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From:	General Secretariat of the Council
To:	Delegations
Subject:	ClientEarth Request for internal review under Title IV of the Aarhus Regulation in relation to Council Regulation (EU) 2022/109 of 27 January 2022 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters

Delegations will find attached the note on the above-mentioned subject, as received from ClientEarth. The request for internal review and Annex 1 were already issued under WK 4497/22 on 28 March 2022.

REQUEST FOR INTERNAL REVIEW UNDER TITLE IV OF THE AARHUS REGULATION

Of 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 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 21, 31.1.2022, p. 1–164.

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).

Contents

Background	4
1. Legal framework	8
1.1. The Contested Act	8
1.2. Other relevant legislation	9
2. Scope of the request	12
3. Admissibility	13
3.1. ClientEarth meets the criteria set out in Article 11 of the Aarhus Regulation	13
3.2. The Contested Act is an administrative act in accordance with Article 2(1)(g) of the Aarhus Regulation	15
4. Grounds of review	20
4.1. Main standards of review	20
4.2. First ground: The Contested Act is vitiated by lack of competence	21
4.3. Second ground: The Council infringed rules of law related to the application of the Treaties, and misused its powers conferred by those rules	32
5. Conclusion	55

Request for Internal Review

Under Title IV of the Aarhus Regulation

Background

1. This Request for Internal Review concerns the Council of the European Union's (the Council) decision, in the Contested Act, to fix 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 above the best available scientific advice. **ClientEarth thereby requests the Council of the European Union to amend a certain subset of those fishing opportunities – or Total Allowable Catches (hereafter referred to as 'TACs') – 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, European Union (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 Basic Regulation (CFP Basic Regulation) which defines the rules and objectives of the CFP.⁴ 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.** 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 is determined every year by the Council: it adopts TACs for the majority of commercially important species fished in the EU. The adoption of these TACs is done by the Council in its AGRIFISH configuration and these figures are then included in annual regulations, such as the Contested Act. This negotiation is commonly a political affair. However, the Council needs to respect the requirements of the CFP Basic Regulation in adopting these regulations.

⁴ 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 of 28.12.2013.

6. Despite the CFP Basic Regulation, overfishing in the EU has largely continued since 2013. The most recent report by the Scientific, Technical and Economic Committee for Fisheries (STECF),⁵ an official advisory body to the European Commission, confirms that as of 2019 – the most recent year for which this information is available – 43% of assessed fish stocks in the North East Atlantic were still subject to overfishing.⁶ This is an increase, i.e. a reversal of progress compared to the data for 2018 (41% of assessed stocks were then subject to overfishing).⁷ It means that in 2019, the EU was still far from achieving the sustainability objectives of the CFP Basic Regulation. The STECF concluded in the same report that “*many stocks remain overfished and/or outside safe biological limits, and that progress until 2019 is obviously too slow to ensure that all stocks are fished at or below [sustainable levels] in 2020*”.⁸
7. As will be shown in this request, the Council enables this overfishing situation, because it consistently disregards essential requirements of the CFP Basic Regulation and exceeds the bounds of its discretion set by the Regulation’s rules when adopting the annual TAC Regulations, such as by fixing fishing opportunities above levels that would ensure achievement of the binding sustainability target. **It is for this reason that the Council contravened EU environmental law in adopting the Contested Act.**
8. 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.

Procedural background

9. Most of the fish stocks of commercial importance in the EU are managed through the adoption of TACs by the Council.
10. 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 United Kingdom (UK) or Norway.
11. 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. As a result, 2022 TACs for EU-only stocks and EU/UK shared stocks have been adopted through two separate processes. The EU-only TACs, as well as provisional TACs for the EU/UK shared stocks (TACs that apply in the interim period preceding formal transposition into EU law of the TACs actually agreed between the EU and the UK), were agreed following these steps:

⁵ Scientific, Technical and Economic Committee for Fisheries (STECF) – Monitoring the performance of the Common Fisheries Policy (STECF-Adhoc-21-01). EUR 28359 EN, Publications Office of the European Union, Luxembourg, 2021, ISBN 978-92-76-36155-8, doi:10.2760/26195, JRC124906. <https://stecf.jrc.ec.europa.eu/documents/43805/55543/STECF+21-01++adhoc+-+CFP+Monitoring.pdf/7638e3df-5593-45e8-bf92-dd5e4423c7b3> (accessed on 20 March 2022).

⁶ Ibid., Tables 5 and 6, p. 33 and 35: 28 stocks with $F > FMSY$ versus 37 stocks with $F \leq FMSY$.

⁷ Ibid., Tables 5, 6, 7 and 8, p. 33-39: 27 stocks with $F > FMSY$ versus 38 stocks with $F \leq FMSY$, and 13 stocks outside SBL versus 29 inside SBL.

⁸ Ibid., p. 14.

- On 9 June 2021, the Commission published an annual communication.⁹ This document provided an overview of the state of EU-only and shared stocks, and explained the procedure for establishing fishing opportunities for the year 2022.
- On 30 June 2021, the International Council for the Exploration of the Sea (ICES) provided its scientific advice for fish stocks in the North East Atlantic, specifying the **maximum catch levels not to be exceeded for each stock in 2022**.¹⁰
- On 3 November 2021, the European Commission adopted its proposal for a Council Regulation on EU-only stocks,¹¹ following the ICES advice in most cases, with a few exceptions.¹²
- During the Agriculture and Fisheries Council of 12 and 13 December 2021, Member States agreed upon the final TACs for EU-only stocks for the year 2022 in the North East Atlantic. They also agreed on provisional TACs for EU/UK shared stocks. With a few exceptions, these provisional TACs are based on a 25% rollover of the 2021 TACs *“in order to cover the first quarter of 2022”*.¹³

12. The Contested Act was formally adopted on 27 January 2022 and published in the Official Journal of the European Union on 31 January 2022. **The final TACs for EU-only stocks are included in Part A of Annex IA and provisional EU/UK TACs are included in Part B of Annex IA of the Contested Act.**
13. For EU/UK shared stocks, both Parties reached an agreement on final TACs on 21 December 2021, through an “Agreed Written Record”.¹⁴ However, these figures still need to be transposed into EU law by an amendment to the Contested Act – this is why **only provisional TACs** were adopted in December 2021 and are included within the scope of this Request for Internal Review.¹⁵ **The present Request does not deal with EU/UK final TACs.**

⁹ Communication from the Commission to the European Parliament and the Council, Towards more sustainable fishing in the EU: state of play and orientations for 2022, 9/6/2021, COM(2021) 279 final.

¹⁰ <https://www.ices.dk/advice/Pages/Latest-Advice.aspx> (accessed on 15 March 2022).

¹¹ Commission Proposal for a Council Regulation 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, 3/11/2021, COM(2021) 661 final.

¹² For instance, the Commission proposal fixed TACs for EU-only stocks above ICES advice for: COD/03AS (“Kattegat cod”): 97 tonnes vs. ICES advice of 0 tonnes; NEP/8CU25 (“Norway lobster” in FU25): 1.7 tonnes monitoring proposal vs. ICES advice of 0 tonnes; POL/8ABDE. + POL/08C. + POL/9/3411 (“Pollack in Bay of Biscay”): 1185+149+182 = 1516 tonnes vs advice of 905 tonnes.

¹³ Recital 67 of the Contested Act.

¹⁴ Written Record of fisheries consultations between the United Kingdom and the European Union for 2022, 21 December 2021.

¹⁵ The Commission Proposal with final TACs for EU/UK shared stocks has already been published on 16 February 2022 and contains the same figures as specified in the Agreed Written Record: Commission Proposal for a Council Regulation amending Regulation (EU) 2022/109 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters, 16/2/2022, COM(2022) 54 final.

14. Strikingly if we look at the final EU-only and final EU/UK 2022 TACs, **20 out of the 60 TACs included in our analysis**,¹⁶ i.e. **33%**, **were set above best available scientific advice**. These excessive TACs include 12 final EU/UK shared TACs (i.e. 31% of the 39 EU/UK shared TACs) and 8 EU-only TACs (i.e. 38% of the 21 EU-only TACs). We refer to Annex 1 to this Request for the details.

Scientific background

15. There are a number of scientific terms used in this Request and its Annexes that are useful to define below (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”.¹⁷

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.

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 %.

¹⁶ ClientEarth's analysis covers those TACs set by the EU alone as well as those shared between the EU and the UK, excluding cases where the TAC and ICES advice do not cover the same area and are thus not directly comparable. The final EU-only TACs were taken from PART A of ANNEX IA of the Contested Act, whereas the final EU/UK shared TACs were taken from the Agreed Written Record between the EU and the UK signed on 21 December 2021. The analysis excludes any TACs not covered by ANNEX IA of the Contested Act. The preliminary results presented here are based on the same methodology described in ClientEarth's latest report, which is still due to be officially updated for 2022. ClientEarth (2021): Taking stock 2021 - are TACs set to achieve MSY?

<https://www.clientearth.org/latest/documents/taking-stock-2021-are-tacs-set-to-achieve-msy/> For information on the included TACs, see: <https://www.clientearth.org/latest/documents/taking-stock-are-tacs-set-to-achieve-msy-annex-ii/>

¹⁷ Article 4(7) of the CFP Basic Regulation.

