

Complaint to the European Ombudsman - Lack of transparency in the Council decision-making process leading to its adoption of Regulations on the Total Allowable Catches in the Northeast Atlantic for 2017, 2018 and 2019

1. The subject of this complaint is the Council of the EU's (the "Council") lack of transparency in its decision-making process leading to the adoption of the regulations setting total allowable catches (TACs) of certain fish stocks in the Northeast Atlantic for 2017, 2018 and 2019.¹
2. Part 1 provides the context of the complaint, including a description of the Council's decision-making process leading to the adoption of TACs on an annual basis and ClientEarth's (the "Complainant") interest in the topic. Part 2 lays out the facts on which the complaint is based, in particular the requests for information submitted by the Complainant to the Council in 2016, 2017, 2018 and 2019. Part 3 establishes that all of the documents requested by the Complainant are legislative documents containing environmental information. Part 4 deals with the Council's maladministration as concerns its failure to produce and provide public access to adequate meeting minutes/reports that record the positions that the Member States defend in meetings of the Council's Working Party on Internal and External Fisheries Policy (the "Working Party") and the Committee of Permanent Representatives to the EU ("COREPER") and at Agriculture and Fisheries Councils. Part 5 deals with the Council's maladministration in failing to make legislative documents available to the public while the decision-making process is ongoing, either through active dissemination or in response to access to documents requests. Part 6 deals with the Council's maladministration as regards the organisation of its documents register. In the conclusion, the Complainant respectfully requests the Ombudsman to seek a fair solution with the Council with regard to future decision-making processes concerning the adoption of TACs in the Northeast Atlantic or, in the alternative, to adopt a finding of maladministration and issue recommendations.
3. The decision-making process leading to the adoption of TACs for 2020 commences in October/November 2019. Therefore, there is a short window for the Council to rectify its behaviours described in this complaint. Furthermore, 2019 is the last opportunity for fisheries ministers to meet the 2020 deadline set by the Basic CFP Regulation² and adopt TACs that follow the best available scientific advice. The stakes are high. It is, therefore, crucially important for members of the public to have access to information that allows for meaningful participation in this decision-making process.

1 Context of the complaint

¹ Council Regulation (EU) 2019/124 of 30 January 2019 fixing for 2019 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, OJ L 29, 31.1.2019, p. 1–166; Council Regulation (EU) 2018/120 of 23 January 2018 fixing for 2018 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, and amending Regulation (EU) 2017/127, OJ L 27, 31.1.2018, p. 1–168; Council Regulation (EU) 2017/127 of 20 January 2017 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, OJ L 24, 28.1.2017, p. 1–172.

² See Article 2(2) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013). The context is further explained in section 1.1.

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1.1 TACs in the Northeast Atlantic

4. The reformed Common Fisheries Policy (CFP)³ includes the fundamental objective to progressively restore and maintain fish stocks above biomass levels capable of producing the maximum sustainable yield (MSY; Article 2(2) of the CFP Basic Regulation). For the purpose of achieving this MSY objective, the MSY exploitation rate shall be achieved on a progressive, incremental basis "*by 2015 where possible and on a progressive and incremental basis at the latest by 2020*".⁴ Moreover, the CFP must apply the precautionary approach to fisheries management (Article 2(2) of the CFP Basic Regulation), and measures should be taken in accordance with the best available scientific advice (Article 3(c) of the CFP Basic Regulation). Recital 7 to the CFP Basic Regulation states that, "*[a]chieving 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.*"
5. The main instrument regulating fishing mortality in the Northeast Atlantic is the annual Council Regulation setting Total Allowable Catches (TACs) following the publication of the European Commission's TAC proposals, on the basis of Article 43(3) TFEU. The European Parliament has no role in this decision-making process. The Commission generally adopts its proposal in late October/early November and the Working Party meets regularly to negotiate the final TAC Regulation, which is generally adopted by consensus at the Agriculture and Fisheries Council meeting in mid to late December.
6. Article 16(4) of the CFP Regulation states that fishing opportunities (which includes TACs) must be set in accordance with the objectives of its Article 2(2). In order for TACs to be in line with these objectives, they need to be proposed and set at levels which are 1) at least moving towards MSY-based exploitation rates (so that they will be achieved by 2020 at the latest), and 2) in line with the precautionary approach where data are more limited and no MSY-based stock assessment is available. To determine whether this is actually the case, it is essential to compare both the Commission's TAC proposals and the final TACs set by the Council with the scientific catch or landings advice provided by the International Council for the Exploration of the Sea (ICES).⁵ In addition, taking into account recital 7, since 2015, if the TACs are set above MSY levels this should be justified by scientific evidence or evidence of serious jeopardy to the social and economic sustainability of the fishing fleets involved.

1.2 ClientEarth's interest

7. The Complainant has a dedicated fisheries team, composed of lawyers and scientists, working to ensure proper implementation of the Common Fisheries Policy so that fish stocks are progressively restored and maintained above biomass levels capable of producing the maximum sustainable yield. With specific regard to the TACs in the Northeast Atlantic, the Complainant engages in the following work streams.
8. First, every year the Complainant performs an analysis of the extent to which the TAC proposal and final TACs are in line with the CFP. As described in paragraph 6 above, this involves

³ As set out in Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy.

⁴ Article 2(2) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy.

⁵ ICES' advice can be found on <http://www.ices.dk/community/advisory-process/Pages/Latest-Advice.aspx>

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comparing the TAC proposal and the final TACs set by the Council with the scientific catch of landing advice. For the years preceding 2020 (the MSY deadline), any TACs that do not comply with the applicable scientific advice should be justified by scientific evidence or evidence of serious jeopardy to the social and economic sustainability of the fishing fleets involved.

9. In order for the Complainant to conduct this comprehensive analysis and meaningfully participate in the decision-making process leading to the adoption of the TACs, a range of information (beyond the scientific advice, the Commission's TAC proposal and the agreed TACs) is required. This includes, for example, information about any top-ups or deductions made to the proposed or agreed TACs to factor in the extent to which they are subject to the landing obligation (and underlying calculations and data),⁶ as well as Member State positions and comments used in Council Working Party meetings or at the December Agriculture and Fisheries Council. At present, the gaps in the information made publicly available by the Council hampers this analysis. It also means that it is impossible to determine for all of the Council's TAC decisions whether they comply with the CFP's requirements.
10. For example, with regard to the TACs for 2017, the Commission's proposal for the overall TAC for COD/7XAD34 was 1447 tonnes (in line with scientific advice provided by ICES), while the TAC adopted by the Council was 2830 tonnes. This represents an increase of 95.6% above the scientific advice. However, the lack of transparency surrounding the Council's decision does not allow us to know for certain if the increase was justified by scientific evidence or evidence of serious jeopardy to the social and economic sustainability of the fishing fleets involved. We also do not have access to the deliberations that allowed the Member States to reach consensus on this increase.
11. In another example, this time with regard to the TACs for 2018, the Commission proposed the overall TAC for stock HER/7G-K at 5445 tonnes (representing a 62% cut on the TAC for 2017 as advised by ICES due to a significant decrease in biomass bringing it close to the biological limit reference point below which reproductive capacity is impaired). However, only a 30% cut was adopted by the Council (resulting in 10127 tonnes). This means that the agreed TAC exceeds the advice by 86%. Again, lack of transparency means that we are not in a position to assess the reasoning and evidence provided to support this decision to decrease the TAC by less than half of the scientifically advised cut.
12. Second, the Complainant engages in advocacy activities during the decision-making process in order to convince decision-makers to set TACs in line with the CFP objectives. This involves engaging with Member State representatives once the Commission's proposal has been published until the TACs are adopted at the Agriculture and Fisheries Council that takes place each December. Such advocacy takes the form of sending letters and joint briefings with other NGOs highlighting key points and TAC recommendations in order to ensure that national ministries understand the impact of divergence from the proposal and the underlying scientific advice. The lack of available information while the decision-making process is ongoing regarding the positions adopted by Member States and the compromises that are made along

