European Ombudsman

Emily O'Reilly
European Ombudsman

Decision

in case 640/2019/TE on the transparency of the Council of the EU's decision-making process leading to the adoption of annual regulations setting fishing quotas

The complaint concerned the transparency of the decision-making process in the Council of the EU, leading to the adoption of the annual regulations setting total allowable catches (TACs) of certain fish stocks in the Northeast Atlantic for 2017, 2018 and 2019. The complaint was submitted by the environmental law organisation ClientEarth.

The complainant was concerned that the Council (1) failed to record the positions of Member States expressed in Council 'preparatory bodies' of national civil servants and Ambassadors, as well as in meetings of the Council of Ministers, (2) failed to provide timely access to legislative documents, proactively and upon request, and (3) has in place an incomplete register of documents that is difficult to use.

The Ombudsman took the view that the documents in question are 'legislative documents', as defined in the EU rules on public access to documents. In addition, the documents contain 'environmental information' within the meaning of the Aarhus Regulation. Wider and more timely access should be granted to such documents. The Ombudsman also found that the Council had not demonstrated that disclosing the documents would seriously affect, prolong or complicate the decision-making process.

The Ombudsman therefore recommended that the Council should proactively make available documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter.

The Council has chosen not to follow the Ombudsman's recommendation. This is disappointing. Furthermore, it suggests the Council has failed fully to grasp the critical link between democracy and the transparency of decision-making regarding matters that have a significant impact on the wider public. This is all the more important when the decision-making relates to the protection of the environment.

The Council's position appears to be that a key democratic standard - legislative transparency - must be sacrificed for what it considers to be the greater good of achieving a consensus on a political issue.

The Ombudsman confirms her finding of maladministration and her recommendation.

1 avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

T. + 33 (0)3 88 17 23 13
F. + 33 (0)3 88 17 90 62

www.ombudsman.europa.eu
eo@ ombudsman.europa.eu

Background to the complaint

1. The complaint concerns the transparency of the decision-making process leading to the adoption of the annual regulations setting 'total allowable catches' (TACs) for certain fish stocks in the Northeast Atlantic. TACs aim, among other things, to maintain fish stocks at sustainable levels, which is a fundamental objective of the **EU's Common Fisheries Policy Regulation**[1] (CFP Regulation).[2]

2. TAC Regulations are adopted by the Council following a procedure set out in the Treaty on the Functioning of the European Union (TFEU)[3]. In line with this procedure, each year the European Commission prepares a proposal for the annual TAC Regulation, based on scientific advice from advisory bodies. It usually adopts its proposal for the Northeast Atlantic TAC in **late October or early November**. Following this, national civil servants meet weekly in one of the 'preparatory bodies' of the Council[4], the Working Party on Internal Fisheries Policy, to discuss the Commission's proposal. Based on these preparatory discussions, the Committee of Permanent Representatives (Ambassadors in COREPER) holds negotiations on the proposal about one week before the Agriculture and Fisheries Council, at which the final TAC Regulation is adopted by the attending ministers. This takes place usually in **mid-December**.

3. The complainant, the environmental law organisation ClientEarth, analyses each year how the TAC proposals and the final TAC Regulation comply with the requirements of the CFP Regulation. The Council may adopt TACs that are at odds with the applicable scientific advice only if it can provide scientific evidence or can show that respecting the scientific advice would pose serious social and economic risks for the fishing fleets and communities involved.

4. For its annual analysis, the complainant requires a range of information. To this end, between 2017 and 2019, it made several requests for public access to documents[5] held by the Council relating to the decision-making process leading to the adoption of the TAC Regulation.

5. Dissatisfied with the outcome of its requests, the complainant turned to the Ombudsman on 8 April 2019.

---

[1] Regulation (EU) No 1380/2013 on the Common Fisheries Policy: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1380&from=EN

[2] More information on TACs: https://ec.europa.eu/fisheries/cfp/fishing_rules/tacs_en.

