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European Union

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#### NOTE

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From:	General Secretariat of the Council
To:	Delegations
Subject:	ClientEarth Request for internal review under Title IV of the Aarhus Regulation in relation to 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  <i>- Approval of a letter - Council's reply to a request under Article 10 of Regulation (EC) n° 1367/2006</i>

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Delegations will find in Annex a revised draft reply to the above-mentioned ClientEarth Request with the addition of one sentence at the end of paragraph 4 as agreed yesterday at the Working Party. This draft reply of the Council will be presented to the Permanent Representatives Committee with a view to its approval.

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Dear ...,

This letter sets out the Council's decision with regard to your request of 25 March 2022 for internal review of a number of total allowable catches (TACs) established by Regulation 2022/109<sup>1</sup> ("the contested regulation"). It explains why, after careful consideration of your arguments, the Council considers that it did not contravene environmental law and sees no need to amend the contested TACs.

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

1. The Council does not contest the admissibility of your request, but considers that three elements of the request fall outside the scope of Article 10 of the amended Aarhus Regulation.<sup>2</sup>
2. The first of these elements comprises all the arguments relating to those TACs that concern stocks shared with the UK. As you correctly state in your request (paragraphs 11-13), these TACs were provisional TACs. Those provisional TACs were meanwhile replaced by the final TACs agreed with the United Kingdom (UK), through Regulation (EU) 2022/515 of 31 March 2022,<sup>3</sup> adopted shortly after the submission of your request. Paragraph 13 of your request explicitly states that the request "*does not deal with EU/UK final TACs*" and you have meanwhile filed a separate request with regard to those final TACs. Since the provisional TACs covered by the request are no longer in force and have been replaced by final TACs, which you excluded from your request and which are the subject of your separate second request, the Council considers that the request has become without object in so far as it concerns those provisional TACs. The Council will therefore not reply to your arguments with regard to those stocks. The Council will reply separately to your subsequent request regarding those TACs.
3. The other two elements are the first ground regarding the alleged lack of competence and the second plea of the second ground regarding the alleged abuse 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.
4. The remainder of this reply broadly follows the structure of your request, while excluding the provisional TACs. The absence of a response to particular points in your request, especially some of the general explanations, does not necessarily imply that the Council agrees with all those points.

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<sup>1</sup> 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> 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.

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

5. 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.

6. 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 69 of the 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.
7. 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

8. 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 73 to 96 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 97 to 104 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

9. 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 86 to 96 and 103 of your request). The Council considers that this interpretation is erroneous and will address that reasoning for both pleas together.
10. 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 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 77 to 83 of your request).
11. 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).
12. 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 under 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

13. 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.
14. 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 a greater margin of discretion than you indicate. To the extent that you are making that argument, the Council therefore rejects it.

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

15. 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 strictly 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 84 to 91 and 96 of your request). This argument covers five TACs. Four of these are provisional TACs concerning stocks shared with the UK, which, as explained above, will not be addressed in this reply. The one remaining TAC is **COD/03AS** (cod in the Kattegat). This stock is mainly caught as a by-catch in the mixed fishery for Norway lobster in that same area.
16. You correctly indicate that this is one of the stocks covered by recital 6 of the contested regulation, which explains that “*There are certain stocks for which ICES has advised zero catches. However, if TACs for those stocks are established at the advised level, the obligation to land all catches, including by-catches from those stocks in mixed fisheries, would give rise to the phenomenon of ‘choke species’.* In order to strike a balance between maintaining fisheries, in view of the potentially severe socio-economic implications of failing to do so, and the need to achieve a good biological status for those stocks, taking account of the difficulty of fishing all stocks in a mixed fishery at maximum sustainable yield (MSY), it is appropriate to establish specific TACs for by-catches for those stocks. Those TACs should be set at levels that ensure that the mortality for those stocks is decreased and that provide incentives to improve selectivity and to avoid by-catches of those stocks. In order to reduce catches of the stocks for which by-catch TACs are set, fishing opportunities for the fisheries in which fish from those stocks are caught should be set at levels that help the biomass of vulnerable stocks to recover to sustainable levels. Technical and control measures that are intrinsically linked to fishing opportunities should also be established to prevent illegal discarding”.
17. 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.
18. 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.