⁶ The information on top-up/deductions calculations and their significance in the decision-making process is described in more detail in paragraphs 91 - 98 below.

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the way means that the Complainant cannot participate effectively in the decision-making process.

13. Third, the Complainant uses its analysis of the TACs to inform public debate on the issue of attaining MSY and to give citizens and civil society organisations the tools they need to hold their governments to account for the decisions they make in the Council. This work is hampered by the fact that meetings of the Agriculture and Fisheries Councils, as well as meetings of the Working Party and COREPER, are not open to the public and the Council very rarely records the deliberations that take place at those meetings.

2 Facts

2.1 Evidence

14. This section of the reports lays out the facts which form the basis of this complaint. The Complainant makes reference to a number of access to documents requests submitted to the Council in respect of the decision-making processes leading to the adoption of the TACs for 2017, 2018 and 2019. Correspondence between the Complainant and the Council is annexed to this complaint. However, the documents that were disclosed to us, either in responses from the Council or on its documents register, are listed in an excel file (Annex 1). This file contains three separate tabs for each decision-making process and shows the titles of all the documents the Complainant has access to with a link to the documents register (Annex 1A regarding TACs for 2017, Annex 1B regarding TACs for 2018 and Annex 1B regarding TACs for 2019). Annex 1 also contains a fourth tab listing documents relevant to this complaint that were received from the Commission but not from the Council (see section 2.5 below - Annex 1D).
15. Only the documents that were disclosed to us but which have not been made available for download on the documents register are annexed to this complaint.

2.2 Access to documents requests related to the adoption of TACs for 2017

16. Political agreement was reached on the TAC Regulation for 2017 at the Agriculture and Fisheries Council that took place on 12-13 December 2016⁷. Since the documents used in the decision-making process had not yet been made available to the public on the Council's documents register, on 15 December 2016, the Complainant sent an access to documents request to the Council in accordance with Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents ("Regulation 1049/2001") and Article 3 of Regulation 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 (the "Aarhus Regulation"). The request asked for 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

⁷ See the Council's press release of 14 December 2016: <https://www.consilium.europa.eu/en/press/press-releases/2016/12/14/fishing-opportunities-2017-north-east-atlantic/>

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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 (Annex 2).

17. The Council replied on 13 January 2017, stating that the Council's General Secretariat was still conducting consultations relevant to our request (Annex 3). On 3 February, the Council sent its initial decision together with 50 documents that were attached in two zip files (Annex 4). The documents were identified in the files by their internal registration number, e.g. st1555.en16 (Annex 5).

18. The disclosed documents consist of the following:

- The Commission's proposal for the TAC Regulation for 2017 (which was already publicly available), amendments to the Commission's proposal and other Commission non-papers issued periodically during the decision-making process (See Annex 1A, rows 5, 7, 23-25, 38, 41-42) and a final consolidated version of the proposal that we presume was the subject of discussion at the Agriculture and Fisheries Council of December 2016 (See Annex 1A, rows 35 to 37);
- The so-called "bible" documents, issued by the General-Secretariat of the Council to delegations. The "bible" is a combined version of the Commission's proposal and the Member States' and Commission's comments. Several versions of the bible were issued during the decision-making process, taking account of the outcome of Working Party meetings and new comments submitted by Member State delegations (Annex 1A, rows 26 to 34);
- Member State written comments circulated by the Council's General Secretariat to the delegations: these consist of the written comments from Member States submitted to the Council's General Secretariat at various points in the decision-making process (Annex 1A, rows 9-22).
- The minutes of the Agriculture and Fisheries Council of December 2016 at which political agreement on the TAC Regulation for 2017 was reached (Annex 6; Annex 1A, row 44).
- A number of other documents, including the agreed TAC Regulation (Annex 1A, rows 48-50), corrections (Annex 1A, rows 6, 8 and 46), two versions of a document produced by the Council Presidency summarising guidelines and outstanding issues before December Council (Annex 1A, rows 39-40), a Presidency compromise in agreement with the Commission (Annex 1A, rows 43 and 45), as well as statements made by the Council, the Commission and delegations made following the December Council meeting (Annex 1A, row 47).⁸

19. No minutes of Working Party or COREPER meetings were disclosed. The Complainant was also concerned that the Council did not provide information on the calculation of the proposed and agreed quota top-ups (and the agreed quantities) that take account of the implementation

⁸ An Opinion from the European Economic and Social Committee (document [ST 15664 2016 INIT](#)) was also included, however this appears to have been an error, since it is unrelated to fisheries, or the December Council process specifically (see Annex 1A, row 51).

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of the landing obligation, as such information is indispensable to assess whether the resulting TACs are in line with the CFP's requirements (see paragraphs 91 - 98 below).

20. On 24 February 2017, the Complainant submitted a confirmatory application in relation to the Council's initial decision (Annex 7). The confirmatory application noted that the documents disclosed by the Council with its initial decision, including the so-called minutes of the December Council meeting, did not contain a record of the Member States' deliberations leading to the political consensus that was ultimately achieved. ClientEarth argued that this failure breached Article 2 of Regulation 1049/2001, which, according to the case law of the CJEU, requires the institutions to draw up and retain documentation relating to their activities in a non-arbitrary and predictable manner.⁹ The Confirmatory Application also noted that records of deliberations leading to the adoption of the TACs fall into the categories of legislative documents and documents that contain environmental information, both of which entail more stringent transparency obligations under Regulation 1049/2001 and the Aarhus Regulation respectively.
21. The Council sent its confirmatory decision on 7 April 2017 (Annex 8), stating that it had conducted a thorough re-examination of the files in its possession and could find no additional documents that had not been disclosed with the initial decision. It concluded that it had therefore discharged its duties under both Regulation 1049/2001 and Regulation 1367/2006.
22. The confirmatory decision then went on to provide a useful summary of the steps in the Council's decision-making process leading to the adoption of the TACs for 2017 and the documents, which had already been disclosed with the initial decision, that were relevant to each step. This at least allowed the Complainant to make sense of the disclosed documents and the role they played in the decision-making process. It also confirmed that a number of Working Party meetings took place during the decision-making process, although no minutes/meeting reports were disclosed by the Council.

