Rat der
Europäischen Union

Brüssel, den 17. Januar 2020
(OR. en)

5266/20

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I/A-PUNKT-VERMERK

Absender:	Generalsekretariat des Rates
Empfänger:	Ausschuss der Ständigen Vertreter/Rat
Nr. Vordok.:	5158/20
Betr.:	Beschwerde 640/2019/TE bei der Bürgerbeauftragten – Billigung der begründeten Stellungnahme

1. Der Rat hat am 29. Oktober 2019 ein Schreiben der Europäischen Bürgerbeauftragten mit dem Entwurf einer Empfehlung an den Rat erhalten, wonach der Rat proaktiv Dokumente im Zusammenhang mit der jährlichen Annahme der Verordnungen des Rates zur Festsetzung der zulässigen Gesamtfangmengen für Fischbestände und Bestandsgruppen veröffentlichen sollte[1].

2. In demselben Schreiben ersuchte die Bürgerbeauftragte den Rat, gemäß Artikel 3 Absatz 6 des Statuts des Bürgerbeauftragten[2] bis spätestens 27. Januar 2020 eine begründete Stellungnahme zu diesem Empfehlungsentwurf vorzulegen.

3. Die Gruppe „Information“ hat diese Angelegenheit am 16. Dezember 2019 geprüft.

4. Am 16. Januar 2020 hat die Gruppe „Information“ im Wege einer schriftlichen Konsultation bei Stimmenthaltung des Vereinigten Königreichs den Entwurf der begründeten Stellungnahme des Rates in der in der Anlage[3] wiedergegebenen Fassung gebilligt.

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1 Vgl. Dokument ST 13576/19.
2 Beschluss des Europäischen Parlaments vom 9. März 1994 (ABl. L 113 vom 4.5.1994, S. 15).
3 Die Anlage liegt nur in englischer Sprache vor.

5. Folgende Erklärung wurde abgegeben:

PL: *„Nach Prüfung des Dokuments erklärt Polen, dass der Vorschlag des Rates für den Entwurf einer Stellungnahme angemessen und richtig ist. Mit der proaktiven Veröffentlichung der Informationen würde die Wirksamkeit eines Entscheidungsprozesses beeinträchtigt, und es können keine Missstände in der Verwaltungstätigkeit diesbezüglich festgestellt werden.*

Darüber hinaus ist es sinnvoll, auf Artikel 4 Absatz 3 der Verordnung (EG) Nr. 1049/2001 des Europäischen Parlaments und des Rates über den Zugang der Öffentlichkeit zu Dokumenten des Europäischen Parlaments, des Rates und der Kommission Bezug zu nehmen, der Folgendes vorsieht: ‚Der Zugang zu einem Dokument, das von einem Organ für den internen Gebrauch erstellt wurde oder bei ihm eingegangen ist und das sich auf eine Angelegenheit bezieht, in der das Organ noch keinen Beschluss gefasst hat, wird verweigert, wenn eine Verbreitung des Dokuments den Entscheidungsprozess des Organs ernstlich beeinträchtigen würde, es sei denn, es besteht ein überwiegendes öffentliches Interesse an der Verbreitung.‘“

6. Die Delegationen haben der Veröffentlichung des Abstimmungsergebnisses zugestimmt.

7. Der Ausschuss der Ständigen Vertreter wird daher ersucht, dem Rat zu empfehlen, dass er auf seiner nächsten Tagung

– den in der Anlage enthaltenen Entwurf einer Stellungnahme als A- Punkt billigt und

– beschließt, das Abstimmungsergebnis zu veröffentlichen.

DRAFT OPINION

OF THE COUNCIL OF THE EUROPEAN UNION

IN COMPLAINT 640/2019/TE

I. THE INQUIRY

1. By letter of 10 May 2019, the European Ombudsman opened an inquiry into a complaint submitted by an environmental law organization regarding the Council's decision-making process leading to the adoption of the annual regulations fixing the fishing opportunities for certain fish stocks and groups of fish stocks ("total allowable catches" or "TACs" Regulations). Specifically, the complainant alleged a lack of transparency of the decision-making process setting the total allowance catches for fish stocks in the Northeast Atlantic for 2017, 2018 and 2019.

2. In her letter of 10 May 2019, the European Ombudsman also requested the inspection of the documents concerning the complaint, in accordance with Article 3(2) of the Statute of the European Ombudsman. This inspection took place on 27 June 2019.

3. On the basis of the inquiry, the Ombudsman made the following recommendation to the Council:
   "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"

   The Ombudsman insisted in particular on documents giving a comprehensive account of the different positions expressed by the members of the Council during the negotiations and notably the document prepared by the General Secretariat of the Council compiling opinions of Member States, commonly referred to as the "bible", available annually at least from the end of November onwards.

