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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 of 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

Delegations will find attached the document on the above-mentioned subject, as received from ClientEarth.

REQUEST FOR INTERNAL REVIEW UNDER TITLE IV OF THE AARHUS REGULATION

Of 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 Union waters and for Union fishing vessels in certain non-Union waters¹ (“the Contested Act”)

SUBMITTED BY

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To

The Council of the European Union, Agriculture and Fisheries Council (“AGRIFISH”)

According to Article 10 of Regulation 1367/2006² and Commission Decision 2008/50/EC of 13 December 2007.³

¹ OJ L 104, 1.4.2022, p. 1-50.

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 Community institutions and bodies (OJ L 264, 25.9.2006, p. 13–19) as amended by Regulation (EU) 2021/1767 (OJ L 356, 8.10.2021, p. 1-7) (the “Aarhus Regulation”).

³ Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts (OJ L 13, 16.1.2008).

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Request for Internal Review

Under Title IV of the Aarhus Regulation

Background

1. This Request for Internal Review concerns the decision of the Council of the European Union (the Council), in the Contested Act amending Council Regulation (EU) 2022/109,⁴ to fix for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks shared between the European Union (EU) and the United Kingdom (UK) (hereafter the 'EU/UK shared stocks') above the best available scientific advice. **ClientEarth thereby requests the Council to amend a certain subset of fishing opportunities in the Contested Act – or Total Allowable Catches (hereafter referred to as 'TACs' or 'fishing limits') – in order to bring them in line with environmental law.**
2. Overfishing, meaning the practice of catching fish faster than stocks can replenish, is a major threat to marine ecosystems. It is not only one of the most significant drivers of marine biodiversity loss, but it also threatens the means of millions of people relying on fish to sustain their livelihoods.
3. Back in the 1980s, EU Member States started to realise that the problem of overfishing had to be addressed and thus adopted, in 1983, a first iteration of the Common Fisheries Policy (CFP). This policy went through a number of reforms over the years, but none of them was successful in tackling overfishing and ensuring the sustainability of all fish stocks in EU waters. This situation motivated the adoption of a new CFP in 2013.
4. At the heart of the 2013 regime sits the Common Fisheries Policy Basic Regulation (CFP Basic Regulation) which defines the rules and objectives of the CFP.⁵ The CFP Basic Regulation is a groundbreaking development in that it sets **clear and mandatory objectives to progressively restore and maintain populations of fish stocks above sustainable levels. It also requires the Council to follow a precautionary approach to fisheries management based on best available science, and to implement an ecosystem-based approach to fisheries management.** Finally, it acknowledges the need for change to be incremental, so it fixed a target deadline of 2015 and a **final and binding deadline of 2020** to exploit all fish stocks at sustainable levels.
5. The actual amount of fish caught by EU vessels – either from fish stocks jointly managed by the EU and third countries, such as the UK, or from fish stocks managed by the EU only – is formally decided every year by the Council: it adopts TACs for the majority of commercially important species fished in the EU or by EU vessels. The adoption of these TACs is done by

⁴ 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 21/1, 31.1.2022.

⁵ 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 354/22, 28.12.2013.

the Council in its AGRIFISH configuration, and these figures are then included in annual Council regulations, such as the Contested Act.

6. The process for adopting TACs for shared stocks with third countries such as the UK differs from the process for EU-only stocks, since it involves negotiations between the EU and the third country. However, as explained further below, regardless of the outcome of these negotiations, the Council ultimately remains in charge of fixing TACs on behalf of the EU and must comply with the rules and objectives as set out in CFP Basic Regulation when it does so.
7. Despite this legal framework that binds the EU, overfishing in the North East Atlantic is still ongoing. The Scientific, Technical and Economic Committee for Fisheries (STECF), an official advisory body to the European Commission, reports annually on progress in achieving MSY objectives in line with the CFP.⁶ The 2022 STECF report⁷ confirms that, as of 2020, the most recent year for which stock status and exploitation levels are known, 28% of assessed fish stocks in the North East Atlantic are still subject to overfishing,⁸ and 38% are still outside safe biological limits.⁹ This means that the EU is still far from achieving the sustainability objectives of the CFP Basic Regulation. The STECF concluded in the same report that "*in the NE Atlantic (both EU and non-EU waters), stock status has significantly improved since 2003 [...] but that many stocks are still overexploited*",¹⁰ and that "*the objective of the CFP to ensure that all stocks are fished at or below F_{MSY} in 2020 has not been achieved*".¹¹
8. The Council enables this overfishing situation because it consistently disregards essential requirements of the CFP Basic Regulation; and it exceeds the bounds of its discretion set by the CFP Basic Regulation when adopting the TAC Regulations, by fixing fishing opportunities above levels recommended by the best available scientific advice. **It is for this reason that the Council contravened EU environmental law in adopting the Contested Act.**
9. Due to the complexity of this matter, it is necessary at this stage to set out the procedural and scientific background behind this Request for Internal Review.

⁶ Article 50 of the CFP Basic Regulation.

⁷ Scientific, Technical and Economic Committee for Fisheries (STECF) – Monitoring the performance of the Common Fisheries Policy (STECF-Adhoc-22-01). EUR 28359 EN, Publications Office of the European Union, Luxembourg, 2022, ISBN 978-92-76-51702-3, doi:10.2760/566544, JRC129080. [STECF 22-01 adhoc - CFP monitoring.pdf - CFP monitoring - European Commission \(europa.eu\)](#) (accessed on 5 May 2022).

⁸ *Ibid.*, p. 2.

⁹ *Ibid.* Whether a stock is in or outside safe biological limits depends on the level of the fishing mortality F (the part of the stock dying due to fishing) and the stock size B or SSB (biomass or spawning stock biomass) in relation to biological reference points. A stock is considered to be outside safe biological limits if F is above F_{pa} and/or if B is below B_{pa} . See **Annex 12** for more detailed background information on biological reference points.

¹⁰ *Ibid.*

¹¹ *Ibid.*, p. 9.

Procedural background

10. Most of the fish stocks of commercial importance in the EU are managed through the adoption of TACs by the Council.
11. These TACs fall into two categories:
 - TACs for stocks managed by the EU only; and
 - TACs for stocks whose management is shared with third countries, such as the UK or Norway.
12. As a consequence of the withdrawal of the UK from the EU, a large majority of North-East Atlantic TACs are no longer set by the EU exclusively. The Trade and Cooperation Agreement between the EU and the UK (TCA)¹² establishes under Articles 494 *et sequitur* principles for shared stock management and a negotiating process for TACs for EU/UK shared stocks. As a result, 2022 TACs for EU-only stocks and EU/UK shared stocks have been adopted through two separate processes. EU-only TACs, as well as provisional TACs for the EU/UK shared stocks (TACs that apply in the interim period preceding the adoption of the Contested Act), were adopted by Council Regulation 2022/109 on 27 January 2022 and published in the Official Journal of the European Union on 31 January 2022. ClientEarth filed a request for internal review of Council Regulation 2022/109 on 25 March 2022, registered by the Council on 29 March 2022 under number 2022/1/RRA.¹³ **This previous request for internal review exclusively dealt with TACs for EU-only stocks and provisional TACs for EU/UK shared stocks.**
13. The Contested Act replaced *provisional* TACs for EU/UK shared stocks with *final* TACs for EU/UK shared stocks. **The present Request therefore deals exclusively with final TACs for EU/UK shared stocks.**
14. The process for adopting final TACs for EU/UK shared stocks as prescribed in the TCA is as follows.
15. The Commission carries out the annual consultations with the UK on behalf of the EU on the basis of the EU's position as agreed by the Council. However, the Council remains fully involved throughout the consultations. This is ensured by means of extensive coordination and cooperation between the Council and the Commission.
16. On 22 October 2021, the Council accordingly adopted a Council Decision concerning the position to be adopted by the Commission on behalf of the EU in the annual consultations with the UK to agree on TACs for EU/UK shared stocks.¹⁴
17. On 10 December 2021, both Parties reached an agreement on final TACs for EU/UK shared stocks through a "Written Record",¹⁵ in accordance with Article 498(6) of the TCA. The Written

¹³See also [Council of the European Union, document No 7725/22, Brussels, 1/04/2022 \(reference in the Council's Register: ST 7725 2022 INIT – NOTE\)](#).

¹⁴ 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 United Kingdom to agree on total allowable catches, L 378/6, 26.10.2021, p. 6-11.

¹⁵ [Written Record of fisheries consultations between the United Kingdom and the European Union for 2022](#), 21 December 2021.

Record “*should be read as an agreement to recommend to the Delegations’ respective authorities to implement the arrangements in this Written Record*”,¹⁶ and is “*without prejudice to (...) the application of TAC setting principles set out in the Parties’ respective legislation*” (emphasis added).¹⁷

18. On 21 December 2021, the Council approved the agreement reached in the Written Record.
19. On 31 January 2022, the EU published Council Regulation 2022/109 fixing the fishing opportunities for TACs for EU-only stocks and provisional TACs for EU/UK shared stocks. As the Council had not formally endorsed the final TACs for EU/UK shared stocks by 20 December, final figures for those TACs could not be included in Council Regulation 2022/109 adopted on 27 January 2022.¹⁸ TACs for EU/UK shared stocks in this Council Regulation were therefore provisional.
20. On 31 March 2022, these figures were amended by the adoption of the Contested Act fixing the final TACs for EU/UK shared stocks. **The present Request deals exclusively with the final TACs for EU/UK shared stocks, as fixed by the Contested Act.**
21. Strikingly, 12 of the TACs for EU/UK shared stocks for 2022 analysed by ClientEarth **were set above best available scientific advice** (i.e. 31% of the 39 EU/UK shared TACs analysed – see **Annex 1** for the details).

Scientific background

22. There are a number of scientific terms used in this Request and its Annexes that it is useful to define at the outset (see also **Annex 2** to this Request for additional definitions compiled by ICES).

Maximum Sustainable Yield (MSY): “*the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process*”.¹⁹

Spawning stock biomass (SSB): total weight of all sexually mature fish in a given stock.

F: instantaneous rate of fishing mortality.

F_{MSY}: fishing mortality consistent with achieving MSY.

B_{MSY}: spawning stock biomass that results from fishing at F_{MSY} for a long time.

B_{lim}: the spawning stock biomass reference point provided for in the best available scientific advice below which there may be reduced reproductive capacity.

MSY B_{trigger}: the spawning stock biomass reference point provided for in the best available scientific advice, below which specific and appropriate management action is to be taken to ensure that exploitation rates in combination with natural variations rebuild stocks above levels capable of producing MSY in the long term.

¹⁶ Written Record para. 3.

¹⁷ Written Record, para. 5(e).

¹⁸ Article 499(2) of the TCA.

¹⁹ Article 4(7) of the CFP Basic Regulation.

Range of F_{MSY} : a range of values provided in the best available scientific advice where all levels of fishing mortality within that range result in 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. It is derived to deliver no more than a 5% reduction in long-term yield compared to the MSY. It is capped so that the probability of the stock falling below the limit spawning stock biomass reference point (B_{lim}) is no more than 5%.

Mixed fisheries: fisheries in which more than one species is present and where different species are likely to be caught in the same fishing operation.

By-catch: a species of fish (or another marine species) that is caught unintentionally in a mixed fishery while targeting (an)other species.

ICES: International Council for the Exploration of the Sea, an intergovernmental marine science organisation.

ICES scientific advice: generic wording applicable to all scientific advice produced by ICES.

ICES headline advice: the ICES headline advice is the advice found at the top of the first page of the stock specific advice on fishing opportunities and indicates the amount of recommended catches which should not be exceeded in line with the ICES advice methodology, as explained in more detail in paragraphs 131-144.

Mixed fisheries considerations / scenarios: catch scenarios prepared by ICES for certain mixed fisheries based on different management scenarios. These scenarios indicate how many tonnes of each stock in the fishery will likely end up being caught for example if the headline advice for one particular stock is fully exhausted, or if fishing stops when the advised catch for a particular stock has been reached.

Multiannual plans (MAPs): these legal instruments provide detailed stock management plans for particular stocks in defined geographic areas.²⁰ They contain timeframes to achieve quantifiable targets to avoid and reduce unwanted catches and to minimise the impact of fisheries on the marine environment. They also allow the use of F_{MSY} ranges for certain stocks.

Shared stocks: Fish, including shellfish, of any kind that are found in EU and UK waters, which includes molluscs and crustaceans.²¹

4. Legal framework

4.1. The Contested Act

23. As mentioned above, the Contested Act fixes final TACs for EU/UK shared stocks to be fished by Union vessels for 2022. It thereby “*replace[s] the provisional TACs that were established in Regulation (EU) 2022/109*”.²²
24. The Council’s competence for adopting the Contested Act stems from Article 43(3) of the TFEU according to which the Council shall, on a proposal from the Commission, adopt measures on the fixing and allocation of fishing opportunities.

²⁰ See Articles 7(1)(a), 9 and 10 of the CFP Basic Regulation.

²¹ Article 495(1)(c) of the TCA.

²² Recital 4 of the Contested Act.

25. As mentioned above, the Contested Act was adopted pursuant to the recommendations contained in the Written Record negotiated between the EU and the UK. Those recommendations are not binding, and the parties can make “*adaptations*” to it, subject to respecting their respective domestic legislation.

4.2. The Council’s obligations under the CFP Basic Regulation when fixing TACs for shared stocks

26. The CFP Basic Regulation sets rules for conserving and managing fish stocks. It is the overarching EU legislation on fisheries. As explained below, the CFP Basic Regulation applies to the Council when setting TACs for stocks shared with third countries. We detail later the substantive provisions of the CFP Basic Regulation that are relevant for this Request.

The CFP Basic Regulation applies to fixing TACs for stocks shared with third countries including the UK

27. Pursuant to Article 1(2)(c), the CFP Basic Regulation covers fishing activities conducted not only in Union waters, but also “*by Union fishing vessels outside Union waters*”, such as in UK waters in the context of this Request.
28. The applicability of Articles 2 and 3 of the CFP Basic Regulation to this Request is confirmed by Article 28(1) of the same Regulation relating to “External Policy”, according to which “*In order to ensure sustainable exploitation, management and conservation of marine biological resources and the marine environment, the Union shall conduct its external fisheries relations in accordance with its international obligations and policy objectives, as well as the objectives and principles set out in Articles 2 and 3*”. Article 28(2)(d) specifies that the Union shall “*ensure that Union fishing activities outside Union waters are based on the same principles and standards as those applicable under Union law in the area of the CFP, while promoting a level-playing field for Union operators vis-à-vis third-country operators*” (emphasis added).
29. Article 28(3) indicates that “*The provisions of this Part shall be without prejudice to specific provisions adopted under Article 218 of the Treaty*”. In the present case, the TCA explicitly confirms that it does not override or derogate from the CFP Basic Regulation in respect of the Union’s obligation to fix TACs for Union vessels (in or outside Union waters) in accordance with Union law. In fact, the TCA confirms that Union law applies in this context. Article 494(1) of the TCA states that the cooperation between the EU and the UK must “*fully [respect] the rights and obligations of independent coastal States as exercised by the Parties*” (emphasis added). Article 494(3)(f) maintains the regulatory autonomy of the parties when taking measures for fisheries management and Article 496(1) states that “***Each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and (2), and having regard to the principles referred to in Article 494(3)***” (emphasis added).
30. This legal situation is further confirmed by the relevant Written Record on EU/UK shared TACs for 2022, indicating that the TAC-setting principles set out in the Parties’ respective legislation apply.²³

²³ Written Record, para. 5(e).

31. The Union is also bound by a separate, complementary obligation in its external fisheries policy. Prior to fixing the final TACs for Union vessels, when negotiating TACs for shared stocks with 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 CFP Basic Regulation], and in particular with the objective laid down in Article 2(2)”.²⁴ This obligation applies the general principle of Article 21 of the TEU – which includes the sustainable management of global natural resources shared with third countries – in the field of fisheries management. With specific regard to the negotiations on the 2022 TACs for EU/UK shared stocks, the Union committed to “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”.²⁵ During the negotiations, the parties must also comply with the relevant international fisheries agreement (the TCA) which notably contains principles of fisheries management in Article 494 and the procedure for agreeing on shared stocks in Articles 498 and 499. Recital (3) of the Contested Act alleges that the negotiations between the EU and the UK were conducted in accordance with those rules and principles.
32. Nevertheless, although the legal framework for the negotiation of shared stocks between the EU and a third country (the UK) is important for the context of those negotiations, the crucial obligation at stake in this Request is the Council’s obligation to respect the CFP Basic Regulation when fixing, on the part of the EU, final TACs for shared stocks for Union vessels, after the negotiations have been conducted. As mentioned above and detailed further below, in doing so the Council must respect, in particular, Articles 2, 16 and 15 of the CFP Basic Regulation. Precisely, regardless of what the EU ends up agreeing with the UK, it is required not to set stocks to be fished by Union vessels in a way that will lead to MSY exceedance and/or violation of the precautionary and ecosystem-based approaches to fisheries management. In practice, this may require the EU to set lower TACs than those recommended in the Written Record.