2.3 Access to documents request related to the adoption of TACs for 2018

23. On 11 April 2018, the Complainant made a similar request for access to documents relating to the decision-making process leading adoption of the TAC Regulation for 2018 at the Agriculture and Fisheries Council of 11 - 12 December 2018. Specifically, the Complainant asked for the minutes of the Agriculture and Fisheries Council of 11 - 12 December 2017, as well as all preparative and supporting documents related to the adoption of the TACs for 2018, in particular additional supporting documents that were not listed in the Council's documents register under inter-institutional code 2017/0287 (NLE), minutes or records of Working Party meetings and a table of proposed and agreed quota top-ups.¹⁰ This time the Complainant submitted its request through the dedicated website www.asktheeu.com. Annex 9 provides the links to each interaction between the Complainant and the Council within the scope of this request.

⁹⁹ In accordance with case T-264/04 WWF European Policy Programme v Council of the European Union, ECLI:EU:T:2007:114.

¹⁰ See paragraphs 91 - 98 below for an explanation of why this information is significant in the decision-making process leading to the adoption of the TACs.

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24. The Council replied on 4 May 2018, extending the deadline for reply by a further fifteen working days. The Council send its initial decision on 31 May 2018, providing access to three new documents that were not on the Council's documents register:
- a redacted version of the minutes of the Agriculture and Fisheries Council of 11-12 December 2017, stating that unanimous political agreement had been reached in relation to the TACs for 2018 and that several Member States had either made a statement on specific matters or would made a declaration (Annex 10; Annex 1B, row 4) The redacted parts of the documents related to topics that were not covered by our request;
 - two written statements from the French delegation from 30 November 2017 and 7 December 2017 that had been omitted from the documents register (the reason for such omission was not stated) (Annex 1B, rows 2 and 3).
25. The initial decision also listed a number of documents that were, by that point, already available on the Council's documents register (see Annex 1B, rows 10-34). These consisted of Member State statements on the Commission's proposal that had been circulated by the Council General Secretariat during the decision-making process. Again, no reports, minutes or notes of Working Party meetings or COREPER discussions were disclosed or identified as falling within the scope of the request. In addition, no documents related to top-ups were disclosed or identified as falling within the scope of the request.
26. The Complainant submitted a confirmatory application on 21 June 2018 (see Annex 9), highlighting the fact that the minutes of the December Agriculture and Fisheries Council did not contain information on how the different Member State positions were reconciled and noting that the Council did not disclose upon request or file in its documents register any record or minutes of discussions that took place at the relevant Working Party and COREPER meetings. The Complainant argued that these failures constituted a breach of the Council's duty to draw up and retain documentation relating to their activities in a non-arbitrary and predictable manner, which effectively breaches EU law on the right to request access to documents. The Complainant also referred to the Ombudsman's decision in Strategic Inquiry OI/2/2017/TE on the transparency of the Council legislative process, in which the Ombudsman had cause to note that such working party meetings are not open to the public and therefore the public can only follow their progress by accessing records of the discussions that take place. As a result, such discussions must be recorded in the first place.
27. The confirmatory application also addressed the fact that the Council failed to disclose information, both in its initial decision and on its documents registry, on proposed and agreed quota top-ups to take account of the phasing in of the landing obligation. This lack of information prevents external stakeholders from assessing whether the TACs agreed by the Council respect maximum sustainable yield, as required by the CFP Basic Regulation.
28. The Council sent a reply on 13 July 2018, the day after the 15 working day deadline, stating that, *"during the summer recess no meetings are planned for the Committee of Permanent Representatives (Coreper) or for the Council. For this reason, it will be very difficult to process your request within the required 15 working days deadline."*

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29. On 10 September 2018 the Complainant wrote to the Council to ask when the confirmatory decision would be sent. The Complainant pointed out that, *"despite the fact that the Council did not invoke the need for a further extension of the deadline under Article 8(2) of Regulation 1049/2001 (which would, in any case, have expired on 2 August) and that Coreper did in fact meet on 18 July and 25 July, and reconvened on 5/7 September, we still have not received a confirmatory decision."*
30. The Council sent a further reply on 14 September 2018, stating that it was still conducting necessary consultations and would reply as soon as possible.
31. The Council finally sent its confirmatory decision on 9 October 2018 (see Annex 9), almost three months after the expiry of the 15 working day deadline laid down in Article 8(1) of Regulation 1049/2001. The confirmatory decision confirmed that the Council had disclosed all of the documents in its possession falling within the scope of the request. It therefore considered that it had fulfilled its obligations under Regulation 1049/2001 and Regulation 1367/2006.
32. The confirmatory decision then went on to give a detailed description of the decision-making process and the documents available on its documents register that were relevant to each stage. The Council concluded that the Commission and/or Member State authorities may hold further documents relevant to the request.

2.4 Access to documents requests related to the adoption of the TACs for 2019

2.4.1 Requests submitted while the decision-making process was ongoing

33. The Complainant submitted several requests to access Council documents during the decision-making process leading to the adoption of the TAC Regulation for 2019 using the Council's online forms. As the decision-making process got underway with the adoption of the Commission's proposal for the 2019 TAC Regulation on 7 November 2018, the Complainant monitored the Council's document register in order to seek access to the documents being circulated among Member State delegations. Many of these documents were listed on the documents register in a timely manner, but they were not available for download. Rather, when one clicked on the document, a pop up window appeared notifying the public that the document was only accessible upon submitting a request.
34. On 23 November 2018, the Complainant requested access to the documents that were listed on the Council's documents register but which were unavailable for download at that time. The request identified the documents in the same way they were identified on the Council's documents register. Since neither the document numbers nor the titles allowed the Complainant to have an initial understanding of their content, the Complainant was obliged to request access to all of the documents listed in order to assess their usefulness. The requested documents were the following (see Annex 1C, rows 2-8):

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- ST 14304 2018 INIT of 14/11/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non paper
- ST 14437 2018 INIT of 19/11/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14485 2018 INIT of 20/11/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non-paper
- ST 14437 2018 ADD 4 of 22/11/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14437 2018 ADD 3 of 22/11/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14437 2018 ADD 2 of 22/11/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14437 2018 ADD 1 of 22/11/2018: Proposal for a Council Regulation fixing for 2019 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

35. On 4 December 2018 the Complainant requested further documents that had been listed in the documents register but which were not available to be downloaded. The documents requested (see Annex 1C, rows 9-14) had the following document numbers and titles:

- ST 14437 2018 ADD 7 of 27/11/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14963 2018 INIT of 29/11/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non-paper
- ST 14960 2018 INIT of 29/11/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non-paper
- ST 14959 2018 INIT of 30/11/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non-paper
- ST 15124 2018 INIT of 3/12/2018: Proposal for a Council Regulation fixing for 2019 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 - UK comments
- ST 15052 2018 INIT of 3/12/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non-paper

