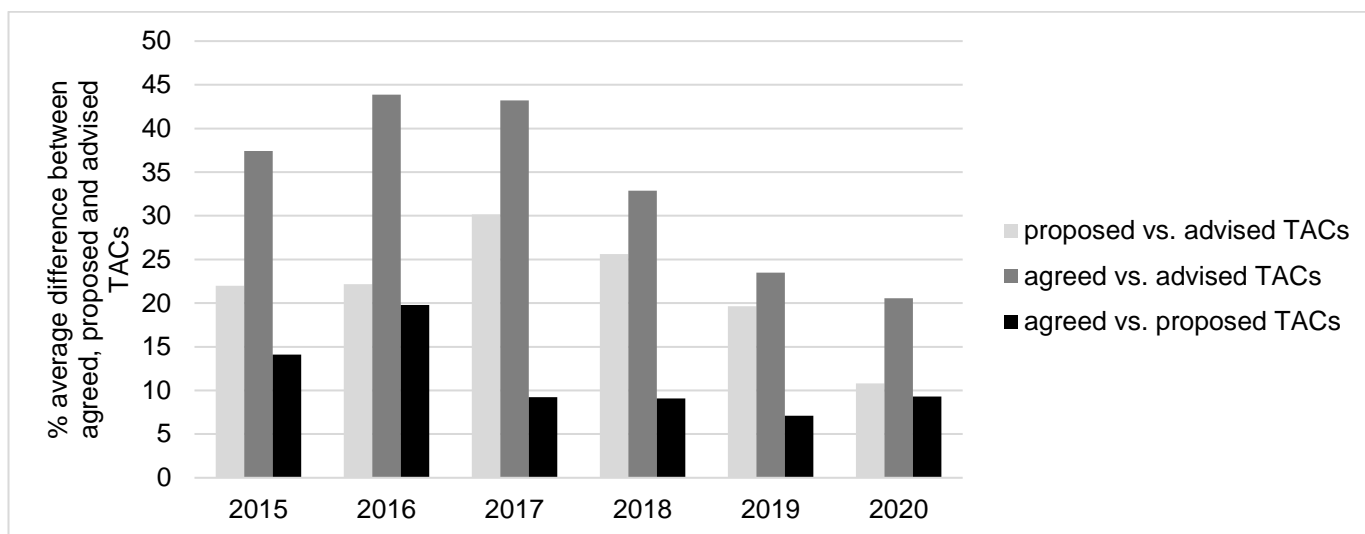


Figure 8. Time series of the average percentage difference per comparison between the proposed and advised TACs (light grey), the agreed and advised TACs (dark grey) and the agreed and proposed TACs (black), excluding outliers.

The above findings illustrated in Figure 7 and Figure 8 indicate that **progress has been made over the past few years regarding aligning the agreed TACs with the advice and the proposal in terms of the overall tonnage and the average percentage difference per comparison. However, the average TAC excess per TAC/advice comparison remains far above 0, and almost half of the TACs were still set above scientific advice in 2020** (see Figure 1), leaving a lot of work to be done to ensure sustainable TAC-setting going forward now that the 2020 MSY deadline has passed.

## 4.2 Use of $F_{MSY}$ ranges and mixed fisheries advice

For a number of stocks included in the core analysis of this report, ICES provides advice or additional catch scenarios based on  $F_{MSY}$  ranges, and/or different scenarios under mixed fisheries considerations. In these cases, the advice corresponding to the  $F_{MSY}$  point value was used in the analysis of this report.

As outlined in section 2.1, the  $F_{MSY}$  point value should be treated as a limit, not a target, in order to meet the requirements of Article 2(2) of the CFP Basic Regulation. However, since the North Sea and Western Waters MAPs provide for the use of the upper  $F_{MSY}$  range under certain circumstances, this section presents some findings on the extent to which the upper and lower  $F_{MSY}$  ranges were used in 2019 and 2020. This analysis includes both stocks where the official headline ICES advice was based on  $F_{MSY}$  ranges, and those where  $F_{MSY}$  range information was merely provided as additional catch scenarios, whereas the official advice was given on a different basis. However, an assessment of whether the conditions for using the upper ranges as specified in the relevant MAPs were met was outside the scope of this report. Note that the Western Waters MAP was not yet in force when the TACs for 2019 were set, but applies from 2020 onwards.

As Figure 9 shows, **the majority of TACs, for which  $F_{MSY}$  ranges are available, were proposed and set based on or below the  $F_{MSY}$  point value, but a number of TACs were also based on the upper range or above, both in 2019 and 2020.** The proportion of TACs set within or beyond the upper range was higher for the agreed TACs compared to the Commission's proposal in both years. For 2019, only one TAC was set below the  $F_{MSY}$  lower value, whereas TACs were set above the  $F_{MSY}$  upper value in 3 cases, i.e. **TACs were more frequently set beyond the upper end of the range than below the lower end of the range.** Compared to 2019, the proportion of TACs proposed and agreed above  $F_{MSY}$  decreased for 2020 (from 32% to 15% for the agreed TACs), indicating a step in the right direction.

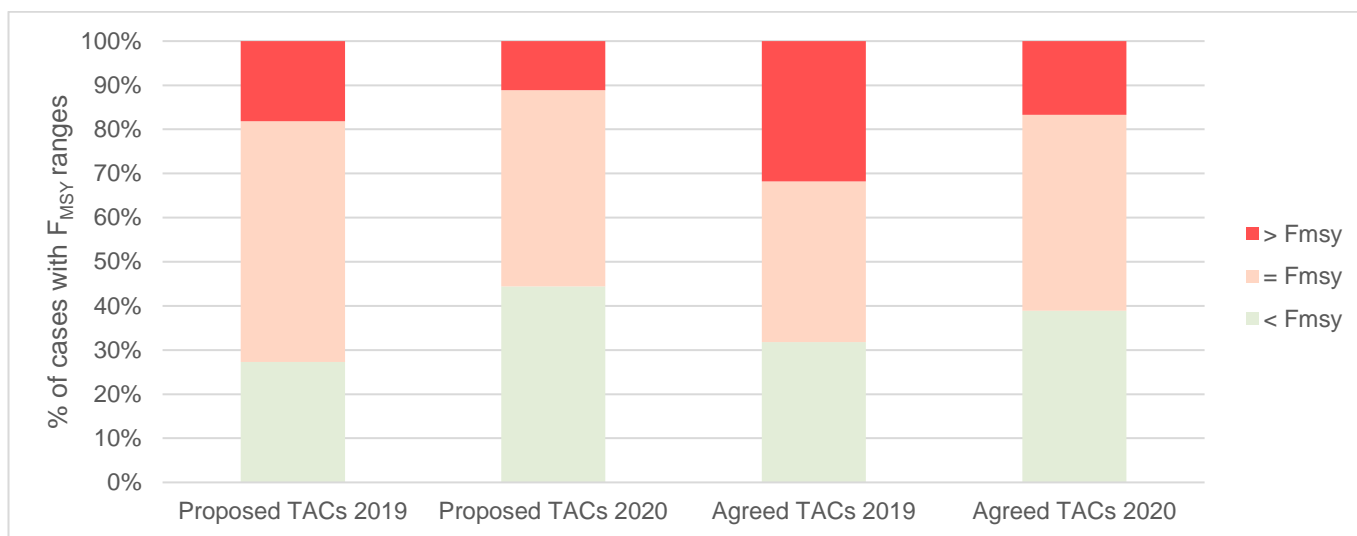


Figure 9. Percentage of the TAC/advice comparisons for which  $F_{MSY}$  ranges are available where TACs were proposed or agreed at levels corresponding to  $F_{MSY}$  (orange), the lower  $F_{MSY}$  range (green) or below, or the upper  $F_{MSY}$  range or above (red) in 2019 and 2020.

Note however, that despite the 2020 MSY deadline one TAC was still set far beyond the relevant  $F_{MSY}$  scenario (805 t versus 189 t, i.e. 326% higher).<sup>45</sup> This is particularly concerning since the stock in question, Celtic Sea cod, is in a dire state (below  $B_{lim}$ ), leading ICES to officially advise zero catches, even though the  $F_{MSY}$  range-based catch options – which do not represent the official headline advice based on ICES’ MSY approach – were also presented for informative purposes.<sup>46</sup>

Moreover, for 2019 the average percentage by which the proposed and agreed TACs differed from the  $F_{MSY}$  point value-based advice was considerably larger for TACs above  $F_{MSY}$  than for those below  $F_{MSY}$  (see Figure 10). This means that **the average TAC excess was larger than the 'undershoot', indicating that decision-makers were inclined to set TACs further above than below  $F_{MSY}$** . While this initial analysis is only based on a small number of cases where  $F_{MSY}$  ranges were available for 2019 (22 cases), this tendency is concerning, since setting TACs consistently above  $F_{MSY}$  jeopardises, or at least delays, the recovery of stocks above sustainable levels, as required by the CFP. It is therefore reassuring that for 2020 the average ‘undershoot’ has increased, while the average excess above  $F_{MSY}$  has decreased (Figure 10). Note however, that Celtic Sea cod was treated here as an outlier with a disproportionate impact on the result given the small sample size and excluded from the analysis. If it is included, the average excess of agreed TACs is actually higher for 2020 than for 2019 (namely 111%, compared to 14% without Celtic Sea cod, and to 41% in 2019). In terms of absolute tonnage, the excess has also decreased from 2019 to 2020 for both the proposal and the agreed TACs, and the total ‘undershoot’ was multiple times (5 for the proposal, 6 for the agreed TAC) larger than the excess (results not displayed), representing a step in the right direction.

<sup>45</sup> See the  $F_{MSY} \times SSB_{2020} / MSY B_{trigger}$  scenario in Table 3 of <http://ices.dk/sites/pub/Publication%20Reports/Advice/2019/2019/cod.27.7e-k.pdf>

<sup>46</sup> Note that in the TAC analyses throughout the rest of this report, the official ICES headline advice of 0 t was used, whereas the  $F_{MSY}$  range-based scenarios were only explored in this present section, but are explicitly not considered the official advice that management should be based on. See ClientEarth’s briefing on scientific catch scenarios for bycatch stocks for further reflections on this topic: 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.documents.clientearth.org/library/download-info/ask-the-right-question-get-the-right-answer-scientific-advice-for-bycatch-or-non-targeted-stocks-that-have-zero-catch-advice/>

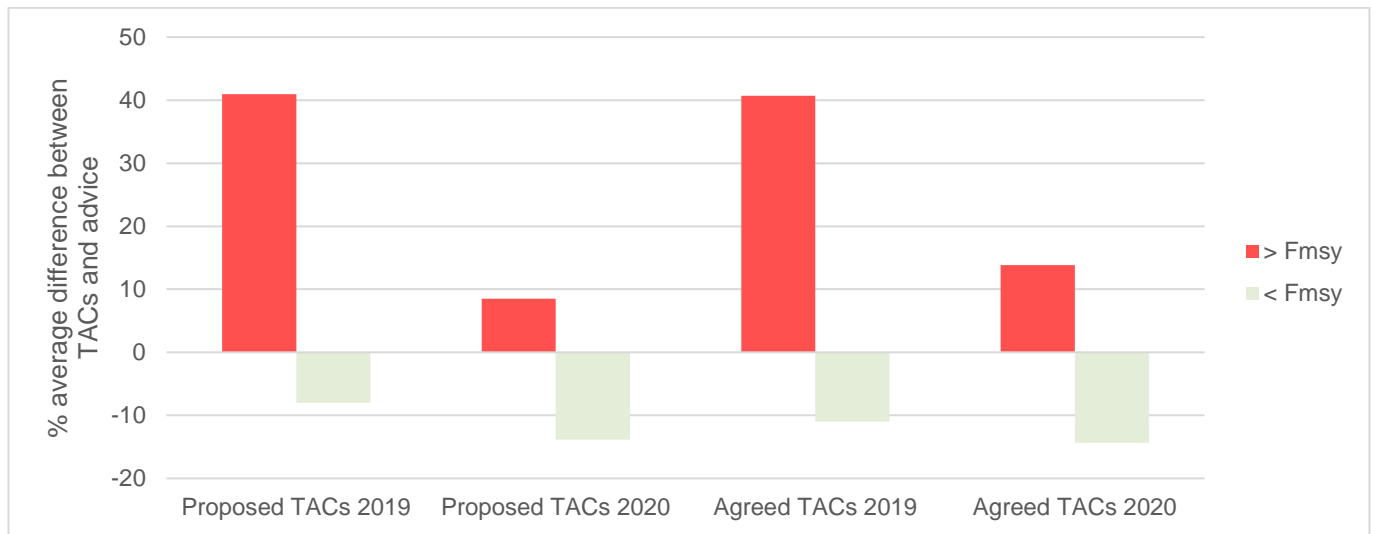


Figure 10. Average percentage difference per TAC/advice comparison in 2019 and 2020 for cases (with  $F_{MSY}$  ranges provided in the catch options presented in the ICES advice) where the TACs were proposed and agreed above (red) or below (green) the  $F_{MSY}$  point value.

ICES mixed fisheries considerations highlight the need to set TACs for some stocks below the advised maximum single species catch levels in order to ensure that other stocks caught in the same fisheries are not overexploited.<sup>47</sup> An analysis of the use of mixed fisheries scenarios, and the compatibility of the TACs set in mixed fisheries with each other and with the ambition to safeguard the most vulnerable stocks caught in the fisheries was outside the scope of this report. However, this is an important aspect that should be given more attention going forward, particularly given that  $F_{MSY}$  ranges are now enshrined in the MAPs and are likely to be increasingly considered in order to provide further flexibility in the management of mixed fisheries.

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

Section 4.1 assessed the overall progress of the TACs proposed by the Commission and agreed by the Council towards following scientific advice. This section zooms in on an area of key concern, namely the lower ambition applied by both the Commission and the Council to stocks for which no full analytical stock assessments based on MSY are available yet.

As Figure 11 demonstrates, TACs are indeed set above scientific advice in the vast majority of the cases (fluctuating without trend between 82% and 87% until 2019, with a slight drop to 71% for 2020), 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.<sup>48</sup> 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 throughout the time series, except a slight improvement in 2020.**

<sup>47</sup> For example included in the ICES fisheries overview for the Celtic Sea provided in 2019: ICES (2019). Celtic Seas ecoregion – Fisheries overview, including mixed-fisheries considerations. [https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2019/2019/FisheriesOverviews\\_CelticSeas\\_2019.pdf](https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2019/2019/FisheriesOverviews_CelticSeas_2019.pdf). Version 2, 17 December 2019.

<sup>48</sup> Note that, as explained in section 4.1, in the present analysis the  $F_{MSY}$  point value advice was used where  $F_{MSY}$  ranges are available, meaning that these 25% also include a number of stocks where the TAC was set above the  $F_{MSY}$  point value, but within the upper  $F_{MSY}$  range. For a separate analysis of the use of the  $F_{MSY}$  ranges please refer to section 4.2..

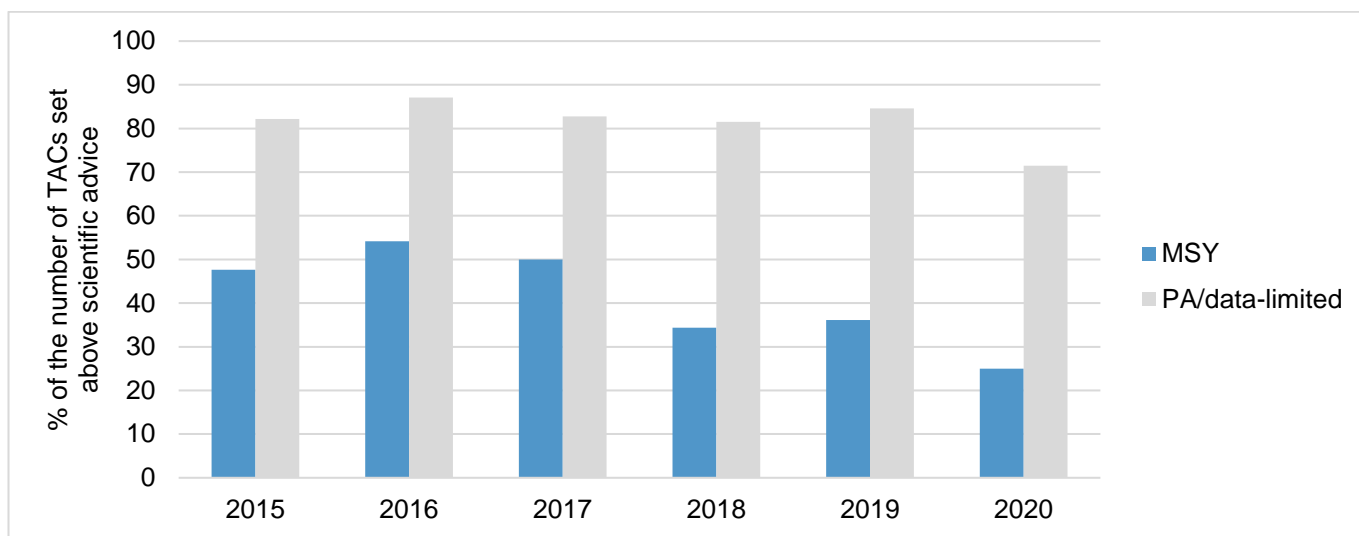


Figure 11. Time series of the percentage of the number of TACs set above scientific advice, depending on the basis of the advice, i.e. the ICES MSY approach (blue) or the ICES Precautionary Approach or approach for data-limited stocks without full analytical stock assessment (light grey).

The 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 proposed and agreed TACs and the advice (see Figure 12 and Figure 13): **both for the proposed and the agreed TACs the average TAC excess above precautionary scientific advice is high throughout the entire time series**, ranging from 34% to 75% for the proposed TACs and from 50% and 83% for the agreed TACs.