4. In her Recommendation of 25 October 2019, the Ombudsman also invited the Council to submit a detailed opinion in accordance with Article 3(6) of the Statute of the Ombudsman.

II. SUMMARY OF MAIN OBSERVATIONS

5. At the outset, the Council wishes to present in a succinct manner the following main observations that will be subsequently further developed:

− Whereas the principle of transparency and widest access is particularly pressing and carries a greater weight as regards documents adopted by the EU institutions when acting in their legislative capacity, the decision-making procedure at issue is one leading to the adoption of a non-legislative act (see below under chapter III).

− The Council understands that this inquiry was not focused on the handling of the requests for access to documents related to the adoption of TACs for 2017, 2018 and 2019 introduced by the complainant, but rather on the proactive disclosure of such documents while the decision-making process is ongoing. Indeed, contrary to what is stated in paragraph 6 of the Ombudsman's Recommendation[4], the Council disclosed all documents in its possession covered by the requests already at the initial stage. In that regard, the Council also notes that whereas the Ombudsman focused her inquiry on direct access during the decision-making process, the majority of the access requests were submitted by the complainant at a time when the Council had already reached a political agreement on the TACs Regulation[5].

− While an institution may only refuse access to a document upon request based on a detailed statement of reasons on the applicability of one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001 and in the absence, where it applies, of an overriding public interest justifying disclosure nonetheless, proactive disclosure should be pursued as far as possible, with particular emphasis when the institutions act in the context of a legislative procedure and as long as such disclosure is without prejudice to the interests protected under the exceptions set out in Article 4 of Regulation (EC) No 1049/2001 (see below under chapter V).

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4 Paragraph 6 of the Recommendation reads "The Council disclosed certain documents to the complainant but withheld other documents with a view to protecting the related decision-making process, by making use of an exception under the EU law on public access to documents (Regulation 1049/2001)". This statement is not accurate and should be rectified. In fact, any redacted parts in the documents only concerned topics that were not covered by the request as recognised by the complainant (see paragraph 24 of the complaint).

5 This is the case as regards the decision-making process leading to the adoption of TACs for 2017 and 2018 and partially as regards 2019.

− In accordance with Article 6(1) of Regulation (EC) No 1367/2006, the grounds for refusal set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001 is to be interpreted in a restrictive way as regards environmental information, taking into account the public interest served by disclosure of the requested information. However, this provision does not preclude the possibility to rely on the exception related to the protection of the decision-making process nor sets the automatic pre-eminence of an overriding public interest (see below under chapter IV).

− Thus, it remains that the Council should not make directly accessible to the public documents clearly covered by the exception under Article 4(3) of Regulation (EC) No 1049/2001 (protection of the decision-making process), which applies as regards documents concerned by the present inquiry (see below under chapter VI).

– Moreover, it should be noted that the vast majority of the documents produced in the context of the decision-making process leading to the adoption of TACs for 2020 were systematically issued as STANDARD (ST) documents and it is possible to trace the documents issued in the framework of the decision-making procedure (see below under chapter VII).

III. AS REGARDS THE NATURE OF THE DECISION-MAKING PROCEDURE FOR THE ADOPTION OF TACS

6. Both the Treaty on European Union (Article 16(8)) and the Treaty on the Functioning of the European Union (Article 15) 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.

7. 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.

8. 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"*[6].

9. 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"*[7].

10. In the Sophie in 't Veld v Council case, it has been similarly recognised that whether an institution acts in its legislative capacity or in the framework of activities falling within the domain of the executive is not without relevance[8].

11. In the Client Earth judgment, the Court of Justice also underlined the importance of the EU legislative process, forming part of the basis for the legislative action of the European Union, in order to determine the obligations of a Union institution under Regulation (EC) No 1049/2001[9].

12. 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.

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

7 Judgment of 22 March 2018, *Emilio De Capitani* v *European Parliament*, T-540/15, EU:T:2018:167, paragraphs 77, 80 and 81 respectively.

8 In judgment of 4 May 2012, *Sophie in 't Veld* v *Council*. T-529/09, EU:T:2012:215, paragraphs 88 and 89, the General Court has confirmed that even if "*the principle of the transparency of the decision-making process of the European Union (...) cannot be ruled out in international affairs*", "*initiating and conducting negotiations in order to conclude an international agreement fall, in principle, within the domain of the executive*", "*public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted*" and "*during that procedure, (...) the Council is not acting in its legislative capacity*". In the final judgment in this case, the Court of Justice has also held that whereas "*the non-legislative activity of the institutions does not fall outside the scope of Regulation No 1049/2001*", the principles of openness and wider access "*are of particular relevance where the Council is acting in its legislative capacity*" (judgment of 3 July 2014, *Sophie in 't Veld* v *Council,* C-350/12 P, EU:C:2014:2039, paragraphs 106 and 107).

