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European Union

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NOTE

From: General Secretariat of the Council
To: Delegations

Subject: Coalition Clean Baltic (CCB) Request for internal review under Title IV of the Aarhus Regulation in relation to COUNCIL REGULATION (EU) 2023/2638 of 20 November 2023 fixing the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea for 2024 and amending Regulation (EU) 2023/194 as regards certain fishing opportunities in other waters
- Reply as approved by Council

Delegations will find in the annex the reply to the above-mentioned request as approved by the Council on 22/04/2024.

Subject: The Council’s decision in relation to the request for internal review under Title IV of the Aarhus Regulation in relation Council Regulation (EU) 2023/2638 of 20 November 2023 fixing the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea for 2024 and amending Regulation (EU) 2023/194 as regards certain fishing opportunities in other waters

Dear [name of the representative of Coalition Clean Baltic who submitted the request],

This letter sets out the Council’s decision with regard to your request of 17 January 2024 for internal review of three total allowable catches (TACs): Central Baltic herring (HER/3D-R30), Bothnian herring (HER/30/31.) and sprat (SPR/3BDC-C), set in the Annex to Council Regulation 2023/2638¹ (“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(1) of the amended Aarhus Regulation.²
2. These three elements are the fourth plea under the first ground, regarding the violation of the principle of sincere cooperation, the second plea under the first ground, regarding the alleged misuse of power, and the second ground regarding the alleged lack of competence. 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. The remainder of this reply broadly follows the structure of your request. The absence of a response to particular points in your request does not necessarily imply that the Council agrees with all those points.

II. First ground: The Council infringed the Treaties and rules of law relating to their application, and misused its powers conferred by those rules

- 1. First plea: the Council committed manifest errors of assessment and exceeded the bounds of its discretion by setting the TACs for the Two Herring Stocks and, in part also the Baltic sprat stock, in violation of fisheries and environmental rules laid down**

¹ Council Regulation (EU) 2023/2638 of 20 November 2023 fixing the fishing opportunities for certain fish stocks and groups of fish stocks applicable in the Baltic Sea for 2024 and amending Regulation (EU) 2023/194 as regards certain fishing opportunities in other waters, OJ L, 22.11.2023.

² 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 Union institutions and bodies, OJ L 264, 25.9.2006, p. 13.

in the CFP Regulation³ and in the Baltic MAP,⁴ as well as in violation of the Council's obligation to sincere cooperation under Article 4(3) TEU

- A. First limb: direct violation of the fishing mortality target set in Article 4(6) of the Baltic MAP
4. Under this limb, you essentially argue that the Council should have set the TACs for both stocks concerned at 0 because the probability of the spawning biomass of those stocks falling below B_{lim} in 2025 was above 5% (9% for Bothnian herring and 22% for Central Baltic herring with 0 TAC). You consider that in such a situation, Article 4(6) of the Baltic MAP requires closure of the targeted fishery, which is “the only possible (or allowed) legal action” (paragraph 150 of your Request). You indicate that this provision does not leave the Council any margin of discretion.
 5. The Council carefully considered the question of application of Article 4(6) at several meetings of its preparatory bodies. It considers that it set the TAC in line with the Baltic MAP and the CFP Regulation.
 6. To begin with, the Council emphasises that the TACs set are fully in line with the F_{MSY} ranges provided by ICES and that ICES did not provide a 0-catch advice for either of the two stocks. These TACs are therefore in full conformity with the MSY objective as set out in the CFP Regulation and further developed in the Baltic MAP (see in particular the reply to the second limb of the first plea below).
 7. Additionally, the Council took into account the probability of the spawning stock biomass (SSB) of either stocks falling below B_{lim} and adopted a series of measures in line with the requirements of Article 4(6). Concretely, the Council set the TACs significantly lower than those for 2023 (-43% for Central Baltic herring and -31% for Bothnian herring) and set them within the lower range of F_{MSY} , at a level which allows an increase in SSB of both stocks (of 31% and 6.6% respectively). The Council further provided for a spawning closure to help rebuild the stock, for an exclusion of year-to-year flexibility under Regulation 847/96 for Central Baltic herring, as well as setting a lower TAC for sprat to take account of the mixing with both herring stocks. Furthermore, Finland and Sweden committed to further measures to be taken in relation to Bothnian herring. The effectiveness of these measures is justified in the reply to the fifth limb of your first plea below.
 8. The Council wishes to emphasise that, according to ICES, not even a TAC set at 0 would ensure that the probability of the SSB falling below B_{lim} is below 5% for either of the two stocks, something which you also acknowledge. The Council also draws your attention to the fact that ICES did not provide any advice on the level at which a TAC could be set in order to ensure that the said probability is below 5%.

