

1. Identity and contact details

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2. Infringement of EU Law

2.1 Authority you are complaining about

The governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain, Sweden and The United Kingdom.

2.2 Which national measures are in breach of EU law and why?

By failing to establish a system to monitor the incidental capture and killing of whales, dolphins and porpoises (collectively known as 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, the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain, Sweden and The United Kingdom are in breach of Article 12(4) of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive).

Further, by failing to implement the measures required under Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 (Regulation 812/2004)¹ and/or those that – on the basis of the best available science– would reduce the capture, killing and disturbance of cetaceans, the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain, Sweden and The United Kingdom are knowingly and willingly allowing fishing activities that cause the bycatch of cetaceans to take place and are thus in breach of Article 12(1) of the Habitats Directive.

2.3 Describe the problem, providing facts and reasons for your complaint

Bycatch is the greatest global threat to the conservation of cetaceans². It is also the greatest threat to cetaceans in Europe³, where incidental catches are of serious concern for a number of cetacean species. Commercial fishing is the last human activity targeting wildlife (fish) on a grand scale where slaughter includes incidental killing of other large sapient wildlife on such a regular basis.

This complaint focuses on the OSPAR region of the Northeast Atlantic. The governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom have failed to establish a monitoring system capable of informing them of what further research or conservation measures are required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned. These same countries have also failed to take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact

¹ In June 2019 Regulation 812/2004 was repealed and replaced with Regulation on Conservation of fisheries resources and the protection of marine ecosystems through technical measures

² Reeves RR, McClellan K, Werner TB. (2013). Marine mammal bycatch in gillnet and other entangling net fisheries, 1990, 2011, End. Sp. Res. 20, 71–97.

³ <https://www.ascobans.org/en/species/threats/bycatch>

on cetaceans in their waters. Therefore, these governments are in breach of Article 12(4) of the Habitats Directive.

Member States must also establish a system of strict protection for cetaceans in their natural range prohibiting all forms of deliberate capture or killing of specimens of these species in the wild and deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration.

The Court of Justice of the European Union (CJEU) has defined “deliberate” as acceptance of the possibility⁴ of the disturbance, capture or killing of a specimen belonging to a protected animal species. The CJEU has also clarified that Article 12(1) imposes the obligation on Member States to go beyond the simple transposition of EU law and implement concrete, specific, coherent and coordinated measures of a preventive nature to enable the effective avoidance of all forms of deliberate capture or killing and disturbance of specimens of animal species listed in Annex IV(a) of the Habitats Directive in the wild.⁵

Regulation 812/2004 lays down measures to monitor and minimise the incidental catches of cetaceans. As will be explained in detail in section 2.4 of this complaint, these measures are the minimum expected from Member States to comply with the obligations under Article 12 of the Habitats Directive in relation to cetaceans.

None of the governments of these Member States has implemented concrete, specific, coherent and coordinated measures that prevent the killing, capture or disturbance of cetaceans in their waters or by their fishing fleets.

The governments have even failed to comply with their obligations under Regulation 812/2004, which are the minimum expected from Member States in relation to their duty to monitor and minimise the likelihood of killing, capture or disturbance to cetaceans by the fleets flying their flag. The governments of these Member States continue to allow the fishing activities that cause the bycatch of cetaceans by their vessels and/or in their waters.

Therefore, the governments of these Member States have breached Article 12(1) of the Habitats Directive by accepting the possibility of the disturbance, capture or killing of cetaceans as a consequence of their inaction to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting all forms of deliberate capture or killing of specimens of these species in the wild and deliberate disturbance of these species.

A summary of Member State failures to comply with their obligations under Council Directive 92/43/EEC and Council Regulation (EC) No 812/2004 for the incidental capture and killing of cetaceans is provided (Table 1).

⁴ Case C-221/04, *Commission v Spain*, para. 71

⁵ Case C- 340/10 *Commission v Cyprus*, para. 59 - 62

Table 1. Summary of Member State failures (X) to comply with Council Directive 92/43/EEC and Council Regulation (EC) No 812/2004 for the incidental capture and killing of cetaceans

* failure to provide an annual report for each of the last 5 years

Member State	Habitats Directive		Regulation 812/2004				
	Arts. 12(1)(a), (b),(3)	Art 12(4)	Art 2	Art 4(1)	Art 4(2)	Art 5	Art 6*
Belgium	X	X	X	X	?	X	
Denmark	X	X		X	?	X	
Estonia	X	X		X	?	X	
Finland	X	X		X	?	X	X
France	X	X	X	X	?	X	
Germany	X	X	X	X	?	X	
Ireland	X	X	X	X	?	X	
Latvia	X	X		X	?	X	
Lithuania	X	X		X	?	X	X
The Netherlands	X	X			?		
Poland	X	X	X	X	?	X	
Portugal	X	X		X	?	X	
Spain	X	X	X	X	?	X	X
Sweden	X	X	X	X	?	X	
United Kingdom	X	X			?		

The impact of bycatch on the populations of cetaceans in EU waters

Bycatch is the incidental entanglement of cetaceans in fishing gear. Bycatch can occur in all types of fishing gear where cetaceans and fishing activities overlap; however, some gear types are especially problematic for particular species. For example, static gillnets are known to be responsible for the majority of cetacean deaths globally⁶, and gillnets, including bottom-set gillnets, tangle nets and drifting gillnets, are responsible by far for the majority of harbour porpoise bycatch in European waters⁷. In addition, various types of trawling, including but not limited to pair trawling, have a serious impact on common dolphins in the Northeast Atlantic and static creel fishing on humpback⁸ and minke whales⁹ in UK waters.

Bycatch as a cause of mortality of cetaceans and its population level impacts

When a cetacean swims into a net, rope or fishing line, they can quickly become entangled. Like humans, they breathe air, and so a race-against-time begins. If they can't surface quickly enough,

⁶ https://www.int-res.com/articles/esr_oa/n020p071.pdf

⁷ North Atlantic Marine Mammal Commission and the Norwegian Institute of Marine Research. (2019). *Report of Joint IMR/NAMMCO International Workshop on the Status of Harbour Porpoises in the North Atlantic*. Tromsø, Norway

⁸ http://www.crru.org.uk/cust_images/pdfs/ryan_et al IWC.pdf

⁹ <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.5013&rep=rep1&type=pdf>

they suffocate. In their desperation to escape, some tear muscles, break teeth, and sheer off fins. But the more they struggle, the more entangled they can become. The majority of bycaught cetaceans asphyxiate in the nets¹⁰. Some who break free carry pieces of gear wrapped around their heads, flippers, bodies or tails; swimming for months with the gear entrapping them and sometimes sawing into their flesh and even bones until they die from resulting infections or starvation¹¹.

Legislation sets objectives for maintaining healthy marine mammal populations and yet there is no clear and accepted level of impact that can be determined as a 'population-level impact'. The goal of policy should be to prevent a population from declining, and variables include the amount of decline and the duration over which decline is measured. Rarely are data adequate to calculate these measures adequately, and objectives are likely to vary from species to species, depending on current status, life span and other factors. Threats are typically considered in isolation, even where multiple threats (such as chemical pollution and bycatch) occur.

Uncertainty remains about the appropriate management unit scale for a number of cetacean species. For example, recent discussions on assessment units at a North Atlantic harbour porpoise workshop suggested the revision of the Celtic and Irish Seas and West Scotland assessment unit previously advised (NAMMCO and IMR, 2019).

The Technical Measures Regulation requires Member States to put in place mitigation measures to 'minimise and where possible eliminate' bycatch of species afforded strict protection under Habitats Directive. This provides a legal requirement to implement the long-stated objectives of ASCOBANS that 'the general aim should be to minimise (i.e. to ultimately reduce to zero) anthropogenic removals within some yet-to-be-specified time frame, and that intermediate target levels should be set'.

There is documented bycatch, with evidence of population-level impact on populations of Celtic Sea, English Channel and Bay of Biscay common dolphin¹²; Baltic¹³, Iberian¹⁴ and North Sea harbour porpoise; and Andalusian bottlenose dolphin¹⁵, as well as humpback whales in UK waters¹⁶.

There is documented bycatch, with insufficient monitoring to determine level of impacts on populations of harbour porpoise, common dolphin, bottlenose dolphin, striped dolphin, long-finned pilot whale, white-beaked dolphin, white-sided dolphin, Risso's dolphin, fin whale, false killer whale, beaked whale and other cetacean populations in EU waters.

¹⁰ Soulsbury CD, Iossa G, Harris S. (2008). The animal welfare implications of cetacean deaths in fisheries. A University of Bristol report to the Whale and Dolphin Conservation Society (WDCS)

¹¹ Dolman SJ & Moore MJ. (2017). Welfare Implications of Cetacean Bycatch and Entanglements. 10.1007/978-3-319-46994-2_4.

¹² https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2016/2016/Protected_species_bycatch.pdf

¹³ https://www.ascobans.org/sites/default/files/document/ASCOBANS_JastarniaPlan_MOP8.pdf

¹⁴ <https://www.ascobans.org/en/project/understanding-harbour-porpoise-phocoena-phocoena-and-fisheries-interactions-north-west>

¹⁵

http://www.ices.dk/sites/pub/Publication%20Reports/Advice/2015/2015/Bycatch_of_PETS_Advice_2015.pdf

¹⁶ http://www.crru.org.uk/cust_images/pdfs/ryan_etal_IWC.pdf

Population level impacts can be particularly devastating for some small (and often coastal) populations, such as bottlenose dolphins, as removal of just one or a few individuals can be expected to have a population level impact. This is also true of harbour porpoises, where small, distinct and endangered populations exist, such as in the Baltic proper and Iberian Peninsula. In the case of large and wide-ranging populations, such as common dolphins, many thousands of individuals are being killed each year and, as a result, the status of the population is threatened – this is a population level impact.