Substantive obligations in the CFP Basic Regulation applying to the Council when fixing TACs for shared stocks

33. Article 2 of the CFP Basic Regulation defines binding objectives for the policy. It states *inter alia* that “the CFP shall:
- “ensure that fishing and aquaculture activities 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, and of contributing to the availability of food supplies”;²⁶

²⁴ Article 33 of the CFP Basic Regulation.

²⁵ 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, ST/12596/2021/INIT, OJ L 378, 26.10.2021, p. 6, Annex point 1(e).

²⁶ Article 2(1) of the CFP Basic Regulation.

- *“apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield”*.²⁷
34. To this end, *“in order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks”* (emphasis added).²⁸ There is therefore a positive, binding and ongoing obligation to achieve the MSY exploitation rate for all stocks by 2020 at the latest. Article 16(4) of the CFP Basic Regulation states that fishing opportunities must be fixed in accordance with the objectives established in Article 2(2) of that Regulation.
 35. Article 2(3) of the CFP Basic Regulation states that: *“The 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”* (emphasis added).
 36. The CFP shall be guided by the principles of good governance laid down in Article 3 of the CFP Basic Regulation. This includes *“the establishment of measures in accordance with the best available scientific advice”*²⁹ as well as *“a long-term perspective”*.³⁰
 37. For the purpose of achieving the objectives of the CFP, Article 6(1) states that *“the Union shall adopt conservation measures as set out in Article 7”*, which *“shall be adopted taking into account available scientific advice [...]”*.³¹ Those conservation measures include, *inter alia*, the adoption of MAPs and *“measures on the fixing and allocation of fishing opportunities”*.³²
 38. Finally, Article 15 of the CFP Basic Regulation lays down the details of the landing obligation, according to which *“all catches of species which are subject to catch limits [...] caught during fishing activities in Union waters or by Union fishing vessels outside Union waters in waters not subject to third countries' sovereignty or jurisdiction, in the fisheries and geographical areas listed below shall be brought and retained on board the fishing vessels, recorded, landed and counted against the quotas where applicable [...]”*. The ultimate objective of this obligation is to eliminate discards by encouraging fishers to fish more selectively and to avoid unwanted catches.³³

²⁷ Article 2(2) of the CFP Basic Regulation.

²⁸ Article 2(2) of the CFP Basic Regulation.

²⁹ Article 3(c) of the CFP Basic Regulation.

³⁰ Article 3(d) of the CFP Basic Regulation.

³¹ Article 6(2) of the CFP Basic Regulation.

³² Article 7(1)(e) of the CFP Basic Regulation.

³³ Article 15 of the CFP Basic Regulation; European Commission, “Synthesis of the landing obligation measures and discard rates”, Final Report, June 2021, p. 7.

4.3. Other relevant legislation

The Treaty on the Functioning of the European Union

39. Article 3(1)(d) of the TFEU gives the EU exclusive competence in the area of "*the conservation of marine biological resources under the common fisheries policy*". Article 4(2)(d) provides for shared competence between the Union and the Member States in the area of "*agriculture and fisheries, excluding the conservation of marine biological resources*".
40. In accordance with Article 11 of the TFEU, "*environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*". Similarly, Articles 37 and 51 of the Charter of Fundamental Rights of the European Union require the Union's institutions to respect the principles of "*protection and improvement of the quality of the environment*" and "*sustainable development*".
41. According to Article 38 of the TFEU, "*the Union shall define and implement a common agriculture and fisheries policy*".
42. Article 43(2) of the TFEU requires the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, to establish the provisions necessary for the pursuit of the objectives of the CFP.
43. Article 43(3) of the TFEU provides that the Council shall, on a proposal from the Commission, adopt measures on the fixing and allocation of fishing opportunities. The Contested Act was adopted on the basis of Article 43(3).

The Western Waters Regulation

44. The Western Waters Regulation³⁴ sets out long-term management measures (or a multiannual plan) for the exploitation of a large number of fish stocks in Western Waters. Its Article 3(1) states that "*the plan shall contribute to the achievement of the objectives of the common fisheries policy listed in Article 2 of Regulation (EU) No 1380/2013, in particular by applying the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce MSY*". Its Article 3(3) also indicates that: "*the 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*".
45. Article 15 of the Western Waters Regulation deals with stocks shared with third countries. It states that "[w]here 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". Therefore, although the other provisions of the Western Waters Regulation (such as the possibility to use ranges or

³⁴ Regulation (EU) 2019/472 of the European Parliament and 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. 1-17.

measures linked to the management of by-catch stocks) do not apply to stocks shared with the UK, the objectives of the CFP Basic Regulation and of the Western Waters Regulation still apply to those stocks, in as much as they are listed in Article 1(1) of the Western Waters Regulation or fall under Article 1(4) of that same Regulation.

5. Scope of the request

46. This Request covers the specific TACs for 2022 identified in **Annex 1** (the 'Contested TACs'), which were fixed above the best available scientific advice, which is the ICES headline advice for each stock. The Contested TACs also include TACs which were not set in line with the ecosystem-based approach to fisheries management. In total, the Request covers 20 TACs for EU/UK shared stocks.
47. **The figures for those TACs are found in Annex 1 to the Contested Act.**
48. Nevertheless, it should be noted that, while the scope of this Request is limited to the stocks identified in **Annex 1** to this Request, these are representative of a wider problem. In fact, more of the TACs contained in the Contested Act have been fixed above the best available scientific advice. They are not included in this Request in their entirety simply because ClientEarth is unable to provide substantiated analysis in relation to them all within the timeframe set by Article 10 of the Aarhus Regulation.³⁵
49. ClientEarth stresses that this Request neither aims at challenging the legality of the TCA itself, nor of the sharing of fishing opportunities between the UK and the EU.

6. Admissibility

50. Article 10 of the Aarhus Regulation, as amended, entitles any non-governmental organisation that meets the criteria set out in Article 11 of the Aarhus Regulation to make a request for internal review to the Union institution or body that adopted an administrative act, as defined in Article 2(1)(g) of the Aarhus Regulation, on the grounds that such an act or omission contravenes environmental law.
51. The present Request fulfils the requirements of this provision because ClientEarth meets the criteria set out in Article 11 of the Aarhus Regulation and the Contested Act constitutes an administrative act in the sense of Article 2(1)(g) of the Aarhus Regulation.

6.1. ClientEarth meets the criteria set out in Article 11 of the Aarhus Regulation

52. Since the Aarhus Regulation has entered into force, ClientEarth has submitted a number of internal review requests and the EU institutions and bodies have always accepted that ClientEarth fulfils the criteria under Article 11(1) of the Aarhus Regulation. In line with Article 3(1) and point 4 of the Annex to Decision 2008/50, ClientEarth is submitting the replies to three

³⁵ ClientEarth's analysis of the 20 TACs for EU/UK shared stocks from the Contested Act also excludes cases where the TAC and ICES advice do not cover the same area and are thus not directly comparable.

of its most recent internal review requests, as evidence that it fulfils the criteria under Article 11 of the Aarhus Regulation (see **Annexes 3, 4 and 5**).

53. For the avoidance of any doubt, ClientEarth also submits the documents listed in points 1-3 of the Annex to Decision 2008/50, specifically:
1. Statute of ClientEarth AISBL in its current form, as published in the Belgian Official Journal (*Moniteur belge*) – see **Annexes 6 and 7**, in French.
 2. Annual activity reports of ClientEarth for the years 2019 and 2020 – see **ClientEarth’s website**, in English (the annual activity report for 2021 has not yet been finalised at the time of submission but will become accessible under the same link).³⁶
 3. An official extract of the Belgian Companies Register, dated 10 January 2022, which proves ClientEarth’s incorporation as a legal person under Belgian law since 25 October 2018, i.e. for well over two years at the time of submission – see **Annex 8**, in French.
54. These documents demonstrate that ClientEarth meets all the criteria under Article 11(1) of the Aarhus Regulation.
55. As to Article 11(1)(a) of the Aarhus Regulation, Article 1 of ClientEarth’s Statute (**Annex 6**, p. 1) proves that it is incorporated in the form of an international, non-profit organisation (“*association internationale sans but lucratif*”, AISBL). This is confirmed by the extract of the Belgian Companies Register (**Annex 8**). Both documents also show that ClientEarth is a legal person in accordance with a Member State’s national law.
56. In relation to Article 11(1)(b) of the Aarhus Regulation, Article 4 of ClientEarth’s Statute (**Annex 7**) demonstrates that its primary stated objective is promoting environmental protection in the context of environmental law. In particular, Article 4(a) enshrines the objective of promoting and encouraging the restoration, conservation and protection of the environment, including the protection of human health and of consumer rights, and Article 4(b) lists the objective of progressing public education in all areas related to the law, the practice and the administration of justice related to the environment. These objectives demonstrate the organisation’s primary focus on environmental protection as well as highlight its particular focus on environmental law. Article 5 further specifies the activities by which ClientEarth implements these objectives in practice, which includes the taking of legal action (Article 5(1)(b)).
57. The extract of the Belgian Companies Register demonstrates that ClientEarth has existed for more than two years, as required by Article 11(1)(c) of the Aarhus Regulation (**Annex 8**). The activity reports provide evidence that ClientEarth is actively pursuing the objectives mentioned above. As these reports show, all of ClientEarth’s activities are directly aimed at environmental protection.
58. As to Article 11(1)(d) of the Aarhus Regulation, the present Request seeks to ensure that the Contested Act sets TACs according to the precautionary and ecosystem-based approaches, the best available scientific advice and at a level that ensures compliance with the MSY

³⁶ See ClientEarth’s website at: <https://www.clientearth.org/about/who-we-are/annual-reports/>.

objective that had to be achieved at the latest by 2020 for all stocks. This objective is fully in line with ClientEarth's statutory purpose described above, as setting fishing opportunities at a sustainable level directly and indirectly contributes to protecting biodiversity and natural resources. It is also in line with ClientEarth's activities aimed at pushing for better fisheries management and responsible fishing practices³⁷ as reflected in its annual activity reports. To name but some examples, these activities include ClientEarth's advocacy on the revision of the CFP Basic Regulation, the enforcement of the obligation to reach the MSY by 2020,³⁸ the revision of the European Maritime and Fisheries Fund,³⁹ fisheries aspects of the EU-UK agreement⁴⁰ and the revision of the Fisheries Control Regulation;⁴¹ its litigation work against unlawful industrial fishing in protected zones and unlawful by-catch;⁴² its litigation work for greater transparency around the setting of catch limits and EU fisheries control;⁴³ and its activities around the organisation of sustainable seafood coalitions in Spain and the UK.⁴⁴

6.2. The Contested Act is an administrative act in accordance with Article 2(1)(g) of the Aarhus Regulation

59. Article 2(1)(g) of the Aarhus Regulation, as amended, defines "*administrative act*" as "*any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)*".

60. The Contested Act fulfils these requirements for the following reasons:

3.2.1 The Contested Act is a non-legislative act adopted by a Union institution

61. In accordance with Article 289(3) of the TFEU, "[l]egal acts adopted by legislative procedure shall constitute legislative acts". The Contested Act was not adopted by such a legislative procedure. Rather, it is a regulation of a non-legislative nature.

62. The fact that the Contested Act is a regulation of a non-legislative nature is evident based on a number of factors.

63. First, it was adopted on the basis of Article 43(3) of the TFEU as a Council Regulation aiming at fixing and allocating fishing opportunities. By contrast to Article 43(2) of the TFEU relating to the adoption of the CFP by ordinary legislative procedure, Article 43(3) of the TFEU does not specify that Council regulations fixing and allocating fishing opportunities are adopted pursuant to a legislative procedure. On the contrary, the Court of Justice, in Grand Chamber, stated that measures on the fixing and allocating of fishing opportunities "*are not subject to*

³⁷ 2020 Annual Report, p. 8.

³⁸ 2020 Annual Report, p. 11.

³⁹ 2019 Annual Report, p. 18.

⁴⁰ 2020 Annual Report, p. 13.

⁴¹ 2020 Annual Report, p. 18.

⁴² 2019 Annual Report, p. 17.

⁴³ 2020 Annual Report, pp. 17-18.

⁴⁴ 2020 Annual Report, p. 18 and 2019 Annual Report, p. 18.

the ordinary legislative procedure”.⁴⁵ Moreover, the General Court clearly ruled in an action for the annulment of the Council Regulation fixing fishing opportunities for 2018 that “the contested provisions are not legislative in nature since, like the contested regulation in which they are contained [the Council regulation fixing fishing opportunities for 2018], they are based on Article 43(3) TFEU and were adopted by the Council on a proposal from the Commission, without the involvement of the European Parliament, in accordance with a procedure which is not a legislative procedure”⁴⁶ (emphasis added).

64. Second, the Court of Justice established that Council Regulations adopted on the basis of Article 43(3) of the TFEU are “implementing measures” of a “primarily technical nature” that do not entail policy choices reserved to the EU legislature by Article 43(2) of the TFEU.⁴⁷
65. Finally, as also expressed by Advocate General Wahl in Joined Cases C-124/13 and C-125/13: “None of the parties [the Council, the European Parliament and the Commission] deny that the drafters of the Treaty prescribed the ordinary legislative procedure under Article 43(2) TFEU for the more general category of measures, namely those necessary for the pursuit of the objectives of the CFP, whereas they reserved a non-legislative procedure under Article 43(3) TFEU for a certain type of regulatory measure (which, however, like the regular setting of TACs, may at the same time be necessary for the pursuit of the objectives of the CFP)” (emphasis added).⁴⁸ The same reasoning applies when the Council fixes fishing opportunities for the implementation of international fisheries agreements, such as in the present case. The Contested Act cannot, therefore, be regarded as a legislative act.

3.2.2 The Contested Act has legally binding and external effects

66. As explained above, the Contested Act is a Council Regulation adopted on the basis of Article 43(3) of the TFEU. In accordance with Article 288 of the TFEU, regulations adopted by the EU institutions have general application, are binding in their entirety and are directly applicable in all Member States. The binding nature of Council regulations fixing and allocating fishing opportunities derives from Article 43(3) of the TFEU vesting the Council with the powers to adopt such regulations for the fixing of fishing opportunities for both EU-only and shared stocks. These provisions confirm that the Contested Act is both legally binding and has external effects.
67. Furthermore, the General Court held that Council Regulations fixing and allocating fishing opportunities for 2016 and 2018 respectively were regulatory acts in the sense of Article 263(4) of the TFEU because they were acts of general application with external legal effects.⁴⁹ The same reasoning applies *mutatis mutandis* to the Contested Act.

⁴⁵ Judgement (Grand Chamber) of 26 November 2014, *European Parliament and European Commission v. Council of the European Union* (“Venezuela” judgement), Joined Cases C-103/12 and C-165/12, ECLI:EU:C:2014:2400, para. 49.

⁴⁶ Judgement of 10 March 2020, *International Forum for Sustainable Underwater Activities (IFSUA) v. Council of the European Union*, T-251/18, ECLI:EU:T:2020:89, para. 36.

⁴⁷ Judgement (Grand Chamber) of 26 November 2014, *European Parliament and European Commission v. Council of the European Union* (“Venezuela” judgement), *Ibid.*, para. 50 and 79; Judgement (Grand Chamber) of 1 December 2015, *European Parliament and European Commission v. Council of the European Union*, Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:790, para. 48-50, 59 and 78; Judgement of 7 September 2016, *Federal Republic of Germany v. European Parliament and Council of the European Union*, C-113/14, ECLI:EU:C:2016:635, para. 55 and 60.

⁴⁸ Advocate General Wahl’s Opinion in Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:337, para. 61 (emphasis added).

⁴⁹ Order of 10 February 2017, *Asociación de armadores de cerco de Galicia (Acerga) v. Council of the European Union*, T-153/16, ECLI:EU:T:2017:73, para. 25; Judgement of 10 March 2020, *International Forum for Sustainable Underwater Activities (IFSUA) v. Council of the European Union*, T-251/18, ECLI:EU:T:2020:89, paras. 35-36.

68. There is nothing in the way the Contested Act is phrased that supports a finding to the contrary. Rather, the Contested Act states itself that it “*shall be binding in its entirety and directly applicable in all Member States*”. Moreover, its Article 1 provides that Articles 7, 11 and 15 of Regulation 2022/109 are respectively “deleted”, “replaced” and “replaced” by new Articles 11 and 15 provided in Article 1 of the Contested Act; and its Annex I is phrased in a mandatory manner stating that “*Annex IA to Regulation (EU) 2022/109 is amended*”.
69. Unlike in a challenge based on Article 263(4) of the TFEU, an applicant in an internal review request under Article 10 of the Aarhus Regulation is not obliged to demonstrate that the Contested Act “*does not entail implementing measures*”. This requirement featured in the Commission proposal to amend the Aarhus Regulation but it was removed at the insistence of the European Parliament and the Council in the legislative process.⁵⁰ Accordingly, the fact that the Contested Act is legally binding and has external effects is in itself sufficient for it to be the subject of an internal review request.

