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**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**

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1. INTRODUCTION

Council Regulation (EC) 812/2004¹ lays down measures for the reporting of incidental catches of cetaceans in defined fisheries and measures to mitigate against such catches. The Regulation identifies fisheries where the use of acoustic deterrent devices (ADDs) is mandatory, the technical specifications and conditions of use of these devices, and fisheries where observer schemes to obtain representative data have to be conducted in order to assess the extent of bycatch of cetaceans. Member States are responsible for enforcing the use of ADDs and monitoring their efficacy over time, as well as implementing monitoring schemes according to the guidelines under this Regulation.

Under Article 6 of the Regulation, Member States must send the Commission an annual report on the implementation of certain provisions of the Regulation. In accordance with Article 7, the Commission, after receiving the second of these reports from Member States, must produce a Communication to the European Parliament and the Council on the operation of this Regulation². Following the submission of the fourth annual report by Member States, the Commission must present an updated Communication to the European Parliament and the Council. These Communications must be based on the assessment of Member States reports and also take account of assessments made by the International Council for the Exploration of the Sea (ICES) and the Scientific, Technical and Economic Committee for Fisheries (STECF). This document is intended to meet the Commission's second reporting obligation.

This Communication contains a summary of the information collected during 2007-2009 and submitted by Member States to the Commission, in accordance with Article 6 of the Regulation. ICES and STECF were also requested to analyse the scientific content of the national reports, the implementation of the Regulation and any additional scientific reports provided by Member States. The conclusions from this analysis by ICES and STECF are reflected.

2. ANALYSIS OF MEMBER STATES REPORTS

Reporting by the Member States under Regulation (EC) 812/2004 has improved since the first Communication from the Commission to Council and the European Parliament in 2009. However the information delivered by Member States continues to be variable in content and format. Both ICES and STECF point out that the inconsistencies found in the information

¹ Council Regulation (EC) No 812/2004 adopted in April 2004 lays down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98

² COM(2009) 368 final

provided by Member States limit the extent of any assessment as to how the Regulation is being implemented. Only some Member States (Ireland, Netherlands, Spain, Seden and UK) have voluntarily adopted the proposed format for reporting suggested by ICES and STECF. This standard format was formally adopted by Member States in May 2010. This should improve the consistency of future reporting.

Among the twenty-two coastal EU Member States all but one has provided at least one annual report. Six Member States (Belgium, Cyprus, Greece, Malta, Bulgaria and Romania) have informed the Commission that they have no reporting obligations under the Regulation. This is either because their fleets did not carry out any fishing operations which fall under the scope of Annex I (the use of ADDs) or Annex III (onboard observers) of the Regulation or in the case of Bulgaria and Romania because their fishing operations take place exclusively in the Black Sea, which is not covered under the Regulation. Denmark, Estonia, Finland, France, Ireland, Italy, Latvia, Netherlands, Poland, Spain, Sweden and UK have submitted reports with onboard observer data. All but one has provided some estimates of incidental catches.

Despite evidence of improvement, however, it is evident to the Commission that many Member States still appear to have difficulties with the implementation of the Regulation and in particular with the requirements set out below:

2.1. Obligation to use ADDs

Eight Member States (Denmark, Estonia, France, Germany, Ireland, Poland, Spain and UK) currently have fisheries in which ADDs are mandatory. These Member States have reported on their usage through direct monitoring by control and enforcement agencies, interviews with fishermen and through pilot studies. In general, the level of implementation with the provisions in Articles 2 and 3 of the Regulation is not clear and there are indications from the national reports that the actual usage by vessels and the monitoring carried out by Member States remains unsatisfactory.

All of the Member State using ADDs have concluded that further work is needed to improve the reliability, effectiveness and practical handling of the current devices. These problems have led virtually all of the Member States affected to commission studies to monitor and assess the use of ADDs and improve their practical handling and technical characteristics in cooperation with several manufacturers. Associated safety hazards with the use of ADDs have also been considered but reports from Member States indicate that these can be largely overcome through improved design, better quality control at supplier level and also through changes to operational practice. Testing of new types of ADDs that have become commercially available has also been carried out by some Member States and at least one of these new devices has given encouraging results. There has been a good level of industry input into all of these trials. Such collaborative research should be continued.