In Table 2 (below), we have compiled the data on levels of impacts of bycatch on cetaceans in EU waters. Where enough evidence has been collected to indicate a population level impact, this is identified as ‘population’ in the table. Where inadequate bycatch monitoring data are collected, a lack of research or lack of access to the appropriate fisheries, these populations have been identified as ‘inadequate data’.

Table 2. Non-exhaustive list of scientific evidence of concerning impact of cetacean bycatch in EU waters

Region	Sea	Member State(s)	Species	Gear	Level of impact	Reference
Baltic Sea	Baltic Proper	Germany, Poland, Sweden Latvia, Lithuania, Finland	Harbour porpoise	Static nets	Population	NAMMCO & IMR, 2019; ICES Advice, 2015; 2010; 2008; Benke et al., 2014; Scheidat et al., 2008;
North Western Waters	Bay of Biscay, English Channel	France, Spain, United Kingdom,	Common dolphin	Various, Incl trawls - pair, high opening	Population	Peltier et al. 2016; ICES Advice, 2016; 2010
South Western Waters	Iberian Peninsula	Portugal, Spain	Harbour porpoise	Various (purse seine, trawl and longline, polyvalent and beach seine)	Population	NAMMCO & IMR, 2019; Llavona Vallina, 2018; Read, 2016; Pereira, 2015; Read et al., 2013; López et al., 2012; López-Fernández and Martínez-Cedeira, 2011; ICES Advice, 2010; López et al., 2003, 2002; Sequeira, 1996;

North Western Waters	Celtic and Irish Sea	Ireland, United Kingdom (SW England)	Harbour porpoise	Static nets	Population (likely declining)	NAMMCO & IMR, 2019; ICES Advice, 2018, 2015; OSPAR, 2017
South Western Waters	Andalusia	Spain	Bottlenose dolphin	Unknown	Population	ICES Advice, 2015, 2010
North Western Waters/ North Sea	Scottish waters	United Kingdom	Humpback whale	Creel gear	Population	Ryan et al., 2016
North Sea	SE England	United Kingdom	Harbour porpoise	Static nets	Population?	Calderan, 2019
North Sea	North Sea and English Channel	Belgium, Denmark, France, Germany, Netherlands, Sweden, United Kingdom	Harbour porpoise	Static nets	Insufficient data	ICES Advice, 2014; ASCOBANS North Sea Steering Group, 2014, 2018
North Western Waters	West Scotland / Ireland	United Kingdom	Harbour porpoise	Static nets	Insufficient data (likely declining)	NAMMCO & IMR, 2019
North Western Waters/North Sea	UK waters	United Kingdom	Minke whale	Creel gear, Ghost netting	Insufficient data	Northridge et al., 2010
North Western Waters	Celtic Sea	Ireland, United Kingdom	Common dolphin	Static nets	Insufficient data	Reeves et al., 2013; Tregenza et al., 1997
North Western Waters	Celtic Sea	Ireland, United Kingdom	Striped dolphin	Static nets	Insufficient data	Reeves et al., 2013
North Western Waters	Bay of Biscay, Celtic Sea	France, Ireland, Spain, United Kingdom	Common dolphin	Historic tuna drift nets	Insufficient data	Reeves et al., 2013; Rogan and Mackay, 2007
North Western Waters	Bay of Biscay, Celtic Sea	France, Ireland, Spain, United Kingdom	Striped dolphin	Historic tuna drift nets	Insufficient data	Reeves et al., 2013; Rogan and Mackay, 2007
North Western Waters	Bay of Biscay	France, Ireland, Spain, United Kingdom	Striped dolphin	Static nets	Insufficient data	Morizur et al., 1999
North Western Waters	Irish waters	Ireland	Minke whale	Trammel nets	Insufficient data	Cosgrove et al., 2013

South Western Waters	NW Spain	Spain	Common dolphin	Pair-trawls	Insufficient data	Fernández-Contreras et al., 2010
South Western Waters	Portuguese waters	Portugal	Common dolphin	Purse-seine nets	Insufficient data	Marçalo et al., 2015

Bycatch as a cause of disturbance for cetaceans

Under Article 12(1)(b) and 12(3) of the Habitats Directive, the deliberate disturbance of cetaceans is prohibited.

The Habitats Directive does not contain a definition of what disturbance of protected species is, but the Commission has provided guidance on its meaning:

“Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (e.g. by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources).

(...)

Disturbance need not directly affect the physical integrity of a species but can nevertheless have a direct negative effect. Disturbance is detrimental for a protected species e.g. by reducing survival chances, breeding success or reproductive ability. A species-by species approach needs to be taken as different species will react differently to potentially disturbing activities.”¹⁷

For each dolphin that dies due to bycatch, others survive and suffer physiological disturbance from such interactions. Pathological data indicate that the majority of bycaught cetaceans asphyxiate in the nets. Other bycaught cetaceans can suffer a variety of injuries and high levels of stress during incidental capture. Documented effects, for those that escape or are released from fishing gear, include behavioural alterations, physiological and energetic costs and associated reductions in feeding, growth or reproduction (i.e. fitness), leading to reduced long-term survival.¹⁸

The injuries suffered by bycaught cetaceans can include skin abrasions, amputations, broken teeth, broken bones, punctured or collapsed lungs and haemorrhaging (see Figures 1 and 2, below). The degree and severity of injuries varies with the method of fishing and species.¹⁹ The wide range of recorded injuries, along with the potential for panic associated with forced submersion, indicate that

¹⁷ European Commission. (2007). Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 2/43/EEC, p.

http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf

¹⁸ Dolman SJ & Moore MJ. (2017). Welfare Implications of Cetacean Bycatch and Entanglements. DOI: 10.1007/978-3-319-46994-2_4

¹⁹ Soulsbury CD, Iossa G, Harris S. (2008). The animal welfare implications of cetacean deaths in fisheries. A University of Bristol report to the Whale and Dolphin Conservation Society (WDCS)

the welfare of bycaught cetaceans is, individually and collectively, very poor. The degree and severity of injuries vary with the methods of fishing method undertaken. Commercial fishing is the last human activity targeting wildlife (fish) on a grand scale where slaughter includes incidental killing of other large sapient wildlife on such a regular basis.²⁰

Figure 1. External injuries associated with bycatch recorded from UK post-mortem data from 1999 to 2005. Reproduced from Soulsbury et al. 2008

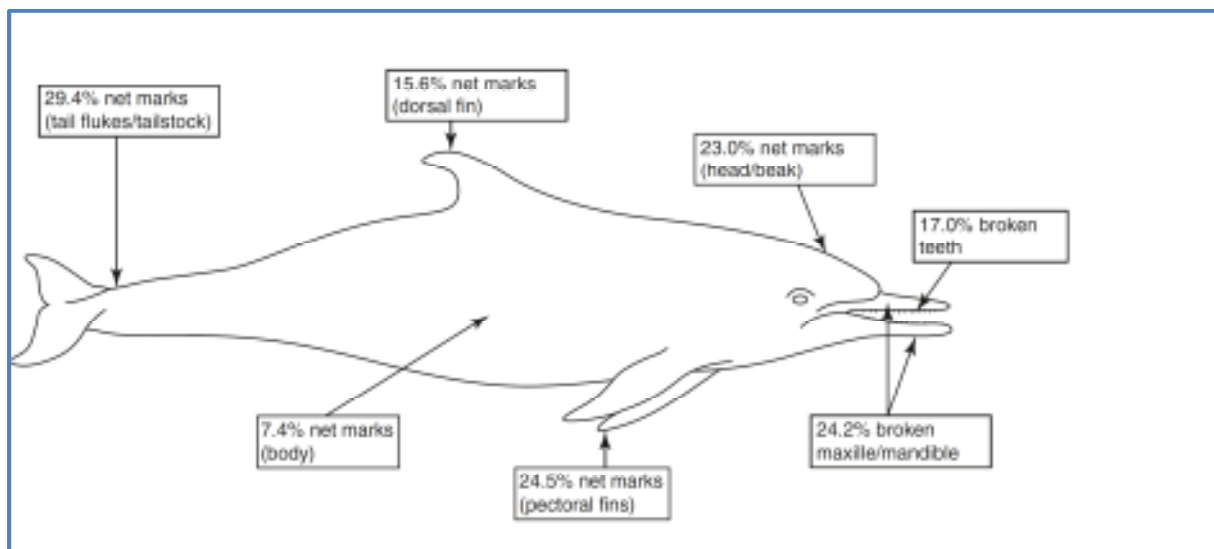
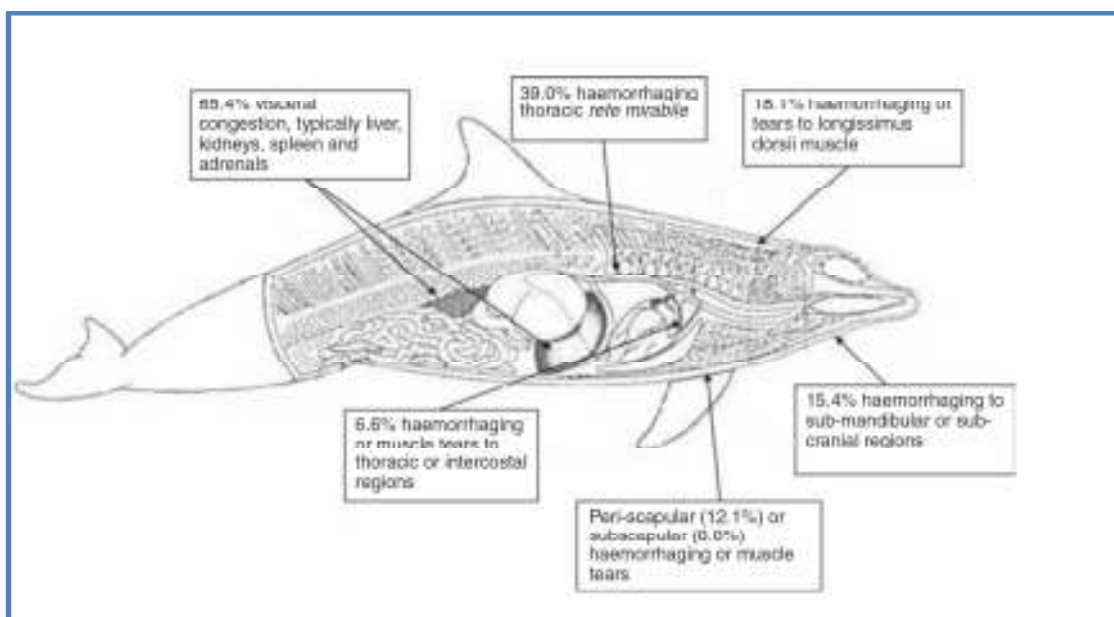


