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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 03/c/01/20

Delegations will find attached the:

- request for access to documents sent to the General Secretariat of the Council on 02 December 2019 and registered on 03 December 2019 (Annex 1);
- reply from the General Secretariat of the Council dated 16 January 2020 (Annex 2);
- confirmatory application dated 06 February 2020 and registered on 07 February 2020 (Annex 3).

[E-mail message sent to access@consilium.europa.eu on 02 December 2019 - 21:15]

Dear Mr Florindo Gijon.

In accordance with Regulation 1049/2001 and Regulation 1367/2006, we hereby request access to any documents in the Council's possession that record the positions of Member States in relation to the Proposal for a Council Regulation fixing for 2020 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.

We also request access to the following documents that are listed on the Council's documents register:

- ST 14385 2019 INIT
- ST 13761 2019 INIT
- ST 14471 2019 INIT
- ST 14471 2019 ADD 1
- ST 14471 2019 ADD 2
- ST 14471 2019 ADD 3
- ST 14471 2019 ADD 4
- ST 14471 2019 ADD 5
- ST 14471 2019 ADD 6
- ST 14471 2019 ADD 7
- ST 14471 2019 ADD 8
- ST 14471 2019 ADD 9
- ST 14471 2019 ADD 10
- ST 14471 2019 ADD 11
- ST 14558 2019 INIT
- ST 13918 2019 INIT
- ST 14134 2019 INIT
- ST 14134 2019 COR 1
- ST 14134 2019 COR 2

We note that the EU Ombudsman recently recommended that:

"The Council should proactively make public documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter" - Recommendation of the European Ombudsman in case 640/2019/FP on the transparency of the Council of the EU's decision-making process leading to the adoption of annual regulations setting

fishing quotas (total allowable catches), available at:

<https://www.ombudsman.europa.eu/en/recommendation/en/120761>

We therefore request that the documents identified above become publicly available on the Council's documents register immediately, in accordance with the Ombudsman's recommendation and Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001.

Yours sincerely,

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Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 16 January 2020

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Email: **DELETED**

Ref. 19/2527-aa/ns

Request made on: 02.12.2019
Registered on: 03.12.2019
Deadline extension: 03.01.2019

Dear **DELETED**

Thank you for your request for access to documents of the Council of the European Union.¹

Please find attached the documents you requested.

Yours sincerely,

Fernando FLORINDO

(Enclosures)

¹ The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

From: **DELETED**

Sent: Thursday, February 06, 2020 17:42

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Subject: Ref. 19/2527-aa/ns - Confirmatory application regarding Council's decision on disclosure of documents relating to fishing TACs for the Northeast Atlantic for 2020

Brussels, 6 February 2020

Council of the European Union
General Secretariat
Directorate-General Communication and Information
Knowledge Management
Transparency

Dear Ms Sir/Madam,

RE: Ref. 19/2527-aa/ns - Confirmatory application regarding Council's decision on disclosure of documents relating to fishing TACs for the Northeast Atlantic for 2020

In accordance with Article 7(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, we would like to request a review of the Council's reply to our request for access to documents, registered on 3 December 2019.

By email sent on 2 December, we submitted the following request:

“...we hereby request access to any documents in the Council's possession that record the positions of Member States in relation to the Proposal for a Council Regulation fixing for 2020 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.

We also request access to the following documents that are listed on the Council's documents register:

- ST 14385 2019 INIT
- ST 13761 2019 INIT.
- ST 14471 2019 INIT
- ST 14471 2019 ADD 1
- ST 14471 2019 ADD 2
- ST 14471 2019 ADD 3
- ST 14471 2019 ADD 4
- ST 14471 2019 ADD 5
- ST 14471 2019 ADD 6
- ST 14471 2019 ADD 7
- ST 14471 2019 ADD 8
- ST 14471 2019 ADD 9
- ST 14471 2019 ADD 10
- ST 14471 2019 ADD 11
- ST 14558 2019 INIT
- ST 13918 2019 INIT
- ST 14134 2019 INIT
- ST 14134 2019 COR 1
- ST 14134 2019 COR 2

We note that the EU Ombudsman recently recommended that:

"The Council should proactively make public documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter".[1]

We therefore request that the documents identified above become publicly available on the Council's documents register immediately, in accordance with the Ombudsman's recommendation and Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001."

The Council sent its response on 16 January 2020, some 25 working days later, providing access to all of the documents that had been specifically identified in our request by their internal Council reference number.