The annual cost of deploying ADDs also remains an issue. This can vary considerably in relation to the technology employed in the devices and the rate of loss of ADDs in specific fisheries. The costs are considered to be significant for static net³ fisheries and these costs combined with poor reliability and negative impacts on fishing operations have discouraged the use of ADDs and compliance with the Regulation. Several Member States have, however, instigated grant aid schemes or provided fishermen with ADDs free of charge to offset the

³ Static nets include gillnets, entangling nets and trammel nets

costs and to try and increase usage. This has helped in some cases but is not uniform across Member States and seems only a short-term solution.

Several Member States have studied the effects of increasing the spacing between ADDs mounted on static nets, concluding that effectively doubling the spacing does not appear to lower their effectiveness. By doubling the spacing, costs to fishermen can be reduced. Article 3 of the Regulation allows Member States to temporarily authorise the use of devices different to the specifications laid out in the technical annex of the Regulation and this does include increasing the spacing of devices. At least two Member States have availed of this derogation.

There is still ambivalence towards ADDs from NGOs due to perceived habitat exclusion and environmental noise effects but there is no scientific evidence of these effects. Habituation has also been cited as a reason that ADDs do not work by NGOs although again there is little scientific evidence that this is in fact the case. ICES has concluded that such effects are unproven and it seems reasonable to assume that as ADDs are effective at reducing incidental catches of harbour porpoises, this outweighs any potential collateral effects.

An additional issue of importance in relation to ADDs is the development of systems to detect if they are functioning correctly. Control and enforcement agencies in a number of Member States have indicated that the provisions of the Regulation are practically unenforceable given the difficulties in testing whether devices are operational or whether fishermen have actually deployed them on gear. The German and Danish authorities have developed a monitoring device which permits inspection of ADDs at sea. Further assessment of whether this device could be adopted should be undertaken by the control authorities of Member States.

2.2. Obligation to design and implement observer schemes

This obligation has been fulfilled by most Member States through a combination of dedicated monitoring programmes, pilot projects, observations carried under the Data Collection Framework (DCF) and from various other scientific and technical trials. As per the requirements of Article 5 of the Regulation it is apparent that suitably qualified observers have been used in all cases.

Denmark, France, Latvia, Poland, Spain, Sweden and UK all reported on observed fishing effort above the levels required under the Regulation. Denmark, Finland, France, Ireland, Netherlands, Slovenia and UK also achieved the required level of coverage in both $\leq 15\text{m}$ and $\geq 15\text{m}$ vessel groups. Estonia, Portugal and Germany have achieved only low coverage of their fisheries for a variety of reasons relating to cost and availability of observers.

A series of constraints limiting observations and their utility are reported by a number of Member States and also by ICES. These difficulties concern (a) the deployment of observers, (b) achieving fishing effort coverage as required by the Regulation, and (c) administrative and economic constraints.

- (a) Some Member States report difficulties accessing vessels due to a lack of notification to observers of vessel movements from producer organisations or individual fishermen; misunderstanding of the role of observers leading to lack of cooperation from fishermen; lack of space preventing observers going to sea, particularly on small vessels; or, lack of manpower (single observers) making sampling difficult when observers are required to combine sampling of discards with monitoring cetacean bycatch.

- (b) It is clear from even a cursory review of the reports under the Regulation that very few Member States have managed to achieve estimates of incidental catches with a coefficient of variation (cv)⁴ anywhere near to 0.3 as required in the Regulation. This is primarily due to the low level of bycatch events observed making validation of results obtained statistically difficult. Achieving a cv of 0.3 requires a high sampling coverage which is expensive and according to ICES is not realistic in a situation where incidental catches are sporadic (i.e. bycatch events are rare meaning a large proportion of hauls need to be observed relative to the total number of hauls carried out in the fishery to have any reasonable chance of observing such events). Member States who opted to observe the required fisheries at a level of 5% of fishing effort using pilot monitoring schemes, as allowed for under the Regulation, also reported difficulties in complying fully with this provision. In some cases Member States had to monitor a large number of vessels to meet the 5% target or observe multiple fisheries in which their vessels were involved. This generally resulted in some fisheries being observed at or above the 5% level while others observed at levels well below 5% or not at all.
- (c) Some Member States pointed out that the level of observations carried out to date can no longer be supported financially in the future, particularly considering the current economic conditions. Many Member States have concluded that it is not cost effective to have dedicated observer programmes solely for this Regulation and have therefore used other observer programmes.

