Fisheries Emergency Measures for the North East Atlantic short-beaked common dolphin in the Bay of Biscay

July 2019

1. Summary

The Northeast Atlantic common dolphin is considered to have an ‘Unfavourable-Inadequate’ conservation status for the European Atlantic. France, Spain and Portugal all classified common dolphin as having an Unfavourable status, with bycatch in fishing gear being the primary concern. Regional experts, the ICES Bycatch Working Group and ASCOBANS (Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas), have raised repeated concerns about the high and unsustainable level of bycatch, and these concerns have been reiterated by the International Whaling Commission Scientific Committee in 2019, which identified that bycatch threatens the conservation status of the population. More than 100,000 common dolphins may have been bycaught since bycatch was first identified in the 1990s.

Common dolphins have been entangled in fishing gear in high numbers for at least 30 years. Most recently, there was a dramatic increase in strandings along the French coastline from December 2018 to March 2019 (Peltier et al., 2019). Only a small percentage of dolphins that become bycaught in fishing gear will wash ashore. Given the Unfavourable status of common dolphins, and the uncertainty about number of populations in this region, this issue requires urgent and decisive action.

Therefore, we, a group of European NGOs, request that the European Commission take emergency measures based on article 12 of the Common Fisheries Policy, and with reference to Article 12 of the Habitats Directive. We ask that the European Commission takes the necessary measures to 1) close the fisheries that are responsible for the common dolphin bycatch in the North East Atlantic between the beginning of December 2019 and the end of March 2020, including, ad minima, the pair-trawl and the gillnet fisheries and 2) implement real time monitoring and dynamic mitigation measures on a permanent basis, as per the recommendations of the IWC Scientific Committee advice.

If these measures are not taken immediately as a matter of precaution, we risk a situation where the population becomes depleted and fisheries have to be closed throughout the region for a much longer period of time.
2. The problem

2.1 Background

Marine mammals have a significant effect on marine ecosystems, both through their prey consumption and through other, behaviour-driven roles (Kiszka et al., 2015). Cetaceans in particular provide significant ecological contributions to the functioning of the marine ecosystem (ICCB, 2017). Dolphins are top level predators, as such they are ecosystem engineers, feeding on old or sick fish and sustaining fish stocks. They are also organic ocean fertilisers, fertilising the ocean with their waste, increasing levels of phytoplankton, which in turn absorbs carbon from the atmosphere.

The common dolphin, however, is facing ever-increasing anthropogenic pressures in the Northeast Atlantic, the most significant of which is bycatch (ASCOBANS, in prep; Fernández-Contreras et al., 2010; Mannocci et al., 2012; Deaville, 2015; Peltier et al., 2016). Common dolphin interactions with fisheries were first identified in the early 1990’s (Tregenza et al., 1997; Tregenza and Collett, 1998). Peltier et al. (2017) calculated that since 1997 between 3,600 and 4,700 dolphins were bycaught per year on average. Peak years were 2001 and 2003, with more than 8,500 animals estimated bycaught yearly in fishing gear. These estimates, based on strandings data, demonstrate an unsustainable level of bycatch (Peltier et al. 2017). ICES advised that the most recent review of national reports under Regulation 812/2004 suggests that the bycatch of common dolphins may be unsustainable (ICES Advice, 2016) throughout the Celtic Seas, Bay of Biscay and Iberian Peninsula, due to bycatch in a range of fisheries (ASCOBANS, in prep; Peltier et al., 2019).

![Figure 1. ICES fishing areas in North East Atlantic (subareas 4 to 12)](image)

ICES (2018) advises that the total common dolphin bycatch in mid-water trawls and in static nets in subareas 7 and 8 (Celtic Seas and Bay of Biscay) in 2016 was likely to have been between 153 -
904 and 1607 - 4355 individuals, respectively. Combined, these figures represent approximately 0.5% and 1.6% of the common dolphin population present in the two subareas. The upper estimate for subarea 27.8 (2.0%) exceeds the (unprecautionary) threshold of 1.7% of abundance. This short-term threshold limit, set by ASCOBANS, is supposed to prevent population level impacts. The number of common dolphin bycatches reported in the literature for the Iberian Peninsula during recent years seems to exceed 1.7% (Saavedra et al., 2017, reported in ICES, 2018). The results from bycatch assessments using cetacean strandings show comparable numbers of bycaught common dolphin (ICES, 2018b).