[3] Article 43(3) of the TFEU.

[4] The Council is supported by the Committee of Permanent Representatives of the Governments of the Member States to the European Union (COREPER) and more than 150 highly specialised working parties and committees, known as the 'Council preparatory bodies'. These bodies cover specific policy areas or subjects and, among other things, prepare the Council's positions. https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/.

[5] In line with the EU's rules on public access to documents. Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049.

The Ombudsman's recommendation

6. In her recommendation,[6] the Ombudsman considered that the documents relating to the adoption of the annual TAC Regulation fall within the broad definition of 'legislative documents' in the EU rules on public access to documents and should, accordingly, benefit from the **wider** access to be granted to such documents.[7] The Ombudsman also considered the documents to contain environmental information within the meaning of the Aarhus Regulation.[8] The Ombudsman therefore concluded that the exception in the EU rules on public access to documents, which states that access to a document shall be refused if disclosure would seriously undermine the institution's decision-making process[9], has to be interpreted restrictively[10].

7. The Ombudsman also noted that documents relating to the adoption of the annual TAC Regulation **exist**, at least from the end of November onwards each year. These documents give a comprehensive overview of the different positions expressed by Member State delegations during negotiations. Most notable of these is a document referred to as the 'bible'. The Ombudsman found that it is exactly this type of information that the public, such as the complainant, would need in order to influence the ongoing decision-making process. However, she also found that the Council did not make documents related to the adoption of the TAC Regulations for 2018 and 2019 publicly accessible while the decision-making was ongoing.[11] Instead, documents were systematically marked as 'LIMITE', meaning that the Council does not make such documents directly accessible to the public on its website.

8. The Ombudsman reiterated her position[12] that restrictions on access to legislative documents should be both exceptional and limited in duration to what is absolutely necessary. The 'LIMITE' status should apply only to those documents which, at the point of assessment, are exempt from disclosure on the basis of one of the exceptions provided for in the EU rules on public access to documents.

---

[6] The recommendation is available here: https://www.ombudsman.europa.eu/en/recommendation/en/120761

[7] Article 12(2) of Regulation 1049/2001.

[8] [8] Regulation 1367/2006 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006R1367

[9] Article 4(3) of Regulation 1049/2001.

[10] Article 6(1) second sentence of Regulation 1367/2006; see also Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 100: http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en.

[11] With the main exception being those documents that have to be made directly accessible in line with the Council's rules of procedure, see Articles 11(3) and (5), Annex II, such as the Commission proposal.

[12] See also Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, para. 36, available at: https://www.ombudsman.europa.eu/en/special-report/en/94921

9. In essence, the Council argued that releasing documents, such as the 'bible', before the final TAC Regulation is adopted, would undermine the ongoing decision-making process, as protected by one of the exceptions in the EU rules on public access to documents[13].

10. The Ombudsman was not convinced by this argument. She found that the Council had not demonstrated that disclosure of the documents in question would seriously affect, prolong or complicate the proper conduct of the decision-making[14].

11. In light of the above, the Ombudsman concluded that the Council's systematic marking of documents related to the adoption process of the annual TAC Regulations for 2018 and 2019 as 'LIMITE' constituted maladministration. She therefore recommended (in accordance with Article 3(6) of the Statute of the European Ombudsman) that:

> ***The Council should proactively make public documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter.***

12. In its reply to the Ombudsman's recommendation, the Council reiterated its position that releasing documents, such as the 'bible', before the final TAC Regulation is adopted, would undermine the ongoing decision-making process. To support its position, the Council put forward three main arguments.