2.3. INCIDENTAL CATCHES

Based on the reports submitted incidental catches are estimated as being low in many of the fisheries observed, although in most cases it is difficult to extrapolate observed catches to estimates of total catches at fleet level. Therefore accurate estimates of incidental catches levels are not available. Both ICES and STECF, however, do highlight that significant incidental catches have been consistently reported in several fisheries. France, Netherlands and Spain reported incidental catches of cetaceans in static net fisheries operating in ICES subareas IV, VII and VIII. The incidental catches were composed mainly of harbour porpoise, common dolphin and striped dolphin.

Observations made for pelagic trawls operated by France and Spain reported incidental catches of common dolphin in ICES subareas VII and VIII. For the same areas, France reported the incidental catch of four long-finned pilot whales. Observations made in the French fisheries in the Mediterranean Sea reported the incidental catch of three striped dolphins and one bottlenose dolphin.

The remaining Member States reported no bycatch in any of the observed fishing fleets requiring monitoring under the Regulation. This was commonly explained due to minimal interaction between cetaceans and the fisheries involved, low observed coverage of the fisheries relative to actual fishing effort, or a lack of coverage of fisheries where incidental catch tends to be significant i.e. the wrong fisheries are being monitored. In this latter case, this is due to fisheries with a known bycatch not being required to be monitored under the

⁴ The coefficient of variation (cv) is defined as the ratio of the standard deviation to the mean.

Regulation as in these fisheries the use of ADDs, designed to mitigate against bycatch, is mandatory.

Several Member States did go beyond the reporting requirements under the Regulation and presented results of observations of incidental catches registered in fisheries not required to be monitored under the Regulation. These results showed occurrences of bycatch of cetaceans in static net fisheries in the North Sea and Celtic Sea (harbour porpoise, common and striped dolphin) as well surface longline operations in the Mediterranean (long-finned pilot whale).

Member States also reported occurrences of stranded marine mammals, whose death was reported as being associated to fishing gears. ICES, point out that care must be taken not to over-interpret data from stranded animals, and that protocols for establishing the real cause of death must be put in place. Stranded animals diagnosed as having died in fishing nets may alert managers to the presence of a potential issue, but should not be used to try to extrapolate the scale of such incidental catches.

3. ICES & STECF ADVICE

The information on cetacean absolute abundance in EU waters, including the Mediterranean Sea, is extremely heterogeneous and unsatisfactory from a management perspective. In 2010 ICES⁵ carried out an assessment of the population status of the cetacean species concerned by the Regulation based on best available information. Table 1 below summarises the findings of this assessment.

Table 1 Population Status of main cetacean species concerned by Regulation 812/2004

Species	Area	Population Status
Harbour Porpoise	Baltic Sea	Very low – critically-endangered
	Kattegat, Belt Seas	Unknown – cause for concern
	Atlantic (North)	Stable or Increasing – evidence of migrations from other areas
	Atlantic (South) – Iberia	Low abundance - major cause for concern
	North Sea	Stable - evidence of southwards migration
Common Dolphin	Mediterranean	Unknown - sharp decline reported over the last 30-40 years
	Atlantic	Relatively stable
	North Sea	Stable - small population
Striped Dolphin	Mediterranean	Unknown – vulnerable
	Other Areas	Unknown - thought to be relatively stable

⁵ ICES, 2010. EU request on cetacean bycatch regulation 812/2004. Item 4, Special request Advice May 2010.

Bottlenose Dolphin	Mediterranean	Unknown – several sub-populations in coastal areas classed as endangered
	Other Areas	Unknown - thought to be relatively stable

From this table it can be seen that one population of harbour porpoise in the Baltic is critically endangered, while a further four are at a level that is described by ICES as of being cause for concern, either because there are indications of a decline in the population, or because there is a lack of information. The harbour porpoise population in the Black Sea, which is not covered by the Regulation, is also considered to be under threat. The other populations are considered to be relatively stable but that is not to say that incidental catches of these species are not impacting on the populations and the nature of trends that would have occurred in the absence of the regulation is unknown.

Following this assessment, ICES⁶ attempted to carry out an analysis of the total incidental catches of cetaceans by management region and whether at their current levels they impact on populations. Due, however, to the incomplete and inconsistent nature of the data available ICES found it only possible to assess bycatch levels in a few fisheries. Existing information on cetacean distribution and abundance available cannot be used to evaluate the effects of the Regulation. Nonetheless ICES concluded that in the following fisheries incidental catches were of concern so monitoring and mitigation measures should be continued or in the case of the Black Sea included under the Regulation:

- harbour porpoises in static nets in the Baltic, Kattegat, North Sea and Skagerrak, Atlantic and Black Sea;
- common and striped dolphins in static nets in the Atlantic and Black Sea;
- common dolphins in pelagic trawls for bass and tuna in the Atlantic; and
- bottlenose dolphins in the Mediterranean.