MSY F lower: lowest value within the range of F_{MSY} .

MSY F upper: highest value within the range of F_{MSY} .

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 that is caught in a mixed fishery when another species is the target catch.

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: for stock specific advice, the ICES headline advice is the advice found at the top of the first page of the advice and indicates the amount of recommended catches which should not be exceeded in order to reach the MSY.

ICES scenarios: in the case of mixed fisheries, scenarios prepared by ICES which indicate how many tonnes of a by-catch species will likely end up being caught if TACs for the target species of that fishery are set at certain levels.

Multiannual plans (MAPs): these legal instruments provide detailed stock management plans for particular stocks in defined geographic areas.¹⁸ 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.

1. Legal framework

1.1. The Contested Act

16. The Contested Act fixes TACs for the year 2022 in Union waters and for Union fishing vessels in certain non-Union waters in the North East Atlantic. The Contested Act notably fixes:
- TACs for stocks managed by EU Member States only;¹⁹
 - TACs for stocks whose management is shared with third countries, including provisional TACs for EU/UK and final TACs for EU/UK/Norway stocks.²⁰

¹⁸ See Articles 7(1)(a), 9 and 10 of the CFP Basic Regulation.

¹⁹ Part A of Annex IA of the Contested Act, covering "*Autonomous Union stocks*".

²⁰ Part B of Annex IA of the Contested Act, covering "*Shared stocks*".

Acting on the basis of the Treaty on the Functioning of the European Union (TFEU) and of the CFP Basic Regulation, the Council is empowered to adopt annual measures on the fixing and allocation of fishing opportunities.²¹ This is done through a Council Regulation adopted on the basis of Article 43(3) of the TFEU. According to Article 16(4) of the CFP Basic Regulation, fishing opportunities shall be fixed in accordance with the objectives set out in Article 2(2) of that Regulation, and must, in accordance with Article 3(c), be established in accordance with the best available scientific advice.

1.2. Other relevant legislation

The Treaty on the Functioning of the European Union

17. 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*”.
18. 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*”.
19. According to Article 38 of the TFEU, “*the Union shall define and implement a common agriculture and fisheries policy*”.
20. 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.
21. 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 CFP Basic Regulation

22. The CFP Basic Regulation sets rules for conserving and managing fish stocks. It is the overarching EU legislation on fisheries.

²¹ Recital 2 of the Contested Act.

23. 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”.²²
 - “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”.²³
24. 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).²⁴ **There is therefore a positive and binding obligation to achieve the MSY exploitation rate for all stocks by 2020 at the latest.**
25. 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.
26. 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”²⁵ as well as “a long-term perspective”.²⁶
27. 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 (...)”.²⁷ Those conservation measures include, *inter alia*, the adoption of MAPs and “measures on the fixing and allocation of fishing opportunities”.²⁸
28. 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.²⁹

²² Article 2(1) of the CFP Basic Regulation.

²³ Article 2(2) of the CFP Basic Regulation.

²⁴ Article 2(2) of the CFP Basic Regulation.

²⁵ Article 3(c) of the CFP Basic Regulation.

²⁶ Article 3(d) of the CFP Basic Regulation.

²⁷ Article 6(2) of the CFP Basic Regulation.

²⁸ Article 7(1)(e) of the CFP Basic Regulation.

²⁹ Article 15 of the CFP Basic Regulation; European Commission, “Synthesis of the landing obligation measures and discard rates”, Final Report, June 2021, p. 7.

The Western Waters Regulation

29. The Western Waters Regulation³⁰ 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”*.
30. The target stocks covered by this Regulation are listed in a comprehensive manner in Article 1(1). TACs for target stocks covered under Article 1(1) are subject to a special regime. Indeed, even if the MSY objective of Article 2 of the CFP Basic Regulation applies to them, there is also some flexibility foreseen as to how these TACs should be set. Article 4(1) of the Western Waters Regulation provides that *“the target fishing mortality, in line with the ranges of F_{MSY} defined in Article 2, shall be achieved as soon as possible, and on a progressive, incremental basis by 2020 for the stocks listed in Article 1(1), and shall be maintained thereafter within the ranges of F_{MSY} , in accordance with this Article”*.
31. Articles 4(3) to 4(5) provide for the use of F_{MSY} ranges to set these TACs. Article 4(6) prescribes that *“fishing opportunities shall in any event be fixed in such a way as to ensure that there is less than a 5 % probability of the spawning stock biomass falling below the limit spawning stock biomass reference point (B_{lim})”*. Safeguards have also been included in Article 7 to deal with cases when the abundance of target stocks is below MSY $B_{trigger}$ or B_{lim} .

The North Sea Regulation

32. The North Sea Regulation³¹ sets out long-term management measures (or a multiannual plan) for the exploitation of a large number of fish stocks in the North Sea. 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.”*
33. Similar to the Western Waters Regulation, the target stocks covered by the North Sea Regulation are listed in a comprehensive manner in Article 1(1). TACs for target stocks covered under Article 1(1) are subject to a special regime.

³⁰ 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.

³¹ Regulation (EU) 2018/973 of the European Parliament and of the Council of 4 July 2018 establishing a multiannual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks, specifying details of the implementation of the landing obligation in the North Sea and repealing Council Regulations (EC) No 676/2007 and (EC) No 1342/2008.

Indeed, even if the MSY objective of Article 2 of the CFP Basic Regulation applies to them, there is some flexibility foreseen as to how these TACs should be set, as F_{MSY} ranges can be used to set them. Article 4(1) of the North Sea Regulation provides that “*the target fishing mortality, in line with the ranges of F_{MSY} defined in Article 2, shall be achieved as soon as possible, and on a progressive, incremental basis by 2020 for the stocks listed in Article 1(1), and shall be maintained thereafter within the ranges of F_{MSY} , in accordance with this Article*”. Articles 4(3) to 4(5) provide for the use of F_{MSY} ranges to set these TACs. Article 4(6) prescribes that “*fishing opportunities shall in any event be fixed in such a way as to ensure that there is less than a 5 % probability of the spawning stock biomass falling below the limit spawning stock biomass reference point (B_{lim})*”. Safeguards have also been included in Article 7 to deal with cases when the abundance of target stocks is below MSY $B_{trigger}$ or B_{lim} .

The Trade and Cooperation Agreement

34. In addition to the relevant provisions of the CFP Basic Regulation, the provisions of the Trade and Cooperation Agreement³² (TCA) apply to stocks whose management is shared between the EU and the UK.
35. Article 498(2) of the TCA states that “*the Parties shall hold consultations annually to agree, by 10 December of each year, the TACs for the following year for the stocks*” shared between them. If an agreement is not reached by 20 December, then each Party is entitled to set provisional TACs corresponding to the level advised by ICES and those apply from 1 January the following year.³³ Each Party is then entitled to set its own share of each provisional TAC.³⁴ These provisional TACs shall apply until a final agreement is reached between the EU and the UK.³⁵

2. Scope of the request

36. 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 the 6 EU-only TACs which were not set in line with the ecosystem-based approach to fisheries management. In total, the Request covers 14 final TACs for EU-only stocks and 8 provisional TACs for EU/UK shared stocks.
37. The relevant TACs for those stocks are found in Annexes IA and IB of the Contested Act.

32 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. OJ L 149/10 of 30.4.2021.

33 Article 499(2) of the TCA.

34 Article 499(7) of the TCA.

35 Article 499(8) of the TCA.

38. Nevertheless, it should be noted that, while the scope of this Request is limited to the stocks identified in Annex 1, 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.

3. Admissibility

40. 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.
41. 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.

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

42. 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 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**).
43. 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 **Annex 6**, in French.
 2. Annual activity reports of ClientEarth for the years 2019 and 2020 (the annual activity report for 2021 has not yet been finalised at the time of submission but can be sent at a later date on request) – see **Annexes 7 and 8**, in English.
 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 9**, in French.
45. These documents demonstrate that ClientEarth meets all the criteria under Article 11(1) of the Aarhus Regulation.

46. 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 9**). Both documents also show that ClientEarth is a legal person in accordance with a Member State's national law.
47. In relation to Article 11(1)(b) of the Aarhus Regulation, Article 4 of ClientEarth's Statute (**Annex 6**) demonstrates that its primary stated objective is promoting environmental protection in the context of environmental law. In particular, Article 4a) enshrines the objective of promoting and encouraging the restoration, conservation and protection of the environment, including the protection of human health, for the public good and Article 4b) 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 5.1b)).
48. 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 9**). The activity reports (**Annexes 7 and 8**) 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.
49. 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 approach, the best available scientific advice and at a level that ensures compliance with the MSY 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 practices³⁶ as reflected in its annual activity reports. To name but some examples, these activities include ClientEarth's advocacy on the revision of the CFP, the enforcement of the obligation to reach the MSY by 2020,³⁷ the European Maritime and Fisheries Fund,³⁸ fisheries aspects of the EU-UK agreement³⁹ and the revision of the Fisheries Control Regulation;⁴⁰ its litigation work against unlawful industrial fishing in protected zones and unlawful by-catch;⁴¹ its litigation work for greater transparency around the setting of catch limits and EU fisheries control;⁴² and its activities around the organisation of sustainable seafood coalitions in Spain and the UK.⁴³

³⁶ 2020 Annual Report (Annex 8), p.8.

