



Council of the
European Union

Brussels, 14 February 2020
(OR. en)

5943/20

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NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 04/c/01/20

Delegations will find attached the:

- requests for access to documents sent to the General Secretariat of the Council on:
21 November 2019 and registered on 22 November 2019 (19/2442), 29 November 2019 and
registered on the same day (19/2504), 9 December 2019 and registered on the same day
(19/2574) and 16 December 2019 and registered on the same day (19/2651) - Annex 1;
- reply from the General Secretariat of the Council dated 16 January 2020 - Annex 2;
- confirmatory application dated 06 January 2020 and registered on 6 February 2020 - Annex 3.

[E-mail message sent to access@consilium.europa.eu on 22 November 2019 - 06:35]

From: **DELETED**

Sent: Friday, November 22, 2019 6:35 PM

To: SECRETARIAT DGF Access Access@consilium.europa.eu

Cc: **DELETED**

Subject: Access to documents request re fishing opportunities for 2020

Dear Sir/Madam,

In accordance with Regulation 1049/2001 and Regulation 1367/2006, we hereby request access to any documents in the Council's possession as at the date of this request that record the Member States' positions on 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, including any minutes of the relevant Council working parties and COREPER meetings that have taken place since the Commission's proposal was published on October 24th 2019.

We also request access to the documents listed on the Council's documents register tagged with inter-institutional code 2019/0235(NLE) and with document numbers ST 14385 2019 INIT and ST 13761 2019 INIT.

We respectfully request that the Council provides access to these documents within as short a time frame as possible, to enable us to exercise our right to participate in the decision-making process leading to the adoption of the TACs for 2020, as guaranteed by Article 10(3) TEU and the case law of the Court of Justice of the EU, and taking into account that this request does not relate to a very long document or to a very large number of documents, within the meaning of Article 7(3) of Regulation 1049/2001.

We would appreciate it if you could send acknowledgment of receipt of this email.

Kind regards,

DELETED

[E-mail message sent to access@consilium.europa.eu on 29 November 2019 - 13:18]

From: **DELETED**

Sent: Friday, November 29, 2019 13:19

To: SECRETARIAT DGF Access Access@consilium.europa.eu

Cc: **DELETED**

Subject: Access to Council documents re TACs for 2020

Dear Sir/Madam,

In accordance with Regulation 1049/2001 and Regulation 1367/2006, we hereby request access to the following documents that are listed on the Council's documents register:

- 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

Additionally, we request access to any other documents that have come into the Council's possession since our last request on 22 November 2019 and which 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.

Finally, we request that the documents coming within the scope of this request be made publicly available on the Council's documents register with immediate effect in order to allow the public to participate in the decision-making process leading to the adoption of the TACs for 2020, in accordance with the Ombudsman's recommendation in case 640/2019/FP, as well as Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001.

Kind regards,

DELETED

[E-mail message sent to access@consilium.europa.eu on 9 December 2019 - 09:44]

From: **DELETED**

Sent: Monday, December 9, 2019 09:44

To: SECRETARIAT DGF Access Access@consilium.europa.eu

Cc: **DELETED**

Subject: Access to documents re TACs for 2020

Dear Sir/Madam,

In accordance with Regulation 1049/2001 and Regulation 1367/2006, we hereby request access to the following documents that are listed on the Council's documents register:

- ST 14471 2019 ADD 21
- ST 14471 2019 ADD 22
- ST 14790 2019 INIT
- ST 14471 2019 ADD 20
- ST 14767 2019 INIT
- ST 14471 2019 ADD 19
- ST 14471 2019 ADD 14
- ST 14471 2019 ADD 15
- ST 14471 2019 ADD 16
- ST 14471 2019 ADD 17
- ST 14471 2019 ADD 18
- ST 14471 2019 ADD 12
- ST 14471 2019 ADD 13
- ST 14724 2019 INIT
- CM 4710 2019 INIT
- CM 4710 2019 REV 1
- CM 4710 2019 REV 2

Additionally, we request access to any other documents that have come into the Council's possession since our last request on 29 November 2019 and which 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.

