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Complaint reference: 640/2019/TE

**7 October 2019**

Dear Ms. Pavesi,

**Subject: Comments on the Council's reply of 25 September 2019 to the Ombudsman's request for clarification**

1. With reference to your email of 30 September 2019, we would like to thank you for forwarding the Council's reply of 25 September 2019 to the Ombudsman's request for clarifications.
2. We do not wish to repeat the arguments put forward in our original Complaint and in our letter of 13 August 2019. Therefore, we confine our comments to the new issues raised by the Council.

#### **Section I: Proactive disclosure and the nature of the decision-making process**

3. First, the Council makes the general point that there is a distinction, both in the Treaties and in the CJEU's case law, between legislative and non-legislative acts, which has a bearing on the standard of transparency required. According to the Council, the fact that the TACs Regulations are not adopted according to one of the legislative procedures contained in Article 189 TFEU means that the documents at issue in this Complaint are not subject to the higher standard of transparency, which applies to legislative acts.
4. The Complainant submits the Council fails to demonstrate that the higher standard of transparency that applies to the institutions' legislative activities does not apply in this case. It also fails to establish that the result of its contention is that the obligation to proactively publish legislative documents does not apply.
5. It cannot be denied that the facts of the Turco<sup>1</sup>, De Capitani<sup>2</sup> and ClientEarth<sup>3</sup> cases concerned acts adopted according to the ordinary legislative procedure. But that does not

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<sup>1</sup> C-39/05 P - Sweden and Turco v Council, ECLI:EU:C:2008:374.

<sup>2</sup> T-540/15 - De Capitani v Parliament, ECLI:EU:T:2018:167.

<sup>3</sup> C-57/16 P - ClientEarth v Commission, ECLI:EU:C:2018:660.

mean that the principles of transparency defined in these cases do not apply equally to documents related to non-legislative acts that are nonetheless legally binding on or in the Member States.

6. Indeed, given the wording of Article 12(2) of Regulation 1049/2001, read together with recital 6 thereof, there is no doubt that the obligation to proactively publish legislative documents extends beyond documents relating to acts adopted according to the legislative procedures contained in Article 289 TFEU. In this regard, please see paragraphs 50 - 52, 62 of the original Complaint and paragraphs 6 - 9 of the Complainant's letter of 13 August 2019.
7. The travaux préparatoires support this conclusion. The 1st reading report adopted by the European Parliament on 16 November 2000 shows that the intention was for EU institutions to proactively publish documents relating to "the adoption of legally binding measures".<sup>4</sup> The text resulting from trilogue negotiations maintained the emphasis on the legally binding effects of the act, rather than the procedure for its adoption.<sup>5</sup> This wide interpretation is also supported by the reference to "delegated powers" in recital 6 of the Regulation, which seems to have been put forward and agreed during trilogue negotiations.<sup>6</sup> This demonstrates that it was the legislature's intention that the obligation to proactively publish documents covers a wider category of acts than those adopted under the legislative procedures in Article 189. The TACs Regulations are legally binding on the Member States and, as such, are subject to the obligations on proactive publication in Article 12 of Regulation 1049/2001.
8. The fact that the Court of Justice of the EU has emphasised the distinction between "legislative and non-legislative acts" in relation to, inter alia, the requirement for the Council to meet in public under Article 15(2) TFEU, has no bearing on the legislature's intention to submit documents related to legally binding measures to a higher standard of transparency, in particular obligations relating to active dissemination. The Complainant therefore questions the relevance of joined cases C-643/15 and 647/15 to the Complaint.
9. Second, the Council seems to argue that the decision-making process leading to the adoption of TACs is not conducive to transparency, because it is a "domain of highly technical expertise and difficult negotiations..." According to the Council, since the higher standard of transparency that applies to the institutions' legislative activities does not apply to such documents, the Council has to pay greater attention to the protection of the decision-making process. The Council seems to disregard that, even in the context of non-

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<sup>4</sup> See "Proposal for a Regulation of the European Parliament and Council regarding public access to European Parliament, Council and Commission documents - Results of the 1st reading of the European Parliament", amendment 46: <https://data.consilium.europa.eu/doc/document/ST-13101-2000-INIT/en/pdf>

<sup>5</sup> See "Proposal for a Regulation of the European Parliament and of the Council regarding public access to documents of the European Parliament, the Council and the Commission - Outcome of the 1st reading of the European Parliament (Brussels, 2 - 3 May 2001)", compromise amendment 110: <https://data.consilium.europa.eu/doc/document/ST-8430-2001-INIT/en/pdf>

<sup>6</sup> IBID, compromise amendment 85.

legislative documents, the exceptions in Article 4 of Regulation 1049/2001 must be interpreted strictly to allow for the widest possible access to documents. Therefore, the documents should be proactively published unless the Council can demonstrate how disclosure would specifically and actually undermine the decision-making process and that the risk is reasonable foreseeable and not purely hypothetical. It is also significant that the documents contain "environmental information" and are therefore also subject to the active dissemination obligations contained in Article 4 of Regulation 1367/2006.

10. Third, the Council argues that there is no obligation to proactively publish the documents at issue in this Complaint because its Rules of Procedure do not contain such an obligation. Suffice to note that the Council's Rules of Procedure do not take precedence over Regulation 1049/2001, including the duty to proactively publish "legislative documents", so defined in its Article 12.

**Risk that proactive publication would entail for the ongoing decision-making process**

11. The Council's reply in this section adds very little to the Inspection Report. We therefore refer to our arguments in paragraphs 12 - 19 of our letter of 13 August and address only one additional point below.
12. The Council makes (an incomplete) reference to the De Capitani case in which the Court noted that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process. The Court also insisted that "the reality of such external pressure must, however, be established with certainty, and evidence must be adduced to show that there is a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure".<sup>7</sup> The Council's reply falls short of that standard. Its reference to press coverage of fisheries lobbyists who accessed the Council building is wholly unrelated to the risks involved in disclosing documents. However, it does demonstrate a pressing need to protect the legitimacy of the decision-making process by ensuring that all stakeholders have access to the same information on an equal footing in order to participate effectively in the decision-making process, regardless of whether they have the means to access Council buildings. It is also worth noting that the Court of Justice made it clear in *Turco*<sup>8</sup> that it is for the Council to take the necessary measures to put a stop to external pressure.
13. Finally, we take this opportunity to point out that, like the Inspection Report, the Council's reply does not address one of the most fundamental aspects of the present Complaint, namely the obligation to draw up minutes. We do not draw a conclusion from this, but merely wish to emphasise the importance of this obligation in relation to the *effet utile* of Regulation 1049/2001.

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<sup>7</sup> T-540/15 - De Capitani v Parliament, ECLI:EU:T:2018:167, paragraph 99.

<sup>8</sup> C-39/05 P - Sweden and Turco v Council, ECLI:EU:C:2008:374, paragraph 61.

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

Yours sincerely,

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