3.2.3 The Contested Act contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1) of the Aarhus Regulation

70. As further explained below, the present Request challenges the Council's decision to fix TACs for certain fish stocks above the best available scientific advice, in violation of the MSY objective, and, for some TACs, in violation of the precautionary and ecosystem-based approaches.
71. The Contested Act has the potential to contravene acts which are to be characterised as environmental law for the purposes of Article 2(1)(f) of the Aarhus Regulation. Pursuant to this Article, ‘environmental law’ means “*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 the Treaty: 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*”. The EU General Court has held that this concept “*must be interpreted, in principle, very broadly*”.⁵¹
72. Insofar as the Contested Act fixes TACs for EU/UK shared stocks in the context of a negotiation with the UK, it has the potential to contravene specific provisions of the CFP Basic Regulation. These include, but are not limited to, Article 2(2) establishing the objective to ensure sustainable fisheries management, the obligation to implement the precautionary approach to fisheries management and the objective to ensure that all stocks are managed at or below the MSY exploitation rate by 2020 at the latest, as well as Articles 2(3) (obligation to implement an ecosystem-based approach to fisheries management, 15 (landing obligation) and 16 (fishing opportunities).
73. The CFP Basic Regulation qualifies as environmental law in the sense of Article 2(1)(f) of the Aarhus Regulation. Indeed, the objective of preserving, protecting and improving the quality of the environment, and ensuring a prudent and rational use of natural resources, is one of

⁵⁰ Compare Article 1(1) of the Commission Proposal to amend the Aarhus Regulation (COM/2020/642 final) with the finally adopted text of Article 1(1) Regulation 2021/1767.

⁵¹ Judgement of 14 March 2018, *TestBioTech v Commission*, T-33/16, ECLI:EU:T:2018:135, para. 44-46.

the core objectives of the CFP Basic Regulation. This is confirmed by its preamble, as well as its Articles 1(1)(a) and 2(2), which indicate that “[t]he scope of the CFP includes the conservation of marine biological resources and the management of fisheries targeting them” and that the aim of the CFP is to “ensure that fishing and aquaculture activities are environmentally sustainable in the long-term”.

74. There is a clear and evident link between the achievement of the environmental objectives of the CFP and the appropriate fixing and allocation of fishing opportunities by the Council of the European Union. Recital (10) of the CFP Basic Regulation provides that “[s]ustainable exploitation of marine biological resources should be based on the precautionary approach, which derives from the precautionary principle referred to in the first subparagraph of Article 191(2) of the Treaty, taking into account available scientific data”. This is an explicit recognition that the CFP directly contributes to the pursuit of the objectives of Union policy on the environment, as defined by Article 2(1)(f) of the Aarhus Regulation. Furthermore, Recital (11) provides that “[t]he CFP should contribute to the protection of the marine environment, to the sustainable management of all commercially exploited species, and in particular to the achievement of good environmental status by 2020, as set out in Article 1(1) of Directive 2008/56/EC of the European Parliament and of the Council”. The preamble further refers to the Union’s biodiversity objectives. Article 2(2) states that “The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield”. Lastly, Article 2(3) provides that “The 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”. Under Article 4(9) of the CFP Basic Regulation, “ecosystem-based approach to fisheries management” means 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”. Concretely, Recitals (13) and (26) respectively specify that “[a]n ecosystem-based approach to fisheries management needs to be implemented, environmental impacts of fishing activities should be limited and unwanted catches should be avoided and reduced as far as possible” and “[u]nwanted catches and discards constitute a substantial waste and negatively affect the sustainable exploitation of marine biological resources and marine ecosystems and the financial viability of fisheries”. To reach the objectives to preserve and minimise the impact of fishing on ecosystems, conservation measures “such as fishing opportunities” must be adopted⁵² (all emphasis added).
75. The fact that the CFP Basic Regulation and Council regulations fixing and allocating fishing opportunities adopted on the basis thereof, such as the Contested Act, pursue additional economic and social objectives for fishers does not call into question the obvious conclusion that these regulations pursue objectives of the Union’s policy on the environment. Neither the notion of “*law relating to the environment*” under the Aarhus Convention, nor the definition of

⁵² Article 7(1)(d) of the CFP Basic Regulation.

“environmental law” under Article 2(1)(f) of the Aarhus Regulation, prescribe that the contested act *exclusively* pursues environmental objectives. Instead, the clarification in Article 2(1)(f) of the Aarhus Regulation that environmental law is to be defined “*irrespective of the legal basis*” demonstrates the intention that measures that also contribute to other policy areas are meant to be covered. It also follows from the Court’s case law, which confirmed that the term “environmental law” is to be given “*a broad meaning, not limited to matters relating to the protection of the natural environment in the strict sense*”.⁵³

76. This also follows from Article 9(3) of the Aarhus Convention, “*in the light of which the Aarhus Regulation must, so far as possible, be interpreted*”, as explicitly confirmed by the EU General Court.⁵⁴ Article 9(3) of the Aarhus Convention specifically refers to the broad notion of “law related to the environment”. The Aarhus Convention Implementation Guide, which though not binding, may be taken into account in interpreting the Convention, clarifies that “*national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment*”.⁵⁵ The Guide goes on to name the “*exploitation of natural resources and pollution from ships*” as examples of laws related to the environment covered by Article 9(3) of the Aarhus Convention, whether or not “*the provisions in question are found in planning laws, taxation laws or maritime laws*”.⁵⁶ This is further confirmed by findings of the Aarhus Convention Compliance Committee which states that the broad understanding of “environment” under the Convention links to the broad definition of environmental information, as found in Article 2(3) of the Aarhus Convention and faithfully transposed in EU law under Article 2(1)(d) of the Aarhus Regulation and Article 2(1) of Directive 2003/4.⁵⁷ The Compliance Committee emphasised that this definition includes for instance “*biodiversity and its components*”⁵⁸ as well as protection of “*wildlife species*”.⁵⁹ Clearly, the provisions of the CFP Basic Regulation are to be characterised as “*somehow relating to the environment*”, regulating the “*exploitation of natural resources and pollution from ships*” as well as protecting “*biodiversity and its components*” and “*wildlife species*”.
77. All of the above-mentioned requirements and explanations under applicable EU legislative acts, the Court’s jurisprudence and the Aarhus Convention point in one clear and unequivocal direction: all provisions of EU law that serve to protect the environment are meant to be covered by Article 2(1)(f) of the Aarhus Regulation. This clearly covers provisions of EU law that aim at conserving and managing natural and biological resources such as marine fish stocks, regardless of the procedure pursuant to which they are adopted.
78. There can therefore be no doubt that the Contested Act has the potential to contravene provisions which pursue the objectives of EU policy on the environment and therefore constitute environmental law for the purposes of Article 2(1)(f) of the Aarhus Regulation.

⁵³ Judgement of 14 March 2018, *TestBioTech v Commission*, T-33/16, ECLI:EU:T:2018:135, paras 43 and 44.

⁵⁴ Judgement of 27 January 2021, *ClientEarth v EIB*, T-9/19, ECLI:EU:T:2021:42, para. 125. See also para. 107.

⁵⁵ UNECE, “The Aarhus Convention: An Implementation Guide”, United Nations publication, Sales No. E.13.II.E.3, p. 197, available at:

https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

⁵⁶ *Ibid.* This has also been confirmed by the Aarhus Convention Compliance Committee in its findings on communication ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, para. 52.

⁵⁷ See findings on communication ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, para. 54.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, para. 55.

Accordingly, the contested provisions of the Contested Act have the potential to contravene environmental law in that sense, thus making the present Request admissible.

7. Grounds of review

79. ClientEarth considers that the Contested Act is vitiated by lack of competence to adopt certain of the Contested TACs specified below, and that the Council committed a manifest error of assessment, clearly exceeded the limits of its discretion and misused its powers when adopting the Contested Act, resulting in an infringement of the Treaties and rules of law relating to their application.

7.1. Main standards of review

80. ClientEarth notes that the CJEU has confirmed that the lack of competence and manifest errors are two distinct pleas and points of law, the first concerning “*the extent of the discretion conferred by the enabling act*”, while the second concerns “*the question of compliance with the limits of the power conferred by the enabling act*”.⁶⁰
81. As further confirmed by the CJEU, “*compliance with those two requirements is subject to different standards*”.⁶¹ Specifically, while in “*the exercise of the powers conferred on them the EU authorities have broad discretion in particular where they are called on to undertake complex assessments and evaluations, it must first be determined whether they are indeed acting within the limits of the powers given to them*”. The Court added that “*more particularly, in a case such as the present one concerning a delegated power under Article 290 TFEU, it must be ascertained whether the EU authorities have exceeded the powers conferred on them by the enabling act, bearing in mind in particular that such a delegated power must in any event comply with the essential elements of the enabling act and come within the regulatory framework as defined by the basic legislative act*”.⁶² The same reasoning must apply to Council regulations adopted to implement a legislative act, such as the Contested Act.
82. As further explained below, ClientEarth claims that the Contested Act disregarded essential elements of the enabling act, *i.e.* the CFP Basic Regulation, thus exceeding the limits of the powers conferred on the Council (Section 7.2).
83. In addition (and partially in the alternative), ClientEarth submits that the Contested Act is vitiated by an infringement of the Treaties and rules of law relating to their application resulting from a manifest error of assessment and exceedance of the limits of the Council's discretion, as well as a misuse of its powers (Section 7.3). In these sections, ClientEarth submits that the Contested Act infringes several provisions of the CFP Basic Regulation that it must implement, and is manifestly inappropriate having regard to the environmental objectives of these provisions.

⁶⁰ Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, para. 52.

⁶¹ *Ibid.*

⁶² *Ibid.*, para. 53.

7.2. First ground: The Contested Act is vitiated by lack of competence

4.2.1 First plea under the first ground: The Council disregarded essential elements of the CFP Basic Regulation by adopting specific TACs for by-catches of certain target stocks in mixed fisheries

84. ClientEarth considers that the Council lacked competence under Article 43(3) of the TFEU to adopt the following TACs because it explicitly disregarded essential elements of the CFP Basic Regulation, thus exceeding its powers under Article 43(3) of the TFEU.⁶³ See [Table 1](#) below for the list of TACs concerned by this plea.

⁶³ See Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, in which the Court confirmed that a plea of lack of competence can be grounded on the circumstance that an authority, in the exercise of its delegated or implementing powers, disregarded essential elements of the enabling act.

Table 1: List of 2022 by-catch TACs included in the Contested Act for stocks with zero catch or landings advice.

Common species name	TAC code(s)	Advice code(s) ⁶⁴	MAP Article ⁶⁵	Stock / exploitation status ⁶⁶	ICES advice basis ⁶⁷	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Cod	COD/7XAD34	cod.27.7e-k	WW 1.1.7	SSB < B _{lim} F > F _{lim}	MSY	0	644 (by-catch)	644 (non-0 TAC)	The by-catch TAC was set 20% below the 2021 TAC of 805 t, and is above any MSY-related scenario. It is between the F _{MSY} scenario (519 t) and the "Whiting F _{MSY} " scenario (814 t). ⁶⁸
Whiting	WHG/07A.	whg.27.7a	WW 1.4	SSB < B _{lim} F > F _{lim}	MSY	0	721 (by-catch)	721 (non-0 TAC)	The by-catch TAC represents a rollover of the 2021 TAC. It is above any MSY-related scenarios as well as the F _{pa} scenario (498 t), and close to the F _{lim} scenario (794 t).
Cod	COD/5BE6A	cod.27.6a	WW 1.4	SSB < B _{lim} F > F _{lim}	MSY	0	1279 (by-catch)	1279 (non-0 TAC)	The by-catch TAC represents a rollover of the 2021 TAC. It is above any MSY-related scenarios, and between the F _{pa} scenario (1182 t) and the saithe scenario (1319 t). ⁶⁹
Northern prawn	PRA/2AC4-C	pra.27.4a	-	Unknown	PA	0 (no target fisheries or landings) ⁷⁰	990 (by-catch)	990 (non-0 TAC)	The by-catch TAC represents a 50% increase compared to the 2021 TAC of 660 t and is far above the recent estimated landings (219 t for 2020). No other scenarios are presented in the ICES advice.

⁶⁴ These are the stock codes used in the relevant ICES advice to identify the different stocks. A list of all ICES advice documents, retrieved from <https://www.ices.dk/advice/Pages/Latest-Advice.aspx>, is contained in **Annex 9**. All information on stock/exploitation status and the ICES advice and basis, as well as the figures presented in the column "Comments on the level of the 2022 TACs" are based on the respective ICES single-stock advice, unless otherwise specified.

⁶⁵ This column indicates which Article in the Western Waters (WW) multiannual plan (MAP) the stock falls under.

⁶⁶ This column indicates the level of the stock size (SSB) and the fishing mortality (F) in relation to biological reference points, based on the single-stock advice.

⁶⁷ PA means the advice is based on the ICES precautionary approach; MSY means it is based on the ICES MSY approach.

⁶⁸ ICES (2021): EU standing request on catch scenarios for zero-TAC stocks; Cod (*Gadus morhua*) in divisions 7.e–k (Celtic Sea). ICES Advice: Special Requests. Report <https://doi.org/10.17895/ices.advice.9151>; this ICES Technical Service, which provides further catch scenarios in addition to the official ICES single-stock advice, contains a "Whiting F_{MSY}" scenario presented in Table 2, p. 3, which is based on fishing whiting in the Celtic Sea at the reduced F_{MSY} (F_{MSY} x SSB₂₀₂₁/MSY B_{trigger}) and corresponds to cod catches of 814 t

⁶⁹ ICES (2021): 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 Advice: Special Requests. Report, <https://doi.org/10.17895/ices.advice.8218>; this ICES Technical Service, which provides further catch scenarios in addition to the official ICES single-stock advice, contains a "F = 0.69 x F₂₀₂₂" scenario corresponding to the single-stock advice for saithe being followed, presented in Table 3, p. 3, with a projected West of Scotland cod catch of 1319 t

⁷⁰ ICES (2021): Northern shrimp (*Pandalus borealis*) in Division 4.a West (Northern North Sea, Fladen Ground). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7835>. The ICES headline advice is that "there should be no targeted fisheries on this stock", and while ICES does not explicitly advise that the overall catch should be 0 t, it specifies in Table 3, p. 3, that the level of "landings corresponding to advice" is 0 t.

85. As detailed above under Section 1 (Legal Framework), the CFP Basic Regulation applies to fisheries management measures concerning Union vessels fishing in and outside Union waters. When fixing TACs for shared stocks with a third country, the Union must comply with the CFP Basic Regulation unless provided otherwise in its international fisheries agreements. In the present case, the TCA, as evidenced by the Written Record, confirms that Union law applies to the Union in respect of fisheries management. The Council's competence to fix TACs for EU/UK shared stocks is thus strictly delineated by the CFP Basic Regulation, as confirmed by the TCA itself.
86. Article 43(2) of the TFEU states that "*the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the Common Agricultural Policy and the Common Fisheries Policy*".
87. As for Article 43(3) of the TFEU, it provides that "*the Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities*". This means that implementing measures on, *inter alia*, the fixing and allocation of fishing opportunities, do not fall within the category of provisions "*necessary for the pursuit of the CFP*" within the meaning of Article 43(2) of the TFEU, and are therefore not subject to the ordinary legislative procedure.
88. As mentioned above under Section 6 (Admissibility), the Court ruled in Joined Cases C-103/12 and C-165/12 that measures adopted under Article 43(3) of the TFEU are of a "*primarily technical nature*" and are intended to be adopted in order "*to implement provisions adopted on the basis of Article 43(2)*",⁷¹ i.e. under the CFP Basic Regulation.
89. To explain the function of Article 43(3) of the TFEU, a comparison can be made with Articles 290 and 291 of the TFEU on the scope of the European Commission's power for delegated and implementing acts. Article 43(3) of the TFEU and Articles 290 and 291 of the TFEU frame the scope of the delegation of power to the Council and the European Commission, respectively, for the adoption of non-legislative acts.
90. Advocate General ('AG') Wahl summed up this approach as follows: "*Article 43(3) TFEU is to be understood as providing the legal basis for the adoption of a special type of implementing measure and that, as such, it is hierarchically subordinate to the legal basis provided by Article 43(2) TFEU*".⁷²
91. AG Wahl further found "*parallels drawn between Article 43(3) TFEU and implementing acts based on Article 291 TFEU to be perfectly apt. By their very nature, measures on the fixing and allocation of fishing opportunities, which must respect the legislative provisions of the CFP, can be assimilated to implementing measures. This is so even though they fall outside the scope of 'implementing acts' for the purposes of Article 291 TFEU. This approach and the line of demarcation between the types of measures that can be adopted under Article 43(2)*

⁷¹ Judgement of 26 November 2014, *European Parliament and European Commission v Council of the European Union*, Joined Cases C-103/12 and C-165/12, ECLI:EU:C:2014:2400, para. 50.