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36. On 13 December 2018 the Complainant requested further documents that had been listed in the documents register but which were not available to be downloaded (Annex X). The documents requested (see Annex 1C, rows 15-21) had the following document numbers and titles:

- ST 14437 2018 ADD 10 of 5/12/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14437 2018 ADD 11 of 6/12/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 15118 2018 INIT of 7/1/2018: Proposal for a COUNCIL REGULATION fixing for 2019 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 - Political agreement
- ST 15325 2018 INIT of 12/12/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14385 2018 REV 2 of 12/12/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14385 2018 ADD 2 REV 2 of 12/12/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 14385 2018 ADD 1 REV 2 of 12/12/2018: Proposal for a Council Regulation fixing for 2019 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

37. On 14 December 2018 the Complainant submitted a request for the last documents to be listed on the document register before political consensus was reached at the Agriculture and Fisheries Council on 17-18 December 2018 (see Annex 1C, rows 22-28). The following documents were requested:

- ST 15597 2018 INIT of 13/12/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non paper
- ST 15577 2018 INIT of 13/12/2018: Proposal for a Council Regulation fixing for 2019 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 - Commission non-paper and working paper
- ST 15326 2018 INIT of 13/12/2018: Proposal for a Council Regulation fixing for 2019 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
- ST 15118 2018 REV 1 of 13/12/2018: Proposal for a COUNCIL REGULATION fixing for 2019 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable

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- in Union waters and, for Union fishing vessels, in certain non-Union waters - Political agreement
- ST 15051 2018 INIT of 13/12/2018: Proposal for a Council Regulation fixing for 2019 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
 - ST 15051 2018 ADD 2 of 13/12/2018: Proposal for a Council Regulation fixing for 2019 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
 - ST 15051 2018 ADD 1 of 13/12/2018: Proposal for a Council Regulation fixing for 2019 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.
38. Rather than responding to the requests in the shortest possible timeframe to enable the Complainant to access the documents while the decision-making process was ongoing, the Council invoked Article 7(3) of Regulation 1049/2001 in respect of all four requests, extending the deadline by a further fifteen working days. This meant that the extended deadlines were as follows:
- 14/12/2018 for the request of 23/11/2018 (Annex 11)
 - 03/01/2019 for the request of 4/12/2018 (Annex 12)
 - 15/01/2019 for the request of 13 December 2018 (Annex 13)
 - 16/01/2019 for the request of 14 December 2018 (Annex 14).
39. However, the Council did not meet these deadlines. In fact, it sent its initial decisions in relation to all four requests together with the requested documents on 4 February 2019, once the decision-making process had been concluded (see Annexes 15 - 18). Since the requested documents had been disclosed in full, the Complainant did not submit a confirmatory application.
40. It should also be noted that the documents did not become available on the Council's documents register until after the decision-making process had been terminated.
41. On 28 February 2019 the Complainant sent a letter to the Head of Unit of the Information Services/Transparency Unit of the Council's General Secretariat (Annex 19), highlighting the fact that documents requested were not available to the public during the decision-making process either through the documents register or on request. The letter also pointed out deficiencies in the documents register and asked for a response on these points from the Council within a one month period. The Council still had not responded to this letter when this complaint was submitted.

2.4.2 Request once the decision-making process had concluded

42. On 8 February 2019 the Complainant made a request to access minutes of the Agriculture and Fisheries Council held on 17-18 of December 2018, insofar as they concern the TACs for EU fish stocks in the Northeast Atlantic for 2019, as well as all preparative and supporting

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documents related to this issue. The request clarified that the Complainant was not seeking access to the documents available on the documents register under inter-institutional file code 2018/0380(NLE) at the date of the request, nor those documents already disclosed in response to access to documents requests described in section 2.4.1 above. The Complainant stated that it was particularly interested in having access to the following:

"1. any additional documents used by Member States to support deviation from the Commission's proposal;

2. records, minutes or notes of the Council Working Party and COREPER discussions held in the lead-up to December Council, including those taken by members of the Council secretariat;

3. a full table of all proposed and agreed quota adjustments (such as those previously referred to as quota top-ups and/or any deductions) to account for a) catches that could be discarded before the introduction of the landing obligation, but now will have to be landed and b) exemptions from the landing obligation (in tonnes and %), and TACs before the adjustments (top-ups and/or deductions) were applied;

4. a detailed description of the methodology used to calculate quota adjustments (top-ups and/or deductions);

5. the calculations that the proposed and agreed quota adjustments (top-ups and/or deductions) were based on, ideally in Excel spreadsheet format."

43. Again, the Complainant submitted its request through the dedicated website www.asktheeu.org. Annex 20 provides the links to each interaction between the Complainant and the Council within the scope of this request.

44. On 1 March 2019 the Council invoked Article 7(2) of the Regulation to extend the deadline by 15 working days. The Council sent its initial decision providing access to a large number of the requested documents on 15 March 2019 (See Annex 1C, rows 29-30, 32-35 and 41-55).

45. The rudimentary minutes of the Agriculture and Fisheries Council that took place on 17-18 December 2018 were not disclosed with the initial decision, unlike in previous years, and neither are they filed on the documents register under inter-institutional code 2018/0380(NLE). A document presenting the 'Outcome of the Council meeting' can be found in the Council's calendar <http://data.consilium.europa.eu/doc/document/ST-15654-2018-INIT/en/pdf>. However, this document merely summarises the agreement, rather than providing any minutes of the "intense negotiations" that took place, or detailing the Member States' positions during these discussions.

46. The additional documents disclosed (i.e. those that were not already made available for download on the Council's register under inter-institutional code 2018/0380(NLE)) comprised the following:

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- A Commission working document with the calculations for the proposed quota deductions (Annex 27; see Annex 1C, row 51). This document, although highly relevant to the decision-making process, is not included on the Council's database. It should be noted that we have not received and cannot locate on the Council's documents register any document with the calculations for the agreed quota deductions.¹¹
- A number of additional working documents produced by the UK (Annex 28), Ireland (Annex 29) and Spain (Annex 30) (see Annex 1C, rows 47-49) and the Council Presidency (Annex 31; see Annex 1C, row 50).
- Records of certain meetings of the Working Party (Annexes 21 - 26; Annex 1C, rows 41-45). With the exception of one document (Annex 25), these documents cannot be described as meeting minutes or reports as, essentially, they only state that a specific topic was discussed and identify the documents under discussion. The Member States' positions are not recorded. These documents do not appear on the Council's documents register under inter-institutional code 2018/0380(NLE). Rather, they are filed (and can be downloaded since 15 March 2019) with the entry in the Council's calendar for that particular Working Party meeting.

47. The Applicant is yet to receive the Council's confirmatory decision in respect of this request. As such, reference to this request in the complaint is for the purpose of providing complete information.

