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Complaint reference: 640/2019/TE

13 August 2019

Dear Ms. O'Reilly,

Subject: Observations on the inspection report concerning the meeting between the Ombudsman's inquiry team and Council representatives on 27 June 2019

1. With reference to your letter of 23 July 2019, we would like to thank you for forwarding the inspection report and for giving us the opportunity to provide our observations thereon.

2. We also appreciate that you have decided to request a written reply from the Council to clarify certain issues raised in the inspection report and are looking forward to receiving the Council's reply.

3. As a preliminary point, it appears from the inspection report that the Council representatives did not address one of the most fundamental aspect of the present Complaint, namely the obligation to draw up minutes. We have set out the relevant legal obligations and facts in section 4, paragraphs 55-72, of the Complaint and provided also by email of 15 July 2019 an example of how other institutions fulfil this obligation. This would especially apply to drawing up detailed minutes of the working party meetings and the December Council meeting, including any side meetings that take place on these occasions. We will therefore not restate this point here but would only wish to reiterate the importance of this issue for the present Complaint.

4. We will keep these submissions as brief as possible and not restate any facts provided or arguments made in our initial complaint and additional correspondence. Accordingly, we will focus our observations solely on three aspects of the Council representatives' statements that warrant specific attention:

    a. The definition of "legislative documents" and obligation to disseminate under Regulation 1049/2001;

    b. Exemption from disclosure for documents relating to an ongoing decision-making procedure (Article 4(3) of Regulation 1049/2001);

c. The workload of the Council as an excuse for non-compliance with its legal obligations.

5. We will address these points in turn below.

Definition of "legislative documents" and obligation to disseminate under Regulation 1049/2001

6. The inspection report summarises a discussion on whether the documents at stake in this inquiry should be considered "legislative documents" (p. 3). In particular, the Council representatives stated that "the requested documents were drawn up in the context of a procedure leading to the adoption of a non-legislative act", apparently to distinguish such documents from "legislative documents". However, no such distinction exists.

7. As stated in paragraph 50 of the Complaint, Article 12(2) Regulation 2014/2001 defines "legislative documents" as "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." There is in the present case no dispute that the TAC Regulation is "legally binding" for the Member States.

8. The fact that the TAC Regulation constitutes a "non-legislative act" is immaterial. "Legislative acts" are defined in Article 289(3) TFEU as "legal acts adopted by legislative procedure". The term is used consistently throughout the Treaties and other pieces of EU law. However, in Regulation 1049/2001 the legislators chose to define the term "legislative document" based on the effect of the act to which it relates (i.e. its binding nature) as opposed to the procedure leading to the adoption of the act (i.e. a legislative procedure as defined in Article 289 TFEU).

9. As the CJEU has held in Case C-57/16 P *ClientEarth v Commission*, "it is apparent from Article 12(2) of Regulation No 1049/2001, which implements the principle derived from recital 6 thereof, 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."[1]

10. As mentioned in the Complaint,[2] the requested documents moreover contain environmental information in the sense of Article 2(1)(d) Regulation 1367/2006. Regulation 1367/2006 contains a stand-alone obligation to actively disseminate environmental information, which reinforces Article 12(2) Regulation 1049/2001.[3] As recognised by the CJEU, this gives these documents an additional quality, since "Regulation No 1367/2006 aims, as provided for in Article 1 thereof, to ensure the widest possible systematic availability and dissemination of environmental information" and because "[i]t follows, in

[1] ECLI:EU:C:2018:660, para. 85.
[2] Complaint, paras 49 and 51-53.
[3] Article 4(1) and (2) Regulation 1367/2006.

essence, from recital 2 of that regulation that the purpose of access to that information is to promote more effective public participation in the decision-making process, thereby increasing, on the part of the competent bodies, the accountability of decision-making and contributing to public awareness and support for the decisions taken."[4] There is therefore an even stronger obligation to actively disseminate the documents concerned.

