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European Union

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**NOTE**

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From: General Secretariat of the Council

To: Delegations

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Subject: Request for internal review under Article 10 of Regulation 1367/2006 in relation to Council Regulation (EU) 2022/515 of 31 March 2022 amending Council Regulation (EU) 2022/109 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in certain non-Union waters

*Approval of the Council's reply*

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Delegations will find in annex a clean version of the draft reply to the above-mentioned ClientEarth Request as approved by the Working Party on Fisheries Policy on 14 July 2022.

**The Council's reply to the request for internal review under Title IV of the Aarhus Regulation of Council Regulation (EU) 2022/515**

This reply sets out the Council's decision with regard to ClientEarth's request of 20 May 2022 for internal review of a number of total allowable catches (TACs) established by Regulation (EU) 2022/515 of 31 March 2022<sup>1</sup> ("the contested regulation"). It explains why, after careful consideration of ClientEarth's arguments, the Council considers that those TACs do not contravene environmental law and sees no need for those TACs to be amended. However, the Council does intend to correct two TACs for which the TAC tables contained a calculation error in the overall TAC level.

**I. Admissibility and scope of your request**

1. The Council does not contest the admissibility of your request, but considers that two elements of the request fall outside the scope of Article 10 of the amended Aarhus Regulation.<sup>2</sup>
2. These elements are the first ground regarding the alleged lack of competence and the second plea of the second ground regarding the alleged misuse of powers. The reasons why the Council considers that these elements fall outside the scope of the internal review under the Aarhus Regulation are set out below.
3. This reply broadly follows the structure of your request. The absence of a response to particular points in your request, especially some of the general explanations and definitions used, does not necessarily imply that the Council agrees with all those points. The Council has focused its reply on those points that are relevant for assessing the legality of the contested TACs.<sup>3</sup>

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<sup>1</sup> Council Regulation (EU) 2022/515 of 31 March 2022 amending Regulation (EU) 2022/109 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters, *OJ L 104, 1.4.2022, p. 1*. That regulation amended Council Regulation (EU) 2022/109 of 27 January 2022 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters, *OJ L 21, 31.1.2022, p. 1*.

<sup>2</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, *OJ L 264, 25.9.2006, p. 13*.

<sup>3</sup> For example, how you define overfishing or  $B_{MSY}$  and subsequently argue on the basis of both these concepts is not relevant for this assessment. In that regard, e.g., in paragraph 140 of your request you link Article 2(2) of the CFP Basic Regulation to maintaining or restoring the biomass of the stock above  $B_{MSY}$ , whereas that provision refers to biomass levels capable of producing maximum sustainable yield and neither the CFP Basic Regulation nor the WW MAP refer to  $B_{MSY}$ . This also affects the arguments in paragraph 141 of your request.

## II. First ground: the alleged lack of competence.

4. The Council does not consider that it lacked competence to adopt the contested TACs, for three reasons. First, this ground exceeds the scope of the Aarhus Regulation. Second, when setting the TACs, the Council is not acting on the basis of an empowerment in secondary law and it therefore cannot exceed the scope of such an empowerment. Third, on the substance, the Council acted within the margin of discretion available to it under the applicable legal framework.

### II.1. The Council considers first of all that this ground falls outside the scope of the internal review provided for under the Aarhus Regulation.

5. Pursuant to Article 10(1) of the Aarhus Regulation, a request for internal review shall be made "*on the grounds that such an act or omission contravenes environmental law within the meaning of point (f) of Article 2(1)*". However, the first ground for review which you invoke is explicitly based on lack of competence of the Council. You explicitly note yourself in paragraph 80 of your request that "*the lack of competence and manifest errors are two distinct pleas and points of law*". Notwithstanding this distinction, you seem to argue that the alleged lack of competence constitutes a contravention of environmental law. The Council considers that the object of the request for review may only be limited to the infringement of environmental law itself, i.e. "*Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment as set out in TFEU : preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems*" as set out in Article 2(1) point (f) of the Aarhus Regulation. The Council does not consider that this includes rules on the attribution of competence to the institutions. The same consideration applies to your argument that the Council regulated matters requiring a policy choice that fall within the scope of Article 43(2) TFEU. Consequently, the first ground of the request cannot be raised under Article 10(1) of the Aarhus Regulation and the Council does not have to reply to it.
6. Nevertheless, despite this ground falling outside the scope of the review, the Council will also briefly address below why it sees no merit in the main arguments you have raised under this ground.

### II.2. The alleged exceeding of an empowerment

7. Second, by the first plea of the first ground, you challenge the setting of certain TACs for by-catches of certain target stocks in mixed fisheries (paragraphs 84 to 108 of your request). By the second plea of the first ground, you challenge the setting of the TAC for certain other stocks at a level that would not achieve the objectives of the Common Fisheries Policy (CFP) Basic Regulation<sup>4</sup> (paragraphs 109 to 116 of your request).

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<sup>4</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and

8. Under both pleas, you rely on an interpretation of the contested Regulation, adopted on the basis of Article 43(3) TFEU, as exceeding an empowerment under secondary law and you argue that the Council has exceeded that empowerment and therefore lacks the competence to adopt it (paragraphs 88 to 108 of your request). The Council considers that this interpretation is erroneous and will address that reasoning for both pleas together.
9. In essence, you claim that the Council lacked competence under Article 43(3) TFEU to adopt the TACs in question because it explicitly disregarded essential elements of the CFP Basic Regulation, adopted on the basis of Article 43(2) TFEU, thus exceeding its powers under Article 43(3) TFEU. More specifically, you argue that the reasoning applied to determine whether EU institutions have exceeded, by adopting a delegated or implementing act, the powers conferred on them by the enabling act, must also apply to the contested Council Regulation, which you say implements the CFP Basic Regulation (paragraphs 89 to 93 of your request).
10. The Council considers that this parallelism with Articles 290 and 291 TFEU and the classification of the Contested Regulation as an implementing act based on an empowerment that was exceeded, is incorrect. Indeed, the Court has clarified the scope of Council's powers under Article 43(3) in a number of judgments, in particular in joined cases C-103/12 and C-165/12,<sup>5</sup> joined cases C-124/13 and C-125/13,<sup>6</sup> as well as case C-113/14.<sup>7</sup> In the most recent of these cases, case C-113/14, the Court has clarified that the Council's powers under Article 43(3) cannot be regarded as implementing acts within the meaning of Article 291 TFEU (paragraphs 56-60). In particular, it has ruled that: "*although Article 43(3) TFEU grants the Council the power to adopt, inter alia, implementing acts in the area concerned, the fact remains that those acts are not simply to be considered the same as those conferring implementing powers, within the meaning of Article 291(2) TFEU*" (paragraph 56); that "*that provision grants the Council the power to adopt acts going beyond what can be regarded as an 'implementing act'*" (paragraph 57) and that "*it cannot validly be claimed that the Court acknowledged the existence of a hierarchy between the two provisions at issue*" (paragraph 59).
11. Furthermore, the setting of TACs manifestly falls within the scope of Article 43(3) TFEU. Therefore, as the contested regulation was based directly on Article 43(3) TFEU and not on an empowerment contained in Regulation 1380/2013 (or any other act of secondary law), it cannot exceed the scope of such a non-existent empowerment. Consequently, the Council considers that your arguments under both pleas of the first ground, according to which the Council exceeded its implementing powers conferred by Article 43(3) TFEU, cannot succeed.

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repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354, 28.12.2013, p. 22 (as amended).

<sup>5</sup> Judgment of 26 November 2014 in Parliament and Commission v Council, C-103/12 et C-165/12, EU:C:2014:2400.

<sup>6</sup> Judgment of 1 December 2015 in Parliament and Commission v Council, C-124/13 and C-125/13, EU:C:2015:790.

<sup>7</sup> Judgment of 7 September 2016, Germany v Parliament and Council, C-113/14, EU:C:2016:635.

### II.3. The alleged violation of essential elements of secondary law and the alleged making of policy choices falling outside the scope of Article 43(3) TFEU

12. Third, while the above argument suffices to reject the first ground on which you rely, the Council also considers that it did not violate any essential elements of secondary law, nor did it make any policy choices that would fall outside the scope of Article 43(3) TFEU.
13. In particular, the Council does not in any way claim that it can make policy choices that fall within the scope of Article 43(2) TFEU and thereby change or set aside rules adopted under that Treaty provision, nor did it make any such policy choices. Rather, the Council considers that the applicable rules of the CFP allow for more flexibility than you indicate. In particular, they allow the Council to take into account a number of elements which you consider to go beyond the Council's discretion. This is explained extensively below. To the extent that you are making that argument (e.g. in paragraphs 98 to 103 and 115 of your request), the Council therefore rejects it.

#### *II.3.A. First plea of the first ground*

14. Under the first plea of the first ground, you essentially argue that the Council created a flexibility not provided for in the applicable legal framework to not follow the zero catch advice recommended by ICES (the International Council for the Exploration of the Sea) in view of reaching the maximum sustainable yield (MSY) (paragraphs 98 to 103 and 108 of your request). This argument covers four TACs: cod in the Celtic Sea (**COD/7XAD34**), cod West of Scotland (**COD/5BE6A**), whiting in the Irish Sea (**WHG/07A**) and Northern prawn in the northern North Sea and Fladen Ground (**PRA/2AC4-C**).
15. In paragraph 96 of your request, you correctly indicate that these stocks are covered by recital 6 of the contested regulation, which explains that *“There are certain stocks for which ICES, while assessing them against maximum sustainable yield (MSY), has issued scientific advice for no catches. If TACs for those stocks were established at the level indicated in such scientific advice, the obligation to land all catches both in the Union and United Kingdom waters, including by-catches from those stocks, in mixed fisheries, would lead to the phenomenon of ‘choke species’. In order to balance the need for the continuation of those mixed fisheries in view of the potentially severe socioeconomic implications of complete interruption of those fisheries with the need to achieve a good biological status for those stocks, and taking into account the difficulty of fishing all stocks in a mixed fishery at MSY at the same time, the Union and the United Kingdom agreed that it is appropriate to establish specific TACs for by-catches for those stocks. Those TACs should be set at a level which decreases mortality for those stocks and provides incentives for improvements in selectivity and avoidance. The levels of the fishing opportunities for those stocks should be established in accordance with the Written Record in order to ensure a level playing field for Union operators while providing for the significant recovery of the biomass of those stocks”*.
16. The Council considers that the applicable legal framework provides for such flexibility. In that respect, the Council will first make some general observations in relation to the general part of your request, before expanding further on the specific situation of mixed fisheries.