2.5 Access to documents requests sent to the Commission

48. The Complainant submitted very similar access to documents requests to the Commission as those described in sections 2.2, 2.3 and 2.4.2 in the hope that the Commission might hold complimentary information that would allow the Complainant to enhance its understanding of the decision-making process. Indeed, we did receive the Commission's own reports of certain Working Party meetings which record Member State positions, providing information that was not forthcoming from the Council. We also received information on the calculation of quota top-ups regarding the TACs for 2018. See Annex 27 for a list of documents provided by the Commission. However, the Complainant's position is that the Council, as sole legislator under Article 43(3) TFEU, has a legal obligation to produce and provide access to legislative documents. Therefore, as the Commission is not the subject of this complaint, the details of these requests are not provided here. Nevertheless, should the Ombudsman wish, the Complainant is happy to provide further information.

3 Status of the requested documents as "legislative documents" containing "environmental information"

49. The Complainant submits that all of the documents falling within the scope of the access to documents requests described in section 2 above constitute "legislative documents" within the

¹¹ The document [ST 15577 2018 INIT](#) (received in response to the Complainant's request of 14 December 2018, see Annex 1C, row 23), contains calculations for deductions proposed for two TACs, but not for the other stocks for which deductions were made. Again, see paragraphs 91 - 98 for a description of the significance of this information.

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meaning of Regulation 1049/2001. In addition, all of them contain "environmental information" within the meaning of Article 2(1)(d) of the Aarhus Regulation.

50. Article 12(2) of Regulation 1049/2001 provides a clear definition of "*legislative documents*", that is "*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*".
51. The documents at issue in this complaint meet this definition because they are documents drawn up and received in the course of the procedure for the adoption of the TACs Regulation, which is legally binding in and for the Member States.

52. The Aarhus Regulation defines "environmental information" as, inter alia:

"any information in written, visual, aural, electronic or any other material form on:

...

(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".

53. The elements referred to in point (i) are:

"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."

54. The documents contain information about the respective TAC Regulations, which regulate the exploitation of stocks of fish and other marine species. Therefore, they have a direct impact on biological diversity in coastal and marine areas. As such, they contain "environmental information" within the meaning of the Aarhus Regulation.

4 Member State positions at Council meetings

4.1 Failure to record Member State discussions leading to the adoption of TACs for 2017 and 2018

55. This part of the complaint deals with the Council's failure to produce or disclose sufficiently detailed records of the discussions that took place at the Agriculture and Fisheries Councils and meetings of the Working Party and COREPER that took place during the decision-making process leading to the adoption of the TACs for 2017 and 2018. Maladministration is not alleged in relation to the decision-making process leading to the adoption of the TACs for 2019 because we have not yet received the Council's confirmatory decision in this matter. However,

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information in relation to this decision-making procedure is included in this section in the interests of providing as complete a picture as possible.

56. Like the vast majority of Council meetings, the Agriculture and Fisheries Councils that took place on 12-13 December 2016, 11-12 December 2017 and 17-18 December 2018 were closed to the public.¹² The respective minutes of the 2016 and 2017 Councils essentially state that a political agreement was reached (see Annexes 6 and 10). The Complainant acknowledges that we do have access to documents that note the Member States' positions at various points in the decision-making process (although they were not available during the decision-making process). However, there is no information on the different positions held by the Member States and the arguments made or the evidence presented during the actual December Council meetings, or on how these positions were reconciled. This is despite the Council's press release 774/16 of 14 December 2016 which stated: "[w]e have **successfully reconciled different opinions** to the benefit of all parties involved, and established the basis for the achievement of maximum sustainable yield"¹³; and the Council's press release of 13 December 2017, which stated that, "[o]n 13 December 2017 **after all-night negotiations**, the Council reached a political agreement on a regulation concerning the 2018 fishing opportunities for the main commercial fish stocks in the Atlantic and the North Sea"¹⁴ (emphasis added).
57. With regard to the minutes/reports of meetings of the Working Party and COREPER in the decision-making process leading to the adoption of the TACs for 2017 and 2018, the Council's replies to our access to documents requests detailed in sections 2.1 and 2.2 above effectively state that the Council does not hold any documents meeting this description. The same arguments that apply to the Council's duty to draw up minutes/reports of the Agriculture and Fisheries Council apply equally to meetings of the Working Party and COREPER.
58. Furthermore, the rudimentary Working Party reports relating to the decision-making process leading to the TACs for 2019 (see Annexes 21 - 26) fail to record the positions of the Member States in the discussions and therefore do not meet the requirements of the EU's transparency rules described above.
59. Finally, the fact that rudimentary reports of Working Party meetings relating to the TACs for 2019 were disclosed in response to our request raises questions as to the completeness of the Council's confirmatory decisions regarding the TACs for 2017 and 2018. Indeed, we have since found that certain Working Party reports regarding the TACs for 2017 and 2018 are listed on the Council's website but are not tagged with the inter-institutional code (see section 6.1 below for more information). These records are not available for download¹⁵ and were not disclosed to us in response to our requests detailed at sections 2.2 and 2.3 above.

¹² Although it should be noted that the a report by Corporate Europe Observatory, "Fishing for influence: Press passes give lobbyists EU Council building access during fishing quota talks", documented fishing industry lobbyists using press badges to enter the Council building during the Agriculture and Fisheries Council of December 2016 and of December 2015 (available at: <https://corporateeurope.org/power-lobbies/2017/05/fishing-influence>).

¹³ Press release 774/16 of 14 December 2016 (which appears to be no longer available online).

¹⁴ <http://www.consilium.europa.eu/en/press/press-releases/2017/12/13/council-agreement-on-2018-fishing-quotas-in-the-atlantic-and-north-sea/>

¹⁵ For example, see the following links:

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14262-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14427-2017-INIT

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60. Article 10(3) of the Treaty on European Union ("TEU") 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*". However, the minutes that were disclosed in relation to the Agriculture and Fisheries Councils of December 2016 and 2017 (see Annexes 6 and 10; none have yet been disclosed in relation to the Agriculture and Fisheries Council of December 2018) do not shed a light on the deliberations that took place or the Member States' positions.
61. Article 15(3) of the Treaty on Functioning of the European Union ("TFEU") 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*."
62. The detailed principles and conditions of access to documents were defined in Regulation 1049/2001. Recital 2 of the Regulation states that, "[o]penness enables citizens to participate more closely in the decision-making process". Article 2 states 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*." Also, since the discussions are legislative in nature as demonstrated in section 3 above, recital 6 ensures "wider access" and Article 12 envisages direct access through a public register.
63. The significance of making legislative documents available to the public has been stressed on a number of occasions by the Court of Justice of the EU. In joined case C-39/05 P and C-52/05 P Kingdom of Sweden and Maurizio Turco v Council of the European, the Court of Justice stated 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*".¹⁶ These principles were emphasised by the Court of Justice more recently in case C-57/16 ClientEarth v Commission, paragraph 84.¹⁷
64. In addition to this, the deliberations on TACs at the Agriculture and Fisheries Councils and meetings of the Working Party and COREPER constitute "environmental information" and, as such, the obligations contained in the Aarhus Regulation must also be upheld. In case C-57/16 the Court of Justice recalled its consistent case law that states:

"Regulation No 1367/2006 aims, as provided for in Article 1 thereof, to ensure the widest possible systematic availability and dissemination of environmental information... It follows, in essence, from recital 2 of that regulation that the purpose of access to that information is to

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14955-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-15143-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-15433-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14227-2016-INIT

¹⁶ C-39/05 P - Sweden and Turco v Council, ECLI:EU:C:2008:374, paragraph 46.