⁷² Opinion of Advocate General Wahl delivered on 21 May 2015, *European Parliament and European Commission v Council of the European Union*, Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:337, para. 45.

and Article 43(3) TFEU, respectively, was confirmed by the Court in the *Venezuela judgment*.⁷³

92. In respect of Article 290 of the TFEU, according to the case-law of the Court, “*the possibility of delegating powers provided for in Article 290 TFEU aims to enable the legislature to concentrate on the essential elements of a piece of legislation and on the non-essential elements in respect of which it finds it appropriate to legislate, while entrusting the Commission with the task of ‘supplementing’ certain non-essential elements of the legislative act adopted or ‘amending’ such elements within the framework of the power delegated to it. [...] It follows that the essential rules on the matter in question must be laid down in the basic legislation and cannot be delegated*”.⁷⁴
93. As the Court further held, “[t]he essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature [...] Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned”.⁷⁵
94. On Article 43 of the TFEU and the CFP in particular, the Court held in Joined Cases C-124/13 and C-125/13 that “*paragraphs 2 and 3 of Article 43 TFEU pursue different aims and each have a specific field of application, which means that they may be used separately as a basis for adopting particular measures under the CFP, provided that the Council, when it adopts measures on the basis of Article 43(3) TFEU, acts within the limits of its powers and, where relevant, within the legal framework already established under Article 43(2) TFEU*”.⁷⁶
95. Accordingly, the Council’s competence under Article 43(3) of the TFEU is limited by the legal framework established under Article 43(2) of the TFEU, i.e. the essential elements of the CFP Basic Regulation. In Article 16 of the CFP Basic Regulation, the co-legislators saw fit to lay down further requirements that the Council must comply with when setting the TACs. Article 16(4) explicitly requires the TACs to be set in accordance with the objectives in Article 2(2) of the CFP Basic Regulation, and to take into account the landing obligation in Article 15. Article 2(2), in turn, lays down a clear and binding obligation to restore and maintain stocks above levels which can produce the MSY, and to do so, states that the MSY exploitation rate shall be achieved at the latest by 2020 for all stocks and the correlative obligation not to adopt measures that would undermine this achievement. It also obliges the Council to apply a precautionary approach to fisheries management. Article 3(c) reflects the principle that the Council should establish measures in accordance with the best available scientific advice. This is directly relevant to Article 2(2) of the CFP Basic Regulation since the determination of what constitutes MSY and a precautionary approach in the sense of Article 4(7) and (8) of the CFP Basic Regulation is immediately dependent on a scientific evaluation. All of these provisions are essential elements of the CFP Basic Regulation, as they clearly required political choices that fall exclusively within the competence of the co-legislators acting in accordance with the ordinary legislative procedure on the basis of Article 43(2) of the TFEU.

⁷³ *Ibid.* para. 67.

⁷⁴ Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, paras 58-59.

⁷⁵ *Ibid.* paras. 61-62.

⁷⁶ Judgement of 1 December 2015, *European Parliament and European Commission v Council of the European Union*, Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:790, para. 58.

96. Recital 6 of the Contested Act provides that “[t]here 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 [...]”.
97. Importantly, in this Recital 6, the Council does not question that following the ICES advice is necessary to achieve the MSY objective for these by-catch stocks. Rather, the Council explicitly acknowledges that to achieve MSY and respect an essential element of the CFP Basic Regulation, it would have to set the TACs at a specific level – 0 tonnes in this case. Yet, the Council decided to set these TACs at a higher level in order to prevent the phenomenon of ‘choke species’. A choke species is a species whose TAC is set at 0, or is extremely low, and which is caught in mixed fisheries, most often as by-catch of a target stock which has a higher quota. When it is caught, it leads to the closing of the mixed fishery in order to avoid overshooting this 0 tonnes or low quota. Since the introduction of the ‘landing obligation’⁷⁷ in 2013, the number of choke species has increased, as fishers now have to land catches for these stocks that they used to discard before, therefore increasing the risk of closing mixed fisheries as a result.
98. To avoid the phenomenon of choke species, the Council considered it “*appropriate*” in the Contested Act to establish specific TACs for by-catches of those stocks, which are not in line with the ICES headline advice, set at 0, and which, as a result, do not meet the MSY objective. This means that the Council deliberately considered, for certain stocks, that it was “*appropriate*” to depart from the objectives laid down in Article 2(2) of the CFP Basic Regulation in order to avoid the consequences of the implementation of the landing obligation prescribed in Article 15 of the CFP Basic Regulation. However, the Council’s power to choose what is an “*appropriate*” TAC is clearly delimited by Article 2(2) of the CFP Basic Regulation. Setting TACs at a higher level than what is required to achieve MSY is therefore outside the Council’s competence.
99. In Recital 6, the Council justifies its decision by “*taking into account the difficulty of fishing all stocks in a mixed fishery at MSY at the same time*”. However, this is not a recognised derogation under the CFP Basic Regulation to the obligation contained in Article 2(2).
100. Article 2(2) of the CFP Basic Regulation makes clear that the MSY exploitation rate must be achieved “*at the latest by 2020 for all stocks*”, in order to “*be coherent with the Union environmental legislation, in particular with the objective of achieving a good environmental*

⁷⁷ This obligation applies to catches of species which are subject to catch limits caught during fishing activities in Union waters or by Union fishing vessels outside Union waters. In summary, it requires fishing vessels to record, land and count – against its quotas – the fish caught. The ultimate objective is to eliminate discards by encouraging fishers to fish more selectively and to avoid unwanted catches. See Article 15 of the CFP Basic Regulation and the European Commission, “Synthesis of the landing obligation measures and discard rates”, Final Report, June 2021, p. 7.

status by 2020 as set out in Article 1(1) of Directive 2008/56/EC, as well as with other Union policies".⁷⁸ The CFP Basic Regulation does not allow for any derogation to this deadline, nor for any flexibility in the achievement of the MSY objective for all stocks. The alleged "difficulty" relates to the objective to fish "all stocks in a mixed fishery at maximum sustainable yield". However, there is nothing in the Regulation that allows the Council to override the objective to achieve MSY for all stocks, neither on that nor any other basis. If the co-legislators had intended to adopt a derogation to this obligation, i.e. to fish certain stocks above MSY so that other stocks could be fished at MSY, they would have done so.

101. Furthermore, Article 15 of the CFP Basic Regulation does not allow the Council to fix fishing opportunities taking into account the phenomenon of 'choke species'. In doing so, on the ground that fixing TACs above levels recommended in the best available scientific advice would facilitate the implementation of the landing obligation in light of the phenomenon of 'choke species', the Council created a flexibility that does not exist in Article 15 of the CFP Basic Regulation. Again, if the co-legislators had intended to introduce a derogation from the MSY objective in reaction to the phenomenon of 'choke species', they would have done so.
102. Ignoring the foregoing, the Council decided, "[i]n order to balance the need for the continuation of those mixed fisheries [...] and the need to achieve a good biological status for those stocks",⁷⁹ to disregard the objectives of Article 2(2) of the CFP Basic Regulation, which explicitly applies to "all stocks".⁸⁰ The Council states in Recital 6 of the Contested Act that it is "appropriate" to depart from fixing TACs for fish stocks at zero – following ICES advice – in order to avoid fisheries closures. Once again, if this were a valid justification to depart from the objectives of the CFP, Article 2(2) of the CFP Basic Regulation would have stated so.
103. The policy choice to restrict the scope of Article 2(2) of the CFP Basic Regulation to certain categories of stocks, whereas it explicitly applies to all stocks, goes beyond the limits of the Council's powers under Article 43(3) of the TFEU.
104. This reasoning is also reflected in Joined Cases C-124/13 and C-125/13, where the Court ruled that the Council had violated its competence by adopting Council Regulation (EU) No 1243/2012 establishing a long-term plan for cod stocks and the fisheries exploiting those stocks under Article 43(3) of the TFEU.
105. The Court declared in paragraph 79 that this Regulation was "not confined — contrary to the Council's contention — to merely providing for the fixing and actual allocation of fishing opportunities but was intended to adapt the general mechanism for setting the TACs and the fishing effort limitations in order to remedy the shortcomings arising from the application of the previous rules on automatic reduction, which were jeopardising attainment of the objectives of the multiannual recovery plan for cod stocks".⁸¹

⁷⁸ Article 2(5)(j) of the CFP Basic Regulation.

⁷⁹ Recital 6 of the Contested Act.

⁸⁰ "In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks" (emphasis added).

⁸¹ Judgement of 1 December 2015, *European Parliament and European Commission v Council of the European Union*, Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:790, para. 79.

106. The Court then ruled at paragraph 80 that the amendments to the contested regulation at issue “*therefore define the legal framework in which fishing opportunities are established and allocated. They thus result from a policy choice having a long-term impact on the multiannual recovery plan for cod stocks*”.⁸² It finally concluded in paragraph 81 that “*it follows that the amendments in question constitute provisions necessary for the pursuit of the objectives of the CFP. Consequently, those amendments should have been adopted under the legislative procedure referred to in Article 43(2) TFEU*”.⁸³
107. In Joined Cases C-103/12 and C-165/12, the Court ruled that “*the adoption of the provisions referred to in Article 43(2) TFEU necessarily presupposes an assessment of whether they are ‘necessary’ for the pursuit of the objectives of the common policies governed by the FEU Treaty, with the result that it entails a policy decision that must be reserved to the EU legislature. By contrast, the adoption of measures on the fixing and allocation of fishing opportunities, in accordance with Article 43(3) TFEU, does not require such an assessment since such measures are of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2)*”.⁸⁴
108. In view of the foregoing considerations, when the Council decided to adopt, on the part of the EU, TACs at levels which – as it itself acknowledges – do not ensure that the MSY exploitation rate will be reached for certain stocks by 2020 at the latest whereas it is an essential element of the CFP Basic Regulation, it exceeded its implementing powers conferred by Article 43(3) of the TFEU. Instead, the Council was obliged, in order not to disregard essential elements of the CFP Basic Regulation – which directly apply, in accordance with the TCA – to fix TACs for *all stocks* at levels that ensure the achievement of the MSY objective.⁸⁵ By failing to do so, the Council lacks competence to adopt these specific TACs under Article 43(3) of the TFEU and Article 16(2) and (4) of the CFP Basic Regulation, and therefore also under the TCA.

4.2.2 Second plea under the first ground: The Contested Act is vitiated by lack of competence because the Council exceeded its powers by setting the TACs for other stocks at a level that it implicitly acknowledged would not achieve the objectives of Article 2(2) of the CFP Basic Regulation, as mandated under Article 16(4) of the CFP Basic Regulation

109. ClientEarth's second claim concerns the stocks included in Table 2 below.

⁸² *Ibid.*, para. 80.

⁸³ *Ibid.*, para. 81.

⁸⁴ Judgement of 26 November 2014, *European Parliament and European Commission v Council of the European Union*, Joined Cases C-103/12 and C-165/12, ECLI:EU:C:2014:2400, para. 50.

⁸⁵ See by analogy, Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, para. 68.

Table 2: List of 2022 TACs exceeding the underlying scientific advice provided by ICES, which are not covered by Recital 6 of the Contested Act.⁸⁶

Common species name	TAC code(s)	Advice code(s)	MAP Article	Stock / exploitation status	ICES advice basis	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Cod	COD/5W6-14	cod.27.6b	WW 1.4	Unknown	PA	14	74 (by-catch)	60 (429%)	The by-catch TAC represents a rollover of the 2021 TAC. No other scenarios are presented in the ICES advice.
Cod	COD/07A.	cod.27.7a	WW 1.1.6	Unknown	PA	74	206 (by-catch)	132 (178%)	The by-catch TAC represents a rollover of the 2021 TAC and equals the catch estimated for 2020. No other catch scenarios are provided in the ICES advice.
Pollack	POL/56-14 POL/07.	pol.27.67	WW 1.1.29	Unknown	PA	3360	8168 (156 + 8012)	4808 (143%)	The sum of both TACs represents a 15% cut compared to the 2021 TACs. No other scenarios are presented in the ICES advice.
Undulate ray	RJU/9-C.	rju.27.9a	WW 1.4 ⁸⁷	Unknown	PA	31	100	69 (223%)	The final by-catch TAC (a sub-TAC within the SRX/89-C TAC for skates and rays) represents a 100% increase compared to the 2021 TAC. ⁸⁸ No other catch scenarios are presented in the ICES advice.
Herring	HER/7G-K.	her.27.irls ⁸⁹	-	SSB < B _{lim} F < F _{MSY}	MSY	0 ⁹⁰	869 ⁹¹	869 (non-0 TAC)	The final TAC represents a rollover of the 2021 TAC and corresponds to the "monitoring TAC" scenario.
Herring	HER/5B6ANB HER/6A57BC	her.27.6a7bc ⁹²	-	Unknown	PA	0 ⁹³	4840 (3480 + 1360) ⁹⁴	4840 (non-0 TAC)	The final TAC represents a rollover of the 2021 TAC and corresponds to a scenario ICES presented in 2016 for a scientific monitoring fishery, at the request of the European Commission.

⁸⁶ For explanations of the headers and abbreviations used in this table, see footnotes 64, 65, 66 & 67 on Table 1; List of 2022 by-catch TACs included in the Contested Act for stocks with zero catch or landings advice.

⁸⁷ Undulate ray, or skates and rays in general, are not explicitly covered by Article 1 of the Western Waters Regulation, but any by-catches in fisheries for the stocks listed in Article 1 fall under Article 1(4).

⁸⁸ The Union share within this TAC is 50 t, whereas the UK share is 0 t. The reason for this discrepancy between the total TAC (100 t) and the sum of the EU and UK shares (50 t) is not specified, but may be related to deductions accounting for exemptions from the landing obligation. Nevertheless, even the EU share on its own still exceeds the advice by 61%.

⁸⁹ In addition to the official ICES advice of 0 t (a full reference to which is provided in Annex 9), ICES also provided a number of responses to Special Requests from the EU regarding catch scenarios to support monitoring of the stock situation through fisheries-dependent data collection, as well as additional catch scenarios with stock size forecasts. The first of these ICES responses (from 2019) specified a number of 17 samples for monitoring, resulting in a catch of 869 t, subject to an appropriate spatial and temporal distribution of samples. The second ICES response (from 2021) presents forecasts of stock development under different additional catch scenarios. ICES (2019): EU request for advice on a monitoring TAC for herring in ICES divisions 7.a South of 52°30'N, 7.g-h, and 7.j-k. ICES Advice: Special Requests. Report. https://doi.org/10.17895/ices_advice.5614. ICES (2021): 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). ICES Advice: Special Requests. Report. https://doi.org/10.17895/ices_advice.8216.

⁹⁰ *Ibid.*: While ICES provided a catch scenario of 869 t for monitoring purposes, subject to an appropriate spatial and temporal distribution of samples, the official ICES headline advice remains 0 t.

⁹¹ *Ibid.*: The sum of the TAC for this stock follows the catch scenario presented by ICES in 2019 for monitoring purposes, and the Contested Act contains two footnotes specifying that quota under this TAC "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 extent to which catches taken under this TAC meet the criteria outlined by ICES in order for the data collection to effectively contribute to monitoring the stock situation and supporting the stock assessment, and to which the amount of 869 t ICES specified in 2019 is still appropriate, is unclear.

⁹² In addition to the official ICES advice of 0 t (a full reference to which is provided in Annex 9), ICES also provided a number of responses to Special Requests from the EU regarding catch scenarios to support monitoring of the stock situation through fisheries-dependent data collection, as well as assuming different levels of uptake of the monitoring TAC of 4840 t (3480 + 1360 t). The first of these ICES responses (from 2016) specified a number of 46 samples for monitoring, resulting in a catch of 4840 t, to be taken as part of a specific sampling programme meeting certain criteria. The second ICES response (from 2021) presents a forecast on the stock development expected with partial (1540 t) or full (4840 t) uptake of the monitoring TAC. ICES (2016). EU request for advice on a scientific monitoring fishery for herring in ICES divisions 6.a, 7.b, and 7.c. In Report of the ICES Advisory Committee, 2016. ICES Advice 2016, Book 5, Section 5.4.3. 7 pp. https://www.ices.dk/sites/pub/Publication%20Reports/Advice/2016/Special_Requests/EU_her-6a7bc_monitoring_fishery.pdf. ICES (2021): 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). ICES Advice: Special Requests. Report. https://doi.org/10.17895/ices_advice.8215.

