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Council of the European Union  
General Secretariat  
Directorate-General Communication and Information  
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Dear Mr Paulino Pereira,

**RE: Ref: 16/2430-Id/dm - Confirmatory application regarding Council's decision on disclosure of Fisheries Council Minutes and accompanying documents**

In accordance with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, ClientEarth hereby submits a confirmatory application with regard to the disclosure of the relevant section of the minutes dated 12 December 2016 relating to the adoption of the fishing opportunities for the Northeast Atlantic under Article 16 of Regulation (EC) No 1380/2013<sup>1</sup> and accompanying documents.

On 15 December 2016 ClientEarth requested access to the minutes of the Agriculture and Fisheries Council held on 12-13 of December 2016, insofar as they concern the total allowable catches (TACs) for EU fish stocks in the Northeast Atlantic for 2017, as well as all preparative and supporting documents related to this issue, including any scientific advice or social/economic arguments used and/or referred to by the EU institutions and/or the Member States, and any correspondence exchanged.

The Council replied on 13 January 2017, stating that the Council's General Secretariat was still conducting consultations relevant to our request. On 3 February, the Council sent its decision together with a number of Member State, Commission and Council documents relating to the TACs in the Northeast Atlantic for 2016.

Among these documents, the relevant section of the minutes of the Council meeting at which political agreement on the TACs was reached is noteworthy for the lack of information it contains. It consists of two sentences: "The Council reached unanimous political agreement of the Regulation fixing for 2017 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters. In addition, the Council agreed to the use of the written procedure for the adoption of this Council Regulation." The other documents disclosed similarly fail to record any deliberations leading to the political consensus that was achieved at the Council meeting on 12 December.

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<sup>1</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L354, 28.12.2013, p.22.

This is particularly surprising given the comment of the Slovakian minister for Agriculture, Gabriela Matečná, in the Council's [press release 774/16 of 14 December 2016](#) in which she stated: "We have successfully reconciled different opinions to the benefit of all parties involved, and established the basis for the achievement of maximum sustainable yield".

The disclosed documents provided by the Council, including the bible and the Member State position papers, confirm that the Member States took a different view to the Commission's proposal on the TACs for 2017. Yet they fail to reveal how these different opinions were reconciled and the interests that were defended in doing so.

### **Breach of Article 2 of EC Regulation 1049/2001: EU institutions must draw up and retain documentation relating to their activities in a non-arbitrary and predictable manner**

Article 10(3) of the Treaty on European Union states that, "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen".

Article 15(3) of the Treaty on Functioning of the European Union further develops this principle by giving citizens a right to access documents of the Union's institutions, "subject to the principles and the conditions to be defined in accordance with this paragraph."

The principles and conditions were defined in Regulation 1049/2001, Article 2 of which provides that, "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation." The Council's failure to make a detailed record of the deliberations that took place at the Council meeting of 12 December 2016 at which a political consensus was achieved regarding the TACs for 2017 infringes ClientEarth's right under Article 2.

In Case T-264/04 WWF European Policy Programme v the Council of the European Union, the Court of First Instance held that "it would be contrary to the requirement of transparency which underlies Regulation No 1049/2001 for institutions to rely on the fact that documents do not exist in order to avoid the application of that regulation. In order that the right of access to documents may be exercised effectively, the institutions concerned must, in so far as possible and in a non-arbitrary and predictable manner, draw up and retain documentation relating to their activities."

Contrary to the present case, in Case T-264/04, the Court of First Instance held that it could not be concluded that the Council, in claiming that minutes of the first agenda item of its Article 133 Committee meeting did not exist, acted in an arbitrary or unpredictable manner. The Court came to this conclusion owing to the "purely informative nature of that item at the meeting and the fact that it did not call for any specific implementing measure". The same conclusion cannot be applied to the Council's failure to draw up and retain a detailed record of discussions leading to the unanimous political agreement for a Regulation which, in many respects, departs significantly from the Commission's proposal and which requires implementing legislation at national level.

This is supported by both the text of Regulation No. 1049/2001 and the Court of Justice's ruling in Case C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v Council of the European. Recital 2 of the Regulation states that "Openness enables citizens to participate more closely in the decision-making process". Article 6 very clearly states that "[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent." In the Turco case, the Court of Justice relied on recital 6 to state that "openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights". The Court also referred to Article 12 of the Regulation, which recognizes the specific nature of the legislative process by providing that 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 should be made directly accessible.