13. First, the Council confirmed its view that, while the requirements for transparency are greater where the Council is acting in the framework of legislative activities, the requested documents were drawn up in the context of a procedure leading to the adoption of a non-legislative act. Therefore, "*the higher standard of transparency, that applies when the institutions act in the context of a legislative process, does not bear the same weight as regards the decision-making procedure concerned by the inquiry at issue*".[15]

14. Second, the Council acknowledged that the documents at issue in this inquiry may contain environmental information and that, in accordance with the Aarhus Regulation[16], the grounds for refusal set out in the first subparagraph of Article 4(3) of the EU rules on public access to documents have to be interpreted in a restrictive way in such cases. However, the Council noted that the Aarhus Regulation "*does not preclude the possibility to rely on the exception related to the protection of the decision-making process nor sets the automatic pre-eminence of an overriding public interest*".[17]

---

[13] Article 4(3) of Regulation 1049/2001.
[14] Judgment of the Court (Grand Chamber) of 4 September 2018, ClientEarth v Commission, C-57/16, para. 108: http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en.
[15] Para. 17 of the Council's Opinion: https://www.ombudsman.europa.eu/en/correspondence/en/124286.
[16] Article 6(1).
[17] Para. 5 of the Council's Opinion.

15. Third, and taking into account the above considerations, the Council maintained its position that proactive disclosure of the documents at issue would seriously undermine the decision-making leading to the adoption of the annual TAC Regulation:

> *"If documents detailing the state of negotiations and consolidating positions of Member States were released in the course of negotiations in this context, this would risk freezing the respective positions and limit the flexibility of Member States to shift from their initial positions as well as their willingness to compromise, which are key to successfully reaching an agreement at Council level. The disclosure of initial positions of Member States ahead of deliberations would lead to more entrenched positions and reduce their margin of manoeuvre to compromise, jeopardising thus an agreement during Council deliberations. This applies not only in the phase of the decision-making procedure leading to the political agreement but is also relevant in the phase leading to the adoption of the legal texts by actual vote within the Council. Disclosure would therefore limit the possibility to discuss in serenity and agree, which would, in turn, run counter to the efficiency of the decision-making process".*[18]

16. The Council further argued that this risk of seriously undermining the decision-making process is not purely hypothetical, but reasonably foreseeable. To support its argument, the Council stated that proactive disclosure of the documents at issue would:

- delay the successful outcome of Council deliberations, as Member States need to balance different interests at stake for more than a hundred fish stocks in preparing their initial positions;

- entail external pressure as the context in which the negotiations take place is highly politicised and subject to external attention; and

- require a comprehensive case-by-case assessment of the individual information contained in the documents in order to verify whether or not exceptions laid down in the EU rules on access to documents prevent such a disclosure. Furthermore, such assessments require consultation of relevant participants before disclosing sensitive information pertaining to them.

17. In light of the above, the Council confirmed its view that it cannot proactively disclose the documents at issue in this inquiry in a systematic way. This conclusion is also in line with the Council's Rules of Procedure, according to which the Council may make public documents (in a context of a legislative or non-legislative process) only if they are clearly not covered by any of the exceptions laid down in the EU rules on public access to documents.

[18] Para. 28 of the Council's Opinion.

The Ombudsman's assessment after the recommendation

18. As regards the first argument put forward by the Council, that a higher standard of transparency applies only when the institutions are acting in the context of a legislative process, the Ombudsman first wishes to reiterate one of the main points made in her recommendation: A general requirement of openness and transparency applies to the conduct of the EU institutions' work - whether it is legislative in nature or not.

19. This requirement is enshrined in Article 15 of the Treaty on European Union.[19] It is also reflected in the EU rules on public access to documents, which require that "[t]*he institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned*".[20] In other words, **all** documents that fall under the definition of a 'document' in the EU rules on public access to documents, independent of their nature, must be made directly accessible "*as far as possible*". Access to documents may be restricted only where one (or several) of the exceptions set out in the rules[21] applies.