⁹³ *Ibid.*: While ICES provided a catch scenario of 4840 t for monitoring purposes, subject to a specific sampling programme, the official ICES headline advice remains 0 t.

⁹⁴ *Ibid.*: While the sum of the two relevant TACs related to this stock follows the catch scenario presented by ICES in 2016 for monitoring purposes, the Contested Act does not make a reference to these TACs being reserved for monitoring purposes, or to any specifics of a dedicated sampling programme as part of which data are to be collected. The extent to which catches taken under these TACs meet the criteria outlined by ICES in order for the data collection to effectively contribute to monitoring the stock situation and supporting the stock assessment, and to which the amount of 4840 t ICES specified in 2016 is still appropriate is unclear.

110. For all these stocks, the Council has set TACs at higher levels than those recommended by ICES in its headline advice. As opposed to those stocks falling under the scope of Recital 6 of the Contested Act, which are covered by the previous section, the Council has not included an explicit explanation as to why it deviated from ICES advice for these stocks. However, the Council was equally aware that it needed to follow ICES headline advice in order to achieve the objective of Article 2(2) of the CFP Basic Regulation of restoring and maintaining all stocks above levels which can produce the MSY. However, it decided not to, thus disregarding essential elements of the CFP Basic Regulation.
111. This follows from the fact that, in the context of the CFP, there is a consensus between the Council, the Member States, the European Parliament and the Commission, to recognise the advice produced by ICES as constituting the best available scientific advice for the purposes of the CFP Basic Regulation, the Contested Act and the Western Waters Regulation. As opposed to other decision-making processes in which an EU institution – usually the EU Commission – needs to take a decision in light of conflicting scientific advice prepared by different scientific authorities, the Council has at hand a reputable, unified scientific advice⁹⁵ based on which it must conduct its assessment as to which TAC levels to set, while respecting the requirements of the CFP Basic Regulation. There is therefore no dispute as to the fact that following ICES advice is necessary to achieve the overarching MSY objective of the CFP.
112. This is demonstrated for instance, by Recital 9 of the Western Waters Regulation, in which it is specified that *“the Commission should obtain the best available scientific advice for the stocks within the scope of the plan. In order to do so, it concludes Memoranda of Understanding with the International Council for the Exploration of the Sea (ICES)”*.
113. In the latest publicly available ICES/EU specific agreement (**Annex 10**),⁹⁶ it is explicitly said that *“ICES has provided advice to the European Commission, DG MARE for more than 30 years and has through this time been the sole advisory body concerning advice for fisheries management”*.⁹⁷ The specific agreement further states that *“ICES aims at producing advice based on the best available science that is characterised by quality assurance, developed in a transparent process, unbiased, independent, and is recognised by all parties as being relevant to management”*.⁹⁸
114. It is even reflected in Recital 3 of the Contested Act itself which states that *“[t]he 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)”*. This recital confirms the position of the Council that ICES advice is not only the best available scientific advice but also its agreement that, accordingly, it is required to base the TACs on ICES advice, in order to comply with the TCA and, as per its obligations under Union law, Articles 16(4) and 2(2) of the CFP Basic Regulation.

⁹⁵ The advice provided by ICES is up-to-date, publicly available, independent and itself based on the best information available. ICES advice is peer reviewed by independent scientists who were not involved in preparing the original advice and who have no vested interest in the outcome of the process. Finally, all ICES proceedings are open to the public, its papers are published online and observers are free to attend its sessions.

⁹⁶ Cooperation Agreement between ICES and the European Union on providing scientific advice from January 2022 to December 2022 (*SPECIFIC GRANT AGREEMENT NO S12.869124*, https://www.ices.dk/about-ICES/Documents/Cooperation%20agreements/EU2022_DGMARE_ICES_Grant-web.pdf [consulted on 16 May 2022]).

⁹⁷ *Ibid.* (page number missing in the specific agreement).

⁹⁸ *Ibid.* p.17.

115. Thus, even though it does not make it as explicit as it does for the TACs covered by Recital 6, by setting a number of TACs above ICES headline advice, the Council effectively introduced an exception to the MSY objective for certain stocks that the CFP Basic Regulation does not provide for. The Council thereby disregarded the essential elements of the CFP Basic Regulation listed in paragraph 95 above.
116. In view of the foregoing considerations, when the Council decided to disregard an essential element of the CFP Basic Regulation by adopting TACs above ICES headline advice, in contradiction with the objective of Article 2(2), it exceeded its implementing powers conferred by Article 43(3) of the TFEU. Instead, the Council was obliged, in order not to disregard essential elements of the CFP Basic Regulation, to fix TACS for *all stocks* at levels that ensure the achievement of the MSY objective.⁹⁹ By failing to do so, the Council lacks competence to adopt the Contested TACs under Article 43(3) of the TFEU and Article 16(2) and (4) of the CFP Basic Regulation.

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

117. ClientEarth submits that if the Council were not considered to lack competence to adopt the Contested TACs for the reasons set out above, it infringed the Treaties and rules of law relating to their application, including several provisions of the CFP Basic Regulation (see Section 4.3.1 below) and also misused its powers (see Section 4.3.2 below).
118. Given the clear obligations in Article 2(2) of the CFP Basic Regulation, the Contested Act should contain the Council's assessment of the level at which TACs need to be set to achieve the overarching MSY objective for all stocks, to apply the precautionary approach to fisheries management and to implement the ecosystem-based approach to fisheries management. ClientEarth submits that the Council's assessment with respect to the Contested TACs is implausible.¹⁰⁰ In adopting the Contested TACs, the Council committed a manifest error of assessment and manifestly exceeded the bounds of its discretion, which resulted in a violation of the CFP Basic Regulation.¹⁰¹
119. In addition to this, as will be shown below, the Council misused the powers conferred on it by Article 43(3) of the TFEU and by the CFP Basic Regulation.

⁹⁹ See by analogy, Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, para. 68.

¹⁰⁰ In the sense of Judgement of 14 March 2018, *TestBioTech v Commission*, T-33/16, ECLI:EU:T:2018:135, paras 78-79.

¹⁰¹ In the sense of Judgement of 30 April 2019, *Italian Republic v. Council of the European Union*, C-611/17, ECLI:EU:C:2019:332, para. 57.

4.3.1 First plea under the second ground: The Council committed a manifest error of assessment and clearly exceeded the bounds of its discretion by setting TACs for certain stocks above levels recommended by ICES, in breach of Articles 16(4), 2(2) and 2(3) of the CFP Basic Regulation

120. This plea is divided into three limbs relating to three different types of Contested TACs:

1. TACs not set in line with the obligation to restore or maintain stocks above levels which can produce the MSY;
2. TACs not set in line with the obligation to apply a precautionary approach to fisheries management; and
3. TACs not set in line with the obligation to implement an ecosystem-based approach to fisheries management.

While some different considerations apply to each of these categories of stocks, the legal plea is the same, i.e. an infringement of the Treaties and rules of law relating to their application.

The three categories of TACs presented here are not mutually exclusive of each other and most contested TACs are covered by two or three different limbs as identified in **Annex 1**.

1st limb: TACs not set in line with the obligation contained in Article 2(2) of the CFP Basic Regulation to restore or maintain stocks above levels which can produce the MSY

121. This claim concerns the Contested TACs listed in the table below ([Table 3](#)).

122. Each of these TACs has not been set in line with the obligation to restore or maintain stocks above levels which can produce the MSY.

Table 3: List of 2022 EU/UK shared TACs in the Contested Act exceeding the underlying scientific headline advice provided by ICES.¹⁰²

Common species name	TAC code(s)	Advice code(s)	MAP Article	Stock / exploitation status	ICES advice basis	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Cod	COD/7XAD34	cod.27.7e-k	WW 1.1.7	SSB < B _{lim} F > F _{lim}	MSY	0	644 (by-catch)	644 (non-0 TAC)	The by-catch TAC was set 20% below the 2021 TAC of 805 t, and is above any MSY-related scenario. It is between the F _{MSY} scenario (519 t) and the "Whiting F _{MSY} " scenario (814 t). ¹⁰³
Whiting	WHG/07A.	whg.27.7a	WW 1.4	SSB < B _{lim} F > F _{lim}	MSY	0	721 (by-catch)	721 (non-0 TAC)	The by-catch TAC represents a rollover of the 2021 TAC. It is above any MSY-related scenarios as well as the F _{pa} scenario (498 t), and close to the F _{lim} scenario (794 t).
Cod	COD/5BE6A	cod.27.6a	WW 1.4	SSB < B _{lim} F > F _{lim}	MSY	0	1279 (by-catch)	1279 (non-0 TAC)	The by-catch TAC represents a rollover of the 2021 TAC. It is above any MSY-related scenarios, and between the F _{pa} scenario (1182 t) and the saithe scenario (1319 t). ¹⁰⁴
Cod	COD/5W6-14	cod.27.6b	WW 1.4	Unknown	PA	14	74 (by-catch)	60 (429%)	The by-catch TAC represents a rollover of the 2021 TAC. No other scenarios are presented in the ICES advice.
Cod	COD/07A.	cod.27.7a	WW 1.1.6	Unknown	PA	74	206 (by-catch)	132 (178%)	The by-catch TAC represents a rollover of the 2021 TAC and equals the catch estimated for 2020. No other catch scenarios are provided in the ICES advice.
Pollack	POL/56-14 POL/07.	pol.27.67	WW 1.1.29	Unknown	PA	3360	8168 (156 + 8012)	4808 (143%)	The sum of both TACs represents a 15% cut compared to the 2021 TACs. No other scenarios are presented in the ICES advice.
Undulate ray	RJU/9-C.	rju.27.9a	WW 1.4 ¹⁰⁵	Unknown	PA	31	100	69 (223%)	The final by-catch TAC (a sub-TAC within the SRX/89-C TAC for skates and rays) represents a 100% increase compared to the 2021 TAC. ¹⁰⁶ No other catch scenarios are presented in the ICES advice.
Northern prawn	PRA/2AC4-C	pra.27.4a	-	Unknown	PA	0 (no target fisheries or landings) ¹⁰⁷	990 (by-catch)	990 (non-0 TAC)	The by-catch TAC represents a 50% increase compared to the 2021 TAC of 660 t and is far above the recent estimated landings (219 t for 2020). No other scenarios are presented in the ICES advice.
Herring	HER/7G-K.	her.27.irls	-	SSB < B _{lim} F < F _{MSY}	MSY	0	869	869 (non-0 TAC)	The TAC represents a rollover of the 2021 TAC and corresponds to the "monitoring TAC" scenario.
Herring	HER/5B6ANB HER/6AS7BC	her.27.6a7bc	-	Unknown	PA	0	4840 = 3480 + 1360)	4840 (non-0 TAC)	The TAC represents a rollover of the 2021 TAC and corresponds to a scenario ICES presented in 2016 for a scientific monitoring fishery, at the request of the European Commission.

¹⁰² For explanations of the headers and abbreviations used in this table, see footnotes 64, 65, 66 & 67 on Table 1: List of 2022 by-catch TACs included in the Contested Act for stocks with zero catch or landings advice.

¹⁰³ ICES (2021): EU standing request on catch scenarios for zero-TAC stocks; cod (*Gadus morhua*) in divisions 7.e-k (Celtic Sea). ICES Advice: Special Requests. Report. <https://doi.org/10.17895/ices.advice.9151>; this ICES Technical Service which provides further catch scenarios in addition to the official ICES single-stock advice contains a "Whiting F_{MSY}" scenario presented in Table 2, p. 3, which is based on fishing whiting in the Celtic Sea at the reduced F_{MSY} (F_{MSY} x SSB₂₀₂₁/MSY B_{trigger}) and corresponds to cod catches of 814 t.

¹⁰⁴ ICES (2021): 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 Advice: Special Requests. Report. <https://doi.org/10.17895/ices.advice.8218>; this ICES Technical Service which provides further catch scenarios in addition to the official ICES single-stock advice contains a "F = 0.69 x F₂₀₂₂" scenario corresponding to the single-stock advice for saithe being followed, presented in Table 3, p. 3, with a projected West of Scotland cod catch of 1319 t.

¹⁰⁵ Undulate ray, or skates and rays in general, are not explicitly covered by Article 1 of the Western Waters Regulation, but any by-catches in fisheries for the stocks listed in Article 1 fall under Article 1(4).

¹⁰⁶ The Union share within this TAC is 50 t, whereas the UK share is 0 t. The reason for this discrepancy between the total TAC (100 t) and the sum of the EU and UK shares (50 t) is not specified, but may be related to deductions accounting for exemptions. Nevertheless, even the EU share on its own still exceeds the advice by 61%.

¹⁰⁷ ICES (2021): Northern shrimp (*Pandalus borealis*) in Division 4.a West (Northern North Sea, Fladen Ground). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7835>. The ICES headline advice is that "there should be no targeted fisheries on this stock", and while ICES does not explicitly advise that the overall catch should be 0 t, it specifies in Table 3, p. 3, that the level of "landings corresponding to advice" is 0 t.

The MSY objective set in Article 2(2) of the CFP Basic Regulation is a legally binding obligation, applicable to all stocks, with a strict deadline

123. As set out above, when fixing TACs for shared stocks with a third country such as the UK, the Council is bound to comply with the CFP Basic Regulation.
124. Article 2(2) of the CFP Basic Regulation states that the CFP shall aim “to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield” (emphasis added). In order to ensure that this overarching objective is reached, it further provides that “in order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate *shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks*” (emphasis added). There is therefore a positive and binding obligation to achieve, i.e. not exceed, the MSY exploitation rate for all stocks by 2020 at the latest.
125. Article 16(4) of the CFP Basic Regulation provides that “[f]ishing opportunities shall be fixed in accordance with the objectives set out in Article 2(2) [...]”, i.e. it requires the Council to fix the TACs at a level that will ensure that fish stocks are restored and maintained above levels which can produce the MSY. To do so, by 2020 at the latest, the Council shall set TACs in line with, i.e. at or below, the MSY exploitation rate for all stocks. This provision therefore translates the general objective into a binding requirement to be respected by the Council when adopting the TAC regulations based on Article 43(3) of the TFEU.
126. In order to be able to comply with its obligations under Article 16(4) and 2(2) of the CFP Basic Regulation, the Council must accordingly conduct an assessment as to what constitutes the MSY exploitation rate for each stock, and whether fixing a TAC at this rate (or not) by 2020 at the latest will allow for all stocks to be restored or maintained at a level which can produce the MSY.

To achieve the objectives in Article 2(2), the Council must follow the best available scientific advice, which is the headline advice provided by ICES

127. In conducting this assessment, the Council shall be guided by the principles of the CFP, as set out in Article 3 of the CFP Basic Regulation. These include, *inter alia*, “the establishment of measures in accordance with the best available scientific advice”.¹⁰⁸ The setting of TACs constitutes one of the key “measures” in EU fisheries management to limit fishing mortality – a measure of the proportion of fish dying due to fishing rather than natural causes. Thus, in line with this provision and the CFP Basic Regulation Article 2(2) objective, the TACs for all stocks must be determined in accordance with the best available scientific advice to achieve MSY for all stocks.
128. As stated in paragraphs 110-114 above, in the context of the CFP, there is a consensus between the Council, the Member States, the European Parliament and the Commission, to recognise the advice produced by ICES as constituting the best available scientific advice for

¹⁰⁸ Article 3(c) of the CFP Basic Regulation. See also Article 6(2) of the CFP Basic Regulation.

the purposes of the CFP Basic Regulation.

129. This is of crucial relevance to determine the margin of discretion of the Council when adopting TACs, i.e. the Contested Act. As the CJEU has held, in a situation in which an EU institution makes a technical assessment (as in the context of the CFP), the EU institution is nonetheless obliged to “*establish whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it*”.¹⁰⁹
130. Where the Council follows ICES headline advice in setting TACs, it would appear in most cases, in light of the consensus as to the status of this advice as best available scientific advice, relatively easy to establish that the Council acted within the margin of its discretion. However, in a situation in which the Council sets the TAC for a specific stock at a level exceeding ICES headline advice, it would have to “*establish*” that it is nonetheless relying on other evidence that is “*factually accurate, reliable and consistent*”, contains “*all the information which must be taken into account*” and that this alternative evidence is “*capable of substantiating the conclusion*” that the TACs should be set at a level higher than advised by ICES and that this evidence will still allow the MSY objective to be reached for all stocks. Failure to do so amounts to a clear violation of Article 16(4) in conjunction with Article 2(2) of the CFP Basic Regulation.

