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Complaint reference: 640/2019/TE

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Dear Ms. O'Reilly

Subject: ClientEarth comments on the Opinion of the Council in compliant 640/2019

1. The Complainant welcomes the Ombudsman's recommendation and is grateful for the opportunity to submit comments on the Council's Opinion.
2. We do not wish to repeat the arguments put forward in our original complaint and subsequent submissions of 13 August 2019 and 7 October 2019. Therefore, we will focus our comments on the new points raised in the Opinion. We will also use this opportunity to inform the Ombudsman of the Complainant's experience of requesting access to the documents relevant to the adoption of the TACs for 2020.

Failure to record discussions at relevant Council meetings

3. In its summary of main observations, the Counsel states that it "*understands that this inquiry was not focused on the handling of the requests for access to documents related to the adoption of TACs for 2017, 2018 and 2019 introduced by the complainant, but rather on the proactive disclosure of such documents while the decision-making process is ongoing.*" The Complainant submits that the Council's understanding is flawed. In fact, one of the main grounds of Complaint against the Council was the failure to provide access upon request to minutes of the Council working party, COREPER and ministerial meetings. This issue indeed featured in the Ombudsman's request to the Council for an inspection meeting and formed part of the Ombudsman's inquiry. Therefore, it is not accurate to state that the handling of the requests was not a focus of the inquiry.
4. The reasons put forward by the Council for failing to disclose such records upon request was that they did not exist. Therefore, with regard to the Council's point that there is an error in paragraph 6 of the Recommendation, the Complainant confirms that the Council

did not refuse access to the Requested Documents on the basis of Article 4(3) of Regulation 1049/2001. Nevertheless, its different but related argument that Article 4(3) prevents active dissemination of relevant documents during the decision-making procedure is dealt with below.

5. In her Recommendation, the Ombudsman found that, "the weekly drafting of extensive minutes, which record the positions of Member States, might be disproportionate in a situation where the Council's General Secretariat is already working under very tight deadlines." We do not agree with this position for the reasons set out in the Complaint and subsequent submissions. In essence, the meetings held among Member State representatives at all levels are a core function of the Council and should, therefore, be recorded. By analogy, it is difficult to think of a national legislative chamber that would omit to record its proceedings. This is the very essence of decision-making being as open and close to the citizen as possible, in accordance Article 10(3) TEC. Failure to do so frustrates the purpose of Regulation 1049/2001 and, in the context of environmental information, Regulation 1367/2006. The finding of no maladministration on this point may lead to a general failure by the Council to record such discussions in other procedures, which are not documented to the same extent as this one. We therefore urge the Ombudsman to adopt a finding of maladministration on this point and to issue a recommendation to the effect that all meetings of Member State representatives in the Council should be recorded, particularly the positions put forward and defended by the Member States.

Definition of "legislative documents"

6. On this point, the Opinion largely follows the logic of the Council's arguments as set out in its response of 25 September 2019, on which the Complainant has already submitted detailed observations which we will not repeat here. The only new argument is perhaps the comparison drawn between the TAC negotiations to those that take place in international fora with third States in order to emphasise that it is "a matter where transparency does not bear the same weight as in legislative matters." The argument is wholly unconvincing. In the absence of the EU's unique legal order and decision-making structures, much of the EU's decision-making would take place in international fora. This does not change the normative choice of the EU Member States for participatory democracy that is reflected in Article 10(3) TEU, and the detailed transparency rules elaborated by the EU legislature in Regulation 1049/2001. Indeed, the exception in Article 4(1)(a), third indent, explicitly protects the EU's international relations when negotiating in international fora, which evidently does not apply to the Requested Documents.

Regulation 1367/2006

7. The Council acknowledges that in case C-57/16 the Court of Justice held that "read in the light of Recital (15) thereof, in particular, the ground for refusal set out in the first subparagraph of Article 4(3) of Regulation 1049/2001 is to be interpreted in a restrictive way, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information". The Council then goes on to observe that the judgment was rendered in the specific context of

an EU legislative process in respect of environmental matters, while the TAC Regulation is non-legislative in nature.

8. The Council seems to imply that environmental information related to EU acts adopted other than by the ordinary or special legislative procedures does not benefit from a restrictive interpretation of Article 4(3) of Regulation 1049/2001, as required by Article 6(1) of Regulation 1367/2006. Such an implication is without foundation in Regulation 1367/2006 itself nor the case law of the CJEU. See in particular, case C-6/16 Saint Gobain v Commission¹, which concerned documents related to an administrative procedure that were unrelated to "legislative documents" within the meaning of Regulation 1049/2001.