17. The Council wishes to underline that it acknowledges that the objective to achieve the MSY exploitation rate for fish stocks is, in principle, a binding target that had to be achieved by 2020, where no derogations apply. The Council also agrees that the best available scientific advice, which is usually provided by ICES for the stocks covered by your request, plays a key role in assessing the state of the stocks and what exploitation rate is sustainable in accordance with MSY or, where less data is available, the precautionary approach.
18. However, the Council considers that the rules on the setting of fishing opportunities leave more margin of appreciation to the Council than you allow for, notably taking into account that the CFP pursues not only environmental objectives but also social and economic ones and that it is the Council's responsibility, within the applicable rules, to strike an appropriate balance between those three objectives when setting TACs. The Council will elaborate on this in its arguments below regarding the individual stocks and the (categories of) arguments that you make with respect to those stocks.
19. At this stage, it would merely point out some elements as regards mixed fisheries and as regards stocks managed jointly with the UK. As regards mixed fisheries, your description of the legal framework in that respect is incomplete and selective. Notably, several provisions recognise the difficulty of fishing all stocks at MSY at the same time and the need for some flexibilities with regard to the management of mixed fisheries. Thus, recital 8 of the CFP basic regulation provides that *“Management decisions relating to [MSY] in mixed fisheries should take into account the difficulty of fishing all stocks in a mixed fishery at maximum sustainable yield at the same time, in particular where scientific advice indicates that it is very difficult to avoid the phenomenon of “choke species” by increasing the selectivity of the fishing gears used. Appropriate scientific bodies should be requested to provide advice on the appropriate fishing mortality levels in such circumstances”* (emphasis added). Building on this, Article 9(5) of that regulation provides that *“Multiannual plans may contain specific conservation objectives and measures based on the ecosystem approach in order to address the specific problems of mixed fisheries in relation to the achievement of the objectives set out in Article 2(2) for the mixture of stocks covered by the plan in cases where scientific advice indicates that increases in selectivity cannot be achieved. Where necessary, the multiannual plan shall include specific alternative conservation measures, based on the ecosystem approach, for some of the stocks that it covers”* (emphasis added). Accordingly, Article 5(3) of the North Sea and Western Waters Multiannual plans (NS MAP<sup>8</sup> and WW MAP<sup>9</sup>) provides that *“In accordance with Article 9(5) of Regulation (EU) No 1380/2013, the management of mixed fisheries with regard to stocks referred to in Article 1(4) of this Regulation shall take into account the difficulty of fishing all stocks at MSY at the same time, especially in situations where that leads to a premature closure of the fishery”*. You overlook this when you present the CFP Basic Regulation and the regulations on the WW MAP (paragraphs 27 to 45 of your request).

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<sup>8</sup> Established by Regulation (EU) 2018/973 (Regulation (EU) 2018/973 of the European Parliament and of the Council of 4 July 2018 establishing a multiannual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks, specifying details of the implementation of the landing obligation in the North Sea and repealing Council Regulations (EC) No 676/2007 and (EC) No 1342/2008, OJ L 179, 16.7.2018, p. 1.

<sup>9</sup> Established by Regulation (EU) 2019/472 of the European Parliament and of the Council of 19 March 2019 establishing a multiannual plan for stocks fished in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC) No 1300/2008, OJ L 83, 25.3.2019, p. 1.

20. The Council also considers that your analysis of the CFP provisions on stocks managed jointly with third countries and of the Trade and Cooperation Agreement with the UK (TCA)<sup>10</sup> is similarly incomplete and selective. You correctly acknowledge in paragraph 29 of your request that Article 28(3) of the CFP Basic Regulation provides that its provisions on the external policy “*shall be without prejudice to specific provisions adopted under Article 218 of the Treaty*”, i.e. international agreements concluded by the Union and decisions relating to such agreements. Indeed, that provision reflects the status and hierarchy of international agreements under Union law.<sup>11</sup> However, you then consider that nothing in the TCA and in the Union position for the consultations with the UK for 2022 entails or permits a departure from the TAC setting rules in the CFP Basic Regulation (paragraphs 29 to 32 and 85 of your request). The Council does not share that view.
21. As to the TCA itself, the Council does not share the interpretation you put forward in paragraph 29 of your request. In particular, the reference to “*the rights and obligations of independent coastal States*” in Article 494(1) TCA was meant to emphasise the rights of coastal States under international law and does not in any way exclude that the TCA, or a measures adopted under the TCA (e.g. by the Specialised Committee on Fisheries (SCF)), may include provisions that derogate from the rules of either or both of the parties that would otherwise apply. The same applies to the reference to “*preserving the regulatory autonomy of the Parties*” in Article 494(3)(f) TCA. This only means that the parties remain free to each regulate as they see fit on points where / to the extent that they have not agreed to adopt certain (common) rules.<sup>12</sup>
22. Furthermore, the rules on the setting of TACs in the TCA are different, less precise and explicitly more flexible than the Union’s internal rules. A number of provisions closely reflect CFP rules, including much of paragraphs 1 to 3 of Article 494 TCA. Those provisions inter alia say that the parties “*shall cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits*” and “*share the objective of exploiting shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield*”. They also require “*applying the precautionary approach to fisheries management*”, “*basing conservation and management decisions for fisheries on the best available scientific advice*” and “*taking due account of and minimising harmful impacts of fishing on the marine ecosystem ...*”. However, there is no equivalent provision to the CFP obligation to set TACs in accordance with the MSY. Instead, Article 494(3)(b) provides for “*promoting the long-term sustainability (environmental, social and economic) and optimum utilisation of shared stocks*”. This wording, including the “*optimum utilisation*”, more clearly and explicitly

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<sup>10</sup> Council Decision (EU) 2021/1875 of 22 October 2021 concerning the position to be adopted on behalf of the Union in the annual consultations with the United Kingdom to agree on total allowable catches, OJ L 378, 26.10.2021, p. 6.

<sup>11</sup> On the primacy of international agreements concluded by the Union over secondary Union law, see e.g. Case C-308/06, *The Queen on the application of International Association of Independent Tanker owners (Intertanko)*, judgment of 3 June 2008, EU:C:2008:312, paragraph 42 and Case C-61/94, *Commission v Germany*, judgment of 10 September 1996, EU:C:1996:313 (*International Dairy Agreement*), paragraph 52. On the related status of decisions adopted under such agreements, see e.g. Case C-192/89, *Sevince*, judgment of 20 September 1990, EU:C:1990:322, paragraphs 8-9.

<sup>12</sup> See also the analysis by R. Churchill, ‘Fisheries Management in European Union and United Kingdom Waters after Brexit: A Change for the Better?’, Vol. 36(1) *Ocean Yearbook Online* 2022, pp. 295-298, who writes that “*While each party enjoys regulatory autonomy in fisheries management for its waters, that autonomy is heavily qualified by the TCA*” and that “*Annex 35 stocks are subject to joint management by the EU and the UK. This is the greatest limitation on their management autonomy*”.

reflects the three dimensions of sustainability. This is further clarified and specified in the provisions of Article 498(2) TCA on the fishing opportunities, which provides for TACs to be agreed: “(a) on the basis of the best available scientific advice, as well as other relevant factors, including socio-economic aspects; and (b) in compliance with any applicable multi-year strategies for conservation and management agreed by the Parties” (emphasis added).<sup>13</sup>

23. Moreover, paragraphs 3 to 5 of Article 499 TCA on provisional TACs explicitly allow for the setting of certain TACs in a way that does not follow the ICES advice. In particular, while paragraph 2 of that Article requires that provisional TACs (when applicable) shall be set “corresponding to the level advised by ICES”, paragraph 3 provides that “By way of derogation from paragraph 2, the TACs for special stocks shall be set in accordance with guidelines adopted under paragraph 5”. According to the latter paragraph, the SCF “shall adopt guidelines by 1 July 2021 for the setting of provisional TACs for special stocks”. Paragraph 4 defines special stocks as “(a) stocks where the ICES advice is for a zero TAC; (b) stocks caught in a mixed fishery, if that stock or another stock in the same fishery is vulnerable; or (c) other stocks which the Parties consider require special treatment”. While Article 499 only concerns provisional TACs, it clearly implies and recognises that for special stocks, also the final agreed TAC may be set differently from the ICES advice, notably for stocks with zero catch advice and mixed fisheries involving vulnerable stocks. This reflects – albeit more explicitly and more clearly – similar flexibilities which are also recognised under Union law, as explained above and below.
24. It is true that nothing in the TCA obliges the Union to fully use its share of the TAC agreed with the UK. However, not doing so would undermine one of the core elements which the Union sought to obtain in the TCA. In particular, the Union sought to preserve as much as possible the share of the fishing opportunities which the 27 member States had while the UK was still a member of the Union, in the face of a UK position which sought to increase the UK share based on a theory of “zonal attachment”. In the end, the Union had to accept a decrease of its share of the TACs for shared stocks but it managed to limit that decrease and had to pay a price for this outcome in the overall negotiations on the TCA.<sup>14</sup> Those shares are set out in annex 35 of the TCA and have to be respected by virtue of Article 498(3) and, as regards provisional TACs, Article 499(7) thereof. Clearly, it cannot have been the intention on the Union side, after having fought so hard to obtain as high a share as possible, to then have to renounce it, in whole or in part, on the basis of more stringent internal rules. Therefore, in the view of the Council, the approval of the TCA by the Union included the possibility of the Union to make full use of its share of the agreed TACs, contrary to what you state in paragraph 32 of your request. While in paragraph 49 of your request, you stress that your request does not aim at challenging the legality of the sharing of fishing opportunities between the UK and the EU, your line of reasoning leads to a conclusion which undermines that sharing.

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<sup>13</sup> See also R. Churchill, above previous note, p. 297: “The reference to “socio-economic aspects” in Article 498 suggests that scientific advice may be departed from to set larger TACs than those recommended by scientists for the purposes of short-term economic gains for the fishing Industry” and R. Churchill, ‘Fisheries Management in United Kingdom Waters after Brexit. An Assessment of the Changes Made by the Trade and Cooperation Agreement’, in J. Echebarria Fernández and others (eds), *Fisheries and the Law in Europe. Regulation after BREXIT*, Routledge, 2022, pp. 20-23.