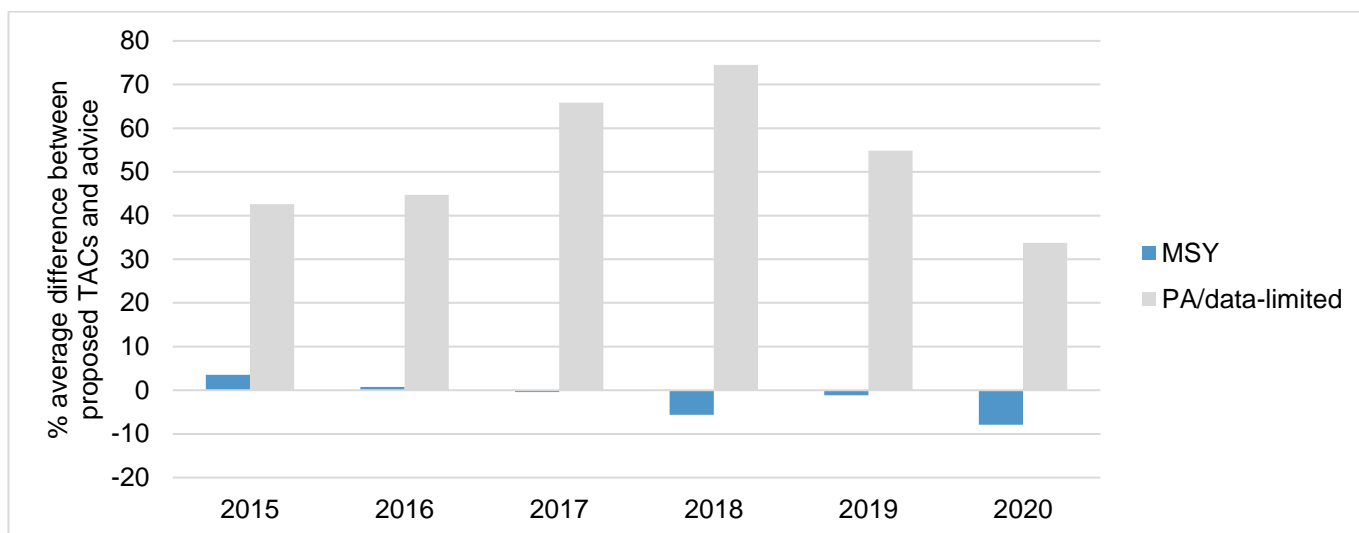


Figure 12. Time series of the average percentage difference per comparison between the proposed and advised TACs, depending on the basis of the scientific advice, i.e. ICES MSY approach (blue) or ICES Precautionary Approach or approach for data-limited stocks without full analytical stock assessment (light grey).

In contrast to this, the average difference between both proposed and agreed TACs and scientific advice based on MSY is relatively small (see Figure 12 and Figure 13), for the Commission's proposal even negative for 2017 onwards, meaning that in those years the proposal on average undershot the advice. There is also a **clear declining trend in the average TAC excess for the agreed TACs for stocks with MSY advice throughout the time series** (see Figure 13), **whereas the average TAC excess remains high (50% for 2020) for stocks with precautionary advice**, despite a decreasing trend since 2017.

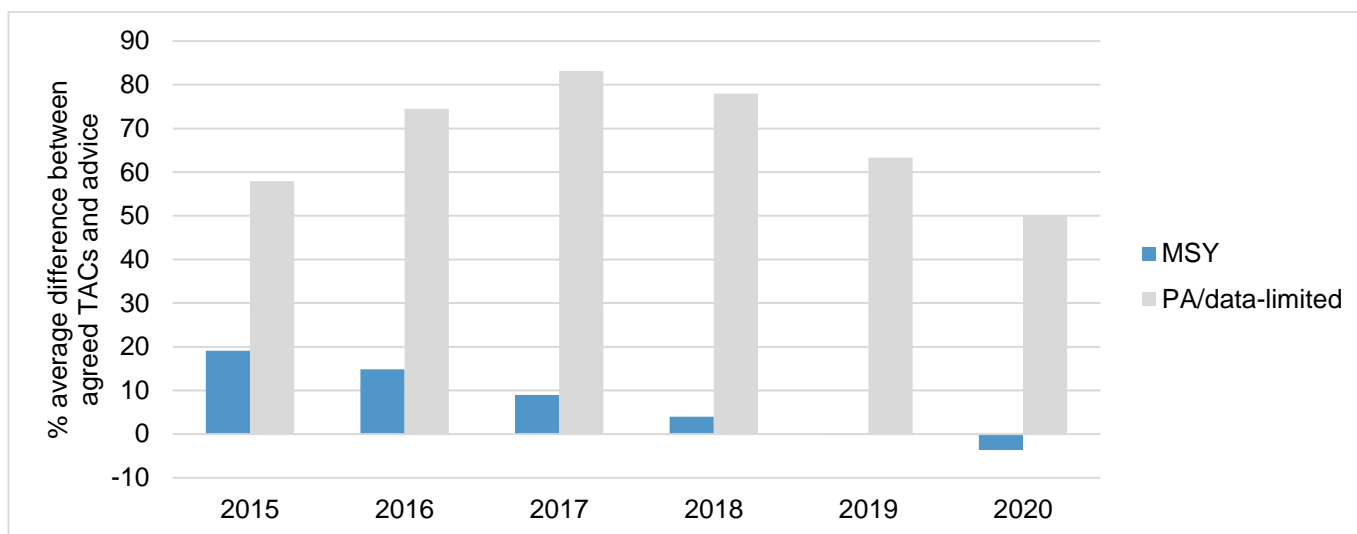


Figure 13. Time series of the average percentage difference per comparison between the agreed and advised TACs, depending on the basis of the scientific advice, i.e. ICES MSY approach (blue) or ICES Precautionary Approach or approach for data-limited stocks without full analytical stock assessment (light grey).

**These findings demonstrate that not only is precautionary scientific advice exceeded more frequently, but also by a higher average amount, than advice based on MSY.** This tendency of both the Commission and the Council 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 CFP's Article 2(2) 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. It also goes against a key principle of good governance, namely the establishment of measures, including the setting of catch limits, in accordance with the best available scientific advice.<sup>49</sup>

## 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 classified as bycatch. Specifically, both MAPs foresee that, while target stocks would fall under  $F_{MSY}$  ranges (see section 4.2), 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. 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.<sup>50</sup> Furthermore, there is a lack of transparency in the way the MAPs categorise 'target' and 'bycatch' stocks, in particular because a target or bycatch stock in one fishery may not be so in another. A definitive categorisation is therefore difficult.

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.

<sup>49</sup> Art. 3(c) of the CFP Basic Regulation.

<sup>50</sup> 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). <http://ices.dk/sites/pub/Publication%20Reports/Advice/2018/2018/ple.27.21-23.pdf>

An analysis of the number of TACs proposed and agreed above scientific advice for 2020, 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**: in 2020, the percentage of TACs above scientific advice was considerably higher for bycatch stocks than for target stocks both for the Commission's proposal and for the agreed TACs (see Figure 14).

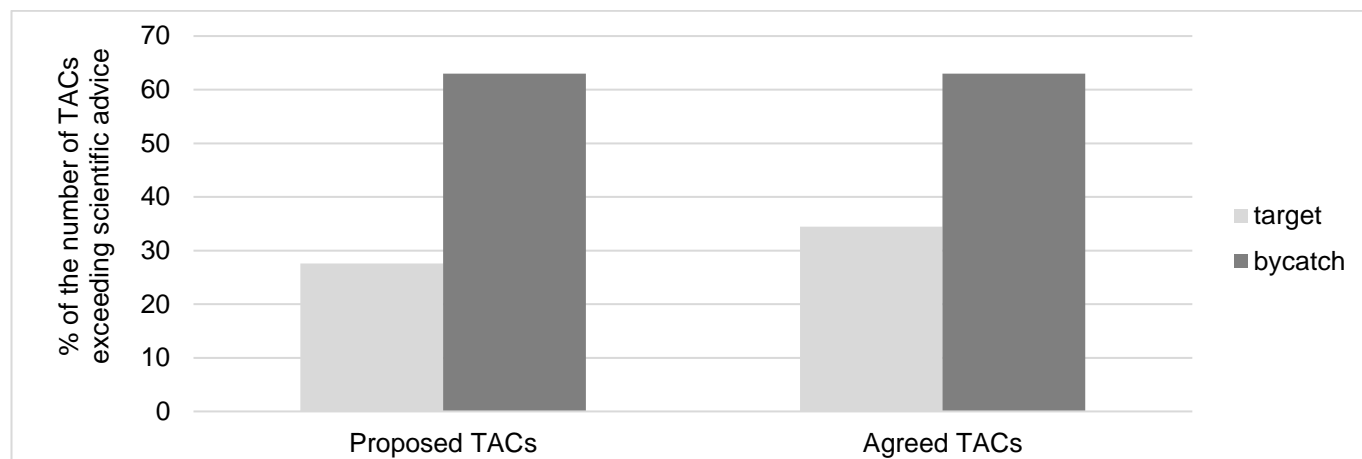


Figure 14. Percentage of the number of TACs proposed and agreed above scientific advice for target (light grey) and bycatch (dark grey) stocks for 2020.

Similarly, the average percentage difference between the TACs and the advice per TAC/advice comparison was higher for bycatch compared to target stocks (see Figure 15), meaning that **on average TACs exceeded the advice by a larger amount for bycatch than for target stocks**.

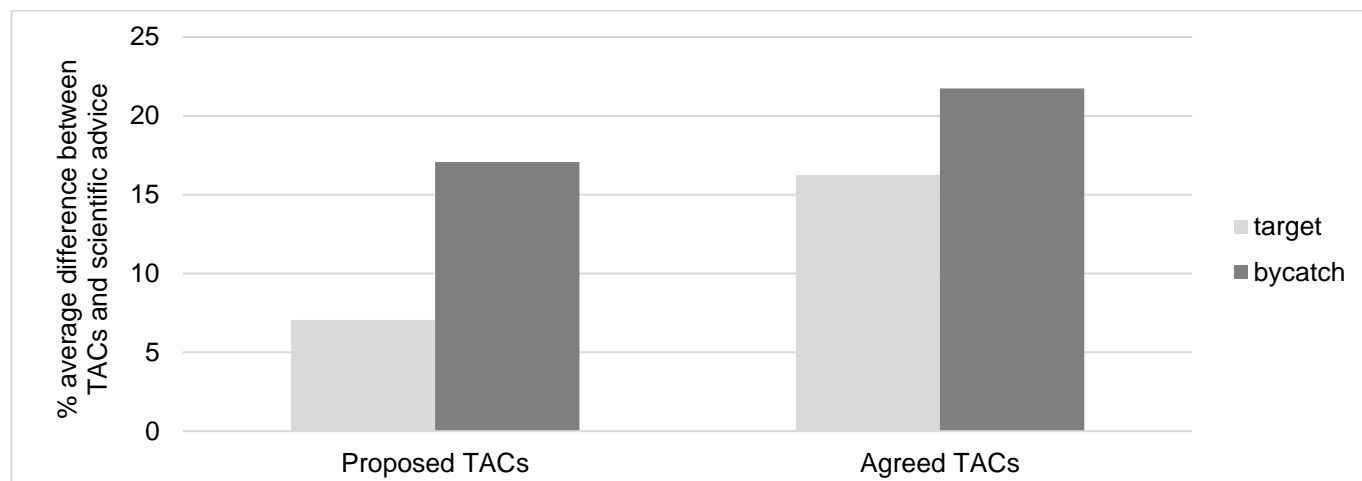


Figure 15. Average percentage difference per TAC/advice comparison (i.e. the average amount by which the TAC exceeded the advice) proposed and agreed for target (light grey) and bycatch (dark grey) stocks for 2020.

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.<sup>51</sup> However, these results provide a strong indication that indeed scientific advice is being followed more stringently for target than bycatch stocks.

<sup>51</sup> 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'.



## 4.5 Removal of TACs

The differentiation between 'target' and 'bycatch' stocks is not only an issue in the context of the MAPs, as demonstrated in the Commission's request to ICES in 2018 to provide advice on removing TAC management for several 'bycatch' stocks.<sup>52</sup> 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.

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

In light of this, it is concerning that for example during the 2018 December Council, Belgium and Ireland requested the removal of certain TACs in order to avoid choke issues under the full implementation of the landing obligation,<sup>53</sup> and similar requests continue to be put forward by industry representatives. Importantly, two of these stocks, Irish Sea whiting and plaice in the southern Celtic Sea are 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 non-zero 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 2020, the year of the 2020 deadline, there are still 9 stocks which, according to the ICES advice for 2020, were below  $B_{lim}$ , and an additional 5 stocks below possible reference points where  $B_{lim}$  is not defined. These include Irish Sea and Celtic Sea whiting, cod in the Celtic Sea and in the west of Scotland, plaice in the southern Celtic Sea southwest of Ireland, herring in the west of Scotland and Ireland, amongst a few others.

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 CFP's sustainability requirements 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,

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<sup>52</sup> The Commission's request as quoted in the ICES Special Request Advice sr.2018.15 from 20 September 2018 referred to the 'requirement to ensure that the stock remains within safe biological limits in the short and middle term', which lowers the ambition below the CFP's MSY objective.

[https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2018/Special\\_requests/eu.2018.15.pdf](https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2018/Special_requests/eu.2018.15.pdf)

<sup>53</sup> This was the case for the TACs PLE/7HJK., PLE/7FG. (plaice in the Celtic Sea) and WHG/07A. (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 at the 2018 December Council to develop bycatch reduction plans,<sup>54</sup> and to the implementation of full catch documentation for these stocks from 2019.<sup>55</sup> This approach was introduced to avoid immediate choke situations arising from zero catch advice.

In its evaluation of the bycatch reduction plan developed by the NWW Member State Group, the STECF found that the bycatch reduction plan *'does not fulfil the commitments made by the Member States as it does not contain any elements to ensure reduced by-catches of the relevant stocks over and above the measures already included in the discard plan'*.<sup>56</sup>

Setting bycatch TACs to address the choke risk in return for ineffective bycatch reduction plans, without the necessary measures to ensure that the bycatch TACs are respected, is inappropriate and counter-productive to the delivery of the CFP's objectives. The STECF's evaluation of the NWW bycatch reduction plan<sup>57</sup> clearly confirms concerns that it is not fit for purpose. Since then, work on this topic seems to have stalled, while bycatch TACs have continued to be set for 2020, 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.<sup>58</sup> 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.

## 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 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 2020 data, 12 TAC/advice comparisons were excluded from the core analysis due to area mismatch between the TACs and scientific advice involved, either because the TAC area did not cover all of the stock area, or because both only overlapped partially. These cases, covering 23 TACs and 53 stocks<sup>59</sup> are listed in Annex III. A further two comparisons were excluded because the relevant TACs were removed at some point throughout the 2015-2020 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, including cases which fall under the EU/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.

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54 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>

55 *'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)

56 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>

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

58 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.documents.clientearth.org/library/download-info/ask-the-right-question-get-the-right-answer-scientific-advice-for-bycatch-or-non-targeted-stocks-that-have-zero-catch-advice/>

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



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, excluding those subject to mismatch as mentioned above. It is therefore possible or even likely that the situation might look different for TACs and stocks outside the scope of this report. Notably, the Commission's own reporting<sup>60</sup> as well as findings presented by the New Economics Foundation<sup>61</sup> suggest that indeed the situation regarding TAC-setting in line with scientific advice is often worse for stocks shared between the EU and third countries. 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 will 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. 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 2020 almost one fifth of the overall TAC tonnage was still made up of TACs set above advice, the overall TAC excess above advice still accounted for almost 6% of the overall TAC volume, and the average percentage difference was still 11% and 21% for the proposed and agreed TACs, respectively. Overall, the agreed TACs exceeded scientific advice more frequently and by a larger amount both in total and on average than the proposed TACs.

Moreover, those TACs that exceed the advice usually exceed it by a larger amount than the amount by which TACs that follow the scientific advice 'undershoot' it. There is also 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. In cases where  $F_{MSY}$  ranges are available, TACs were frequently set at the  $F_{MSY}$  point value, but the upper and lower ranges (and beyond) were also used in 60% of the cases in 2020. On average, TACs set above  $F_{MSY}$  for 2019 exceeded the  $F_{MSY}$ -point value advice by a larger amount than the amount by which TACs set below the  $F_{MSY}$ -point value advice undershot the advice. This again highlights a tendency towards setting TACs further above than below the advice. The increase in the average 'undershoot' for 2020 in turn represents a step in the right direction.

The analysis also confirms concerns that the Commission and the Council are 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 25% for 2020), whereas it remained stable at over 80% throughout most of the time series for precautionary advice, with only a slight drop to 71% for 2020. Similarly, the average percentage difference per TAC/advice comparison decreased to close to 0% for MSY-based advice (and was for the first time negative for 2020, at almost -4%), but was still 50% for precautionary advice in 2020. In a similar way, both the Council and the Commission seem to prioritise following scientific advice for target rather than bycatch stocks.

Importantly, the CFP's MSY objective and the legal 2020 deadline for ending overfishing 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 the requirements of the CFP, as well as existing environmental legislation. So, where MSY-based

60 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.

61 New Economics Foundation 2019: Landing the blame: Overfishing in the Northeast Atlantic 2019, Fig 4, p. 6.

[https://neweconomics.org/uploads/files/NEF\\_LTB\\_ATLANTIC\\_2019.pdf](https://neweconomics.org/uploads/files/NEF_LTB_ATLANTIC_2019.pdf)

assessments exist, whether for target or bycatch stocks, fishing opportunities must be proposed and 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 CFP's requirements, the Commission, the Council, and individual Member States, should therefore:

- 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 in order to safeguard the most vulnerable stocks;
- 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 2021 unless and until the relevant Member States put in place a bycatch reduction plan 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. In particular, the five bycatch TACs granted for 2019 onwards should not be granted again unless the shortcomings of the NWW bycatch reduction plan are immediately rectified, and until robust, full catch documentation is put in place. 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;
- 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 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, including the UK as of 2021, to end overfishing of shared stocks.

## 5 Identifying the Member States behind unsustainable TACs

### 5.1 Information used about positions of Member States

This section provides a more detailed overview of the files used in this report to identify and analyse Member State positions ahead of the December Council meetings, during which the TACs were set for 2017, 2018 and 2019. Note that the content of section 5 was not updated compared to the 2019 version of this report, i.e. it does not contain additional findings regarding the behaviour of Member States throughout the 2019 December Council process. As highlighted in section 2.4, a general lack of transparency around the December Council TAC-setting process makes it difficult for members of civil society to identify which role individual Member States have played in the process, for example who has actively advocated for higher than scientifically advised TACs.

This report attempts to shed some light on this question by presenting the findings of an analysis of the files received by ClientEarth in response to a series of AIRs and subsequent confirmatory applications to the Council and the Commission, regarding the December Council processes that took place in 2016,<sup>62</sup> 2017<sup>63</sup> and 2018.<sup>64</sup>

The various AIRs covered all files held by the Council and the Commission respectively, which were used throughout these processes, explicitly including any records of a) Member State positions or comments, b) discussions throughout preparatory meetings ahead of December Council (such as the Council Working Party meetings), and c) the December Council meetings themselves.

Both the Council and the Commission confirmed in their responses to ClientEarth that they have provided all files in their possession relating to these decision-making processes, with a small number of exceptions.<sup>65</sup> The findings of the present report are therefore based on the assumption that no further information or supporting evidence beyond the files received by ClientEarth in response to its AIRs and confirmatory applications has been used when setting these TACs. This means that where the disclosed files do not contain any evidence to support a particular statement, it is assumed that no such evidence was provided. This is important to assess, for example, whether any claims of serious jeopardy to the social and economic sustainability of the fishing fleets to justify delays beyond 2015 in achieving MSY exploitation rates<sup>66</sup> were indeed substantiated.

The responses from the Council and the Commission included a range of documents containing relevant information on the views and arguments presented by individual Member States. Table 2 lists the key documents used in the analysis for this report (in order of their creation throughout the process).