In its assessment of reporting under the Regulation, ICES advises adopting a more flexible approach to monitoring focusing on areas where incidental catches of cetaceans are known to be high, instead of monitoring fisheries with very low observed incidental catches and/or low levels of fishing effort.

Both ICES and STECF have identified several gaps in the Regulation that should be addressed. Currently the Regulation does not include a requirement for Member States to report for the Black Sea, where there are clearly bycatch issues. The activities of vessels < 15m that are known to be responsible for incidental catches are not adequately covered. Under Article 4 of the Regulation Member States are requested to collect scientific data on vessels < 15m through scientific studies and pilot projects. While some Member States have carried out such studies and projects, monitoring remains poor. In this regard Member States are obliged under the Habitats Directive⁷ to monitor incidental mortality of protected species, including cetaceans, so all fisheries concerned should be included in the scope of the Regulation.

⁶ ICES, 2010. EU request on cetacean bycatch Regulation 812/2004. Item 3, Special request Advice October 2010.

⁷ Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora.

Under Article 12.4 of the Habitats Directive, Member States are required to establish a system to monitor the incidental capture and killing of strictly protected animal species, such as cetaceans, listed under Annex IV of the Directive. Relevant information forms part of the reporting requirements under Article 17 of the Habitats Directive and is currently contained in an EU database⁸. ICES assessed the data contained in this database and looked for linkages between data collected under the Habitats Directive and under the Regulation. ICES concluded that there was a large degree of duplication between the two and very little evidence of coordination among Member States activities between addressing obligations under the Habitats Directive (area based management and species protection including bycatch monitoring) and actions undertaken in fulfilment of the Regulation. Furthermore the Habitats Directive is focused on area based management through the creation of protected areas, yet in most cases this is unlikely to be an effective means of addressing conservation issues for cetaceans, most of which range over very wide areas and are caught in many different fisheries. ICES therefore advised that it may make sense to review the national arrangements to monitor incidental catches under the Habitats Directive and their coordination with the Regulation.

ICES and STECF have pointed out the need to extend monitoring under the Regulation to include bycatch of pinnipeds, seabirds and sea turtles. ICES have highlighted the significant incidental catches of loggerhead turtles reported in a wide range of fisheries in the Mediterranean and seabirds in longline fisheries. Again Member States have obligations under the Habitats Directive to monitor incidental catches of these species.

ICES have recommended that clear definitions of the gear types to which the Regulation applies should be developed and included in the Regulation as it is currently unclear whether certain types of fishing gear known to interact with cetaceans are covered by the scope of the Regulation (e.g. trammel nets).

4. RESEARCH CONDUCTED

Over the period 2007-2010, a number of Member States carried out studies with the objective of developing new mitigation measures or improving the current ADDs, improving monitoring programmes including the use of novel monitoring equipment (CCTV) and improving knowledge on the distribution of cetaceans and interactions with fishing operations. These studies were either developed at national level or in collaboration with other Member States. The EU funded a major research project called NECESSITY that specifically looked at mitigating incidental catches in pelagic trawl fisheries.

In addition to these studies, a great deal of research work has also been undertaken globally, recognising the importance of the issue of incidental catches of cetaceans. However, it is apparent that there are currently no alternative technical mitigation measures to ADDs that have been proven to be effective at reducing the incidental catches of cetaceans in fishing gears. Alternative mitigation devices such as excluder grids and net barriers tested primarily in pelagic trawls have resulted in high fish losses and are not acceptable to fishermen. Other measures such as time and area closures have been shown to reduce the incidental catches but only when catch events are predictable and relatively restricted in time and space. Such circumstances in European fisheries are rare. Results from trials with acoustically reflective

⁸ <http://eionet.europa.eu/article17>

gillnets in Denmark, Canada and South America are more encouraging but require further testing before being considered a viable alternative to ADDs.