19. 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 its arguments below regarding the individual stocks and the (categories of) arguments that you make with respect to those stocks.
20. At this stage, it would merely point out some elements as regards mixed fisheries. In particular, your description of the legal framework in that respect is incomplete and somewhat 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 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 these two Multiannual Plans (paragraphs 23 to 34 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.

21. Turning specifically to **cod in the Kattegat**, this is not a target species under the NS MAP,<sup>10</sup> but a by-catch for another stock, Norway lobster, which is a target stock in the same area.<sup>11</sup> Thus COD/03AS falls under Article 1(4) of the NS MAP and the by-catch rules set out in Article 5 of that MAP. This Article provides that:

*“1. For the stocks referred to in Article 1(4), management measures 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. Those stocks 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.*

*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.”*

22. 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 low by-catch only TAC – i.e. prohibiting a directed fishery for cod – that should avoid a choke effect. The level of this by-catch only TAC was set at 97 tonnes, which reflects the lowest number of catches in recent years<sup>12</sup> and reflects another reduction of the TAC as in previous years since 2019.<sup>13</sup> In addition, a Member State may grant an additional quantity of no more than 30 % of its quota to vessels participating in a remote electronic monitoring project, subject to certain conditions, as an incentive to encourage participation in such projects.<sup>14</sup>
23. Moreover, the Council wishes to underline that it has also set, as in several previous years, the TAC for the related Norway lobster fishery in this area below the MSY point value, at, and even below FMSY<sub>lower</sub> (see also below on that TAC, including its broader geographical scope), i.e. in the lowest range of the single advice stock,<sup>15</sup> precisely to limit the cod by-catches.

<sup>10</sup> Article 1(a) of the NS MAP only covers cod in other areas, including “3a.20 (Skagerrak)”, which does not cover Kattegat.

<sup>11</sup> See Article 1(j) of the NS MAP. However, this provision of the NS MAP covers Norway lobster in the entire area 3a, i.e. not only the Kattegat but also Skagerrak; see below on the significance of this.

<sup>12</sup> ICES could not provide an estimate of by-catch levels but did mention 97 tonnes as the lowest catch in recent years, see the technical advice at [https://ices-library.figshare.com/articles/report/EU\\_standing\\_request\\_on\\_catch\\_scenarios\\_for\\_zero-TAC\\_stocks\\_cod\\_Gadus\\_morhua\\_in\\_Subdivision\\_21\\_Kattegat\\_/18639122?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_Subdivision_21_Kattegat_/18639122?backTo=/collections/ICES_Advice_2021/5796932).

<sup>13</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>14</sup> Denmark in particular is running such a project on a large scale in the Kattegat fishery.

<sup>15</sup> See table 6, p. 5 of the ICES advice of 30 June 2021 (<https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2021/2021/nep.fu.3-4.pdf>). For 2022, the TAC was set at 8501 tonnes, even though the advice in line with the NS MAP was for 10241 to 14449 tonnes.

24. In addition, the Council also adopted remedial measures for this stock to help it recover (see Article 17 of the contested regulation) and the Member States concerned have made a statement that they will not apply the inter-annual flexibility - which they are entitled to apply under Article 15(9) CFP Basic Regulation - to this stock.<sup>16</sup>
25. The Council considers that the combination of these measures is in accordance with the precautionary approach and notes that the advice for this stock was a precautionary one. It underlines the significant efforts thus made to allow the stock to recover while limiting the impact on the Norway lobster fishery and considers that it has set the TAC in accordance with the applicable legal framework. The Council sees no need to amend this TAC.

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

26. 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 98 to 104 of your request).
27. Of the eight TACs which are covered in this plea, three are provisional TACs concerning stocks shared with the UK, which, as explained above, will not be addressed in this reply. The remaining five TACs are addressed below.
28. 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 very important, scientific advice remains advice and is usually not the only consideration which the legislator or competent authority has to take into account. 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>17</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 five TACs, there was MSY advice for only one, and precautionary advice for the other four.
29. You point to recital 6 of the contested regulation to argue that the Council recognised that it has to follow the ICES headline advice. That recital explains that *"Fishing opportunities for stocks covered by the landing obligation should take account of the fact that discarding is in principle no longer allowed. Therefore, they should be based on the advice figure for total catches (rather than that for wanted catches) provided by the International Council for the Exploration of the Sea (ICES). The quantities that, by way of exemption from the landing obligation, may continue to be discarded should be deducted from that advice figure for total catches"*. In this respect, the Council notes that the wording "based on" is less strict than, for example, the words "in accordance with" and leaves room for some margin.