Figure 2. Internal injuries associated with bycatch recorded from UK post-mortem data from 1999 to 2005. Reproduced from Soulsbury et al. 2008



²⁰ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6262414/>

In addition, the disturbance effects of bycatch are not limited to the individual cetaceans who suffer the bycatch, as they can have a knock-on effect on the transmission of ecologically important knowledge within a population. Cetaceans have complex social lives and different individuals within a population can have specific roles, which enable them to share important information, for example, about the location of food or safe places for rearing young.

The importance of baseline and bycatch monitoring

Cetacean surveillance monitoring is a requirement under Habitats Directive Article 11. Surveillance monitoring is a fundamental tool for ensuring the effectiveness of the conservation mechanisms used to achieve and maintain favourable conservation status, including cetacean bycatch. Both baseline monitoring of conservation status (an obligation arising from Article 11 of the Habitats Directive) and bycatch monitoring (an obligation under Article 12 of the Habitats Directive) are necessary to collect sufficient data to understand the pressures that cause mortality and disturbance of cetaceans and affect their population levels. Such information is required to design adequate conservation measures to protect the cetaceans in EU waters. The European Court of Justice ruled against Ireland in 2007. The Commission criticises Ireland for failing to put in place a comprehensive, adequate, ongoing monitoring programme for cetaceans that could enable a system of strict protection for that species to be devised.

Were robust and science-led monitoring to occur on board the fishing fleets, bycatch levels could be calculated with confidence and mitigation measures implemented that are commensurate with the level of risk.

The ICES' Bycatch Working Group (WGBYC) Advice continually cite the shortcomings in bycatch data collection to accurately reflect the magnitude of cetacean bycatch in European waters.²¹

Some Member States do more bycatch monitoring than others. The UK is the only Member State with a dedicated bycatch observer programme however that is insufficient to comply with the requirements of Article 12(4) of the Habitats Directive. Other Member States use non-dedicated observers through the Data Collection Framework (DCF ((EC) No 2017/1004) and DC-MAP (Commission Decision 2016/1251/EU). WGBYC remains concerned about the likely negative bias in PETS (Protected, Endangered and Threatened Species) data recorded by non-dedicated observers and therefore discussions on training for on-board observers were recommended, as were improved on-board sampling protocols, training of bycatch observers and regional design of sampling programmes.²²

WGBYC's ability to evaluate the magnitude of bycatch mortality of cetaceans (and other protected species or species of possible concern) continues to be hampered by limited availability of accurate total fishing effort from relevant European waters for gear types covered by Regulation 812/2004. Consequently there continues to be considerable uncertainty in the representativeness of total fishing effort reported in the reports submitted to the European Commission by the Member States

²¹ <https://www.ices.dk/community/advisory-process/pages/latest-advice.aspx>

²² https://nammco.no/wp-content/uploads/2018/10/ices_wgbyc_final_-2018.pdf

under Regulation 812/2004. WGBYC continues to highlight the inconsistent submission and content of annual reports provided by some MS and the shortcomings of Regulation 812/2004 to accurately reflect the magnitude of cetacean bycatch in European fisheries.¹⁷

At-sea monitoring is essential, but must be conducted at adequate levels to provide a representative sample of data. An example of how poor monitoring affects the possibility of understanding the pressures affecting cetaceans and adopting adequate and effective conservation measures can be found in relation to the North East Atlantic population of common dolphin. In the winter of 2018-2019, more than 1,200 dolphins washed ashore along the French coastline, most showing signs of having been entangled in fishing gear. This is more dolphins than have been observed bycaught in any year previously. The high strandings rates of common dolphin indicate a substantial bycatch problem, likely causing population level impacts²³, beyond pair-trawls and gillnets, it is not clear exactly which fisheries are contributing to this, although pelagic freezer and high vertical opening trawls are suspected.²⁴

2.4 Breaches of the EU law in question

This complaint focuses on the breaches by the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain, Sweden and The United Kingdom of the following obligations under Article 12 of the Habitats Directive:

- a) Obligation to establish a system to monitor the incidental capture and killing of cetaceans [Art. 12(4)],
- b) Obligation to, in light of the information gathered by the monitoring system, 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 [Art. 12(4)],
- c) Obligation to establish a system of strict protection for cetaceans, prohibiting all forms of deliberate disturbance, capture and killing of cetaceans in the wild [Arts. 12(1)(a), 12(1)(b) and 12(3)].

2.4.1 Relationship between Council Regulation (EC) No. 812/2004 and Article 12 of the Habitats Directive

Regulation 812/2004 establishes specific measures to monitor and minimise bycatch of cetaceans²⁵. These were divided into four components by ASCOBANS:

²³ Peltier H, Authier M, Deaville R, Dabin W, Jepson PD, Van Canneyt O, Daniel P, Ridoux V. (2016). Small cetacean bycatch as estimated from stranding schemes: The common dolphin case in the northeast Atlantic. *Environmental Science & Policy*, 63, 7-18.

<http://www.sciencedirect.com/science/article/pii/S1462901116301514>

²⁴ Ibid.

²⁵ The European Parliament and Council have reached a provisional agreement on a proposal [2016/0074(COD)] for a Regulation that has been adopted and Regulation 812/2004 repealed

“Reg. 812/2004 had four components: mitigation, monitoring, reporting and phasing out of driftnets in the Baltic Sea:

- 1) Mitigation in defined fisheries
 - Requirement of using ADDs with defined technical specifications for vessels with an overall length of 12 m or more in specific fisheries, geographic areas and periods of the year – Ensuring that ADDs are fully operational when setting the gear
 - Monitoring and assessing the effects of ADDs use over time
- 2) Monitoring in defined fisheries - not required to use ADDs
 - Monitoring with a specific effort level vessels with an overall length of 15 m or more in defined fisheries,
 - Establishing pilot monitoring projects for vessels below 15m in the same fisheries
- 3) [Phasing out of the use of driftnet in the Baltic Sea]
- 4) Annual reporting to the EU
 - Annual reporting to the Commission, by June 1, for the preceding year.”²⁶

In July 2019, Regulation 812 was repealed and replaced by Regulation on the Conservation of fisheries resources and the protection of marine ecosystems through technical measures (2016/0074(COD)).²⁷ The Technical Measures Regulation has replaced the four components above. Mitigation and monitoring are required in the same defined fisheries.

The environment is an area of shared competence under Article 4(2) of the Treaty on the Functioning of the European Union (TFEU).

Article 5 (4) of the Treaty on European Union (TEU) establishes that “under the principle of proportionality, **the content and form** of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”

Article 5 (4) of the TEU establishes that “under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

From these principles we can understand that the EU will prefer instruments that give more freedom and discretion to Member States when this is possible.

²⁶ ASCOBANS. (2015). Expert Workshop on the Requirements of Legislation to Address Monitoring and Mitigation of Small Cetacean Bycatch. p. 5. Available at: https://www.ascobans.org/sites/default/files/document/ASCOBANS_WS_Bycatch_2015_Doc.03_Compilation-Recommendations-Bycatch.pdf

²⁷ <https://data.consilium.europa.eu/doc/document/PE-59-2019-INIT/en/pdf>

According to Articles 288 and 297 of the TFEU, regulations are directly applicable in all Member States and come into force solely by virtue of their publication on the official journal of the EU. Hence, they do not allow Member States room for discretion.

Article 193 of the TFEU allows Member States to introduce protective measures that are more stringent than those at EU level, subject to compatibility with other EU treaties and legislation.

Therefore, when the EU adopts a Regulation in an area where the Member States have duties under other instruments like Directives, it must be understood that compliance with the Regulation is the bare minimum expected from the Member States.

In this case, Article 12 of the Habitats Directive establishes a series of obligations on Member States, for the strict protection of the species listed in Annex IV of the Directive. All species of cetaceans are strictly protected.

In numerals 1 and 2, Regulation 812/2004 cites the need for the Common Fisheries Policy to be consistent with other Community policies, in particular with environmental policy, and the obligations under Article 12 of the Habitats Directive as the justification for the adoption of the Regulation. In addition, the document *Protecting whales, dolphins and porpoises against incidental catch* (which summarises Regulation 812/2004) published by the EU explains, “Whales, dolphins and porpoises are all protected under the EU’s Habitats Directive which requires EU countries to undertake surveillance of the conservation status of these species. The EU has therefore taken specific measures to ensure that the impact of fishing activities is minimised.”²⁸

It shall be understood that compliance with the obligations under Regulation 812/2004 are the minimum expected from Member States in relation to their duty to monitor and minimise bycatch of cetaceans. Not complying with these obligations will in consequence result in a breach of Article 12 of the Habitats Directive.