³ 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 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. 22–61.

⁴ Regulation (EU) 2016/1139 of the European Parliament and of the Council of 6 July 2016 establishing a multiannual plan for the stocks of cod, herring and sprat in the Baltic Sea and the fisheries exploiting those stocks, amending Council Regulation (EC) No 2187/2005 and repealing Council Regulation (EC) No 1098/2007, OJ L 191, 15.7.2016, p. 1–15.

9. Furthermore, the Council observes that your argument according to which the correct application of Article 4(6) automatically implies closure of both fisheries, would make Article 4(6) inconsistent with Article 5(2) of the Baltic MAP, and render the latter article obsolete. Article 5(2) addresses the specific situation of a SSB being below B_{lim} , in which case remedial measures shall be put in place. These measures may, but do not necessarily have to, include suspension of the targeted fishery of such a stock.
 10. The Council also considers it opportune to refer to some other considerations you make in your Request. First, contrary to what you claim in paragraphs 151 to 153 of your Request, the Council did not disregard the fact that even a 0 TAC would leave the probability of the SSB of both stocks falling under B_{lim} above 5%. A reference to that probability clearly appears in the corresponding recitals.
 11. Second, as regards the reference you make to the SwAM report (paragraph 155), the Council does not see in it any considerations which refer specifically to Article 4(6) and the 5% rule laid down therein. The Council reads this report as containing arguments in favour of lowering the level of TAC but it will address your arguments in that regard under the second, third and the fourth limb. However, the Council may already confirm that both TACs set are fully in line with the best available scientific advice, obtained from ICES.
 12. Third, in relation to the comparison you make in paragraphs 157 to 160 of your Request with other stocks, namely Eastern and Western Baltic cod stocks and the Western Baltic herring stock, the Council does not consider their situation to be comparable inasmuch as ICES clearly provided a 0-catch advice for those stocks.⁵ By contrast, ICES provided MSY advice and the safe ranges for the two other stocks. Accordingly, there was thus no question of “alignment” to the approach to other stocks or adopting “consistent” approaches.
- B. Second limb: violation of the obligation to restore stocks above levels which can produce the MSY in violation of the MSY obligation under Articles 16(4) and 2(2) of the CFP Regulation and Article 3(1) of the Baltic MAP:
13. Under this limb, you maintain that the two TACs concerned were not set in line with the obligation to restore or maintain stocks above levels which can achieve MSY, which would amount to a violation of the MSY obligation under Articles 16(4) and 2(2) of the CFP Regulation and Article 3(1) of the Baltic MAP.
 14. The Council does not see how setting a TAC within the MSY ranges provided by ICES and in line with the applicable MAP provisions may be read as incompatible with the MSY objective. More specifically, Article 2 point 2 of the Baltic MAP, which defines a range of F_{MSY} , indicates that it is “a range of values provided in the best available scientific advice, in particular from ICES or a similar independent scientific body recognised at Union or international level, where all levels of fishing mortality within that range result in maximum sustainable yield (MSY) in the long term with a given fishing pattern and under current average environmental conditions without significantly affecting the reproduction process for the stock in question.”
 15. According to Article 4(3) of the Baltic MAP, the Council “shall establish [fishing] opportunities within the lower range of F_{MSY} available at that time for that stock.” The lower MSY range, as defined in Article 2 point 6 of the Baltic MAP, “contains values from MSY

⁵ For Western Baltic cod, the precautionary advice indicated a very low TAC level, only 24 tonnes.

F_{lower} to F_{MSY} point value,” the F_{MSY} point value being defined in point 5 as “the value of the estimated fishing mortality that with a given fishing pattern and under current average environmental conditions gives the long-term maximum yield.”