<sup>14</sup> For a brief description, see R. Churchill, above note 12, pp. 293-294 and 300-302 and A. Serdy, ‘The Fisheries Provisions of the Trade and Cooperation Agreement. An Analytical Conspectus’, in J. Echebarria Fernández and others (eds), above note 13, pp. 52-53.



25. In paragraph 30 of your request, you refer to paragraph 5(e) of the written record of the annual EU-UK consultation for 2022. However, that paragraph merely indicates that the agreement reached on the TACs for 2022 is without prejudice to the approach to TAC setting in future years. The words “*including the application of the TAC setting principles set out in the Parties’ respective legislation*” simply reflect that in that future TAC setting, the Parties may invoke those principles but no more than that. It moreover refers to the joint TAC setting rather than to the implementation of the agreed TACs by each Party.
26. In paragraph 31 of your request, you refer to Article 33 of the CFP Basic Regulation, entitled ‘Principles and objectives of management of stocks of common interest to the Union and third countries and agreements on exchange and joint management’. This Article provides that (emphasis added):
- “1. Where stocks of common interest are also exploited by third countries, the Union shall engage with those third countries with a view to ensuring that those stocks are managed in a sustainable manner that is consistent with this Regulation, and in particular with the objective laid down in Article 2(2). Where no formal agreement is reached, the Union shall make every effort to reach common arrangements for fishing of such stocks with a view to making the sustainable management possible, in particular, concerning the objective in Article 2(2), thereby promoting a level-playing field for Union operators.*
- 2. In order to ensure a sustainable exploitation of stocks shared with third countries and to guarantee stability of the fishing operations of its fleets, the Union shall, in accordance with UNCLOS, endeavour to establish bilateral or multilateral agreements with third countries for the joint management of stocks, including the establishment, where appropriate, of access to waters and resources and conditions for such access, the harmonisation of conservation measures and the exchange of fishing opportunities.”*
27. Like the other provisions on the external policy title in the CFP Basic Regulation, this provision is subject to Article 28(3) thereof and without prejudice to any decision adopted under Article 218 TFEU. Moreover, the essence of Article 33 is that the Union shall strive to persuade third countries to sustainably manage shared stocks and stocks exploited by both the Union and third countries and in that way ensure a level playing field. This provision does not, however, include an obligation of result – which would be impossible, as the Union cannot impose its will on third countries – nor does it require the Union to bear the sole burden of ensuring a sustainable management of joint stocks if a third country does not agree joint rules that ensure this. In the latter case, the Union has to balance its objective to ensure sustainable fishing with the defence of the Union’s legitimate fisheries interests. Indeed, recitals 5 and 6 of the contested Regulation refer to the level playing field.<sup>15</sup>
28. Article 33 of the CFP Basic Regulation is reflected in Article 13(1) of the NS MAP and in Article 15(1) of the WW MAP. Both provisions are identical and provide that “*Where stocks of common interest are also exploited by third countries, the Union shall engage with those third countries with a view to ensuring that those stocks are managed in a sustainable manner that is consistent with the objectives of Regulation (EU) No 1380/2013, in particular Article 2(2) thereof, and of this Regulation. Where no formal agreement is reached, the Union shall make every effort to reach common arrangements for fishing of such stocks with a view to making sustainable management possible, thereby promoting a level-playing field for Union operators*”. You refer to Article 15 of the WW MAP in

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<sup>15</sup> The Council notes in this respect that according to Figure 2 on page 10 of the STECF report on monitoring the performance of the CFP, to which you refer in paragraph 7 of your request, the average fishing pressure for the 44 assessed stocks in Union waters of the North East Atlantic is very close to FMSY, whereas that for 12 assessed stocks outside Union waters in the North East Atlantic is higher.

paragraph 45 of your request and consider that it has the effect of making applicable only the objectives of the CFP Basic Regulation and of the WW MAP. The Council considers that this provision should be interpreted in the same way as Article 33 of the CFP Basic Regulation (thus leaving some room to balance sustainability and level playing field, see above) and does not exclude making use of any of the provisions of the MAP, including those on the MSY ranges and on the management of by-catches.

29. Both Articles 28(3) and 33 of the CFP Basic Regulation are referred to in Council decision (EU) 2021/1875 of 22 October 2021 concerning the position to be adopted on behalf of the Union in the annual consultations with the United Kingdom to agree on total allowable catches,<sup>16</sup> adopted under Article 218(9) TFEU. The overall Union position as set out in that decision includes, as you point out in paragraph 31 of your request, under ‘principles’ that the Union shall (emphasis added)

“(d) **ensure** that the TACs and other functionally linked measures are set in a way which is consistent with the Trade and Cooperation Agreement and fully take into account any measures or guidance established by the Specialised Committee on Fisheries (SCF);

(e) **seek to ensure** that TACs are jointly determined in accordance with the common fisheries policy (CFP) objective of ensuring that fisheries are environmentally sustainable in the long term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, including the core conservation objective of the CFP, namely MSY, as well as with the applicable multiannual plans;”

30. However, you do not mention in your request that, under ‘orientations’, that position includes more detailed elements on the TAC setting with the UK, including (emphasis added) to “(g) seek to take into account the difficulty of fishing all stocks in a mixed fishery at the MSY level at the same time, and in particular where it is difficult to avoid the phenomenon of choke species, including TACs with 0-catch advice for either target or by-catch TACs; the Union should seek, where relevant under the multiannual plans, to accompany the TAC level with remedial measures in the relevant sea basins;” and to “(h) seek to establish TACs for scientific or monitoring purposes in line with the scientific advice;”. These points in particular reflect the flexibilities in the applicable legal framework set out above and below.

31. Turning specifically to the four stocks covered by this plea, the Council will first address **Irish Sea whiting (WHG/07A)**. This stock is not a target species under the WW MAP, but by-catch for another stock, namely for nephrops, which is a target stock in the same area.<sup>17</sup> Thus, as you acknowledge in table 1 of your request, **WHG/07A** falls under Article 1(4) of the WW MAP. Therefore, it is subject to the by-catch rules set out in Article 5 of that MAP. This Article provides that:

“1. Management measures for the stocks referred to in Article 1(4) including, where appropriate, fishing opportunities shall be set taking into account the best available scientific advice and shall be consistent with the objectives laid down in Article 3.

2. The stocks referred to in Article 1(4) shall be managed under the precautionary approach to fisheries management as defined in point 8 of Article 4(1) of Regulation (EU) No 1380/2013 when no adequate scientific information is available, and in accordance with Article 3(5) of this Regulation.

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<sup>16</sup> OJ L 378, 26.10.2021, p. 6; see recitals 11 and 12.

<sup>17</sup> See Article 1(1), point (23) of the WW MAP.

3. In accordance with Article 9(5) of Regulation (EU) No 1380/2013, the management of mixed fisheries with regard to stocks referred to in Article 1(4) of this Regulation shall take into account the difficulty of fishing all stocks at MSY at the same time, especially in situations where that leads to a premature closure of the fishery.”

32. As explained above, the latter paragraph specifically addresses the challenge of mixed fisheries and recognizes the need to avoid choke effects. It is on the basis of this provision that the Council set a by-catch only TAC – i.e. prohibiting a directed fishery for this stock - that should avoid a choke effect.
33. The explanatory memorandum to the Commission proposal for the contested Regulation explains that “*Whiting Irish Sea is a by-catch stock under the Western Waters MAP. A TAC was agreed, with the United Kingdom based on a rollover, as requested by the United Kingdom above the ICES determined FMSY and above the upper FMSY ICES advice rule. This will result in an increase in the stock size of at least 23% compared to the 2021 biomass level. This is one of the two stocks for which the Council adapted the mandate on 6 December 2021*” and that “*For a limited number of stocks (Rockall, West of Scotland, Irish Sea and Celtic Sea cod; Irish Sea whiting; Pollack 6 and 7), TACs were agreed with the United Kingdom at a level above that proposed by the Union in order to achieve an overall outcome considered necessary and desirable in terms of sustainability and socio-economic considerations, including the need to promote the level playing field*”.
34. More specifically, the level of this by-catch only TAC was set at 721 tonnes (with a Union share of 299 tonnes). This is significantly below 957 tonnes, which ICES assessed to be the unavoidable level of bycatch of in the nephrops fishery<sup>18</sup> and the same as the TAC for 2021. The Union had sought a somewhat lower TAC, but the UK, which has the bigger share of this fishery, insisted on a higher TAC and in order to secure an overall agreement, the Union agreed that TAC. This TAC level should lead to a 27 % increase in spawning stock biomass (SSB) by 2023.<sup>19</sup>
35. Furthermore, as explained in recital 7 of the contested Regulation, “*Since the biomass of certain blue ling (BLI/12INT, BLI/24, BLI/03A), cod (COD/5BE6A, COD/7XAD34), herring (HER/7G-K) and whiting (WHG/07A) stocks are below the biomass reference points (Blim), the Union and the United Kingdom agreed in the Written Record that it is necessary that Member States do not apply Article 15(9) of Regulation (EU) No 1380/2013 in respect of those stocks for transfers from 2021 to 2022, so that catches in 2022 do not exceed the TAC established for those stocks*”.<sup>20</sup> In fact, the Member States concerned had already committed not to make use of that flexibility - which they are entitled to use under Article 15(9) of the CFP Basic Regulation – for WHG/07A when the Council adopted Regulation 2022/109.<sup>21</sup>

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<sup>18</sup> EU standing request on catch scenarios for zero TAC stocks 2021; cod (*Gadus morhua*) in Division 6.a (West of Scotland) and whiting (*Merlangius merlangus*) in Division 7.a (Irish Sea), ICES Technical Service, 30 June 2021, [https://ices-library.figshare.com/articles/report/EU\\_standing\\_request\\_on\\_catch\\_scenarios\\_for\\_zero\\_TAC\\_stocks\\_2021\\_cod\\_Gadus\\_morhua\\_in\\_Division\\_6\\_a\\_West\\_of\\_Scotland\\_and\\_whiting\\_Merlangius\\_merlangus\\_in\\_Division\\_7\\_a\\_Irish\\_Sea\\_/18639098](https://ices-library.figshare.com/articles/report/EU_standing_request_on_catch_scenarios_for_zero_TAC_stocks_2021_cod_Gadus_morhua_in_Division_6_a_West_of_Scotland_and_whiting_Merlangius_merlangus_in_Division_7_a_Irish_Sea_/18639098), p. 3.

<sup>19</sup> Ibid, p. 4, table 6.

<sup>20</sup> See paragraph 14 and annex 2 of the written record for 2022.

