



REPORT ON THE EUROPEAN OMBUDSMAN'S INSPECTION MEETING

COMPLAINT: 640/2019/TE

Case title: The transparency of the Council of the EU's decision-making process leading to the adoption of regulations setting fishing quotas (total allowable catches)

Date: Thursday, 27 June 2019

Location: Council of the European Union, Brussels

Present

Representatives from the European Ombudsman:

- 1) Mr Fergal O'Regan, Head of Unit, Inquiries Unit 2 and Strategic Inquiries Unit
- 2) Ms Tanja Ehnert, Case Handler, Strategic Inquiries Unit
- 3) Ms Francesca Pavesi, Case Handler, Inquiries Unit 2
- 4) Ms Dorien Laermans, Case Handler Trainee, Inquiries Unit 2

Five representatives from the Council of the European Union, including two persons dealing with the files in question, one member of the Council legal service and one Head of Unit.

Purpose of the inspection meeting

The meeting was organised pursuant to Article 3.2 of the Statute of the European Ombudsman and Article 4 of the European Ombudsman's Implementing Provisions, in order to inspect:

- all documents held by the Council related to the decision-making process for adopting the annual TAC Regulations for EU fish stocks in the Northeast Atlantic for 2018 and 2019; and
- any records held by the Council of the "internal consultations" related to the examination of the 27 documents covered by the complainant's four initial requests for access to documents 18/2318, 18/2412, 18/2516 and 18/2518.

In addition, the purpose of the meeting was to clarify certain issues raised in the complaint and set out in the Ombudsman's letter sent to the Council on 10 May 2019.

Introduction and procedural information

The meeting started at 13:00h and finished at 14:40h.

The Ombudsman's inquiry team set out the object, purpose and procedure of the meeting within the context of the Ombudsman's inquiry into complaint 640/2019/TE. In particular, the Ombudsman representatives explained that this inquiry does not so much concern the disclosure of the documents as such, but rather the *timing* of the disclosure.

The Ombudsman representatives also informed the Council representatives that, if they want to provide the Ombudsman with any documents that they identify to be confidential, no access may be granted without the Council's prior agreement, neither to the complainant nor to any other person outside the Ombudsman's Office. Information and documents of this kind will be deleted from the Ombudsman's files shortly after the inquiry has ended.

Discussion during the meeting

1) Adoption process of the annual TAC Regulation

The Council representatives first set out the decision-making process leading to the adoption of the annual TAC Regulation. They explained that the Commission adopts annually, usually in late October/early November, its proposal for the December TACs and Quotas Regulation.

Following the adoption of the proposal, the responsible Council Working Party on Internal Fisheries Policy meets every week to discuss the proposal. At the time the Commission adopts its proposal, not all information about every fish stock is yet available. Therefore, the Commission submits updates in form of non-papers with additional information in the course of negotiations.

Member States (MS) delegations make oral preliminary comments on the proposal during early negotiations and submit written comments at a later stage. These written comments by MS delegations take the form of standard (ST) documents, to which addendums are added whenever new comments are made. These ST documents are listed in the Council register of documents, marked as LIMITE (restricted access).

The working party meetings are recorded in an "*outcome of proceedings*" document, marked as LIMITE. This document is concise and does not contain the positions of individual MS delegations. It is of an administrative nature. The Council representatives explained that these documents do not bear an interinstitutional code, as different files and topics are discussed during working party meetings. The agendas of the working party meetings are, however, publicly available, so that interested parties are aware of the files and topics discussed and can request public access accordingly.

Towards the end of November of each year, the Council General Secretariat drafts the initial version of a document referred to as "*bible*", which is circulated to the delegations and which is listed as a LIMITE ST document in the Council register of documents. This document gathers the opinions expressed by MS delegations on the Commission proposal over the preceding weeks (normally covering the discussions of three working party meetings and the

abovementioned written comments received to date). The initial version of the “*bible*” is generally updated twice to reflect the evolving discussions in the working party and the Committee of Permanent Representatives (Coreper), before the TAC Regulation is adopted by the Agriculture and Fisheries Council in December.

Coreper meets about one week before the Agriculture and Fisheries Council. After the meeting, the final update of the “*bible*” is prepared.

The two-day meeting of the Agriculture and Fisheries Council includes plenary discussions with various informal discussions on the side. The minutes of the Council meeting reflect the discussions in plenary, but not those that take place in side meetings. A press release following the Council meeting contains detailed information on the outcome of negotiations and is published directly after the meeting on the Council website.

2) Proactive disclosure of documents while the decision-making process is ongoing

Participants discussed the nature of the documents at stake in this inquiry and, in particular, whether the documents should be considered “legislative documents” for the purposes of determining whether they should be made public proactively. The Ombudsman representatives argued that the documents at stake fall under the definition of “legislative documents” as set out in Article 12(2) of Regulation 1049/2001.

The Council representatives noted 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. They added 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.

According to the Council representatives, the flexibility of MS to shift from their initial positions as well as their willingness to compromise are key to successfully reaching an agreement at Council level. The 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. Moreover, 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.

3) Disclosure of documents following the complainant’s access to document requests in 2018

¹ Article 4(3) of Regulation 1049/2001.

The Council representatives confirmed that all documents in possession of the Council were disclosed and sent to the applicant. They also referred to the high workload of the different services dealing with the request for access to documents during the relevant period (December 2018 and March 2019). They noted that during this period of time the Council's Transparency team has received 1066 initial requests involving the assessment of 2806 documents and 9 confirmatory applications with 33 documents assessed. They underlined that the Transparency Unit needs to conduct a case-by-case assessment of each requested document. The standard procedure the Transparency Unit follows is to always consult with the relevant Directorates-General to decide whether the documents can be released. The process is time consuming and the high number of requests does not always make it possible to release the documents during the established deadlines. The Council representatives provided the Ombudsman's inquiry team with a record of the "*internal consultations*" related to the examination of the complainant's four initial applications for access to documents made in November/December 2018, as requested by the Ombudsman in her letter of 10 May 2019.

Information exchanged and documents inspected

The Ombudsman representatives obtained copies of internal and external correspondence held by the Council relating to:


- The complaint to the European Ombudsman (640/2019/TE);
- The complainant's confirmatory application of 5 April 2019 and the Council's confirmatory decision of 27 May 2019 (19/4890);
- The complainant's initial access to documents request of 8 February 2019 and the Council's initial decision of 15 March 2019 (19/0408);
- The complainant's four initial access to document requests submitted between 23 November and 14 December 2018 and the Council's initial decisions of 4 February 2019 (18/2318, 18/2412, 18/2516, 18/2518);
- The complainant's confirmatory application of 21 June 2018 and the Council's confirmatory decision of 9 October 2018 (SGS18/07960);
- The complainant's initial access to documents request of 11 April 2018 and the Council's initial decision of 31 May 2018 (18/0747);
- An access to documents request of a Brussels based NGO of 7 December 2017 and the Council's initial decision of 29 January 2018 (17/2583/2584).

The Council requested the documents to be treated confidentially.

Brussels, 04/07/2019



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