³⁷ 2020 Annual Report (Annex 8), p. 11.

³⁸ 2019 Annual Report (Annex 7), p. 18.

³⁹ 2020 Annual Report (Annex 8), p. 13.

⁴⁰ 2020 Annual Report (Annex 8), p. 18.

⁴¹ 2019 Annual Report (Annex 7), p. 17.

⁴² 2020 Annual Report (Annex 8), pp. 17-18.

⁴³ 2020 Annual Report (Annex 8), p. 18 and 2019 Annual Report (Annex 7), p. 18.

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

50. 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)*”.
51. 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

52. 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.
53. The fact that the Contested Act is a regulation of a non-legislative nature is evident based on a number of factors. 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 the ordinary legislative procedure*”.⁴⁴ 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*”⁴⁵ (emphasis added).

⁴⁴ Judgment (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.

⁴⁵ 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.

54. 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.⁴⁶ 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)”.⁴⁷ The Contested Act cannot, therefore, be regarded as a legislative act.

3.2.2 The Contested Act has legally binding and external effects

55. As explained above, the Contested Act is a Council Regulation intended to implement legislative provisions adopted on the basis of Article 43(2) of the TFEU, as settled by the case law mentioned above. 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 implementation of Article 16(4) of the CFP Basic Regulation. These provisions confirm that the Contested Act is both legally binding and has external effects.
56. 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.⁴⁸ The same reasoning applies *mutatis mutandis* to the Contested Act.
57. 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 5 is phrased in a mandatory manner stating that the TACs for Union fishing vessels, their allocation and the conditions functionally linked thereto “are set out” in Annex I to the Contested Act, Union fishing vessels are authorised to fish in certain waters “subject to” those TACs (Article 5(2) of the Contested Act) and TACs for certain fish stocks “shall be determined” by the Member States concerned with certain requirements (Article 6 of the Contested Act).

46 Judgment (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.

47 Advocate General Wahl's Opinion in Joined Cases C-124/13 and C-125/13, ECLI:EU:C:2015:337, para. 61 (we underline)

48 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.

58. 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.⁴⁹ Accordingly, the fact that the Contested Act is legally binding and has general 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

59. 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 and beyond the mandatory MSY objective that had to be attained for all stocks at the latest by 2020.
60. 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 “*Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community 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*”.⁵⁰
61. Moreover, the Contested Act was adopted for the implementation of the CFP Basic Regulation and must therefore comply with specific provisions of that Regulation. These include, but are not limited to, Article 2(2) establishing the objective to ensure sustainable fisheries management and ensure that all stocks are managed at the MSY exploitation rate by 2020 at the latest, as well as Articles 15 (landing obligation) and 16 (fishing opportunities). Accordingly, the challenged provisions of the Contested Act have the potential to contravene the CFP Basic Regulation, which also qualifies as environmental law in the sense of Article 2(1)(f) of the Aarhus Regulation.
62. 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 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 CFP is to “ensure that fishing and aquaculture activities are environmentally sustainable in the long-term”.

49 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.

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

63. 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 “*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*”. 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 “*The 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 “*An 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 “*Unwanted 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 adopted⁵¹ (all emphasis added).
64. 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 “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*”.⁵²

⁵¹ Article 7(1)(d) of the CFP Basic Regulation.

⁵² Judgment of 14 March 2018, *TestBioTech v Commission*, T-33/16, ECLI:EU:T:2018:135, paras 43 and 44.

65. 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.⁵³ 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”*.⁵⁴ 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) Aarhus Convention, whether or not *“the provisions in question are found in planning laws, taxation laws or maritime laws”*.⁵⁵ This is further confirmed by findings of the Aarhus Convention Compliance Committee which state 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 2003/4.⁵⁶ The Compliance Committee emphasised that this definition includes for instance *“biodiversity and its components”*⁵⁷ as well as protection of *“wildlife species”*.⁵⁸ 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”*.
66. 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.
67. There can therefore be no doubt that the Contested Act has the potential to contravene provisions which pursue the objectives of EU policy to the environment and therefore constitute environmental law for the purposes of Article 2(1)(f) of the Aarhus Regulation. Accordingly, the contested provisions of the Contested Act have the potential to contravene environmental law in that sense, thus making the present Request admissible.

⁵³ Judgement of 27 January 2021, *ClientEarth v EIB*, T-9/19, ECLI:EU:T:2021:42, para. 125. See also para. 107.

⁵⁴ 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.

⁵⁵ *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.

⁵⁶ See findings on communication ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, para. 54.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, para. 55.

4. Grounds of review

68. 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.

4.1. Main standards of review

69. 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*”.⁵⁹
70. As further confirmed by the CJEU, “*compliance with those two requirements is subject to different standards*”.⁶⁰ 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*”.⁶¹ The same reasoning must apply to Council Regulation adopted to implement a legislative act, such as the Contested Act.
71. 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 4.2).
72. 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 4.3). 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.

⁵⁹ Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, para. 52.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para. 53.

4.2. 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

73. 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, adopted on the basis of Article 43(2) of the TFEU, thus exceeding its powers under Article 43(3) of the TFEU:⁶² (see Table 1 below for the list of TACs concerned by this plea)

⁶² 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 for stocks with zero catch advice, including EU-only and EU/UK shared provisional TACs in the Contested Act. With the exception of Kattegat cod (COD/03AS.) all of these are EU/UK shared stocks.

Common species name	TAC code(s)	Advice code(s) ⁶³	MAP Article ⁶⁴	Stock / exploitation status ⁶⁵	ICES advice basis ⁶⁶	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Cod	COD/03AS.	cod.27.21	NS 1.4	Unknown	PA	0	97 (by-catch)	97 (non-0 TAC)	The by-catch TAC equals the level of the most recent catch estimated for 2020. Footnote 2 in the Contested Act provides for an additional allowance for vessels participating in REM trials. ⁶⁷
Cod	COD/7XAD34	cod.27.7e-k	WW 1.1.7	SSB < B _{lim} F > F _{lim}	MSY	0	Provisional: 202 (Final: 644) (by-catch)	Provisional: 202 Final: 644 (non-0 TAC)	The final 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 The provisional TAC as included in the Contested Act exceeds both the headline advice (zero catch) and the F _{MSY upper} x SSB ₂₀₂₂ /MSY B _{trigger} scenario (186 t) reflecting the low biomass level.
Whiting	WHG/07A.	whg.27.7a	WW 1.4	SSB < B _{lim} F > F _{lim}	MSY	0	Provisional: 289 (Final: 721) (by-catch)	Provisional: 289 Final: 721 (non-0 TAC)	The final 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). The provisional TAC as included in the Contested Act exceeds both the headline advice (zero catch) and the F _{MSY upper} x SSB ₂₀₂₂ /MSY B _{trigger} scenario (44 t) reflecting the low biomass level.
Cod	COD/5BE6A	cod.27.6a	WW 1.4	SSB < B _{lim} F > F _{lim}	MSY	0	Provisional: 320 (Final: 1279) (by-catch)	Provisional: 320 Final: 1279 (non-0 TAC)	The final 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 The provisional TAC as included in the Contested Act exceeds both the headline advice (zero catch) and the F _{MSY upper} x SSB ₂₀₂₁ /MSY B _{trigger} scenario (198 t) reflecting the low biomass level.

63 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 10. 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.

64 This column indicates which Article in the relevant multiannual plan (MAP) the stock falls under (WW = Western Waters; NS = North Sea).

65 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.

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

67 “In addition to these quotas, a Member State may grant to vessels flying its flag and participating in trials on remote electronic monitoring an additional allocation, within an overall limit of 30 % of the quota allocated to that Member State. Each vessel participating in trials on remote electronic monitoring shall take no more than 300 kg. Catches from this additional allocation shall be reported separately (COD/03AS_REM). This shall be without prejudice to the relative stability.”

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 FMSY” scenario presented in Table 2, p. 3, which is based on fishing whiting in the Celtic Sea at the reduced FMSY (FMSY 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.

Common species name	TAC code(s)	Advice code(s) ⁶³	MAP Article ⁶⁴	Stock / exploitation status ⁶⁵	ICES advice basis ⁶⁶	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Northern prawn	PRA/2AC4-C	pra.27.4a	-	Unknown	PA	0 (no target fisheries or landings)	Provisional: 165 (Final: 990) (by-catch)	Provisional: 165 Final: 990 (non-0 TAC)	The final 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. The provisional TAC as included in the Contested Act exceeds the headline advice.

74. 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”*.
75. 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.
76. As mentioned above under Section 3 (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)”*,⁷⁰ i.e. under the CFP Basic Regulation.
77. 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.
78. 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”*.⁷¹
79. 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 measure that can be adopted under Article 43(2) and Article 43(3) TFEU, respectively, was confirmed by the Court in the Venezuela judgment”*.⁷²

70 Judgment 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.

71 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.

72 Ibid. para. 67.

80. 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”*.⁷³
81. 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”*.⁷⁴
82. 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”*.⁷⁵
83. 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, which 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 Common Fisheries Policy 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 Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, paras 58-59.