Bycatch rates are influenced by a temporal and spatial overlap of animals and fishing gear, more so than purely specific characteristics of that gear (Mackay, 2011). In other words, bycatch rates increase when there is an increase of both the fishing effort and the presence of dolphins in the area. There appears to be a seasonal upward trend in stranding numbers of common dolphins, with a primary peak from December to March and a secondary peak in August and September. An upward trend in reported strandings along French, Irish and UK Atlantic coastlines, many of which have been reported as having been bycaught (Peltier et al., 2016; Deaville et al., in press) supports the assumption that there has been an increase in the number of dolphins bycaught in recent years in the Southern Celtic Seas and Bay of Biscay area.

The following extracts from the Global Fishing Watch map (Figure 2) show variations of fishing effort levels in the Bay of Biscay during the periods of higher bycatch rates.

The fisheries in this area, however, remain poorly monitored and so, are poorly understood (ICES, 2016; Peltier et al., 2017), therefore the impact of fishing cannot be fully quantified due to a lack of data on incidental capture rates in some fisheries, and limited sampling in other fisheries (Murphy et al., 2018).
al., 2013). As a result, bycatch is not assessed and it is not well mitigated. The International Whaling Commission Scientific Committee formally noted the limitations of cetacean bycatch estimates and mitigation programmes across the EU and recommended that improved monitoring programmes should be established (IWC SC, 2019). As well as having a population level impact, bycatch raises ethical and welfare issues, for individual dolphins and because of the number of dolphins bycaught.

While more monitoring and research are a high priority to clearly identify the problem fisheries, the situation is quite dynamic in terms of the distribution of dolphins and fishing effort and requires immediate and parallel action to reduce bycatch immediately. An approach to monitoring and research over several years, followed by lengthy considerations of management actions, will likely not respond quickly enough to be effective or provide the most appropriate response in this dynamic situation. Simultaneous monitoring and mitigation are required.

Unprecedented numbers of strandings occurred off the French coast in 2019, but in previous years they have occurred elsewhere in the region. So if attention is focused too narrowly, there is a risk of not dealing with the whole issue. Implementation of effective mitigation measures or reduction of fishing effort, rather than displacement of fishing effort is required, due to the wide range of common dolphins and the risk of moving the bycatch problem rather than solving it.

### 2.2 Country-specific situations

**France**

Between December 2018 to April 2019, 1,200 cetaceans washed ashore along the French coastline. 90% of those were examined by the national stranding scheme of which 93% were identified as common dolphins, 85% of them being diagnosed as bycatches (Peltier et al., 2019). These events occurred along the whole Atlantic seaboard, with higher numbers south of the river Loire, *i.e.* in the Bay of Biscay proper. This is more dolphins than have been observed bycaught in any year previously (Figure 3).

![Figure 3. French dolphin strandings from December to March from 2017 to 2019](image-url)
The years 2016-2018 display outstanding record numbers of stranded common dolphins in February or March or in both months and 2019 is going to follow the same trend with figures well above long term average in January, February and March.

In addition to the winter season, a secondary seasonal peak is also visible in late summer (Figure 4).

![Figure 4. French dolphin strandings per month from 2016 to 2018, showing primary peak in February to March and a secondary peak in August](image)

In 2016, 1342 cetaceans and 271 pinnipeds were recorded stranded along the French coasts. Bycatch remains the main cause of death for common dolphins, accounting for 76% of the examined carcasses in 2016 (ICES WGBYC, 2018).

At a recent working group on bycatch organised by the French government, observers on board pelagic trawlers reported on their recent observations:

- Some observers reported witnessing many captures but the frequency of captures seems to depend on certain factors, including type of twin trawl, length of the turn, motors, sonars etc.
- Technical problems were reported concerning the use of pingers, such as, among others, loading and corrosion.
- Despite legal requirements to report dolphin bycatch, extremely low numbers were reported. Observers explained that the fishermen were defiant of this type of reporting and that the online tool was reported by fishermen was not working properly. Observers, however, pointed out that paper forms had been made available to fishermen but they still had not declared incidental captures, despite repeated requests by observers.