Finally, we request that the documents requested above be made publicly available on the Council's documents register with immediate effect in order to allow the public to participate in the decision-making process leading to the adoption of the TACs for 2020, in accordance with the Ombudsman's recommendation in case 640/2019/FP, as well as Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001.

Kind regards,

DELETED

[E-mail message sent to access@consilium.europa.eu on 16 December 2019 - 16:16]

From: **DELETED**

Sent: Monday, December 16, 2019 16:16

To: SECRETARIAT DGF Access Access@consilium.europa.eu

Cc: **DELETED**

Subject: Access to documents re TACs for 2020

Dear Sir/Madam,

In accordance with Regulation 1049/2001 and Regulation 1367/2006, we hereby request access to the following documents that are listed on the Council's documents register:

ST 14684 2019 ADD 1

ST 14684 2019 ADD 2

ST 14684 2019 INIT

ST 14471 2019 ADD 25

ST 14471 2019 ADD 24

ST 14471 2019 ADD 23

ST 14947 2019 INIT

Additionally, we request access to any other documents that have come into the Council's possession since our last request on 9 December 2019 and which 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.

Finally, we request that the documents requested above be made publicly available on the Council's documents register with immediate effect in order to allow the public to participate in the decision-making process leading to the adoption of the TACs for 2020, in accordance with the Ombudsman's recommendation in case 640/2019/FP, as well as Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001.

Kind regards,

DELETED



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

DELETED

Email: **DELETED**

Ref. 19/2442-19/2651-19/2504-19/2574-aa/jg

Requests made on: 22.11.2019, 29.11.2019, 09.12.2019 and 16.12.2019,
Deadline extension: 16.12.2019, 20.12.2019 and 9.01.2020

Dear **DELETED**,

Following our letter of 16 December 2019, the General Secretariat of the Council has concluded its examination of the documents relevant to your above-mentioned requests.¹

The General Secretariat of the Council has examined the following 42 documents:

WK 11790/2019 INIT + ADD 1
13761/19
13918/19
14134/19 + COR1 + COR 2
14385/19
14471/19 + ADD1 to ADD 25
14558/19

14684/19 + ADD1 and ADD2
14724/19
14767/19
14790/19
14947/19

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).

Please find attached the documents you requested.

Yours sincerely,

Fernando FLORINDO

(Enclosures)

From: **DELETED**

Sent: Thursday, February 06, 2019 21:58

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

Subject: Confirmatory application - 19/2442, 19/2651, 19/2504, 19/2574-aa/jg

Dear Sir/Madam,

Please find attached ClientEarth's confirmatory application in respect of the Council's response to our requests for access to documents with references 19/2442, 19/2651, 19/2504, 19/2574-aa/jg.

We would appreciate it if you would acknowledge receipt of this application.

Kind regards,

DELETED

DELETED

Brussels, 6 February 2020

DELETED

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

[email to: access@consilium.europa.eu]

Dear Ms Sir/Madam,

RE: Ref. 19/2442, 19/2651, 19/2504, 19/2574-aa/jg - Confirmatory application regarding Council's decision on disclosure of documents relating to the adoption of the fishing opportunities 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, ClientEarth hereby submits a confirmatory application with regard to the Council's initial reply to its requests for documents relating to the decision-making process leading to the adoption of the fishing opportunities for the Northeast Atlantic for 2020, with references **19/2442, 19/2651, 19/2504, 19/2574-aa/jg**.