<sup>21</sup> According to this statement, “*Given that the biomass of the stocks of COD/03AS; COD/5BE6A; WHG/56-14; WHG/07A and PLE/7HJK is below Blim and that only by-catch and scientific fisheries will be permitted in 2022, in order to ensure the recovery of the stocks in accordance with Regulations (EU) 2018/973 and (EU) 2019/472, Belgium, Denmark, France, Germany, Ireland, the Netherlands and Sweden undertake not to make use of inter-annual flexibility under Article 15(9) of Regulation (EU) No 1380/2013 with regard to these stocks in 2022. ...*” (this statement is reproduced in the annex to Council doc. CM 1355/22).

36. With regard to **PRA/2AC4-C** (Northern prawn in the northern North Sea and Fladen Ground), which is caught primarily as a by-catch in the Norway pout fishery, you admit in the footnote to the comments in table 1 of your request that the ICES headline advice<sup>22</sup> is not that there should be zero catches but only that there should be no directed fishery, but you invoke Table 3 of that advice, which indicates 0 catches under the heading “landings corresponding to advice”.
37. The explanatory memorandum to the Commission proposal for the contested Regulation explains that *“The proposal lists 32 TACs for stocks with precautionary advice. The Union sought agreement with the United Kingdom on these TACs, taking into account the corresponding ICES headline advice and the precautionary approach provided for in Article 2(2) of the CFP Regulation. Most of these TACs have been agreed with the United Kingdom in line with, or below the ICES advice levels. However, a number of TACs ([...] Northern Prawn [North Sea] [...]) were agreed with the United Kingdom at levels that avoid choking situations and cater for the specificities in mixed fisheries. A by-catch only footnote was added to the Northern Prawn (North Sea) TAC because the ICES advice suggests that this should not be a directed fishery”*.
38. In this regard, the Council underlines that the full headline advice reads as follows: *“ICES advises that when the precautionary approach is applied, there should be no targeted fisheries on this stock for the years of 2022 and 2023. ICES cannot provide advice on the status of this stock because of a lack of sufficient survey and catch data”* (emphasis added). This advice is therefore clearly different from the explicit zero catch advice that ICES has issued for other stocks. It is clearly not based on an assessment that the stock is in a bad state, but only that ICES has insufficient data to assess it. In fact, on p. 2 of its advice, ICES indicates that *“A new index of abundance based on the weight proportion of shrimps as bycatch in the Danish small meshed fishery for Norway pout shows a steep increase in 2021”*. This suggests that the stock is not in such a state that no catches at all should be permitted. On the contrary, a report from NAFO/ICES Pandalus Assessment Group Meeting NIPAG, on 1-4 November 2021, contains a rather positive assessment of the status of the stock, including that the *“Stock size is likely at a relative high level and fishing mortality at a relatively low level”* and that *“The state of the stock relative to reference points is unknown. However, new information from the fisheries and the Norwegian shrimp survey indicate that the stock size has increased since 2018 and presently is at a relatively high level”*.<sup>23</sup> Moreover, not allowing any catches at all would also mean that the lack of sufficient data would not be remedied.
39. Undoubtedly, that explains why the headline advice is only that there should be no *directed* fishery, rather than that there should be zero catches. By setting a by-catch only TAC, which aims to avoid choking the related Norway pout fishery, the Council has correctly followed that advice. Furthermore, the Council also set the TAC for Norway pout well below the level indicated in the ICES advice, precisely to limit Northern prawn by-catches.<sup>24</sup>

<sup>22</sup> Northern shrimp (*Pandalus borealis*) in division 4.a West (Northern North Sea, Fladen Ground), ICES Advice, 30 November 2021, [https://ices-library.figshare.com/articles/report/Northern\\_shrimp\\_Pandalus\\_borealis\\_in\\_Division\\_4\\_a\\_West\\_Northern\\_North\\_Sea\\_Fladen\\_Ground\\_/18639776](https://ices-library.figshare.com/articles/report/Northern_shrimp_Pandalus_borealis_in_Division_4_a_West_Northern_North_Sea_Fladen_Ground_/18639776).

<sup>23</sup> NAFO/ICES. 2021. Report of the NAFO/ICES Pandalus Assessment Group Meeting, 1 – 4 November 2021, WebEx. NAFO SCS Doc. 21/19, <https://www.nafo.int/Portals/0/PDFs/sc/2021/scs21-19.pdf>, pp. 43-48 (citations from pp. 47 and 48).

<sup>24</sup> The TAC for NOP/2A3A4 from 1 November 2021 to 31 October 2022 was set at 59.728 tonnes whereas the ICES advice was for catches up to 118.273 tonnes. See ICES advice, Norway pout (*Trisopterus esmarkii*) in

40. West of Scotland cod (**COD/5BE6A**) is a by-catch, mainly in the fisheries for haddock, saithe and anglerfish in the same area,<sup>25</sup> which are target stocks under the NS MAP.<sup>26</sup> In line with the importance of avoiding choke situations, a by-catch only TAC was set at 1279 tonnes (with a Union share of 349 tonnes). This reflects a roll-over of the TAC for 2020 and 2021, after a major reduction compared to the 2019 TAC.<sup>27</sup> This TAC level should ensure an increase in the SSB of 45 % by the end of 2022.<sup>28</sup> As the Commission explained in the explanatory memorandum to the proposal for the contested Regulation, “*Cod West of Scotland is a by-catch stock under the Western Waters MAP. A TAC was agreed with the United Kingdom based on a rollover as requested by the United Kingdom, above the ICES determined FMSY and above the upper FMSY ICES advice rule. This will result in an increase in the stock size by 45% compared to the 2021 biomass level. This is one of the two stocks for which the Council adapted the Union position on 6 December 2021*”. Indeed the Union had sought a somewhat lower TAC but agreed this outcome as part of an overall agreement with the UK. Moreover, the Council has also set the TAC for two of the three above-mentioned related fisheries in this area below the MSY point value, precisely to limit the cod by-catches. In particular, for haddock, the TAC was set at 52.691 tonnes, well below the advised level of 128.708 tonnes, as in previous years.<sup>29</sup> For whiting, the WHG/56-14 TAC was set at 1800 tonnes while the advice was for up to 4114 tonnes.<sup>30</sup> The TAC for saithe was set at the level advised by ICES.<sup>31</sup>

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Subarea 4 and Division 3.a (North Sea, Skagerrak, and Kattegat), 8 October 2021, [https://ices-library.figshare.com/articles/report/Norway\\_pout\\_Trisopterus\\_esmarkii\\_in\\_Subarea\\_4\\_and\\_Division\\_3\\_a\\_North\\_Sea\\_Skagerrak\\_and\\_Kattegat\\_/18639500?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Norway_pout_Trisopterus_esmarkii_in_Subarea_4_and_Division_3_a_North_Sea_Skagerrak_and_Kattegat_/18639500?backTo=/collections/ICES_Advice_2021/5796932).

<sup>25</sup> ICES technical service, EU standing request on catch scenarios for zero TAC stocks 2021; cod (*Gadus morhua*) in Division 6.a (West of Scotland) and whiting (*Merlangius merlangus*) in Division 7.a (Irish Sea), [https://ices-library.figshare.com/articles/report/EU\\_standing\\_request\\_on\\_catch\\_scenarios\\_for\\_zero\\_TAC\\_stocks\\_2021\\_cod\\_Gadus\\_morhua\\_in\\_Division\\_6\\_a\\_West\\_of\\_Scotland\\_and\\_whiting\\_Merlangius\\_merlangus\\_in\\_Division\\_7\\_a\\_Irish\\_Sea\\_/18639098?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/EU_standing_request_on_catch_scenarios_for_zero_TAC_stocks_2021_cod_Gadus_morhua_in_Division_6_a_West_of_Scotland_and_whiting_Merlangius_merlangus_in_Division_7_a_Irish_Sea_/18639098?backTo=/collections/ICES_Advice_2021/5796932).

<sup>26</sup> See its Article 1(1), points (b), (d) and (h) respectively.

<sup>27</sup> See table 3 on p. 4 of the ICES advice of 30 June 2021 ([https://ices-library.figshare.com/articles/report/Cod\\_Gadus\\_morhua\\_in\\_Subdivision\\_21\\_Kattegat\\_/18638663?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Cod_Gadus_morhua_in_Subdivision_21_Kattegat_/18638663?backTo=/collections/ICES_Advice_2021/5796932)).

<sup>28</sup> ICES advice, Cod (*Gadus morhua*) in Division 6.a (West of Scotland), 30 June 2020, [https://ices-library.figshare.com/articles/report/Cod\\_Gadus\\_morhua\\_in\\_Division\\_6\\_a\\_West\\_of\\_Scotland\\_/18637100?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Cod_Gadus_morhua_in_Division_6_a_West_of_Scotland_/18637100?backTo=/collections/ICES_Advice_2021/5796932), especially Table 3.

<sup>29</sup> See ICES advice, Haddock (*Melanogrammus aeglefinus*) in Subarea 4, Division 6.a, and Subdivision 20 (North Sea, West of Scotland, Skagerrak), 30 June 2021, [https://ices-library.figshare.com/articles/report/Haddock\\_Melanogrammus\\_aeglefinus\\_in\\_Subarea\\_4\\_Division\\_6\\_a\\_and\\_Subdivision\\_20\\_North\\_Sea\\_West\\_of\\_Scotland\\_Skagerrak\\_/18638720?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Haddock_Melanogrammus_aeglefinus_in_Subarea_4_Division_6_a_and_Subdivision_20_North_Sea_West_of_Scotland_Skagerrak_/18638720?backTo=/collections/ICES_Advice_2021/5796932), especially Table 6a. The advice covers 3 TAC areas and the combined TAC (44.924 + 5006 + 2761 tonnes) was well below the advised 128.708 tonnes.

<sup>30</sup> ICES advice, Whiting (*Merlangius merlangus*) in Division 6.a (West of Scotland), 30 June 2021, [https://ices-library.figshare.com/articles/report/Whiting\\_Merlangius\\_merlangus\\_in\\_Division\\_6\\_a\\_West\\_of\\_Scotland\\_/18639074?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Whiting_Merlangius_merlangus_in_Division_6_a_West_of_Scotland_/18639074?backTo=/collections/ICES_Advice_2021/5796932).