16. ICES identified those values and provided the ranges of F_{MSY} for both stocks, i.e. the ranges of values within which all levels of fishing mortality result in MSY. These ranges were 41 706 to 52 549 tonnes for Central Baltic herring⁶ and 48 824 to 63 049 tonnes for Bothnian herring, the highest of these values being the F_{MSY} point value. The Council set the TACs, on the basis of this best available scientific advice obtained in conformity with Article 4(2) of the Baltic MAP, at the level of 40 368 tonnes for Central Baltic herring and 55 000 tonnes for Bothnian herring. By doing so, it clearly respected the Baltic MAP framework, which itself translates into the provisions on ranges the MSY objective laid down in Article 2(2) of the CFP Regulation.
17. Therefore, since you do not challenge Article 4 of the Baltic MAP as being contrary with the MSY objective, the Council cannot consider that the TAC set in line with that article violates the MSY objective set out in Article 2(2) of the CFP Regulation and Article 3(1) of the Baltic MAP.
18. Nor is the Council convinced by your argument according to which “while in normal situations, the Council may claim that it did not commit an error of assessment when following ICES headline advice, the current situation required the Council to recognise that the received ICES advice was contradictory and prone to be misunderstood, because it did not set 0 t TACs as headline advice for the Two Herring Stocks” (paragraph 172 of your Request).
19. To the extent your considerations in this context relate to the interpretation of Article 4(6) of the Baltic MAP, the Council refers to its reply to the first limb of the first plea above.
20. You seem to consider that the Council infringed the MSY objective despite setting the TAC within the ranges and in line with Article 4 of the Baltic MAP, because of the fact that the stocks in question had been in a bad state for several years and did not achieve the MSY by 2020. In that regard, the Council disagrees with your claim that it set fishing opportunities irresponsibly in previous years. Notably, it recalls that the state of a stock depends on various factors, often external to the fishing opportunities. In any case, the Council does not see any legal foundation for your claim that it would “normally” have the discretion and could have legitimately set the TAC within the MSY ranges, but lost its discretion because, in your view, it had not exercised it “wisely” in the past. The Council reiterates that ICES provided MSY ranges for both stocks (and did not advise 0 catches, as it did for some other stocks) and that the Council set the TAC for 2024 on the basis of the best available scientific MSY advice. Clearly, the Baltic MAP does not indicate that provisions of its Article 4 do not apply, or that different provisions apply, after 2020.
21. Finally, on the appropriateness of remedial measures, the Council refers you to the reply to the fifth limb of the first plea below.

C. Third limb: violation of the obligation to apply a precautionary approach to fisheries management;

⁶ These ranges were further adjusted in order to take into account the share the Russian Federation held under International Baltic Sea Fishery Commission as well as intermixing of herring from different management areas.

22. Under this plea, you point to several issues related to the fisheries of the two herring stocks, such as previous misreporting of herring and sprat, the lack of estimates for the volume of catches attributable to the Russian Federation as well as the existence of genetically distinct subpopulations. You essentially argue that the fact that the ICES advice on Bothnian herring and Central Baltic herring identifies these uncertainties should have compelled the Council to adopt stricter measures than ICES advised.
23. As you write, the CFP Regulation defines the precautionary approach to fisheries management as meaning “*an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment.*” Article 3(1) of the Baltic MAP further indicates that “*The plan shall contribute to the achievement of the objectives of the common fisheries policy (CFP) listed in Article 2 of Regulation (EU) No 1380/2013, in particular by applying the precautionary approach to fisheries management.*” Article 9(2) of the CFP Regulation provides that “[w]here targets relating to the maximum sustainable yield as referred to in Article 2(2) cannot be determined, owing to insufficient data, the multiannual plans shall provide for measures based on the precautionary approach, ensuring at least a comparable degree of conservation of the relevant stocks.”
24. The Baltic MAP integrates the precautionary approach in its provisions, which you do not seem to question. Therefore, where the Council sets a TAC in accordance with Article 4 on targets, on the basis of the best available scientific advice, it is difficult to argue that the fishing opportunities have been set in a way that disregards the precautionary approach.
25. Second, ICES provided MSY advice, which itself is precautionary,⁷ and did so as category 1 advice. As you mention yourself in paragraph 187 of your Request, ICES flagged the above-mentioned issues in its advice, which means that they were taken into account when assessing the safe MSY ranges. Still, ICES did not consider that they warranted treating the stock as data-limited or downgrading the category of the advice, nor did it indicate any specific measures that should be taken to mitigate their effects, such as the closures you suggest.⁸
26. Third, the advice provided by ICES was clearly the best available scientific advice, and you have not shown otherwise. Your argument is based on misrepresentation of the significance which ICES attributed to the aforementioned data issues, and supposes that the Council should have departed from the best available scientific advice. In truth, your position that “*data uncertainties need to trigger a more cautious approach instead of being abused as pretext to set even higher quotas*” amounts to a criticism of ICES, which you allege should