Following the publication by the Commission on 24 October 2019 of its proposal for a Regulation setting total allowable catches ("TACs") in the Northeast Atlantic² (the "TACs Regulation"), ClientEarth began monitoring the Council's documents register using the relevant inter-institutional code (2019/0235) in order to track the decision-making process. As in previous years, with the exception of the Commission's proposal, all of the other documents tagged with the inter-institutional code were not publicly available on the register. Therefore, ClientEarth introduced the following requests for access to the documents listed on the documents register, plus any other documents in the Council's possession that were not tagged with the relevant inter-institutional code but that nevertheless recorded the positions defended by the Member States during the decision-making process:

1. On 22 November 2019, ClientEarth requested access to:

"any documents in the Council's possession as at the date of this request that record the Member States' positions on 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, including any minutes of

² 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.

the relevant Council working parties and COREPER meetings that have taken place since the Commission's proposal was published on October 24th 2019.

We also request access to the documents listed on the Council's documents register tagged with inter-institutional code 2019/0235(NLE) and with document numbers ST 14385 2019 INIT and ST 13761 2019 INIT.

We respectfully request that the Council provides access to these documents within as short a time frame as possible, to enable us to exercise our right to participate in the decision-making process leading to the adoption of the TACs for 2020, as guaranteed by Article 10(3) TEU and the case law of the Court of Justice of the EU, and taking into account that this request does not relate to a very long document or to a very large number of documents, within the meaning of Article 7(3) of Regulation 1049/2001."

2. On 29 November 2019, ClientEarth requested access to:

"...the following documents that are listed on the Council's documents register:

- 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

Additionally, we request access to any other documents that have come into the Council's possession since our last request on 22 November 2019 and which 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.

Finally, we request that the documents coming within the scope of this request be made publicly available on the Council's documents register with immediate effect in order to allow the public to participate in the decision-making process leading to the adoption of the TACs for 2020, in accordance with the Ombudsman's recommendation in case 640/2019/FP, as well as Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001."

3. On 9 December 2019, ClientEarth requested access to:

"...the following documents that are listed on the Council's documents register:

- ST 14471 2019 ADD 21
- ST 14471 2019 ADD 22
- ST 14790 2019 INIT
- ST 14471 2019 ADD 20
- ST 14767 2019 INIT
- ST 14471 2019 ADD 19
- ST 14471 2019 ADD 14
- ST 14471 2019 ADD 15
- ST 14471 2019 ADD 16
- ST 14471 2019 ADD 17
- ST 14471 2019 ADD 18
- ST 14471 2019 ADD 12
- ST 14471 2019 ADD 13
- ST 14724 2019 INIT
- CM 4710 2019 INIT
- CM 4710 2019 REV 1
- CM 4710 2019 REV 2

Additionally, we request access to any other documents that have come into the Council's possession since our last request on 29 November 2019 and which 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.

Finally, we request that the documents requested above be made publicly available on the Council's documents register with immediate effect in order to allow the public to participate in the decision-making process leading to the adoption of the TACs for 2020, in accordance with the Ombudsman's recommendation in case 640/2019/FP, as well as Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001."

4. On 16 December 2019, ClientEarth requested access to:

“...the following documents that are listed on the Council’s documents register:

- ST 14684 2019 ADD 1
- ST 14684 2019 ADD 2
- ST 14684 2019 INIT
- ST 14471 2019 ADD 25
- ST 14471 2019 ADD 24
- ST 14471 2019 ADD 23
- ST 14947 2019 INIT

Additionally, we request access to any other documents that have come into the Council’s possession since our last request on 9 December 2019 and which 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.

Finally, we request that the documents requested above be made publicly available on the Council’s documents register with immediate effect in order to allow the public to participate in the decision-making process leading to the adoption of the TACs for 2020, in accordance with the Ombudsman’s recommendation in case 640/2019/FP, as well as Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001.”

Together, these requests are referred to as the “Requests” and the documents falling within the scope of the Requests are referred to as the “Requested Documents”.

The Council’s response

On 16 December, ClientEarth received a letter by email from the Council informing that it was still conducting consultations regarding the request dated 22 November 2019 (ref 19/2442) because it involved a large number of documents, which required extending the initial deadline by an additional fifteen working days until 16 January 2020.

On 20 December, ClientEarth received a similar letter attached to an email from the Council in respect of the request of 19 November 2019 (ref 19/2504). The letter stated that the Council was still conducting the necessary consultations and had extended the deadline by an additional fifteen working days until 22 January 2020.