⁷⁴ *Ibid.* paras. 61-62.

⁷⁵ Judgment 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.

84. Recital 6 of the Contested Act provides that *“there are certain stocks for which ICES has advised zero catches. However, if TACs for those stocks are established at the advised level, the obligation to land all catches, including by-catches from those stocks in mixed fisheries, would give rise to the phenomenon of ‘choke species’. In order to strike a balance between maintaining fisheries, in view of the potentially severe socio-economic implications of failing to do so, and the need to achieve a good biological status for those stocks, taking account of the difficulty of fishing all stocks in a mixed fishery at maximum sustainable yield (MSY), it is appropriate to establish specific TACs for by-catches for those stocks. (...)”*.
85. 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 the 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 target fishery in order to avoid overshooting this 0 tonne or low quota. Since the introduction of the ‘landing obligation’⁷⁶ in 2013, the number of choke species has increased, as fishers now have to report catches for these stocks that they used to discard before, therefore increasing the risk of closing target fisheries as a result.
86. 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 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.
87. 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).

⁷⁶ 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.

88. Article 2(2) of the CFP Basic Regulation makes clear that the MSY objective 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 status by 2020 as set out in Article 1(1) of Directive 2008/56/EC, as well as with other Union policies*”.⁷⁷ 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.
89. 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 landing obligation in reaction to the phenomenon of ‘choke species’, they would have done so.
90. Ignoring the foregoing, the Council decided, “[i]n order to strike a balance between maintaining fisheries (...) and the need to achieve a good biological status for those stocks”,⁷⁸ to disregard the objectives of Article 2(2) of the CFP Basic Regulation, which explicitly applies to “*all stocks*”.⁷⁹ The Council states at 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 of the CFP Basic Regulation would have stated so.
91. 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, therefore goes beyond the limits of the Council’s powers under Article 43(3) of the TFEU.
92. 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.

⁷⁷ Article 2(5)(j) of the CFP Basic Regulation.

⁷⁸ Recital 6 of the Contested Regulation.

⁷⁹ “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).

93. The Court declared at 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*”.⁸⁰
94. 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*”.⁸¹ It finally concluded at 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*”.⁸²
95. 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)*”.⁸³
96. In view of the foregoing considerations, when the Council decided to adopt TACs at levels which, as it itself acknowledges, do not ensure that the MSY exploitation rate, which is an essential element of the CFP Basic Regulation, will be reached for certain stocks by 2020 at the latest, 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.⁸⁴ 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.

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

97. ClientEarth’s second claim concerns the stocks included in Table 2 below.

⁸⁰ Judgment 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.

⁸¹ Ibid., para. 80.

⁸² Ibid., para. 81.

⁸³ Judgment 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.

⁸⁴ 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. With the exception of Rockall cod (COD/5W6-14) and the herring stocks (HER/7G-K., HER/5B6ANB, HER/6AS7BC), these are EU-only stocks.

Common species name	TAC code(s)	Advice code(s) ⁸⁵	MAP Article ⁸⁶	Stock / exploitation status ⁸⁷	ICES advice basis ⁸⁸	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Hake	HKE/8C3411	hke.27.8c9a	WW 1.1.20	Unknown	PA	6947	7836	889 (13%)	The TAC represents an 8% cut compared to the 2021 TAC of 8517 t and is between the “hke” (6947 t) and the “meg” (9921 t) scenarios in the mixed fisheries considerations. ⁸⁹
Pollack	POL/8ABDE. POL/08C. POL/9/3411	pol.27.89a	WW 1.4	Unknown	PA	905	1851 (1482 + 166 + 203)	946 (105%)	The sum of the three TACs represents a rollover of the 2021 TAC and is between the “nep” (1786 t) and “ank” (2351 t) scenarios in the mixed fisheries considerations. ⁹⁰
Norway lobster	NEP/9/3411	nep.fu.2627 nep.fu.2829 nep.fu.30	WW 1.1.25	FU 28-29: SSB unknown Relative $F < \text{relative } F_{\text{MSY}}$	PA / MSY	316 (0 + 266 + 50)	355 (305 for FU 28-29)	39 (12% overall 15% for FU 28-29)	The TAC represents a 5% cut compared to the 2021 TAC of 374 t. It covers several functional units (FUs) and, due to footnotes 1 and 2 in the Contested Act prohibiting catches in FU 26-27 and limiting catches in FU 30 to 50 t, ⁹¹ is in line with the scientific headline advice for FU 26-27 (zero catch) and FU 30 (50 t), but not for FU 28-29 (355 t – 50 t = 305 t compared to advice for FU 28-29 of 266 t).
Common sole	SOL/7BC.	sol.27.7bc	WW 1.4	Unknown	PA	19	34	15 (79%)	The TAC represents a rollover of the 2021 TAC. No other scenarios are provided.
Norway lobster	NEP/8CU25	nep.fu.25	-	Relative $\text{SSB} < B_{\text{lim}}$ Relative $F < F_{\text{MSY}}$	MSY	0	1.7	1.7 (non-0 TAC)	The monitoring TAC represents a rollover of the 2021 TAC and is reserved for a sentinel fishery through footnote 1 on the Contested Act. ⁹²

85 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 10. 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.

86 This column indicates which Article in the relevant multiannual plan (MAP) the stock falls under (WW = Western Waters; NS = North Sea).

87 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.

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

89 ICES (2021): Iberian waters – mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report <https://doi.org/10.17895/ices.advice.9151>; Table 3, p. 3.

90 ICES (2021): Bay of Biscay– mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report <https://doi.org/10.17895/ices.advice.9182>; Table 3, p.4.

91 Footnote (1): “Shall not be taken in functional units 26 and 27 of 9a.”; footnote (2): “Within the limits of these quotas, no more than the following amount may be taken in functional unit 30 of 9a (NEP/*9U30): 50.”

92 “Exclusively as part of a sentinel fishery to collect catch per unit effort (CPUE) data with vessels carrying observers on board, during five trips per month in August and September.”

Common species name	TAC code(s)	Advice code(s) ⁸⁵	MAP Article ⁸⁶	Stock / exploitation status ⁸⁷	ICES advice basis ⁸⁸	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	Provisional: 19 (Final: 74) (by-catch)	Provisional: 5 (36%) Final:60 (429%)	The final by-catch TAC represents a rollover of the 2021 TAC. No other scenarios are presented. The provisional TAC as included in the Contested Act exceeds the headline advice.
Herring	HER/7G-K.	her.27.irls	-	Unknown	MSY	0	Provisional: 217 (Final: 869)	Provisional: 217 Final: 869 (non-0 TAC)	The final TAC represents a rollover of the 2021 TAC and corresponds to the "monitoring TAC" scenario. The provisional TAC as included in the Contested Act exceeds the headline advice.
Herring	HER/5B6ANB HER/6AS7BC	her.27.6a7bc	-	Unknown	PA	0	Provisional: 1210 (870 + 340) (Final: 4840 = 3480 + 1360)	Provisional: 1210 Final: 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. The provisional TAC as included in the Contested Act exceeds the headline advice.

98. 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 provide the MSY but decided not to, thus disregarding essential elements of the CFP Basic Regulation.
99. 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, the Western Waters Regulation and the North Sea 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 advice⁹³ 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 CFP overarching MSY objective.
100. 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)*”.
101. In the latest publicly available ICES/EU specific agreement (Annex 11), it is explicitly said that “*ICES has provided advice to the European Commission, DGMARE for more than 30 years and has through this time been the sole advisory body concerning advice for fisheries management*”.⁹⁴ 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*”.⁹⁵
102. It is even reflected in Recital 5 of the Contested Act itself which states that “*the fishing opportunities should be based on the advice figure [...] 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 Articles 16(4) and 2(2) of the CFP Basic Regulation.

⁹³ 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.

⁹⁴ *Ibid.*, p.14.

⁹⁵ *Ibid.* p.25.

103. 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 83 above.
104. 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 objectives 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.⁹⁶ 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.

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

105. ClientEarth submits that if the Council were not considered to lack competence to adopt the Contested Regulation 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).
106. Given the clear obligation in Article 2(2) of the CFP Basic Regulation, the Contested Regulation 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. ClientEarth submits that the Council's assessment is implausible.⁹⁷ 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.⁹⁸
107. 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.

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) and 2(2) of the CFP Basic Regulation

⁹⁶ See by analogy, Judgement of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, para. 68.

⁹⁷ In the sense of Judgment of 14 March 2018, *TestBioTech v Commission*, T-33/16, ECLI:EU:T:2018:135, paras 78-79.

⁹⁸ In the sense of Judgment of 30 April 2019, *Italian Republic v. Council of the European Union*, C-611/17, ECLI:EU:C:2019:332, para. 57.

108. 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 provide 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 to restore or maintain stocks above levels which can produce the MSY

109. This claim concerns the Contested TACs listed in the two tables below. One of these tables concerns the provisional TACs set for EU/UK shared stocks (Table 4), and the other one the final TACs set for EU only-stocks (Table 3).

Table 3: List of 2022 EU-only TACs in the Contested Act exceeding the underlying scientific headline advice provided by ICES.