⁷ See table 3 of ICES advice for both stocks, which reads: “An EU MAP in place for stocks in the Baltic Sea includes herring (EU, 2016, 2019, 2020). The advice, based on the F_{MSY} ranges used in the management plan, is considered precautionary.”

⁸ The appropriateness of closures as a solution to address these issues is, in Council’s view, questionable.

have provided a different advice, and not of the Council which set the fishing opportunities on the basis of that advice.

27. Insofar as non-exclusion, for Bothnian herring, of the year-to-year flexibility provided for in Articles 3(2) and (3) as well as Article 4 of Council Regulation (EC) No 847/96 is concerned (paragraph 192 of your Request), the Council draws your attention to the fact that in line with Article 2 of that Regulation, when the Council fixes TACs, it shall decide on “the stocks to which Articles 3 or 4 shall not apply, on the basis of the biological status of the stocks and of commitments reached with third countries.” The Council has been using in the past, and used in the present case, the status of the SSB with regard to the B_{lim} point, which it considers to be an appropriate benchmark. Clearly, the non-exclusion of the flexibility does not imply that that flexibility will be used, which is a choice to be made by each Member State. Finally, your comment on inter-year flexibility in paragraph 193 of your Request is not clear to the Council – you appear to misinterpret recital 28 of the CFP Regulation, and its connection with the precautionary principle is unclear.
28. Therefore, the fishing opportunities fixed for both stocks are in line with the precautionary approach.
- D. Fourth limb: violation of the obligation to implement an ecosystem-based approach to fisheries management and the principle of sincere cooperation under Article 4(3) TEU.
29. Under this plea, you rely on the argument that by setting the TACs for the two herring stocks, the Council infringed the principle of sincere cooperation.
30. As a preliminary point, the Council underlines that this plea falls outside the scope of the internal review under the Aarhus Regulation. More specifically, pursuant to Article 10(1) of that 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 fourth limb of the first ground is explicitly based on an alleged violation by the Council of the principle of sincere cooperation under Article 4(3) TEU. 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 the principle of sincere cooperation.
31. Consequently, this plea cannot be raised under Article 10(1) of the Aarhus Regulation and the Council does not consider itself obliged to reply to it. Nevertheless, despite it falling outside the scope of the review, the Council will also briefly address the substance of this plea.

32. Your assessment that the Council “risks to make it harder for the Member States” (paragraph 210 of your Request) to achieve the objectives of the Marine Strategy Framework Directive⁹, Birds Directive¹⁰ and Habitats Directive¹¹ is not shared by the Council. First of all, fixing of fishing opportunities in a Council regulation does not imply that the entire quota allocated to individual Member States must be fished - “TAC” means total “allowable catches”. Your attention is also drawn to several provisions of the CFP Regulation which allow the Member States to adopt conservation measures, among others to comply with obligations under environmental law or emergency measures.¹² Hence, there does not seem to be any direct relationship between the fixing of fishing opportunities by the Council and fulfilment by the Member States of their obligations under the MSFD.
33. Second, the CFP Regulation indicates in Article 2(3) that “[t]he CFP shall implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and shall endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment.” The ecosystem-based approach is defined as “an integrated approach to managing fisheries within ecologically meaningful boundaries which seeks to manage the use of natural resources, taking account of fishing and other human activities, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected, by taking into account the knowledge and uncertainties regarding biotic, abiotic and human components of ecosystems.”
34. Moreover, the Baltic MAP provides in Article 3(3) that: “[t]he plan shall implement the ecosystem-based approach to fisheries management in order to ensure that negative impacts of fishing activities on the marine ecosystem are minimised. It shall be coherent with Union environmental legislation, in particular with the objective of achieving good environmental status by 2020 as set out in Article 1(1) of Directive 2008/56/EC. In particular the plan shall aim to: (a) ensure that the conditions described in descriptor 3 contained in Annex I to Directive 2008/56/EC are fulfilled; and (b) contribute to the fulfilment of other relevant descriptors contained in Annex I to that Directive in proportion to the role played by fisheries in their fulfilment.”
35. This means that the ecosystem-based approach is an integral part of the CFP and the Baltic MAP, and their provisions aim to ensure consistency with the MSFD, which you do not seem to question. Therefore, where the Council fixes fishing opportunities in accordance with that framework, in particular with Article 4 of the MAP on targets, on the basis of the