9 Judgement of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraphs 84–93.

13. 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.

14. It is also 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*"[10]. 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*"[11].

15. 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.

16. The Council therefore strongly disagrees with the statement made by the complainant in paragraph 62 of the complaint according to which "*the discussions [at stake] are legislative in nature*". As regards the interpretation of Article 12(2) of Regulation (EC) No 1049/2001 made in paragraphs 31-34 of the Ombudsman's Recommendation the Council notes that: proactive disclosure is indeed not limited to documents issued in the context of a legislative process (see below under chapter V) ; this does not however put into question the fact that the exigence of transparency and openness is more pressing in the legislative domain than in the areas of non-legislative activity; in the court case to which paragraph 33 of the Ombudsman's

[10] Judgement of 6 September 2017, *Slovak Republic and Hungary v. Council*, Joined Cases C-643/15 and C-647/15, EU:C:2017:631, paragraph 62.

[11] Judgement of 6 September 2017, *Slovak Republic and Hungary v. Council*, Joined Cases C-643/15 and C-647/15, EU:C:2017:631, paragraph 59.

Recommendation refers, the documents at stake were relevant to impact assessments carried out upstream of a legislative procedure but in view of the potential adoption of legislative initiatives (see also below under chapter IV).

17. It results from the above that the higher standard of transparency, that applies when the institutions act in the context of a legislative process, does not bear the same weight as regards the decision-making procedure concerned by the inquiry at issue.

IV. AS REGARDS REGULATION (EC) NO 1367/2006

18. Regulation (EC) No 1367/2006 deals with the application of the Aarhus Convention[12] and environmental information. To the extent the documents concerned by this inquiry contain "*environmental information*" in the sense of Article 2 of Regulation (EC) No 1367/2006, it is recalled that Article 3 of this Regulation does not exclude the possibility to rely on the exceptions enshrined in Article 4 of Regulation (EC) No 1049/2001. Rather, Article 6 of Regulation (EC) No 1367/2006 adds more specific rules concerning such requests for access to environmental information which in part favour and in part restrict that access[13]. Therefore, the merits of these exceptions still need to be assessed on a case-by-case basis.

19. Concerning Article 6(1), second sentence, of Regulation (EC) No 1367/2006, the Court has indeed held in its Client Earth ruling that, read in the light of Recital (15) thereof, in particular, the ground for refusal set out in the first subparagraph of Article 4(3) of Regulation No 1049/2001 is to be interpreted in a restrictive way as regards environmental information, taking into account the public interest served by disclosure of the requested information, thereby aiming for greater transparency in respect of that information[14]. It should be borne in mind, however, that this judgment was rendered in the context of an EU legislative process in respect of environmental matters and concerned documents which determined whether or not the Commission would initiate a legislative procedure under the Treaties.

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12 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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, OJ L 264, 25.9.2006, p. 13.

13 See judgments of 13 July 2017, *Saint-Gobain Glass Deutschland v Commission*, C- 60/15 P, EU:C:2017:540, paragraph 65; 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 99.

14 Judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 100.

The information contained in the impact assessment was found to contain important elements of the EU legislative process, forming part of the basis for the legislative action of the European Union[15]. It was in this specific context where the initiation of a legislative procedure was at issue, that the judgment was rendered.

20. As already clarified, the procedure under Article 43(3) TFEU does not constitute a legislative procedure in the meaning of the Treaties. Rather, the decision-making procedure is one leading to the adoption of a non-legislative act which was not without importance for the drafters of the Treaties as explained above in paragraph 15.

V. AS REGARDS PROACTIVE DISCLOSURE TO THE PUBLIC IN PARTICULAR

21. 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 extent[16]. The Regulation also sets the principle that, subject to the exceptions it provides for, proactive publicity shall be pursued by the institutions as far as possible and in accordance with the rules of the institution concerned[17].

22. 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 procedure ; this does not however 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);
- in accordance with the rules of the institutions concerned.

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15 Judgment of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660, paragraph 91 et sq.
16 Recital 6 of Regulation (EC) 1049/2001.
17 Article 12 (1) and (2) of Regulation (EC) 1049/2001.

23. The Council's rules of Procedure (CRP) contain the provisions on how to proactively disclose Council documents[18]. 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 the TACs, those provisions do not set an obligation of proactive disclosure while the decision-making is ongoing. Instead they provide that the General Secretariat of the Council may make available to the public documents (in a context of a legislative or non-legislative process) as soon as they have been circulated provided that they are clearly not covered by any of the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001[19].