Common species name	TAC code(s)	Advice code(s) ⁹⁹	MAP Article ¹⁰⁰	Stock / exploitation status ¹⁰¹	ICES advice basis ¹⁰²	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Hake	HKE/8C3411	hke.27.8c9a	WW 1.1.20	Unknown	PA	6947	7836	889 (13%)	The TAC represents an 8% cut compared to the 2021 TAC of 8517 t and is between the “hke” (6947 t) and the “meg” (9921 t) scenarios in the mixed fisheries considerations. ¹⁰³
Pollack	POL/8ABDE. POL/08C. POL/9/3411	pol.27.89a	WW 1.4	Unknown	PA	905	1851 (1482 + 166 + 203)	946 (105%)	The sum of the three TACs represents a rollover of the 2021 TAC and is between the “nep” (1786 t) and “ank” (2351 t) scenarios in the mixed fisheries considerations. ¹⁰⁴
Norway lobster	NEP/9/3411	nep.fu.2627 nep.fu.2829 nep.fu.30	WW 1.1.25	FU 28-29: SSB unknown Relative F < relative F _{MSY}	PA / MSY	316 (0 + 266 + 50) (266 for FU 28-29)	355 (305 for FU 28-29)	39 (12% overall 15% for FU 28-29)	The TAC represents a 5% cut compared to the 2021 TAC of 374 t. It covers several functional units (FUs) and, due to footnotes 1 and 2 in the Contested Act prohibiting catches in FU 26-27 and limiting catches in FU 30 to 50 t, ¹⁰⁵ is in line with the scientific headline advice for FU 26-27 (zero catch) and FU 30 (50 t), but not for FU 28-29 (355 t – 50 t = 305 t compared to advice for FU 28-29 of 266 t).
Common sole	SOL/7BC.	sol.27.7bc	WW 1.4	Unknown	PA	19	34	15 (79%)	The TAC represents a rollover of the 2021 TAC. No other scenarios are provided.
Cod	COD/03AS.	cod.27.21	NS 1.4	Unknown	PA	0	97 (by-catch)	97 (non-0 TAC)	The by-catch TAC equals the level of the most recent catch estimated for 2020. Footnote 2 in the Contested Act provides for

⁹⁹ 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 10. 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.

¹⁰⁰ This column indicates which Article in the relevant multiannual plan (MAP) the stock falls under (WW = Western Waters; NS = North Sea).

¹⁰¹ 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.

¹⁰² PA means the advice is based on the ICES precautionary approach; MSY means it is based on the ICES MSY approach.

¹⁰³ ICES (2021): Iberian waters – mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report <https://doi.org/10.17895/ices.advice.9151>; Table 3, p. 3.

¹⁰⁴ ICES (2021): Bay of Biscay – mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9182>; Table 3, p.4.

¹⁰⁵ Footnote (1): “*Shall not be taken in functional units 26 and 27 of 9a.*”; footnote (2): “*Within the limits of these quotas, no more than the following amount may be taken in functional unit 30 of 9a (NEP/9U30): 50.*”

Common species name	TAC code(s)	Advice code(s) ⁹⁹	MAP Article ¹⁰⁰	Stock / exploitation status ¹⁰¹	ICES advice basis ¹⁰²	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
									an additional allowance for vessels participating in REM trials. ¹⁰⁶
Norway lobster	NEP/8CU25	nep.fu.25	-	Relative SSB < B _{lim} Relative F < F _{MSY}	MSY	0	1.7	1.7 (non-0 TAC)	The monitoring TAC represents a rollover of the 2021 TAC and is reserved for a sentinel fishery through footnote 1 on the Contested Act. ¹⁰⁷

Table 4: List of 2022 EU/UK shared provisional TACs in the Contested Act exceeding the underlying scientific headline advice provided by ICES.

Common species name	TAC code(s)	Advice code(s) ¹⁰⁸	MAP Article ¹⁰⁹	Stock / exploitation status ¹¹⁰	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	Provisional: 202 (Final: 644) (by-catch)	Provisional: 202 Final: 644 (non-0 TAC)	The final 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). ¹¹¹ The provisional TAC as included in the Contested Act exceeds both the headline advice (zero catch) and the F _{MSY upper} X SSB ₂₀₂₂ /MSY B _{trigger} scenario (186 t) reflecting the low biomass level.
Whiting	WHG/07A.	whg.27.7a	WW 1.4	SSB < B _{lim} F > F _{lim}	MSY	0	Provisional: 289 (Final: 721) (by-catch)	Provisional: 289 Final: 721 (non-0 TAC)	The final 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). The provisional TAC as included in the Contested Act exceeds both the headline advice (zero catch) and the F _{MSY upper} X SSB ₂₀₂₂ /MSY B _{trigger} scenario (44 t) reflecting the low biomass level.
Cod	COD/5BE6A	cod.27.6a	WW 1.4	SSB < B _{lim}	MSY	0	Provisional:	Provisional: 320	The final by-catch TAC represents a rollover of the 2021 TAC. It is above any

¹⁰⁶ “In addition to these quotas, a Member State may grant to vessels flying its flag and participating in trials on remote electronic monitoring an additional allocation, within an overall limit of 30 % of the quota allocated to that Member State. Each vessel participating in trials on remote electronic monitoring shall take no more than 300 kg. Catches from this additional allocation shall be reported separately (COD/03AS_REM). This shall be without prejudice to the relative stability.”

¹⁰⁷ “Exclusively as part of a sentinel fishery to collect catch per unit effort (CPUE) data with vessels carrying observers on board, during five trips per month in August and September.”

¹⁰⁸ 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 10. 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.

¹⁰⁹ This column indicates which Article in the relevant multiannual plan (MAP) the stock falls under (WW = Western Waters; NS = North Sea).

¹¹⁰ 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.

¹¹¹ 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.

Common species name	TAC code(s)	Advice code(s) ¹⁰⁸	MAP Article ¹⁰⁹	Stock / exploitation status ¹¹⁰	ICES advice basis	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
				$F > F_{lim}$			320 (Final: 1279) (by-catch)	Final: 1279 (non-0 TAC)	MSY-related scenarios, and between the F_{pa} scenario (1182 t) and the saithe scenario (1319 t). ¹¹² The provisional TAC as included in the Contested Act exceeds both the headline advice (zero catch) and the $F_{MSY upper} \times SSB_{2021}/MSY B_{trigger}$ scenario (198 t) reflecting the low biomass level.
Cod	COD/5W6-14	cod.27.6b	WW 1.4	Unknown	PA	14	Provisional: 19 (Final: 74) (by-catch)	Provisional: 5 (36%) Final: 60 (429%)	The final by-catch TAC represents a rollover of the 2021 TAC. No other scenarios are presented. The provisional TAC as included in the Contested Act exceeds the headline advice.
Northern prawn	PRA/2AC4-C	pra.27.4a	-	Unknown	PA	0 (no target fisheries or landings)	Provisional: 165 (Final: 990) (by-catch)	Provisional: 165 Final: 990 (non-0 TAC)	The final 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. The provisional TAC as included in the Contested Act exceeds the headline advice.
Herring	HER/7G-K.	her.27.irls	-	Unknown	MSY	0	Provisional: 217 (Final: 869)	Provisional: 217 Final: 869 (non-0 TAC)	The final TAC represents a rollover of the 2021 TAC and corresponds to the "monitoring TAC" scenario. The provisional TAC as included in the Contested Act exceeds the headline advice.
Herring	HER/5B6ANB HER/6AS7BC	her.27.6a7bc	-	Unknown	PA	0	Provisional: 1210 (870 + 340) (Final: 4840 = 3480 + 1360)	Provisional: 1210 Final: 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. The provisional TAC as included in the Contested Act exceeds the headline advice.

¹¹² 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 " $F = 0.69 \times F_{2022}$ " 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.

110. 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.

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

111. 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.
112. 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 at 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.
113. 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 an MSY exploitation rate for each stock, and whether fixing a TAC at this rate 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, the Council must follow the best available scientific advice, which is the headline advice provided by ICES

114. 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*”.¹¹³ 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.
115. As stated in paragraphs 99-102 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 the purposes of the CFP Basic Regulation.

¹¹³ Article 3(c) of the CFP Basic Regulation. See also Article 6(2) of the CFP Basic Regulation.

116. 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”*.¹¹⁴
117. 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.
118. Moreover, insofar as provisional EU/UK TACs are concerned by this limb, an additional legal requirement to follow ICES advice applies. Indeed, Article 499 (2) of the TCA states that: *“If a stock [...] remains without an agreed TAC on 20 December, each Party shall set a provisional TAC corresponding to the level advised by ICES, applying from 1 January”*.

ICES general methodology

119. 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.
120. ICES Advice Background 2021 (Annex 12) 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.
121. 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.

¹¹⁴ Judgment of 15 December 2016, *TestBioTech eV and Others v European Commission*, T-177/13, ECLI:EU:T:2016:736, para. 79.