2.4.2 Obligations under Article 12(4) of the Habitats Directive

Article 12(4) of the Habitats Directive

“Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall 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.”

2.4.2.1 Obligation to establish a system to monitor the incidental capture and killing of cetaceans [Art. 12(4) of the Habitats Directive]

The first obligation in relation to cetaceans for Member States under Article 12(4) of the Habitats Directive is to establish a monitoring system capable of informing the Member States of the further

²⁸ Publications Office of the European Union, 2016. *Protecting whales, dolphins and porpoises against incidental catch*. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:l66024>

research or conservation measures required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned. To better understand the conservation measures that are required to be undertaken, both population monitoring under Article 11, and bycatch monitoring under Article 12(4), need to be undertaken in parallel, to collect sufficient data to understand the pressures that cause mortality and disturbance of cetaceans and affect their population levels.

In relation to the obligations under Article 12(4), in 2015 ASCOBANS explained that “because the stated aim of Article 12 of the Habitats Directive is to “ensure that incidental capture and killing does not have a significant negative impact on the [cetacean] species concerned”, **monitoring schemes should at least enable authorities to determine whether or not significant negative impacts are occurring. This would imply sufficient monitoring to be reasonably sure that bycatch rates did or did not exceed some predefined bycatch ‘reference limit’.**”²⁹

As evidenced in Table 2 in the introductory section, there is documented bycatch, with insufficient monitoring to even determine its impact levels for some populations of harbour porpoise, common dolphin, bottlenose dolphin, striped dolphin, long-finned pilot whale, white-beaked dolphin, white-sided dolphin, Risso’s dolphin, fin whale, false killer whale, beaked whale and other cetacean populations in EU waters.

None of the aforementioned Member States has implemented a monitoring system capable of informing the relevant authorities of the further research or conservation measures required to ensure that incidental capture and killing does not have a significant negative impact on the populations of cetaceans in their waters or bycaught by the fishing vessels flying the Member State’s flag.

The Member States have even failed to comply with the monitoring and reporting obligations under Regulation 812/2004 that, as was explained in section 2.4.1, sets the minimum standard of compliance with the monitoring obligation in Article 12 of the Habitats Directive.

2.4.2.1.1 The minimum standard of monitoring and reporting set by Regulation 812/04

Regulation 812/2004 sets the obligation for Member States to implement different monitoring schemes for vessels flying the Member State’s flag and to report the results from the monitoring yearly to the Commission.

The Commission has an administrative agreement with ICES whereby ICES collates and analyses this data to provide conservation advice. “Most of the information that constitutes the background for

²⁹ ASCOBANS. (2015). Expert Workshop on the Requirements of Legislation to Address Monitoring and Mitigation of Small Cetacean Bycatch. Available at: https://www.ascobans.org/sites/default/files/document/ASCOBANS_WS_Bycatch_2015_Doc.03_Compilation-Recommendations-Bycatch.pdf

ICES Advice on “Bycatch of small cetaceans and other marine animals” derives from Member State (MS) reports required under Council Regulation (EC) No. 812/2004.”³⁰

It is clear then that compliance by the Member States with their reporting obligations under Regulation 812/04 is crucial for the protection of cetacean populations in EU waters and that lack of compliance with those obligations hinders the possibility of adopting adequate and effective conservation measures for these species.

Lack of compliance with the reporting obligations under Regulation 812/04

Under Article 6 of Regulation 812/2004, each year, Member States shall send the Commission a comprehensive annual report on the implementation of Articles 2, 3, 4 and 5 during the previous year.

On the basis of the observers' reports and all other appropriate data, the annual report shall include estimates of the overall incidental catches of cetaceans in each of the Member States' fisheries concerned. This report shall include an assessment of the conclusions of the observers' reports and any other appropriate information, including any research conducted within the Member States to reduce the incidental capture of cetaceans in fisheries.

When reporting on the results of scientific studies or pilot projects as provided for in Articles 2(4) and 4(2) of the Regulation, Member States shall ensure that sufficiently high quality standards are reached in their design and implementation and shall provide detailed information concerning those standards to the Commission.

Several Member States fail to submit their annual reports to the Commission, while many others send insufficient information or even send duplicates of reports submitted in previous years.

As indicated above, the ICES Bycatch Working Group have continually stated: “WGBYC’s ability to evaluate the magnitude of bycatch mortality of cetaceans and other protected species or species of possible concern continues to be hampered by limited availability of accurate total fishing effort from relevant European waters for gear types covered by Reg. 812. Consequently there continues to be considerable uncertainty in the representativeness of total fishing effort reported in MS Reg. 812 reports submitted to the EC. WGBYC continues to highlight the inconsistent submission and content of annual reports provided by some MS and the shortcomings of Reg. 812 to accurately reflect the magnitude of cetacean bycatch in European fisheries.”

Data below (Table 3) were collated by Whale and Dolphin Conservation about the compliance of the Member States to submit the reports up until 2014:

³⁰ ICES. (2018). *Basis for the advice on Bycatch of small cetaceans and other marine animals*, <https://doi.org/10.17895/ices.pub.4530>

Table 3. Status of EC Regulation 812/2004 reports submitted to the European Commission by Member States until 2014³¹

MEMBER STATE	EC REGULATION 812/2004 REPORT SUBMITTED								
	2006	2007	2008	2009	2010	2011	2012	2013	2014
Belgium	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Denmark	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Estonia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Finland	Yes	Yes	Yes	No	No	No	No	No	No
France	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes-late	Yes
Germany	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	No
Ireland	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Latvia	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Lithuania	No	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Netherlands	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Poland	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Portugal	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Spain	Yes	Yes	Yes	Yes	No	No	No	No	No
Sweden	Yes	No	Yes	Yes	Yes	No	Yes	No	No
United Kingdom	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

A Recent ICES report shows that the situation has not changed since 2014 and a number of Member States continued to breach their reporting obligations under Regulation 812/2004 up until 2016 (Table 4). The following extracts of the report are illustrative of the lack of compliance:

“Three Member States that are affected by Reg. 812/2004, but which did not submit reports to the EC were Finland, Lithuania and Spain [...] Reports were received from the remaining 14 of the 17 MS affected by Articles 4–5 of Reg. 812/2004. The reports from Belgium, Denmark, Estonia, France, Italy, Germany, Ireland, Latvia, Poland, Portugal, Slovenia, and the UK were obtained via the EC. The reports from Sweden, Portugal and the Netherlands were submitted directly to WGBYC.”³²

“The quality and scope of the information provided by the reports for 2016 was variable, with several EU Member States simply repeating the information provided in previous years.”³³

³¹ Read, F.L., Evans, P.G.H. and Dolman, S.J. (2017). Cetacean Bycatch Monitoring and Mitigation under EC Regulation 812/2004 in the Northeast Atlantic, North Sea and Baltic Sea from 2006 to 2014. A WDC Report. P. 52. Available at: http://www.wdcs.co.uk/media/submissions_bin/EU-Cetacean-Bycatch-Monitoring-Mitigation-Report.pdf

³² ICES. (2018). Report from the Working Group on Bycatch of Protected Species (WGBYC), 1–4 May 2018, Reykjavik, Iceland. ICES CM 2018/ACOM:25. p.13. Available at: http://www.ices.dk/sites/pub/Publication%20Reports/Expert%20Group%20Report/acom/2018/WGBYC/wgbyc_2018.pdf

³³ Ibid, p. 13

The following governments have failed to submit their annual report on the implementation of Articles 2, 3, 4 and 5 of Regulation 812/2004, from 2006 - 2016:

Finland	8 years (no submission in 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016)
Spain	7 years (no submission in 2010, 2011, 2012, 2013, 2014, 2015, 2016)
Belgium	2 years (no submission in 2007, 2008)
Germany	2 years (no submission in 2007, 2014)
Lithuania	2 years (no submission in 2006, 2016)
Sweden	2 years (no submission in 2013, 2014)
France	1 year (no submission in 2013)
Latvia	1 year (no submission in 2007)
Portugal	1 year (no submission in 2007)

Table 4. Summary table of coastal EU Member States by Regional coordination meetings (RCM) regarding the status of Regulation 812/2004 report submissions to the European Commission from 2006 to 2016.³⁴

RCM	Coastal Member State of the EU	Monitoring (Art. 4-5)	Annual Report Regulation 812 & effort data provided											
			Fishing in area affected	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Baltic	Estonia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Baltic	Finland	Yes	Yes	Yes	Yes*	No	No	No	No	No	No	No	No	No
Baltic	Latvia	Yes	Yes*	No	Yes*	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Baltic	Lithuania	Yes	No	Yes	Yes	Yes	Yes*	Yes	Yes	Yes	Yes	Yes*	Yes*	No
Baltic	Poland	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Mediterranean & Black Sea	Italy	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Mediterranean & Black Sea	Slovenia	Yes	Yes*	No	Yes*	No	Yes*	Yes*	*	**	**	**	**	Yes
North Atlantic	Portugal	Yes	Yes*	No	Yes*	Yes*	Yes	Yes	Yes	Yes	Yes	Yes	Yes	*** *
North Atlantic	Spain	Yes	Yes*	Yes	Yes	Yes	No	No	No	No	No	No	No	No
North Atlantic, Baltic	Germany	Yes	Yes*	***	Yes*	Yes	Yes	Yes	Yes	Yes	Yes	***	Yes	Yes
North Atlantic, North Sea & Eastern Arctic	France	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	*** *	Yes	Yes	Yes

