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From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)
No. prev. doc.:	12094/19; 12190/19
Subject:	Complaint 640/2019/TE - Inspection by the Ombudsman of documents held by the Council in the framework of her inquiry - Approval of a letter

1. Following the inspection carried out by the Ombudsman's services on 27 June 2019, the related report was transmitted to the Council by letter of 23 July 2019¹.
2. In the said letter the Ombudsman asked the Council's views on a possible pro-active publication of the documents issued during the decision-making process leading to the annual adoption of Council Regulations fixing the total allowable catches ("TACs") of fish stocks.
3. On 17 September 2019, a draft reply letter to the Ombudsman was circulated to the Working Party on Information².
4. The Coreper is therefore invited, in accordance with Article 19(7)(k) of the Council's Rules of Procedure, to approve the draft letter as set out in the ANNEX.

¹ Document 12094/19.

² Document 12190/19.

DRAFT

Brussels,

**Ms Emily O'Reilly
European Ombudsman
1, Avenue du Président Robert Schuman
B.P. 403
F-67001 Strasbourg Cedex**

Subject: Complaint 640/2019/TE

Dear Ms O'Reilly,

Thank you for your letter of 23 July 2019 concerning your inquiry as regards complaint 640/2019/TE on the transparency of Council's decision-making process for adopting annual Regulations setting fishing quotas (total allowable catches).

In your letter, you requested further information on whether documents detailing the state of negotiations and consolidating positions of individual Member State delegations on the decision-making at issue¹ could be made publicly available proactively when circulated and at least as from the end of November of each year.

You have also suggested that any additional comment on the complaint is provided on this occasion.

You will find herewith detailed observations on your request.

Yours sincerely,

Coreper chair

¹ In particular the so-called 'bible' document

I. PRELIMINARY REMARKS ON PROACTIVE DISCLOSURE AND ON THE NATURE OF THE DECISION-MAKING AT STAKE

As regards the nature of the decision-making procedure for the adoption of TAC's

Both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15(2) and (3)) make a distinction between legislative and non-legislative activities as regards the application of transparency rules, with particular emphasis on transparency in the context of legislative activities.

As also confirmed by established case law, the principle of widest access is particularly pressing and, therefore, the requirements for transparency are greater, where the institutions act in the framework of legislative activities.

In that regard, for instance, in its leading judgment in the *Turco* case, the Court of Justice has made it clear that openness *"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"*².

In the *De Capitani* judgment, the General Court has underlined that *"primary EU law establishes a close relationship that, in principle, exists between legislative procedures and the principles of openness and transparency"*, that the considerations on widest possible right of access *"are clearly of particular relevance where those documents are part of the EU's legislative activity"* and that *"the principles of publicity and transparency are inherent to the EU legislative process"*³.

In that respect, it is important to stress that the documents concerned by this inquiry are drawn up in the context of a procedure leading to the adoption of a non-legislative act.

More specifically, this file concerns the decision making process leading to the annual adoption of Council Regulation fixing the fishing opportunities for certain fish stocks and groups of fish stocks, which is a non-legislative act, based on Article 43 (3) TFUE.

² Judgment of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, paragraph 46

³ Judgment of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, paragraphs 77, 80 and 81 respectively.

In that respect, it is important to recall that the Lisbon Treaty has clarified that constitute legislative acts, the legal acts adopted by a legislative procedure (Article 289 (3) TFUE). The Court of Justice has also held in its judgment of 6 September 2017 on the relocation cases that "*a legal act can be classified as a legislative act only if it has been adopted on the basis of a provision of the Treaties which expressly refers either to the ordinary legislative procedure or to the special legislative procedure*"⁴. Making particular reference to the requirement of transparency under Article 15 (2) TFUE, the Court, has further considered that "*The distinction between legislative and non-legislative acts is undoubtedly significant, since it is only on the adoption of legislative acts that certain obligations must be complied with*"⁵.

The fact that the decision-making procedure at issue is one leading to the adoption of a non-legislative act is particularly relevant since it is a domain of highly technical expertise and difficult negotiations where the Council acts as the regulator of fish stocks for the European Union. This does not mean that the public must not be informed as much as possible of the discussions taking place in the Council on these important issues, but the fixing of fishing opportunities and sharing these opportunities among Member States, like it is done in international fora with third States, is a matter where transparency does not bear the same weight as in legislative matters. It is thus not without importance that the drafters of the Treaties have foreseen a non-legislative procedure for this file.

It results from the above that, contrary to the higher standard of transparency that applies when the institutions act in the context of a legislative process, the Council has to pay greater attention to the protection of the decision-making process in the context of the decision-making procedure concerned by the inquiry at issue.