<sup>31</sup> ICES advice, Saithe (*Pollachius virens*) in subareas 4 and 6, and in Division 3.a (North Sea, Rockall and West of Scotland, Skagerrak and Kattegat), 30 June 2021, [https://ices-library.figshare.com/articles/report/Saithe\\_Pollachius\\_virens\\_in\\_subareas\\_4\\_and\\_6\\_and\\_in\\_Division\\_3\\_a\\_North\\_Sea\\_Rockall\\_and\\_West\\_of\\_Scotland\\_Skagerrak\\_and\\_Kattegat\\_/18638918?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Saithe_Pollachius_virens_in_subareas_4_and_6_and_in_Division_3_a_North_Sea_Rockall_and_West_of_Scotland_Skagerrak_and_Kattegat_/18638918?backTo=/collections/ICES_Advice_2021/5796932) was for up to 49 614 tonnes. The TACs POK/2C3A4 (44.950 tonnes) and POK/56-14 (4.664 tonnes) add up to that value.

41. The final stock under this plea is **COD/7XAD34**, Cod in the Celtic Sea. In its explanatory memorandum to the proposal for the contested Regulation, the Commission explained that “Cod Celtic Sea is a target stock under the Western Waters MAP. A TAC was agreed between the Union and the United Kingdom at a level of 644 tonnes (-20% compared to 2021 level) for unavoidable by-catches in the mixed demersal fishery, leading to an increase in biomass of at least 82% and staying below the FMSY upper value. While no new remedial (technical) measures were agreed with the United Kingdom, the Commission has recently adopted [Commission Delegated Regulation (EU) 2021/2324 of 23 August 2021 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards technical measures for certain demersal and pelagic fisheries in the Celtic Sea, the Irish Sea and the West of Scotland (OJ L 465, 29.12.2021, p. 1–7)] new gear-based measures and by-catch thresholds to reduce by-catches of cod in the Celtic Sea and adjacent waters. Those new measures will apply until 31 December 2022.” In addition, it has been agreed to not apply inter-annual flexibility for this stock for 2022 (see paragraph 35 above). However, this stock was overlooked in the statement that Member States concerned made in January (*ibid.*). For avoidance of doubt and to confirm the commitment agreed with the UK, the Member States concerned have adopted an additional statement entered into the minutes of the Council at the occasion of the approval of this reply and covering COD/7XAD34 (see annex). The TAC level only seeks to avoid a premature closure of the fisheries for multiple other stocks caught together (see paragraph 70 below on the effects of setting this TAC at zero<sup>32</sup>) and is for by-catches only. Taking into account the difficulty of fishing all stocks in this mixed fishery at MSY at the same time, that approach is in line with Article 8(2) of the Western Waters MAP, which explicitly mentions suspending the targeted fishery as an appropriate remedial measure, as well as the adequate reduction of fishing opportunities, and with the TCA provisions on special stocks with zero advice.
42. For the above reasons, the Council considers that, in combination with the other measures adopted, these four TACs were set in accordance with the applicable legal framework. The Council sees no need for these TACs to be amended.

### II.3.B. Second plea of the first ground

43. Under the second plea of the first ground, you argue in essence that the Council did not follow the ICES advice and by doing so, effectively introduced an exception to the MSY objective, thus disregarding an essential element of the CFP Basic Regulation (paragraphs 110 to 116 of your request).
44. This plea covers six TACs (Table 2 of your request): **COD/5W6-14** (cod in 6b; United Kingdom and international waters of 5b west of 12o 00' W and of 12 and 14), **COD/07A** (cod in the Irish Sea), **POL/56-14** and **POL/07** (Pollack in 6; United Kingdom and international waters of 5b; international waters of 12 and 14), **RJU/9-C** (Undulate ray in Union waters of 9), **HER/5B6ANB** and **HER/6AS7BC** (herring in 6b and 6aN; United Kingdom and international waters of 5b) and **HER/7G-K** (herring in 7a south of 52° 30'N; 7g, 7h, 7j and 7k).<sup>33</sup>

<sup>32</sup> According to the ICES advice, Celtic Sea mixed-fisheries considerations, 30 November 2021, [https://ices-library.figshare.com/articles/report/Celtic\\_Sea\\_mixed\\_fisheries\\_considerations/18639896?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Celtic_Sea_mixed_fisheries_considerations/18639896?backTo=/collections/ICES_Advice_2021/5796932), even under a reduced cod F<sub>MSY</sub> scenario with a TAC of 132 tonnes, the fleets concerned by this mixed fishery (24 fleets, 22 of which have cod catches) would need to reduce their effort in 2022 by 94 %.

<sup>33</sup> Two of these comprise two TACs.

45. In this respect, the Council considers that your interpretation of the role of scientific advice is overly strict and amounts to a delegation of decision-making power to scientists. While it is important, scientific advice remains advice and is usually not the only consideration which the legislator or competent authority has to take into account. Indeed, several provisions in the CFP Basic Regulation mention scientific advice together with technical and economic advice (e.g. Article 6(2) and 9(1)). The Court has clearly confirmed this with regard to the general principle under Article 6(2) of the CFP Basic Regulation that conservation measures should be adopted "*taking into account available scientific, technical and economic advice*".<sup>34</sup> This is especially relevant for cases in which the scientific advice itself acknowledges that it is based on inadequate data and therefore is less conclusive. The Council notes that of these six TACs, there was MSY advice for only one (**HER/7G-K**), and precautionary advice for the other five.
46. You inter alia point to recital 3 of the contested regulation to argue that the Council recognised that it has to follow the ICES headline advice. That recital explains that "*The Union position was based during the consultations on the best available scientific advice as provided by the International Council for the Exploration of the Sea (ICES) in accordance with Article 494(3), point (c), of the TCA*". In this respect, the Council notes that the wording "based on" may be less strict than, for example, the words "in accordance with" and leaves room for some margin. Furthermore, as the consultations with the UK are a (difficult) negotiation, the Union had to make some concessions compared to its initial negotiating position (see especially paragraphs 33-34 and 40 above), which is lawful under the flexibilities provided for in the applicable legal framework (see above).
47. The Council now turns to each of the specific stocks covered by this plea.
48. **COD/5W6-14** (cod in Rockall - 6b; United Kingdom and international waters of 5b west of 12° 00' W and of 12 and 14) is, as you correctly acknowledge in Table 2 of your request, not a target stock under the WW MAP but a by-catch stock, caught together with primarily haddock but also megrims<sup>35</sup> and anglerfish<sup>36</sup>. Therefore, as explained above, mixed fisheries considerations can be taken into account in setting this TAC, in particular to avoid a choke effect. Indeed, it is for this reason that the by-catch only TAC was set at the level of 74 tonnes (and a Union share of 23 tonnes). This was also in part due to the UK's position on this TAC (the UK has the major share of this TAC). Furthermore, the TAC has been set at that level since 2013 with the ICES precautionary advice having been that catches should not exceed 17 (for 2016 and 2017) and 14 tonnes (from 2018 on) and this does not appear to have harmed the stock, as the ICES advice even indicates that "*A new survey also*

<sup>34</sup> With regard to Article 6(2), see Case C-733/19, *Netherlands v Parliament and Council*, EU:C:2021:272, paragraphs 52-53 (« *il ne saurait être déduit de l'article 6, paragraphe 2, du règlement de base, [...], que le législateur de l'Union serait tenu de se conformer aux résultats de ces avis, lorsqu'il adopte des mesures de conservation. Il appartient, au contraire, à celui-ci de prendre ces mesures à l'issue d'une mise en balance des différents intérêts en cause et à la lumière de l'ensemble des éléments pertinents, au nombre desquels figurent de manière non exclusive lesdits avis* » and « *En effet, l'article 6, paragraphe 2, du règlement de base se limite à établir une obligation de « tenir compte » des avis scientifiques, techniques et économiques disponibles lors de l'adoption des mesures de conservation* » ; judgment not yet available in English). See also, in relation to an essentially identical provision in one of the previous CFP basic regulations, Case C-405/92, *Mondiet*, EU:C:1993:906, paragraphs 30-31 ("*measures for the conservation of fishery resources need not be completely consistent with the scientific advice, and the absence of such advice or the fact that it is inconclusive cannot prevent the Council from adopting such measures as it deems necessary for achieving the objectives of the common fisheries policy*").

<sup>35</sup> Haddock is a target species under the WW MAP (see its Article 1(1)(14)), as is megrims (ibid, Art. 1(1)(9)).

<sup>36</sup> Anglerfish in this area is a target stock under the NS MAP; see Art. 1(1)(h) NS MAP.

provides information indicating a recent increase in biomass”.<sup>37</sup> In the light of those elements, having kept the TAC at 74 tonnes is justified.

49. **COD/07A** (cod in the Irish Sea) is a target stock under the WW MAP.<sup>38</sup> However, as no MSY values were available, it is to be managed in the same way as by-catches.<sup>39</sup> As already explained above, this means that under Article 5(3) of that MAP, it is legitimate to avoid a choke situation and the associated negative impact in social and economic terms of a premature closure of other related fisheries. Indeed, for that reason, this TAC was set as a by-catch only TAC, at 208 tonnes (and a Union share of 115 tonnes), which is the same as in 2021 and above the level recommended by ICES in its precautionary advice. As the Commission explained in the explanatory memorandum to the proposal for the contested Regulation: “*For a limited number of stocks (West of Scotland, Irish Sea and Celtic Sea cod; Irish Sea whiting; Pollack 6 and 7), TACs were agreed with the United Kingdom at a level above that proposed by the Union in order to achieve an overall outcome considered necessary and desirable in terms of sustainability and socio-economic considerations, including the need to promote the level playing field*”.
50. The next stock is Pollack, namely **POL/56-14** and **POL/07** (Pollack in 6; United Kingdom and international waters of 5b; international waters of 12 and 14). This is a target stock under the WW MAP<sup>40</sup> but is managed under the WW MAP by-catch rules since no MSY advice is available (see above). As the Commission explained in the explanatory memorandum to the proposal for the contested Regulation, “*For a limited number of stocks (Rockall, West of Scotland, Irish Sea and Celtic Sea cod; Irish Sea whiting; Pollack 6 and 7), TACs were agreed with the United Kingdom at a level above that proposed by the Union in order to achieve an overall outcome considered necessary and desirable in terms of sustainability and socio-economic considerations, including the need to promote the level playing field*”. The ICES advice was that catches should not exceed 3360 tonnes; it is a category 4 advice, with very limited data, relying solely on commercial catch data.<sup>41</sup> The TAC was set at 8168 tonnes, which is a 15 % reduction compared to the 2021 TAC, which was in turn a 22,5 % reduction compared to the 2020 TAC. Given the nature of the advice, the Council considers that this significant but lesser reduction is justified. The Council notes that in recent years, the TAC has not been fully used<sup>42</sup> and it is unlikely that overall catches will exceed the level of catches advised by ICES. Nevertheless, given the different uptake of the quota by Member States and the need to respect relative stability of the allocation of the TAC between Member States, it was necessary to set the overall TAC at this level.
51. **RJU/9-C** is the TAC for undulate ray in Union waters of 9. It is a sub-TAC of the larger TAC for skates and rays in Union waters of 8 and 9 (SRX/89-C), for which ICES issued

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<sup>37</sup> ICES advice, Cod (*Gadus morhua*) in Division 6.b (Rockall), 30 June 2020, [https://ices-library.figshare.com/articles/report/Cod\\_Gadus\\_morhua\\_in\\_Division\\_6\\_b\\_Rockall/\\_18636854?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Cod_Gadus_morhua_in_Division_6_b_Rockall/_18636854?backTo=/collections/ICES_Advice_2021/5796932), p. 2.