¹⁷ C-57/16 P - ClientEarth v Commission, ECLI:EU:C:2018:660, paragraph 84.

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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".¹⁸

65. However, the transparency obligations enshrined in Article 10(3) TEU, Article 15(3) TFEU, Regulation 1049/2001 and the Aarhus Regulation are contingent on the institutions drawing up and retaining documents relating to their functions. Institutions cannot simply frustrate the right to access documents by failing to document in sufficient detail their activities, as the Council has done in relation to Council meetings leading to the adoption of the TACs for 2017 and 2018 at both preparatory and ministerial levels.
66. Indeed, the (then) Court of First Instance (now the General Court) has recognised that such failure is unlawful.
67. In case T-264/04 WWF European Policy Programme v the Council of the European Union, the then 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."*¹⁹
68. 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 record of discussions leading to the unanimous political agreement of the TACs Regulations for 2017 and 2018 which, in many respects, depart significantly from the Commission's proposals and the best available scientific advice and which require implementing measures at national level.
69. With specific regard to the meetings of the Working Party and COREPER, both the Ombudsman and the European Parliament have called on the Council to record discussions at such meetings and to make them publicly available in a timely manner.
70. The Ombudsman's Decision in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process states:

"Since the Council's preparatory bodies do not meet in public, citizens can exercise their democratic right to follow legislative discussions only by accessing records of these discussions.

¹⁸ C-57/16 P - ClientEarth v Commission, ECLI:EU:C:2018:660, paragraph 98.

¹⁹ T-264/04 WWF European Policy Programme v Council of the European Union, ECLI:EU:T:2007:114, paragraph 6.

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14. For this to be possible, legislative discussions in the preparatory bodies must be documented; where Member States take positions in preparatory bodies, this must be recorded' and timely access to legislative documents must be easily available.

15. The Ombudsman found that the Council's failure systematically to record the identity of Member States when they express positions in discussions within preparatory bodies [18] constitutes maladministration" (emphasis added).

71. On 19 January 2019 the European parliament adopted Resolution 2018/2096(INI) on the Ombudsman's Strategic Inquiry²⁰. In the Resolution, the Parliament: "*Deplores the fact that, unlike committee meetings in Parliament, meetings of the preparatory bodies of the Council as well as the majority of debates in the Council are held in camera; believes that citizens, media and stakeholders must have access by appropriate means to the meetings of the Council and its preparatory bodies, including via live- and web streaming, and that **the minutes of these meetings should be published in order to ensure a high level of transparency in the legislative process in both components of the European legislature; underlines that, according to the principle of democratic legitimacy, the public must be able to hold both components of the legislature accountable for their actions***" (emphasis added)

72. The failure of the Council to record in sufficient detail the discussions at the Agriculture and Fisheries Councils and meetings of the Working Party and COREPER in relation to the adoption of the TACs for 2017 and 2018, at the very least recording the positions adopted by the different Member States in these discussions, and to disclose those documents, is a clear case of maladministration.

5 Failure to make legislative documents available to the public while the decision-making process is ongoing

73. This section deals with the timing of disclosure of legislative documents containing environmental information in the decision-making process leading to the adoption of the TACs for 2017, 2018 and 2019. Over the last three years, the Complainant has observed that the Council lists many of the documents used in the decision-making process leading to the adoption of the TACs on its documents register. However, these documents (with the exception of the Commission's proposal) are not available for the public to download until after the decision-making process has come to an end. The Complainant submits that failure to make legislative documents directly accessible to the public while the decision-making process is ongoing is an instance of maladministration.

74. As described in section 2.4.1 above, during the decision-making process leading to the adoption of the TACs for 2019, the Complainant made a number of access to documents requests in an attempt to see relevant legislative documents at a time when they could be used to enhance participation in the decision-making process. The documents requested were clearly identified using the Council's own document numbers. As such, it was perfectly possible

²⁰ Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2019-0045&format=XML&language=EN>

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for the Council to disclose the documents in the shortest possible timeframe and certainly while the decision-making process was ongoing. By contrast, the Council resorted to inappropriate use of Article 7(2) of Regulation 1049/2001 in order to extend the deadlines by a further 15 working days. It then flouted these extended deadlines, thereby ensuring that the decision-making process had come to an end by the time the documents were disclosed. The failure of the Council to make these documents available during the decision-making process in response to the Complainant's requests is a further instance of maladministration.

75. Both Article 10(3) TEU and Article 15(1) TFEU emphasise the right of citizens to participate in the EU's decision-making processes and the recitals to Regulation 1049/2001 and the Aarhus Regulation, cited above, demonstrate that participation in the decision-making process is one of the main objectives of these Regulations. This is precisely why Article 12 of Regulation 1049/2001 requires legislative documents to be made directly available to the public through an electronic register.
76. Given the emphasis placed on participation in the decision-making process in the EU Treaties and legislation, there is a clear intention that public access to legislative documents and documents containing environmental information must be ensured during the decision-making process, i.e. at a time when the public can use the information to enhance their participation.
77. This has been explicitly recognised by the Court of Justice sitting in grand chamber formation. In case C-57/16 ClientEarth v the Commission, the Court referred to the right of participation in Article 10(3) TEU and stated that, "the exercise of those rights presupposes not only that those citizens have access to the information at issue so that they may understand the choices made by the EU institutions within the framework of the legislative process, but also that they may have access to that information in good time, at a point that enables them effectively to make their views known regarding those choices"²¹ (emphasis added).
78. This was echoed in the Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process. Paragraph 2 states:

*"Ensuring that citizens are able to follow the progress of legislation is not something to be desired; it is a legal requirement. Under the EU Treaties, every citizen has "the right to participate in the democratic life of the Union" and EU decisions must be taken "as openly and as closely as possible to the citizen". The Treaties specifically require that the Council meets in public "when considering and voting on a draft legislative act". This kind of transparency is meant to apply **during the entire legislative process, in good time, and not only retrospectively after the process has been concluded**. Fundamentally, this is aimed at ensuring that citizens can know how any particular legislative process is progressing, the various options that are being discussed and the positions that are being promoted or opposed by national governments."* ²²

²¹ C-57/16 P - ClientEarth v Commission, ECLI:EU:C:2018:660, Paragraph 84.

²² Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, available at: <https://www.ombudsman.europa.eu/en/special-report/en/94921>

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79. She concluded that: "*[a]t present, legislative documents of the Council are not, to any significant extent, being made directly and proactively accessible to the public while the legislative process is ongoing.*"
80. The Complainant agrees with this analysis and confirms that it is consistent with our experience described above.
81. The Council should provide the public with direct access to legislative documents while the decision-making process is ongoing through its documents register in accordance with Article 12 of Regulation 1049/2001. Such direct access should be provided as and when the documents are circulated among Member State delegations. At the very least, the Council should provide such timely access in response to access to document requests, in accordance with both Regulation 1049/2001 and the Aarhus Regulation. Failure to do either is an instance of maladministration.

6 Failures regarding the Council's documents register

82. This section deals with serious failings in the way legislative documents containing environmental information are organised in the Council's documents register.
83. As mentioned above, Article 12(2) of Regulation 1049/2001 requires the Council to make legislative documents directly available to the public. According to Article 12(1) this should be done by way of an electronic public register of documents. Article 12(4) clarifies that where direct access is not given through the register, the register shall as far as possible indicate where the document is located. At the very least, this allows members of the public to identify the documents they are interested in and know how to go about accessing them.
84. Article 6 of the Aarhus Regulation also requires the Council to actively disseminate environmental information through "*electronic databases that are easily accessible to the public through public telecommunication networks.*" Such databases should be equipped with search aids and other forms of software designed to assist the public in locating the information they require.
85. The Council has a well-established documents register where it lists many of the documents used in the annual decision-making processes leading to the adoption of TACs. Besides the fact that documents are not available for download on the register during the decision-making process, which is dealt with in section 5 above, the Complainant agrees with the Ombudsman's finding that the register is incomplete and not user friendly.
86. In her Special Report in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, the Ombudsman found that "*the Council's current public register of documents is **incomplete and not very user-friendly**. For example, the practice of publishing lists of 'working documents', which have no separate entry in the register, is unsatisfactory, as it makes it difficult for members of the public to find out easily and in good time that such documents exist. Overall, an **extensive knowledge of the Council's functioning is required in order to find a specific document**. This makes it cumbersome for the general public to access information on negotiations in preparatory bodies.*" (emphasis added).

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87. This finding was echoed by the European Parliament in its resolution of 17 January 2019 when it stated that it: *Deplores the fact that the Council **does not proactively publish most documents related to legislative files, preventing citizens from knowing which documents actually exist and thus impeding their right to request access to documents**; regrets the fact that available information on legislative documents is presented by the Council in a register which is **incomplete and not user-friendly**; calls on the Council to list in its public register all the documents related to legislative files, irrespective of their format and their classification; notes in this regard the efforts made by the Commission, Parliament and the Council to create a joint database for legislative files and underlines that all three institutions have a responsibility to swiftly finalise this work;*" (emphasis added).
88. The Complainant agrees with the findings of the Ombudsman and the European Parliament. In the Complainant's experience, the register is currently unfit for two reasons. First, it does not list all of the documents that are relevant to the decision-making process. Second, the way that the documents are listed makes it very difficult for members of the public to have any understanding of their content and, therefore, if they are of interest.

6.1 The documents register is incomplete

89. First, the Complainant has already set out at some length the fact that Council minutes of Agriculture and Fisheries Councils and meetings of the Working Party and COREPER that record Member State positions apparently do not exist and therefore cannot be included in the register. In addition to this, even the rudimentary meeting reports that have been made available to the Complainant with the Council's initial decision of 15 March 2019 (see Annexes 21 - 26) are not tagged with the relevant inter-institutional code and stored in the documents register. Rather, members of the public must search through the Council's meeting agenda to locate the specific meeting in which they are interested. The Complainant has also found such Working Party reports in the agenda for the decision-making process leading to the TACs for 2017 and 2018 that are still not available for download and are not tagged with the relevant inter-institutional code.²³ We also managed to find some Commission non-papers that were not tagged with the relevant inter-institutional code.²⁴ Furthermore, the documents in Annex 1C, rows 47 - 51 are not in the documents register.

²³ For example, see the following links:

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14262-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14427-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14955-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-15143-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-15433-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14227-2016-INIT

²⁴ https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14316-2017-INIT

https://www.consilium.europa.eu/register/en/content/out?&typ=ENTRY&i=ADV&DOC_ID=ST-14317-2017-INIT

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90. In addition to this, it is impossible to search the Council's agenda for past meetings of the Working Party on External and Internal Fisheries Policy. When one searches for working party meetings related to "fisheries", the only meetings identified by the search engine are of the Working Party on Statistics. In order to find the meeting reports of working parties related to fisheries, it is necessary to click on every date during the decision-making process. The Complainant submits that all documents related to the TACs decision-making process should be tagged with the relevant inter-institutional code and placed in the documents register.
91. There is also a lack of documents containing information on the calculation of proposed and agreed quota top-ups/deductions to take account of the implementation of the landing obligation, as well as on the agreed figures.
92. The only documents regarding such information in relation to December Councils 2016, 2017 and 2018 available on the documents register, are a number of Commission non-papers with updates to the Commission's proposal, which specify the proposed (but not the agreed) quota top-ups/deductions. For December Council 2018, one of these non-papers²⁵ contains calculations for deductions proposed for two TACs.
93. However, the documents register does not seem to contain any information on calculations of the other quota deductions proposed regarding the TACs for 2019, or any calculations of quota top-ups proposed or agreed regarding the TACs for 2017 and 2018. Information on the agreed (as opposed to the proposed) quantities of quota top-ups or deductions and the agreed (as opposed to the proposed) TACs before such top-ups or deductions were applied is not included in the register for any of the December Councils 2016, 2017 or 2018.
94. This information is needed to analyse whether the agreed TACs, taking into account any applied quota top-ups or deductions, were set in line with the maximum sustainable yield exploitation rate as required by Article 2(2) of the CFP, or - where MSY-based advice is not available - in line with the best available scientific advice.
95. Before the introduction of the landing obligation, TACs effectively were 'Total Allowable Landing' limits, since catches in excess of these TACs could be discarded. This means that when following scientific advice, TACs were based on the scientific advice on landings rather than advice on total catches.
96. As the landing obligation was gradually phased in between 2015 and 2019, the purpose of TACs changed from regulating landings to regulating catches. Within this timeframe, the catches of many stocks were partially subject to the landing obligation, meaning that a quota 'top-up' was added to what used to be 'Total Allowable Landing' limits, to account for that part of the catch that used to be discarded but now had to be landed. Until December Council 2017, the Commission proposed such quota top-ups, which have subsequently been incorporated into the TACs adopted by the Council. The landing obligation came fully into force in 2019, meaning that all catches of quota stocks in the Northeast Atlantic now have to be landed, unless exemptions apply. The Commission therefore changed its approach from proposing landings-TACs plus quota top-ups, to proposing catch-TACs, with deductions applied to TACs

²⁵ The document [ST 15577 2018 INIT](#) (received in response to the Complainant's request of 14 December 2018), contains calculations for deductions proposed for two TACs, but not for the other stocks where deductions were made (See Annex 1C, row 23).