122. 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 advised catch is sustainable (...). This framework (...) was simulation tested for a range of stocks and in general was found to be appropriate*”.¹¹⁵ In the absence of a full range of data, 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 and therefore is the advice which is the closest possible to the MSY exploitation rate for that stock.
123. These two approaches rely upon two broad assessment tools:
- Fishing Mortality (‘F’)
 - Spawning Stock Biomass (‘SSB’ or ‘B’)
124. 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.
125. 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, 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 13** further illustrates the various biological reference points.
126. In order to calculate the recommended catch for a given year, ICES assesses fishing mortality and biomass level 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 B_{MSY} is not yet available.

¹¹⁵ Annex 12, p. 7.

127. 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.
128. 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 recognised by ICES which states that *“surplus 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} ”*.¹¹⁶
129. 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 $MSY B_{trigger}$.
130. A slightly different approach is taken by ICES for stocks covered by Articles 1(1) of the Western Waters Regulation and of the North Sea Regulation. For these stocks, it is possible to use ranges of fishing pressure around F_{MSY} .¹¹⁷ These possibilities (so-called F_{msy} ranges) are provided for by Articles 4(3), 4(4) and 4(5) of these two Regulations. According to Article 4(7) of the Western Waters Regulation, fishing opportunities ‘*shall in any event be fixed in such a way as to ensure that there is less than a 5% probability of the spawning stock biomass falling below B_{lim}* ’. In the case of each of the stocks addressed in this request for which MSY -based advice is available (i.e. certain provisional EU/UK stocks), the agreed TACs are associated with a fishing pressure far beyond F_{MSY} while the most recent estimates of biomass levels are far below any potential MSY -related biomass reference points, or even below B_{lim} . Therefore, the Western Waters Regulation approach is mentioned here out of completeness only.
131. 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.

¹¹⁶ Annex 12, p. 4.

¹¹⁷ This possibility is included in Articles 4(3), 4(4) and 4(5) of both Regulations.

132. 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 in the same fisheries. They do not constitute best available scientific advice for the purpose of reaching the objectives of Article 2(2) or 2(3) of the CFP Basic Regulation.
133. 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 which 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 to the EU. **It represents the maximum catch level not to be exceeded**,¹¹⁸ rather than a recommendation that the TAC should be set at that level exactly. Setting TACs 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, as well as of Article 499(2) of the TCA

134. As shown in Tables 3 and 4 inserted above, the Council has set 8 EU-only TACs and 8 provisional EU/UK shared TACs above the level recommended by ICES in its headline advice (several specific and detailed stock profiles are also included in **Annex 14**).
135. 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*”.¹¹⁹ 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 [...]*”.¹²⁰ 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.
136. It is therefore evident that the Council did not rely on evidence that “*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*”, in the sense of the case law.¹²¹

¹¹⁸ The ‘headline’ advice usually contains the wording “*catches in 2022 should be*” or “*there should be*”.

¹¹⁹ Judgment of 22 November 2017, *Commission v Bilbaina de Alquitranes SA et al.*, C-691/15P, ECLI:EU:C:2017:882, para. 35.

¹²⁰ 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.

¹²¹ Judgement of 15 December 2016, *TestBioTech*, Case T-177/13, *Ibid.*, para. 79.

137. ClientEarth submits therefore that the Council could not conclude that the Contested TACs will restore or maintain populations of harvested species above levels which can produce the MSY, in light of the best available science.
138. Equally, the Council could not conclude that the Contested provisional TACs will respect Article 499(2) of the TCA, which states clearly that *“If a stock [...] remains without an agreed TAC on 20 December, each Party shall set a provisional TAC corresponding to the level advised by ICES, applying from 1 January”*. Even though they were a 25% rollover of the corresponding 2021 TACs, these provisional TACs were not set in line with the TCA, as they already exceeded the levels recommended by ICES.
139. 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 MSY exploitation rates recommended by ICES after the legally binding deadline of 2020 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 recommended by ICES in its headline advice would comply with the MSY objective in Article 2(2) of the CFP Basic Regulation, since these catch levels are the pre-requisite to achieve MSY in the absence of more stock data. 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 CFP Basic Regulation precautionary approach to fisheries management

140. For a subset of the stocks covered by the previous section, available data is 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 this ICES headline advice. These TACs are set out in **Error! Reference source not found.** below and several specific and detailed stock profiles are included in Annex 14 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. It has been separated from the above section because specific legal considerations apply to TACs set based on a precautionary approach.

Table 5: List of 2022 TACs in the Contested Act exceeding precautionary advice provided by ICES. With the exception of the Northern prawn and herring stocks (PRA/2AC4-C, HER/5B6ANB + HER/6AS7BC), which are shared between the EU and the UK, these are EU-only stocks.

Common species name	TAC code(s)	Advice code(s) ¹²²	MAP Article ¹²³	Stock / exploitation status ¹²⁴	ICES advice basis ¹²⁵	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
Hake	HKE/8C3411	hke.27.8c9a	WW 1.1.20	Unknown	PA	6947	7836	889 (13%)	The TAC represents an 8% cut compared to the 2021 TAC of 8517 t and is between the “hke” (6947 t) and the “meg” (9921 t) scenarios in the mixed fisheries considerations. ¹²⁶
Pollack	POL/8ABDE. POL/08C. POL/9/3411	pol.27.89a	WW 1.4	Unknown	PA	905	1851 (1482 + 166 + 203)	946 (105%)	The sum of the three TACs represents a rollover of the 2021 TAC and is between the “nep” (1786 t) and “ank” (2351 t) scenarios in the mixed fisheries considerations. ¹²⁷
Norway lobster	NEP/9/3411	nep.fu.2627 nep.fu.2829 nep.fu.30	WW 1.1.25	FU 28-29: SSB unknown Relative F < relative F _{MSY}	PA / MSY	316 (266 for FU 28-29)	355 (305 for FU 28-29)	39 (12% overall 15% for FU 28-29)	The TAC represents a 5% cut compared to the 2021 TAC of 374 t. It covers several functional units (FUs) and, due to footnotes 1 and 2 in the Contested Act prohibiting catches in FU 26-27 and limiting catches in FU 30 to 50 t, ¹²⁸ is in line with the scientific headline advice for FU 26-27 (zero catch) and FU 30 (50 t), but not for FU 28-29 (355 t – 50 t = 305 t compared to advice for FU 28-29 of 266 t).
Common sole	SOL/7BC.	sol.27.7bc	WW 1.4	Unknown	PA	19	34	15 (79%)	The TAC represents a rollover of the 2021 TAC. No other scenarios are provided.
Cod	COD/03AS.	cod.27.21	NS 1.4	Unknown	PA	0	97 (by-catch)	97 (non-0 TAC)	The by-catch TAC equals the level of the most recent catch estimated for 2020. Footnote 2 in the Contested Act provides for an additional allowance for vessels participating in REM trials. ¹²⁹
Cod	COD/5W6-14	cod.27.6b	WW 1.4	Unknown	PA	14	Provisional: 19	Provisional: 5 (36%)	The final by-catch TAC represents a rollover of the 2021 TAC. No other scenarios are presented. The provisional TAC as included in the

¹²² 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 10. 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.

¹²³ This column indicates which Article in the relevant multiannual plan (MAP) the stock falls under (WW = Western Waters; NS = North Sea).

¹²⁴ 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.

¹²⁵ PA means the advice is based on the ICES precautionary approach; MSY means it is based on the ICES MSY approach.

¹²⁶ ICES (2021): Iberian waters – mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report <https://doi.org/10.17895/ices.advice.9183>; Table 3, p. 3.

¹²⁷ ICES (2021): Bay of Biscay– mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9182>; Table 3, p. 4.

¹²⁸ Footnote (1): “Shall not be taken in functional units 26 and 27 of 9a.”; footnote (2): “Within the limits of these quotas, no more than the following amount may be taken in functional unit 30 of 9a (NEP/*9U30): 50.”

¹²⁹ “In addition to these quotas, a Member State may grant to vessels flying its flag and participating in trials on remote electronic monitoring an additional allocation, within an overall limit of 30 % of the quota allocated to that Member State. Each vessel participating in trials on remote electronic monitoring shall take no more than 300 kg. Catches from this additional allocation shall be reported separately (COD/03AS_REM). This shall be without prejudice to the relative stability.”

Common species name	TAC code(s)	Advice code(s) ¹²²	MAP Article ¹²³	Stock / exploitation status ¹²⁴	ICES advice basis ¹²⁵	ICES advice in t	Agreed TAC in t	TAC excess in t (and %)	Comments on the level of the 2022 TACs
							(Final: 74) (by-catch)	Final:60 (429%)	Contested Act exceeds the headline advice.
Northern prawn	PRA/2AC4-C	pra.27.4a	-	Unknown	PA	0	Provisional: 164 (Final: 990) (by-catch)	Provisional: 164 Final: 990 (non-0 TAC)	The final 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. The provisional TAC as included in the Contested Act exceeds the headline advice.
Herring	HER/5B6ANB HER/6AS7BC	her.27.6a7bc	-	Unknown	PA	0	Provisional: 1210 (870 + 340) (final: 4840 = 3480 + 1360)	Provisional: 1210 Final: 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. The provisional TAC as included in the Contested Act exceeds the headline advice.