_Ireland and United Kingdom_

Data from Ireland (Figure 5) and the UK (Figure 6) demonstrate the scale and the seasonality of the problem across the wider region. Stranding peaks occur in December to March and again from August to September (McGovern et al., 2018).
Since the mid-1970s, the relative frequency of strandings of common dolphins has increased significantly in the southwest of the UK (Table 1).

<table>
<thead>
<tr>
<th></th>
<th>Southwest England</th>
<th>Rest of UK</th>
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<tbody>
<tr>
<td>Strandings</td>
<td>1747</td>
<td>730</td>
</tr>
<tr>
<td>Necropsies</td>
<td>517</td>
<td>224</td>
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<tr>
<td>Bycatch</td>
<td>287</td>
<td>32</td>
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**Table 1.** Number of necropsied common dolphin bycatch cases from strandings in southwest England compared to the rest of the UK, 1990-2017

Seasonal peaks in strandings frequencies are apparent between December and March (Leeney et al., 2008). Of those subject to full veterinary necropsy to determine cause of death, between 1990 and 2006, 61% of cetaceans were determined to have died due to bycatch (Leeney et al., 2008). Common dolphin bycatch is very much a southwest UK issue, data (Table 1; Figures 6 and 7) are drawn from animals examined at necropsy only.

**Figure 6.** Common dolphin seasonal bycatch from UK and southwest England strandings necropsy data, 1990-2017
An EMFF funded project ‘Assessment of Species Catch Composition in Fisheries Posing a Risk to Biodiversity’ ran from 2017-2018 and will provide more detailed information\(^1\).

**Spain**

The numbers of short-beaked common dolphins captured annually by pair trawlers operating off Galicia (northwestern Spain) in 2001 and 2002 and the operational factors influencing the bycatch were evaluated using on-board observations. Hauling time, fishing depth, and season of the year were identified as the key factors involved in the incidental capture. The dolphins in this area were most vulnerable to trawls at night from May to September, around the continental shelf break. The same pattern applies to pair trawlers in the Bay of Biscay from January to March.

López et al. (2019) predicted a higher presence of common dolphins in areas where the trawl fisheries mainly operate. The main fisheries responsible for common dolphin bycatch in Galician waters are bottom trawlers, with estimations ranging from 394 to 900 common dolphins captured per year (López et al., 2003; Fernández-Contreras et al., 2010). López et al. (2003) estimated an annual mortality of 87 small dolphin species (most of them probably common dolphins) in gill-net fisheries in Galician waters, derived from interview data and observations from fishing vessels.

With an increase of 16% of the bottom trawl catches along the continental shelf in the last 10 years (official catches from Ribeira harbour, Galician Institute for Statistics, 2018), current harvesting regimes along the study area might exacerbate both fishery-induced bycatch mortalities and fishing pressure on dolphin prey availability, increasing the risk of a negative population effect (see López et al., 2019). Previous studies in the region showed that the percentage of stranded common dolphins due to fishery interactions has increased approximately 18% during the last 20 years (Murphy et al., 2013).

Portugal

ICES WGBYC (2018) reported that in 2016, 99 cetacean strandings were registered along the Portuguese mainland coast. As in previous years, for the same area, the indication was that about 30–50% mortality was attributed to confirmed bycatch in fisheries, and most attributed to fixed net fisheries (either gill/trammel nets). The common dolphin was the species of which most strandings have been recorded (n = 212; about 48% of total (n=445)) during the Life+ Marpro project from 2010–2016 along the southern Portuguese coast (Algarve). Mortality due to bycatch (as identified by post-mortem analyses) was recorded for 87 common dolphins, corresponding to 41.2% of the analysed animals (n = 212). Most stranded animals with evidence of bycatch showed signs of interaction with fixed gears, either gill or trammel nets. ICES WGBYC (2018) state that this incidence of strandings of common dolphins confirmed bycaught in static gears supports the necessity of reinforcing the at-sea monitoring of incidental catch in static gear in order to assess the relative impact of the different gears used in the area.