<sup>16</sup> According to this statement, *"Given that the biomass of the stocks of COD/03AS; ... 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).

<sup>17</sup> In particular, in relation to an essentially identical provision in one of the previous CFP basic regulations, the Court has recognised that *"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"*: see Case C- 405/92, *Mondiet*, EU:C:1993:906, paragraphs 30-31.



30. The Council now turns to each of the specific stocks.
31. For **HKE/8C3411** the ICES headline advice was that when the precautionary approach is applied, catches in 2022 should be no more than 6947 tonnes.<sup>18</sup> The Council set the TAC at 7836 tonnes. The main reason for this decision is that hake is the limiting species in mixed fisheries in this area.<sup>19</sup> In addition, there was discussion in the Council on the assessment of the stock in the ICES advice and the related level of the headline advice.
32. This stock is a target stock under the WW MAP, but as no MSY values were available, it is to be managed in the same way as by-catches.<sup>20</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.
33. As regards the ICES advice, the Council regrets that despite significant efforts for data collection, ICES downgraded the stock from category 1 to category 3 in the 2020 assessment, leading to a precautionary rather than MSY advice. It notes that in the last available MSY advice, issued in 2019, the stock was regarded to be at safe biological level.<sup>21</sup> The change to precautionary advice in 2020 resulted in the application of a precautionary buffer in the form of advice for a 20 % reduction on the mere basis of this change in the kind of advice.<sup>22</sup> The Council has previously questioned the automatic use of such a precautionary buffer. A benchmarking exercise should take place in 2022. In these circumstances, the Council considered it justified not to fully follow the advice as to the TAC level, and to limit the TAC decrease to 8 % instead of 18 %.
34. The next stock is Pollack, namely **POL/8ABDE, POL/08C and POL/9/3411**. This is a stock covered by the by-catch provisions of the WW MAP. This stock is subject to precautionary advice of category 5 nature, i.e. with little data.<sup>23</sup> The Council set the TAC for this stock at a level above that advised by ICES for similar reasons as for hake, namely that

<sup>18</sup> See the advice at [https://ices-library.figshare.com/articles/report/Hake\\_Merluccius\\_merluccius\\_in\\_divisions\\_8\\_c\\_and\\_9\\_a\\_Southern\\_stock\\_Cantabrian\\_Sea\\_and\\_Atlantic\\_Iberian\\_waters\\_/18638774?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Hake_Merluccius_merluccius_in_divisions_8_c_and_9_a_Southern_stock_Cantabrian_Sea_and_Atlantic_Iberian_waters_/18638774?backTo=/collections/ICES_Advice_2021/5796932)

<sup>19</sup> See the ICES mixed fisheries considerations for this area of 30 November 2011, at [https://ices-library.figshare.com/articles/report/Iberian\\_waters\\_mixed\\_fisheries\\_considerations/18639890?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Iberian_waters_mixed_fisheries_considerations/18639890?backTo=/collections/ICES_Advice_2021/5796932).

<sup>20</sup> See Articles 1(1)20, 4(6) and 5 of this MAP.

<sup>21</sup> See the advice at [https://ices-library.figshare.com/articles/report/Hake\\_Merluccius\\_merluccius\\_in\\_divisions\\_8\\_c\\_and\\_9\\_a\\_Southern\\_stock\\_Cantabrian\\_Sea\\_and\\_Atlantic\\_Iberian\\_waters\\_/18634661?backTo=/collections/ICES\\_Advice\\_2019/5796926](https://ices-library.figshare.com/articles/report/Hake_Merluccius_merluccius_in_divisions_8_c_and_9_a_Southern_stock_Cantabrian_Sea_and_Atlantic_Iberian_waters_/18634661?backTo=/collections/ICES_Advice_2019/5796926)