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62 ClientEarth's Access to Information Request to the Council related to TACs in the Northeast Atlantic for 2017. [https://www.asktheeu.org/en/request/access\\_to\\_documents\\_related\\_to\\_t#outgoing-8779](https://www.asktheeu.org/en/request/access_to_documents_related_to_t#outgoing-8779)

63 ClientEarth's Access to Information Request to the Council regarding TACs of EU fish stocks in the Northeast Atlantic discussed and adopted on 11 and 12 December 2017. [https://www.asktheeu.org/en/request/access\\_to\\_information\\_regarding\\_3#outgoing-10700](https://www.asktheeu.org/en/request/access_to_information_regarding_3#outgoing-10700). ClientEarth's Access to Information Request to the Commission regarding TACs of EU fish stocks in the Northeast Atlantic discussed and adopted on 11 and 12 December 2017, and exemptions from the landing obligation. [https://www.asktheeu.org/en/request/access\\_to\\_information\\_regarding\\_2#outgoing-10699](https://www.asktheeu.org/en/request/access_to_information_regarding_2#outgoing-10699)

64 ClientEarth's Access to Information Request to the Council regarding TACs of EU fish stocks in the Northeast Atlantic discussed and adopted on 17 and 18 December 2018. [https://www.asktheeu.org/en/request/access\\_to\\_information\\_regarding\\_5#outgoing-12644](https://www.asktheeu.org/en/request/access_to_information_regarding_5#outgoing-12644). ClientEarth's Access to Information Request to the Commission regarding TACs of EU fish stocks in the Northeast Atlantic discussed and adopted on 17 and 18 December 2018, and exemptions from the landing obligation. [https://www.asktheeu.org/en/request/access\\_to\\_information\\_regarding\\_4#outgoing-12643](https://www.asktheeu.org/en/request/access_to_information_regarding_4#outgoing-12643)

65 For example, the Commission refused access to five flash reports of meetings involving Member State and Commission representatives, which took place throughout the TAC-setting process in 2018, based on the argument that disclosure of these documents would undermine the decision-making process.

66 Based on Recital 7 of the CFP Basic Regulation.

Table 2. Key documents received through ClientEarth's AIRs and confirmatory applications regarding December Council 2016, 2017 and 2018.

Type of files	Source of files	Years files were provided for
Written comments submitted by the Member States themselves	Council	2016, 2017, 2018
Records of the Council Working Party meetings, produced by the Commission	Commission	2016, 2017
Records of the Council Working Party meetings, produced by the Council Secretariat	Council	2018
'Council bible' <sup>67</sup>	Council, Commission	2016, 2017, 2018
Presidency documents, like compromise agreements and revisions thereof	Council	2016, 2017, 2018
Statements made by Member States and the Commission at the December Council meeting	Council	2016, 2017, 2018
Records of the December Council meeting	Council, Commission	2016, 2017, 2018 (Council 'minutes' only for 2016 and 2017, Commission 'summary record' only for 2018)

It is important to note that the Council's records of the December Council meetings themselves cannot be described as 'minutes' since they do not contain any details of the discussions or contributions made by any Member States. Moreover, the Council provided these rudimentary records only for December Councils 2016 and 2017, but not for 2018. One file received from the Commission in response to ClientEarth's confirmatory application regarding the 2018 December Council does contain a section with Member State contributions during the December Council meeting, but the Commission refused disclosure of the content of this particular section.<sup>68</sup> This means that effectively, no information on views expressed by Member States during the December Council meetings is publicly available.

Information on Member State positions and contributions ahead of December Council in turn is limited to views expressed in the written comments submitted by Member States, the Commission's records of the Council Working Party meetings (which are however not available for December Council 2018) and the Council bible.

In addition to these documents provided by the Council and the Commission, a number of further files were identified throughout a comprehensive search of the Council's meeting calendar for all meetings of the Council Working Party on Internal/External Fisheries Policy. These include primarily records of the Council Working Party meetings, prepared by the Council. However, these documents do not represent

<sup>67</sup> 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.

<sup>68</sup> Response from the Commission to ClientEarth's confirmatory application regarding December Council 2018. Decision of the European Commission pursuant to Article 4 of the implementing rules to Regulation (EC) No 1049/2001, p. 4 onwards. C 2019 5154 F1 DECISION LETTER EN V2 P1 1040950.PDF.pdf on [https://www.asktheeu.org/en/request/access\\_to\\_information\\_regarding\\_4#incoming-22670](https://www.asktheeu.org/en/request/access_to_information_regarding_4#incoming-22670)

detailed minutes and provide only limited insight into the discussions at these meetings, since they merely list the topics discussed without specifying any details.<sup>69</sup> A detailed analysis of these files was outside the scope of this report.

## 5.2 Vocal versus quiet Member States

The results presented in this section focus on the extent to which Member States are documented (in the respective Council bible) to have pushed for TACs above scientifically advised levels. These results are based on an analysis of a) the number of the comparisons between TACs and scientific advice for 2017 to 2019 where the agreed TACs exceeded vs. followed the advice (depending on whether Member States advocated for this or not), b) the volume by which the agreed TACs in these comparisons differed from the scientific advice (overall and on average), and c) the percentages that these numbers or volumes represent. The numerical analysis exclusively looks at the agreed TACs, although some observations in relation to the underlying proposals are made.

Whenever a Member State was documented to have asked for a larger than advised increase, a smaller than advised cut, or a rollover or increase instead of an advised cut, this was considered as a 'push' for a higher than advised TAC. This includes cases where the Member State expressed support for a proposal from the Commission that already exceeded the scientific advice to begin with. Cases where the resulting TAC was then indeed set above the scientific advice were classified as 'successful push', whereas those where the agreed TAC nevertheless followed the advice were considered 'unsuccessful'. Cases where Member States expressed support for following the scientific advice or a proposal in line with the scientific advice were recorded as 'positive statements'. Each comparison was ultimately categorised overall, depending on whether at least one Member State had pushed for a higher than advised TAC and on whether the agreed TAC exceeded the advice, to provide an overall overview. Various metrics were then computed both for the individual Member States and for all TACs included in the analysis as a whole.

Overall, at least one Member State advocated for higher than scientifically advised TACs in 52%, 37% and 49% of the cases included in the analysis in the years 2017, 2018 and 2019. In the majority of these cases, the relevant TACs were then indeed set above the scientific advice, with only 8-10% of the 'push' attempts being unsuccessful (see dark red bars compared to light red bars in Figure 16). In a considerable number of cases (ranging between 13% and 23% across the three years), TACs were set above the advice without any Member State demonstrably having advocated for it. With two exceptions,<sup>70</sup> these were all cases where the agreed TACs followed a proposal from the Commission which already exceeded scientific advice. The majority of those TACs which indeed followed the scientific advice were cases where Member States had not advocated for a higher than advised TAC. 'Positive statements', i.e. where at least one Member State suggested following the scientific advice, or a proposal in line with the advice, were made in an increasing number and proportion of cases throughout the three years included in the analysis (6%, 15% and 25% of the cases in 2017, 2018 and 2019, respectively), and in these cases the advice was indeed mostly followed.

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<sup>69</sup> For example, the 'Outcome of Proceedings' file about the Working Party on Internal and External Fisheries Policy meeting on 7 December 2018, ST 15445 2018 INIT <https://data.consilium.europa.eu/doc/document/ST-15445-2018-INIT/en/pdf>. Based on the agenda, TACs were discussed at this meeting, but regarding this point the document only specifies that the Working Party continued the examination of the proposal and the revised Council bible, without providing more detailed information on specific discussion points or Member State positions.

<sup>70</sup> PRA/2AC4-C and RJU/9-C. for 2019, where the agreed TAC exceeded the Commission's proposal (which followed the scientific advice), without a Member State demonstrably having pushed for this.



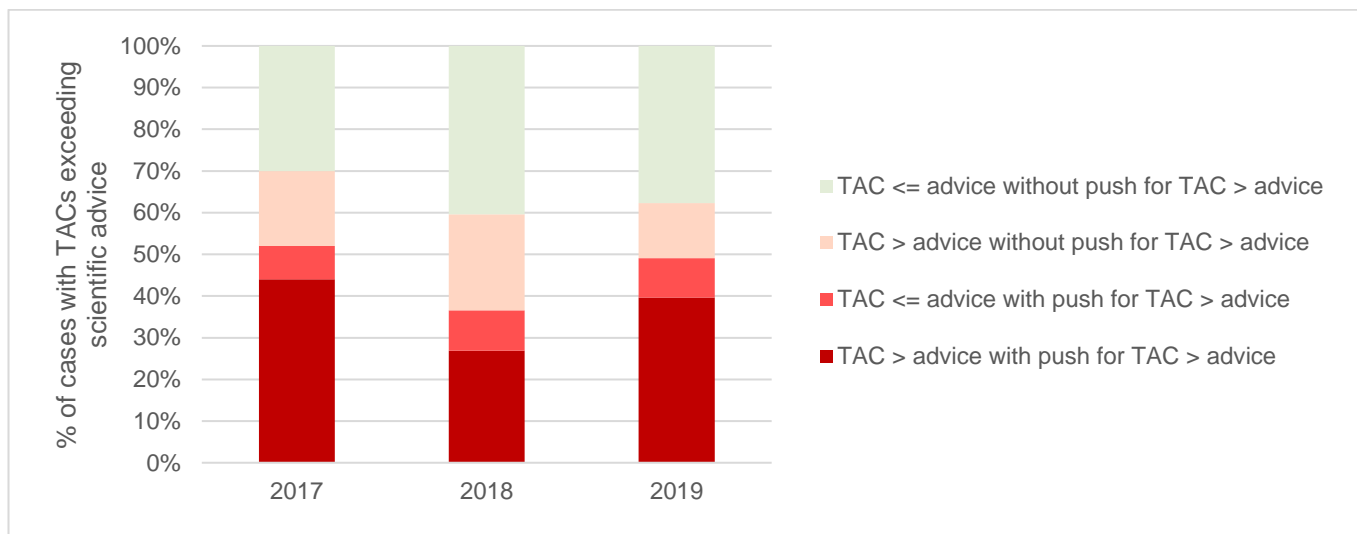


Figure 16. Percentage of cases for 2017, 2018 and 2019, where the TAC(s) exceeded or followed the scientific advice, with or without at least one Member State having advocated for a higher than advised TAC, as documented in the Council bible. The entries labelled 'without push for TAC > advice' refer to cases where no Member State was documented to have advocated for a higher than advised TAC.

**When it comes to comparing Member States to each other, it is important to note that different metrics, as outlined at the start of this section, focus on different parts of the story.** This means that the order of Member States when ranking them based on this information, e.g. in terms of how frequently or successfully they have pushed for higher than advised TACs, can differ substantially, depending on the metric chosen. In order to avoid misinterpretation, the results presented in this section should therefore not be treated in isolation from each other. Moreover, the results differ considerably between the years, in most cases without clear trends, suggesting that the situation and any ranking of Member States can change from year to year. However, many of the trends and patterns identified in the analysis are robust over the years.

The results of all metrics for all Member States for all three years are included in Annex V, whereas the remainder of this section provides an overview of some key findings, based on data from the most recent year, 2019, and on an average across the three years for some selected metrics. Section 5.4 goes into a bit more detail for individual Member States. All results were rounded to the nearest whole number. The metrics investigated for each Member State include:

- The number of cases with a Member State 'push', as well as the percentage of this in relation to the number of cases with a Member State share of the TAC(s); this gives an idea of the frequency with which a Member State pushed for higher TACs,
- The percentage of cases with an at least partially successful 'push' (i.e. the request from the Member State was followed either fully or partially); this gives an idea of the frequency with which TACs were indeed set above advice following a push from that Member State;
- The percentage of cases where the TAC was set above the advice without that Member State having advocated for it; this gives an idea of the frequency with which that Member State accepted TACs being set higher than advised without actively advocating for or against this;
- The overall TAC excess above the scientific advice, as well as the proportion of this that the Member State did vs. did not advocate for; this gives an idea of the overall extent to which the TACs, of which a Member State has a share, exceeded the scientific advice, and the extent to which that Member State actively pushed for this;
- The percentage of the Member State-specific TAC excess in relation to the Member State-specific overall TAC share, as well as the proportion of this that the Member State did vs. did not advocate

for; this gives an idea of the proportion of a Member State's TAC share that was set above scientific advice, and the extent to which that Member State actively pushed for this;

- The average percentage difference between the agreed TACs and the scientific advice;<sup>71</sup> this gives an idea of the average proportion by which TACs that a Member State has a share of diverged from the advice.

Based on this analysis, **there are two clear groups of Member States: those that have actively advocated for higher than advised TACs in at least one case, and those that have largely remained silent**, neither actively pushing for higher TACs nor preventing others from doing so. Vocal Member States include (in no particular order) France, Ireland, the United Kingdom, Spain, Belgium, Portugal and Denmark. Meanwhile, Sweden, Germany and the Netherlands are not documented to have pushed for higher than advised TACs within the subset covered by this report. Importantly, **all Member States with a share of any of the TACs included in the analysis, whether vocal or not, have received TACs in excess of scientific advice**, ranging on average between 43% and 63% of the number of cases where that Member State holds a TAC share as included in this analysis (see Figure 17, light and dark red bars versus green bars).<sup>72</sup>

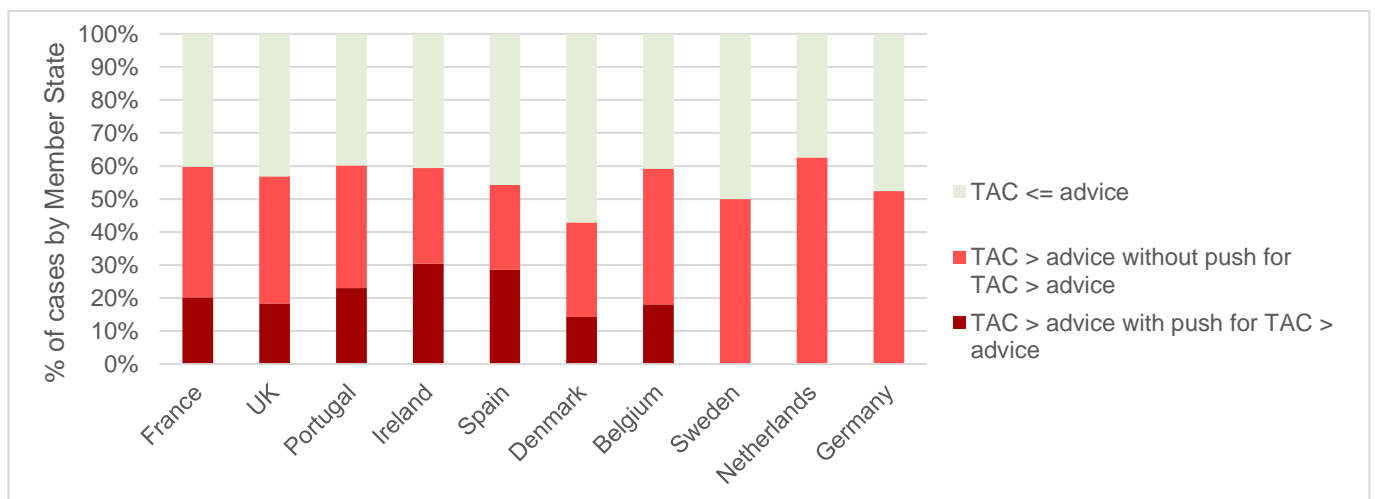


Figure 17. Number of cases where the TAC was set above scientific advice following a push from the respective Member State (dark red) or without such a push (light red) versus where the TACs followed the scientific advice, regardless of a push by that Member State (green). The results are presented as a percentage of the number of cases in which the respective Member State holds a TAC share (on average across the period 2017-2019). The Member States are listed in descending order of the volume of their overall TAC share as included in the analysis for this report.

As mentioned before, it is difficult to conclusively rank the Member States due to differences between the results for different metrics and years. However, France, Ireland and Spain are among the top 4 Member States who have **most frequently pushed (successfully or not) for higher than advised TACs** in all three years.<sup>73</sup> The maximum number of such cases was 14 for Ireland in 2017 (representing 50% of the cases where Ireland holds a TAC share), closely followed by 13 for France in the same year (representing 31% of the cases where France holds a TAC share). Other Member States who have frequently pushed for higher TACs are the United Kingdom (8 times, or 22%, on average) and Belgium (6 times, or 23%, on average). Portugal advocated for higher TACs in 3 cases every year (representing 26% of the cases where it holds a TAC share), whereas Denmark consistently (and successfully) pushed for a higher TAC for the same stock - Kattegat cod - every year and otherwise remained silent.

<sup>71</sup> This was calculated as the average of the percentage difference between the TAC and the advice across all TAC/advice comparisons for which the Member State in question has a share. This includes cases where the agreed TAC was set in line with or below the scientific advice.

<sup>72</sup> These percentages are based on the average across all three years, 43% for Denmark and 63% for the Netherlands.

<sup>73</sup> Note that this finding and the figures specified in this paragraph refer to the cases where a Member State pushed for a higher than advised TAC, regardless of whether this push was successful or not, whereas the dark red bars in Figure 18 refer to just the successful 'push'-attempts.

Figure 17 illustrates the **percentage of the cases** (in relation to the total number of cases for which a particularly Member State has a TAC share), **in which the different Member States received a TAC excess**, and in how many of these cases that Member State actively (and successfully) pushed for this. This shows that Ireland, on average, had the highest percentage of TAC decisions where it successfully pushed for a higher TAC, followed by Spain, Portugal and France. For 2019 specifically, Spain had the highest percentage of TAC decisions (in relation to the number of cases where it holds a TAC share) where it pushed for a higher than advised TAC (41%), followed by Belgium (29%), Portugal (25%) and Ireland (24%).

In terms of the **overall TAC excess (in tonnes)**, the top 4 are the same for all three years: France, the United Kingdom, Ireland and Spain, with an average ranging from 12509 t (France) to 2589 t (Spain) (see Figure 18). Unsurprisingly, these are the Member States with the largest overall TAC shares. On average, Ireland is the Member State that has actively advocated for the largest proportion of its TAC excess (86%), followed by Spain (80%), France (69%), Portugal (67%) and the United Kingdom (52%). Belgium and Denmark did not push for the majority of their TAC excess (85% and 91%, respectively), whereas the Netherlands, Germany and Sweden did not push for any of their TAC excess.