On 9 January, ClientEarth received a further letter attached to an email in respect of the request of 9 December 2019 (ref 19/2574). Again, the Council informed that it was conducting the necessary consultations and had extended the deadline by an additional fifteen working days until 30 January 2020.

On 16 January 2020, ClientEarth received an email from the Council transferring 43 files, including a letter containing the Council's initial decision in respect of the Requests (the "Initial Decision"). The Initial Decision stated that the Council had concluded its examination of the documents related to the Requests and provided access to the following 42 documents:

WK 11790/2019 INIT
WK 11790/2019 ADD 1
ST 13761/19
ST 13918/19
ST 14134/19
ST 14134/19 COR1
ST 14134/19 COR 2
ST 14385/19
ST 14471/19
ST 14471/19 ADD1
ST 14471/19 ADD 2
ST 14471/19 ADD 3
ST 14471/19 ADD 4
ST 14471/19 ADD 5
ST 14471/19 ADD 6
ST 14471/19 ADD 7
ST 14471/19 ADD 8
ST 14471/19 ADD 9
ST 14471/19 ADD 10
ST 14471/19 ADD 11
ST 14471/19 ADD 12
ST 14471/19 ADD 13
ST 14471/19 ADD 14
ST 14471/19 ADD 15
ST 14471/19 ADD 16
ST 14471/19 ADD 17
ST 14471/19 ADD 18
ST 14471/19 ADD 19
ST 14471/19 ADD 20
ST 14471/19 ADD 21
ST 14471/19 ADD 22
ST 14471/19 ADD 23
ST 14471/19 ADD 24
ST 14471/19 ADD 25
ST 14558/19
ST 14684/19
ST 14684/19 ADD1
ST 14684/19 ADD2
ST 14724/19
ST 14767/19
ST 14790/19
ST 14947/19

ClientEarth hereby requests a re-examination of the Initial Decision on the following grounds:

Re-examination of the documents falling within the scope of the Requests

In the period between the publication of the Commission's proposal for the 2020 TACs Regulation and the political agreement arrived at during the Agriculture and Fisheries Council on 16 and 17 December 2019 which effectively marks the end of the decision-making process, ClientEarth used the inter-institutional code 2019/0235 to monitor the Council's documents register. This allowed us to identify specific documents in the Requests using the Council's internal referencing system.³ However, we were aware from our experience of monitoring the process in previous years that not all of the documents that contain Member State positions are tagged with the inter-institutional code, which makes them difficult to locate on the register. For this reason, all of the Requests, in addition to identifying specific documents, included a paragraph requesting access to "any other documents" in the Council's possession containing Member State positions.

Indeed, the Initial Decision did disclose two documents that were not specifically identified in the Requests by their reference number (WK 11790 and WK 11790 ADD1). However, careful analysis of the documents that were disclosed revealed the existence of other documents that seemed to fall within the scope of the Requests but which had not been disclosed with the Initial Decision.

We were particularly concerned that the disclosed documents did not include the "bible", i.e. the Member State opinions that are compiled by the Council General Secretariat into one document. We noted at least two of the documents that were disclosed (ST 14471 2019 ADD 16 of 2 December 2019 and ST 14922 2019 INIT of 12 December 2019) refer to documents 14458/19 + ADD 1 and 2 of 16 November as the "bible". We also found revised versions of these documents listed on the documents register, dated 2 and 10 December. These documents were not disclosed with the Initial Decision, despite falling within the scope of the Requests.

In view of this, ClientEarth made a further access to documents request on 17 January 2020 requesting access to all of the outstanding documents that it could identify on the Council's documents register as being possibly related to the TACs in the Northeast Atlantic for 2020.