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

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

25. 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 TACs Regulation, which was reflected in the inspection report.

26. 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.

[18] Notably Articles 6 to 10 of the CRP and Article 11 of Annex 2 of the CRP.
[19] Article 11 of Annex II to the CRP.

27. 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 (EC) No 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 reconciled. This is all the more so since those documents reflect and consolidate the essence of the positions expressed by Member States, which are at the heart of the discussions. Therefore, those documents constitute an essential working tool to facilitate finding a compromise and are critical for the decision-taking.

28. 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. This applies not only in the phase of the decision-making procedure leading to the political agreement but is also relevant in the phase leading to the adoption of the legal texts by actual vote within the Council. 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.

29. 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 it is therefore to be expected that the implications of such a disclosure for each Member State and for each stock would considerably delay the success of the Council deliberations.

30. Moreover, it is noted that the decision-making process at stake takes place in a context which is highly politicised and is subject to intense external attention. Exposure of the initial positions on the issues debated, in view of their sensitivity, would entail external pressure to the detriment of the effectiveness of the decision-making process.

31. Notwithstanding paragraph 42 of the Ombudsman's Recommendation which states that "*these documents and notably 'the bible' give a comprehensive account of the different positions expressed by Member States during negotiations. It is exactly this type of information that the public and stakeholders (...) need in order to influence the ongoing decision-making process*", it is noted 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 process[20]. In the present case, the risk of strong external interference exercised by stakeholders is not purely hypothetical but instead concrete. To illustrate this point, it could be indicated that a number of articles in the press comment on an incident were a number of fish lobbyists had used press passes to enter the Council building during ministerial deliberations about fishing quotas[21].

32. In addition, the decision-making process is conducted under considerable time constraints involving a large number of participants. Before systematically releasing the relevant documents upon request (or even proactively) it is necessary to undertake a comprehensive case-by-case assessment of the individual information contained in these documents in order to verify whether or not exceptions laid down in Article 4 of Regulation (EC) No 1049/2001 prevents such a disclosure. For example, the documents may include at times legal advice protected under Article 4(2), second indent, of this Regulation which not only has to be identified but also would need to be separated from the rest of these documents if the assessment finds that there is no overriding public interest in disclosure. Moreover, the assessments require consultation of relevant participants before disclosing sensitive information pertaining to them. While the positions reflected in these documents are evolving rapidly the assessments remain necessary during the whole time the decision-making process is ongoing. Without such assessments there is not only a risk of violating Article 4 of Regulation (EC) No 1049/2001, it would also seriously undermine the decision-making process as such by eroding the trust of the participants involved in this process that information originating from them is protected in accordance with the applicable rules.

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20 See notably judgment of 22 March 2018, *Emilio De Capitani v European Parliament*, T-540/15, EU:T:2018:167, paragraph 99.

21 See for instance: https://www.economist.com/europe/2018/11/24/the-power-of-fish.

33. The case-law has also recognised that preserving a 'space to think', that is to say, the possibility of a free exchange of views, is not to be called into question[22]; preserving such a space is possible for the Council by temporarily protecting from external interference the exchanges between its members on complex issues so as to find a compromise solution. In fact, as it is apparent from the fact that all requested documents were disclosed following the access to document requests submitted by the complainant, the Council systematically releases the relevant documents upon request (or even proactively) once the invoked exception ceases to apply.

34. It results from the above that there is a reasonable foreseeable and not purely hypothetical risk that disclosure of the documents at issue during 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 at that stage.

VII. TRACEABILITY OF DOCUMENTS ISSUED IN THE FRAMEWORK OF THE DECISION-MAKING PROCEDURE FOR THE ADOPTION OF TACS

35. The Council would like to inform the European Ombudsman that the vast majority of the documents produced in the context of the decision-making process leading to the adoption of TACs for 2020 were systematically issued as STANDARD (ST) documents.

36. The Council considers that this practice satisfies the Ombudsman's suggestions in paragraphs 54 to 56 of the Recommendation. Indeed, it is recalled that ST documents are identified in the Council's register, regardless of whether they have been made public or not.

[22] Judgment of 22 March 2018, *Emilio De Capitani* v *European Parliament*, T-540/15, EU:T:2018:167, paragraph 106.

VIII. FINAL REMARKS

37. In light of the above, and taking into account that the relevant documents have been made publicly available as soon as the exception under Article 4(3), first subparagraph, of Regulation 1049/2001 ceased to apply and bearing in mind the Council's institutional autonomy which entails a margin of appreciation when assessing whether proactive disclosure would adversely affect the decision-making process at stake, the Council considers that no instances of maladministration can be found.