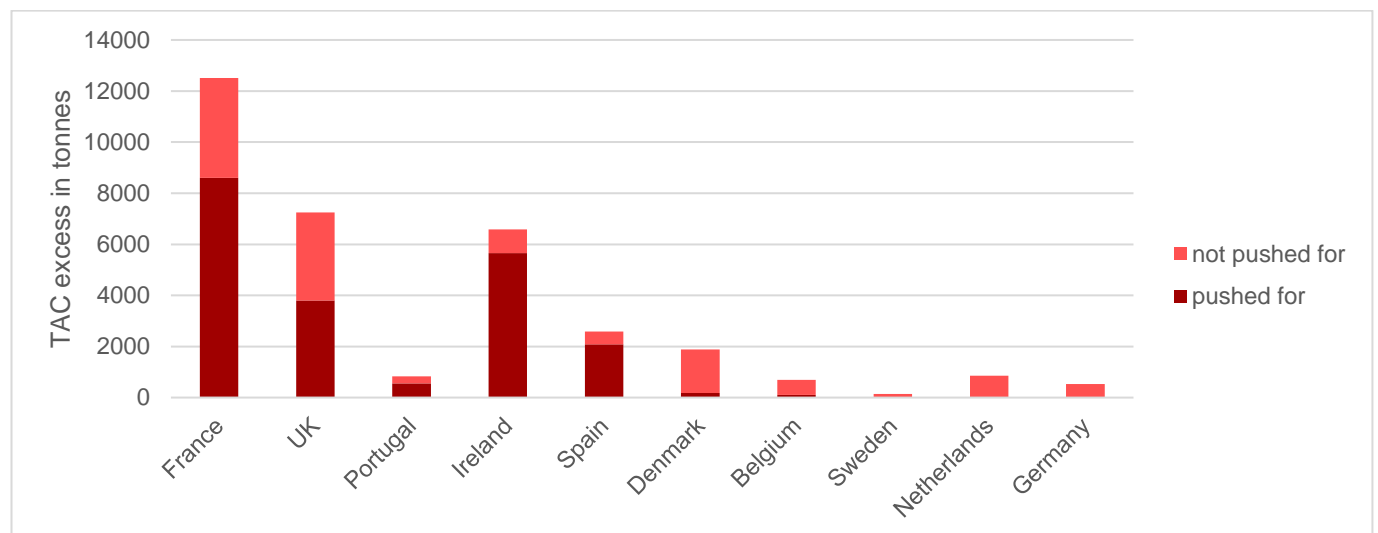


Figure 18. Total TAC volume in excess of the scientific advice (on average 2017-2019) by Member State, with (dark red) and without (light red) that Member State having actively advocated for this. The Member States are listed in descending order of their share (in t) of the overall sum of TACs, averaged across the period 2017-2019.

In terms of the **percentage of the TAC excess in relation to the overall TAC share held by the relevant Member State**, the list is topped by Germany and Netherlands, with 50% and 29% respectively on average. Neither of these are documented to have actively pushed for higher than advised TACs within the subset covered by this analysis. Therefore, this can most likely be explained by a combination of their overall TAC share included in the analysis being rather small (529 t and 857 t on average, respectively) and consisting primarily of TACs which other Member States successfully advocated to be set above scientific advice.

Indeed, the three 'quiet' Member States, the Netherlands, Germany and Sweden, on average had the largest **percentage of cases where TACs exceeded scientific advice without explicit push**, ranging from 50% (Sweden) to 63% (Netherlands), compared to 26-41% for the other Member States. On the other end of the spectrum, the Member States with the **largest average proportion of cases where they pushed successfully for higher than advised TACs** are Ireland, Spain and Portugal, closely followed by France, the United Kingdom and Belgium, with percentages ranging from 30% to 18%.

France and Ireland also top the list regarding the **largest TAC excess (in terms of volume) in relation to the overall Member State-specific TAC share**, with 15% and 12%, respectively, on average across



all three years, peaking at 18% for France in 2017 and 14% for Ireland in 2018. These figures refer to the overall TAC excess by Member State, as a proportion of the total TAC share held by the relevant Member State. The **average difference between the TAC and the corresponding advice per TAC/advice comparison** (rather than in total) ranged from 20% (for Belgium) to 34% (for Ireland and Sweden), when averaged across all three years.<sup>74</sup> This means that, for example, the Irish share of the TACs exceeded the corresponding advice on average by 34% per TAC/advice comparison, compared to a 10% overall TAC excess calculated as a proportion of Ireland's total TAC share.

This analysis has highlighted that certain Member States have been more vocal and more successful than others in advocating for higher than advised TACs, though the ranking differs depending on the year and metric in question. Meanwhile, certain Member States have remained silent, but nevertheless received TACs in excess of the scientific advice, and therefore have become complicit in allowing vocal Member States to push for unsustainable TACs. It is important to note that the findings presented here refer to a specific subset of TACs set at December Council, and that the picture is likely to look different for example for Baltic TACs.

### 5.3 Arguments used by Member States to justify unsustainable TACs

Since the Council bible contains only a relatively brief summary of the requests and comments made by the Member States throughout the TAC-setting process, it does not present many details on the rationale behind the various statements. However, key arguments 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 comprehensive review of all arguments and supporting evidence brought forward throughout the TAC-setting process to justify setting TACs beyond scientifically advised levels was outside the scope of this report. However, a partial review of all documents related to certain TACs, as received through ClientEarth's Access to Information Requests and consecutive confirmatory applications, was undertaken. This demonstrated that indeed in these cases Member States did not provide compelling, or often any, evidence to support their claims and advocacy for higher than advised TACs. A few illustrative examples are provided below.

#### **Celtic Sea whiting (TAC code WHG/7X7A-C), December Council 2016**

The TAC for WHG/7X7A-C seems to have been set without a proposal from the Commission and there is no record of any Member State comments, with the exception of a scrutiny reservation from Ireland. There is literally no information available to allow citizens to understand how the TAC was decided.

#### **Celtic Sea cod (TAC code COD/7XAD34), December Council 2016**

The Commission's proposal for the overall TAC in this case was 1447 tonnes (in line with scientific advice provided by ICES), while the TAC adopted by the Council was 2830 tonnes. This represents an excess of 95.6% above the proposal. The Council bible and Member State positions show that the UK, France, Ireland and Belgium asked for the Commission's proposed TAC to be increased based on mere assertions

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<sup>74</sup> Note that values regarding the average difference between the TAC and the corresponding advice include those cases where the agreed TACs were set in line with or even below the scientific advice, and not just those where the TAC was set higher.

regarding the socio-economic impact of the proposed TAC decrease,<sup>75</sup> the mixed fishery implications and growing biomass. No concrete evidence of these trends was provided or referenced in the disclosed documents, nor do they disclose an exchange of views that could allow EU citizens to understand the considerations leading to the TAC being 95.6% higher than scientifically advised as sustainable. Note that based on the most recent ICES advice for this stock available at the time of writing this report Celtic Sea cod is at a historically low biomass level far below  $B_{lim}$ , leading to ICES advice for zero catch for 2020.<sup>76</sup>

### **Southern hake (TAC code HKE/8C3411), December Council 2016**

The Commission's proposal for the overall TAC was 7357 tonnes, while the figure adopted by the Council was 10520 tonnes, i.e. 43% above the proposal. Again the Council bible and Member State positions show that Spain and Portugal favoured an increase on the proposal based on the assertion that the stock was improving, but scientific evidence to support these statements is not provided or clearly referenced to support this. Spain also mentioned socio-economic reports that it intended to submit. Given the absence of such reports among the disclosed documents, ClientEarth assumes that they were not in fact produced before the Council reached its political agreement on 12 December.<sup>77</sup>

### **Herring in the Irish Sea (TAC code HER/7G-K.), December Council 2017**

The Commission proposed the overall TAC at 5445 tonnes (representing a 62% cut on the TAC for 2017 as advised by ICES due to significant decrease in biomass). However, only a 30% cut was adopted by the Council (resulting in 10127 tonnes). This means that the agreed TAC exceeds the advice by 86%. The only comment provided was Ireland's request that the management plan (limiting the cut to 30%) should continue to be followed.<sup>78</sup>

These are just some illustrative examples that demonstrate that TACs have been regularly set above scientifically advised levels following certain requests or claims from Member States throughout the December Council process, mostly without compelling, or any, supporting evidence. Frequently, the explanation for a Member State's advocacy for a higher than advised TAC is little more than the advised cut being '*not acceptable*'<sup>79</sup> or the anticipated socio-economic impacts being '*unbearable*'.<sup>80</sup> The corresponding, more detailed, comments submitted by Member States in the lead-up to December Council rarely provide further information or evidence to support these claims, let alone concrete plans for how exploitation of these stocks will be brought to sustainable levels in future.

## **5.4 Member State profiles**

This section presents key findings about the track record in TAC-setting of individual Member States over the past three years. For those Member States that are documented to have advocated for higher than advised TACs more than once per year (France, United Kingdom, Portugal, Ireland, Spain, Belgium), a 'Member State profile' summarises the results for a range of metrics. The positioning of each Member State within the ranking for different metrics is also specified for the same purpose. However, note that as mentioned in section 5.2, results from the different metrics, as well as the corresponding rankings, should not be treated in isolation from each other, in order to avoid misinterpretation. The metrics used are:

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<sup>75</sup> '*unbearable socio-economic effects*', as referred to in the 2016 Council bible

<sup>76</sup> <http://ices.dk/sites/pub/Publication%20Reports/Advice/2019/2019/cod.27.7e-k.pdf>

<sup>77</sup> Note that socio-economic studies were presented by Spain throughout the December Council process for the following year.

<sup>78</sup> Note that the TAC for 2019 finally followed the advised cut.

<sup>79</sup> For example, comments from France and Ireland on Celtic Sea haddock during the 2017 December Council, from Spain and Portugal on southern hake during the 2016 and 2017 December Councils, and from Ireland on Norway lobster in the Irish Sea, Celtic Sea and waters southwest of Ireland during the 2016 December Council.

<sup>80</sup> For example, comments from France, Ireland and Belgium on Celtic Sea cod during the 2016 December Council.

- The percentage of cases of higher than advised TACs, with versus without a 'push' from the Member State; this indicates how vocal the Member State has been and how this has changed over time
- The percentage of cases where the TACs were set above versus in line with scientific advice; this provides an overview of the proportion of cases where the TACs of which the Member State has a share have been set above advice
- The extent of the TAC excess above scientific advice in tonnes and the proportion of this that the Member State did versus did not push for
- The percentage of the overall TAC share volume of each Member State that was in excess of the scientific advice

This analysis shows that for some Member States there are clear trends from 2017 to 2019 in relation to some of these metrics, whereas for others the results change from year to year without apparent trend. For example, for Ireland and the United Kingdom the proportion of cases where these Member States actively pushed for a higher than advised TAC declined from 2017 to 2019, whereas for Portugal the proportion stayed the same across all years, and for Spain and France there is no clear trend. For Spain, France and Belgium the extent of the TAC excess in tonnes declined from 2017 to 2019, whereas there were no clear trends for the other Member States. The proportion of the Member State-specific TAC excess that the Member State pushed for versus did not push for decreased consistently for France and the United Kingdom. Note that there may be several reasons for any such trends, and a full evaluation thereof goes beyond the scope of this analysis. For example, a decline in the percentage of cases where a Member State pushed for higher TACs could mean either that

- a) the Member State has decided to follow scientific advice more stringently; or
- b) that the status of stocks has improved, making it easier to follow scientific advice; or
- c) that the proposed TACs in the later years were already higher than advised so that a push was not necessary.

Importantly, trends in the extent of the TAC excess in tonnes need to be treated with caution, since the volume of TACs as well as the excess can fluctuate considerably between the years, depending on the status of the stocks and the resulting advice, and on the in/exclusion of certain TACs in some years.<sup>81</sup> Therefore, percentages in relation to a Member State's specific TAC share or the number of cases included in the analysis for that Member State, give a more robust impression of the situation across the years, and for comparisons between Member States. Moreover, note that the rankings of individual Member States for the various metrics differ considerably, depending on whether they are related to the number of cases, or TAC share volume, or to the percentages these account for. However, despite the above caveats, the results presented in the following sections provide a comprehensive impression of the different Member States' track record throughout the past three December Councils, and the findings highlighted in the sections below are, in principle, largely robust throughout the years.

Finally, it is important to remember that the number of cases in which the different Member States have a TAC share, as well as the size of their TAC share, differ substantially between the Member States. On average across the three years, France has the largest TAC share by volume (85311 t) and by number of cases (43), compared to Germany (1057 t) and Sweden (4 cases) on the other end of the spectrum. Therefore, the majority of metrics used in the Member State profiles are expressed as a percentage of that specific Member State's share of the TACs, or number of cases where it has a TAC share, in order to make the results comparable between Member States. The Member State profiles below are presented in descending order of the size of the overall TAC share (in tonnes) of the Member States, averaged across the period 2017-2019.

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<sup>81</sup> Some TAC/advice comparisons had to be excluded for certain years, e.g. where the relevant advice was not available, meaning that the number and list of comparisons is not exactly the same for each year.

## France

France is the Member State within the analysis with the largest share of the TACs (on average across all three years) in terms of both the volume and the number of TACs. It is also one of the most vocal Member States, having pushed in 10 cases for higher than advised TACs (on average across the period 2017-2019), accounting for just over 23% of the cases where it has a share of the TAC (see Figure 19). It has advocated less frequently for higher TACs in 2018 and 2019 compared to 2017, but still ranked number 1 in terms of the total number of cases for 2019 (together with Spain), though only number 5 in terms of the percentage of the cases where it has a TAC share.

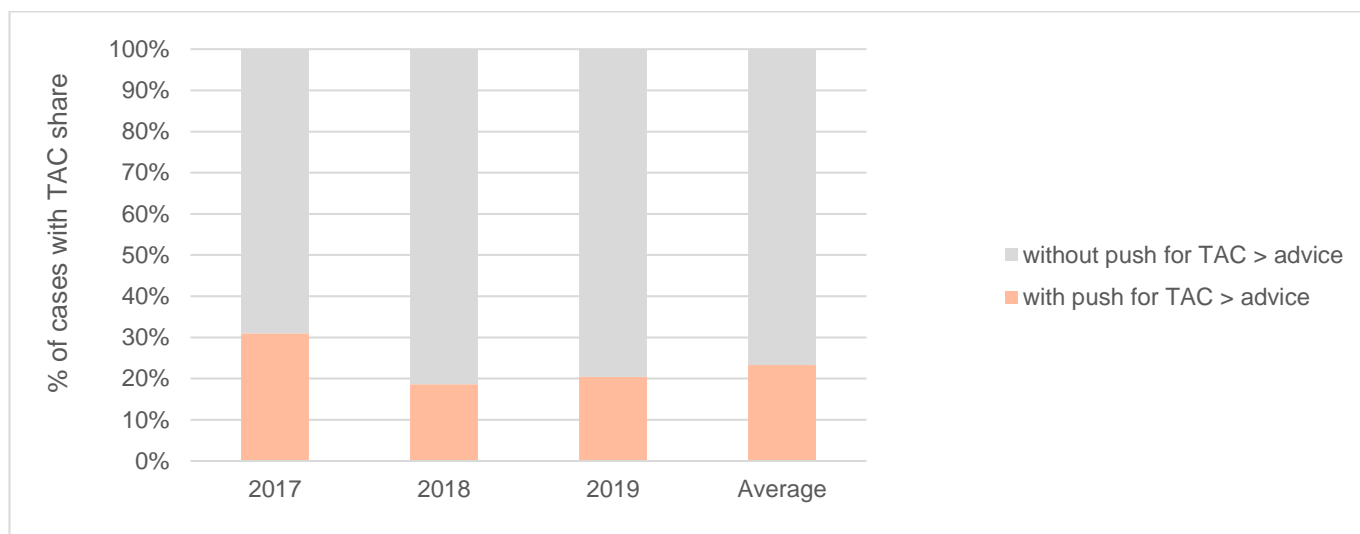


Figure 19. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where France has a share of the TAC) where France pushed (orange) versus did not push (grey) for a higher than advised TAC. This figure does not specify whether these attempts were successful or not.

More than half of the TACs of which France has a share exceeded scientific advice for each of the years 2017, 2018 and 2019, averaging at 60% of the cases (see Figure 20), making it number 3 on average in this regard. The percentage was highest in 2017 (almost 70%, the third-highest percentage across all Member States and years, behind 77% and just over 70% for Netherlands and Belgium in the same year).

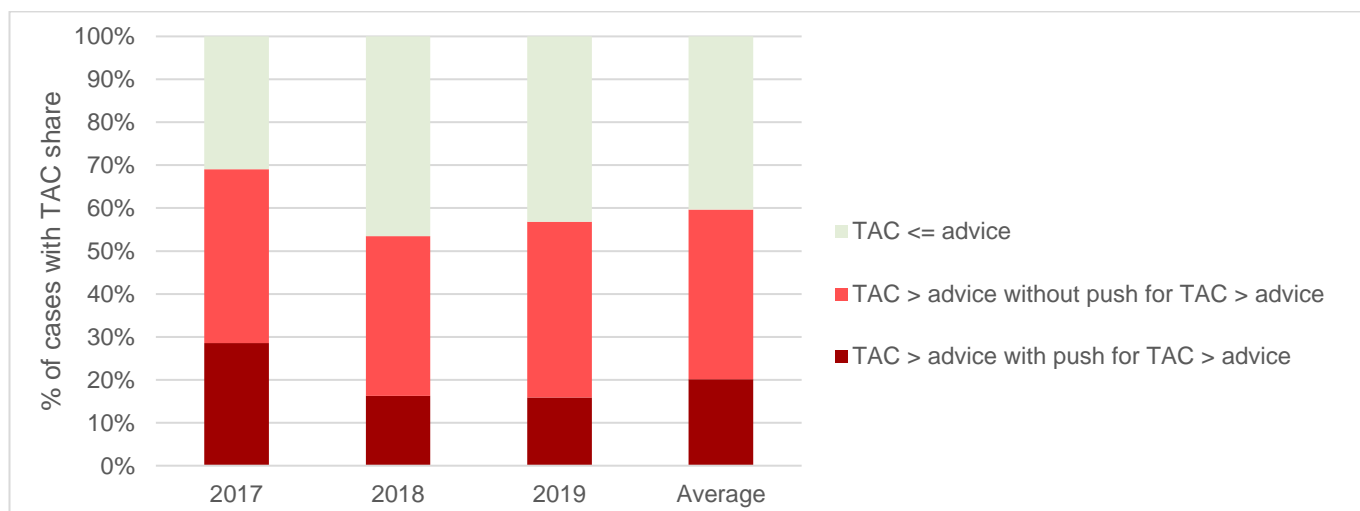


Figure 20. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where France has a share of the TAC) where the TAC was set above (dark red: with push from France, light red: without push from France) versus below or in line with (green) the scientific advice.

France's overall TAC excess (in tonnes) above scientific advice decreased slightly throughout the time series from 13263 t in 2017 to 11892 t in 2019, averaging 12509 t (see Figure 21). The French TAC excess accounted for 13% (in 2019) to 18% (in 2017) of the overall French TAC share in terms of volume, averaging at 15%. On average, France is number 1 in terms of tonnage of the excess, and number 3 in terms of the percentage of its overall TAC share. While, in terms of the number and percentage of cases with a French TAC share where the TACs exceeded scientific advice, France had not pushed for this excess in the majority of cases (see light red vs. dark red bars in Figure 20), the situation looks different in terms of the volume of the TAC excess (see Figure 21). For both 2017 and 2018, France actively pushed for the vast majority of its TAC excess. However, the picture was reversed for 2019, where France pushed for just under a quarter of its TAC excess, and overall the percentage of the excess that it had pushed for decreased throughout the time series.