These considerations are of particular importance in the context of setting TACs, where the Council's legislative discretion is fettered by Regulation (EU) No 1380/2013 on the Common Fisheries Policy (the "CFP Basic Regulation"). The TACs are adopted on the basis of Article 16 of the CFP Basic Regulation. According to Article 2(2), "[t]he CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield." Article 3(c) provides for the "establishment of measures based on the best available scientific advice". This is why the Commission's proposal is based on scientific advice provided by the International Council for the Exploration of the Sea (ICES), and has the objective of bringing the stocks to levels that can deliver MSY by "2015 where possible and on a progressive and incremental basis at the latest by 2020". Recital 7 to the CFP Basic Regulation states that, "Achieving those exploitation rates by a later date should be allowed only if achieving them by 2015 would seriously jeopardise the social and economic sustainability of the fishing fleets involved." Therefore, in order for EU citizens to be able to scrutinise the considerations underpinning the Council's legislative action in setting TACs and to ensure that the Council has acted within the legal limits of the CFP Basic Regulation, the reasons for any departure from the Commission's proposal, and the scientific advice reflected therein, must be recorded and should at the very least reference scientific evidence or evidence of serious jeopardy to the social and economic sustainability of the fishing fleets involved.

The disclosed documents are far from meeting this legal standard. For example, with regard to the TAC for COD/7XAD34, the Commission's proposal for the overall TAC was 1447 tonnes (in line with scientific advice provided by ICES), while the TAC adopted by the Council is 2830 tonnes. This represents an increase of 95.6% above the proposal. The Council bible and Member State positions show that the UK, France, Ireland and Belgium asked for the Commission's proposed TAC to be increased based on mere assertions regarding the socio-economic impact of the proposed TAC decrease, the mixed fishery implications and growing biomass. No concrete evidence of these trends was provided or referenced in the disclosed documents, nor do they disclose an exchange of views that could allow EU citizens to understand the considerations leading to the TAC being 95.6% higher than science advised was sustainable.

Another example is the TAC for HKE/8C3411. The Commission's proposal for the overall TAC was 7357 tonnes, while the figure adopted by the Council is 10520 tonnes, i.e. 43% above the proposal. Again the Council bible and Member State positions show that Spain and Portugal favoured an increase on the proposal based on the assertion that the stock was improving, but scientific evidence to support these statements is not provided or clearly referenced to support this. Spain also mentioned socio-economic reports that it intended to submit. Given the absence of such reports among the disclosed documents, ClientEarth assumes that they were not in fact produced before the Council reached its political agreement on 12 December.

The TAC for WHG/7X7A-C seems to have been set without a proposal from the Commission and there is no record of any Member State comments, with the exception of a scrutiny reservation from Ireland. There is literally no information available to allow citizens to understand how the TAC was decided.

It should be noted that many other examples bearing similar characteristics are identifiable from the documents disclosed.

Therefore, given the special status afforded to “legislative documents” in the Regulation and the relevant case law, the failure to record the deliberations that reconciled the different Member State and Commission positions on the relevant TACs in a non-arbitrary and predictable manner, within the meaning of Case T-264/04, is in breach of Article 2 of Regulation 1049/2001 and the democratic principles enshrined in Article 10 TEU and Article 15 TFEU.

### **Access to “Environmental Information” in compliance with Regulation No 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**

A record of the deliberations which “successfully reconciled different opinions” on the TACs for 2017 constitute “environmental information” within the meaning of Article 2(d) of the Aarhus Regulation because they are information on measures affecting biological diversity.<sup>2</sup>

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<sup>2</sup> Article 2(d): “environmental information” means any information in written, visual, aural, electronic or any other material form on:

- (i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
- (iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;
- (iv) reports on the implementation of environmental legislation;
- (v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);
- (vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be

The Aarhus Regulation goes further than Regulation No 1049/2001 in that it guarantees access, not only to documents, but to information. Therefore, even if the Council is not in possession of the documents requested, it is obliged to provide ClientEarth with information on the content of the discussions at the Council meeting in question.

Yours sincerely,

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affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii);”