<sup>38</sup> See its Art. 1(1)(6).

<sup>39</sup> See Articles 4(6) and 5 of this MAP.

<sup>40</sup> See its Art. 1(1)(29).

<sup>41</sup> ICES advice, Pollack (*Pollachius pollachius*) in subareas 6–7 (Celtic Seas and the English Channel), 30 June 2021, [https://ices-library.figshare.com/articles/report/Pollack\\_Pollachius\\_pollachius\\_in\\_subareas\\_6\\_7\\_Celtic\\_Seas\\_and\\_the\\_English\\_Channel/\\_18638933?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Pollack_Pollachius_pollachius_in_subareas_6_7_Celtic_Seas_and_the_English_Channel/_18638933?backTo=/collections/ICES_Advice_2021/5796932).

<sup>42</sup> Ibid, Table 4.



precautionary advice in 2020 for the years 2021 and 2022.<sup>43</sup> In Table 2 of your request, you argue that the TAC was increased by 100 % compared to 2021 and overshoots the ICES advice by 69 tonnes or 223 %. In addition, in footnote 88 in Table 2 of your request, you correctly identify the discrepancy that the Union TAC is 50, the UK quota 0 but the overall TAC is 100. You write that this may relate to deductions relating to exemptions from the landing obligation. In fact, it is an error. The overall TAC should read 50 tonnes, equal to the Union TAC (the UK share of this sub-TAC is 0 and this species is a prohibited species for third countries<sup>44</sup>). Furthermore, as you acknowledge, it is a by-catch only TAC,<sup>45</sup> which is in line with the ICES advice. You claim that even with 50 tonnes, this TAC would still overshoot the advice, which was for 31 tonnes, by 61 %. This is a stock with very little information.<sup>46</sup> The TAC has been stable at a level around 50 tonnes since 2016 while the advice since 2019 has been for catches to be no more than 31 tonnes.<sup>47</sup> During this period, landings have fluctuated somewhat but have not decreased overall.<sup>48</sup> Furthermore, when setting the RJU/9-C sub-TAC, the Council has not applied solely the separate stock advice for that area but rather looked at the advice change for all relevant stocks in areas 8 and 9. For 2021 and 2022, this led to an increase of 8% for the SRX/89 TAC and led to the setting of the RJU/9-C (and RJU/8-C, at 33 tonnes<sup>49</sup>) TACs accordingly.<sup>50</sup>

52. **HER/5B6ANB** and **HER/6AS7BC** (West of Scotland herring - in 6b and 6aN; United Kingdom and international waters of 5b). This concerns two TACs not subject to the WW MAP with precautionary advice. The Council set ‘sentinel’ (monitoring) TACs for both, to ensure adequate data collection for better stock assessment. While it is correct that the contested Regulation does not explicitly limit the use of this TAC to scientific fisheries, it is and should clearly be understood to be only a sentinel TAC.<sup>51</sup> Moreover, in part of the area concerned, directed fishing for herring is prohibited.<sup>52</sup> The level of these TACs (3480 and 1360 tonnes respectively, together 4840 tonnes) corresponds to the level of a sentinel TAC

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<sup>43</sup> ICES advice, Undulate ray (*Raja undulata*) in Division 9.a (Atlantic Iberian waters), 2 October 2020, [https://ices-library.figshare.com/articles/report/Undulate\\_ray\\_Raja\\_undulata\\_in\\_Division\\_9\\_a\\_Atlantic\\_Iberian\\_waters\\_/18637385?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Undulate_ray_Raja_undulata_in_Division_9_a_Atlantic_Iberian_waters_/18637385?backTo=/collections/ICES_Advice_2021/5796932).

<sup>44</sup> See Article 56(1)(g) of Regulation 2022/109.

<sup>45</sup> See footnote 2 in the TAC table for the larger TAC SRX/89-C.

<sup>46</sup> The advice for 2021 and 2022 (above note 43) indicates that “*There is no assessment for this stock in this area*” and the attached advice for 2019 and 2020 identifies it as a category 6 advice.

<sup>47</sup> See *ibid.*, Table 3.

<sup>48</sup> See *ibid.*, Figure 1, showing that landings in 2019 were somewhat higher than those in 2016.

<sup>49</sup> The 66 tonnes is an error and should read 33 tonnes.

<sup>50</sup> The advice for Undulate ray (*Raja undulata*) in divisions 8.a–b (northern and central Bay of Biscay), 2 October 2020, is available at [https://ices-library.figshare.com/articles/report/Undulate\\_ray\\_Raja\\_undulata\\_in\\_divisions\\_8\\_a\\_b\\_northern\\_and\\_central\\_Bay\\_of\\_Biscay\\_/18637367?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Undulate_ray_Raja_undulata_in_divisions_8_a_b_northern_and_central_Bay_of_Biscay_/18637367?backTo=/collections/ICES_Advice_2021/5796932). It is for catches up to 202 tonnes. The combined advice for areas 8 and 9 is therefore 233 tonnes and the combined TAC for both areas is 83 tonnes.

<sup>51</sup> E.g. the explanatory memorandum to the proposal for the contested Regulation explains that “*A monitoring TAC was agreed with the United Kingdom for herring West of Scotland (HER/5B6ANB) and the sister TAC herring West of Ireland (HER/6AS7BC) ...*”.

<sup>52</sup> See footnote 2 in the TAC table for **HER/5B6ANB** : “*It shall be prohibited to target any herring in the part of the ICES zones subject to this TAC that lies between 56°N and 57°30' N, with the exception of a six nautical mile belt measured from the baseline of the United Kingdom's territorial sea*”.

advised by ICES in 2016, as you acknowledge in your request,<sup>53</sup> and should lead to a 17 % increase of the biomass by the end of 2022.<sup>54</sup>

53. **HER/7G-K** (herring in 7a south of 52° 30'N; 7g, 7h, 7j and 7k) is the one stock under this plea for which ICES issued MSY advice. It is not subject to the WW MAP. The Council set a 'sentinel' TAC for this stock, for data collection purposes only.<sup>55</sup> The level of 869 tonnes corresponds to the level identified in the ICES advice and should result in a biomass increase of 7 % by 2023.<sup>56</sup> Furthermore, as indicated in paragraph 35 above, the Union and the UK agreed in the Written Record that it is necessary that Member States do not apply Article 15(9) of Regulation (EU) No 1380/2013 in respect of this stock for transfers from 2021 to 2022. However, this stock was overlooked in the statement that Member States concerned made in January (*ibid.*). For avoidance of doubt and to confirm the commitment agreed with the UK, the Member States concerned have adopted an additional statement entered into the minutes of the Council at the occasion of the approval of this reply and covering HER/7G-K (see annex).
54. In conclusion, after having reviewed the first ground of your request, the Council does not consider that it lacked competence to adopt the contested TACs and sees no need for those TACs to be amended. However, it intends to correct the TACs for **RJU/9-C** and **RJU/8-C** to 50 and 33 tonnes respectively as those TAC tables erroneously mention 100 and 66 tonnes.

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<sup>53</sup> See footnotes 92 to 94 in Table 2 of your request. In the latter, you say it is not clear whether the monitoring TAC level advised by ICES in 2016 is still appropriate. In that regard, in its 2021 technical advice ICES still refers to that level without questioning it (see next footnote). On the contrary, in its 2021 main advice ICES even comments that "*Reducing monitoring catches in 6aN might limit the ability to provide robust management advice in future years*" (ICES advice, Herring (Clupea harengus) in divisions 6.a and 7.b–c (West of Scotland, West of Ireland), 30 June 2021, [https://ices-library.figshare.com/articles/report/Herring\\_Clupea\\_harengus\\_in\\_divisions\\_6\\_a\\_and\\_7\\_b\\_c\\_West\\_of\\_Scotland\\_West\\_of\\_Ireland\\_/18638750?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Herring_Clupea_harengus_in_divisions_6_a_and_7_b_c_West_of_Scotland_West_of_Ireland_/18638750?backTo=/collections/ICES_Advice_2021/5796932), p. 2). Therefore, the Council considers that this level remains appropriate.

<sup>54</sup> ICES technical service, EU standing request on catch scenarios for zero TAC stocks 2021; herring (Clupea harengus) in divisions 6.a and 7.b–c (West of Scotland, West of Ireland), 30 June 2021, [https://ices-library.figshare.com/articles/report/EU\\_standing\\_request\\_on\\_catch\\_scenarios\\_for\\_zero\\_TAC\\_stocks\\_2021\\_herring\\_Clupea\\_harengus\\_in\\_divisions\\_6\\_a\\_and\\_7\\_b\\_c\\_West\\_of\\_Scotland\\_West\\_of\\_Ireland\\_/18639107?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/EU_standing_request_on_catch_scenarios_for_zero_TAC_stocks_2021_herring_Clupea_harengus_in_divisions_6_a_and_7_b_c_West_of_Scotland_West_of_Ireland_/18639107?backTo=/collections/ICES_Advice_2021/5796932), Table 2.

<sup>55</sup> The footnote in the TAC table for this stock provides that "*This quota may only be allocated to vessels participating in the sentinel fishery to allow fisheries-based data collection for this stock as assessed by ICES. The Member States concerned shall communicate the name(s) of the vessel(s) to the Commission before allowing any catches*".