<sup>22</sup> See the 2020 advice at [https://ices-library.figshare.com/articles/report/Hake\\_Merluccius\\_merluccius\\_in\\_divisions\\_8\\_c\\_and\\_9\\_a\\_Southern\\_stock\\_Cantabrian\\_Sea\\_and\\_Atlantic\\_Iberian\\_waters\\_/18636962?backTo=/collections/ICES\\_Advice\\_2020/5796929](https://ices-library.figshare.com/articles/report/Hake_Merluccius_merluccius_in_divisions_8_c_and_9_a_Southern_stock_Cantabrian_Sea_and_Atlantic_Iberian_waters_/18636962?backTo=/collections/ICES_Advice_2020/5796929)

<sup>23</sup> The advice is at [https://ices-library.figshare.com/articles/report/Pollack\\_Pollachius\\_pollachius\\_in\\_Subarea\\_8\\_and\\_Division\\_9\\_a\\_Bay\\_of\\_Biscay\\_and\\_Atlantic\\_Iberian\\_waters\\_/18638942?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Pollack_Pollachius_pollachius_in_Subarea_8_and_Division_9_a_Bay_of_Biscay_and_Atlantic_Iberian_waters_/18638942?backTo=/collections/ICES_Advice_2021/5796932).

this Pollack stock is a limiting stock in the mixed fisheries in the Bay of Biscay, whose quota is first reached for 15 of 22 defined fleets,<sup>24</sup> and that it is not convinced of the justification to apply a precautionary buffer reduction, also taking into account that catches have remained relatively stable. In these circumstances, the Council considered it justified to set a TAC at the same level as the TAC set for 2021.

35. For **SOL/7BC**, which is subject to the by-catch provisions of the WW MAP, the Council also considered it justified to set the TAC at the same level as for 2021 and in particular did not consider it appropriate to apply the 20 % reduction as a precautionary buffer.
36. **NEP/9/3411** is a composite TAC covering several functional units. You acknowledge that for functional units 26-27 and 30, the TAC with related conditions is consistent with the ICES headline advice but you contest the TAC for functional units 28-29, which is for 305 tonnes whereas the ICES headline advice for this area was 266 tonnes,<sup>25</sup> and you also contest the level of the combined TAC. The Council notes that for functional units 28-29 the advice is precautionary, so despite being a target stock, in the absence of MSY values, it is to be managed under the WW MAP by-catch rules. According to the ICES advice, *“Fishing pressure has been well below the MSY reference point for over a decade and remains at a low level. Stock size, however, is unknown, so the precautionary buffer was applied in the advice”*, despite the biomass index table showing a high biomass. In those circumstances, the Council considers it justified to set the TAC somewhat higher than the advice for those functional units and, consequently, also for the combined TAC.
37. For **NEP/8CU25** a very low ‘sentinel’ TAC of 1,7 tonnes was set, for a scientific fishery collecting catch per unit effort (CPUE) data, as proposed by the Commission. The level of this special TAC followed that advised by ICES in 2018.<sup>26</sup>
38. 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 to amend these TACs.

### **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

39. Under this limb, you cover seven provisional TACs concerning stocks shared with the UK, which, as explained above, will not be addressed in this reply. The remaining six TACs are addressed below.

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<sup>24</sup> See the ICES mixed fisheries considerations at [https://ices-library.figshare.com/articles/report/Bay\\_of\\_Biscay\\_mixed\\_fisheries\\_considerations/18639884?backTo=/collections/ICES\\_Advice\\_2021/5796932](https://ices-library.figshare.com/articles/report/Bay_of_Biscay_mixed_fisheries_considerations/18639884?backTo=/collections/ICES_Advice_2021/5796932).

<sup>25</sup> See the advice at <https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2021/2021/nep.fu.2829.pdf>.

<sup>26</sup> See the special advice at [https://ices-library.figshare.com/articles/report/EU\\_request\\_for\\_advice\\_on\\_a\\_sentinel\\_fishery\\_for\\_Norway\\_lobster\\_Nephrops\\_in\\_functional\\_unit\\_25\\_Division\\_8\\_c/18631631](https://ices-library.figshare.com/articles/report/EU_request_for_advice_on_a_sentinel_fishery_for_Norway_lobster_Nephrops_in_functional_unit_25_Division_8_c/18631631).