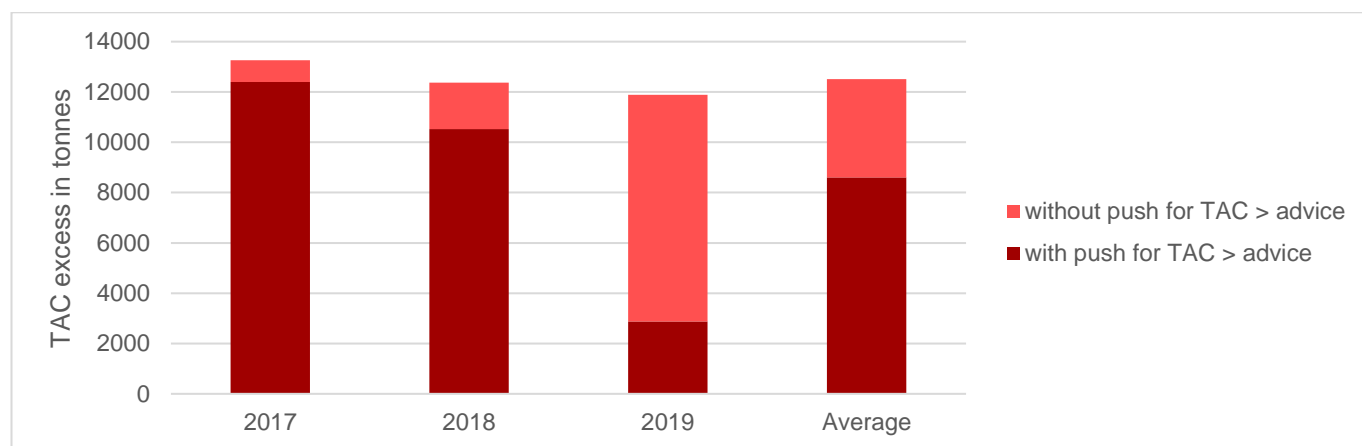


Figure 21. Time series and average across 2017-2019 of the French TAC volume in excess of the scientific advice, with (dark red) and without (light red) active push from France.

TACs with a French TAC share exceeded scientific advice on average by 29% per TAC/advice comparison, averaged across the three years (grey bar for 'Average' in Figure 22), making France number 4 within the ranking of Member States in this regard. This average excess per TAC/advice comparison was highest in 2017, and roughly the same (27%) for 2018 and 2019. For 2017 and 2018 the average excess per TAC/advice comparison was higher for those cases where France had pushed for a higher TAC than where it had not advocated for this (dark red versus light red bars in Figure 22), whereas in 2019 the situation was reversed.

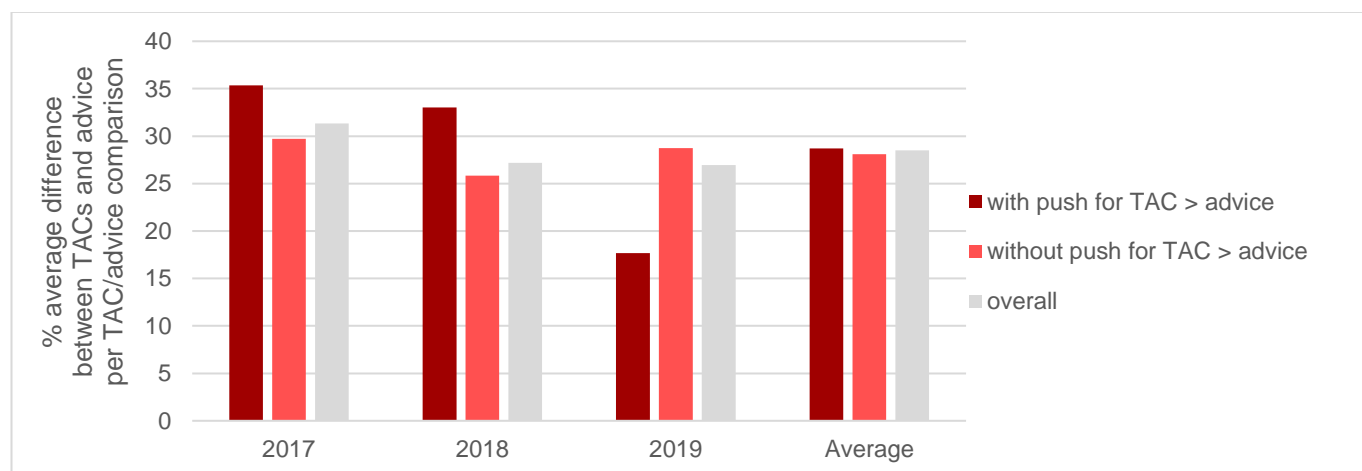


Figure 22. Time series across 2017-2019 of average percentage difference per TAC/advice comparison between the French TAC share and the corresponding scientific advice, for cases with (dark red) and without (light red) an active push from France for higher than advised TACs, as well as overall (including all cases where France has a TAC share).

## United Kingdom

The United Kingdom is the Member State with the second-largest overall share of the TACs (on average across all three years), both in terms of volume and number of TACs. It is also among the more vocal Member States in terms of the average number of cases where it pushed for a higher TAC, although in terms of the percentage of the cases where it has a TAC share, it occupies only rank 6 (8 cases, accounting for 22%). As Figure 23 shows, there is a declining trend in the frequency with which it has advocated for higher TACs, from 32% in 2017 to 11% in 2019.

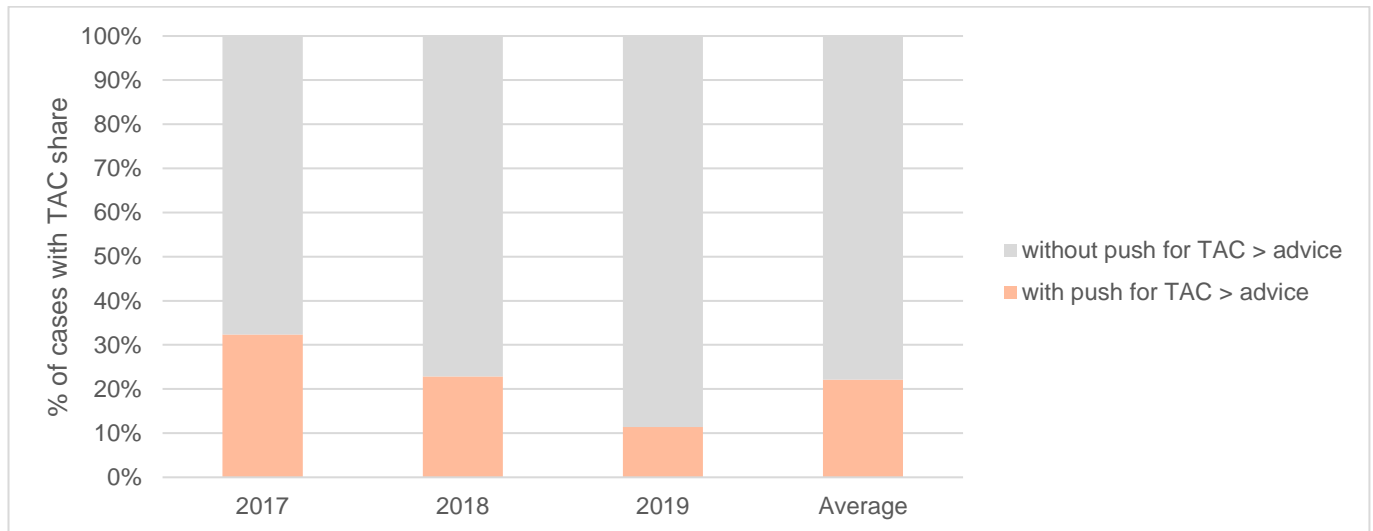


Figure 23. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where the United Kingdom has a share of the TAC) where the United Kingdom pushed (orange) versus did not push (grey) for a higher than advised TAC. This figure does not specify whether these attempts were successful or not.

More than half of the TACs of which the United Kingdom has a share exceeded scientific advice for each of the years 2017, 2018 and 2019, averaging at 57% of the cases (see Figure 24), making it number 6 on average in this regard. The percentage was highest in 2017 (almost 65%, or rank 6 for that year, and also on average).

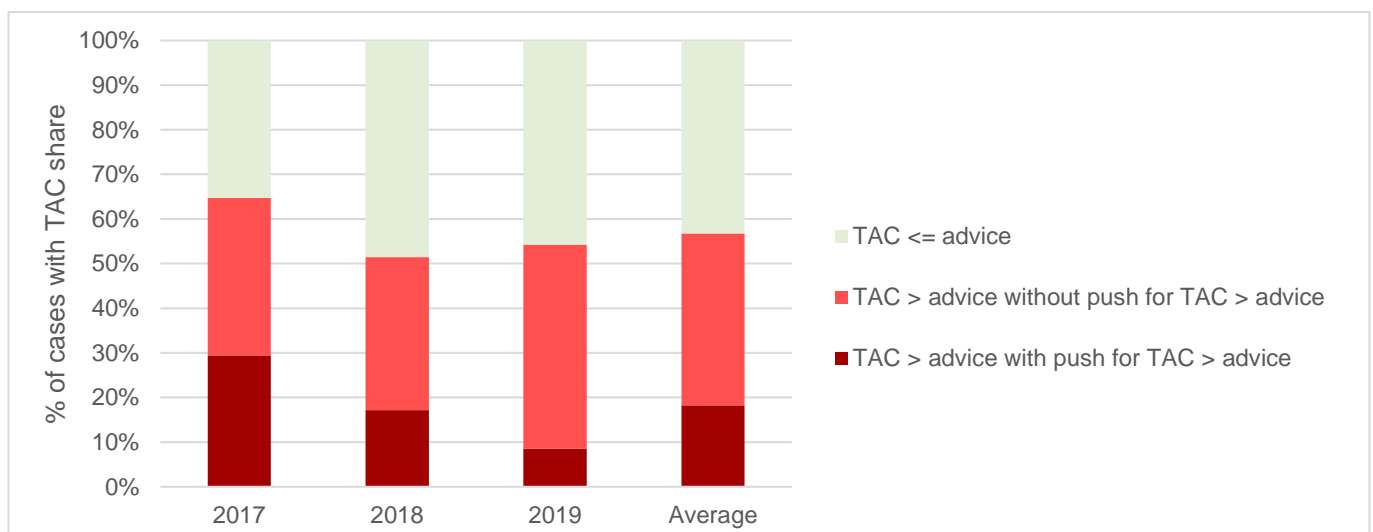


Figure 24. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where the United Kingdom has a share of the TAC) where the TAC was set above (dark red: with push from the United Kingdom, light red: without push from it) versus below or in line with (green) the scientific advice.



There is no clear trend in the extent of the United Kingdom's TAC excess (in tonnes) above scientific advice throughout the time series (see Figure 25). On average throughout the time series, its TAC excess is 7252 t (accounting for 9% of its overall TAC share on average), making the United Kingdom number 2 in the ranking in this regard behind France.

However, the extent to which the United Kingdom actively pushed for higher than advised TACs clearly declined from 2017 (83% of the excess) to 2019 (7% of the excess), both in terms of the frequency (see Figure 24) and the excess in tonnes (see Figure 25). This indicates that the United Kingdom has become less vocal in pushing for higher than advised TACs over time.

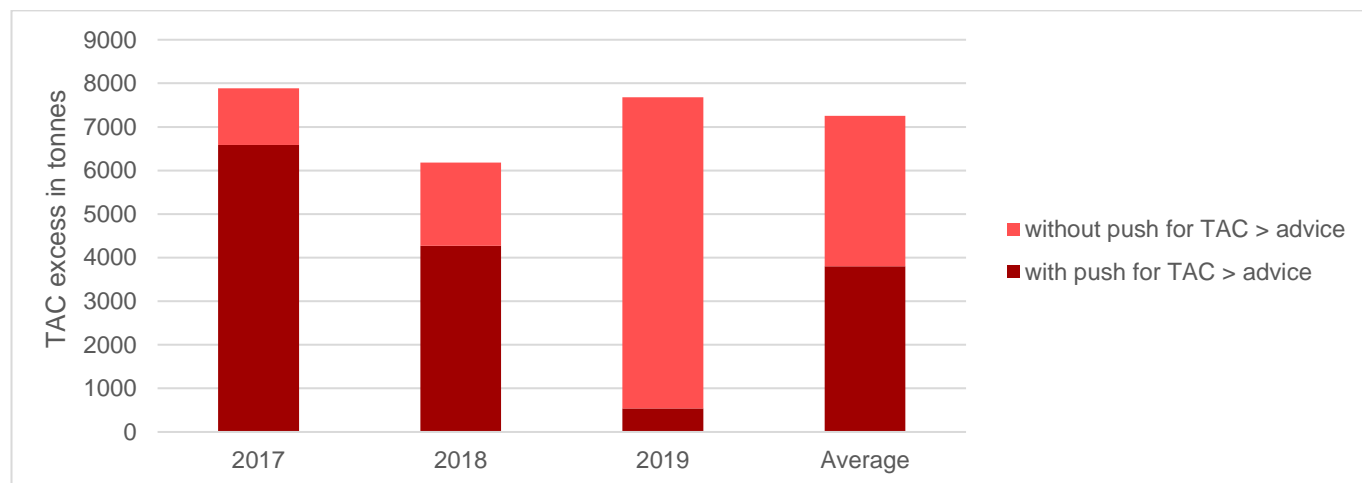


Figure 25. Time series and average across 2017-2019 of the United Kingdom's TAC volume in excess of the scientific advice, with (dark red) and without (light red) active push from the United Kingdom.

TACs with a TAC share for the United Kingdom exceeded scientific advice on average by 29% per TAC/advice comparison, averaged across the three years (grey bar for 'Average' in Figure 26), making the United Kingdom number 3 within the ranking of Member States in this regard, just before France. This average excess per TAC/advice comparison was highest in 2017, but there is no clear trend throughout the time series. For 2017 and 2018, the average excess per TAC/advice comparison was considerably higher for those cases where the United Kingdom had pushed for a higher TAC than where it had not advocated for this (dark red vs. light red bars in Figure 26), whereas for 2019 the values were similar.

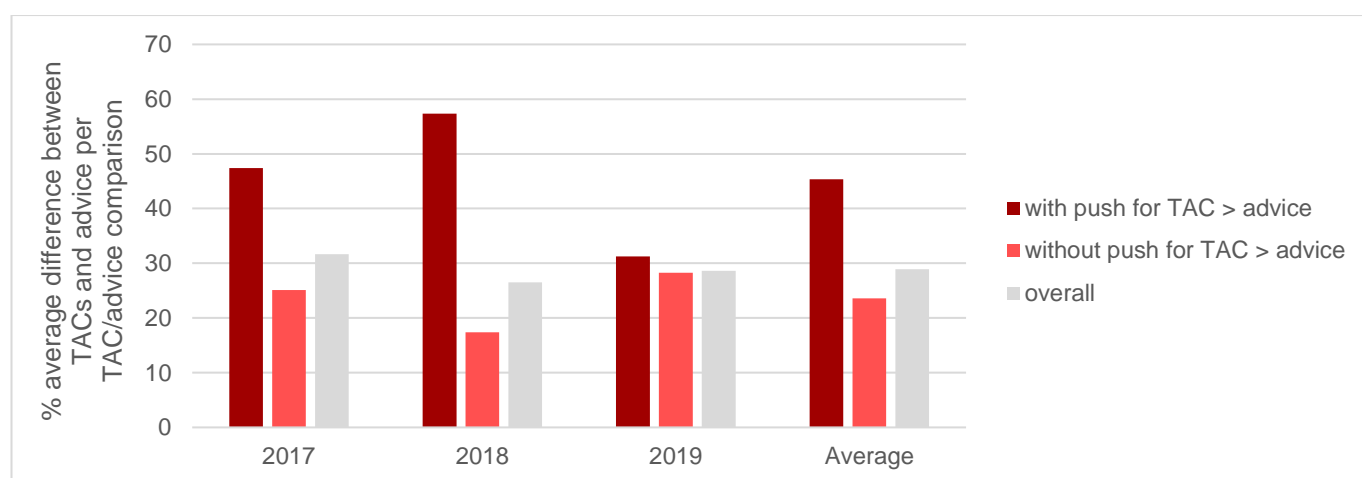


Figure 26. Time series and average across 2017-2019 of average percentage difference per TAC/advice comparison between the United Kingdom's TAC share and the corresponding scientific advice, for cases with (dark red) and without (light red) an active push from the United Kingdom for higher than advised TACs, as well as overall (including all cases where the United Kingdom has a TAC share).

## Portugal

Portugal is the Member State within the analysis with the third-largest share of the TACs (on average across all three years), in terms of volume,<sup>82</sup> whereas in terms of the number of TACs it has a share of it only occupies rank 8. It advocated for higher than advised TACs in 3 cases in each year of the time series (see Figure 27), and was unsuccessful only in one case in 2018.

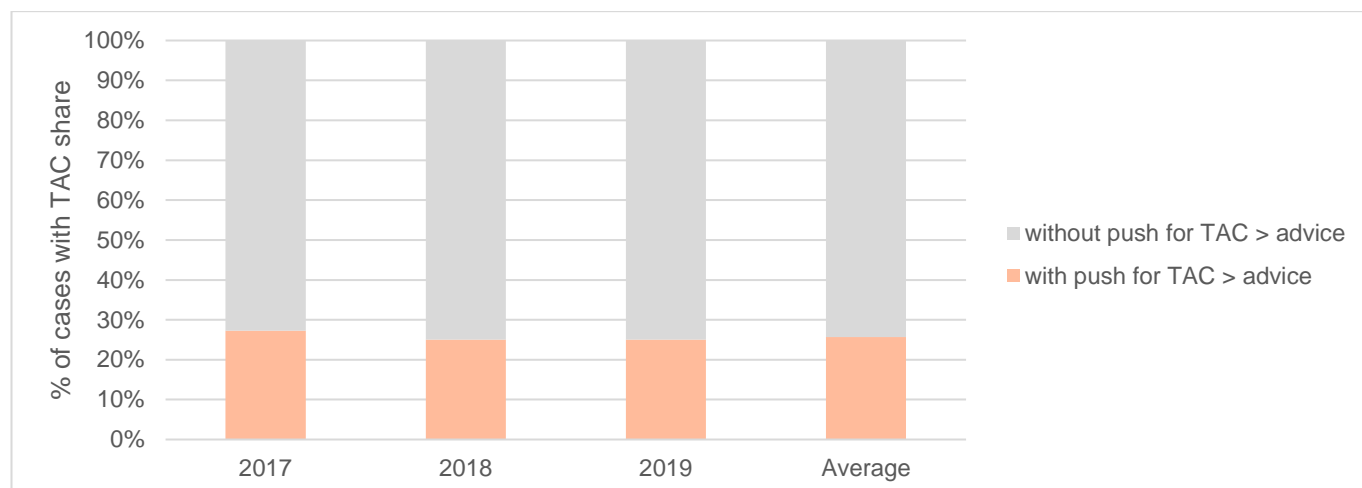


Figure 27. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Portugal has a share of the TAC) where Portugal pushed (orange) versus did not push (grey) for a higher than advised TAC. This figure does not specify whether these attempts were successful or not.