<sup>56</sup> ICES advice, Herring (Clupea harengus) in divisions 7.a South of 52°30'N, 7.g–h, and 7.j–k (Irish Sea, Celtic Sea, and southwest of Ireland), 30 June 2021, [https://ices-library.figshare.com/articles/report/Herring\\_Clupea\\_harengus\\_in\\_divisions\\_7\\_a\\_South\\_of\\_52\\_30\\_N\\_7\\_g\\_h\\_and\\_7\\_j\\_k\\_Irish\\_Sea\\_Celtic\\_Sea\\_and\\_southwest\\_of\\_Ireland\\_/18638756?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Herring_Clupea_harengus_in_divisions_7_a_South_of_52_30_N_7_g_h_and_7_j_k_Irish_Sea_Celtic_Sea_and_southwest_of_Ireland_/18638756?backTo=/collections/ICES_Advice_2021/5796932). See also ICES technical service, EU standing request on catch scenarios for zero TAC stocks 2021; herring (Clupea harengus) in divisions 7.a South of 52°30'N, 7.g–h, and 7.j–k (Irish Sea, Celtic Sea, and southwest of Ireland), 30 June 2021, [https://ices-library.figshare.com/articles/report/EU\\_standing\\_request\\_on\\_catch\\_scenarios\\_for\\_zero\\_TAC\\_stocks\\_2021\\_herring\\_Clupea\\_harengus\\_in\\_divisions\\_7\\_a\\_South\\_of\\_52\\_30\\_N\\_7\\_g\\_h\\_and\\_7\\_j\\_k\\_Irish\\_Sea\\_Celtic\\_Sea\\_and\\_southwest\\_of\\_Ireland\\_/18639113?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/EU_standing_request_on_catch_scenarios_for_zero_TAC_stocks_2021_herring_Clupea_harengus_in_divisions_7_a_South_of_52_30_N_7_g_h_and_7_j_k_Irish_Sea_Celtic_Sea_and_southwest_of_Ireland_/18639113?backTo=/collections/ICES_Advice_2021/5796932).

### **III. Second ground: alleged infringements of the rules related to the application of the Treaties and alleged misuse of the powers conferred by those rules**

#### III.1. First limb of the first plea of the second ground: TACs allegedly not set in line with the MSY obligation

55. Under this limb (paragraphs 121-149 of your request), you cover ten TACs,<sup>57</sup> namely **COD/7XAD34**, **WHG/07A**, **COD/5BE6A**, **COD/5W6-14**, **COD/07A**, **POL/56-14** and **POL/07**, **RJU/9-C**, **PRA/2AC4-C**, **HER/7G-K** and **HER/5B6ANB** and **HER/6AS7BC**.
56. Your argument with respect to those TACs is that the Council did not set these TACs in line with the obligation to restore or maintain the stocks above levels which can produce MSY. You argue that that obligation applies fully to stocks shared with third countries (paragraphs 123-126 of your request) and then argue, in particular, that the ICES headline advice represents the maximum catch level not to be exceeded (paragraphs 127-144 of your request); that in order not to follow that advice, the Council would need to rely on other evidence capable of substantiating that the TAC may be set higher and that there is no such other evidence (paragraphs 146-147 of your request). On that basis, you conclude that the Council's assessment that the TACs comply with the scientific advice and MSY objective is implausible and that the Council committed a manifest error of assessment (paragraphs 148-149 of your request).
57. The Council has already explained above why it considers that it set these TACs in accordance with the entire legal framework applicable to them. Those explanations included both elements pertaining to the assessment of the scientific advice and to why the Council considers that it has more discretion than you claim. The Council also notes that several of those elements were reflected in the explanatory memorandum to the Commission proposal for the contested Regulation, in recitals of that regulation and in other documents cited above. Given the number of TACs which the Council has to set each year and the complexity of many of these TACs, as well as the limited time frame, the Council cannot – and does not have to – explain in the contested Regulation in detail the entire reasons for setting each single TAC.
58. The Council furthermore does not agree with the essence of your argument that the ICES headline advice represents the maximum catch level not to be exceeded. Leaving aside all other elements of flexibility in the legal framework as identified above, this view turns the scientists into the decision-makers. Rather, the legal obligation is not to exceed MSY taking into account the best available scientific advice. The more uncertain that advice is, the more reasonable it may be for the Council to not entirely follow the headline advice only and also to take into account other elements, including uncertainties identified in the advice itself. The Council moreover disagrees with your argument (in paragraph 143 of your request) that ICES advice in response to special requests does not constitute best available scientific advice. Such advice may only respond to a particular issue but on that point nevertheless constitutes the best available scientific advice to the same extent as any other ICES advice. Finally, for stocks in safe biological limits, the Council does not see any basis for your argument (in paragraph 141 of your request) that constantly fishing at  $F_{MSY}$  will not achieve the MSY objective in Article 2(2) of the CFP Basic Regulation. In fact, often the TACs are not fully utilised, so that catches remain below  $F_{MSY}$  even if the TAC is set at that level.

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<sup>57</sup> Two of these comprise two TACs.

59. The Council therefore sees no need for the TACs covered by these arguments to be amended. However, it does intend to correct the TACs for **RJU/9-C** and **RJU/8-C**.

### III.2. Second limb of the first plea of the second ground: TACs allegedly not set in line with the precautionary approach

60. Under this limb (paragraphs 150-168 of your request), you argue that the precautionary approach as applicable under the rules of the CFP, based on the precautionary principle reflected in Article 191(2) TFEU and in the UN Fish Stocks Agreement, strictly limit the Council's discretion to set TACs and that the Council has to follow the ICES headline advice in this respect (paragraphs 151 to 164 of your request). You then argue that the Council has not followed that advice for these stocks without justification and in doing so, has no plausible case that the TACs set are consistent with the MSY objective and hence the Council committed a manifest error of assessment (paragraphs 165 to 168 of your request).

61. This limb covers six TACs,<sup>58</sup> namely **COD/5W6-14**, **COD/07A**, **POL/56-14** and **POL/07**, **RJU/9-C**, **PRA/2AC4-C**, and **HER/5B6ANB** and **HER/6AS7BC**.

62. The Council has already explained in the sections above why it considers that it set these TACs in accordance with the entire legal framework applicable to them. Those explanations included elements pertaining to the role and the assessment of scientific advice, both in general and with regard to specific stocks, and the reasons why the Council considers that it has more discretion than you claim (see also para. 57 above on the extent to which the Council can be required to explain those elements).

63. The Council furthermore does not share your views on the application of the precautionary approach. In particular, even when acting exclusively in the sphere of the Union's environmental policy, the Treaty and the case-law recognize that there is no obligation to always apply the highest possible level of protection of the environment but that some balancing is needed, including with "*the potential benefits and costs of action or lack of action*" and "*the economic and social development of the Union as a whole and the balanced development of its region*" (Article 91(3) TFEU).<sup>59</sup> This applies even more to environmental aspects of the CFP, which, as indicated above, also pursues social and economic objectives.

64. The Council considers that it has adequately balanced all the relevant considerations in the way it has applied the precautionary approach for these TACs, without exceeding its margin of discretion under the applicable legal framework, and that it has not committed any error of assessment. It therefore sees no need for these TACs to be amended. However, it does intend to correct the TACs for **RJU/8-C** and **RJU/9-C**.

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<sup>58</sup> Two of these comprise two TACs.

<sup>59</sup> For case-law, see e.g. the judgment of 13 March 2019 in Case C-128/17, *Republic of Poland v European Parliament and Council of the European Union*, EU:C:2019:194, paragraphs 132-135, in which the CJEU held that the required high level of protection "*does not necessarily have to be the highest that is technically possible*" and that in view of the need to strike a balance between certain of the objectives and principles included in Article 191 TFEU, and in view of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the EU legislature committed a manifest error of assessment as regards the conditions for the application of Article 191 TFEU. See also *Associazione Italia Nostra Onlus*, Case C-444/15, EU:C:2016:978, especially paragraphs 44-46.

### III.3. Third limb of the first plea of the second ground: the ecosystem approach

65. Under this limb, you cover eight TACs, namely **HAD/7X7A34** (Celtic Sea haddock), **LEZ/07** and **LEZ/8ABDE** (megrin and four-spot megrim in the west and southwest of Ireland and Bay of Biscay), **ANF/07** and **ANF/8ABDE** (white and black-bellied anglerfish in that same area), **SOL/7FG** (common sole in 7f and 7g – the Bristol Channel and Celtic Sea), **NEP/07** (Norway lobster in 7) and **NEP/5BC6** (Norway lobster in 6 and UK and international waters of 5b).
66. Your argument with respect to those TACs is that the Council did not set these TACs in line with the ecosystem-based approach. In particular, you argue in essence that the Council had to follow the ecosystem approach as advised by ICES, notably in its mixed fisheries considerations, adopting moreover a precautionary approach where there is uncertainty (paragraphs 169-177 of your request). You further argue that this requires setting a TAC below the single species advice where that is necessary to limit catches of another stock caught in the same fishery and argue that the Council did not do this but followed a single species approach, thereby committing a manifest error of assessment (paragraphs 178 to 181 of your request, as also further developed in Annex 13 of your request).
67. The Council agrees that it has to apply an ecosystem-based approach, which requires taking into account in particular the interaction between catches of different stocks caught together in mixed fisheries. Indeed, this is why the CFP Basic Regulation provides for the adoption of multi-species multi-annual plans (see its Article 9, paragraphs 3(b) and 5) and why the Baltic, North Sea, Western Waters and Western Mediterranean MAPs all adopt a multi-species approach.
68. However, the way the co-legislators balanced the environmental, social and economic objectives, is more complex than the picture you present. In particular, and as already set out in the general observations above, the provisions of the North Sea and Western Waters MAPs on mixed fisheries do not entail an absolute rule that it is only the protection of the stock in the worst state which dictates the TAC level for all other stocks in a mixed fishery, irrespective of the social and economic cost. This is not only reflected in Article 5(3) of these MAPs (see above) but also in their provision allowing the use of the  $MSY_{upper}$  range in certain conditions including for mixed fisheries reasons.<sup>60</sup> At least to a certain extent, these provisions put the responsibility on the Council to strike the best balance between the various TACs. Moreover, ICES does not actually advise one mixed fisheries scenario, and it typically presents mixed fisheries considerations rather than advice, precisely because it involves choices that are not only scientific. Furthermore, mixed fisheries considerations may not fully reflect possible changes in fishing patterns and/or gear which may result in increased selectivity and different catch compositions (a caveat you acknowledge e.g. in the comments on NEP/07 in Table 5 of your request).
69. Moreover, in case the Council sets one TAC (A) in a mixed fishery in line with its single stock advice but at a level which might entail catches of another stock in that same mixed fishery (B) that would be higher than the TAC for that other stock (B), then the result will not be that the TAC of the other stock (B) can be exceeded but that the other stock (B) will have a choke effect on the fishery for the former stock (A). It is difficult to fully exclude a choke effect and the Council may legitimately prefer not to excessively limit all the TACs.

