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European Union

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OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	6423/21; 6425/21; 6425/21 COR 1
Subject:	Public access to documents - Confirmatory application No. 06/c/01/21 - Outcome of proceedings of the written procedure

Following the written procedure of the aforementioned confirmatory application, delegations will find herewith the agreed text of the reply as approved by the Council on 8 April 2021.

REPLY ADOPTED BY THE COUNCIL ON 8 April 2021
TO CONFIRMATORY APPLICATION 06/c/01/21,
made by email on 19 February 2021,
pursuant to Article 7(2) of Regulation (EC) No 1049/2001 and
Article 3(1) Regulation (EC) No 1367/2006

The Council has considered this confirmatory application under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145 of 31.5.2001, p. 43) (hereafter "Regulation (EC) No 1049/2001") and Annex II to the Council's Rules of Procedure (Council Decision 2009/937/EU, Official Journal L 325, 11.12.2009, p. 35) and has come to the following conclusion:

1. By its letter of 19 February 2021,¹ the applicant introduced a confirmatory application asking the Council to reconsider the reply of the General Secretariat of the Council (GSC) to its initial request of 11 December 2020 (under reference 20/2337), as follows:
 - “ (...), in accordance with Article 7(2) of Regulation 1049/2001 (...) in respect of the partial access to documents correspondent to the previously submitted Request for access to documents Ref. 20/2337-aa/nb-ADD (...);
 - 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 (...);
 - We note that the documents provided by the Council with its initial response did not include the so-called “bible” document, collating the comments of the Member States on the Commission’s proposal. We presume this is because it was not yet in existence at the date of our request but we would like to have confirmation of this. In the case that the bible document was in the Council’s possession as at 11 December 2020, we confirm our request to have access to it. (...);

¹ Cfr. Doc. 6423/21 containing copies of ClientEarth’s initial request of 11/12/2020, replies from the GSC of 12 and 29/1/2021 and the confirmatory application dated 19/2/2021.

- (...) the documents/information falling within the scope of this request (...), be made publicly available on the Council's documents register, in accordance with Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2001. (...)"

2. The said letter also contains the following new initial request:

"(...) in accordance with Article 6(1) of Regulation 1049/2001, Article 3 of Regulation 1367/2006, and Article 42 of the Charter of Fundamental Rights, [the applicant] requests access to any documents that have come into the Council's possession since our last request of 11 December 2020 that record the Member States' positions in relation to the Commission's Proposal for a Council Regulation fixing for 2021 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 (interinstitutional file 2020/0308). For the sake of clarity, we include within this request any Member State positions on the Commission non-paper of 9 December 2020 (Council document number ST 13901 2020 INIT-EN).(...)"

3. This new request was processed separately, as it involved further internal consultations aimed at verifying the possible existence of other documents issued by the General Secretariat of the Council (GSC) which could match this new request's specific scope.
4. On 19 March 2021, the GSC has replied to this new request by sending the applicant an additional set of documents which were in the meantime identified and considered relevant both to the new request and to the confirmatory application (see points 13-16 below).
5. It should be noted that, in its initial application of 11 December 2020, ClientEarth had requested access to documents:
- "(...) 13509 2020 REV 1 (...): Proposal for a Council Regulation fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters - political agreement;
 - 13509 2020 (...): Proposal for a Council Regulation fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters - political agreement;
 - 12528 2020 ADD 8 (...): Proposal for a Council Regulation fixing for 2021 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 - Lithuanian comments;

- 12528 2020 ADD 7 (...): Proposal for a Council Regulation fixing for 2021 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 - French comments;
- 12528 2020 INIT (...): Proposal for a Council Regulation fixing for 2021 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 - Latvian comments;
- 12348 2020 (...): Proposal for a Council Regulation fixing for 2021 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 - Supporting document: Worksheet of deductions corresponding to exemptions from the landing obligations;
- (...) any other documents in the Council's possession that record the Member States' positions in relation to the Commission's Proposal for a Council Regulation fixing for 2021 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 (interinstitutional file 2020/0308).(...)"

6. In addition, on 11 December 2020, the applicant had also requested that "(...) the documents falling 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 2021, 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.(...)"
7. On 12 January 2021, the GSC sent an initial reply whereby it identified 44 standard documents ("STs") matching the scope of the applicant's request of 11 December 2020, three of these being public documents: **ST 12189/20 INIT, 12189/20 ADD 1 and 12189/20 ADD 2**. Moreover, a first set of the requested documents were sent: **ST 13509/20 INIT, 13509/20 REV 1, and 12348 2020 INIT**.
8. However, taking into account the large number of remaining documents requiring examination and assessment, the GSC had to extend the deadline for the final reply to this request for an additional period of 15 working days (until 02.02.2021), pursuant to Article 7(3) of Regulation (EC) No 1049/2001. The applicant has not opposed to this extension.

