



Brussels, 10 September 2020  
(OR. en)

9063/20

LIMITE

INF 128  
API 88  
OMBUDS 14  
JUR 289  
INST 118

**NOTE**

---

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	5266/20, 7691/20
Subject:	Complaint 640/2019/TE - European Ombudsman final decision - Approval of reply letter

---

1. Following the Council's Detailed Opinion of 27 January 2020<sup>1</sup> in the above-mentioned complaint, the European Ombudsman adopted its final decision and Recommendation on 29 April 2020.<sup>2</sup>
2. The said Recommendation concerns the Council's decision-making process leading to the adoption of annual regulations fixing the fishing opportunities for certain fish stocks and groups of fish stocks, and their respective total allowable catches ("TACs").
3. In June 2020, the Working Party on Internal and External Fisheries Policy was informed of the said Recommendation and acknowledged the need to prepare a reply letter to the Ombudsman.

---

<sup>1</sup> Document 5266/20.

<sup>2</sup> Document 7691/20.

4. Subsequently, and after consultations held in July 2020 between the Presidency and the Council's Legal service, it was considered appropriate to reply to the said Ombudsman's decision, in particular, because the Council's decision-making process leading to the adoption of the TACs for 2021 has already started.
5. To that end, delegations will find herewith a Council's draft reply letter.

---

*DRAFT LETTER*

Brussels, ... September 2020

Ms Emily O'Reilly  
European Ombudsman  
1, avenue du Président Robert Schuman  
CS 30403  
F - 67001 Strasbourg Cedex  
France

**Subject: Ombudsman's decision of 29 April 2020 in case 640/2019/TE**

Dear Ms O'Reilly,

The Council refers to the Ombudsman's decision of 29 April 2020 in case 640/2019/TE concerning the Council decision-making process leading to the adoption of annual regulations fixing the fishing opportunities for certain fish stocks and groups of fish stocks, including the related total allowable catches ("TACs").

The Council takes note of the Ombudsman's recommendation to proactively make public documents at the time they are circulated to Member States or as soon as possible thereafter. In this respect the Council would like to reiterate the following views contained in its detailed Opinion of 27 January 2020 (Council document 5266/20).

To begin with, much of the Ombudsman's reasoning, including the case-law relied upon, is based on the assumption that this case would concern acts adopted by legislative procedure. However, in accordance with the Treaty, the TACs are adopted by the Council in a non-legislative procedure. This is fully in line with the most recent case-law about the distinction pursuant to the Treaty, between legislative and non-legislative acts-

In this context, it should also be recalled that the applicable voting rule for the adoption of TACs, pursuant to Article 43(3) TFEU in conjunction with Article 16(3) TEU, is qualified majority and not consensus.

In addition, the case-law recognises that the risk of external pressure can constitute a legitimate ground for restricting access to a document related to a decision-making process. In this regard, the Council had underlined how there is a concrete and not purely hypothetical risk of strong external interference exercised by stakeholders.

In light of the above and for the reasons already expressed in its Opinion of 27 January 2020, the Council maintains the view that its practice to make the relevant documents publicly available as soon as the exception under Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 ceases to apply is fully in line with the legal obligations incumbent upon the Council and does not constitute an instance of maladministration.

Yours sincerely,

For the Council

The President