40. 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. In particular, you argue that the ICES headline advice represents the maximum catch level not to be exceeded (paragraph 133 of your request); while acknowledging a slightly different approach under the MAPs with MSY ranges (paragraph 130 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 should (or may) be set higher (paragraph 117 of your request) and that there is no such other evidence (paragraphs 135-136 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.
41. 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.
42. The Council furthermore does not agree that "*The ICES headline advice represents the maximum catch level not 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.
43. The Council therefore sees no need to amend the TACs covered by these arguments.

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

44. Under this limb, 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 141 to 156 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 157 to 159 of your reply).
45. This limb covers three provisional TACs concerning stocks shared with the UK, which, as explained above, will not be addressed in this reply.
46. As regards the remaining five TACs, 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.

47. 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>27</sup> This applies even more to environmental aspects of the CFP, which, as indicated above, also pursues social and economic objectives.
48. 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 to amend these TACs.

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

49. Under this limb, you cover six autonomous TACs, namely LEZ/8C3411, ANF/8C3411, NEP/03A, WHG/08, SOL/8AB and NEP/8ABDE.
50. 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 160-167 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 168 to 172 of your request).
51. 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.

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<sup>27</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.

52. 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>28</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 (see e.g. below on hake), precisely because it involves choices that are not only scientific.
53. 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, then the result will not be that the TAC of the other stock (B) can be exceeded but that the other stock 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. 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.
54. The Council furthermore rejects the argument that it has followed a single species approach for the six TACs which you cover under this section.
55. This is obvious for the example you use to illustrate your point, namely **NEP/03A** (Norway lobster in the Kattegat and Skagerrak). The Council has already shown above, in relation to the Kattegat cod that is caught in the same mixed fishery, that it has set the TAC for Norway lobster at and even below the lowest end of the advice for this stock<sup>29</sup> for the sole reason of limiting by-catches of cod, and has adopted further measures to limit by-catches of cod there. Moreover, in the comments in table 6 of your request, the calculations do not take into account that the TAC for this Norway lobster covers not only the Kattegat but also Skagerrak. In fact, a majority of the catches under this TAC are normally taken in the Skagerrak, which means that the cod by-catches of this fishery in Kattegat are well below those reflected in your calculation. Furthermore, the TAC takes into account deductions for discards in accordance with the exemption from the landing obligation for high survivability. If the Council had followed a single stock approach, it would have set the Norway lobster TAC at or nearer to  $MSY_{point}$  and not close to  $MSY_{lower}$ . It is therefore obvious that the Council has followed an ecosystem approach for this stock. The Council has also explained above why it considers that it could set a small by-catch only TAC for Kattegat cod, with which the TAC for Norway lobster is consistent.
56. For LEZ/8C3411, ANF/8C3411, WHG/08, SOL/8AB and NEP/8ABDE, you do not contest that the TAC is set in accordance with the single stock advice and with the applicable provisions other than the provisions addressing the ecosystem approach. For WHG/08, SOL/8AB and NEP/8ABDE, you furthermore concede that these TACs are consistent with

<sup>28</sup> See Article 4(5)a of the Western Waters and North Sea MAPs.

<sup>29</sup> See note 14 above.

the adopted TAC for Pollack,<sup>30</sup> which the Council considers legitimate for the reasons set out above. In addition the TAC for SOL/8AB already constituted a 36 % decrease compared to that TAC for 2021. The TACs for LEZ/8C3411 and ANF/8C3411 may be limited by the hake TAC, but as explained above, that is not unlawful and does not permit the hake TAC to be exceeded.

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

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

58. 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 abuse of power by the Council and you claim that the Council tried to evade the procedure applicable under Article 43(2) TFEU (paragraphs 173-176 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.
59. Nevertheless, despite this ground falling outside the scope of the review, the Council will also briefly address the substance of this plea.
60. 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.
61. You then claim that the Council sought to permit the fishing industry to continue to operate in the short term without taking into consideration the achievement of the objective set out in article 2 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).
62. The Council strongly denies having pursued any such objective or having attempted to adopt measures which would fall within the scope of Article 43(2) TFEU rather than Article 43(3) TFEU. As already explained above, the Council only set the TACs, and aimed to set the TACs, in a manner respecting the entire applicable legal framework as understood by the Council and taking into account all the objectives of the CFP in a balanced manner.
63. 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 to amend these TACs.

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<sup>30</sup> With some possible divergence as regards whiting

#### IV. Conclusion

64. 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 to amend those TACs.