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subject to certain exemptions, to reflect that certain discards may continue under these exemptions.

97. Access to information on the proposed and agreed top-ups or deductions is crucial to reliably assess whether the proposed and agreed TACs (after top-ups/deductions have been applied) are in line with scientific advice. The TAC Regulation itself only contains the final agreed TACs, without the applied top-up/deduction amount being specified. Moreover, since the underlying calculations for the proposed top-ups/deductions are complex, it is difficult for external stakeholders, who do not have access to the data and methodology used, to assess whether these top-up/deduction levels are in line with scientific advice. Therefore, a list of the proposed and agreed top-ups/deductions as well as the TACs before the top-ups/deductions were applied, is particularly important to allow at least a direct comparison of the 'pre-top-up/deduction TACs' with the relevant ICES landings or catch advice, respectively.
98. Documents containing information on top-ups/deductions must be in the Council's possession. Otherwise, the institution would not be in a position to know whether the TACs it adopts are in line with scientific advice. Therefore, they should be tagged with the relevant inter-institutional code and placed on the documents register.

6.2 The documents register is not user friendly

99. Besides the issue of the incompleteness of the documents register, our main concern regarding its user-friendliness concerns the fact that it does not allow members of the public to identify the documents to which they would like to request access. Documents are listed in the register according to their internal document number and a title. As can be seen from Annex 1, many of the documents have the same title, i.e. that of the Commission's proposal. Sometimes slightly more information is provided in brackets, e.g. that the document is a "Commission non-paper" or that it is a "Member State comment". The lack of a title that describes the content makes it impossible for the public to identify the specific documents to which they want access. In fact, to have an understanding of the content of a document it is necessary to read it. Obviously, this is impossible when the documents are not available for download without first submitting a request for access to the Council. This goes against the very objective of a documents register, which is to allow the public to identify the information it is interested in reading. Incidentally, it probably adds to the Council's workload as members of the public are more likely to submit general and open-ended requests for access to documents, rather than requests that identify precise documents.

7 Conclusion

100. According to the Basic CFP Regulation, the deadline for achieving MSY is 2020. Therefore, 2019 is the last opportunity for fisheries ministers to meet this deadline by adopting TACs that follow the best available scientific advice. It is, therefore, crucially important for members of the public to have access to information that allows for meaningful participation in this decision-making process. The public must also be in a position to verify that the TACs adopted comply with CFP and to hold their governments to account for the positions adopted during Council meetings.

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101. Therefore, we call on the Ombudsman to seek a solution with the Council to remedy the instances of maladministration described in this complaint before the decision-making process leading to the adoption of TACs for 2020 commences in October/November 2019. In the absence of such a solution, the Complainant calls on the Ombudsman to adopt a finding of maladministration and to make the following recommendations:

- The Council must draw up reports or minutes of future Agriculture and Fisheries Councils and meetings of the Working Party and COREPER, that record the positions adopted by the Member States throughout the discussions and allow members of the public to understand how the different positions were reconciled;
- The Council must make all legislative documents available to the public on its documents register (i.e. available for download) as and when they are circulated among Member State delegations and/or as they are completed, to allow for meaningful public participation in the decision-making process;
- The Council must list all documents related to the decision-making procedure on its register in a way that allows members of the public to identify the information they contain, for example by giving them meaningful titles, and ensure that all documents relevant to the decision-making process are tagged with the relevant inter-institutional code.

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Annexes

Annex 1A: List of documents accessible to ClientEarth regarding the adoption of TACs for 2017 (including links to those documents on the Council's documents register)

Annex 1B: List of documents accessible to ClientEarth regarding the adoption of TACs for 2018 (including links to those documents on the Council's documents register)

Annex 1C: List of documents accessible to ClientEarth regarding the adoption of TACs for 2019 (including links to those documents on the Council's documents register)

Annex 1D: List of documents relevant to the adoption of the TACs for 2017 and 2018 received from the Commission in response to ClientEarth's access to documents requests

Annex 2: ClientEarth access to documents request of 15 December 2016

Annex 3: Council replied on 13 January 2017

Annex 4: Council's initial decision of 3 February 2017

Annex 5: Screenshot of zip files received with the Council's initial decision of 3 February 2017

Annex 6: The minutes of the Agriculture and Fisheries Council of December 2016

Annex 7: ClientEarth's confirmatory application of 24 February 2017

Annex 8: Council's confirmatory decision of 7 April 2017

Annex 9: Links to all of the correspondence exchanged between ClientEarth and the Council regarding ClientEarth's access to documents request in respect of the decision-making process leading to the adoption of the TACs for 2018 (on asktheeu.org)

Annex 10: Minutes of the Agriculture and Fisheries Council of 11-12 December 2017

Annex 11: Council letter of 14 December 2018 extending deadline regarding ClientEarth's request of 23 November 2018

Annex 12: Council letter of 3 January 2019 extending deadline regarding ClientEarth's request of 4 December 2018

Annex 13: Council letter of 15 January 2019 extending deadline regarding ClientEarth's request of 13 December 2018

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Annex 14: Council letter of 16 January 2019 extending deadline regarding ClientEarth's request of 14 December 2018

Annex 15: Council decision of 4 February 2019 regarding ClientEarth's request of 23 November 2018

Annex 16: Council decision of 4 February 2019 regarding ClientEarth's request of 4 December 2018

Annex 17: Council decision of 4 February 2019 regarding ClientEarth's request of 13 December 2018

Annex 18: Council decision of 4 February 2019 regarding ClientEarth's request of 14 December 2018

Annex 19: ClientEarth letter to the head of the Council's transparency unit of 28 February 2019

Annex 20: Links to all of the correspondence exchanged between ClientEarth and the Council regarding ClientEarth's access to documents request in respect of the decision-making process leading to the adoption of the TACs for 2019 (on asketheeu.org)

Annex 21: Council document st14399.en18PA containing a report of the Working Party meeting of 21 November 2018

Annex 22: Council document st14706.en18PA containing a report of the Working Party meeting of 27 November 2018

Annex 23: Council document st14709.en18PA containing a report of the Working Party meeting of 10 December 2018

Annex 24: Council document st15444.en18PA containing a report of the Working Party meeting of 10 December 2018

Annex 25: Council document st15445.en18PA containing a report of the Working Party meeting of 10 December 2018

Annex 26: Council document st15624.en18PA containing a report of the Working Party meeting of 7 January 2019

Annex 27: Council document wk13666 –Commission working document of 9 November 2018

Annex 28: Council document wk15264 – UK working paper of 17 December 2018

Annex 29: Council document wk15264 – Ireland working paper of 11 December 2018

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Annex 30: Council document wk15550 – Spain working paper of 13 December 2018

Annex 31: Council document wk15065 – Presidency working paper of 5 December 2018