³⁴ Ibid, p. 29

North Atlantic, North Sea & Eastern Arctic	Ireland	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
North Atlantic, North Sea & Eastern Arctic	Netherlands	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	*** *
North Atlantic, North Sea & Eastern Arctic	United Kingdom	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
North Sea & Eastern Arctic, Baltic	Belgium	Yes	Yes	No	No	Yes	Yes*	Yes*	Yes*	Yes*	Yes	Yes	Yes	Yes
North Sea & Eastern Arctic, Baltic	Denmark	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
North Sea & Eastern Arctic, Baltic	Sweden	Yes	Yes	Yes*	Yes	Yes	Yes*	Yes	Yes*	*** *	*** *	Yes	*** *	
Mediterranean & Black Sea	Bulgaria	No												
Mediterranean & Black Sea	Croatia	No												
Mediterranean & Black Sea	Cyprus	No												
Mediterranean & Black Sea	Greece	No												

KEY	
Yes	Yes for report with data on observer effort
Yes*	Yes for report with no data on observer effort
No	No report submitted
*	Two trawlers that were monitored in 2012 have been scrapped
**	An independent NGO monitoring setnets indicated bycatch of one/two bottlenose dolphins
***	No Regulation 812 monitoring, but reports on cetacean bycatch observations made under DCF sent to the Commission
****	Data made available at the meeting

In September 2018, ICES reiterated that “the quality and scope of the information provided by the reports for 2016 was variable, with several EU Member States simply repeating the information

provided in previous years”, adding: “It is difficult for ICES to assess the overall impact of fisheries on protected species if data from major fishing nations are not provided” .³⁵

In the latest report by the European Commission on the implementation of Regulation 812/2004, the Commission pointed out that the “ICES and STECF review of the national annual reports found considerable variation in the format and content. There is little evidence of cooperation between Member States, and most of the work reported has been the result of independent national efforts. As regards incidental catches information, “few recent estimates of total bycatch of small cetaceans in individual fisheries are available from European waters” .³⁶

There has not been an implementation report from the European Commission since this report in 2009. This hinders the assessment of what, if any, progress has been made by the Member States in implementing measures to reduce and monitor cetacean bycatch in compliance with the law.

Monitoring obligations under Article 4(1) of Regulation 812/2004

Under Article 4(1) of Regulation 812/2004, Member States are under obligation to design and implement monitoring schemes for incidental catches of cetaceans designed to provide representative data of the fisheries concerned using observers on board the vessels flying their flag and with an overall length of 15 m or over, under the following conditions:

ANNEX III

Fisheries to be monitored and minimum level of fishing effort subject to on-board observers

1. General monitoring obligations

Monitoring schemes shall be designed on an annual basis and established to monitor cetacean by-catch, in a representative manner, in the fisheries defined in the table in paragraph 3.

Monitoring schemes shall be made sufficiently representative by adequately spreading observer coverage over the fleets, time and fishing areas.

As a general rule, monitoring schemes shall be based on a sampling strategy designed to allow the estimation of the by-catch rates of cetaceans, for the most frequent species in the by-catch per unit effort by a given fleet to achieve a coefficient of variation not exceeding 0,30. The sampling strategy shall be designed on the basis of existing information on the variability of previous by-catch observations.

[...]

3. Fisheries to be monitored and monitoring starting dates

Area	Gear	Starting date
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³⁵ ICES. (2018). Bycatch of small cetaceans and other marine animals – review of national reports under Council Regulation (EC) No. 812/2004 and other information. p.2.

Available at: <https://doi.org.10.17895/ices.pub.45142>

³⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0368&from=EN>

A. ICES subareas VI, VII and VIII.	Pelagic trawls (single and pair)	1 January 2005
B. Mediterranean Sea (of the east of line 5°36' west)	Pelagic trawls (single and pair)	1 January 2005
C. ICES divisions VI a, VII a and b, VIII a, b and c, and IX a	Bottom-set gillnet or entangling nets using mesh sizes equal to or greater than 80 mm	1 January 2005
D. ICES subarea IV, division VI a, and subarea VII with the exception of divisions VII c and VII k	Driftnets	1 January 2006
E. ICES subareas III a, b, c, III d south of 59° N, III d north of 59° N (only from 1 June to 30 September), IV and IX	Pelagic trawls (single and pair)	1 January 2006
F. ICES subareas VI, VII and VIII and IX	High-opening trawls	1 January 2006
G. ICES sub area III b, c, d, excluding the areas referred to in rows A and E of Annex I	Bottom-set gillnet or entangling nets using mesh sizes equal to or greater than 80 mm	1 January 2006

The governments of Spain and Sweden, despite having vessels of 15 m or over using fishing gear in the conditions specified above, did not design and implement monitoring schemes for incidental catches of cetaceans using observers on board the vessels flying their flag.

The governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Poland and Portugal, having vessels of 15 m or over using fishing gear in the conditions specified above, designed but did not consistently implement monitoring schemes for incidental catches of cetaceans using observers on board the vessels flying their flag.

The governments of the Netherlands and the United Kingdom, having vessels of 15 m or over using fishing gear in the conditions specified above, designed and implemented monitoring schemes for incidental catches of cetaceans using observers on board the vessels flying their flag, but due to their flawed design or failed or inadequate implementation, those schemes did not provide representative data of the fisheries concerned.³⁷³⁸

Monitoring obligations under Article 4(2) of Regulation 812/2004

Under Article 4(2) of Regulation 812/2004, Member States shall take the necessary steps to collect scientific data on incidental catches of cetaceans by means of appropriate scientific studies or pilot

³⁷ http://www.wdcs.co.uk/media/submissions_bin/EU-Cetacean-Bycatch-Monitoring-Mitigation-Report.pdf

³⁸ For example, there is no good monitoring system of common dolphin bycatch across the fleets in the English Channel and Bay of Biscay

projects, for vessels with an overall length less than 15 m and involved in fisheries defined in Annex III point 3.

The fisheries in question are:

Area	Gear	Starting date
A. ICES subareas VI, VII and VIII.	Pelagic trawls (single and pair)	1 January 2005
B. Mediterranean Sea (of the east of line 5°36' west	Pelagic trawls (single and pair)	1 January 2005
C. ICES divisions VI a, VII a and b, VIII a, b and c, and IX a	Bottom-set gillnet or entangling nets using mesh sizes equal to or greater than 80 mm	1 January 2005
D. ICES subarea IV, division VI a, and subarea VII with the exception of divisions VII c and VII k	Driftnets	1 January 2006
E. ICES subareas III a, b, c, III d south of 59° N, III d north of 59° N (only from 1 June to 30 September), IV and IX	Pelagic trawls (single and pair)	1 January 2006
F. ICES subareas VI, VII and VIII and IX	High-opening trawls	1 January 2006
G. ICES sub area III b, c, d, excluding the areas referred to in rows A and E of Annex I	Bottom-set gillnet or entangling nets using mesh sizes equal to or greater than 80 mm	1 January 2006

The requirements of the Pilot observer schemes are:

2. Pilot monitoring schemes

Where, due to absence of information on variability of by-catch, the sampling strategies cannot be designed to achieve the coefficient of variation within the limit set in paragraph 1³⁹, Member States shall implement pilot on-board observer schemes for two consecutive years, starting at the dates in paragraph 3 for the concerned fisheries.

³⁹ 1. General monitoring obligations

Monitoring schemes shall be designed on an annual basis and established to monitor cetacean bycatch, in a representative manner, in the fisheries defined in the table in paragraph 3. Monitoring schemes shall be made sufficiently representative by adequately spreading observer coverage over the fleets, time and fishing areas. **As a general rule, monitoring schemes shall be based on a sampling strategy designed to allow the estimation of the bycatch rates of cetaceans, for the most frequent species in the bycatch per unit effort by**

These pilot observer schemes shall be based on a sampling strategy aimed at determining the variability of by-catch which will provide the basis for the design of subsequent sampling strategies under the conditions of the paragraph 1, and shall also provide estimates of by-catch of cetaceans per unit effort, broken down by species.

The pilot schemes shall cover, at least, the following minimum value of fishing effort:

(a) for all fisheries defined in point 3, with the exception of pelagic trawls (single and pair) from 1 December to 31 March in ICES subareas VI, VII and VIII:

	Fleets of more than 400 vessels	Fleets of more than 60 and less than 400 vessels	Fleets of less than 60 vessels
Minimum effort covered by the pilot schemes	The fishing effort of 20 vessels	5 % of the fishing effort	5 %, covering at least three different vessels

(b) for pelagic trawls (single and pair) from 1 December to 31 March in ICES subareas VI, VII and VIII:

	Fleets of more than 60 vessels	Fleets of less than 60 vessels
Minimum effort covered by the pilot schemes	10 % of the fishing effort	10 %, covering at least three different vessels

None of the Member States against which this complaint is filed have established a monitoring system that allows the estimation of the bycatch rates of all cetaceans in the bycatch per unit effort by a given fleet to achieve a coefficient of variation not exceeding 0.30, or implemented pilot observer schemes that provide a reliable estimates of bycatch of cetaceans per unit effort, broken down by species, where ICES annual WGBYC reports provide the details of uncertainties in the levels of bycatch for each species and population considered. If no bycatch is recorded then it is not possible to reach this threshold in which case a Member State can apply for a derogation. Nevertheless, there is poorly monitored bycatch in the waters of every Member State listed in this complaint, as demonstrated by the thousands of cetaceans that each year wash ashore with markings caused by fishing nets but for which it is often difficult or impossible to establish which fleet or gear caused the incidental death.

Given the lack of compliance with the reporting obligations under Regulation 812/2004, it is not possible to ascertain which governments have breached the monitoring obligations under Article 4(2) of Regulation 812/2004.

a given fleet to achieve a coefficient of variation not exceeding 0.30. The sampling strategy shall be designed on the basis of existing information on the variability of previous by-catch observations.”