2.3 Distribution and habitat requirements

The common dolphin is abundant and widely distributed in the Northeast Atlantic, mainly occurring in deeper waters from Macaronesia and north-west Africa north to approximately 65°N latitude (although rare north of 62°N), west of Norway and the Faroe Islands (Reid et al., 2003; Murphy et al., 2008). Common dolphin occur westwards at least to the mid-Atlantic ridge (40°W) (Doksæter et al., 2008; Cañadas et al., 2009; Murphy et al., 2013; Ryan, 2013), but is variable to rare or absent in the eastern English Channel, the North Sea, Danish Belt Seas, and the Baltic Sea (Kinze, 1995; Evans et al., 2003; Reid et al., 2003; Camphuysen & Peet, 2006; Kinze, 2010). Short-beaked common dolphins also prefer waters altered by underwater geologic features such as underwater ridges and sea mounts where upwelling occurs, increasing nutrient concentrations and supporting higher productivity.

Oceanography plays an important role in determining the types of fisheries that exist within and surrounding the Bay of Biscay. The currents running along the continental shelves and the upwelling in some areas modulate the production in different areas and during different seasons. The currents also affect the migrations and viability of larvae. This latter effect can have profound impacts on recruitment in marine species. In this environment important fisheries develop for pelagic (anchovy and sardine) as well as benthic (hake, anglerfish, megrim, sole, Norway lobster) species. Other species living in the water column are also exploited and include scad and mackerel (Stockin, 2000). Important prey species for common dolphin in the Bay of Biscay include sardine, anchovy, sprat and horse mackerel (Meynier et al. 2008).

2.4 Population structure and status

There remains uncertainty about the population structure of common dolphins in this region. According to the low genetic differentiation of this species in the north Atlantic, it is commonly admitted that common dolphins can be managed as a single management area (Murphy et al., 2013), but according to ecological tracers (stable isotopes, fatty acids, metal tracers, stomach contents), two management areas should be considered for common dolphin management (Caurant et al., 2011; Lahaye et al., 2005; Pusineri et al., 2007). Two issues could arise from a lack of understanding of population structure. First, populations could be under-characterised; this would lead to smaller populations not gaining the protection they need. Second, populations could be mischaracterised or not represent biologically meaningful units at all (Leslie, 2018).
The IUCN Red List of Threatened and Endangered Species lists common dolphin as ‘Data Deficient’ at the European level. This lack of data affects our abilities to fully evaluate the anthropogenic risks to the population. Following the 2013 Habitats Directive reporting round, the species is considered to have an ‘Unfavourable-Inadequate’ conservation status for the European Atlantic. France, Spain and Portugal all classified the species as having an unfavourable status, with the issue of bycatch being the main concern. ASCOBANS has noted the need for monitoring the NE Atlantic common dolphin population and subsequently adopted a resolution for the conservation of common dolphins in September 2016, with the aim of restoring the population to a favourable conservation status.

2.5 Fishing gear types

The main fisheries identified as responsible by the French Observatory “Pelagis” are pair-trawls, bottom trawlers and gillnets. Pelagic freezer and high vertical opening trawls are also suspected (Peltier et al., 2016). The fish targeted by these fisheries include: seabass, hake, mackerel and cuttlefish. Historically seabass was the main problem; today the hake pair trawl fishery seems to be more important. Spanish bottom trawlers that include GOV and other very high opening trawls, seem to largely overlap with areas of bycatch mortality, as identified by reverse drift modelling of stranded dolphins.

Analyses conducted on the common dolphin stranding event in 2017 found that the relationship between the origin of stranded bycaught dolphins and fishing effort distribution during the different stranding events was strongly positive for French midwater pair trawlers, Spanish otter bottom trawlers and French Danish seiners (Peltier et al., 2019b). Beyond this diversity of gears, two characteristics appeared to be shared: targeting predatory fishes (sea bass and hake) in winter and using high vertical opening gears.

Some fisheries known to have high bycatch rates were not identified in the analyses, mostly because their fishing effort albeit important was widely distributed (Lewison et al., 2014). This is mainly the case for set gillnets and trammel nets landing hake and seabass (Peltier et al., 2019b). Gill-netters targeting hake also overlap with areas of high bycatch mortality. The development of ‘pêche-tout’ gill nets (basically a sole gillnet fitted on top with a hake gillnet); appears to coincide in time with the recent years of very high stranding numbers in the Bay of Biscay.