Proactive publication and assessment of the risk for the ongoing decision-making process

9. The Opinion does not raise any new points and therefore the Complainant directs the Ombudsman to our comments submitted on 13 August 2019 and 7 October 2019. In essence, the Council has failed to demonstrate that active dissemination of the Requested Documents would specifically and actually undermine the decision-making process and that the risk is reasonable foreseeable and not purely hypothetical.

Traceability of documents issues in the framework of the decision-making procedure for the adoption of TACs

10. The Complainant regrets that the Council Opinion fails to acknowledge the serious failures in its documents register identified in the Complaint and in the Ombudsman's Recommendation. A number of documents related to the decision-making process, notably Council working party agendas and summary minutes, are not issued as ST documents and are not tagged with the relevant inter-institutional code. In addition to this, the ST documents that are tagged with the relevant inter-institutional code bear the title of the Commission's proposal, making it very difficult for users to know the type of information they contain and assess whether they should submit a request to access them (e.g. whether they contain a Member State's position and, if so, which Member State). We urge the Ombudsman to issue a more detailed recommendation to put a stop to this practice.

Update from the Complainant regarding the adoption of TACs for 2020

11. For your information, the Complainant would like to take this opportunity to update the Ombudsman on the decision-making process leading to the adoption of the TACs for 2020.
12. Following the publication of the Commission's proposal on 24 October 2019, ClientEarth started to systematically check the Council's documents register using the relevant inter-institutional code. Seeing that the relevant documents were not available for download, we submitted requests to have access to documents recording the Member States' positions on 22 November 2019, 29 November 2019, 9 December 2019 and 16 December 2019.

¹ C-60/15 P - Saint-Gobain Glass Deutschland v Commission ECLI:EU:C:2017:540, see paragraphs 78 - 80.

The requests also referred to the Ombudsman's recommendation and requested that the relevant documents be actively disseminated before the Agriculture and Fisheries Council, which took place on 16 and 17 December 2019.

13. The Council responded by extending the deadline to the first three requests by a further 15 working days, despite the fact that the requests did not relate to a large number of documents nor to a very long document. Indeed, where possible, the Complainant had identified the documents by referring to the number assigned to them in the documents register. The Council sent its initial reply on 16 January 2020, i.e. the extended deadline for the first request (and one month after the conclusion of the decision-making procedure), disclosing 42 files that were related to the decision-making procedure. Upon examining the files, we noted that the "bible" document was missing. As such, we introduced a new request on 17 January in order to have the bible as quickly as possible in the interests of our annual analysis of the TACs. We received further documents in relation to this request on 30 January, including the bible, which had not been tagged with the relevant inter-institutional code (and since then still has not been tagged accordingly): https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14458-2019-INIT
14. We have submitted a confirmatory application in respect of the Council's initial decision of 16 January 2020 and await the Council's decision, due on 20 March 2020. We are concerned that relevant documents still have not been disclosed, particularly written comments from Germany, Belgium or Denmark (even though the Council bible contains comments from the latter two, suggesting that they must have provided input during the process).
15. The Complainant also remarked that the Council's practice regarding the documents register has not changed following the Recommendation. Not only are none of the documents available for download while the decision-making process is ongoing, some of the most significant documents, notably the bible, were not tagged with the inter-institutional code. It should also be noted that, two of the files received in response to our requests are still not included in the register at all (WK 11790/2019 INIT and WK 11790/2019 ADD 1). In addition to this, the vast majority of the documents continue to bear the name of the Commission's proposal.

Conclusion

16. In conclusion, we would like to express our gratitude once again for the consideration given to our Complaint and this possibility to provide our views. In view of the Council's disregard for the Recommendation issued, we invite the Ombudsman to:
 - Reaffirm her Recommendation regarding the active dissemination of the Requested Documents while the decision-making process is ongoing;
 - Provide more detailed recommendations regarding the documents register, particularly the practice of failing to tag all relevant documents with the inter-institutional code and the failure to give titles to the documents that accurately reflect their content.

- Adopt a finding of maladministration in relation to the Council's failure to record Member State positions expressed at all Council meetings, whether at working party, COREPER or ministerial levels, and issue an appropriate recommendation in this regard.

Yours sincerely,

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