Monitoring obligations under Article 5 of Regulation 812/2004

Article 5 of Regulation 812/2004 establishes the minimum requirements of the personnel appointed by the Member States to discharge their obligation to provide observers. The Article also establishes the obligations of personnel to monitor and record the fishing operations of the vessels concerned and the incidental catches of cetaceans.

In 2018, ICES explained that the observers appointed by most Member States were focused on other tasks and not focused on correctly monitoring the incidental catches of cetaceans: “Most countries rely on the DCF sampling programme to monitor marine mammal and other protected species bycatch, with the exception of the UK, the only EU country to have a dedicated protected species bycatch monitoring programme (PSBMP) for the purposes of meeting the requirements of Reg. 812/2004 and the EU Habitats Directive. As discussed in previous years’ reports, relying only on observations carried under the DCF may lead to underestimation of bycatch events as some bycatches may be missed by the observers who focus mostly on other tasks (e.g. fish sampling).”⁴⁰

The governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Poland, Portugal, Spain and Sweden have failed to appoint the required personnel to monitor the incidental catches of cetaceans.

2.4.2.2 Obligation to, in light of the information gathered by the monitoring system, 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. [Art. 12(4) of the Habitats Directive]

None of the governments have taken the necessary research or implemented the conservation required to ensure that bycatch does not have a significant negative impact on all the populations of cetaceans in their waters or bycaught by the fishing vessels flying the Member State’s flag. As noted by EU cetacean experts, “Knowledge of bycatch numbers remains poor, there has been little change in fisheries management and, in general, inadequate effort to reduce the numbers of cetaceans caught in nets. As a result, thousands of cetaceans continue to die each year in European waters, for some species at levels likely to be causing population level impacts.”⁴¹

Much less than 1% of the fishing fleets of bycatch concern flying the flag of EU Member States in EU waters are being monitored. Even the United Kingdom, the Member State with the highest level of compliance with the obligations in Regulation 812/2004, monitors less than 1% of its fleet (Dr Simon Northridge, pers comm.), recognising that in some high risk métiers in the UK, coverage is higher. A recent UK workshop on bycatch recognised that monitoring is needed to be improved.⁴²

⁴⁰ ICES. (2018). Report from the Working Group on Bycatch of Protected Species (WGBYC), 1–4 May 2018, Reykjavik, Iceland. ICES CM 2018/ACOM:25. Available at: http://www.ices.dk/sites/pub/Publication%20Reports/Expert%20Group%20Report/acom/2018/WGBYC/wgbyc_2018.pdf

⁴¹ Dolman SJ, Baulch S, Evans PGH, Read F, & Ritter F. (2016). Towards an EU Action Plan on Cetacean Bycatch. Marine Policy, 72, 67-75. <https://doi.org/10.1016/j.marpol.2016.06.020>

⁴² https://www.cefas.co.uk/media/201924/hauling_up_solutions-workshop-report-final_web.pdf

As repeatedly stated by ICES in its annual expert Advice, bycatch monitoring levels are woefully inadequate across Member States. Obtaining the required amount of monitoring coverage would be challenging using dedicated observers alone. Yet minimal effort has been focused on also implementing Remote Electronic Monitoring, which is becoming standard in other fleets around the world.

Member State data provided for the EU Marine Strategy Framework Directive and OSPAR's Good Environmental Status indicator for harbour porpoise bycatch are also inadequate, where OSPAR identifies that there is low confidence in bycatch estimates due to incomplete data⁴³. ICES has concluded that more effective monitoring of bycatch, fishing effort and population sizes of cetaceans would be required to provide a quantitative assessment of the impact of bycatch on harbour porpoise and other cetacean species. ICES Advice to the European Commission has repeatedly cited the insufficient data and monitoring provided by Member States⁴⁴.

This lack of data has led to a lack of action to tackle bycatch. As a result, a number of cetacean populations are declining due to bycatch and a number are at risk of declining but there is not enough data to be certain (Table 2).

The levels of bycatch monitoring conducted by the governments of Belgium, Denmark, Finland, France, Germany, Ireland, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain, Sweden and The United Kingdom are inadequate and the US government, in its assessment of the European dataset as provided to meet the requirements of the US Marine Mammal Protection Act Import Provision Rule⁴⁵, has deemed them as 'export fisheries'. Export fisheries are those fisheries with more than a remote likelihood of marine mammal bycatch or insufficient information available on marine mammal interactions.

By failing to establish a system to monitor the incidental capture and killing of cetaceans and, in the light of the information gathered, undertake 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, the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain, Sweden and The United Kingdom are in breach of Article 12(4) of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive).

⁴³ <https://oap.ospar.org/en/ospar-assessments/intermediate-assessment-2017/biodiversity-status/marine-mammals/harbour-porpoise-bycatch/>

⁴⁴ <https://www.ices.dk/community/advisory-process/pages/latest-advice.aspx>

⁴⁵ NOAA. (2018). *NOAA Fisheries Establishes International Marine Mammal Bycatch Criteria for U.S. Imports*. Available from: <https://www.fisheries.noaa.gov/foreign/marine-mammal-protection/noaa-fisheries-establishes-international-marine-mammal-bycatch-criteria-us-imports>

2.4.3 Obligation to establish a system of strict protection for cetaceans, prohibiting all forms of deliberate disturbance, capture and killing of cetaceans in the wild [Arts. 12(1)(a), 12(1)(b) and 12(3) of the Habitats Directive].

Article 12(1)(a) of the Habitats Directive establishes the obligation of Member States to take the requisite measures to establish a system of strict protection for cetaceans in their natural range prohibiting all forms of deliberate capture or killing of specimens of these species in the wild.

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.

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.**"⁴⁶

This is in line with the definition of "deliberate" by the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats, which includes "any act committed without the intention to cause damage or destruction but in the knowledge that such would probably be the consequences of the act".⁴⁷

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.⁴⁸ This same interpretation of the duties of Member States under Article 12(1) of the Habitats Directive is found in *Commission v Hellenic Republic*⁴⁹ and *Commission v Ireland*.⁵⁰

For example, in *Commission v Hellenic Republic*⁵¹, the Commission brought the action before the CJEU arguing that Greece had breached its duties under Article 12(1)(b) of the Habitats Directive in relation to the *Caretta caretta* turtle because in the places where it lays its eggs: (i) there was no supervision and there were no notices on the beaches; (ii) there were pedalos and boats in the sea area where their use is prohibited; (iii) there were a significant number of beach umbrellas and deck-chairs on various beaches (Kalamaki, Gerakas, Dafni);(iv) there were illegal buildings and recent works on the beach at Dafni. The CJEU found Greece in breach of the Directive. And, as the

⁴⁶ Case C-221/04, *Commission v Spain*, para. 71

⁴⁷ Resolution No. 1 (1989) of the standing committee on the provisions relating to the conservation of habitats (Adopted by the Standing Committee of 9 June 1989). Available from https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=0900001680746be2

⁴⁸ Case Case C-340/10, *Commission v Cyprus*, para. 59 - 62

⁴⁹ Case C-518/04 *Commission v Hellenic Republic*, para. 16.

⁵⁰ Case C-183/05 *Commission v Ireland*, para. 29, 30.

⁵¹ Case C-103/00, *Commission v Hellenic Republic*, para. 8, 36-39

Commission explained, there was a failure of enforcement.⁵²As the Commissioner for the Environment explained to the European Parliament in 2008, the death of a specimen of a protected species might not breach the Habitats Directive *if* “a monitoring system is in place and conservation measures are implemented to prevent a significant negative impact on the species concerned, say to ensure a favourable conservation status”.⁵³

For the case of cetaceans, simply enshrining in national legislation a general prohibition of disturbance, capture and killing is insufficient to comply with Article 12(1) of the Habitats Directive.

As was explained in section 2.3 of this complaint, it is widely documented that the interaction with fishing gear is the main cause of death and disturbance of cetaceans in the EU. Carrying out fishing activities without taking the precautions to reduce the possibility of disturbance, capture and killing of cetaceans constitutes deliberate disturbance, capture and killing of these species in the sense of acceptance of the consequences described in *Commission v Spain*.

Therefore, if Member States authorise fishing activities but do not adopt effective, coherent and coordinated measures to ensure that fishing is carried out in a way that reduces the possibility of causing the death, capture or disturbance of cetaceans, the Member States would fail to establish a system of strict protection for these species and be in breach of Article 12(1) of the Habitats Directive.

[The mitigation measures required under Regulation 812/2004](#)

Article 2 of Regulation 812/2004 imposes the obligation on vessels of 12 m or over in overall length to use fully operational ADDs when using fishing gear under the following conditions:

⁵² European Commission (2007), *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, p. 36.

⁵³ Answer given in 11 February 2008 by Mr. Dimas on behalf of the European Commission to the European Parliament question E-5890/2007. Available from: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-5890&language=EN>

Area	Gear	Period	Starting date
A. Baltic Sea area delimited by a line running from the Swedish coast at the point at longitude 13° E, thence due south to latitude 55° N, thence due east to longitude 14° E, thence due north to the coast of Sweden; and, area delimited by a line running from the eastern coast of Sweden at the point at latitude 55°30' N, thence due east to longitude 15° E, thence due north to latitude 56° N, thence due east to longitude 16° E thence due north to the coast of Sweden	(a) Any bottom-set gillnet or entangling net	All year	1 June 2005
	(b) Any drift-net	All year	1 June 2005
B. ICES subarea IV and division III a	(a) Any bottom-set gillnet or entangling net, or combination of these nets, the total length of which does not exceed 400 metres	(a) 1 August - 31 October	1 August 2005
	(b) Any bottom-set gillnet or entangling net with mesh sizes > 220 mm	(b) All year	1 June 2005
C. ICES divisions VII e, f, g, h, and j	(a) Any bottom-set gillnet or entangling net	(a) All year	1 January 2006
D. ICES division VII d	(a) Any bottom-set gillnet or entangling net	(a) All year	1 January 2007
E. Baltic Sea subdivision 24 (except for the area covered under A)	(a) Any bottom-set gillnet or entangling net	(a) All year	1 January 2007
	(b) Any drift-net	(b) All year	1 January 2007

The governments of Belgium, France, Germany, Ireland, Poland, Spain and Sweden, in spite of having vessels of 12 m or over using fishing gear in the conditions specified above, have not enforced the obligation of using ADDs in the nets of the vessels flying their flag, as required (Table 5).