20. At the same time, it is evident that particular decision-making processes, especially those that lead to acts which are directly binding on the Member States and, either directly or indirectly binding, on citizens, require an even higher standard of transparency. This is certainly the case when the institutions are acting in their legislative capacity. As the Court noted in *Turco*, "[o]*penness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights*".[22] The Ombudsman understands that the fundamental idea underlying the Court's reasoning is that there are decision-making processes that are of particular importance to the public and therefore require a particularly high standard of transparency.

21. This reasoning is reflected in the broad definition of 'legislative documents' in the EU rules on public access to documents, which is **not** restricted to documents drawn up in the context of a formal 'legislative procedure', but which includes all "*documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States*". All such

---

[19] According to Article 15(1) TEU, *"[i]n order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible"*. To this end, *"[e]ach institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents"* (Article 15(3) TEU).

[20] Article 12(1) of Regulation 1049/2001.

[21] Article 4 of Regulation 1049/2001.

[22] Judgment of the Court (Grand Chamber) of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, Joined cases C-39/05 P and C-52/05 P, para. 46: http://curia.europa.eu/juris/liste.jsf?num=C-39/05&language=en.

documents, *"in particular"*, should be made directly accessible, subject to the exceptions laid down in these rules.[23] As the Ombudsman noted in her recommendation, this broader definition of 'legislative documents' has been emphasised by the Court of Justice of the EU in a judgment of 2018:

> *"it is apparent from Article 12(2) of Regulation No 1049/2001 ... that not only acts adopted by the EU legislature, but also, more generally, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, fall to be described as 'legislative documents' and, consequently, subject to Articles 4 and 9 of that regulation, must be made directly accessible"*.[24]

22. The distinction between 'legislative acts' and 'non-legislative acts' in the Treaties is of a formal nature. As the Council rightly noted in its reply to the Ombudsman, only legal acts adopted by a legislative procedure set out in Article 289 TFEU can formally be referred to as 'legislative acts'. The Ombudsman also accepts that the legal basis for the TAC Regulation, Article 43(3) TFEU, does not concern, formally, the adoption of 'legislative acts' within the meaning of the Treaties.

23. The Ombudsman does not, however, consider this formal distinction to be critical in determining the standard of transparency that should apply to the adoption of an act, in line with the above considerations. The crucial issue is whether the decision-making process concerns the adoption of acts which are legally binding in or for the Member States. This logic is reflected in the Council's own Rules of Procedure. Article 8 of these rules states that:

> *"[w]here* ***a non-legislative proposal is submitted to the Council relating to the adoption of rules which are legally binding in or for the Member States, by means of regulations, directives or decisions****, on the basis of the relevant provisions of the Treaties, with the exception of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions),* ***the Council's first deliberation on important new proposals shall be open to the public****"*.[25]

The Council's Rules of Procedure thus acknowledge that there are non-legislative proposals relating to the adoption of rules which are legally binding in or for the Member States, which are important and should therefore, like 'legislative' proposals, be deliberated upon publicly in the Council.

---

[23] Article 12(2) of Regulation 1049/2001.

[24] Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 85: http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en.

[25] Emphasis added. At the same time, the Ombudsman notes that the Council Rules of Procedure do not follow the broad definition of "legislative documents" in Article 12(2) of the EU rules on public access to documents, but define a legislative document as "*any document drawn up or received in the course of procedures for the adoption of a legislative act*". Such a restrictive approach is regrettable.

24. As the Council stated in its reply to the Ombudsman, "*in preparing their initial position [on the TACs], Member States need to juggle between different interests (industry vs. environment, small vs. large-scale fisheries etc.) for more than a hundred stocks*".[26] Furthermore, the Council pointed out that the "*decision-making process at stake takes place in a context that is highly politicised and is subject to intense external attention*".[27] It follows from these statements that there is a considerable public interest in the decision-making process at stake in this inquiry, as it involves reconciling and balancing significant environmental, economic and social interests.

25. The Ombudsman considers that the Council's insistence, within the scope of this inquiry, on the formal distinction between legislative and non-legislative acts is not in line with the spirit of the Treaties and the EU rules on public access to documents, which require a high standard of transparency in EU decision-making and the taking of decisions as closely as possible to the citizen.

