

## ClientEarth's response to the Commission's communication concerning a consultation on fishing opportunities for 2016 under the CFP

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

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ClientEarth welcomes the European Commission's Communication concerning a consultation on fishing opportunities for 2016 under the Common Fisheries Policy (CFP). We particularly support:

- The Commission's intention to propose TACs in line with achieving maximum sustainable yield (MSY) in 2016.
- The Commission's intention to adopt proposals for TACs on the basis of MSY where multiannual plans have become incompatible with the CFP.
- The Commission's aspiration to follow the precautionary approach in a "*systematic, predefined and transparent way*" in the absence of MSY assessment and proxies.
- The Commission's recognition that fishing opportunities for stocks falling under the landing obligation are to be fixed taking into account catches rather than landings, based on biological advice and in the understanding that any increases in fishing opportunities as a result of this change should not jeopardise the MSY objective or increase fishing mortality.

### State of Stocks

We acknowledge the positive developments that have been made in some areas of fisheries management in the EU. For example, the generally increasing number of stocks with full MSY assessments and quantitative advice, and the generally decreasing proportion of assessed stocks that are overfished. We are pleased to see in the Commission's Communication that fishing has generally progressed towards MSY in the Northeast Atlantic, North Sea and Baltic Sea since 2006. Particularly notable features of the trends between 2006 and 2014 in these areas are a) that the number of stocks inside safe biological limits has risen from 11 to 21; and b) that the number of stocks with quantitative catch advice rose (from 59 to 72). Unfortunately, the most recent years' assessments (between 2013 and 2014) show that the number of stocks

within safe biological limits decreased from 24 to 21, and the number of stocks where their status relative to reference points was unknown due to poor data increased from 41 to 47.

It is evident from the Communication that the state of the stocks in the Mediterranean remains dire, with 2013 data showing that 96% of the EU fish stocks in the Mediterranean are exploited at levels above MSY. This demonstrates the need for further measures in this area.

## Recommendations

### The European Commission's approach to MSY

Article 2(2) of the CFP basic regulation (the "Basic Regulation")<sup>1</sup> sets a clear objective for EU fisheries management.<sup>2</sup> The first paragraph of Article 2(2) contains a clear legal obligation for those acting under the CFP framework as a whole: that fisheries management shall aim to restore and maintain fish populations above MSY levels – what we refer to as the MSY objective. Such actors include the EU institutions. The second paragraph explains the tool through which the MSY objective is to be achieved: it is a requirement to adopt MSY-based exploitation rates, which are to be achieved by 2015 where possible and on a progressive, incremental basis by 2020 at the latest. Articles 16(3) and 16(4) of the Basic Regulation establish a clear legal obligation to set fishing opportunities (total allowable catches along with effort limits) in line with Article 2(2) of that regulation. This means that the Commission's proposals for fishing opportunities must also be in line with Article 2(2).

Unfortunately, there is a lack of clarity in the Commission's communication regarding their approach to the objective and accompanying requirement in Article 2(2). On a basic level, the Commission's references to MSY are vague. It is largely unclear throughout the Communication whether the Commission is referring to MSY in terms of fishing mortality, biomass or yield, which in turn results in a lack of clarity as to what the Commission means by "MSY objective", i.e. whether it refers to the first or second paragraph of Article 2(2). The Commission should take into account that the lack of clarity regarding references to MSY inevitably poses difficulties in responding in a detailed way to the Commission's approach as outlined in the Communication. It is also unclear in at least some cases whether the Commission means mortality rates or yield when referring to "*ranges of exploitation rates considered to be in accordance with MSY*", which may be contained in multiannual plans.

The Commission also presents an incorrect interpretation of the requirements of Article 2(2). It states that the fishing opportunities for 2016 will be fixed under the objectives of the new CFP, in particular "*the objective of bringing the impact of fishing fleets on the stocks (fishing mortality) in the shortest feasible time frame to the levels required to allow stocks to rebuild to biomass levels that can produce maximum sustainable yield*". This is not, in fact, in line with the objective set out in Article 2(2) of the Basic Regulation. Article 2(2) actually says that the CFP "*shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield*".