To summarise, since receiving the Initial Response, ClientEarth received the following additional documents from the Council on 30 January:

15166 2019 INIT
15146 2019 INIT
15198 2019 INIT
15065 2019 INIT
15065 2019 REV1
15065 2019 REV2
15264 2019 INIT
15264 2019 ADD1
15264 2019 ADD2
14458 2019 INIT
14458 2019 ADD1
14458 2019 AD1RE1
14458 2019 AD1RE2
14458 2019 ADD2
14458 2019 AD2RE1

³ It should be noted that the Council's internal referencing system and the document titles do not allow the public to understand what the content of specific documents is, for example if it contains Member State positions or not.

14458 2019 AD2RE2
14458 2019 REV2
14238 2019 INIT
14480 2019 INIT
14480 2019 REV1
14812 2019 INIT
14922 2019 INIT
15066 2019 INIT
14458 2019 REV1

Nevertheless, given the tendency for relevant documents to escape identification by the Council as coming within the scope of the Requests, we request a re-examination on this basis.

For example, the documents received from the Council do not contain any written submissions from Belgium, Denmark and Germany, whereas the files ST 14471 2019 INIT and ADD1-25 contain such comments from the other Member States. This is particularly concerning since the Council bible (in its final version, ST 14458 2019 REV 2 and ST 14458 2019 ADD 1 REV 2) contains several comments from Belgium and Denmark suggesting that indeed these Member States did at some point during the process make interventions which served as the basis for collating their positions in the bible. Documentation of such interventions, if it exists, falls within the scope of the Requests and should have been disclosed with the Initial Response.

As confirmed by the CJEU (Case T-653/16 Malta v Commission, para. 63), it is well-established practice for the institutions to verify as part of the assessment of a confirmatory application whether all documents falling under the scope of the request have been identified at the initial stage. This is especially the case where the applicant, as in this confirmatory application, contests that the initial list of documents was complete.

The Requested Documents are legislative documents containing environmental information

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

With regard to the concept of "legislative documents", recital 6 of Regulation 1049/2001 states that "*[w]ider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.*"

It should be noted that "acting in their legislative capacity" for the purposes of Regulation 1049/2001 is not confined to the adoption of acts by way of the ordinary or special legislative procedures, defined in Articles 289 TFEU. The reference to "delegated powers" puts this beyond doubt. The adoption of TACs on the basis of Article 43(3) TFEU is comparable to a delegated power. This is consistent with the Court of Justice's finding that fishing opportunities adopted under Article 43(3) are "intended to be taken in order to implement provisions adopted on the basis of Article 43(2)."⁴

⁴ Joined Cases C-103/12 and C-165/12, 26 November 2014, EU:C:2014:2400, para. 50.

In any case, 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".

As the CJEU has held in Case C-57/16 P *ClientEarth v Commission*, "it is apparent from Article 12(2) of Regulation No 1049/2001, which implements the principle derived from recital 6 thereof, that not only acts adopted by the EU legislature, but also, more generally, 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, fall to be described as 'legislative documents' and, consequently, subject to Articles 4 and 9 of that regulation, must be made directly accessible."⁵

Therefore, it is clear that in Regulation 1049/2001 the legislators chose to define the term "legislative document" based on the effect of the act to which the document relates (i.e. its binding nature) as opposed to the procedure leading to the adoption of the act (i.e. a legislative procedure as defined in Article 289 TFEU). The Requested Documents meet this definition because they are 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.

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".

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."

The Requested Documents contain information about the TACs Regulation, which regulates the exploitation of fish stocks and other marine species in the Northeast Atlantic. 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.

Failure to record Member State positions at relevant Council meetings: breach of Article 2 of Regulation 1049/2001

The Council disclosed several documents containing records of the meetings of the Council Working Party in Internal and External Fisheries Policy. However, while these records did provide some details on the content of the discussions regarding other agenda points, such as the *status quo* of the EU/Norway negotiations, the information provided on the discussions related to the 2020 TACs is extremely rudimentary and does not contain information on the positions defended by Member States at these meetings.

⁵ ECLI:EU:C:2018:660, para. 85.