11. Accordingly, there is no doubt that documents drawn up in the course of procedures for the adoption of the annual TAC Regulations constitute legislative documents containing environmental information for the purposes of Article 12(2) Regulation 1049/2001 in conjunction with Article 4 Regulation 1367/2006 and must accordingly be proactively disseminated, unless they are covered by one of the exemptions set out in Articles 4 and 9 of that Regulation.

Exemption from disclosure for documents relating to an ongoing decision-making procedure (Article 4(3) Regulation 1049/2001)

12. According to the inspection report, the Council representatives argued that "the Council had no obligation to make the relevant documents directly accessible all the more since their disclosure before the TAC Regulation is adopted would undermine the ongoing decision-making process, as protected by one of the exceptions in Regulation 1049/2001" (p. 3).

13. Article 4(3), first indent, Regulation 1049/2001 indeed permits that "[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

14. However, the Court has imposed stringent criteria on the application of this provision. As the Court has held, "it is apparent from the second sentence of Article 6(1) of Regulation No 1367/2006, read in the light of recital 15 thereof, in particular, that 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."[5] To rule out the disclosure of Member State positions while the decision-making procedure is ongoing in a general manner, does not amount to interpreting this exemption from disclosure in a restrictive manner.

15. The Court has moreover made clear that "the mere reference to a risk of negative repercussions linked to access to internal documents and the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution

4 Case C-57/16 P *ClientEarth v Commission*, para. 98 and case law referred to therein..
5 Case C-57/16 P *ClientEarth v Commission*, para. 100.

concerned."[6] The arguments raised by the Council representative do not amount to anything else.

16. The Council firstly argued that "disclosure of initial positions of MS ahead of deliberations would lead to more entrenched positions and reduce manoeuvre to compromise, jeopardising thus an agreement during Council deliberations." Firstly, this is basically the same argument that was already rejected by both the General Court and the Court of Justice in the Access Info Europe case to justify the Council's application of Article 4(3) of Regulation 1049/2001 to refuse access to the positions of Member States tabled in working party meetings.[7] Indeed, if the need to reach compromise would be accepted sufficient to justify non-disclosure, this would make Article 4(3), first indent, Regulation 1049/2001 applicable to any document that forms part of an ongoing decision-making procedure. It is clear from the Court's case law that such general assertions that could apply to any document of the same kind are insufficient to justify non-disclosure under Article 4(3), second indent.[8]

17. The Council representatives secondly argued that "in preparing their initial positions, MS need to juggle between different interests (industry vs. environment, small vs. large-scale fisheries…) for more than a hundred stocks, and therefore the implications of such a disclosure for each MS for each stock would considerably delay the success of the Council deliberations." The report does not specify here what "implications" would be expected from disclosing a position that "juggles different interests." The argument fails for that reason alone to justify that that disclosure would seriously undermine the Council's decision-making procedure.

18. Possibly, the Council representatives meant to insinuate that third parties might send observations on these positions to the Member States and seek to influence or exert pressure on the Member States to change their positions. However, the Court has already rejected this argument holding that "although Article 11(2) TEU provides that the EU institutions are to maintain an open, transparent and regular dialogue with representative associations and civil society, that provision in no way means that the Commission is required to respond, on the merits and in each individual case, to the remarks it may have received following disclosure of a document under Regulation No 1049/2001."[9] While this case concerned the Commission, EU law does not impose such an obligation on the Member States when acting through the Council either.