⁹ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy, OJ L 164, 25.6.2008, p. 19–40, hereafter: “MSFD”.

¹⁰ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010, p. 7–25.

¹¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7–50.

¹² See Article 11(1), 13(1) or 19(1) of the CFP Regulation, which refers to MSFD, Birds Directive and Habitats Directive.

best available scientific advice, there is little scope to argue that the fishing opportunities disregard the ecosystem-based approach.

36. The Council wishes to add that it sees limited pertinence in your reference, in paragraph 204 of your Request, to the Opinion of Advocate General in case C-308/06 *Intertanko*, which concerned the specific situation of a potential conflict between EU law and Member States' obligations under international law. By contrast, a reference may be made to the case-law, in which the Court held that *“the adoption of a legislative measure by the Council cannot constitute either a breach of the obligation imposed on the Member States to guarantee the application and effectiveness of Community law, [...] or a breach of the duty of sincere cooperation attaching to the Council as an institution.”*¹³
37. Finally, you argue that the TAC set is not in line with the ecosystem-based approach, because the Council did not take account of the fact that herring is caught together with sprat, or of the biological state of both herring stocks (paragraphs 213 to 218 of your Request). However, this claim is incorrect insofar as the Council precisely did take into account these interactions and decided to set the TAC for sprat at a much lower level than the one considered as safe by ICES. This was indeed a remedial measure taken with regard to the herring stocks and therefore the Council refers you to its considerations in paragraph 46 below. On the data uncertainties to which you point in this context, the Council already addressed them in its reply to the third limb of the first plea above.
- E. Fifth limb: violation of the Council's obligations to not disregard in its TAC setting that remedial measures were called for under Article 5(1) and (2), as well as (4) of the Baltic MAP.
38. Under this limb, you claim that the Council did not adopt the remedial measures as required under Article 5(1) and (2) of the Baltic MAP.
39. The Council agrees with you that it was under an obligation to adopt the appropriate remedial measures for Bothnian herring, whose spawning biomass is assessed to be below B_{trigger} , as well as further remedial measures for Central Baltic herring, whose spawning biomass is assessed to be below B_{lim} . However, the Council considers that it fulfilled its obligations under Article 5 of the Baltic MAP.
40. It may be recalled that the Council adopted the following remedial measures: for Bothnian herring, a TAC set within the lower range, allowing for an increase in SSB, as well as a lower TAC for sprat (201 000 tonnes where F_{MSY} point value for this stock was 241 604 tonnes). Moreover, Finland and Sweden made a statement in which they committed to adopting further measures to support the forming of spawning shoals and their undisturbed migration to the coastal spawning areas, so as to strengthen spawning success and a larger year-class. For Central Baltic herring, in addition to a lower TAC for this stock (also allowing for an increase in SSB) as well as a lower TAC for sprat, a monthly closure to protect the spawning has been established, with the closure period varying depending on the subdivision concerned. In addition, the use of the year-to-year flexibility as provided in Articles 3 and 4 of Council Regulation (EC) No 847/96 has been excluded for this stock.

¹³ Joined Cases C-63/90 and C-67/90 Portugal and Spain v Council, para 53.

These remedial measures allow to reduce the fishing pressure on the stocks and allow the stocks to rebuild.