Table 5. Use of ADDs on the fishing gear in Annex I for vessels of 12m or over in overall length (Reg. 812/2004 Articles 2, 3) by Member States until 2014⁵⁴

Member State	Mitigation
<i>Belgium</i>	No
<i>Denmark</i>	Yes (not 2007)
<i>Estonia</i>	Not required
<i>Finland</i>	Not required
<i>France</i>	No (until 2017)
<i>Germany</i>	Partial
<i>Ireland</i>	No
<i>Latvia</i>	Yes
<i>Lithuania</i>	No longer required
<i>The Netherlands</i>	Partial
<i>Poland</i>	Partial
<i>Portugal</i>	Partial
<i>Spain</i>	No
<i>Sweden</i>	Partial
<i>United Kingdom</i>	Partial

Mitigation measures recommended by the best available science

The Convention on Migratory Species produced a ‘Review of methods used to reduce risks of cetacean bycatch and entanglements’ in 2018.⁵⁵ The measures to reduce risk that were evaluated include reducing fishing effort, implementing closed areas, gear modifications and use of alternative gears, reducing gear loss and ‘wet storage’ (reducing the instances where fishing gear is left in the water when it is not actively being used to fish. The report states that the “generally most effective mitigation is reduction in effort, starting with those fisheries that have the largest bycatch” and “the most promising solutions are fisheries-based and lie with the development of alternative gear to replace current fishing methods such as gillnets”.

Proposed measures identified in Tables 6 and 7 are based upon the current state of knowledge of effective monitoring and mitigation for each species and each fishing gear type, drawn upon from the CMS review.

⁵⁴ http://www.wdcs.co.uk/media/submissions_bin/EU-Cetacean-Bycatch-Monitoring-Mitigation-Report.pdf

⁵⁵ https://d2ouvy59p0dg6k.cloudfront.net/downloads/cms_report_042918_web_pages.pdf

Table 6. Preliminary fishery specific bycatch solutions for identified priority cetacean populations

Species	Fishery region, where specified	Potential mitigation measures <i>These are likely to vary from region to region, & best in combination</i>	Notes
Harbour porpoise (HP)	Beach seine <i>Portugal</i>	Inclusion of beach seines for mandatory ADDs Trials on alternative mitigation Spatial & temporal restrictions Monitoring & compliance efforts	Beach seines are not permitted in most countries ADDs not required under current legislation because it is considered a mobile gear
	Driftnets Static gillnets <i>Baltic Sea</i>	Maintain existing ban on driftnets Cod pots to replace gillnets Spatial & temporal restrictions where high densities of HP occur	
	All other static nets	Appropriately spaced and functioning pingers on all static nets, not based on vessel size Restrictions (e.g. spatial, temporal) in the use of static nets where high densities of harbour porpoises occur Consider restrictions versus pinger use, including within Special Areas of Conservation (due to noise/disturbance impacts)	Investigate modifications to gear types, and spatial & temporal measures that might reduce bycatch Investigate welfare impacts Understand behaviour of porpoises around nets
Common dolphin (CD)	see Table 7, below		Regional collaboration required across the English Channel, Celtic Sea & Bay of Biscay ADDs trials to assess effectiveness for CD Concern about welfare impacts of exclusion grids
Harbour porpoise Common dolphin Striped dolphin	Static gillnets <i>All regions including</i>	Multiple mitigation measures required, including: ADDs on all static nets, not	Regional collaborations required across the North Sea for HP

(SD) Bottlenose dolphin (BND)	<i>Mediterranean</i> (SD) <i>Black Sea, Andalucía & Galicia</i> (BND)	based on vessel size Restrictions (e.g. spatial, temporal, gear types) where high densities of cetaceans occur Trials on alternatives to pingers Monitoring & compliance efforts	ADDs trials to assess effectiveness for CD & BND
Baleen whale (humpback & minke whale)	Static creels / pots	Reduce the amount of rope, including wet storage Cap on number of licenses Application of best practice ^[1] Training and capacity building in whale disentanglement	Investigate ropeless fishing gear Understand where minke and humpback whales become predominantly entangled in the gear Investigate welfare impacts of creel entanglements
Sperm whale Common dolphin Striped dolphin	Driftnets <i>Mediterranean</i>	Stop use of illegal driftnets Compliance efforts	Wider use of illegal driftnets beyond the Mediterranean is not well documented, but may still occur
Various species	Long-lines	Gear modifications, such as 'net sleeve' or changes to hooks Robust monitoring	Unknown levels of impacts

Table 7. Monitoring, mitigation and research measures to be considered in eastern North Atlantic fisheries to understand and eliminate common dolphin bycatch

Fishery	Monitoring requirements	Mitigation measures <i>Best in combination</i>	Research requirements
Pair trawls	1. Mandatory monitoring using predetermined % of independent observers and/or electronic monitoring, regardless of vessel size	Spatial (e.g. depth) & temporal restrictions (e.g. December to March) Real time fishing restrictions, where skipper moves away a predetermined distance from an area when CD observed at sea by an independent observer,	Review data to understand temporal component of bycatch
Very high vertical opening (VHVO) trawls			Investigate effectiveness of 'moving away'
Pelagic trawls			Understand effectiveness of pingers to reduce common dolphin bycatch
Factory trawlers			

^[1] For example: <http://www.scottishcreelfishermensfederation.co.uk/entanglement.htm>

	2. Mandatory reporting of all bycatch by skipper 3. Compliance efforts, for monitoring and mitigation measures	before bycatch occurs Functioning pingers on all nets, not based on vessel size	Trials on alternative mitigation Investigate exclusion grids/hatches on trawls, with monitoring of efficacy and any welfare impacts - Concern about welfare impacts of exclusion grids
Static nets		Appropriately spaced and functioning pingers on all static nets, not based on vessel size Restrictions (e.g. spatial, temporal) in the use of static nets where high densities of common dolphins occur	Understand effectiveness of pingers to reduce dolphin, porpoise & seal bycatch Investigate modifications to gear types, and spatial & temporal measures that might influence bycatch, Investigate welfare impacts
Driftnets	Maintain existing ban on driftnets	Maintain existing ban on driftnets	None

By allowing fishing activities without enforcing compliance with the bycatch mitigation measures under Regulation 812/2004 and/or those that – on the basis of the best available science – would reduce the numbers of capture and killing and disturbance of cetaceans, the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, The Netherlands, Poland, Portugal, Spain, Sweden and The United Kingdom are failing to establish a system of strict protection for cetaceans in their natural range prohibiting all forms of deliberate capture or killing of specimens of these species in the wild and are thus in breach of Article 12(1) of the Habitats Directive.

3. The case for urgent measures

Two separate documents have been provided to the European Commission. The documents are titled: “Fisheries Emergency measures for the North East Atlantic short-beaked common dolphin in the Bay of Biscay” and “Fisheries Emergency Measures for the Baltic Sea harbour porpoise”. These are provided as annexes to the complaint.

These two documents provide evidence of the problem, legal basis for emergency measures and proposed solutions. The required measures include the following:

North East Atlantic common dolphin - proposed emergency 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 – in the wider region

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.

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.

Baltic harbour porpoise - proposed emergency measures

To minimise the impact of bycatch on the Baltic Sea harbour porpoise, we propose two levels of emergency measures:

- 1) Measures within Natura 2000 areas in Sweden, Poland and Germany, with reference to Article 11(4) of the CFP and Article 6 of the Habitats Directive. Swedish, Polish and German waters are considered key areas for the Baltic Proper harbour porpoise population, and are also high-risk areas for harbour porpoise bycatch.
- 2) Measures outside Natura 2000 sites, with reference to Article 12 of the Habitats Directive, as well as Article 12 of the CFP. The Baltic Proper harbour porpoise population is highly vulnerable, and bycatch risk has to be minimised throughout its entire range.

1) Measures within Natura 2000 areas in Sweden and Poland

- a. Closure of the Northern Midsea Bank for all fisheries: The Northern Midsea bank is situated in the large Natura 2000 area designated due to the important breeding area for the Baltic Proper harbour porpoise population (SE0330308). One of the Swedish harbour porpoise monitoring stations in this area has the single most acoustic detections of porpoises in the entire SAC. The Northern Midsea bank has been pointed out by the Swedish Agency for Marine and Water Management to be set aside as an area without local human impacts. We propose that this area is closed for all fisheries with effect immediately.
- b. Closing of gillnet fisheries in the rest of the Natura 2000 area Hoburgs bank och Midsjöbankarna (SE0330308) as well as in all other Natura 2000 areas east of 13.5°E where the harbour porpoise is listed as present, until site-specific assessments have been made of the impact of use of ADDs. Natura 2000 areas where the harbour porpoise is listed as present should be closed to gillnet fisheries, unless it can be proven beyond scientific doubt that the integrity of the respective site (including it being an environment with conditions that promote the porpoise population to achieve a favorable conservation status) is not adversely affected or reduced by the use of gillnets with ADDs. If assessments show that some gillnet fishing using ADDs could be allowed, this needs to be subject to a strict permitting procedure, and with mandatory use of ADDs and AIS/high resolution VMS, as well as REM monitoring.