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<sup>1</sup> Regulation (EU) 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC

<sup>2</sup> See our legal briefing on MSY in the CFP for a detailed analysis <http://documents.clientearth.org/wp-content/uploads/library/2015-09-08-maximum-sustainable-yield-in-the-common-fisheries-policy-ce-en.pdf>

The word "above" in the objective is fundamental, since this means setting exploitation levels below  $F_{MSY}$ , the fishing mortality that should lead to the biomass that enables a stock to deliver the maximum sustainable yield ( $B_{MSY}$ ), including when ranges of exploitation ( $F_{MSY}$  ranges) are used. Fishing **at**  $F_{MSY}$  would, as a matter of scientific reality, only lead to biomass being above  $B_{MSY}$  50% of the time<sup>3</sup> (and then only for stocks which have recovered to levels very close to  $B_{MSY}$ ). So, fishing **at**  $F_{MSY}$  does not fulfil the MSY objective in Article 2(2).  $F_{MSY}$  is a limit, not a target, exploitation rate and only if the 2016 TACs are set **below**  $F_{MSY}$  can the requirements in Article 2(2) be met (though note the potential derogation and our associated recommendations considered below).

We note that there were many examples in 2014 where the Commission chose not to propose total allowable catches (TACs) for 2015 at these levels.<sup>4</sup> Indeed, the Commission proposed TACs for eight stocks that were over 50% higher than scientific advice.<sup>5</sup> An example is whiting in Area IIIa, where the Commission's proposal was almost five times higher than scientific advice, with ICES advising 212 tonnes and the Commission proposing 1,031 tonnes. The Council then set TACs for three of these stocks in line with the Commission's proposal, and set an even higher TAC for four stocks.<sup>6</sup> The Commission must therefore ensure that this year its proposals do not exceed scientific advice which allows for the restoration and maintenance of populations of harvested species above levels which can produce MSY.

## The timeframe for achieving MSY

ClientEarth welcomes the progress made towards increasing the number of stocks fished at levels corresponding to MSY and the Commission's intention to propose TACs in line with achieving MSY in 2016. However, as the 2015 deadline set out in Article 2(2) has already passed there must be a clear focus on ensuring the 2016 TACs are set in line with MSY-based exploitation rates.

Article 2(2) requires that in order to meet the objective set out in the first paragraph – that fisheries management shall aim to restore and maintain fish populations above MSY levels - "*the [MSY] exploitation rate shall be achieved by 2015 where possible and on a progressive, incremental basis at the latest by 2020 for all stocks*". The Commission refers to the shortest "*feasible*" time frame. It is not clear what this means in practice. There are no biological or ecological reasons that exploitation rates that would put stocks on the path to recovery could not be achieved almost immediately with the adjustment of fishing mortality, though there may be social and economic impacts from adopting MSY-based fishing opportunities in some fisheries. We would therefore recommend adopting a clear timeframe with a final deadline, within the 2020 limit stipulated by the Basic Regulation, for achieving the MSY exploitation rates.

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3 ICES Advice Basis 2015, ICES Advice 2015, Book 1

4 COM(2014)670 final Proposal for a Council Regulation fixing for 2015 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in certain non-EU waters and repealing Council Regulation (EU) No 779/2014

5 On the basis of ICES' advice sheets for 2014 [www.ices.dk/community/advisory-process/Pages/Advice-Search.aspx](http://www.ices.dk/community/advisory-process/Pages/Advice-Search.aspx) and STECF's Consolidated advice on fish stocks of interest to the European Union 2014 (STECF-14-24) [http://stecf.jrc.ec.europa.eu/documents/43805/861036/2014-12\\_STECF+14-24++Consolidated+Review+of+advice+for+2015\\_JRC93360.pdf](http://stecf.jrc.ec.europa.eu/documents/43805/861036/2014-12_STECF+14-24++Consolidated+Review+of+advice+for+2015_JRC93360.pdf)

6 Council Regulation (EU) 2015/104 of 19 January 2015 fixing for 2015 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union vessels, in certain non-Union waters, amending Regulation (EU) No 43/2014 and repealing Regulation (EU) No 779/2014 [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2015.022.01.0001.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.022.01.0001.01.ENG)

## Social and economic reasons for delay

This is referred to by the Commission where it states only where this would imply “*very large*” annual reductions of fishing opportunities that “*seriously jeopardise the social and economic sustainability of the fleets involved*”<sup>7</sup> would the Commission see a delay in achieving the objective beyond 2016 as acceptable.

The first question this raises is how to quantify a “*very large*” reduction. The Commission does not attempt to clarify this. Secondly, when would a reduction be seen to “*seriously jeopardise*” social and economic sustainability? This implies a situation that goes beyond fluctuations in the social and economic conditions of the fishing fleet that could be expected to be associated with, at least initially, a shift to MSY-based exploitation rates. It requires, rather, a significant risk to the future of the fleet. Yet the Commission has not at this stage provided a quantitative interpretation of this, which could result in variable and possibly wide application of the derogation from reaching  $F_{MSY}$  by 2015 and an unlevel playing field across EU waters. ClientEarth recommends that the Commission provides clarification on this issue as a matter of priority.