<sup>60</sup> See Article 4(5)a of the Western Waters and North Sea MAPs.

This also has the advantage of creating a major incentive for fishing more selectively: if fishers manage to reduce the catches of the limiting stock, they can fish more of the stocks with (sustainable) higher TACs.

70. By contrast, setting zero TACs prevents data collection and proper stock assessment and, in the case of mixed fisheries, means furthermore that not only the fishery for the most vulnerable stock has to be closed, but also the fisheries for all other stocks that are caught in the same mixed fishery, even those in very good state. Hence setting one TAC at zero may mean immediately closing the fishery for up to as much as seven stocks.<sup>61</sup> The social and economic costs of closing such entire mixed fisheries would be enormous and would be contrary to the balanced pursuit of all the objectives of the CFP. That is why, as explained above, the applicable legal framework does acknowledge the challenges and particular management needs of mixed fisheries.
71. The Council notes that in Table 5 of your request and in Annex 13 thereto, you acknowledge that for all of these stocks, the TACs were set at (SOL/7FG, NEP/07 and NEP/5BC6) or below (HAD/7X7A34, LEZ/07 and LEZ/8ABDE, as well as ANF/07 and ANF/8ABDE) the level advised by ICES in its single stock advice. You do not claim that these TACs violate applicable provisions other than the provisions concerning the ecosystem approach.
72. The Council furthermore rejects your argument that it has followed a single species approach for these eight TACs. This is especially the case for those TACs which the Council set below the level recommended in the ICES single stock advice. To take the example you highlight (see paragraphs 175 and 179 of your request), for HAD/7X7A34 the TAC was set at 15.000 tonnes, whereas the advice was for up to 15.946 tonnes and the stock is considered to be in a good state.<sup>62</sup> Moreover, also in 2020 and 2021 the TAC was set significantly below the FMSY advice.<sup>63</sup> It is therefore simply incorrect to regard this as applying a single stock approach. While even this lower TAC may be limited by the cod TAC in the same area, that is not unlawful and does not permit the cod TAC to be exceeded (as explained above). For LEZ/07 and LEZ/8ABDE too, the combined TAC was set below the advice, as was the case for 2021, with the stock being in very good shape.<sup>64</sup> This was also the case for

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<sup>61</sup> For example, setting the TAC for West of Scotland cod at zero would imply the immediate closure of the related fisheries for haddock, saithe and anglerfish (see paragraph 40 above). Similarly, the ICES mixed fisheries considerations for the Celtic Sea cover cod, haddock, whiting, Norway lobster, sole, anglerfish and megrim: see ICES technical service, EU standing request on catch scenarios for zero-TAC stocks; cod (*Gadus morhua*) in divisions 7.e–k (Celtic Sea), 30 November 2021, [https://ices-library.figshare.com/articles/report/EU\\_standing\\_request\\_on\\_catch\\_scenarios\\_for\\_zero-TAC\\_stocks\\_cod\\_Gadus\\_morhua\\_in\\_divisions\\_7\\_e\\_k\\_Celtic\\_Sea/18639263?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/EU_standing_request_on_catch_scenarios_for_zero-TAC_stocks_cod_Gadus_morhua_in_divisions_7_e_k_Celtic_Sea/18639263?backTo=/collections/ICES_Advice_2021/5796932).

<sup>62</sup> ICES advice, Haddock (*Melanogrammus aeglefinus*) in divisions 7.b–k (southern Celtic Seas and English Channel), 30 June 2021, [https://ices-library.figshare.com/articles/report/Haddock\\_Melanogrammus\\_aeglefinus\\_in\\_divisions\\_7\\_b\\_k\\_southern\\_Celtic\\_Seas\\_and\\_English\\_Channel/18638741?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Haddock_Melanogrammus_aeglefinus_in_divisions_7_b_k_southern_Celtic_Seas_and_English_Channel/18638741?backTo=/collections/ICES_Advice_2021/5796932). Furthermore, the sum of the UK and EU shares is actually only 14.378 tonnes because a deduction relating to exemptions from the landing obligation was applied to the EU share.

<sup>63</sup> Ibid, Table 3.

<sup>64</sup> ICES advice, Megrim (*Lepidorhombus whiffiagonis*) in divisions 7.b–k, 8.a–b, and 8.d (west and southwest of Ireland, Bay of Biscay), 30 June 2021, [https://ices-library.figshare.com/articles/report/Megrim\\_Lepidorhombus\\_whiffiagonis\\_in\\_divisions\\_7\\_b\\_k\\_8\\_a\\_b\\_and\\_8\\_d\\_west\\_and\\_southwest\\_of\\_Ireland\\_Bay\\_of\\_Biscay/18638816?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Megrim_Lepidorhombus_whiffiagonis_in_divisions_7_b_k_8_a_b_and_8_d_west_and_southwest_of_Ireland_Bay_of_Biscay/18638816?backTo=/collections/ICES_Advice_2021/5796932).

ANF/07 and ANF/8ABDE (white and black-bellied anglerfish in 7 and 8).<sup>65</sup> Furthermore, by-catches of cod are more limited in the case of megrim, anglerfish, sole and nephrops.

73. The Council therefore considers that it has not set these TACs in any way contrary to the ecosystem approach and sees no reasons for these TACs to be amended.

#### III.4. Second plea of the second ground: the alleged misuse of powers

74. As already indicated above in relation to the first ground, pursuant to Article 10(1) of the Aarhus Regulation, a request for internal review shall be made "*on the grounds that such an act or omission contravenes environmental law within the meaning of point (f) of Article 2(1)*". However, the second plea of the second ground is explicitly based on an alleged misuse of power by the Council and you claim that the Council tried to evade the procedure applicable under Article 43(2) TFEU (paragraphs 182 to 185 of your request). The Council considers that the object of the request for review may only be limited to the infringement of environmental law itself. Consequently, this plea cannot be raised under Article 10(1) of the Aarhus Regulation and the Council does not have to reply to it.

75. Nevertheless, despite this ground falling outside the scope of the review, the Council will also briefly address the substance of this plea.

76. You correctly note that under the case law of the Court of Justice, an abuse of power requires that a measure is adopted with the exclusive or main purpose of achieving an end other than that stated, or of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case.

77. You then claim that the Council sought to permit the fishing industry to continue to operate in the short term and to ensure a level playing field for Union operators without taking into consideration the achievement of the objectives set out in article 2, paragraphs 2 and 3 of the CFP basic regulation, thereby evading the ordinary legislative procedure under article 43(2) TFEU, which would be required to limit the scope of the obligation to achieve MSY and/or to derogate from that objective or its timely achievement (paragraphs 174-176).

78. The Council has taken into account the importance of trying to avoid a premature closure of fisheries for stocks in good shape and has tried to ensure a level playing field for Union operators. However, as explained above, those two objectives are entirely legitimate under the applicable legal framework and by pursuing them the Council has not in any way attempted to adopt measures which would fall within the scope of Article 43(2) TFEU rather than Article 43(3) TFEU. The Council only set the TACs, and aimed to set the TACs, in a manner respecting the entire applicable legal framework and taking into account all the objectives of the CFP in a balanced manner.

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<sup>65</sup> The combined TACs were set at 52.205 tonnes (41173 + 11032 tonnes), whereas the combined advice for the two stocks was up to 52.936 tonnes (34275 + 18661 tonnes). See ICES advice, White anglerfish (*Lophius piscatorius*) in Subarea 7 and divisions 8.a–b and 8.d (Celtic Seas, Bay of Biscay), 30 June / 30 August 2021, [https://ices-library.figshare.com/articles/report/White\\_anglerfish\\_Lophius\\_piscatorius\\_in\\_Subarea\\_7\\_and\\_divisions\\_8\\_a\\_b\\_and\\_8\\_d\\_Celtic\\_Seas\\_Bay\\_of\\_Biscay\\_/18638831](https://ices-library.figshare.com/articles/report/White_anglerfish_Lophius_piscatorius_in_Subarea_7_and_divisions_8_a_b_and_8_d_Celtic_Seas_Bay_of_Biscay_/18638831) and Black-bellied anglerfish (*Lophius budegassa*) in Subarea 7 and divisions 8.a–b and 8.d (Celtic Seas, Bay of Biscay), 30 June 2021, [https://ices-library.figshare.com/articles/report/Black-bellied\\_anglerfish\\_Lophius\\_budegassa\\_in\\_Subarea\\_7\\_and\\_divisions\\_8\\_a\\_b\\_and\\_8\\_d\\_Celtic\\_Seas\\_Bay\\_of\\_Biscay\\_/19486877](https://ices-library.figshare.com/articles/report/Black-bellied_anglerfish_Lophius_budegassa_in_Subarea_7_and_divisions_8_a_b_and_8_d_Celtic_Seas_Bay_of_Biscay_/19486877).

79. The Council therefore considers that the second ground of your second plea falls outside the scope of the review and in any event the Council does not agree with your arguments and does not see any need for these TACs to be amended.

#### **IV. Conclusion**

80. For the reasons explained above, after having examined your request, the Council considers that it has set all the contested TACs in accordance with the applicable rules of the CFP and does not see any need for these TACs to be amended.
81. However, it intends to correct the TACs for **RJU/9-C** and **RJU/8-C** to 50 and 33 tonnes respectively as those TAC tables erroneously mention 100 and 66 tonnes.

#### **Annex. Statement by Belgium, France, Germany, Ireland and the Netherlands on the application of Article 15(9) of the Basic Regulation for COD/7XAD34 and HER/7G-K**

Given that the biomass of the stocks of COD/7XAD34 and HER/7G-K is below Blim and that only by-catch or scientific fisheries will be permitted in 2022 for these stocks, in order to ensure their recovery and in accordance with the written record agreed with the UK for the fishing opportunities for 2022, Belgium, France, Germany, Ireland and the Netherlands undertake not to make use of inter-annual flexibility under Article 15(9) of Regulation (EU) No 1380/2013 with regard to these stocks in 2022.