5. CONCLUSIONS

- (1) There has been insufficient sampling in the right fisheries or areas to enabling sound management decisions to be made with respect to cetacean bycatch. Of the Member States that actually did report to the Commission most reported low or no bycatch in EU waters but scientific evidence from at-sea observer schemes or from post-mortem analysis of stranded animals continues to indicate significant interactions between fisheries and cetaceans. Information on cetacean populations is fragmented and population status remains unclear so the actual impact of fishing on populations is poorly understood. Absolute estimates that might be useful to inform management actions exist only for a few species in the North Sea, the Baltic Sea and parts of the NE Atlantic.
- (2) Currently there appears to be an over emphasis on mitigation measures (i.e. ADDs) where such measures are only proven to work in reducing bycatch of harbour porpoise in static net fisheries and not for other cetacean species (e.g. common and striped dolphin) or with other fishing methods (e.g. pelagic trawls). This has resulted in Article 2 of the Regulation being ineffective. There is a general reluctance by fishermen to use the devices currently available due to practical and economic reasons that are well documented.
- (3) Many Member States have made a considerable effort to meet the reporting requirements of the Regulation. The improvements to the reporting format advised by ICES and STECF and accepted by the Member States will further improve this. However, the quality and content of the reports from some Member States submitted remains inconsistent, making analysis difficult. Reporting by Member States should be at a fleet segmentation level that follows the classification set out in the DCF and also with a monthly rather than a quarterly resolution.
- (4) Monitoring targets specified in the regulation appear over ambitious and these targets could be rethought. Adherence to the monitoring scheme mandated under the Regulation in fisheries where bycatch rates are known to be low is not the most effective use of resources, especially when bycatch is known to be occurring more frequently in fisheries or areas where there is currently no requirement for monitoring under the Regulation. According to ICES, a more general approach whereby Member States would be required to demonstrate their fisheries were not exceeding some agreed level of cetacean bycatch would be more appropriate without overburdening Member States with excessive monitoring requirements. Greater flexibility and co-ordination is required in allocating monitoring effort.
- (5) Cetacean distribution and interactions with fisheries are not constant through time. The development of dedicated research on mitigation measures and improvement of monitoring interactions between cetaceans and fisheries in parallel with the full implementation of the Regulation will contribute to a better understanding of those shifts and support the enhancement of sound management tools. Data collection under the Habitats Directive and also the linkage with the Regulation needs to be clarified so the utility of the data collected is maximised and there is not duplication.

- (6) Member States have obligations under the Habitats Directive to monitor the incidental capture and killing of all cetaceans and ensure that incidental capture or killing do not have a significant impact on the populations. In this regard, for other fishing activities and for other areas where incidental catches are problematic and not covered by the Regulation, Member States have the responsibility to take appropriate measures to safeguard cetacean populations. In particular incidental cetacean bycatch in the Black Sea and the incidental catches of pinnipeds, seabirds and turtles in fishing gears in all areas are highlighted as specific cases which are currently outside the scope of the Regulation but require monitoring.

6. WAY FORWARD

Although monitoring targets, data formats and other issues are subjects of ongoing debate, the Regulation has, according to ICES, "*succeeded in providing a much more comprehensive picture of cetacean bycatch in European fisheries*". Some Member States have become more knowledgeable about the impacts that their fisheries have on cetaceans, allowing them to streamline the needs for research and protection of cetaceans and improve the implementation of the Regulation.

The Regulation has been in place for 6 years, and despite these improvements it is still not fully meeting its objective of preventing the accidental capture of cetaceans in fishing gears. Bycatch is still evident in a number of fisheries in the North Atlantic, North Sea and the Baltic and according to ICES several sub-populations of harbour porpoise and common dolphin in these areas are considered as endangered. For the Mediterranean and the Black Sea it is apparent that estimates of cetacean abundance are inadequate making any assessment of population or bycatch impossible for these regions but there is enough evidence to conclude that bycatch remains high in these sea basins.

There is therefore a need to ensure that monitoring and mitigation are targeted in the areas and for the species most under threat. Improved mitigation measures could be incorporated under the new technical measures framework that will be developed as part of the reform of the Common Fisheries Policy. This would set out the scope, objectives and targets to be met in relation to cetacean bycatch, with the possibility for Member States to take specific mitigation measures for specific areas and fisheries. The monitoring requirements could be incorporated into the DCF, in line with a move to a wider ecosystem approach to fisheries monitoring which would include bycatch of non-target species such as cetaceans, seabirds and benthic organisms. Once this is achieved, Regulation (EC) 812/2004 could be repealed.