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

Article 2(2) stipulates that if the MSY-based exploitation rate is not achieved by 2015, it must be achieved “*on a progressive, incremental basis at the latest by 2020*”. The 2015 deadline has already passed and, as noted, the Commission’s intention is now to propose TACs in line with achieving MSY in 2016. However, the Commission also refers to “*a more gradual reduction of fishing opportunities to achieve MSY timely*”. If the Commission is to propose fishing opportunities that cause a delay in achieving MSY-based exploitation rates beyond 2016 it should give a concrete and evidence-based explanation as to why this is the case, and give a timeline showing how these exploitation rates will be achieved progressively and incrementally by 2020 at the latest. The explanation and timeline must show that the delay caused by the proposal will not result in a breach of Articles 2(2) and 16(4). This in turn would help to show that the Commission is respecting the principle of sincere cooperation, something it would fail to do if it proposed a Regulation that contravenes these articles. Such a justification was not provided in the 2015 TAC Regulation. The Commission should also request justification from the Council should the 2016 fishing opportunities not meet the required timescale.

Additionally, ClientEarth recommends that the European Commission issues guidelines regarding what reasons and evidence are adequate to justify a delay. This should make clear who is to provide evidence of this serious jeopardy to social and economic sustainability and in what form.

Overall, the use of any derogation from the 2015 deadline should be limited so that the vast majority of 2016 TACs are set in line with MSY.

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

## MSY and the interplay with multiannual plans

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

## Stocks without an MSY assessment

It is important that where approximate parameters (proxies) are used the TAC proposals are still in line with Article 2(2). However, ClientEarth recommends that continued effort be made to increase the number of stocks with MSY-based reference points that allow sustainable catch limits to be derived with a high level of certainty through quantitative assessments. This may require the expansion of data collection programmes.

We welcome the recognition by the Commission that the precautionary approach will be taken into account for stocks where there is an absence of MSY assessment and proxies cannot be developed. In addition, the aspiration to follow the precautionary approach in a "*systematic, predefined and transparent way*", in line with Article 2(2) of the Basic Regulation, is something ClientEarth welcomes. However, the lack of definitions and information as to how this method will be developed, what it will be based on and when it will be available is a concern raised by ClientEarth in last year's consultation response and one that does not appear to have been addressed. We recommend that the Commission develops a communication or a guidance document on how to implement the precautionary approach to fisheries management in line with Article 4(1)(8) of the Basic Regulation and Article 6 and Annex II of the UN Fish Stocks Agreement.

The Commission's Communication refers to an agreement in earlier years to maintain TACs unchanged for 26 stocks unless biological advice calls for adjustment and the Commission's intention to continue with this approach. This blanket approach is not in line with the MSY objective in the CFP or with the precautionary approach to fisheries management. The TAC for stocks with a presumption of stability should only have their TAC maintained at that set in previous years if it was set in accordance with the best available scientific advice. TACs for stocks in this category that had TACs set higher than scientific advice should be reduced so that they are in line with the best evidence of sustainable catch levels. Furthermore, we recommend that the Commission include the list of stocks in this category in future Communications to allow stakeholders to better access this information.

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

## TACs and the obligation to land all catches

ClientEarth wholly supports the Commission's recognition that TAC adjustments taking into account the change to reflect catches instead of landings need to remain compatible with achieving MSY, and that they should not increase fishing mortality rates. However, we do have concerns that the Commission intends to propose TAC adjustments where catches from a stock are "*predominantly*" under the landing obligation. This raises the question of how to define a stock as being "*predominantly*" under the landing obligation? There is a real risk that unless the entire stock is under the landing obligation, discarding will continue in some fisheries and the combination of quota uplift and continued discarding could mean that fishing mortality is higher than that required by Article 2(2). The risk of overfishing by giving quota uplift to stocks not fully covered by the landing obligation is compounded by the potential use of exemptions from the landing obligation. We recommend that the Commission provides clarification on how these risks will be accounted for in both the Commission's proposal for fishing opportunities and the opportunities that are set by the Council.

## Report on the state of the stocks

Whilst ClientEarth welcomes the Commission's request to STECF to report on the performance of the CFP, the Communication in its present form is not sufficient to qualify as a report on the progress of achieving MSY and on the situation of fish stocks, as required under Article 50 of the Basic Regulation. Data is at times incorrectly referenced, not referenced at all or not in accordance with that provided by STECF. A number of examples are provided below.