41. As you rightly point out in paragraph 235 of your Request, remedial measures are to be chosen in accordance with the nature, seriousness, duration and repetition of the situation where the SSB is below B_{trigger} or B_{lim} . The Council considers that the measures adopted are appropriate and correctly reflect those elements.
42. Importantly, the Council does not see a basis for the claim you make in paragraph 238 of your Request that “the Council’s margin of discretion was in the case of both herring fisheries reduced to zero.” While the Council does not dispute its obligation to lay down the remedial measures, which it did, it cannot agree that it lost the discretion due to the state of the stock. As already demonstrated above, while Central Baltic herring’s spawning biomass is indeed below B_{lim} and further remedial measures are necessary, ICES provided the MSY ranges and did not recommend a closure of the fishery (as opposed, for instance, to Western Baltic herring). Hence, the Council was entitled to select the measure it deemed appropriate, with a closure of the fishery being an option and not an obligation, as the wording of Article 5(2) explicitly confirms.
43. Furthermore, the Council does not support your interpretation of the term “all appropriate remedial measures” as requiring from Council to adopt more than one “appropriate measure” (paragraphs 239, 241 and 244 of your Request). In spite of the fact that there have been more than one remedial measure for Bothnian herring and more than two measures for the Central Baltic herring, this provision must be read as meaning that the number of the appropriate measures is to be determined by the Council, and this number may be one or more.
44. In the same vein, the Council does not agree with you that the same type of remedial measure, namely setting the TAC at a level lower than the level admissible in light of the scientific advice, cannot be adopted for a stock whose spawning biomass falls under B_{trigger} and for a stock whose spawning biomass falls under B_{lim} in the same regulation. Indeed, in paragraph 243 of your Request, you seem to defend the view that the remedial measures must be different. However, the assessment of appropriateness of a measure is individual to each stock and there is no reason why the same measure could not be considered as appropriate for more than one stock. In any case, the actual TAC reduction remains specific to each stock and is not aligned between both stocks, the cut being bigger for Central Baltic herring than for the Bothnian herring.
45. Moreover, and as regards your argument outlined in paragraph 244, according to which the spawning closure is not appropriate, in particular because a considerable part of the quota would be fished before the closure begins, the Council disagrees that the uptake of herring before the closure is so high that it would undermine the appropriateness of that measure. Indeed, data from previous years demonstrates that the quota uptake is relatively constant and constitutes, in different parts of the central Baltic, between 10 and 18% of the TAC in the period before the scheduled closure.
46. On the TAC set for sprat, you claim that due to the by-catch of Central Baltic herring in the sprat fishery, “*the negative impact of the sizeable sprat TAC on the SSB situation of the Central Baltic herring stock by far outweighs any conservation effect that those spawning closures could have*” (paragraph 245 of your Request). However, you do not cite any concrete data which could support your subjective conclusion. Moreover, the Council recalls

that it did take measures with regard to the sprat fishery specifically to take into account the fact that both species are caught together, and set the TAC for sprat at a level 40 000 tonnes lower than the F_{MSY} point value, despite this stock being in a good state. Lastly, as regards misreporting, the Council refers you to its reply to the third limb of the first plea. It may add that such issues need to be addressed in a more horizontal manner, and therefore improvements as regards monitoring of fishing activities were at the heart of the recently published revision of Control Regulation.¹⁴

47. As regards your suggestion in paragraph 242 of your Request that the Council should have excluded the year-to-year flexibility provided for in Council Regulation (EC) No 847/96 with regard to Bothnian herring, the Council refers you to paragraph 27 of its reply and considers that it did not infringe Article 5(1) by not deciding on the exclusion of that flexibility.
48. Finally, as regards your argument related to the fact that the Council did not follow the Commission's proposal as regards the closure of both fisheries (paragraph 247 of your Request), this closure was proposed on the basis of the Commission's interpretation of Article 4(6) of the Baltic MAP and not as a remedial measure under Article 5(2). The Council thus refers you to its reply to the first limb of the first plea above.
49. In light of the above, the Council does not see the need to review the contested Regulation on the basis of arguments raised under the first plea of the first ground.

2. Second plea: the Council misused its powers under Article 16(4) of the CFP Regulation by using them to set TACs based on other objectives than those recognised in the relevant provisions of the CFP Regulation and the Baltic MAP.