ICES general methodology

131. To establish whether or not the Council has set the TACs in accordance with the ICES headline advice, and hence the best available scientific advice, the ICES general methodology needs to be quickly explained.
132. The ICES Advice Background 2021 (**Annex 11**) describes how ICES advice is developed. ICES conducts scientific stock assessments in order to provide advice on the maximum catches for each stock that should not be exceeded in order for the stocks to meet the MSY objective contained in Article 2(2) of the CFP Basic Regulation. It does this using two main approaches, depending on the available data for the stock concerned.
133. Where sufficient data are available, it **adopts an “MSY approach”**: it assesses the status of the particular stock, identifies the MSY exploitation rate, and provides catch advice on this basis, geared towards delivering the MSY objective. The headline advice for this stock therefore corresponds to the MSY exploitation rate which, according to Article 2(2) of the CFP Basic Regulation, has to be achieved by 2020 at the latest in order to ensure that all stocks are restored or maintained above levels capable of producing the MSY.
134. Where the data do not allow for an MSY approach, **ICES adopts the “precautionary approach”**. Indeed, “*a substantial number of the stocks for which ICES provides advice have no population estimates from which catch options can be derived using the MSY framework. ICES has therefore developed a precautionary framework for quantitative advice regarding such stocks. The overall aim of the approach for these stocks is to ensure that the*

¹⁰⁹ Judgement of 15 December 2016, *TestBioTech eV and Others v European Commission*, T-177/13, ECLI:EU:T:2016:736, para. 79.

advised catch is sustainable. The underlying principles of the approach are that (a) the best available information should be used and (b) a precautionary approach should be followed. [...] This framework [...] was simulation tested for a range of stocks and in general was found to be appropriate" (emphasis added).¹¹⁰ In the absence of a full MSY-based stock assessment with reliable data on the status of the stock and its exploitation (and in the absence of any other best available scientific advice for these stocks), the headline advice provided by ICES for stocks falling under this category is the best available scientific advice for the purpose of reaching the MSY objective of Article 2(2) of the CFP Basic Regulation. Following ICES headline advice here does not provide a 100% guarantee that the TACs for the corresponding stocks will be set at MSY exploitation rates, since the MSY is unknown here. But not following the ICES headline advice makes it implausible for the Council to restore and maintain those stocks above levels which can produce the MSY, since this advice is the closest the Council can actually get to a full MSY advice and ICES provides no other alternative.

135. These two approaches rely upon two broad assessment tools:
- Fishing Mortality ('F')
 - Spawning Stock Biomass ('SSB' or 'B')
136. F is the only factor that can be directly controlled by fisheries management, notably through the setting of TACs. ICES assesses the exploitation level (F) as well as the status of the biomass (B) as the basis for specific advice as to what catch level should not be exceeded in order to ensure a sustainable exploitation in line with the MSY and/or precautionary approaches.
137. When preparing its advice, ICES identifies thresholds for both the fishing mortality F and the biomass B, outside of which the stock is at a high risk of impaired reproduction or even at risk of collapse, i.e. far outside "*safe biological limits*". If F is above or at the limit reference point for F (F_{lim}), it means that fishing pressure is such that the stock cannot be maintained at safe biological levels, but will decline to or below the limit reference point for B (B_{lim}). If B is below or at the B_{lim} threshold, it equally means that there are not enough adult fish available to reproduce at a rate sufficient to maintain the stock at safe biological levels. Both thresholds should therefore be avoided (i.e. F must be kept well below F_{lim} and B kept well above B_{lim}), since they are associated with unknown population dynamics and a higher risk of stock collapse. An additional set of biological reference points, " F_{pa} " and " B_{pa} ", marks the aforementioned "*safe biological limits*". A stock is only within safe biological limits, i.e. the risk of the true F actually being above F_{lim} or of the true B actually being below B_{lim} is less than 5%, if the fishing mortality F is below or at F_{pa} and the biomass B is at or above B_{pa} . The diagram presented in Figure 1 of Annex 12 further illustrates the various biological reference points.
138. In order to calculate the recommended catch that should not be exceeded for a given year, ICES assesses the fishing mortality and biomass levels against the relevant MSY reference points: F_{MSY} (i.e. the fishing mortality consistent with delivering the MSY) and B_{MSY} (the biomass of a particular stock which can deliver the MSY), or relevant proxies where F_{MSY} or B_{MSY} are not yet available.

¹¹⁰ Annex 11, p. 7-9.

139. Indeed, B_{MSY} is unknown for most stocks as fishing pressure needs to have been at or below F_{MSY} for a long time in order to reliably establish this reference point, which is not the case for the vast majority of stocks. In addition, B_{MSY} is, in any event and irrespective of fishing pressure, subject to natural fluctuations over time. This issue is partly addressed by the adoption of the reference point $MSY B_{trigger}$, which is used as a proxy in the absence of B_{MSY} . This reference point marks the lower boundary of the fluctuation around B_{MSY} , and if the biomass of a stock falls below it, this will trigger ICES to adopt more cautious catch advice in order to rebuild the stock above levels capable of producing MSY. This means that whenever a stock falls below $MSY B_{trigger}$, the catch advice issued by ICES will be based on a lower fishing mortality than F_{MSY} in order to allow the stock to recover.
140. In order to reach the MSY objective enshrined in Article 2(2) of the CFP Basic Regulation, the fishing mortality shall not exceed F_{MSY} (i.e. must be at or below F_{MSY}) by 2020 at the latest, and the biomass of the stock shall be maintained or restored above B_{MSY} . This is consistent with the explanation given by ICES that the “[s]urplus production of a stock is the catch that can be harvested without changing the average production in the long term. For a given fishing pattern there is a level of fishing mortality that, in the long term, will generate the highest surplus production. This peak of surplus production [...] is the MSY and the fishing mortality generating this peak is F_{MSY} ”.¹¹¹
141. The word “*above*” is fundamental, since this entails setting exploitation levels **below** F_{MSY} , the fishing mortality rate that should lead to the biomass that enables a stock to deliver the maximum sustainable yield (B_{MSY}), including when ranges of exploitation (F_{MSY} ranges as provided for in multiannual plans) are used. As such, consistently fishing at F_{MSY} (or above the F_{MSY} point value, where F_{MSY} ranges are used) will not fulfil the MSY objective in Article 2(2); F_{MSY} is a limit, not a target exploitation rate. This is reflected in ICES’ approach of basing its advice on an exploitation rate **below** F_{MSY} when the biomass falls below $MSY B_{trigger}$.
142. It is important to note that while the ICES advice document for a particular stock often provides a table with additional so-called “*catch scenarios*” or “*catch options*”, the official “*headline*” advice is always found at the start of the document.
143. Moreover, ICES occasionally issues responses to “*special requests*” from its clients, such as the EU. These responses give further catch scenarios not covered in the official stock-specific advice on fishing opportunities. They mostly provide estimates of likely catch levels of certain stocks, depending on the level at which TACs are set for other stocks caught in the same fisheries. They do not constitute the best available scientific advice for the purpose of reaching the objectives of Article 2(2) or 2(3) of the CFP Basic Regulation.
144. In light of all the foregoing, the best available scientific advice to reach the MSY objective of Article 2(2) of the CFP Basic Regulation is the one that follows the ICES MSY approach (where available) or the ICES precautionary approach (where data are more limited) – it is found in the ICES’ headline advice. It **represents the maximum catch level not to be exceeded**,¹¹² rather than a recommendation that the TAC should be set at that level exactly. Setting TACs

¹¹¹ Annex 11, p. 4.

¹¹² The ‘headline’ advice usually contains the wording “*catches in 2022 should be no more than*” or “*there should be*”.

in line with the best available scientific advice means setting them at or below the level recommended in the ICES headline advice.

The Council's assessment that the Contested TACs comply with the best available scientific advice is implausible and therefore vitiated by a manifest error of assessment, resulting in a violation of Articles 2(2) and 16(4) of the CFP Basic Regulation

145. As shown in Table 3 inserted above, the Council has set 12 EU/UK shared TACs above the level that ICES advised in its headline advice should not be exceeded (several specific and detailed stock profiles are also included in **Annex 13**).
146. ClientEarth notes that the Court has established that even where an EU institution is called upon to make a complex assessment, it has a duty to carefully and impartially verify all the relevant facts and a duty to act diligently which is "*inherent in the principle of sound administration*".¹¹³ The Court has also established that this duty implies that scientific risk assessments must be "*carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence*" (emphasis added) and that this "*is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures [...]*".¹¹⁴ This standard is clearly not met by the Contested Act, given that there is no publicly available evidence that the Council based itself on any other scientific evidence than ICES advice. There is not even an indication that the Council called into question that ICES advice constitutes the best available scientific advice or questioned that it was obliged to base the TACs on the ICES advice.
147. It is therefore evident that the Council did not rely on evidence that is factually accurate, reliable and consistent, containing all the information that must be taken into account in order to assess a complex situation, and which is capable of substantiating the conclusions drawn from it, in the sense of the case law.¹¹⁵
148. ClientEarth submits therefore that the Council could not conclude that the Contested TACs will restore or maintain populations of harvested species above levels that can produce the MSY, in light of the best available science.
149. More specifically, for stocks for which ICES produces its headline advice based on its MSY approach, it was implausible for the Council to conclude that setting the TACs above the best available MSY-based scientific advice after the legally binding deadline of 2020 to set exploitation rates at or below levels capable of producing the MSY would comply with the MSY objective in Article 2(2) of the CFP Basic Regulation. For stocks for which ICES produces advice based on its precautionary approach, it was implausible for the Council to conclude that setting TACs above the catch levels advised by ICES in its headline advice would comply with the MSY objective in Article 2(2) of the CFP Basic Regulation. Indeed, the Council has never provided a plausible assessment explaining how setting TACs above catch levels

¹¹³ Judgement of 22 November 2017, *Commission v Bilbaina de Alquitranes SA et a.*, C-691/15P, ECLI:EU:C:2017:882, para. 35.

¹¹⁴ Among others, Judgement of 16 September 2013, *Animal Trading Company (ATC) BV and Others v European Commission*, T-333/10, ECLI:EU:T:2013:451, paras 84-85.

¹¹⁵ Judgement of 15 December 2016, *TestBioTech*, Case T-177/13, *Ibid.*, para. 79.

advised by ICES would ensure that the MSY objective is reached by 2020 for stocks subject to precautionary advice. ClientEarth submits that the Council has therefore committed a manifest error of assessment and exceeded the bounds of its discretion, thus violating Article 16(4) in conjunction with Article 2(2) of the CFP Basic Regulation, which requires the Council to set TACs for all stocks at levels capable of producing the MSY exploitation rate by 2020 at the latest and to restore and maintain populations of fish stocks above levels which can produce the MSY.

2nd limb: TACs not set in line with the obligation in Article 2(2) of the CFP Basic Regulation to apply a precautionary approach to fisheries management

150. For a subset of the stocks covered by the previous section, available data are more limited. For those stocks, ICES followed its precautionary approach to deliver its headline advice. For 8 of these, the Council has set the TACs above ICES headline advice. These TACs are set out in Table 4 below and several specific and detailed stock profiles are included in **Annex 13**. This section gives some further explanation as to why setting these specific 8 TACs at this level amounts to an infringement of the Treaties and rules relating to their application.

Table 4: List of 2022 EU/UK shared TACs in the Contested Act exceeding precautionary advice provided by ICES.¹¹⁶

Common species name	TAC code(s)	Advice code(s)	MAP Article	Stock / exploitation status	ICES advice basis	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Cod	COD/5W6-14	cod.27.6b	WW 1.4	Unknown	PA	14	74 (by-catch)	60 (429%)	The by-catch TAC represents a rollover of the 2021 TAC. No other scenarios are presented in the ICES advice.
Cod	COD/07A.	cod.27.7a	WW 1.1.6	Unknown	PA	74	206 (by-catch)	132 (178%)	The by-catch TAC represents a rollover of the 2021 TAC and equals the catch estimated for 2020. No other catch scenarios are provided in the ICES advice.
Pollack	POL/56-14 POL/07.	pol.27.67	WW 1.1.29	Unknown	PA	3360	8168 (156 + 8012)	4808 (143%)	The sum of both TACs represents a 15% cut compared to the 2021 TACs. No other scenarios are presented in the ICES advice.
Undulate ray	RJU/9-C.	rju.27.9a	WW 1.4 ¹¹⁷	Unknown	PA	31	100	69 (223%)	The final by-catch TAC (a sub-TAC within the SRX/89-C TAC for skates and rays) represents a 100% increase compared to the 2021 TAC. ¹¹⁸ No other catch scenarios are presented in the ICES advice.
Northern prawn	PRA/2AC4-C	pra.27.4a	-	Unknown	PA	0 (no target fisheries or landings)	990 (by-catch)	990 (non-0 TAC)	The by-catch TAC represents a 50% increase compared to the 2021 TAC and is far above the recent estimated landings (219 t for 2020). No other scenarios are presented in the ICES advice.
Herring	HER/5B6ANB HER/6AS7BC	her.27.6a7bc	-	Unknown	PA	0	4840 (3480 + 1360)	4840 (non-0 TAC)	The final TAC represents a rollover of the 2021 TAC and corresponds to a scenario ICES presented in 2016 for a scientific monitoring fishery, at the request of the European Commission.

¹¹⁶ For explanations of the headers and abbreviations used in this table, see footnotes 64, 65, 66 & 67 on [Table 1](#): List of 2022 by-catch TACs included in the Contested Act for stocks with zero catch or landings advice.

¹¹⁷ Undulate ray, or skates and rays in general, are not explicitly covered by Article 1 of the Western Waters Regulation, but any by-catches in fisheries for the stocks listed in Article 1 fall under Article 1(4).

¹¹⁸ The Union share within this TAC is 50 t, whereas the UK share is 0 t. The reason for this discrepancy between the total TAC (100 t) and the sum of the EU and UK shares (50 t) is not specified, but may be related to deductions accounting for exemptions. Nevertheless, even the EU share on its own still exceeds the advice by 61%.

Articles 16(4) and 2(2) of the CFP Basic Regulation require the Council to follow the precautionary approach to fisheries management when setting TAC limits

151. For these TACs for which less scientific data are available, Article 2(2) of the CFP Basic Regulation requires the precautionary approach to fisheries management to be applied. Article 4(1)(8) of the same Regulation – which defines the precautionary approach – refers to Article 6 of the UN Fish Stocks Agreement,¹¹⁹ which provides further guidance on how to implement the precautionary approach. Finally, Article 3(1) of the Western Waters Regulation defines the precautionary approach to fisheries management as an objective to follow when less scientific data on fish stocks are available.
152. More specifically, in order to implement the precautionary approach, Article 6 of the UN Fish Stocks Agreement – to which the EU is a Contracting Party – includes several requirements to, *inter alia*:
- “*be more cautious when information is uncertain, unreliable or inadequate*”;
 - set “*reference points*” (against which the state of stocks and their exploitation level can be assessed) based on the best available scientific information, and actions to be taken if those reference points are transgressed;
 - take into account a wide range of uncertainties; and
 - “*take measures to ensure that, when reference points are approached, they will not be exceeded*” and, if they are exceeded, act “*without delay*” to restore the stocks.
153. This requirement is transposed in Article 4(1)(8) of the CFP Basic Regulation, which states that the “*precautionary approach to fisheries management, as referred to in Article 6 of the UN Fish Stocks Agreement, means 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*”. This concretely means that uncertainty or a lack of knowledge or data cannot justify delaying or failing to take action to conserve fish stocks and the ecosystems they depend on.
154. Article 2(2) of the CFP Basic Regulation states that the “*CFP shall apply the precautionary approach to fisheries management*” and Article 16(4) requires that “[f]ishing opportunities shall be fixed in accordance with the objectives set out in Article 2(2)”. Accordingly, the Council is obliged to fix TACs in accordance with the precautionary approach to fisheries management.
155. More generally, the CFP Basic Regulation also establishes a **direct link between the precautionary approach and the precautionary principle, a keystone principle of environmental law**, enshrined in Article 191(2) of the TFEU. The CFP Basic Regulation provides that “*sustainable exploitation of marine biological resources should be based on the precautionary approach, which derives from the precautionary principle referred to in the first subparagraph of Article 191(2) of the Treaty, taking into account available scientific data*”.¹²⁰

¹¹⁹ The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995.

¹²⁰ Recital 10 of the CFP Basic Regulation.

156. As the CJEU has explained: “*The precautionary principle requires the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests*”.¹²¹
157. Therefore, also in this case, ICES headline advice has to be followed by the Council in order to apply the precautionary approach to fisheries management.
158. The Court has also addressed the application of the precautionary approach to fisheries management in the specific context of TAC-setting, reinforcing in Case C-128/15 the binding nature of the precautionary approach of Article 2(2) of the CFP Basic Regulation.
159. The Court recalled that “*it is apparent from Article 2(2) of the CFP Regulation that ‘the precautionary approach’ is to be applied in fisheries management*”.¹²² It then recalled the definition of the precautionary approach, stating that it “*implies that 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*”.¹²³
160. In light of the foregoing, it is clear that the Council was under an obligation to follow a precautionary approach to fisheries management when adopting the Contested Regulation.