There is no concrete information on where stocks are in relation to biomass levels that can produce MSY as the Commission did not request this information from STECF. This information is essential for assessing whether the Article 2(2) objective of restoring and maintaining populations of fish stocks above biomass levels capable of producing the MSY is being met; the evaluation is inherently incomplete without this.

The Commission requested calculations based on only a limited selection of the indicators recommended by STECF as useful and/or necessary. In turn, the Commission then selected a further limited number of these indicators in its report. One particular indicator of note that was not reported upon by the Commission, although STECF had recommended it, was an "*indicator for the difference between agreed TACs and advised catches*",<sup>8</sup> to show the overshoot (or undershoot) of agreed TACs compared to the best available scientific advice<sup>9</sup> regarding sustainable catch limits. We agree that such an indicator is an essential element of any assessment of "*progress on achieving maximum sustainable yield and on the situation of fish stocks*", which is required by Article 50 of the Basic Regulation and should therefore be included in the Commission's report.

The decision of the Commission to request information on the number of stocks at/below  $F_{MSY}$  is a useful general indicator for whether the requirement in paragraph 2 of Article 2(2) is being complied with, however, the decision to not include the arithmetic mean of  $F/F_{MSY}$  restricts the assessment of progress towards this requirement. Without this quantitative indicator we cannot tell if  $F$  is progressively decreasing towards  $F_{MSY}$ , only whether it is above or below. Additionally,

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<sup>8</sup> STECF report "Reporting needs under the new Common Fisheries Policy" (STECF-14-23) page 7, [http://stecf.jrc.ec.europa.eu/documents/43805/850765/2014-12\\_STECF+14-23+-+Reporting+needs+under+new+CFP\\_JRC93936.pdf](http://stecf.jrc.ec.europa.eu/documents/43805/850765/2014-12_STECF+14-23+-+Reporting+needs+under+new+CFP_JRC93936.pdf)

<sup>9</sup> A principle of good governance in the Basic Regulation Article 3(c)

the decision to request information on the number of stocks inside/outside safe biological limits is insufficient to determine whether the objective in paragraph 1 of Article 2(2) is being met. "*Stocks within safe biological limits*" as defined in Article 4(1)(18) of the Basic Regulation means a high probability that the stock's fishing mortality is below  $F_{lim}$  and the estimated stock biomass above  $B_{lim}$ . These are both necessary indicators to prevent recruitment failure, but inadequate indicators for whether one of the main objectives of the CFP - to recover and maintain stocks above levels that can produce MSY - is being met.

The sampling frame set by STECF in its 15-04 report<sup>10</sup> is limited to data-rich stocks with MSY estimates. However, as referred to above, Article 2(2) of the Basic Regulation covers all harvested species. The Commission's report should reflect this, to the extent possible, by covering all of these species. We recommend that this is addressed in the next report.

Another limitation of the Communication is that the time series upon which the Commission is basing its report are vague and/or inconsistent. STECF provided data for 2003-2013 but the Commission refers to 2015 data without providing references as to where this has come from, which is essential in supporting any quantitative assessment. The data range that the Commission refers to on page 7 is 2002-2015, which is also at odds with the STECF range. This means it is unclear which years the Commission's conclusions are referring to and there are occasions upon which numbers do not correspond as they derive from different years. The Commission needs to clearly and consistently present information showing changes over time, as opposed to selectively highlighting evidence from particular years, in order to properly assess progress towards achieving MSY. We recommend that this approach is taken in future reports.

Data inconsistencies include a reference by the Commission within the body of the communication to 26 stocks being fished at levels corresponding to MSY in 2015 but then in the Annex referring to 32 out of 62 stocks fished at or below  $F_{MSY}$ , with a lack of information about how many are 'at' and how many are 'below'  $F_{MSY}$  (something that is required to fully assess the progress towards the Article 2(2) requirements). Additionally, Table 1 of Annex 1 refers to 16 stocks being outside safe biological limits whereas STECF reports that in 2013, 38 out of 62 stocks were outside safe biological limits. No reason is provided by the Commission for these disparities.

The lack of clarity in the Commission's reporting and the data inconsistencies mean that what is presented as an Article 50 report is lacking in transparency and does not provide sufficiently detailed information to either constitute an adequate assessment under Article 50 or for stakeholders to evaluate themselves the progress towards achieving the CFP's objectives.

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<sup>10</sup> STECF "Monitoring the performance of the Common Fisheries Policy" (STECF-15-04)

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

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