2) *Measures outside Natura 2000 areas*

- a. Mandatory use of ADDs in all commercial gillnet fisheries outside Natura 2000 areas: Mandatory use of ADDs east of E13.5° and north to the Finnish Archipelago Sea at N 60.0°, to minimise bycatch risk in the entire range of the population.
- b. Accurate recording of fishing effort and gear type used: Accurate data on fishing effort is crucial for calculating bycatch rates, which in turn is necessary to take conservation action.
- c. Dedicated electronic monitoring on all gillnet vessels in the region: Remote Electronic Monitoring for monitoring of bycatch, for example using cameras on board, should be mandatory for all gillnet vessels, for example in relation to the size and setup of the vessel. Detailed positioning of the vessel at all times, using for example high resolution VMS or AIS, should be mandatory in all cases.
- d. Monitoring and adaptive management/mitigation measures of gillnet fisheries: Monitoring on all gillnet vessels should be made mandatory. If bycatch is observed, an assessment should be made and adaptive management such as alternative gear or time-area closures implemented. Gillnet effort as well as harbour porpoise presence is comparably high in the Polish EEZ, and it is therefore necessary to implement full-scale monitoring to get better understanding of where the two overlap and bycatch risk is high.

4. Request for action from the Commission

We ask that the Commission fulfil its role as guardian of the Treaties by:

- Taking infringement action against the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain and Sweden for failure to comply with their obligations under Article 12 (4) of the Habitats Directive by failing to establish a system to monitor their incidental capture and killing of cetaceans.
- Taking infringement action against the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom for failure to comply with their obligations under Article 12 (4) of the Habitats Directive by failing to take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on cetaceans.
- Taking infringement action against the governments of Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom for failure to comply with their obligations under Article 12 (1) of the Habitats Directive by allowing fishing activities without enforcing compliance with the bycatch mitigation measures under Regulation 812/2004 and/or those that – on the basis of the best available science – would reduce the numbers of capture and killing and disturbance of cetaceans, thus failing to establish a system of strict protection for cetaceans in their natural

range prohibiting all forms of deliberate capture or killing of specimens of these species in the wild.

- Adopting immediately applicable implementing acts for the protection of the populations of Baltic harbour porpoise and Northeast Atlantic common dolphin that are critically endangered and in unfavourable conservation status respectively, as is authorised by Article 12(1) of the Common Fisheries Policy under duly justified imperative grounds of urgency relating to a serious threat to the conservation of marine biological resources or to the marine ecosystem. These measures consist of spatial and temporal closures to some types of fishing gear, increased monitoring and bycatch mitigation requirements in the regions where these populations reside. More information is provided in the Emergency Measures briefings for the common dolphin and the Iberian harbour porpoise, submitted to the Commission and annexed to this complaint.
- Requesting the Court of Justice of the European Union to prescribe the necessary interim measures under Article 279 to prevent irreparable harm to the endangered populations of Baltic and Iberian harbour porpoise, as well as Northeast Atlantic common dolphin and humpback whale. We consider fishing gear specific management measures that are proven to reduce bycatch vital for preventing irreparable harm to conservation of these populations of strictly protected species.

Previous action taken to solve the problem

On several occasions, Whale and Dolphin Conservation (WDC) has contacted the governments of the Member States in this complaint, asking them to implement better monitoring systems, to take measures for the prevention of bycatch of cetaceans and to improve their reporting under regulation 812/2004. Some of those letters were submitted by Wildlife and Countryside Link (WCL), the largest environment and wildlife coalition in England, of which Whale and Dolphin Conservation leads the working group dedicated to the prevention of bycatch of cetaceans.

- WCL letter to Spanish Government in Feb 2019: *Reducing cetacean bycatch, including common dolphin bycatch in the Northeast Atlantic*
- WCL letters to French, Irish and Spanish governments on bycatch, Jan 2018: *Reducing cetacean bycatch, including common dolphin bycatch in the Northeast Atlantic*
- WDC letter to Member States (Belgium, Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Netherlands, Poland, Portugal) in May 2018: *implementation of EU Regulation 812/2004 on cetacean bycatch.*
- WDC report on Regulation 812/2004 implementation, released in 2017.
- WDC face to face engagement with Member States with presentation at ASCOBANS and in drafting of report, 2016 and 2017.

5. Previous correspondence with EU institutions

- WDC met with the European Commission to raise bycatch concerns, June 2018.
- WDC letter to DG MARE, May 2018: *implementation of EU Regulation 812/2004 on cetacean bycatch.*

- WDC letter to European Commission, Nov 2017: *Reducing cetacean bycatch in European waters*.

6. List any supporting documents/evidence which you could – if requested – send to the Commission

Besides from all the scientific studies listed on table 2 of this complaint, we can submit the following documents to the Commission, if requested:

Read, F.L., Evans, P.G.H. and Dolman, S.J. (2017). Cetacean Bycatch Monitoring and Mitigation under EC Regulation 812/2004 in the Northeast Atlantic, North Sea and Baltic Sea from 2006 to 2014. A WDC Report. 68 pp. Available at: http://www.wdcs.co.uk/media/submissions_bin/EU-Cetacean-Bycatch-Monitoring-Mitigation-Report.pdf

Dolman, S.J., Baulch, S., Evans, P.G.H., Read, F. and Ritter, F. (2016). Towards an EU Action Plan on Cetacean Bycatch. *Marine Policy*, 72, 67-75. <https://doi.org/10.1016/j.marpol.2016.06.020>

European Commission. (2009). 368: Communication from the Commission to the European Parliament and the Council. Cetacean incidental catches in Fisheries: report on the implementation of certain provisions of Council Regulation (EC) No 812/2004 and on a scientific assessment of the effects of using in particular gillnets, trammel nets and entangling nets on cetaceans in the Baltic Sea as requested through Council Regulation (EC) No 2187/2005. 9 pp. Available online at: <http://eur-lex.europa.eu/procedure/EN/198455>

European Commission. (2011). 578: Communication from the Commission to the European Parliament and the Council on the implementation of certain provisions of Council Regulation (EC) No 812/2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98. 9 pp. Available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0578:FIN:EN:PDF>

ICES. (2018, 2017, 2016, 2015, 2014, 2013, 2012, 2011). Cetacean bycatch expert Advice provided to the European Commission annually and available online at <https://www.ices.dk/community/advisory-process/pages/latest-advice.aspx>

ICES. (2018). Report from the Working Group on Bycatch of Protected Species (WGBYC), 1–4 May 2018, Reykjavik, Iceland. ICES CM 2018/ACOM:25. 128 pp http://www.ices.dk/sites/pub/Publication%20Reports/Expert%20Group%20Report/acom/2018/WGBYC/wgbyc_2018.pdf

ICES. (2018). Bycatch of small cetaceans and other marine animals – review of national reports under Council Regulation (EC) No. 812/2004 and other information. Available at <https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2018/2018/byc.eu.pdf> <https://doi.org/10.17895/ices.pub.45142>

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7. Personal data

Do you authorise the Commission to disclose your identity in its contacts with the authorities you are lodging a complaint against? **YES**

8. Signatures



Chris Butler-Stroud
Chief Executive
Whale and Dolphin Conservation



Douglas A. Rouley
Chief Counsel
ClientEarth



Mikhail Durkin
Executive Secretary
Coalition Clean Baltic



Morten Pedersen
Head of Department
Danish Society for Nature Conservation



Karin Dubsky
International coordinator
Coastwatch Europe



Ana Aldarias
Coordinator of Marine Programme
Ecologistas en Accion



Jan Isakson
Director
The Fisheries Secretariat



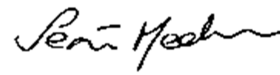
Lydia Chaparro Elias
Environmental Consultant
Fundació ENT



Michel Dubromel
President
France Nature Environnement




Staci McLennan
EU Office Director
International Fund for Animal Welfare



Seán Meehan
Chairman
Irish Wildlife Trust



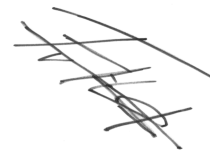
Simon Berrow
Chief Executive Officer
Irish Whale and Dolphin Group



Allain Bougrain Dubourg
President
Ligue pour la Protection des Oiseaux



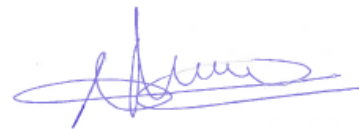
Sandy Luk
Chief Executive
Marine Conservation Society



Floris van Heist
Executive Director
North Sea Foundation



Karin Lexén
Secretary General
Naturskyddsforeningen – Swedish Society for
Nature Conservation



Ann Monsaert
Acting Director General
Natuurpunt



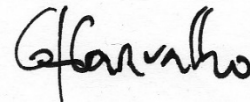
Pascale Moehrle
Executive Director of Oceana in Europe
Oceana



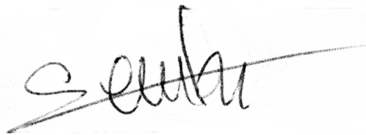
Nicolas Entrup
Co-Director International Relations
OceanCare



Rebecca Hubbard
Program director
Our Fish



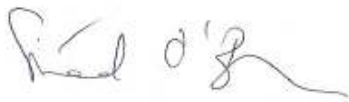
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Lamya Essemblali
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Monica Verbeek
Executive Director
Seas At Risk



Sinead O'Brien
Coordinator
Sustainable Water Network SWAN



Sarah Dolman
Chair
Wildlife and Countryside Link
Bycatch sub-group



Samantha Burgess
Head of EU Marine Policy
WWF European Policy Office



Dr Jo Swabe
Senior Director of Public Affairs
Humane Society International/Europe