EU funded projects such as PETRACET (Pelagic TRAwl and CETaceans) and NECESSITY estimated annual fishing effort among the main French, Irish, UK, Danish and Dutch pelagic trawl fisheries in the Celtic Sea and Bay of Biscay (Northridge et al., 2006; NECESSITY Report, 2008). In the PETRACET project, most common dolphin bycatch was recorded in the French pelagic pair trawl fishery targeting sea bass (Morizur et al., 1999; Northridge et al., 2006).

2.6 Fishing effort in the area concerned

According to estimates from the French Fisheries Department, for the winter 2018-2019, the following vessels were operating in the Bay of Biscay:
- 662 bottom trawlers (including large vertical opening bottom trawls) for 2080 tides;
- 226 gillnets for 3400 tides and 6000 days of fishing efforts;
- 13 twin trawlers for 182 days of fishing efforts.

According to the Spanish Ministry of Agriculture, Fisheries and Food, the following vessels were authorised to operate in ICES blocks 8a, 8b, 8c, 8d and 8e, which includes the Bay of Biscay:
- 31 bottom trawlers;
- 57 fixed fishing gears;
- 5 bottom-set longliners.

According to estimates from Seafish, only 8 vessels from the UK operated in areas 8a and 8b in 2018, using gillnets and long lines, for a total of around 170 days at sea.

In 2016, the ICES Working Group on Bycatch of Protected Species (WGBYC) reported the following data for 2014 for ICES area 8 (days at sea)\(^2\):

- France:
  - Midwater otter trawl: 754;
  - Midwater pair trawl: 2523;
  - Set gillnet: 20408;
  - Trammel nets: 32380.
- Ireland:
  - Midwater otter trawl: 45.
- Netherlands:
  - Midwater otter trawl: 37;
  - Midwater pair trawl 2.
- Germany:
  - Midwater otter trawl: 89.
- Denmark:
  - Midwater otter trawl: 55.
- Spain:
  - Bottom otter trawl: 46,810;
  - Bottom pair trawl: 27,625;
  - Set gillnet: 89,150.
- UK:
  - Set gillnet: 249.

### 2.7 Regional collaboration and data requirements to eliminate bycatch

ASCOBANS is about to publish a Common Dolphin Action Plan that identifies bycatch as the most significant pressure, identifying action as an essential priority.

Common dolphins in urgently require a collaborative and funded transboundary management plan and strictly enforced Range State protections. Governmental programmes to monitor cetacean-fishery interactions and mitigation methods for common dolphins in the region need to be established, legally implemented and enforced as a matter of urgency.

Long-term, centrally-funded, cetacean population and bycatch monitoring programmes must be undertaken as a priority.

National bycatch monitoring should be reported upon annually, but many are not (Read et al., 2017).

More generally, accurate recording of fishing effort and gear type used is necessary to understand bycatch rates in different gear types.

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\(^2\) Fleet effort totals (days at sea) for 2014 by division, reporting member state and major gear type. The records are not comprehensive but are focused on those gear types that have been subject to monitoring by member states. Most complete will be the data for static nets (though missing some smaller vessel data) and for pelagic trawlers, both of which require monitoring under Regulation 812/2004, ICES Working Group on Bycatch of Protected Species (WGBYC), 1-5 February 2016, ICES WGBYC REPORT 2016, ICES CM 2016/ACOM:27.

The IWC Scientific Committee noted that a robust evaluation of the effectiveness of bycatch mitigation measures requires a combination of monitoring measures, including well-designed and effectively implemented observer/electronic monitoring programmes and stranding programmes:

I. **High intensity observer effort** is required to identify the fisheries involved, produce reliable estimates of total bycatch and determine the relative contribution from each fishery (the complexity of the situation and highly over-dispersed bycatch rates indicate that this may need to be 100% coverage with either observers or electronic monitoring);

II. **Full monitoring coverage** (either through observers or electronic monitoring) is required to facilitate compliance with and monitoring of ‘moving on’ procedures as a mitigation measure;

III. **Further consideration of the area covered** by the monitoring and mitigation provisions is needed and this should take into account the distribution of estimated bycatch locations identified in SC/68A/HIM11;

IV. Further work is needed to **specify a ‘moving on procedure’** including determination of the trigger for ‘moving on’ (e.g. level of bycatch) and the extent of the movement required - implementing full monitoring coverage that allows any ‘moving on’ procedure to be evaluated may remove the need for time area closures which would otherwise have to be considered;

V. **Mandatory participation** in the monitoring programme and agreeing to the mitigation measures should be made a condition for fishing in the area during the period January to March through the relevant European Union fisheries management processes. Should dedicated observation and mitigation not be acceptable, then spatial and temporal closures are required.