In the majority of cases with a Portuguese TAC share, the TACs were set above scientific advice, accounting for 60% of these cases in each year of the time series (see Figure 28), making it number 2 in the ranking in this regard, just before France.

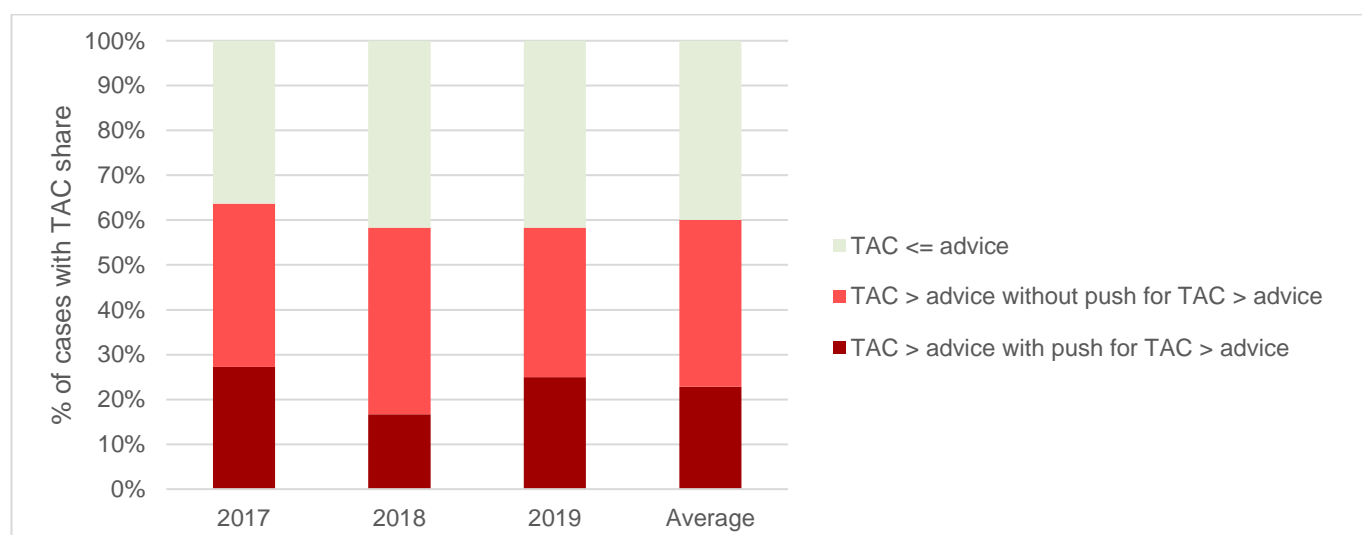


Figure 28. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Portugal has a share of the TAC) where the TAC was set above (dark red: with push from Portugal, light red: without push from Portugal) versus below or in line with (green) the scientific advice.

Portugal's overall TAC excess (in tonnes) above scientific advice decreased from 941 t in 2017 to 749 t in 2018, increasing again slightly to just over 801 t in 2019 (see Figure 29). Its TAC excess accounted for a

<sup>82</sup> Primarily due to the large southern horse mackerel TAC.

relatively small part of its overall TAC share, namely 1.1% (in 2019) to 1.6% (in 2017 and 2018). In terms of volume of the TAC excess, it occupies rank 7 (absolute tonnage) and 10 (percentage of its overall TAC share), i.e. it is one of the Member States with a smaller TAC excess compared to others like France.

In terms of the number and percentage of cases with a Portuguese TAC share where the TACs exceeded scientific advice, Portugal had not pushed for this excess in the majority of cases (see light red vs. dark red bars in Figure 28). In terms of the volume of the TAC excess, the proportion for which Portugal actively advocated is larger (46% for 2018 and 55% for 2019, and even 95% for 2017, see Figure 29).

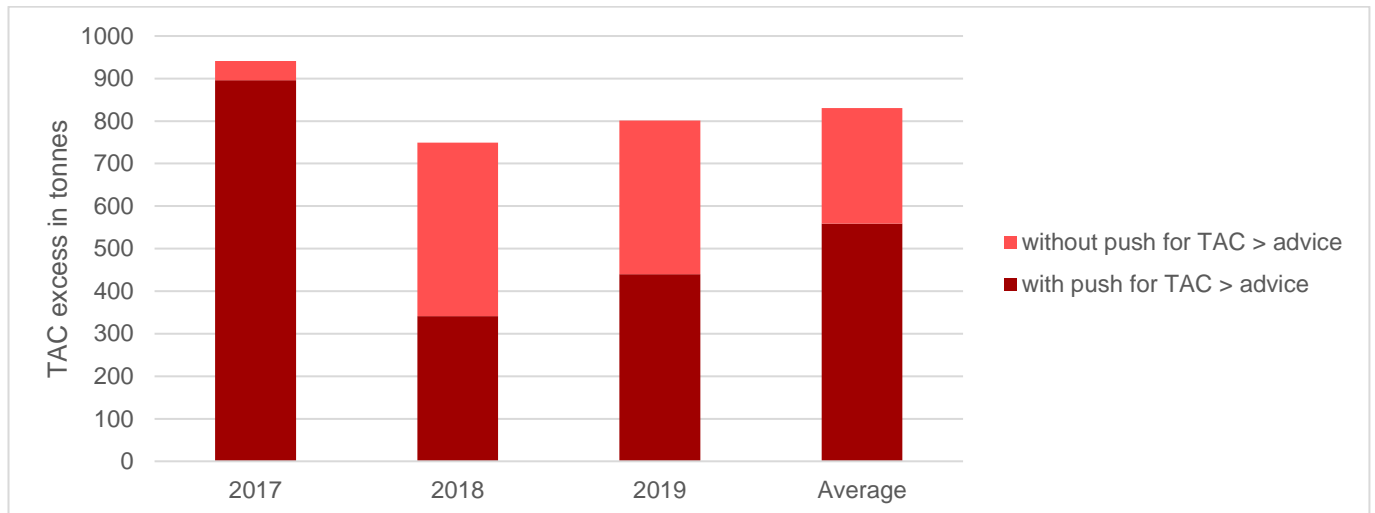


Figure 29. Time series and average across 2017-2019 of the Portuguese TAC volume in excess of the scientific advice, with (dark red) and without (light red) active push from Portugal.

TACs with a Portuguese TAC share exceeded scientific advice on average by 25% per TAC/advice comparison, averaged across the three years (grey bar for 'Average' in Figure 30). The percentage was roughly the same for 2017 and 2018 (28%) and decreased to 17% in 2019. Throughout all three years, the average excess per TAC/advice comparison was higher for those cases where Portugal had pushed for a higher TAC than where it had not advocated for this (dark red versus light red bars in Figure 30).

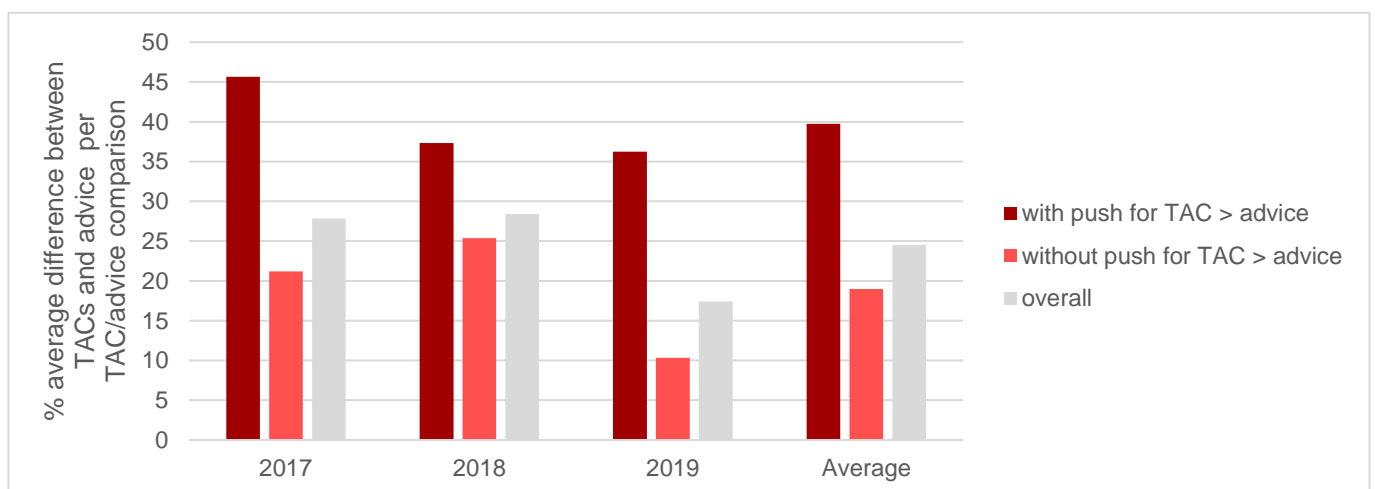


Figure 30. Time series and average across 2017-2019 of average percentage difference per TAC/advice comparison between the Portuguese TAC share and the corresponding scientific advice, for cases with (dark red) and without (light red) an active push from Portugal for higher than advised TACs, as well as overall (including all cases where Portugal has a TAC share).

## Ireland

Ireland has the fourth-largest share of the TACs within the analysis in terms of volume, on average across the period 2017 to 2019. Both in terms of the number of cases where it advocated for a higher than advised TAC, and the percentage of cases where it has a TAC share, it is on average the most vocal Member State. In 2017, it pushed for higher than advised TACs in 50% of the cases where it has a TAC share (see Figure 31), which is the highest percentage across all Member States and years. There is a clear declining trend throughout the time series (see Figure 31), indicating that Ireland has become less vocal over time.

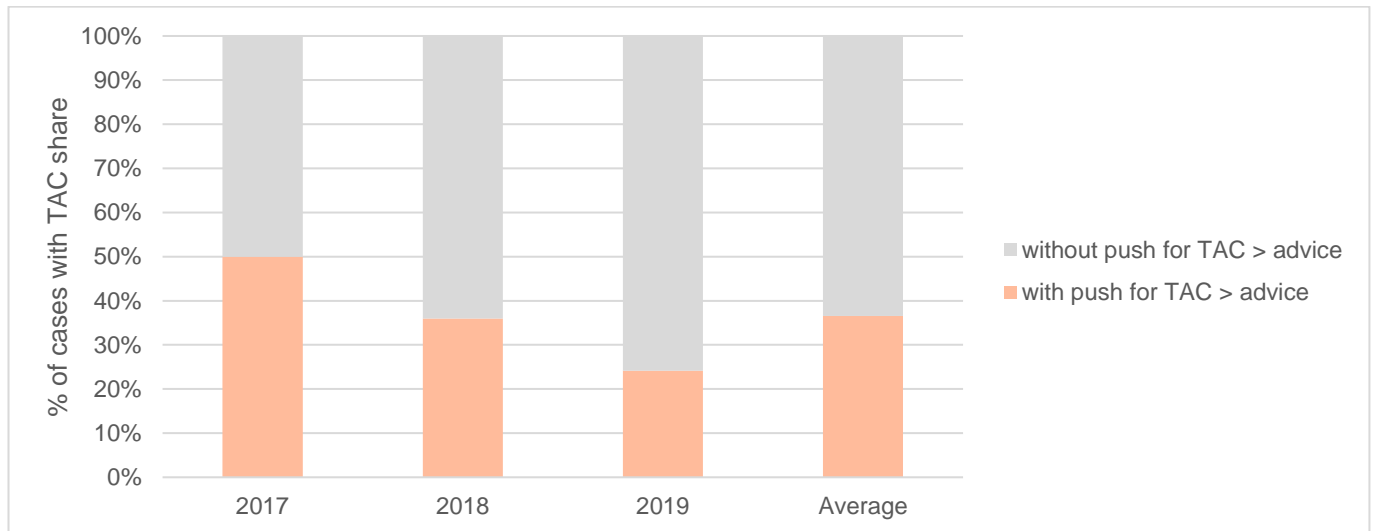


Figure 31. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Ireland has a share of the TAC) where Ireland pushed (orange) versus did not push (grey) for a higher than advised TAC. This figure does not specify whether these attempts were successful or not.

More than half of the TACs of which Ireland has a share exceeded scientific advice for each of the years 2017, 2018 and 2019, averaging at 59% of the cases (see Figure 32), making it number 4 on average in this regard. The percentage was highest in 2017 (68%), and dropped to 55% in 2018 and 2019, though remaining well above half of the cases where Ireland has a TAC share.

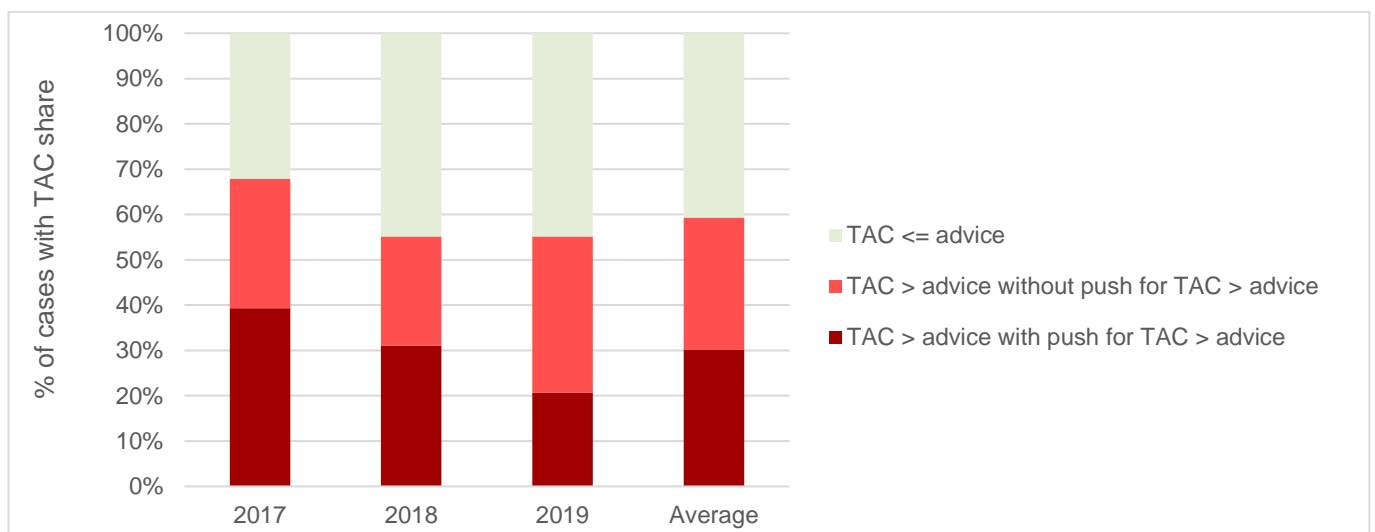


Figure 32. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Ireland has a share of the TAC) where the TAC was set above (dark red: with push from Ireland, light red: without push from Ireland) versus below or in line with (green) the scientific advice.

Ireland's overall TAC excess (in tonnes) above scientific advice shows no trend throughout the time series (see Figure 33), peaking at 7926 t in 2018 (or 14% of its overall TAC share), and averaging at 6588 t across the years, making Ireland number 3 in the ranking in this regard on average.

While there was a declining trend in terms of the number and percentage of cases with an Irish TAC share where the TACs exceeded scientific advice (see Figure 32), there is no clear trend in this regard in terms of the TAC excess in tonnes (see Figure 33).

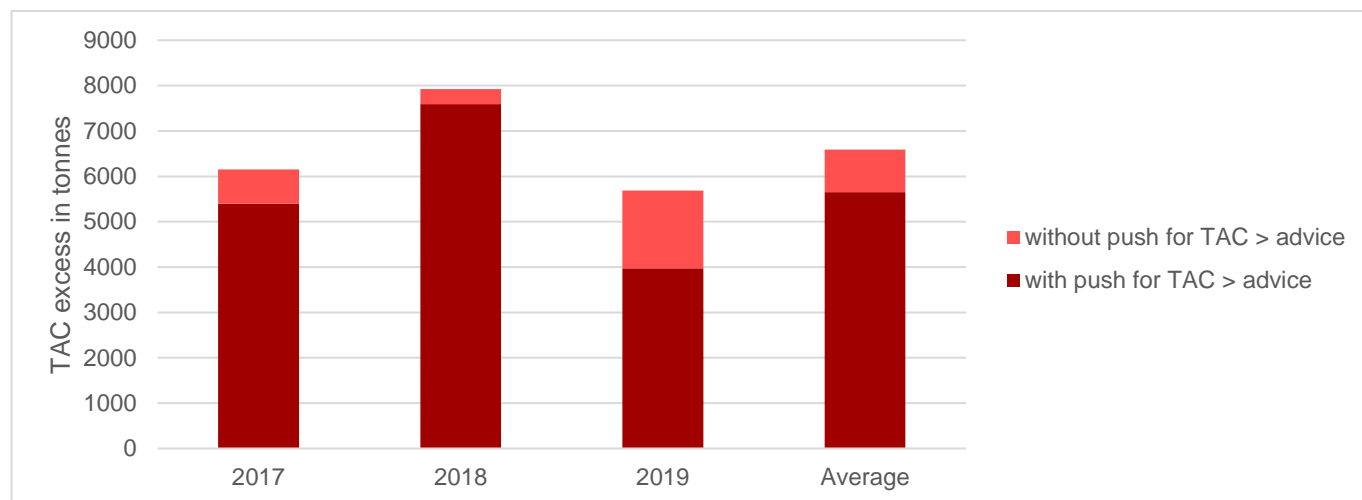


Figure 33. Time series and average across 2017-2019 of the Irish TAC volume in excess of the scientific advice, with (dark red) and without (light red) active push from Ireland.

TACs with an Irish TAC share exceeded scientific advice on average by 34% per TAC/advice comparison, averaged across the three years (grey bar for 'Average' in Figure 34), making it number 2 in the ranking of Member States in this regard. This average excess per TAC/advice comparison was highest in 2017, and roughly the same for 2018 and 2019. The average excess per TAC/advice comparison was higher for those cases where Ireland had pushed for a higher TAC than where it had not advocated for this in all three years (dark red versus light red bars in Figure 34). This difference was most pronounced in 2018, where the average excess per TAC/advice comparison in cases where Ireland actively pushed for a higher than advised TAC was almost 60%, the second-highest value across all Member States and years.