To implement the precautionary approach as required by Article 2(2) of the CFP Basic Regulation, the Council must follow the best available scientific advice, which is the precautionary advice provided by ICES

161. As required by Articles 2 and 3 of the CFP Basic Regulation, when there is uncertainty or limited knowledge and data as to the status of a certain stock, the overall approach followed by ICES for these stocks is “*to ensure that the advised catch is sustainable*”.¹²⁴ The underlying principles of ICES’ approach – in line with the objectives of the CFP – are the following:
- the best available information should be used; and
 - a precautionary approach should be followed.¹²⁵
162. ICES then further explains its precautionary approach, which implies that “*as information becomes increasingly limited, more conservative reference points should be used, and a further margin of precaution should be adopted when there is limited knowledge of the stock status*”.¹²⁶
163. The resulting ICES headline advice provided for data-limited stocks represents the “*best available scientific advice*” for those stocks in line with the CFP’s precautionary approach.

¹²¹ Judgement of 12 April 2013, *Du Pont de Nemours et a. v. European Commission*, T-31/07, ECLI:EU:T:2013:167, para. 134 and case law cited.

¹²² *Ibid.*, para. 47.

¹²³ *Ibid.*, para. 48.

¹²⁴ Annex 11, p. 7.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

164. As explained in paragraphs 110-114 above, there is no debate in the Council as to whether ICES advice is the best available scientific evidence. There is also no such debate for the ICES precautionary advice.

The Council's assessment that setting the TACs at this level would comply with the precautionary approach to fisheries management is implausible and therefore vitiated by a manifest error of assessment, resulting in a violation of Articles 2(2) and 16(4) of the CFP Basic Regulation

165. It has been established above that:

- the precautionary approach is mandatory when fixing fishing opportunities; and
- in the absence of any other scientific assessment, the ICES precautionary approach headline advice constitutes the best available scientific advice.

166. Nevertheless, in the Contested Act, the Council chose to depart from the ICES headline advice and fixed certain TACs at a level exceeding the catch levels ICES recommended not to exceed for the corresponding stocks, without any justification that this approach would comply with the precautionary approach. The Council also did not provide any evidence that would suggest that it did in fact rely on any other scientific advice but the one provided by ICES. This does not meet the standard of evidence required by the case law, as set out under paragraphs 146-147 above.

167. Thus, rather than implementing the precautionary approach by setting TACs at or below the precautionary scientific advice provided by ICES in the absence of a full MSY-based stock assessment, it has set 8 TACs above this advice. The Council did so despite alleging in the Contested Act that it set the TACs having regard to the ICES advice; and there is no publicly available indication that the Council would have, in fact, relied on another scientific advice. This is the opposite of the precautionary approach that requires more, not less, caution when information is limited. This decision amounts to a manifest error. In doing so, the Council is acting like a driver with a broken speedometer who does not know the speed limit, but who, instead of slowing down, decides to drive even faster.

168. ClientEarth submits that the Council could not conclude that the Contested TACs covered by this section will achieve the objective of implementing the precautionary approach to fisheries management. The Council's assessment on this point is therefore implausible in the sense of the Court's case law. ClientEarth submits that the Council has therefore committed a manifest error of assessment and exceeded the bounds of its discretion, thus violating Article 16(4) in conjunction with Article 2(2) of the CFP Basic Regulation, which requires the Council to apply a precautionary approach to fisheries management.

3rd limb: TACs not set in line with the obligation in Article 2(3) of the CFP Basic Regulation to implement an ecosystem-based approach to fisheries management

169. The Council failed to adopt an ecosystem-based approach when fixing 8 TACs in the Contested Act at levels that are projected to result in overshooting the relevant single-stock advice for one or more of the stocks identified in Table 3, and in most cases also the TACs set for those stocks, and therefore violated Article 2(3) of the CFP Basic Regulation. These TACs are shown in Table 5 below and further explanations are provided in **Annex 13**. For the sake of clarity, these TACs are not included in the first ground related to lack of competence. Therefore, the second ground as it relates to the stocks in Table 5 below is in addition to, and not alternative to, the first ground.

Table 5: List of 2022 TACs in the Contested Act set at levels projected to result in catches of at least one of the stocks in [Table 3](#) that exceed the single-stock advice and/or the agreed TACs for those stocks, contrary to the ecosystem-based approach to fisheries management.

Common species name	TAC code(s)	Advice code(s) ¹²⁷	MAP Article ¹²⁸	ICES advice in t	Agreed TAC in t	Other TACs affected and potential overshoot ¹²⁹	Comments on the level of the 2022 TACs
Haddock	HAD/7X7A34	had.27.7b-k	WW 1.1.16	15946	15000	COD/7XAD34 (between 677 and 854 t overshoot of the TAC, and between 1321 and 1498 t overshoot of the cod advice)	Celtic Sea cod is caught alongside a number of other species like haddock, whiting, anglerfish, megrim, sole and hake. The haddock TAC was set at 15000 t (constituting a rollover from 2021), which is below the F_{MSY} point value advice for that stock (15946 t), but far above the $F_{MSY\ lower}$ scenario (10570 t). ¹³⁰ This TAC is projected to result in a by-catch of cod between 1498 t (for the haddock F_{MSY} scenario) and 1321 t (for the haddock midway between F_{MSY} and $F_{MSY\ lower}$ scenario), ¹³¹ which is more than twice the agreed TAC for cod. Even if the final haddock TAC had been set at $F_{MSY\ lower}$, this would still have resulted in cod catches of 1109 t, ¹³² i.e. still far above the agreed 644 t. In turn, based on the "min" scenario in the mixed fisheries considerations presented by ICES, 0 t of haddock can be caught if the headline advice for cod of 0 t is not to be exceeded. ¹³³ Moreover, the slightly less restrictive "cod $F_{AF,MSY}$ " scenario, based on keeping cod catches in line with the reduced F_{MSY} for that stock (recognising its low stock size), would allow for 1040 t of haddock to be caught. ¹³⁴
Megrim and four-spot megrim	LEZ/07, LEZ/8ABDE	meg.27.7b-k8abd, ldb.27.7b-8abd	WW 1.1.10	23831 (22964 + 867)	20786 (18916 + 1870)	COD/7XAD34 (between 899 and 902 t overshoot of the TAC, and between 1536 and 1543 t overshoot of the cod advice)	Celtic Sea cod is caught alongside a number of other species like haddock, whiting, anglerfish, megrim, sole and hake. The sum of the final TACs for megrim and four-spot megrim was set below the sum of the headline advice for both stocks, ¹³⁵ but the agreed level is somewhere between the "had.2.7b-k" and "sq_E" scenarios presented in the mixed fisheries considerations, ¹³⁶ which are projected to result in cod catches of 1543 t and 1536 t, respectively. In turn, based on the "min" scenario, 5446 t of megrim can be

¹²⁷ These are the stock codes used in the relevant ICES advice to identify the different stocks. A list of all ICES advice documents, retrieved from <https://www.ices.dk/advice/Pages/Latest-Advice.aspx>, is contained in **Annex 9**.

¹²⁸ This column indicates which Article in the Western Waters (WW) multiannual plan (MAP) the stock falls under.

¹²⁹ This column highlights TACs for stocks covered in [Table 3](#) that are caught alongside other stocks covered by TACs listed in column 2 of this table. It specifies the amount by which those TACs from [Table 3](#) (or the single-stock advice for the corresponding stocks) would be overshoot, if the TAC specified in the column "Agreed TAC in t" is fully exhausted. The overshoot figures are based on a calculation of the difference between the projected catches of the stocks listed in this column and the agreed TACs for these stocks, as well as the single-stock advice for these stocks. A range of values is provided where the agreed TAC specified in the second column of this table does not correspond to one specific catch scenario, but is between two such scenarios. The scenarios are found in the respective ICES mixed fisheries considerations or ICES Technical Service documents, as referenced in footnotes within the column called "Comments on the level of the 2022 TACs" which provides further detail and context.

¹³⁰ ICES stock code "had.27.7bk", ICES (2021): Haddock (*Melanogrammus aeglefinus*) in divisions 7.b-k (southern Celtic Seas and English Channel). ICES Advice: Recurrent Advice. Report.

<https://doi.org/10.17895/ices.advice.7764>, Table 3, p. 2, rows "MSY approach: F_{MSY} " and " $F = MAP^{1.1} F_{MSY\ lower}$ ".

¹³¹ ICES (2021): EU standing request on catch scenarios for zero-TAC stocks; cod (*Gadus morhua*) in divisions 7.e-k (Celtic Sea). ICES Advice: Special Requests. Report. <https://doi.org/10.17895/ices.advice.9151>.

Table 2, p. 3, scenarios "Haddock F_{MSY} " and "Haddock $F_{MSY\ lower} - F_{MSY}$ ", row 1.

¹³² *Ibid.*, Table 2, p. 3, "Haddock $F_{MSY\ lower}$ " scenario, row 1.

¹³³ ICES (2021): Celtic Sea - mixed fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9184>; Table 3, p. 4, column "min". This scenario is based on fishing stopping as soon as "the catch for any one of the stocks meets the fleet's stock share" (see Table 1, p. 2).

¹³⁴ *Ibid.*, Table 3, p. 4, column "cod_ $F_{AF,MSY}$ ". This scenario is based on total cod catches across all fleets not exceeding the reduced F_{MSY} for the stock (i.e. $F = 0.068 = F_{MSY} \times SSB_{2022} / MSY_{B_{trigger}}$), corresponding to an overall cod catch of 132 t, which of course exceeds the headline advice of 0 t.

¹³⁵ The TACs LEZ/07, and LEZ/8ABDE, correspond to two megrim stocks (megrim and four-spot megrim) with ICES stock codes meg.27.7b-k8abd and ldb.27.7b-8abd. The sum of the advice for the two stocks is 22964 + 867 = 23831 t (and the corresponding final TACs were set at 20786 t (18916 t + 1870 t). ICES advice for megrim (ICES stock code "meg.27.7b-k8abd"), ICES (2021): Megrim (*Lepidorhombus whiffiagonis*) in divisions 7.b-k, 8.a-b, and 8.d (west and southwest of Ireland, Bay of Biscay). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7790>. ICES advice for four-spot megrim (ICES stock code "ldb.27.7k8abd"): ICES (2021): Four-spot megrim (*Lepidorhombus boschii*) in divisions 7.b-k, 8.a-b, and 8.d (west and southwest of Ireland, Bay of Biscay). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7780>.

¹³⁶ ICES (2021): Celtic Sea - mixed fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9184>; Table 3, p. 4, column "had.27.7b-k" and "sq_E", row for "cod.27.7e-k". Table 1 on p. 2 explains the different scenarios. The "had.27.7b-k" scenario is based on all fleets setting their effort corresponding to that require to catch their share of haddock, regardless of other catches. The "sq_E" scenario refers to the "status quo effort" (corresponding to the same average effort for 2018-2020).

Common species name	TAC code(s)	Advice code(s) ¹²⁷	MAP Article ¹²⁸	ICES advice in t	Agreed TAC in t	Other TACs affected and potential overshoot ¹²⁹	Comments on the level of the 2022 TACs
							caught if the headline advice for cod of 0 t is not to be exceeded. ¹³⁷ Moreover, the slightly less restrictive "cod F _{AR} MSY" scenario, based on keeping cod catches in line with the reduced F _{MSY} for that stock (recognising its low stock size), would allow for 6882 t of megrim to be caught. ¹³⁸ Four-spot megrim is not included in these scenarios.
White and black-bellied anglerfish	ANF/07. ANF/8ABDE.	mon.27.78abd, ank.27.78abd	WW 1.1.12	52936 (34275 + 18661)	52205 (41173 + 11032)	COD/7XAD34 (close to 899 t overshoot of the TAC, and 1536 t overshoot of the cod advice)	Celtic Sea cod is caught alongside a number of other species like haddock, whiting, anglerfish, megrim, sole and hake. The sum of the final TACs for white and black-bellied anglerfish was set below the sum of the headline advice for both stocks. ¹³⁹ but the nearest scenario (sq_E) in the mixed fisheries considerations is projected to result in cod catches of 1536 t. ¹⁴⁰ In turn, based on the "min" scenario, 2905 t of white anglerfish can be caught if the headline advice for cod of 0 t is not to be exceeded. ¹⁴¹ Moreover, the slightly less restrictive "cod F _{AR} MSY" scenario, based on keeping cod catches in line with the reduced F _{MSY} for that stock (recognising its low stock size), would allow for 4812 t of white anglerfish to be caught. ¹⁴² Black-bellied anglerfish is not included in these scenarios.
Common sole	SOL/7FG.	sol.27.7fg	WW 1.1.33	1337	1337	COD/7XAD34 (close to 899 t overshoot of the TAC, and 1536 t overshoot of the cod advice)	Celtic Sea cod is caught alongside a number of other species like haddock, whiting, anglerfish, megrim, sole and hake. The final TAC for common sole was set in line with the headline advice for this stock, but the nearest scenario (sq_E) in the mixed fisheries considerations is projected to result in cod catches of 1536 t. ¹⁴³ In turn, based on the "min" scenario, 0 t of common sole can be caught if the headline advice for cod of 0 t is not to be exceeded. ¹⁴⁴ Moreover, the slightly less restrictive "cod F _{AR} MSY" scenario, based on keeping cod catches in line with the reduced F _{MSY} for that stock (recognising its low stock size), would allow for 71 t of common sole to be caught. ¹⁴⁵
White and black-bellied anglerfish	ANF/07. + ANF/ABDE.	mon.27.78abd, ank.27.78abd	WW 1.1.12	52936 (34275 + 18661)	52205 (41173 + 11032)	COD/07A. (cannot quantify potential overshoot, but by-catch likely to increase, given increase in anglerfish TAC)	Mixed fisheries scenarios like those produced by ICES for the Celtic Sea are not available for the Irish Sea. However, according to the ICES fisheries overview for the Celtic Sea, which includes the Irish Sea, cod is caught in a range of fisheries alongside other species like haddock, Norway lobster, monkfish (another name for anglerfish), plaice and sole. The TACs for anglerfish were set at a sum of 52205 t, slightly below the sum of the ICES headline catch advice of both anglerfish stocks, representing an 8% increase compared to the 2021 TACs. The most recent catch of Irish Sea cod was 206 t for 2020, which is 178% above the current ICES headline catch advice of 74 t. Bringing the actual catches in 2022 in line with this advice would require a 64% decrease in catches compared to the 2020 catch. Clearly, the level at which the Council set the anglerfish TACs is not going to deliver

¹³⁷ *Ibid.*; Table 3, p. 4, column "min".

¹³⁸ *Ibid.*, Table 3, p. 4, column "cod_F_{AR}MSY".

¹³⁹ The TACs ANF/07. and ANF/8ABDE. correspond to two anglerfish stocks (white and black-bellied anglerfish) with ICES stock codes mon.27.78abd and ank.27.78abd. The sum of the advice for the two stocks is 34275 + 18661 = 52936 t and the corresponding TACs were set at 52205 t (41173 + 11032). ICES advice for white anglerfish (ICES stock code "mon.27.78abd"), ICES (2021): White anglerfish (*Lophius piscatorius*) in Subarea 7 and divisions 8.a–b and 8.d (Celtic Seas, Bay of Biscay). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7792>. ICES advice for black-bellied anglerfish (ICES stock code "ank.27.78abd"), ICES (2021): Black-bellied anglerfish (*Lophius budegassa*) in Subarea 7 and divisions 8.a–b and 8.d (Celtic Seas, Bay of Biscay). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7724>

¹⁴⁰ ICES (2021): Celtic Sea - mixed fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9184>; Table 3, p. 4, column and "sq_E", row for "cod.27.7e-k". Only white anglerfish is included in the mixed fisheries considerations (not black-bellied anglerfish), and since the sum of both TACs was set slightly below the sum of the advice for both stocks, the nearest scenario is the one closest to (but below) the white anglerfish advice (row "mon.27.78abd"), namely the "sq_E" scenario of 31701 t (compared to white anglerfish advice of 34275 t).

¹⁴¹ *Ibid.*, Table 3, p. 4, column "min".

¹⁴² *Ibid.*, Table 3, p. 4, column "cod_F_{AR}MSY".

¹⁴³ *Ibid.*, Table 3, p. 4, column and "sq_E", row for "cod.27.7e-k", corresponding to the scenario closest to the headline advice (1337 t) for common sole (row "sol.27.7fg").

¹⁴⁴ *Ibid.*, Table 3, p. 4, column "min".

¹⁴⁵ *Ibid.*, Table 3, p. 4, column "cod_F_{AR}MSY".