⁴ *Slovak Republic and Hungary v. Council*, joined cases C-643/15 and C-647/15, paragraph 62

⁵ Paragraph 59 referred to in footnote 4

As regards proactive disclosure to the public in particular

Regulation 1049/2001 provides that wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, but that at the same time the effectiveness of the institutions' decision-making process should be preserved. Such documents should be made directly accessible to the greatest possible extent⁶. The Regulation also sets the principle that, subject to the exceptions it provides for, proactive publication shall be pursued by the institutions as possible and in accordance with the rules of the institution concerned⁷.

It results from the above provisions that proactive disclosure should be pursued:

- to the greatest extent possible and without prejudice to the exceptions provided by Article 4 of Regulation (EC) 1049/2001 (including but not limited to the protection of the institution's decision-making process);
- with particular emphasis when the institutions act in the context of a legislative procedure⁸;
- in accordance with the rules of the institutions concerned.

The Council's rules of Procedure (CRP) provide the rules for proactive disclosure of Council documents⁹. As regards documents concerned by the inquiry at issue, i.e. documents available at least as from the end of November of each year consolidating the state of negotiations and the positions of Member States in the context of the non-legislative procedure for adoption of TAC's, those provisions do not set an obligation of proactive disclosure while the decision-making is ongoing.

It follows from the above that the Council does not have an obligation to proactively release the documents requested at issue, but that it should rather refrain from such disclosure if this would seriously undermine its decision-making. This is the case as it will be demonstrated below.

⁶ Recital 6 of Regulation (EC) 1049/2001

⁷ Article 12 (1) and (2) of Regulation (EC) 1049/2001

⁸ This does not mean that documents that are not issued in the context of a legislative procedure are *ipso facto* excluded from proactive disclosure (as they are not by any means excluded from the right of access on request), but only that as regards those documents the particular pressing exigence of transparency that concerns legislative files does not apply.

⁹ Notably Articles 6 to 10 of the CRP and Article 11 of Annex 2 of the CRP.

II. ASSESSMENT OF THE RISK THAT PROACTIVE PUBLICATION WOULD ENTAIL FOR THE ONGOING DECISION-MAKING PROCESS

During the inspection meeting of 27 June 2019, the representatives of the General Secretariat of the Council have provided detailed information on the decision-making process for the annual adoption of the TAC's Regulation, which was reflected in the inspection report.

The Council representatives also made it clear that this is a highly complex process carried out in extremely short deadlines and that proactive disclosure of the documents at issue would seriously undermine the effectiveness of the decision-making procedure.

More specifically, the documents at issue are drawn up for the internal use of the Council in the sense of Article 4(3), first subparagraph, of Regulation 1049/2001 and relate to matters on which the decision-making process is ongoing in the context of arduous negotiations characterised by intense discussions and very divergent preliminary positions that have to be conciliated. This is all the more so since those documents, consolidating the essence of the positions expressed, are at the heart of the discussions and are therefore critical for the decision-taking.

If documents detailing the state of negotiations and consolidating positions of Member States were released in the course of negotiations in this context, this would risk freezing the respective positions and limit the flexibility of Member States to shift from their initial positions as well as their willingness to compromise, which are key to successfully reaching an agreement at Council level. The disclosure of initial positions of Member States ahead of deliberations would lead to more entrenched positions and reduce their margin of manoeuvre to compromise, jeopardising thus an agreement during Council deliberations. Such disclosure would therefore limit the possibility to discuss in serenity and agree, which would, in turn, run counter to the efficiency of the decision-making process.

As also reflected in the inspection report, in preparing their initial positions, Member States need to juggle between different interests (industry vs. environment, small vs. large-scale fisheries etc.) for more than a hundred stocks, and therefore the implications of such a disclosure for each Member State and for each stock would considerably delay the success of the Council deliberations.

Moreover, it is noted that the decision-making process at stake is subject to intense external attention. Exposure of the issues debated, in view of their sensitivity, would entail external pressure to the detriment of the effectiveness of the decision-making process¹⁰.

In that regard, it is added that case-law recognises that the risk of external pressure can constitute a legitimate ground for restricting access to a document related to the decision-making process¹¹.

It results from the above that there is a reasonable foreseeable risk that disclosure of the documents at issue while the decision making process is ongoing could specifically and effectively undermine this process and that such risk is in itself a sufficient reason for refraining from systematic proactive disclosure.

¹⁰ To illustrate this point, it could be added that a number of articles in the press comment on an incident where a number of fish lobbyists had used press passes to enter the Council building during ministerial deliberations about fishing quotas (for instance: <https://www.economist.com/europe/2018/11/24/the-power-of-fish>)

¹¹ See notably judgment of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, paragraph 99.