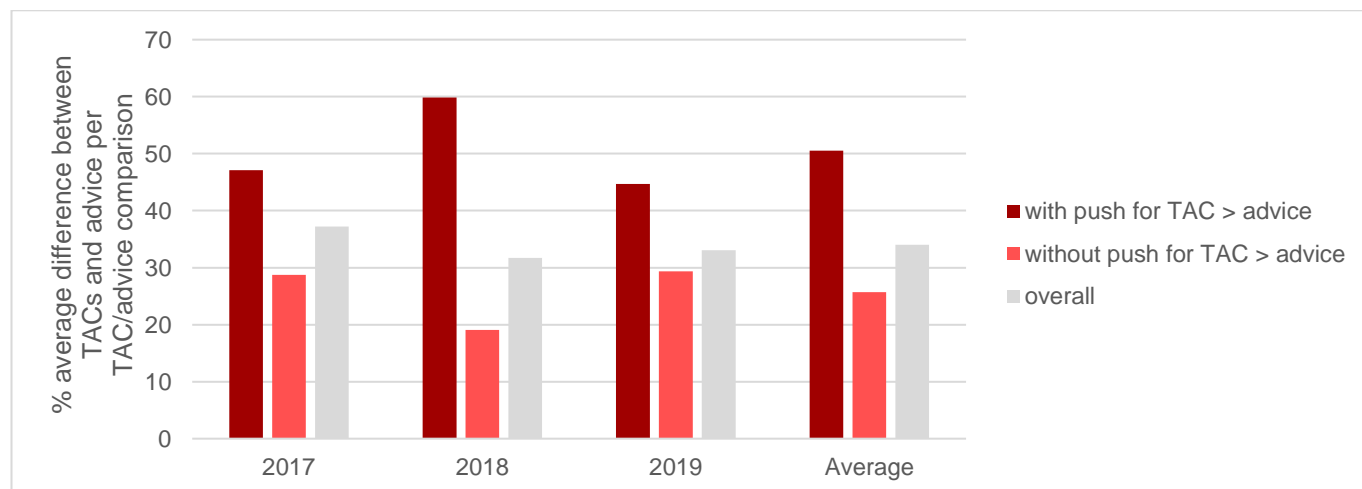


Figure 34. Time series and average across 2017-2019 of average percentage difference per TAC/advice comparison between the Irish TAC share and the corresponding scientific advice, for cases with (dark red) and without (light red) an active push from Ireland for higher than advised TACs, as well as overall (including all cases where Ireland has a TAC share).

## Spain

Spain has the fifth-largest share of the TACs (on average across all three years) in terms of both the volume and the number of TACs. It is also the second-most vocal Member State in terms of the percentage of cases where it has a TAC share, having pushed for higher than advised TACs in one third of these cases on average across the time series (see Figure 35). There is no trend in the frequency with which Spain has pushed for higher than advised TACs between 2017 and 2019, the 40% for 2019 being the highest in the time series.

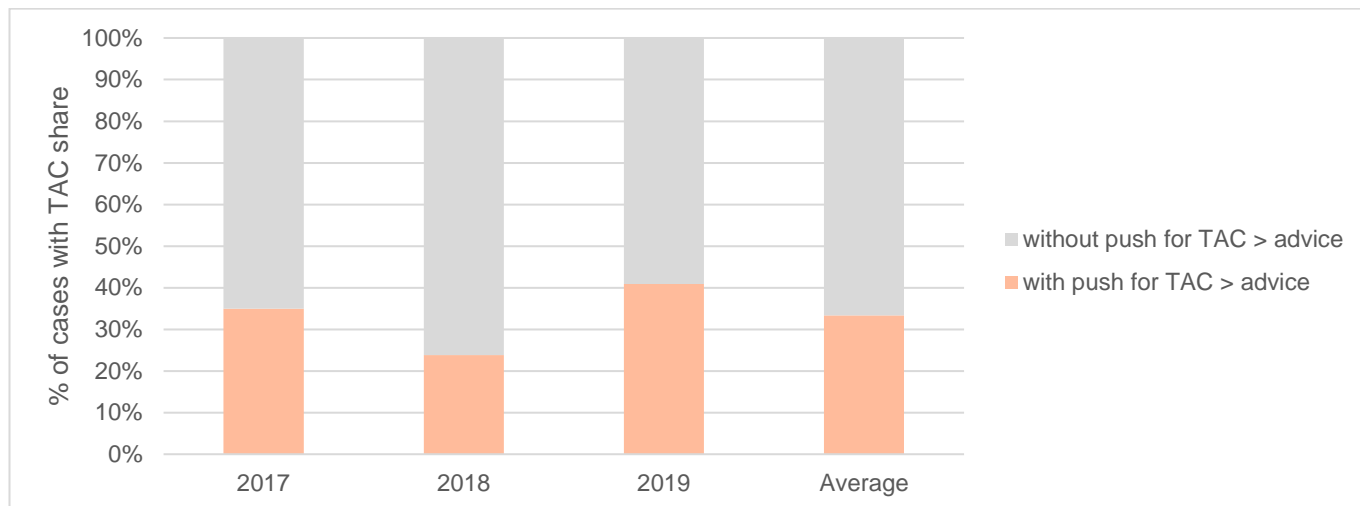


Figure 35. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Spain has a share of the TAC) where Spain pushed (orange) versus did not push (grey) for a higher than advised TAC. This figure does not specify whether these attempts were successful or not.

More than half of the TACs of which Spain has a share exceeded scientific advice 2017 and 2018, dropping to 46% in 2019 and averaging at 56% of the cases (see Figure 36), and there is a declining trend over the years.

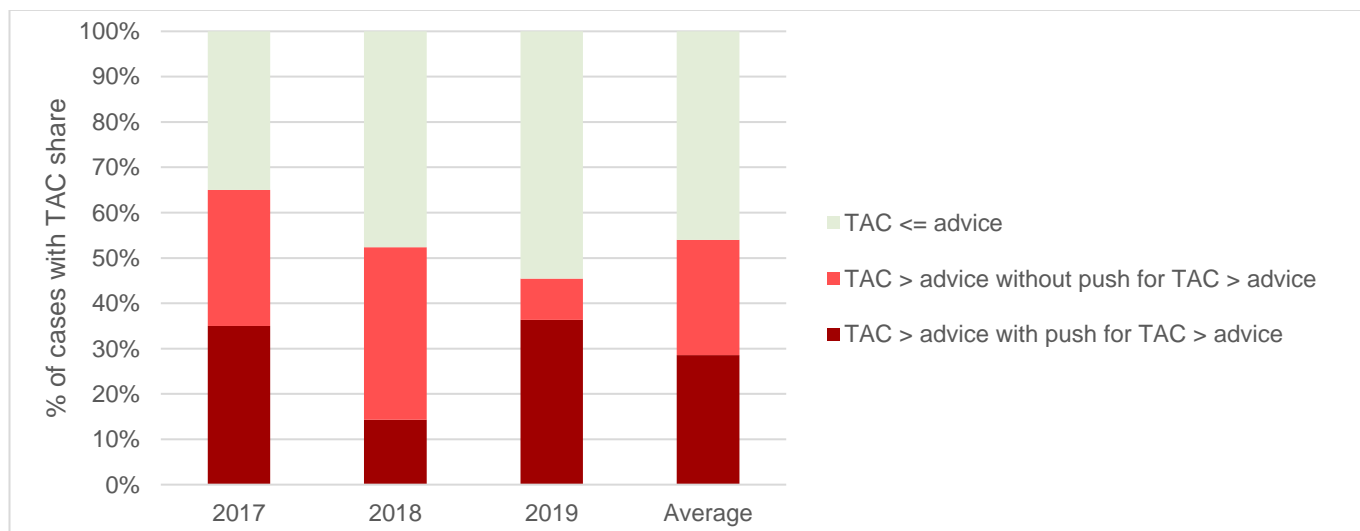


Figure 36. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Spain has a share of the TAC) where the TAC was set above (dark red: with push from Spain, light red: without push from Spain) versus below or in line with (green) the scientific advice.

Spain's overall TAC excess (in tonnes) above scientific advice decreased throughout the time series from 3406 t in 2017 to 2219 t and 2142 t in 2018 and 2019, respectively (see Figure 37), on average accounting



for 5% of Spain's overall TAC share. On average across the three years, Spain is number 4 in the ranking in terms of the tonnage, but only number 8 in terms of the percentage this excess accounts for in relation to its overall TAC share. There is no trend in terms of the percentage of cases or volume where Spain actively advocated for higher than advised TACs (see Figure 36 and Figure 37), 2019 being Spain's most vocal year in both regards (99% in terms of TAC excess in tonnes). Spain also commented a few times on TACs of which it has no share (once for 2018, three times for 2019), highlighting anticipated choke issues due to a lack of quota. However, these cases are not included in the quantitative analysis which focuses just on those cases where the respective Member State has a TAC share.

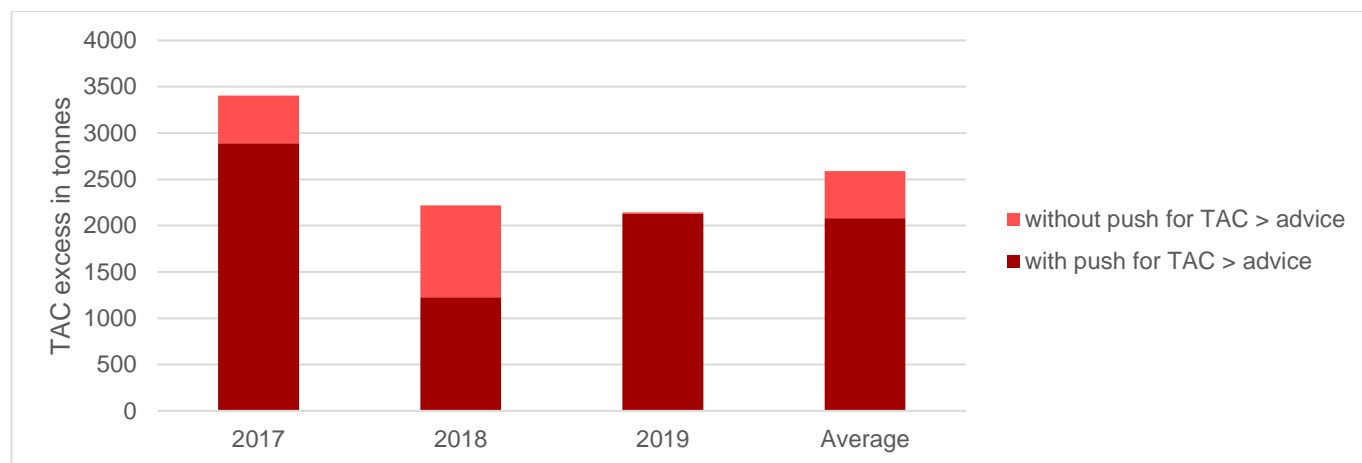


Figure 37. Time series and average across 2017-2019 of the Spanish TAC volume in excess of the scientific advice, with (dark red) and without (light red) active push from Spain.

TACs with a Spanish TAC share exceeded scientific advice on average by 22% per TAC/advice comparison, averaged across the three years (grey bar for 'Average' in Figure 38). The values for 2017 and 2018 were roughly the same (26% and 25%), and dropped to 17% in 2019. There is no trend regarding the extent of the average excess per TAC/advice comparison depending on whether Spain did or did not push for higher than advised TACs (dark red versus light red bars in Figure 38). For 2018 and 2019, the average excess was higher where Spain had actively advocated for higher than advised TACs, whereas for 2018 it was the other way around.

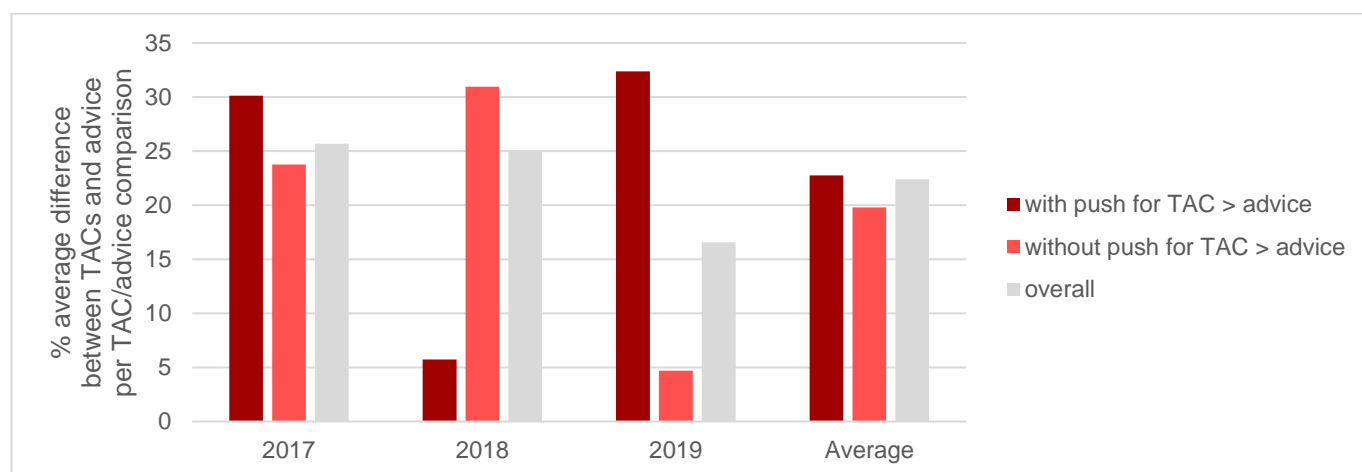


Figure 38. Time series and average across 2017-2019 of average percentage difference per TAC/advice comparison between the Spanish TAC share and the corresponding scientific advice, for cases with (dark red) and without (light red) an active push from Spain for higher than advised TACs, as well as overall (including all cases where Spain has a TAC share).

## Belgium

Belgium pushed for higher than advised TACs more than once, despite having only a relatively small overall TAC share in terms of volume (ranking 7<sup>th</sup> on average in this regard). There is no trend throughout the 2017-2019 period regarding the frequency with which Belgium advocated for higher than advised TACs (see Figure 39), with an average of 6 cases (or 23% of the cases where Belgium has a TAC share), ranking 5<sup>th</sup> in terms of both number and percentage of cases.

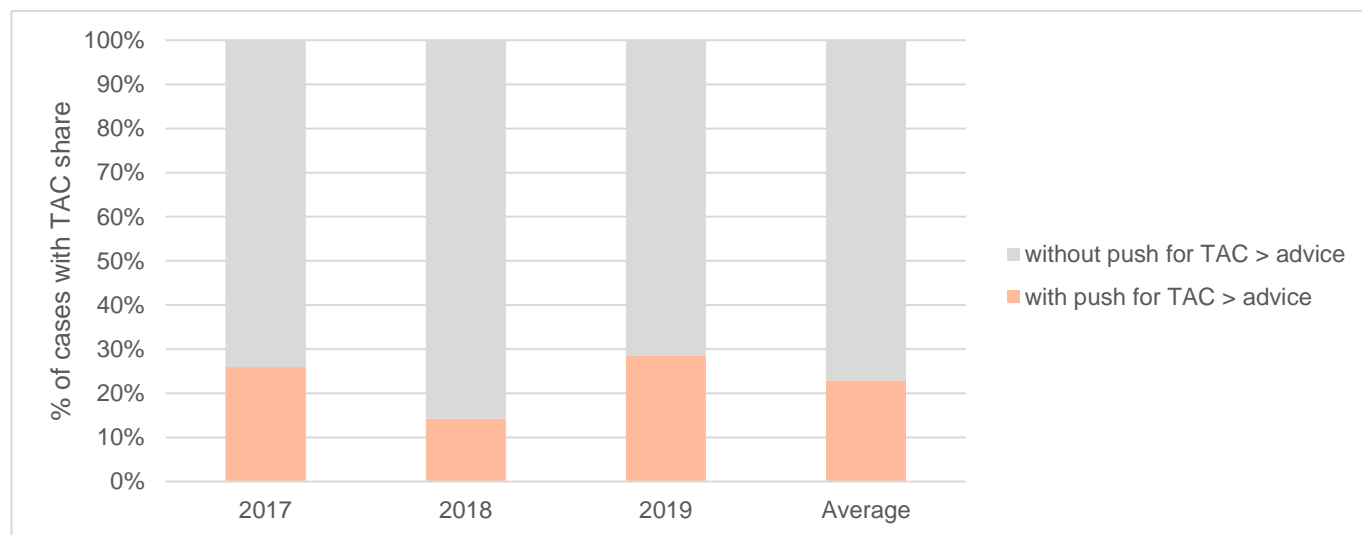


Figure 39. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Belgium has a share of the TAC) where Belgium pushed (orange) versus did not push (grey) for a higher than advised TAC. This figure does not specify whether these attempts were successful or not.

Like for most other Member States, TACs were set above scientific advice in the majority of cases where Belgium has a TAC share on average across the three years (59%), ranging between 70% in 2017 and 50% in 2018 (see Figure 40). On average, Belgium ranks 4<sup>th</sup> in this regard in terms of the percentage of cases where it has a TAC share.

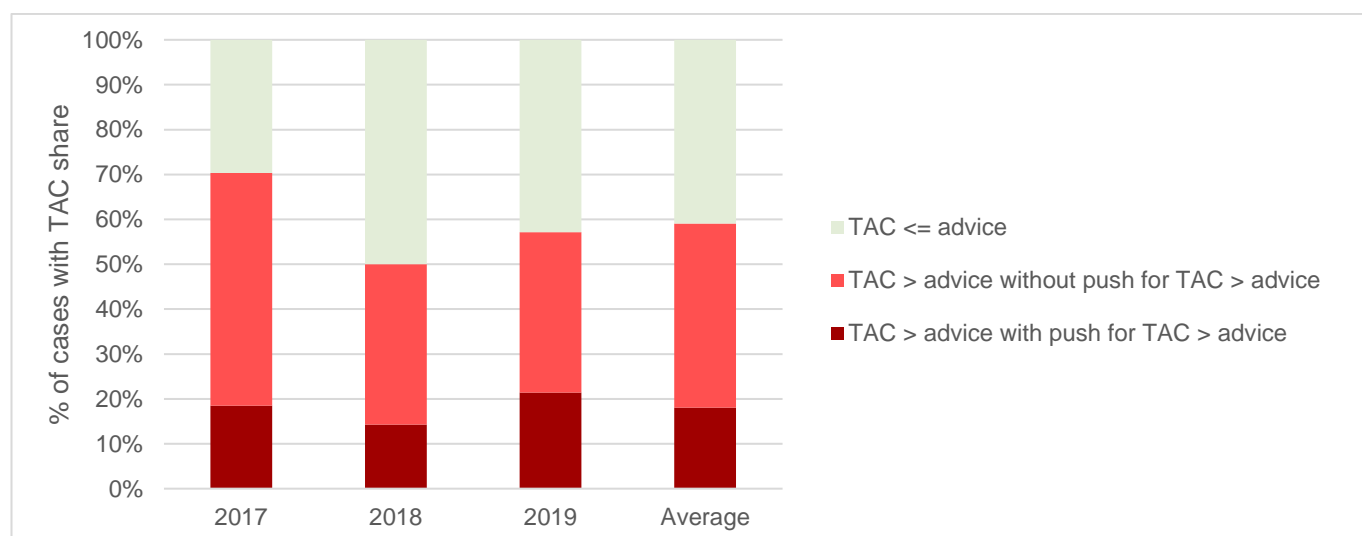


Figure 40. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Belgium has a share of the TAC) where the TAC was set above (dark red: with push from Belgium, light red: without push from Belgium) versus below or in line with (green) the scientific advice.