In addition, the IWC Scientific Committee:

1. advises that the ICES WGMME (2018) found that ‘Good Environmental Status’ had not been achieved in the Bay of Biscay due to unsustainable bycatch of common dolphin and that bycatch pressure must be addressed adequately in French waters during the next EU Marine Strategy Framework Directive (MSFD) cycle; and
2. recommends that the concurrent implementation of both monitoring and mitigation is required to ensure that bycatch is properly assessed and reduced in an appropriate timescale to meet MSFD obligations.

3. Emergency Measures

3.1 Proposed measures

To minimise the impact of bycatch on the North East Atlantic common dolphin, two levels of measures are proposed:

1) **Spatial and temporal closures**
2) **Year-round on board observations and mitigation**
3.1.1 Spatial and temporal closures

On the basis of the precautionary principle and Article 12 of Regulation 1380/2013 (the CFP), we ask that the European Commission takes the necessary measures to close the fisheries that are responsible for the common dolphin bycatch in the North East Atlantic between the beginning of December 2019 and the end of March 2020. This must include, ad minima, the pair-trawl and the gillnet fisheries.

Reduction, rather than displacement of fishing effort is required, due to the wide range of common dolphins and the risk of moving the bycatch problem rather than solving it.

Closures should remain in place each winter until effective bycatch prevention and conservation measures are implemented on a permanent basis by the Member States.

Dynamic, real-time closures should be considered once a predetermined level of bycatch has occurred in any fishery. These levels must be determined independently by regional cetacean bycatch scientists.

3.1.2 Year-round on board observations and mitigation – in the wider region

Common dolphin bycatch occurs all year and given the second strandings peak in August, year-round on board observations and mitigation are required. The following measures should therefore be implemented as a matter of urgency:

- Outside of the peak season from December to March, over the next 12 months, dedicated observations (observers and/or electronic monitoring) and a pre-agreed set of rules on a specific course of action as a response to observed dolphins at sea and to bycatch should be implemented. Fishing vessels should only fish in the region if they allow independent observations to be undertaken on board. If effective electronic monitoring is available, this may be sufficient to allow such actions based on observations by the fishermen. This would require an agreed code of conduct which would be backed up by the possibility of examining video records.

- Dedicated observers and/or electronic monitoring should be undertaken on all fleets that may be involved in common dolphin bycatch in the region year-round. This includes the sea bass, hake and tuna pair trawl fishery, set net fisheries (including bottom set gill-net in particular the combined sole-hake gillnets), pelagic freezer trawlers and high vertical opening trawl fisheries.

- Nets should only be set during daylight hours. If dolphins are observed by independent observations in the vicinity of the gear, nets should not be set and the vessel should move area.

- Fishing activities should halt and the vessel should move area as soon as any bycatch is observed.

- Considering the urgency of the situation, Member States should report monitoring measures to ICES in a specified format on a monthly basis and results should lead directly to concurrent mitigation actions.

- At the same time, a scientific panel should be set up to meet regularly and to look at the data as it comes in and to develop a robust, coherent regional mitigation plan to be implemented within and no later than 12 months. After 12 months a longer term monitoring and mitigation plan is in place, and funding is secured for implementation, as required based on the first 12 months of data.
3.2 Legal basis for the adoption of emergency measures

Two key pieces of EU legislation aim to protect all cetacean populations in EU waters against the harmful impacts of industrial fishing.