50. As a preliminary point, the Council refers to its reasoning in paragraphs 30 and 31 above and underlines that this plea falls outside the scope of the internal review under the Aarhus Regulation, as it is explicitly based on an alleged abuse of power by the Council and evasion of the procedure applicable under Article 43(2) TFEU.
51. Consequently, this plea cannot be raised under Article 10(1) of the Aarhus Regulation and the Council does not have to reply to it. Nevertheless, despite it falling outside the scope of the review, the Council will also briefly address the substance of this plea.
52. Under this plea, your argument is that by setting the TAC for the two herring stocks, the Council pursued objective other than the MSY objective and the objectives related to targets and safeguards under Articles 4 and 5 of the Baltic MAP. That other objective would be to “permit the fishing industry to continue to operate in the short-term without taking into consideration whether or not that will achieve [the above-mentioned objectives laid down in the CFP Regulation and the Baltic MAP].” Accordingly, you consider that the Council evaded the legislative procedure under Article 43(2), which would be necessary to: a) reduce the scope of the obligation to achieve the MSY, b) derogate or postpone the MSY deadline, c) eliminate the alleged requirement laid down in Article 4(6) to close targeted fisheries, and d) eliminate the obligation to adopt appropriate remedial measures.

¹⁴ See Regulation (EU) 2023/2842 of the European Parliament and of the Council of 22 November 2023 amending Council Regulation (EC) No 1224/2009, and amending Council Regulations (EC) No 1967/2006 and (EC) No 1005/2008 and Regulations (EU) 2016/1139, (EU) 2017/2403 and (EU) 2019/473 of the European Parliament and of the Council as regards fisheries control

53. 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.
54. The Council did not pursue any such objective and did not attempt 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 fixed the fishing opportunities, and in doing so, pursued aims compatible and in line with the applicable legal framework of the CFP Regulation and the Baltic MAP.
55. In light of the above, the Council does not see the need to review the contested Regulation on the basis of arguments raised under the second plea of the first ground.

III. Second ground: the Council disregarded essential elements of the CFP Regulation and of the Baltic MAP when setting the TACs for the Two Herring Stocks and the Baltic sprat stock and thus adopted the Contested Act despite a lack of competence

56. To the extent that this ground relies on a lack of competence, the Council underlines that it falls outside the scope of the internal review under the Aarhus Regulation. Once more, the Council recalls that pursuant to Article 10(1) of that 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)*". You note yourself 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 is limited to the infringement of environmental law itself, and it 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 falls within the scope of Article 43(2) TFEU.
57. Consequently, the second 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. Nevertheless, despite it falling outside the scope of the review, the Council will also briefly address the substance of this plea.
58. Under this ground, you claim that the Council lacked competence and exceeded its powers under Article 43(3) TFEU by explicitly disregarding essential elements of the CFP Regulation and of the Baltic MAP, which constitute the legal framework that the Council had to respect when setting the TACs, as well as obligation to engage in sincere cooperation with the Member States under Article 4(3) TEU.
59. As regards the alleged violation of the obligation of sincere cooperation, the Council refers you to its reply to the fourth limb of the first plea above.

60. The Council does not consider that it lacked competence to adopt the contested TACs. The setting of TACs manifestly falls within the scope of Article 43(3) TFEU. Furthermore, 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 pursuant to that Treaty provision. In the Council's view, it acted within the margin of discretion available to it under the applicable legal framework, and thus it did not violate any elements of secondary law, nor did it make any policy choices that would fall outside the scope of Article 43(3) TFEU. Rather, it has a different interpretation of that legal framework than the one you rely on.
61. Moreover, the Council would like to comment on the reference, in paragraph 255 of your Request, to the case-law, from which you retain that measures under Article 43(3) TFEU are intended to be adopted to "*implement provisions adopted on the basis of Article 43(2) TFEU.*" The Council recalls that 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. 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*"; that "*that provision grants the Council the power to adopt acts going beyond what can be regarded as an 'implementing act'*" and that "*it cannot validly be claimed that the Court acknowledged the existence of a hierarchy between the two provisions at issue.*"¹⁵
62. In light of the above, the Council does not see the need to review the contested Regulation on the basis of arguments raised under the second ground.

IV. Conclusion

63. 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 Regulation and does not see any need to amend those TACs.

Yours sincerely,

[name and function of the GSC official who will sign the reply]

¹⁵ See, for the most recent case-law, judgment of 7 September 2016, Germany v Parliament and Council, C-113/14, EU:C:2016:635, paragraphs 56-60.