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

141. For these TACs for which less scientific data is available, Article 2(2) of the CFP Basic Regulation requires the precautionary approach to fisheries management to be followed. Article 4.1(8) of the same Regulation – which defines the precautionary approach – refers to Article 6 of the UN Fish Stocks Agreement,¹³⁰ which provides further guidance on how to implement the precautionary approach. Finally, Article 3(1) of the Western Waters Regulation and Article 3(1) of the North Sea Regulation also define the precautionary approach to fisheries management as an objective to follow when less scientific data on fish stocks is available.
142. More specifically, in order to implement the precautionary approach, the UN Fish Stocks Agreement¹³¹ – to which the EU is a Contracting Party – includes several requirements, *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.
143. This requirement is implemented in Article 4(8) of the CFP Basic Regulation, which states: 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*”.¹³² 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.
144. 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.
145. 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*”.¹³³

¹³⁰ 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.

¹³¹ Article 6 of the UN Fish Stocks Agreement.

¹³² Article 4(8) of the CFP Basic Regulation.

¹³³ Recital 10 of the CFP Basic Regulation.

146. 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*”.¹³⁴
147. ClientEarth’s view is that the margin of discretion of the Council in the implementation of the precautionary principle and of the precautionary approach to fisheries management is strictly limited by the obligation contained in Article 2(2) of the CFP Basic Regulation to reach the MSY objective by 2020 at the latest for all stocks. This includes stocks for which an ICES precautionary approach applies.
148. Therefore, also in this case, ICES headline advice has to be followed by the Council.
149. Finally, 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 of the CFP Basic Regulation.
150. 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*”.¹³⁵ 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*”.¹³⁶
151. 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 CFP Basic Regulation, the Council must follow the best available scientific advice, which is the precautionary advice provided by ICES

152. As required by Articles 2 and 3 of the CFP Basic Regulation, when there is uncertainty or limited knowledge and data as to a certain stock status, the overall approach followed by ICES for these TACs is “*to ensure that the advised catch is sustainable*”.¹³⁷ 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.¹³⁸
153. 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*”.¹³⁹

¹³⁴ 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.

¹³⁵ *Ibid.*, para. 47.

¹³⁶ *Ibid.*, para. 48.

¹³⁷ Annex 12, p. 7.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

154. 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.
155. As explained in paragraphs 99-102 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 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

156. It has been established above that:
- i. restoring and maintaining populations of fish stocks above levels which can produce the MSY is a legally-binding obligation which has to be implemented by setting MSY exploitation rates by 2020 at the latest;
 - ii. the precautionary approach is mandatory when fixing fishing opportunities; and
 - iii. the ICES headline advice constitutes the best available scientific advice based on a precautionary approach ensuring that the MSY exploitation rate would not be exceeded.
157. Nevertheless, in the Contested Act, the Council chose to depart from the ICES headline advice and fixed certain TACs at a level exceeding the MSY 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 as required by the case law, as set out under paragraphs 135-136 above
158. 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.
159. ClientEarth submits that the Council could not conclude that the Contested TACs will achieve the objective of restoring and maintaining populations of fish stocks above levels which can produce the MSY in light of the precautionary approach and of the best available science. 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 restore and maintain populations of fish stocks above levels which can produce the MSY and to set TACs for all stocks at levels capable of producing the MSY exploitation rate by 2020 at the latest for all stocks.

3rd limb: Stocks not set in accordance with the ecosystem-based approach to fisheries management

160. The Council failed to adopt an ecosystem-based approach when fixing 6 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 Tables 3 and 4, 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 6 below and further explanations are provided in Annex 14. 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 6 below is in addition to, and not alternative to, the first ground.

Table 6: List of 2022 TACs in the Contested Act set at levels projected to result in catches of at least one of the stocks in Tables 3 and 4 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) ¹⁴⁰	MAP Article ¹⁴¹	ICES advice in t	Agreed TAC in t	Other TACs affected and potential overshoot ¹⁴²	Comments on the level of the 2022 TACs
Norway lobster	NEP/03A.	nep.fu.3-4	NS 1.1.j	11993 for landings (based on F_{MSY}) ¹⁴³	8501	COD/03AS. (between 243 and 313 t overshoot of the TAC and between 340 and 410 t overshoot of the cod advice)	The majority of Kattegat cod catches originate from the Norway lobster fishery. The Norway lobster TAC was set in line with the projected landings associated with the $F_{MSY\ lower}$ scenario (10241 t for catches, assuming recent discard rates). According to the ICES Technical Service, ¹⁴⁴ cod accounts for 4% of catches in the Norway lobster fishery. This corresponds to cod catches of between 340 and 410 t (depending on the level of discarding of Norway lobster, i.e. whether total catches are limited to 8501 t, or discarding continues beyond this under exemptions). ¹⁴⁵ This is far above the agreed by-catch TAC of 97 t, which already exceeds the headline advice of zero catch.
Black-bellied and white anglerfish	ANF/8C3411	mon.27.8c9a ank.27.8c9a	WW 1.1.13	3868 (1969 + 1899, based on MSY)	3868	HKE/8C3411 (close to 21775 t overshoot of the TAC, and 22664 t overshoot of the hake advice)	Southern hake is both targeted and caught alongside other stocks in mixed fisheries, for example black-bellied and white anglerfish, megrim and four-spot megrim. ¹⁴⁶ The combined TAC for both anglerfish species was set in line with the sum of the single-stock advice of 1969 t (black-bellied anglerfish) and 1899 t (white anglerfish). This is closest to the “mon” scenario (1991 t for black-bellied anglerfish and 1899 t for white anglerfish), which would correspond to a projected catch of southern hake of 29611 t. ¹⁴⁷ This is almost 3.8 times the agreed hake TAC of 7836 t, meaning that if the anglerfish TAC is fully exhausted, the southern hake TAC (which itself already exceeds the advice of 6947 t) would be considerably overshoot. In turn, the “hke”

¹⁴⁰ 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 10.

¹⁴¹ This column indicates which Article in the relevant multiannual plan (MAP) the stock falls under (WW = Western Waters; NS = North Sea).

¹⁴² This column highlights TACs for stocks covered in Tables 1A 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 1A (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.

¹⁴³ ICES stock code “nep.fu.3-4”, ICES (2021): Norway lobster (*Nephrops norvegicus*) in Division 3.a, functional units 3 and 4 (Skagerrak and Kattegat). ICES Advice: Recurrent Advice. Report.

<https://doi.org/10.17895/ices.advice.7807>. The headline advice is based on F_{MSY} ranges, and the F_{MSY} point value scenario corresponds to a catch of 14449 t, or projected landings of 11993 t, as shown in Table 2, p. 2.

¹⁴⁴ ICES (2021): EU standing request on catch scenarios for zero-TAC stocks: cod (*Gadus morhua*) in Subdivision 21 (Kattegat). ICES Advice: Special Requests. Report.

<https://doi.org/10.17895/ices.advice.8217>.

¹⁴⁵ The Norway lobster TAC of 8501 t corresponds to the projected landings for the $F_{MSY\ lower}$ scenario of 10241 t catches. Assuming that the TAC is fully exhausted and the discard rate remains the same (i.e. 8501 t of Norway lobster are landed and the remaining 10241 t - 8501 t = 1740 t are discarded), and assuming selectivity for cod remains the same (i.e. 4% cod by-catch of the whole catch in that fishery), this would result in $0.04 * 10241\ t = 410\ t$ of cod by-catch. If there is no discarding beyond the agreed Norway lobster TAC of 8501 t, this would still correspond to cod catches of $0.04 * 8501\ t = 340\ t$.

¹⁴⁶ ICES (2021): Iberian waters – mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9183>

¹⁴⁷ *Ibid.*, Table 3 on p. 3, column “mon”, rows for “ank.27.8c9a”, “mon.27.8c9a” and “hke.27.8c9a”.