19. Moreover, even if it had been established that disclosure would have seriously undermined the Council's decision-making procedure, an overriding public interest in disclosure would nonetheless justify releasing the requested documents. Based on the reasons set out in paragraphs 9-12 of the Complaint, to have access to the information in the present case

[6] Case C-60/15 P *Saint-Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540, para. 83.
[7] Case T-233/09 *Access Info Europe v Council*, ECLI:EU:T:2011:105, para. 68 onwards, upheld on appeal in case C-280/11 P *Council v Access Info Europe*, ECLI:EU:C:2013:671.
[8] Compare Case T‑392/07 *Guido Strack v European Commission*, ECLI:EU:T:2013:8, para 242, upheld on appeal in case C-127/13 P *Strack v Commission,* ECLI:EU:C:2014:2250.
[9] Case C-57/16 P *ClientEarth v Commission*, para. 107.

constitutes an overriding public interest, as it is crucial to verify compliance with the applicable EU law that seeks protection of the aquatic environment and to ensure public participation in the decision-making procedure.

The workload of the Council as an excuse for non-compliance with its legal obligations.

20. With regard to the disclosure of documents following the complainant's access to document requests in 2018 (point 3), the Council representatives seem to have solely argued that the responsible services were dealing with a high number of information requests and that this workload justified the late reply.

21. This misses the decisive point. As set out in paragraph 3 above, the central point of contention with regard to the disclosure of the documents has been that the Council has failed to draw up relevant meeting reports. Moreover, if the Council were to disclose proactively the requested information as argued by ClientEarth, it would free up much of the time that needs to be spent by its staff on evaluating and replying to individual access to information requests.

22. Nonetheless, it should also be noted that the Court has established that the workload of an institution does not justify withholding documents.[10]

23. In order to permit the institutions to deal with large information requests that require additional time, Article 7(2) and 8(2) of Regulation 1049/2001 allow the institution to extend the deadline of 15 working days by another 15 working days. The institution may rely on this possibility only once and are afterwards required to disclose the information.

24. Compliance with these legal deadlines is crucial to make the right to access to information effective, in particular where the information concerns an ongoing decision-making procedure. As the Court has recognized, the provision of information in good time is crucial to allow citizens to make their views known in an ongoing decision-making procedure.[11]

25. It should also be noted that a deadline of overall 30 working days, which amounts to 1.5 months or more, is set comparatively high in comparison to EU Member States and other States in the region. A 2019 draft prepared prepared based on national expert evidence under the auspices of the UNECE Aarhus Convention shows that out of the 10 States that provided information, the European Union was among the 3 States with the longest deadlines to respond to an access to information requests.[12] These legally required deadlines are therefore also in no way set at an unreasonable level.

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[10] Case T-245/11, *ClientEarth and International Chemical Secretariat v ECHA*, ECLI:EU:T:2015:675, para. 161.
[11] Case C-57/16 P *ClientEarth v Commission*, para. 84.
[12] See Draft Report to the Task Force on Access to Justice under the Aarhus Convention on Access to Justice in Information Cases, available at: <https://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF12-2019/JD_2019_A2J_Info_Draft_Final.pdf>.

We would like to express our gratitude once again for the consideration given to our Complaint and this possibility to provide our views. We remain at your disposal if you require any further information and are looking forward to your final decision on our Complaint.

Yours sincerely,

Sebastian Bechtel, on behalf of Anne Friel
Environmental Democracy Lawyer

Elisabeth Druel, Lawyer/Juriste Fisheries

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The following 7 states provided for shorter timelines: Georgia (the following day or after 10 days if considerable extent, see pp. 23 & 24), Kazakhstan (15 days or 30 days (not working days) in case of complex cases, see p. 35); Moldova (15 days and 20 days for complex cases, see p. 42); Portugal (10 days, see pp.44 & 46); Serbia (48 hours or 15 days for a decision in case of a refusal, see p. 48); Slovakia (8 working days or 16 working days in exceptional cases, see pp. 53 & 55); Sweden ("fortwith" or "as soon as possible", meaning in practice within a few days, see pp. 57 & 58); Switzerland (20 days and 20 days in exceptional cases, see p. 63). Longer timelines were only found in Germany & Ireland (1 months or 2 months due to volume or complexity, see pp. 27, 30, 32).