Belgium's overall TAC excess (in tonnes) above scientific advice decreased continuously throughout the time series, from 880 t in 2017 to 486 t in 2019 (see Figure 41). Belgium had not pushed for the majority of its TAC excess in all three years, with a maximum of 96% in 2018. This means that the majority of its TAC excess goes back to either other Member States successfully pushing for higher than advised TACs, or the Commission's proposal already being too high to begin with. The same applies to the number of cases where TACs with a Belgian share were set above scientific advice (see Figure 40). There is no trend throughout the time series, both in terms of the percentage of cases and of the TAC excess in tonnes that Belgium did versus did not push for.

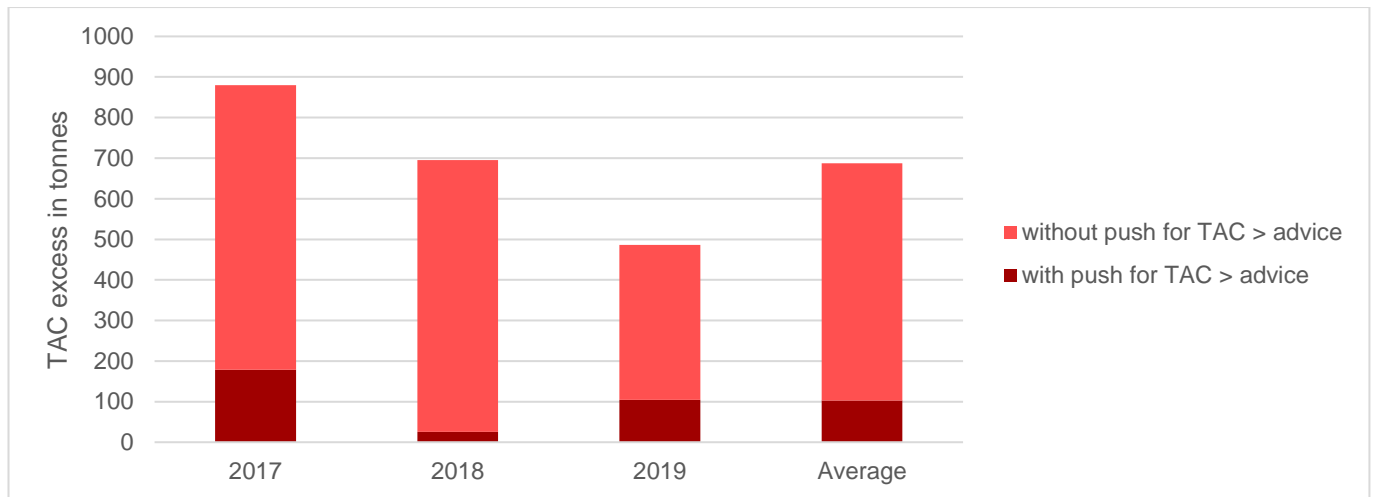


Figure 41. Time series and average across 2017-2019 of the Belgian TAC volume in excess of the scientific advice, with (dark red) and without (light red) active push from Belgium.

TACs with a Belgian TAC share exceeded scientific advice on average by 20% per TAC/advice comparison, averaged across the three years (grey bar for 'Average' in Figure 42), making Belgium number 10 out of 10 in the ranking of Member States in this regard. This means that Belgium's 20% average percentage difference between the agreed TACs and the scientific advice was the smallest compared to all other Member States. There is no clear trend throughout the time series, though the average percentage difference per TAC/advice comparison was higher for cases where Belgium had pushed for higher than advised TACs, than for cases where it had not advocated for this.

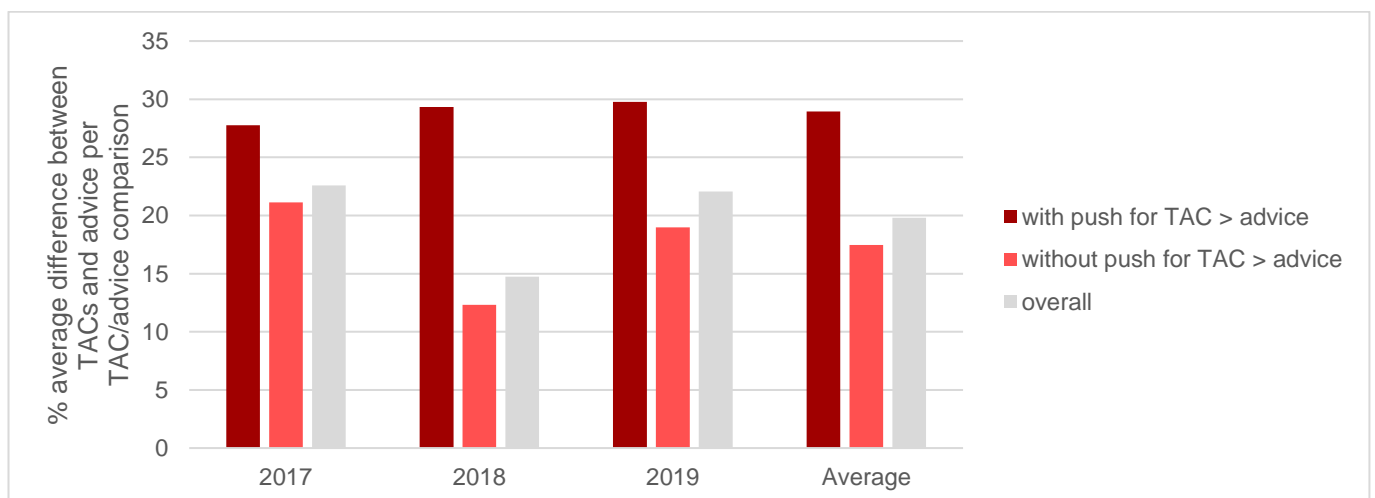


Figure 42. Time series and average across 2017-2019 of average percentage difference per TAC/advice comparison between the Belgian TAC share and the corresponding scientific advice, for cases with (dark red) and without (light red) an active push from Belgium for higher than advised TACs, as well as overall (including all cases where Belgium has a TAC share).

## Other Member States

Out of the remaining four Member States in the analysis (Denmark, the Netherlands, Germany and Sweden), Denmark is the only one that actively pushed for a higher than advised TAC, always the same one in each of the three years: Kattegat cod (TAC code COD/03A.). The Netherlands, Germany and Sweden did not actively push for higher than advised TACs within the subset included in the analysis. However, all of these Member States nevertheless received TACs in excess of the scientific advice, despite not having actively pushed for this.

The Netherlands, Germany and Sweden are the three Member States with the smallest overall TAC share in tonnes, which may be part of the explanation why they were not vocal in pushing for higher than advised TACs. Denmark and Sweden only have very few cases involved in the analysis (7 and 4, respectively), meaning that any percentages on this basis should be treated with caution.

Despite not having pushed for higher than advised TACs, the Netherlands are the number 1 Member State on average across the three years in terms of the percentage of cases where the TACs exceeded scientific advice, with an average of 62%. There was a clear declining trend from 76% in 2017 (by far the highest value across all Member States and years) to 50% in 2019 (see Figure 43).

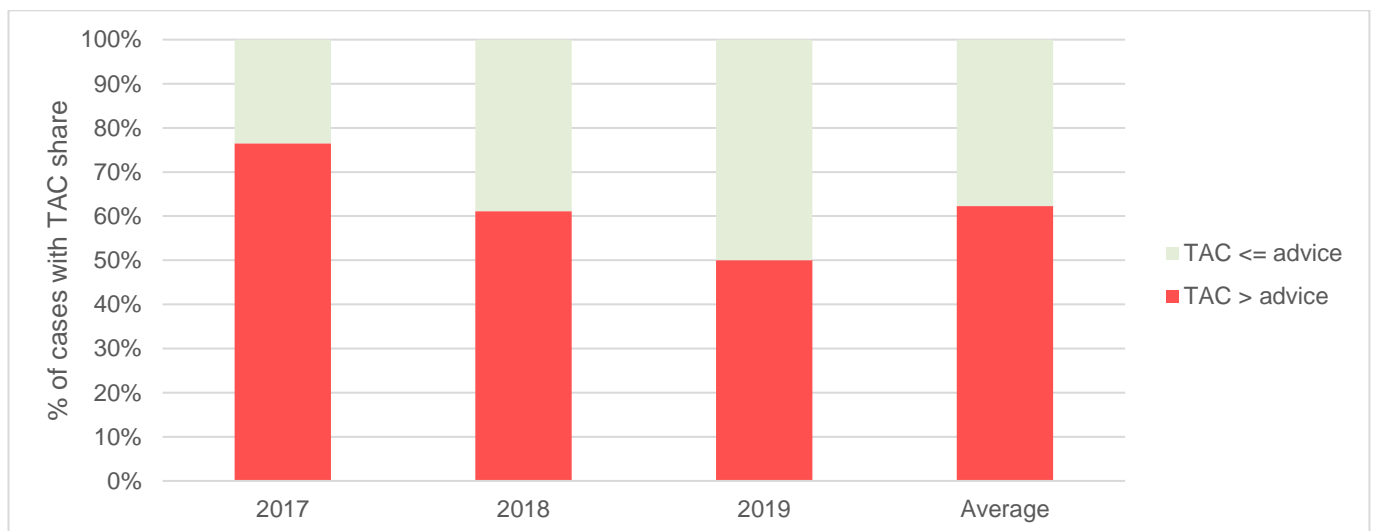


Figure 43. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where the Netherlands have a share of the TAC) where the TAC was set above (red) versus below or in line with (green) the scientific advice.

On the other end of the spectrum, Denmark ranked last on average and in each year with 43%, making it the only Member State in the analysis with less than 50%. Germany and Sweden on average ranked 8<sup>th</sup> and 9<sup>th</sup> in this regard, with 52% and 50% on average, respectively. For Sweden, the percentage was the same (50%, i.e. two out of 4 cases) across all three years, for Germany it was slightly higher in 2018 (57%, see Figure 44).

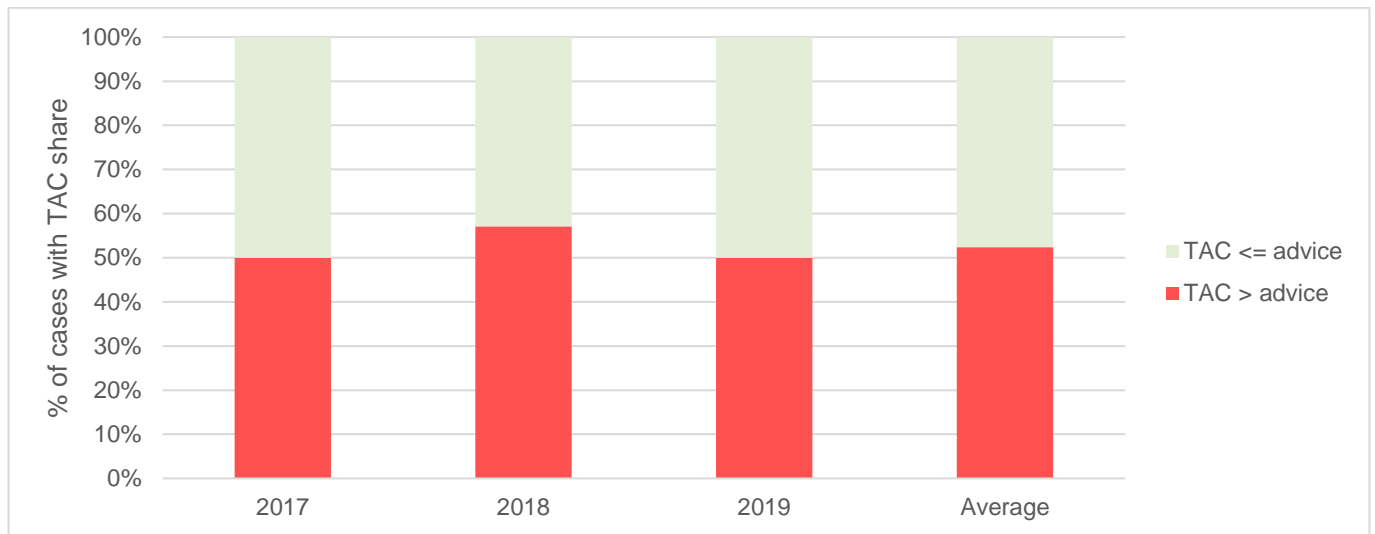


Figure 44. Time series and average across 2017-2019 of the percentage of cases (in relation to the total number of cases where Germany has a share of the TAC) where the TAC was set above (red) versus below or in line with (green) the scientific advice.

In terms of the extent of the TAC excess in relation to the overall Member State TAC share, Germany and the Netherlands occupy rank 1 and 2 on average, with 50% and 29%, respectively, well ahead of other Member States like France (15%, rank 3) or Ireland (12%, rank 4). Since neither Germany nor the Netherlands actively pushed for higher than advised TACs, these high percentages of their overall TAC excess are due to either other Members having pushed successfully for higher than advised TACs of which Germany or the Netherlands have a share, or the Commission having already proposed the TACs at a higher level. Denmark and Sweden in turn occupy rank 5 and 9, respectively, in this regard.

In terms of the average percentage difference between the agreed TACs and the scientific advice per TAC/advice comparison, Sweden, perhaps surprisingly, ranks 1st on average, with 34%. Since it did not actively push for higher than advised TACs and in fact advocated for scientific advice to be followed in two instances in 2018 and 2019, this high value goes back to other Member States having successfully advocated for higher TACs or the Commission's proposal having been too high to begin with. For both Sweden and Denmark the average percentage difference decreased considerably throughout the time series, from 44% in 2017 to 19% in 2019 for Sweden, and from 27% in 2017 to 14% in 2019 for Denmark.

## Key findings and recommendations

Certain Member States have been more vocal than others in pushing for higher than scientifically advised TACs. France, the United Kingdom, Portugal, Ireland, Spain and Belgium have all advocated for TACs above scientific advice more than once throughout each of the three December Council processes in 2016, 2017 and 2018 covered by this report, whereas Denmark has done so in one case 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 by this analysis). Nevertheless, all Member States have received TACs in excess of the scientific advice, in the majority of the cases each year, 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).

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 here 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. On the basis of the present analysis, the following conclusions and recommendations apply:

- All Member States are individually and collectively responsible for the outcome of the Council meeting. They must therefore ensure that TACs for 2021 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 German Council Presidency, despite Germany holding more limited stakes in the discussions of Northeast Atlantic TACs than some of the other Member States, 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 recent 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.
- 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 becoming shared stocks, a commitment of all involved parties to sustainability and greater transparency will be crucial for 2021 and beyond.



## Annexes

### Annex I: Relevant ClientEarth briefings and reports

ClientEarth (2020). Setting Total Allowable Catches (TACs) in the context of the Landing Obligation. July 2020. <https://www.documents.clientearth.org/library/download-info/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.documents.clientearth.org/library/download-info/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.documents.clientearth.org/library/download-info/lets-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.documents.clientearth.org/library/download-info/the-control-of-the-landing-obligation-in-france/>

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

ClientEarth (2019). The control of the landing obligation in Denmark. October 2019. <https://www.documents.clientearth.org/library/download-info/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.documents.clientearth.org/library/download-info/comparing-total-allowable-catch-decisions-and-ices-advice-areas-pdf/>

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.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/>

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/>

ClientEarth (2015). Maximum Sustainable Yield in the Common Fisheries Policy, Legal briefing. September 2015. <http://www.documents.clientearth.org/library/download-info/maximum-sustainable-yield-in-the-common-fisheries-policy/>

ClientEarth (2015). Transparency in the Common Fisheries Policy. Briefing, November 2014 (updated in August 2015). <http://www.documents.clientearth.org/library/download-info/transparency-in-the-common-fisheries-policy/>

## Annex II: TACs included in the core analysis

Annex II can be found here: <https://www.documents.clientearth.org/library/download-info/taking-stock-2020-are-tacs-set-to-achieve-msy-annex-ii/>

## Annex III: TACs excluded from the core analysis

Annex III can be found here: <https://www.documents.clientearth.org/library/download-info/taking-stock-2020-are-tacs-set-to-achieve-msy-annex-iii/>

## Annex IV: Data used in the core analysis

The **ICES advice** was downloaded from the ICES website,<sup>83</sup> and where the initial advice was subsequently updated, the most up-to-date figures available at the time of the respective December Council meeting were used. The official advice figures for catch and landings (or 'wanted catch') were taken from the top of the individual advice documents. Whenever the 'wanted catch' figure was not provided at the top of the advice, the relevant figures were taken from the catch options tables. Further information extracted from the ICES advice to allow for a differentiated analysis by these criteria include: the advice basis (e.g. ICES MSY approach or ICES precautionary approach); the ICES stock data category (i.e. 1 to 6);<sup>84</sup> and the availability of catch options a) for a management plan, b) for  $F_{MSY}$  ranges and c) for mixed fisheries scenarios is available. Basic information on the current stock status regarding fishing mortality and spawning stock biomass in relation to available reference points was also extracted based on the table presented in the 'Stock and exploitation status' section.

The **proposed TACs** were taken from the Commission's consolidated TAC proposals for Northeast Atlantic TACs, rather than from the initial TAC proposal, in order to use the most up-to-date figures available at the time of the respective December Council. These figures, along with details of the area covered and information on whether the figures refer to the EU alone or include other countries, were entered into the database. Both the overall proposed TACs as well as the figures referring to the EU part of the TAC alone were included.

The **agreed TACs** (as well as equivalent information as described above regarding the Commission's proposal) were taken from the TAC and Quota Regulation published following the conclusion of the respective December Council meetings. Updates to this throughout the year were not considered, since the focus of this report is to evaluate the decisions taken at December Council.

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.

Information on **Member State positions in the lead-up to December Council** is based on the files received in response to ClientEarth's series of AIRs and confirmatory applications to the Council and the

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<sup>83</sup> <https://www.ices.dk/community/advisory-process/Pages/Latest-Advice.aspx>

<sup>84</sup> ICES (2018). Introduction to ICES advice. 13 July 2018. Section 1.2.5

[https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2018/2018/Introduction\\_to\\_advice\\_2018.pdf](https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2018/2018/Introduction_to_advice_2018.pdf)

Commission regarding the December Council processes in 2016, 2017 and 2018. A number of additional documents were identified through a targeted search of the Council's meeting calendar<sup>85</sup> for all meetings of the Council Working Party on Internal/External Fisheries Policy between October and December of these three years. The key files used are a) the so-called 'Council bible',<sup>86</sup> b) written comments from the Member State delegations submitted in the lead-up to December Council, c) the Commission's records of the meetings of the Council Working Party on Internal/External Fisheries Policy, and d) the Council's own records of these meetings. For further details please refer to section 5.1.

## Annex V: Results of the analysis of Member States' track record during the December Council processes in 2016-2018

Annex V can be found here: <https://www.documents.clientearth.org/library/download-info/taking-stock-2020-are-tacs-set-to-achieve-msy-annex-v/>

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<sup>85</sup> <https://www.consilium.europa.eu/en/meetings/calendar/>

<sup>86</sup> 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 from the Commission.

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