We hereby request a review of the Council's decision on the following grounds:

[1] Recommendation of the European Ombudsman in case 640/2019/FP on the transparency of the Council of the EU's decision-making process leading to the adoption of annual regulations setting fishing quotas (total allowable catches), available at: <https://www.ombudsman.europa.eu/en/recommendation/en/120761>

Not all of the documents falling within the scope of our request have been disclosed

First, we are surprised that the disclosed documents do not include the so-called bible (i.e. the document that collates all of the Member State positions on the Commission's proposal). We would have expected it to have been circulated among delegations before 2 December 2019. This is undoubtedly a document that falls within the scope of our request because it contains Member State positions.

Second, we noted that in the only record of meetings of the Council Working Party in Internal and External Fisheries Policy (document ST 13918) mentions the deadline of 25 November was given for Member States to send written submissions. Therefore, we are surprised that we have received only 11 submissions from Member States. If the other submissions were received on or before 3 December, these should have been disclosed to us.

Third, we also expected to receive more documents containing records of the positions put forward by Member States at meetings of the Council Working Party in Internal and External Fisheries Policy in the period between 24 October 2019 and 3 December 2019. We note that document ST 13918 is the only record of a working party meeting that was received and this document only contains a very short summary of the discussion.

For these reasons, we request a re-examination of the documents that were in the Council's possession as at the date of our request to ensure that all relevant documents have been disclosed.

The Council has an obligation to record discussions at working party meetings

If the reason for the lack of access to records or minutes of Council working party meetings is due to the fact that they do not exist, this is in itself a breach of Regulation 1049/2001.

As opposed to committee meetings in the European Parliament, the meetings of Council working parties take place behind closed doors. Therefore, in order for EU citizens to follow and participate in the decision-making process, the Council is obliged to record the discussions that take place, including the positions put forward by Member State delegations.

Failure to do so removes the effect utile of Article 2 of Regulation 1049/2001 and breaches Articles 10(3) of the Treaty on European Union and Article 15(3) of the Treaty on the Functioning of the European Union. For the public to have access to documents, they must exist in the first place. To this effect, see the General Court's reasoning at paragraph 61 of Case T-264/04 WWF European Policy Programme v the Council of the European Union.

This is all the more important when the Council is discussing measures that will become binding on the Member States, one of the Council's essential functions. The TACs, as set unilaterally by the Council on the basis of Article 43 of the Treaty on the Functioning of the European Union, are binding on the Member States and must be implemented by them. In addition to this, the TACs themselves implement the Common Fisheries Policy Regulation, an EU legislative act. Therefore, the public (and indeed Members of the European Parliament) must have timely access to documents that record discussions leading to the adoption of such measures.

Documents related to setting the TACs should have been published in the Council's documents register before political consensus was reached at the Agriculture and Fisheries Council in December

Article 10(3) of the Treaty on European Union, Article 15(3) of the Treaty on the Functioning of the European Union, Regulation 1049/2001 and Regulation 1367/2006 make it clear that the main objective of providing access to documents held by the institutions of the EU is to allow for public participation in the decision-making processes. This is why the institutions must respond to requests within a strict timeframe, i.e. fifteen working days. According to Article 7(3) of Regulation 1049/2001, this timeframe can only be extended in exceptional circumstances. The late delivery of the Council's decision and disclosure of the documents in this case was not an appropriate use of Article 7(3). The result was that we only gained access to the documents once the decision-making procedure had come to an end.

The objective of public participation is also reason why there are specific rules in both Regulations 1049/2001 and 1367/2006 dedicated to the publication of “legislative documents” and documents containing environmental information. See, in particular, Article 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2006. All of the documents requested fall into the category of legislative documents containing environmental information, within the meaning of these Regulations. This was recognised by the European Ombudsman in her recommendation in case 640/2019.

The European Ombudsman has called for such timely active publication on a number of occasions (see her recommendations in relation to strategic inquiry OI/2/2017/TE and case 640/2019). The Court of Justice of the EU has also called for timely publication of legislative documents containing environmental information in case C-57/2016 ClientEarth v Commission (see, in particular, paragraphs 84 and 85). To give effect to these rules and the Court’s case law, all of the relevant documents must be published before the decision-making procedure has come to an end. Publication only after the decision-making process has been concluded is too late to comply with the Council’s obligations under EU law.

For these reasons, we respectfully request a review of your decision of 16 January.

^[1] Recommendation of the European Ombudsman in case 640/2019/FP on the transparency of the Council of the EU’s decision-making process leading to the adoption of annual regulations setting fishing quotas (total allowable catches), available at:

<https://www.ombudsman.europa.eu/en/recommendation/en/120761>

Yours faithfully,
on behalf of

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