

EU FISHERIES CONTROL COALITION











Article 113: the Achilles' heel of sustainable EU fisheries

The year is 2020. European Union Law is entirely freed from the authorship rule. Well, not entirely... One small provision in the fisheries Control Regulation holds out against transparency. And life is not easy for decision makers, fishers and civil society organisations who work on the implementation of the Common Fisheries Policy.

This fact sheet, based on an in-depth legal study, argues that Article 113 of the EU Fisheries Control Regulation is incompatible with EU rules on access to documents and environmental information. To bring EU fisheries in line with EU transparency rules, the fact sheet proposes amendments to ensure that EU decision makers (including Members of the European Parliament) and EU citizens have the information necessary to assess whether the Common Fisheries Policy is effectively being controlled, monitored and enforced.

The past two decades have seen a sea change in access to public information in Europe, moving from a presumption of confidentiality to a presumption of transparency. But this “freedom of information” has not reached the troubled waters of EU fisheries.

The content of Article 113 (2) and (3): Member States can veto transparency without any reason

Article 113 of the EU Fisheries Control Regulation (1224/2009) deals with fisheries data exchanged between the Member States and the European Commission. It prohibits this data (a) being shared with anyone unless their job means they need to have it and (b) being used for any purpose other than what is specifically described in the Control Regulation.

Article 113

2. The data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent.
3. The data referred to in paragraph 1 shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.

This is a reincarnation of the old 'authorship rule', which prevailed before the freedom-of-information era and allowed the EU institutions to refuse access to documents that had not been authored by them. Indeed, the strict wording of Article 113 has been interpreted by the General Court of the European Union as **allowing Member States to veto the disclosure of all the information collected under the Fisheries Control Regulation without having to give any reasons (Case T-653/16)**. This wording and interpretation, which has not yet been considered by the European Court of Justice, makes vital environmental data generated by Member States under the Control Regulation subject to one of the strictest confidentiality rules currently in force in EU Law.

The problem with Article 113 (2) and (3): the European Parliament cannot scrutinise implementation of fisheries rules

Article 113 (2) and (3) of the Control Regulation, as interpreted by the General Court, does not comply with the EU rules on transparency. Indeed, much of the information at stake constitutes "environmental information" within the meaning of Article 2(1)(d) of the Aarhus Regulation, which guarantees "*the right of public access to environmental information received or produced by Community institutions or bodies and held by them*". The principles and conditions to implement this transparency are further specified in Regulation 1049/2001 on access to European Parliament, Council and Commission documents (Access to Documents Regulation).

Article 4 of the Access to Documents Regulation sets out a closed list of exceptions to the right of access to documents. Those exceptions should, according to the European Courts, be construed and applied strictly. In particular, Article 4 (5) allows Member States to object to the disclosure of documents, but only on the basis of the exceptions – such as commercial interests and the protection of personal data – laid down in Article 4 (1) to (3). And, crucially, the Member State must give proper reasons for its objection. Indeed, the Court of Justice of the EU confirmed that Article 4 (5) does not reinstate the "authorship rule" and does not confer on the Member State concerned a general and unconditional right of veto.

The general and unconditional right to veto in Article 113 is therefore incompatible with the Aarhus Regulation and the Access to Documents Regulation; and it disproportionately undermines the right to access documents contained in Article 42 of the Charter of Fundamental Rights. Moreover, the broad scope of Article 113 is a big part of the reason why there is so little information in the public domain on European fisheries. Indeed, the Control Regulation applies to "*all activities covered by the common fisheries policy carried out on the territory of Member States or in Community waters or by Community fishing vessels or, [...] by nationals of Member States*".

Decision makers (in particular in national parliaments and in the European Parliament), fishers, consumers and civil society organisations do not have the information necessary to assess whether the Control Regulation is effectively being implemented. This lack of transparency creates a culture of mistrust and the potential for misinformation and mismanagement, ultimately jeopardising the objectives of the Common Fisheries Policy (CFP). In the Commission's words (SWD(2017) 134 final, p.2), "*the success of the Common Fisheries Policy depends very much on the implementation of an effective control system*", but the effectiveness of the control system is undermined by the unnecessary and disproportionate secrecy in Article 113.

It should be noted that this battle between access to information and confidentiality requirements is not new. A clear example of this was when the Commission introduced uniform rules on defeat devices in the wake of the Dieseltgate scandal. The new rules contained a blanket requirement for public authorities and EU institutions to keep crucial information to ascertain the existence of defeat devices strictly confidential, a provision that was challenged in the EU General Court because it breached the Aarhus Convention and

the public's right to access information on emissions (case T-667/17). The Commission therefore withdrew the provision.

The solution: amending Article 113 to bring it in line with EU rules on access to documents and environmental information

We call on Members of the European Parliament and the Council to seize the opportunity of the revision of the Control Regulation to amend Article 113. This is their chance to ensure environmental accountability by bringing EU fisheries in line with EU transparency rules.

We are advocating for an approach that balances competing needs, not for unfettered public access to data. Disclosure of certain data may undermine commercial interests or indeed any other justified interests. **We therefore propose to use the EU's existing world-class transparency frameworks to ensure an appropriate balance between the public interest in disclosure of fisheries data and the private and public interest in secrecy.**

The proposed amendments set out below ensure that the EU rules on access to documents and environmental information regulate public access to data collected under the Fisheries Control Regulation.

Current Article 113	Proposal for amending Article 113
<p>1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.</p> <p>2. The data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent.</p> <p>3. The data referred to in paragraph 1 shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.</p> <p>4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:</p> <p>(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;</p> <p>(b) the commercial interests of a natural or legal person, including intellectual property;</p> <p>(c) court proceedings and legal advice; or</p> <p>(d) the scope of inspections or investigations;</p> <p>shall be subject to applicable rules on confidentiality.</p>	<p>1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.</p> <p>2. The data exchanged between Member States and the Commission shall not may be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent provide a reasoned refusal to disclose the data.</p> <p>3. The data referred to in paragraph 1 shall not may be used for any a purpose other than that provided for in this Regulation unless the authorities providing the data provide a reasoned refusal for it to be so used and give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.</p> <p>4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:</p> <p>(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;</p> <p>(b) the commercial interests of a natural or legal person, including intellectual property;</p> <p>(c) court proceedings and legal advice; or</p> <p>(d) the scope of inspections or investigations;</p>

Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.

5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.
6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.
7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters.

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8. ***This Article is without prejudice to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents and 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.***