Common species name	TAC code(s)	Advice code(s) ¹²⁷	MAP Article ¹²⁸	ICES advice in t	Agreed TAC in t	Other TACs affected and potential overshoot ¹²⁹	Comments on the level of the 2022 TACs
Norway lobster	NEP/07.	nep.fu.19, nep.fu.22, nep.fu.2021, nep.27.7outFU, nep.fu.14, nep.fu.15, nep.fu.16, nep.fu.17 ¹⁴⁶	WW 1.1.23	17038 (286 + 1083 + 1703 + 785 + 9924 + 2804 + 303) (for landings)	17038	WHG/07A. (up to 236 t overshoot of the TAC, and 957 t overshoot of the advice, assuming recent average catches of Norway lobster)	this decrease, unless the catch composition, and specifically the by-catch level of cod, changes substantially. Mixed fisheries scenarios like those produced by ICES for the Celtic Sea are not available for the Irish Sea. However, the majority of whiting caught are fish below minimum conservation reference size in the fishery for Norway lobster. ¹⁴⁷ The TAC for Norway lobster in area 7 (which includes the Irish Sea) was set in line with the projected landings corresponding to the sum of the headline catch advice. ¹⁴⁸ However, a continuation of this fishery at or near previous levels is likely to continue to result in substantial whiting discards, unless the catch composition changes substantially. For example, the "Catch = Bycatch estimate" scenario presented in the ICES Technical Service ¹⁴⁹ projects a whiting by-catch of 957 t, assuming a catch of Norway lobster in 2022 corresponding to the average catch of 2018-2020 in the area.
Norway lobster	NEP/5BC6.	nep.fu.11, nep.fu.12, nep.fu.13, nep.27.6outFU	WW 1.1.22	11862 (for landings) ¹⁵⁰	11862	COD/5BE6A. (no overshoot of the TAC, but likely continued overshoot of the cod advice)	West of Scotland cod is primarily caught using demersal finfish trawls (alongside for example haddock, saithe and anglerfish) and in the Norway lobster fishery. The latter accounts for a substantial part of cod discards, namely 45% of 204 t, i.e. 92.7 t, for 2019, ¹⁵¹ and 32% of 310 t, i.e. 99.2 t, for 2020. ¹⁵² The Norway lobster TAC was set in line with the sum of the projected landings (11862 t) corresponding to the headline advice for the three functional units and Norway lobster outside functional units in the area. Mixed fisheries considerations are not available for these stocks. However, these discard levels suggest that if the 2022 TAC for Norway lobster is fully exhausted, a considerable amount of cod, in any case exceeding the zero-catch advice, could be expected to be discarded in 2022, ¹⁵³ unless the catch composition or selectivity changes.

¹⁴⁶ The two functional units covering the Irish Sea are FU14 (East) and FU15 (West).

¹⁴⁷ ICES (2021): Whiting (*Merlangius merlangus*) in Division 7.a (Irish Sea). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7887>. P. 3.

¹⁴⁸ The sum of the projected landings corresponding to the headline ICES advice for all functional units of Norway lobster in area 7 (FUs 14-17, 19-22) and outside of functional units is 17038 t (286 + 1083 + 1703 + 150 + 785 + 9924 + 2804 + 303), which is the level at which the TAC was set.

¹⁴⁹ ICES (2021): 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 Advice: Special Requests. Report. <https://doi.org/10.17895/ices.advice.8218>. Table 6, p. 4. "Catch = Bycatch estimate" scenario.

¹⁵⁰ The TAC for Norway lobster in this area (NEP/5BC6.) comprises 3 functional units (FUs 11, 12 and 13) as well as catches outside of functional units. The projected landings corresponding to the headline advice for 2022 are 3752 t (FU 11, or nep.fu.11), 3890 t (FU12, or nep.fu.12), 4011 t (FU 13, or nep.fu.13, including 3416 t for the Firth of Clyde component, and 595 t for the Sound of Jura component), and 209 t (outside FUs, or nep.27.6outFU), i.e. 11862 t in total. ICES stock code "nep.fu.11", ICES (2021): Norway lobster (*Nephrops norvegicus*) in Division 6.a – FU 11 (West of Scotland, North Minch). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7794>. ICES stock code "nep.fu.12", ICES (2021): Norway lobster (*Nephrops norvegicus*) in Division 6.a, Functional Unit 12 (West of Scotland, South Minch). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7795>. ICES stock code "nep.fu.13", ICES (2021): Norway lobster (*Nephrops norvegicus*) in Division 6.a, Functional Unit 13 (West of Scotland, the Firth of Clyde, and the Sound of Jura). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7796>. ICES stock code "nep.27.6outFU", ICES (2020): Norway lobster (*Nephrops norvegicus*) in Division 6.a, outside the functional units (West of Scotland). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7559>.

¹⁵¹ ICES stock code "cod.27.6a". ICES (2020): Cod (*Gadus morhua*) in Division 6.a (West of Scotland). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.6106>. Table 1, p. 2, specifies that 32% of the 310 t of discards in 2020 were derived from the "Nephrops fleet", i.e. the fishery for Norway lobster.

¹⁵² ICES (2021): 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 Advice: Special Requests. Report. <https://doi.org/10.17895/ices.advice.8218>. Table 8, p. 6, specifies that 45% of the 204 t of discards in 2019 were derived from the "Nephrops fleet", i.e. the fishery for Norway lobster.

¹⁵³ For example, the sum of Norway lobster landings recorded for 2019 (where 92.7 t of cod were discarded in this fishery) was 9055 t, which is below the agreed 2022 TAC for Norway lobster of 11862 t. This suggests that a similar or higher amount of cod could be expected to be discarded in 2022, unless discard rates change. Source of the 2019 discard levels: ICES stock code "nep.fu.11", ICES (2021): Norway lobster (*Nephrops norvegicus*) in Division 6.a – FU 11 (West of Scotland, North Minch). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7794>; 1979 t (Table 6, p. 5). ICES stock code "nep.fu.12", ICES (2021): Norway lobster (*Nephrops norvegicus*) in Division 6.a, Functional Unit 12 (West of Scotland, South Minch). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7795>; 2220 t (Table 6, p. 5); ICES stock code "nep.fu.13", ICES (2021): Norway lobster (*Nephrops norvegicus*) in Division 6.a, Functional Unit 13 (West of Scotland, the Firth of Clyde, and the Sound of Jura). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7796>; 4683 t (Table 8, p. 8); ICES stock code "nep.27.6outFU", ICES (2020): Norway lobster (*Nephrops norvegicus*) in Division 6.a, outside the functional units (West of Scotland). ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.7559>; 173 t (Table 3, p. 2).

The Council was under a legally binding obligation to implement the ecosystem-based approach to fisheries management

170. In accordance with Article 2(3) of the CFP Basic Regulation, the “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” (emphasis added).
171. The Western Waters Regulation confirms the mandatory application of the ecosystem-based approach. Its Recital 4 states that “[t]he objectives of the CFP are, *inter alia*, to ensure that fishing and aquaculture are environmentally sustainable in the long term, to apply the precautionary approach to fisheries management and to **implement the ecosystem-based approach to fisheries management**” and its Article 3 provides 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” (emphasis added).

To implement the ecosystem-based approach, as required by Article 2(3) of the CFP Basic Regulation, the Council must set TACs in mixed fisheries at levels that do not allow the best available scientific advice for other stocks by-caught in these fisheries to being overshot

172. The ecosystem-based approach to fisheries management is defined in Article 4(1)(9) of the CFP Basic Regulation 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”. Fisheries management under the CFP therefore has to follow an ecosystem-based approach, as laid down in Article 2(3) of the CFP Basic Regulation.
173. The purpose of this approach is to move away from the less complex single-species approach, which manages species in isolation, failing to account for their interactions within the ecosystem and as part of mixed fisheries. As a consequence, TAC-setting must take into account ecosystem dynamics, such as interactions between species, as well as the impact of TACs for certain stocks on other stocks caught in the same mixed fisheries. Concretely this means that, in order to implement an ecosystem-based approach, the TACs for certain target stocks will have to be set below the single-stock headline advice for these stocks, in order to ensure that the best available scientific advice for other stocks caught as by-catch in the same fisheries is not exceeded, so that the MSY objective of the CFP can be reached for all stocks.

174. In this context, in addition to the scientific single-stock advice, ICES provides ecosystem and fisheries overviews and mixed fisheries considerations which highlight trade-offs between catch levels of different species.¹⁵⁴ They contain projections, for all included stocks, of the catch levels expected for a variety of scenarios; for example, if fishing ceases when the single-stock advice level for a particular stock is reached. This information illustrates that catches for certain stocks are expected to either exceed or remain below their respective single-stock advice, depending on by-catches of other stocks in the same fisheries. Such scenarios – based on underlying assumptions about the behaviour of the fleet – give an idea of which stocks will be more or less limiting. For example, they highlight which stocks may have to be fished below the scientific advice given for the stock individually, in order not to overfish other more vulnerable stocks by-caught in the mix.¹⁵⁵
175. This approach can be illustrated with an example, such as the cod stock found under the TAC code COD/7XAD34 (Celtic Sea cod), which is by-caught alongside a number of other species like haddock, whiting, anglerfish and megrim in mixed fisheries in the Celtic Sea. The ICES headline advice for that cod stock was 0 tonnes, and a by-catch TAC was set by the Council at 644 tonnes. To follow the ecosystem-based approach, the Council would have been obliged to set the TACs for other stocks of which cod is a by-catch in mixed fisheries at levels that do not allow for catches of cod to exceed the best available scientific advice. However, as shown in [Table 5](#), the Council instead set the TACs for Celtic Sea haddock and other stocks caught in the mixed fisheries at levels that are projected by ICES to result in cod catches that not only exceed the headline advice for cod (0 tonnes), but also the by-catch TACs set by the Council itself (644 tonnes).
176. The complex nature of ecosystems means there will always be a degree of uncertainty around the exact nature and extent of certain interactions and processes. However, in the absence of data or information, a precautionary approach must be implemented, alongside the ecosystem-based approach to fisheries management.
177. In this context, the information that is indeed already available, for example in the shape of mixed fisheries considerations, should be used to inform the setting of TACs at levels that not only do not exceed the relevant single-stock advice provided by ICES for the stock in question, but that also do not risk overshooting the headline advice for other stocks in the same fisheries. In mixed fisheries, TACs for the more abundant stocks must be set below their single-stock advice where this is necessary to safeguard vulnerable stocks that are by-caught in the same fisheries and are in a bad or unknown state.

¹⁵⁴ For example, ICES (2021): Celtic Sea - mixed fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9184>

¹⁵⁵ ClientEarth, "How (not) to implement the ecosystem-based approach when setting Total Allowable Catches (TACs)?", December 2020, available at: <https://www.clientearth.org/latest/documents/how-not-to-implement-the-ecosystem-based-approach-when-setting-total-allowable-catches-tacs/>

The Council's assessment that the Contested TACs comply with the ecosystem-based approach is implausible and therefore vitiated by a manifest error of assessment, resulting in a violation of Articles 2(3) and 16(4) of the CFP Basic Regulation

178. For all the TACs listed in [Table 5](#), ClientEarth submits that the Council followed a single species approach instead of an ecosystem-based approach, as required.
179. To return to the example described in paragraph 175 above, the Council set a TAC of 15,000 tonnes for Celtic Sea haddock. This TAC is between two catch scenarios presented by ICES which are projected to result in cod catches of 1321 tonnes and 1498 tonnes, respectively.¹⁵⁶ This substantially exceeds both the headline advice for cod (0 tonnes) and the by-catch TAC set by the Council (644 tonnes), and is therefore incompatible with both. The same principle, with an associated potential overshoot of over 1500 tonnes above the cod advice and around 900 tonnes above the cod TAC, applies to a number of other stocks in the Celtic Sea mixed fisheries.¹⁵⁷ By following a single species approach and failing to implement an ecosystem-based approach to fisheries management, which would have implied to set TACs for stocks like Celtic Sea haddock at lower levels to respect both the by-catch TAC and ICES advice for cod, the Council committed a manifest error of assessment.
180. For all the TACs included in [Table 5](#), the Council also did not show that it relied on any scientific evidence other than the one provided by ICES to determine that this single species approach would be consistent with the ecosystem-based approach. This does not meet the standard of evidence as required by the case law, as set out under paragraphs 146-147 above.
181. By failing to implement the ecosystem-based approach to fisheries management for the TACs listed in [Table 5](#), as required in Article 2(3) of the CFP Basic Regulation, the Council has committed a manifest error of law. It should have indeed set TACs at lower levels for these target stocks in order to ensure that its obligations under Article 2(3) would be fulfilled and that the MSY objective, which applies to all stocks, can also be reached for by-catch stocks in the relevant fisheries.

¹⁵⁶ ICES (2021): EU standing request on catch scenarios for zero-TAC stocks; cod (*Gadus morhua*) in divisions 7.e-k (Celtic Sea). ICES Advice: Special Requests. Report. <https://doi.org/10.17895/ices.advice.9151>. The TAC of 15000 t set by the Council for Celtic Sea haddock is between the two scenarios "Haddock $F_{MSY,lower} - F_{MSY}$ " (12671 t) and "Haddock F_{MSY} " (15166 t) specified in row 2 of Table 2, p. 3. These scenarios are projected to result in a by-catch of cod between 1321 t and 1498 t (row 1 of the same table). This corresponds to a potential overshoot of between 677 t and 854 t above the by-catch TAC for cod (644 t), and between 1321 and 1498 t above the cod advice (0 t).

¹⁵⁷ ICES (2021): Celtic Sea - mixed fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9184>. The TACs for several species, including megrim, anglerfish and sole, were set at levels close to the "sq_E" scenario (Table 3, p. 4), which corresponds to the "status quo effort" (corresponding to the same average effort for 2018-2020), which is projected to result in cod catches of 1536 t. See [Table 5](#) of this request for internal review for further details.

4.3.2 Second plea under the second ground: The Council misused its powers under Article 16(4) of the CFP Basic Regulation by using them to set TACs based on other objectives than those recognised under Articles 2(2) and 2(3) of the CFP Basic Regulation

182. It is settled case law of the Court that *"an act is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case"*.¹⁵⁸
183. ClientEarth submits that this is the case for all the Contested TACs. The analysis above demonstrates that the Council adopted the TACs based on objectives other than to achieve the objectives of Articles 2(2) and 2(3) of the CFP Basic Regulation, which should have been the main purpose of setting the TACs by way of the Contested Act. The Council instead pursued another main purpose, namely to permit the fishing industry to continue to operate in the short-term and to *"ensure a level-playing field for Union operators"*¹⁵⁹ without taking into consideration whether or not that will achieve the objectives of Articles 2(2) and 2(3).
184. The Council thereby also evaded a procedure specifically prescribed by the Treaties, namely the ordinary legislative procedure described Article 43(2) of the TFEU, including the involvement of the European Parliament, which would have been necessary to achieve the Council's purposes of:
- reducing the scope of the obligation to restore or maintain fish stocks above levels which can produce the MSY to certain stocks only; and/or
 - derogating from or postponing the legally binding deadline to set TACs at or below the MSY exploitation rates for all stocks by 2020 at the latest for the Contested TACs.
185. Thus, ClientEarth submits that the Council misused its powers in setting these TACs at this level because it followed a purpose other than the one foreseen for the Contested Act, as included in Articles 16(4), 2(2) and 2(3) of the CFP Basic Regulation, and because it effectively evaded the procedure foreseen for an act with the purpose of derogating from the established objective of the CFP, namely Article 43(2) of the TFEU.

¹⁵⁹ Recital 6 of the Contested Act.

8. Conclusion

186. In this Request for Internal Review, ClientEarth AISBL has put forward facts and legal arguments raising serious doubts about the lawfulness of the Contested Act as regards the Contested TACs. We hereby ask the Council of the European Union to review Council Regulation (EU) 2022/515 of 31 March 2022 in accordance with the Aarhus Regulation.
187. More specifically, ClientEarth asks the Council to set TACs in line with ICES headline advice for the following stocks:
- Cod (COD/5W6-14)
 - Cod (COD/7XAD34)
 - Whiting (WHG/07A.)
 - Cod (COD/5BE6A)
 - Cod (COD/07A.)
 - Pollack (POL/56-14 and POL/07.)
 - Northern shrimp (PRA/2AC4-C)
 - Undulate ray (RJU/9-C.)
 - Herring (HER/7G-K.)
 - Herring (HER/5B6ANB and HER/6AS7BC)
188. ClientEarth asks the Council to apply the ecosystem-based approach to fisheries management and therefore, for the following target species caught in mixed fisheries, set TACs at a level which will ensure that ICES headline advice for their by-catch stocks is not overshoot:
- Haddock (HAD/7X7A34)
 - Norway lobster (NEP/07.)
 - Norway lobster (NEP/5BC6.)
 - Black-bellied and white anglerfish (ANF/07. and ANF/8ABDE.)
 - Megrin and four-spot megrim (LEZ/07. and LEZ/8ABDE.)
 - Common sole (SOL/7FG.)