26. In light of the above, the Ombudsman is not convinced by the Council's first argument, according to which only acts, which are formally adopted via a legislative procedure set out in Article 289 TFEU, should benefit from the higher standard of transparency attributed to legislative documents in the EU rules on public access to documents. To the contrary, the Ombudsman confirms her position that the documents at issue in this inquiry should be considered 'legislative documents' for the purposes of Regulation 1049/2001.

27. As regards the Council's second argument, the Ombudsman welcomes the Council's acknowledgement that the documents at stake in this inquiry may contain environmental information within the meaning of the Aarhus Regulation. She agrees with the Council's view that access to environmental information may still be refused if disclosure would seriously undermine an ongoing decision-making process. However, the Ombudsman reiterates that the exception in the EU rules on public access to documents, which states that access to a document shall be refused if disclosure would seriously undermine the institution's decision-making process[28], has to be interpreted in a restrictive way as regards environmental information[29]. Furthermore, contrary to what the Council seems to imply in its reply to the Ombudsman[30], this requirement of a restrictive interpretation of the exception when environmental information is

[26] Para. 29 of the Council's Opinion.
[27] Para. 30 of the Council's Opinion.
[28] Article 4(3) of Regulation 1049/2001.
[29] Article 6(1) second sentence of Regulation 1367/2006; see also Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 100: http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en.
[30] Paragraph 19 of the Council's Opinion reads: "*Concerning Article 6(1), second sentence, of Regulation (EC) No 1367/2006, the Court has indeed held in its Client Earth ruling that, read in the light of Recital (15) thereof, in particular, the ground for refusal set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001 is to be interpreted in a restrictive way as regards environmental information, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information. It should be borne in mind, however, that this judgment was rendered in the context of an EU legislative process in respect of environmental matters and concerned documents which determined whether or not the Commission would initiate a legislative procedure under the Treaties*".

concerned is **not** affected by the legislative or non-legislative nature of the documents in question.

28. Finally, the Council argued that the risk of seriously undermining the decision-making process, in case of proactive disclosure, would not be purely hypothetical, but reasonably foreseeable. In essence, the Council argued that disclosure of documents, especially those containing evolving Member State positions, would limit the possibility to discuss these matters serenely and to find agreement. This, according to the Council, is evidenced by the important different interests at stake in this decision-making process, by the significant external pressure that may be put on decision-makers due to the important economic and environmental interests at stake, the attention the decision-making process attracts (the Council mentions the example of lobbyists trying to enter the Council's premises with press badges) and by the need to analyse comprehensively all documents before disclosure.

29. The Ombudsman is not convinced by the Council's arguments. She reiterates her conviction that the possibility for the public, including those members of the public with a significant interest in the outcome of the negotiations, be they economic interests or environmental interests, to express views is an integral part of the exercise by EU citizens of their democratic rights.[31] The Ombudsman's understanding is that past disclosure of documents relating to ongoing legislative files containing individual delegations' positions has not tended to disrupt the decision-making process. She has not been presented with evidence in this case that would suggest that the outcome would be any different.

30. The Ombudsman therefore confirms her position that the Council has not demonstrated that disclosure of the documents in question would seriously affect, prolong or complicate the proper conduct of the decision-making.[32]

31. On the basis of the above, the Ombudsman reaffirms her conclusion that the Council's systematic marking of documents related to the adoption process of the annual TAC Regulations for 2018 and 2019 as 'LIMITE' constituted maladministration.

[31] Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 101: http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en.
[32] Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 108: http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

The Ombudsman is not satisfied with the Council's reply to her recommendation. The Ombudsman reiterates her recommendation that the Council should proactively make public documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter.

The complainant and the Council will be informed of this decision.

Emily O'Reilly
European Ombudsman

Strasbourg, 29/04/2020