For example, the document ST 15066 2019 INIT (dated 12 December 2019) concerning the meeting of 10 December 2019 contains specific information on interventions by specific Member State delegations regarding agenda item I on EU/Norway. By contrast, the information under agenda item II regarding the “Main TACs 2020” only notes that the “Working Party continued the examination of the proposal, in particular the sixth Commission non-paper (doc. 14947/19)”, and that the Presidency concluded that “the Working Party had finalised the examination of the proposal and of the related non-papers”, without giving any insight into the content of the discussions.

The same lack of meaningful record of the discussions and Member States’ contributions applies to the documents relating to the Council Working Party meetings on 30 and 31 October 2019 (ST 13918), 7 November 2019 (ST 14134 INIT, ST 14134 COR 1, ST 14134 COR 2), 14 November 2019 (ST 14238), 22 November 2019 (ST 14480 INIT, ST 14480 REV 1), 28 and 29 November 2019 (ST 14812), 4 and 5 December 2019 (ST 14922).

It is also likely that the TACs for 2020 were discussed at meetings of COREPER I but we have received no records of such meetings or confirmation that any discussions took place.

It should be noted that none of these meetings are open to the public. Therefore, the only opportunity for the public to have any insight into the discussion is through the Council’s own records. This is why EU law imposes a legal duty on EU institutions to draw up and retain documentation relating to their activities in a non-arbitrary and predictable manner.

Article 10(3) of the Treaty on European Union states that, “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen”. Article 15(3) of the Treaty on Functioning of the European Union further develops this principle by giving citizens a right to access documents of the Union’s institutions, “subject to the principles and the conditions to be defined in accordance with this paragraph.”

The principles and conditions were defined in Regulation 1049/2001, Article 2 of which provides that, “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.” The Council’s failure to make a detailed record of the deliberations that took place at the relevant Council meetings infringes ClientEarth’s right of access under Article 2.

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

Contrary to the present circumstances, 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 for a Regulation which, in several respects, departs significantly from the Commission’s proposal and which requires implementing measures at national level.

These considerations are of particular importance in the context of setting TACs for 2020, where the Council's discretion in the decision-making process is fettered by Regulation (EU) No 1380/2013 on the Common Fisheries Policy (the "CFP Basic Regulation"). The TACs are adopted on the basis of Article 16 of the CFP Basic Regulation. According to Article 2(2), "[t]he CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield." Article 3(c) provides for the "establishment of measures based on the best available scientific advice". This is why the Commission's proposal takes account of the scientific advice provided by the International Council for the Exploration of the Sea (ICES), and has the objective of bringing the stocks to levels that can deliver MSY, by achieving the MSY exploitation rate by "2015 where possible and on a progressive and incremental basis **at the latest by 2020**" (emphasis added).

In other words, the TACs for 2020 were the last opportunity for the Council to meet the MSY deadline in the CFP Basic Regulation, imposed by the Council and the European Parliament. Unfortunately, the Council has failed to respect this deadline for a number of stocks. Therefore, in order for EU citizens to be able to scrutinise the considerations underpinning the Council's decision in setting TACs for 2020 and to evaluate why the Council failed to meet the MSY deadline for a number of stocks, the discussions at relevant Council meetings should have been recorded.

Failure to disclose the Requested Documents while the decision-making process was ongoing

ClientEarth introduced the Requests in order to access relevant legislative documents at a time when they could be used to enhance participation in the decision-making process leading to the adoption of the TACs. To the extent that was possible, the Requested Documents were clearly identified in the Requests using the Council's own reference numbers. As such, it was perfectly possible 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 using Article 7(3) of Regulation 1049/2001, which should be reserved for "exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents" in respect of three out of the four Requests, extending the deadlines by a further 15 working days, which ensured disclosure only after the decision-making process was effectively concluded.

In addition, the Requests of 29 November, 9 December and 16 December asked specifically for the Requested Documents to be actively disseminated on the Council's documents register in accordance with the Ombudsman's recommendation in case 640/2019/FP, as well as Articles 11 and 12 of Regulation 1049/2001 and Article 4 of the Aarhus Regulation.