Common species name	TAC code(s)	Advice code(s) ¹⁴⁰	MAP Article ¹⁴¹	ICES advice in t	Agreed TAC in t	Other TACs affected and potential overshoot ¹⁴²	Comments on the level of the 2022 TACs
							scenario which follows the single-stock advice for hake, would allow for only 935 t of anglerfish (463 t for black-bellied and 472 t for white anglerfish) to be caught, ¹⁴⁸ i.e. only 24% of the agreed anglerfish TAC.
Megrim and four-spot megrim	LEZ/8C3411	meg.27.8c9a ldb.27.8c9a	WW 1.1.11	2445 (1892 + 553, based on MSY)	2445	HKE/8C3411 (between 2085 and 9428 t overshoot of the TAC, and between 2974 and 10317 overshoot of the hake advice)	See above. The combined TAC for megrim and four-spot megrim was set in line with the sum of the single-stock advice for both stocks (1892 t + 553 t = 2445 t). This is between the “meg” (1309 t + 553 t) and “ldb” (1892 t + 598 t) scenarios, and would be associated with between 9921 t (with the “meg” scenario) and 17264 t (with the “ldb” scenario) of hake. ¹⁴⁹ This means that, like for the anglerfish, if the megrim TAC is fully exhausted, this would result in a substantial overshoot of the agreed southern hake TAC of 7836 t which itself already exceeds the advice of 6947 t. In turn, the “hke” scenario which follows the single-stock advice for hake would allow for only 1135 t of megrim (334 t for megrim and 801 t for four-spot megrim) to be caught, ¹⁵⁰ i.e. only 46% of the agreed megrim TAC.
Norway lobster	NEP/8ABDE.	nep.fu.2324	WW 1.1.24	3880 for landings (6075 for total catch, based on MSY)	3880	POL/8ABDE. POL/08C. POL/9/3411 (no TAC overshoot, but 881 t overshoot of the pollack advice)	Pollack is caught alongside a number of other stocks like anglerfish, Norway lobster, sole and whiting, and is considered to be the most limiting stock for the Bay of Biscay demersal fisheries. ¹⁵¹ The Norway lobster TAC was set in line with the headline advice of 3880 t (for landings, corresponding to total catches of 6075 t), in line with the “nep” scenario, with corresponding pollack catches of 1786 t. ¹⁵² This is just below the sum of the agreed pollack TACs (1851 t), but still far above the ICES advice for pollack (905 t). In turn, the “pol” scenario which follows the single-stock advice for pollack would allow for only 1293 t of Norway lobster to be caught, ¹⁵³ i.e. only 38% of the agreed TAC (or even only 21% of the total catch of 6075 t corresponding to that landings-based TAC, assuming discarding continues as before).
Common sole	SOL/8AB.	sol.27.8ab	WW 1.1.35	2233 (based on $F_{MSY} \times SSB_{2022/MSY}$ $B_{trigger}$)	2233	POL/8ABDE. POL/08C. POL/9/3411 (no TAC overshoot, but likely overshoot of the pollack advice)	See above. The sole TAC was set in line with the headline advice of 2233 t. This is between the “pol” (1612 t) and the “hom” (2542 t) scenarios, and would correspond to catches of pollack between 905 t (“pol”) and 1393 t (“hom”). ¹⁵⁴ While this is below the sum of the agreed pollack TACs (1851 t), it still exceeds the pollack advice (905 t), given that the agreed sole TAC of 2233 t is closer to the “hom” scenario which corresponds to pollack catches of 1393 t. In turn, the “pol” scenario which follows the single-stock advice for pollack would allow for only 1612 t of sole to be caught, ¹⁵⁵ i.e. only 72% of the agreed sole TAC.
Whiting	WHG/08.	whg.27.8ab	WW 1.1.18	2276	2276	POL/8ABDE.	See above. The whiting TAC was set in line with the headline advice of 2276 t. This is

¹⁴⁸ *Ibid.*, Table 3 on p. 3, column “hke”, rows for “ank.27.8c9a” and “mon.27.8c9a”.

¹⁴⁹ *Ibid.*, Table 3 on p. 3, columns “meg” and “ldb”, rows for “ldb.27.8c9a”, “meg.27.8c9a” and “hke.27.8c9a”.

¹⁵⁰ *Ibid.*, Table 3 on p. 3, column “hke”, rows for “meg.27.8c9a” and “ldb.27.8c9a”.

¹⁵¹ ICES (2021): Bay of Biscay—mixed-fisheries considerations. ICES Advice: Recurrent Advice. Report. <https://doi.org/10.17895/ices.advice.9182>. P. 1.

¹⁵² *Ibid.*, Table 3 on p. 4, column “nep”, rows for “nep.fu.2324” and “pol.27.89a”.

¹⁵³ *Ibid.*, Table 3 on p. 4, column “pol”, row for “nep.fu.2324”.

¹⁵⁴ *Ibid.*, Table 3 on p. 4, columns “pol” and “hom”, rows for “sol.27.8ab” and “pol.27.89a”.

¹⁵⁵ *Ibid.*, Table 3 on p. 4, column “pol”, row for “sol.27.8ab”.

Common species name	TAC code(s)	Advice code(s) ¹⁴⁰	MAP Article ¹⁴¹	ICES advice in t	Agreed TAC in t	Other TACs affected and potential overshoot ¹⁴²	Comments on the level of the 2022 TACs
				(precautionary advice)		POL/08C. POL/9/3411 (potential TAC overshoot and likely overshoot of the pollack advice)	between the "sq_E" (1864 t) and "ank" (2833 t) scenarios, with corresponding pollack catches between 1540 t ("sq_E") and 2351 t ("ank"). ¹⁵⁶ Given that it is about halfway between both scenarios it would be expected to overshoot both the single-stock advice for pollack (905 t) and the sum of the agreed pollack TACs (1851 t). In turn, the "pol" scenario which follows the single-stock advice for pollack would allow for only 1056 t of whiting to be caught, ¹⁵⁷ i.e. only 46% of the agreed whiting TAC.

¹⁵⁶ *Ibid.*, Table 3 on p. 4, columns "sq_E" and "ank", rows for "whg.27.89a" and "pol.27.89a".

¹⁵⁷ *Ibid.*, Table 3 on p. 4, column "pol", row for "whg.27.8ab".

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

161. 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).
162. The Western Waters Regulation and the North Sea Regulation confirm the mandatory application of the ecosystem-based approach: their respective Recitals 4 state that “*The 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 their respective Articles 3 provide 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. 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 follow the best available scientific advice, which is the ecosystem-based approach as advised by ICES

163. 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.
164. The purpose of this approach is to enhance 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, if implemented, this means that the TAC for certain target stocks will have to be set below the MSY exploitation rate in order to ensure that this MSY objective can also be reached for stocks caught as by-catch in this fishery.

165. In this context, in addition to the scientific single-stock advice, ICES provides ecosystem overviews and mixed fisheries considerations which highlight trade-offs between catch levels of different species.¹⁵⁸ 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 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 caught in the mix.¹⁵⁹
166. This approach can be illustrated with an example, such as the cod stock found under the TAC code COD/03AS (Kattegat cod), which is a by-catch of the target Norway lobster fishery. The ICES headline advice for that cod stock was 0 tonnes, and a by-catch TAC was set by the Council at 97 tonnes. Accordingly, to follow the ecosystem-based approach, when determining the TAC for Norway lobster, the Council was obliged to set it at a level that was consistent with the TAC for cod.
167. 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.
168. 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 do not only not exceed the relevant single-stock advice provided by ICES for the stock in question, but that also do not risk overshooting the advice for other stocks in the same fisheries either. 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 caught in the same fisheries and are in a bad or unknown state.

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

169. For all the TACs listed in Table 6, ClientEarth submits that the Council followed a single species approach instead of an ecosystem-based approach, as required.

¹⁵⁸ For example, ICES (2021): Bay of Biscay and Iberian Coast ecoregion – Fisheries overview. ICES Advice: Fisheries Overviews. Report. <https://doi.org/10.17895/ices.advice.9100>

¹⁵⁹ 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/>

170. To return to the example described in paragraph 166 above, the Council set a TAC of 8501 tonnes for Norway lobster. However, ICES indicates that Kattegat cod represents 4% of the catches in the Norway lobster fishery, a fact which would set the real catches of Kattegat cod at a level estimated between 340 and 410 tonnes. By following a single species approach and failing to implement an ecosystem-based approach to fisheries management, which would have implied to set the Norway lobster TAC at lower levels to respect both the by-catch TAC and ICES advice, the Council committed a manifest error of assessment.
171. For all the TACs included in Table 6, 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 135-136 above.
172. By failing to implement the ecosystem-based approach to fisheries management for the TACs listed in Table 6, 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 the MSY objective, which applies to all stocks, can also be reached for by-catch stocks in the relevant fisheries.

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 Article 2(2) of the CFP Basic Regulation

173. 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*”.¹⁶⁰
174. 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 Article 2(2) 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 without taking into consideration whether or not that will achieve the objectives of Article 2(2).

175. The Council thereby also evaded a procedure specifically prescribed by the Treaties, namely the ordinary legislative procedure prescribed by 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:
- i. 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
 - ii. derogating from or postponing the legally binding deadline to set TACs at the MSY exploitation rates for all stocks by 2020 at the latest for the Contested TACs.
176. 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) and 2(2) 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.

5. Conclusion

177. 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 finally or provisionally set for certain fish stocks for 2022. We hereby ask the Council of the European Union to review Council Regulation (EU) 2022/109 of 27 January 2022 in accordance with the Aarhus Regulation.
178. 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/03AS.)
 - Cod (COD/7XAD34)
 - Whiting (WHG/07A.)
 - Cod (COD/5BE6A)
 - Northern prawn (PRA/2AC4-C)
 - Hake (HKE/8C3411)
 - Pollack (POL/8ABDE., POL/08C., POL/9/3411)
 - Norway lobster (NEP/9/3411)
 - Common sole (SOL/7BC.)
 - Herring (HER/7G-K.)
 - Herring (HER/5B6ANB and HER/6AS7BC)
 - Norway lobster (NEP/8CU25).

179. ClientEarth asks the Council to apply the ecosystem-based approach to fisheries management and therefore, for the following target stocks caught in mixed fisheries, set TACs at a level which will ensure that ICES headline advice for their by-catch stocks is not overshoot:

- Norway lobster (NEP/03A.)
 - Black-bellied and white anglerfish (ANF/8C3411)
 - Megrim and four-spot megrim (LEZ/8C3411)
 - Norway lobster (NEP/8ABDE)
 - Common sole (SOL/8AB.)
 - Whiting (WHG/08.)
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