9. Finally, by its letter of 29 January 2021 the GSC informed the applicant that public access was granted to the remaining non-public (40) documents in possession of the Council which were used during the decision-making process leading to the adoption of the TACs for 2021 and that all those disclosed documents would become public and available to be directly downloaded from the Council's Public Register.
10. The said 40 documents are the following:
- Member States comments: 12528/20 INIT, and 12528/20 ADD 1 to ADD 15;
 - Non papers: 12768/20, 13187/20, 13395/20, 13561/20, 13775/20 + COR 1, 13776/20, 13901/20 + ADD 1, 13921/20, 14029/20, 14164/20, and 12348/20;
 - Note to Council: 13850/20;
 - Presidency compromise: 13999/20, and 13999/20 REV 1;
 - 1st consolidated version: 13590/20 + ADD 1 - 2;
 - 2nd consolidated version: 14049/20 + ADD 1 -2; and
 - Comments on errors: 5101/21 + ADD 1.
11. In the same letter of 29 January 2021, the GSC has also attached two documents concerning the European Ombudsman's recommendation in case 640/2019/TE: ST 9063/20 containing the text of the reply letter which was approved by the Council on 8 October 2020 and the related approval Communication (CM 3994/20).
12. The Council has carefully considered the confirmatory application. Having thoroughly examined the documents concerned by the request and carried out renewed consultations, it has re-assessed the initial request in full consideration of the principles and rules underlying Regulations (EC) No 1049/2001 and 1367/2006.
13. In the context of these renewed consultations, the GSC has discovered that, due to a clerical error, six working papers (WKs)² were not, unfortunately, identified during the examination of the applicant's initial request of 11 December 2020, and therefore not included in the GSC's replies of 12 and 29 January 2021.

² 12249/2020, 13198/2020, 13506/2020, 14309/2020, 14462/20 and 14564/20 which are listed in ST (public) document 5293/21 available in the Council's Public Register since 20 January 2021.

14. Those Wks are summaries of informal videoconference meetings of the Working Party on Internal and External Fisheries Policy. In those meetings, the Proposal for a Council Regulation fixing the TACs for 2021 was discussed along with other files which are not relevant to the applicant's request. The Council notes that, to the extent they fall within the scope of the applicant's request, public access has already been granted to those Wks by the reply of the GSC of 19 March 2021 to the applicant's new request, whereby the relevant parts of the said Wks were disclosed (see points 2 to 4 above).³
15. In the aforementioned letter of 19 March 2021, the GSC has also ensured the applicant that there are no other documents in the Council's possession containing Member States' positions in relation to the Council Regulation related to the 2021 TACs.
16. The GSC has thus identified and disclosed a total number of 49 documents⁴ related to the Council Regulation fixing for 2021 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 (interinstitutional file 2020/0308).
17. It should however be underlined that although no document called "bible" is in the possession of the Council, all documents containing Member States' positions on this file were disclosed and sent to the applicant by the replies of the GSC of 12 and 29 January 2021, as well as by its reply of 19 March 2021.
18. Moreover, all the documents that were disclosed following the applicant's request and sent to the applicant on 12 and 29 January 2021 have become public and available for any other applicant requiring their access. Indeed, it is recalled that, as a general rule, the disclosure of a document has an *erga omnes* effect. This entails that the Council would not object to these documents being communicated to other applicants, but would instead allow anyone to have access to their content⁵.

³ The request was registered under reference number 21/0426, and the reply letter to the applicant was sent on 19 March 2021.

⁴ 43 standard documents (STs) and 6 working papers (Wks).

⁵ See, for example, case T-439/08, *Agapiou Joséphidès v Commission and EACEA*, ECLI:EU:C:2011:726, paragraph 116.

19. It should also be recalled that according to established case-law of the Court of Justice, the right of access to documents held by the institutions within the meaning of Article 2(3) of Regulation (EC) No 1049/2001 applies only to existing documents in the possession of the institution concerned⁶. Regulation (EC) No 1049/2001 does not oblige an institution to create a document for which it has been asked to grant access but which does not exist⁷.
20. As regards the applicant's request to make the received documents fully available in the Council's documents register, the Council notes that Regulation No 1049/2001 does not directly link the obligation under Articles 11 and 12 thereof to the right to access to documents under Article 2(1). As expressly held by the Court of Justice in its judgment of 2 October 2014, "compliance with the duty to register documents cannot therefore be enforced by means of an application for access to documents"⁸. Therefore, such a request cannot be addressed in the context of a confirmatory application.
21. Finally, according to Article 3(1) of Regulation (EC) No 1367/2006, "(...) Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies (...)". Therefore, by disclosing all documents in its possession falling within the scope of the applicant's request in accordance with Regulation (EC) No 1049/2001, the Council has also complied with its obligations under Regulation (EC) No 1367/2006.
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⁶ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 38.

⁷ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, ECLI:EU:C:2014:2250, paragraph 46.

⁸ Case C- 127/13 P, *Strack v Commission*, EU:C:2014:2250, paragraph 44.