3.2.1 Habitats Directive

Article 12 of the Habitats Directive creates the obligation of Member States to establish a system of strict protection for cetaceans in their natural range. This prohibition is not subject to the capture or killing having a significant negative impact on the species concerned. All deliberate captures or killings of cetaceans in the wild are prohibited in the EU. Article 12(4) requires Member States to establish a system to monitor the incidental capture and killing of cetaceans and, in the light of the information gathered, take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

What is understood by ‘deliberate’ has been defined by the Court of Justice of the European Union (CJEU) in Commission v Spain, which establishes that “For the condition as to ‘deliberate’ action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.”

In Commission v Cyprus, the CJEU found that Article 12(1) imposes the obligation to Member States to go beyond the simple transposition of EU law and adopt a coherent and coordinated set of measures to enable the effective avoidance of all forms of deliberate capture or killing of specimens of animal species listed in Annex IV(a) of the Habitats Directive in the wild. This same interpretation of the duties of Member States under Article 12(1) of the Habitats Directive is found in Commission v Hellenic Republic and Commission v Ireland.

3.2.2 Article 12 of the CFP

Under Article 12 of the CFP, on duly justified imperative grounds of urgency relating to a serious threat to the conservation of marine biological resources or to the marine ecosystem based on evidence, the Commission, at the reasoned request of a Member State or on its own initiative, may, in order to alleviate that threat, adopt immediately applicable implementing acts applicable for a maximum period of six months.

Member States have failed to comply with their obligations to prevent and monitor bycatch of cetaceans as required to ensure that incidental capture and killing does not have a significant negative impact on these species, and as a result the North East Atlantic common dolphin population has currently an unfavourable conservation status; the on-going unsustainable rate of bycatch may lead to further negative population impacts (see section above).

Further, the IWC Scientific Committee (IWC SC, 2019) determined that:

- (a) new information reveals a complex situation with potentially multiple different fisheries involving both mobile and static gear contributing to the high levels of bycatch;

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3 Case C-221/04, Commission v Spain, para. 71
4 Case Case C-340/10, Commission v Cyprus, para. 59 - 62
5 Case C-518/04 Commission v Hellenic Republic, para. 16.
6 Case C-183/05 Commission v Ireland, para. 29, 30.
(b) the level of strandings associated with bycatch has been steadily increasing (2019 is the highest on record) - this highlights the urgency of the situation and adds to the previous concerns;

(c) the substantial and consistent peak from strandings from January-March suggests that the most intense observer effort is required during this period and in fact short concentrated periods (1-3 weeks) have been have contributed to more than half of the annual counts in 23 of the last 30 winter seasons;

(d) this suggests a short period of intense spatial and temporal overlap between dolphin distribution and the fisheries and hence that a ‘moving on procedure’ in line with the new EU Technical Measures Regulation might be an effective mitigation option; and,

(e) obtaining representative observer coverage had been problematic in the past because vessels could choose whether or not to accept observers.

It is our contention that the European Commission should make use of the powers granted by Article 12 of the CFP to prevent a decline in the North East Atlantic common dolphin population and irreversible impacts to the ecosystem it is part of.

4. Proposed measures to address possible social impacts

Funding has to be provided to establish programmes to develop and test alternative gear to replace gillnets. Such programmes have been conducted in Germany, Sweden and (other countries) to design and test gear such as pots, automated jigging machines and automated long-lines. Currently, the German Thünen Institute is developing more reflective types of gillnets, with the aim to prevent cetacean bycatch. The European Maritime and Fisheries Fund (EMFF) is one potential funding source for such programmes.

Funding to provide fishermen with Acoustic Deterrent Devices can also be sought from the EMFF, or similar sources. It is very likely that the costs would have to be removed from fishermen for the regulation to be effective.

Funding should also be provided to increase co-operation and dialogue between fishermen, fisheries scientists, developers of alternative gear types, managers, and NGOs. All stakeholders must be involved in the process to transform local and regional fisheries, with the aim to minimise and where possible eliminate cetacean bycatch, as required under the Technical Conservation Measures.

5. Signatories

Monica Verbeek, Executive Director, Seas At Risk
Chris Butler-Stroud, Chief Executive, Whale and Dolphin Conservation
Douglas A. Rouley, Chief Counsel, ClientEarth
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Jan Isakson, Director, The Fisheries Secretariat
Lydia Chaparro Elias, Environmental Consultant, Fundació ENT
Michel Dubromel, President, France Nature Environnement
6. Reference