The failure of the Council to make the Requested Documents available during the decision-making process, either in response to the Requests or by publishing them in the documents register, breaches Article 10 TEU, Article 15 TFEU, Regulation 1049/2001 and the Aarhus Regulation.

Both Article 10(3) TEU and Article 15(1) TFEU emphasise the right of citizens to participate in the EU's decision-making processes. Recital 2 to Regulation 1049/2001 and recital 2 to the Aarhus Regulation 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 be made directly available to the public through an electronic register.

Regulation 1367/2006 contains a stand-alone obligation to actively disseminate environmental information, which reinforces Article of 12(2) Regulation 1049/2001.⁶ As recognised by the CJEU, this gives these documents an additional quality, since "*Regulation No 1367/2006 aims, as provided for in Article 1 thereof, to ensure the widest possible systematic availability and dissemination of environmental information*" and because "*[i]t follows, in essence, from recital 2 of that regulation that the purpose of access to that information is to 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.*"⁷ There is therefore an even stronger obligation to actively disseminate the Requested Documents.

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.

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. In addition, as was emphasised by the Advocate General in points 64 and 65 of his Opinion, it is apparent from Article 12(2) of Regulation No 1049/2001, which implements the principle derived from recital 6 thereof, that not only acts adopted by the EU legislature, but also, more generally, 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, fall to be described as 'legislative documents' and, consequently, subject to Articles 4 and 9 of that regulation, must be made directly accessible.*"⁸ (emphasis added).

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."*⁹

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.*"

⁶ Article 4(1) and (2) Regulation 1367/2006.

⁷ Case C-57/16 P *ClientEarth v Commission*, para. 98 and case law referred to therein.

⁸ C-57/16 P - *ClientEarth v Commission*, ECLI:EU:C:2018:660, Paragraphs 84 and 85.

⁹ 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>

The Ombudsman recently handed down her recommendation to the Council in case 640/2019 in the context of this very decision-making process, stating: “*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 Requested Documents are not covered by Article 4(3) of Regulation 1049/2001

We are aware that in its response of 27 January 2020 to the Ombudsman’s recommendation in case 640/2019, the Council takes the view that the Requested Documents are covered by the exception in Article 4(3), first sub-paragraph, of Regulation 1049/2001 in their entirety while the decision-making process is ongoing. According to that response, active dissemination of the Requested Documents would “seriously undermine the effectiveness of the decision-making procedure.”

The active dissemination obligations contained in Article 12 of Regulation 1049/2001 and Article 4 of the Aarhus Convention are indeed subject to the exceptions contained in Article 4 of Regulation 1049/2001, including protection of the institutions’ decision-making procedures.

However, the Court has imposed stringent criteria on the application of Article 4(3) of Regulation 1049/2001. As the Court has held, “*it is apparent from the second sentence of Article 6(1) of Regulation No 1367/2006, read in the light of recital 15 thereof, in particular, that 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.*”¹⁰ To rule out the disclosure of Member State positions while the decision-making procedure is ongoing in a general manner, breaches the obligation to interpret this exemption from disclosure in a restrictive manner.

The Court has moreover made clear that “*the mere reference to a risk of negative repercussions linked to access to internal documents and the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution concerned.*”¹¹ The Council’s response to the Ombudsman references a number of negative repercussions that it perceives are linked to the disclosure of the Requested Documents during the decision-making procedure. However, these arguments remain unsubstantiated and fail to demonstrate that the risk of undermining the decision-making procedure is serious and foreseeable and not purely hypothetical.

For these reasons, we respectfully request a re-examination of the Initial Decision and a response to the points raised above.

Yours faithfully,

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¹⁰ Case C-57/16 P *ClientEarth v Commission*, para. 100.

¹¹ Case C-60/15 P *Saint-Gobain Glass Deutschland v Commission*, ECLI:EU:C:2017:540, para. 83.