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From:	Ms E. O'Reilly, European Ombudsman
date of receipt:	25 October 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject:	Complaint 640/2019/TE to the European Ombudsman - Recommendation of the European Ombudsman
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Delegations will find in the Annex a copy of a letter sent by the European Ombudsman to the Council concerning complaint 640/2019/TE.

Personal data have been blanked out.



## European Ombudsman

**Emily O'Reilly**  
European Ombudsman

Mr Jeppe Tranholm-Mikkelsen  
Secretary-General  
Council of the European Union

DELETED

copy to:

therese.blanchet@consilium.europa.eu

Strasbourg, 25/10/2019

Complaint 640/2019/FP

**Subject:** Recommendation of the European Ombudsman in the above case 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)

Dear Mr Tranholm-Mikkelsen,

Please find enclosed my recommendation in the above case, made in accordance with Article 3(6) of the Statute of the European Ombudsman.

My recommendation is as follows:

**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.**

In accordance with the Statute of the European Ombudsman, the Council shall send a detailed opinion before 27 January 2020.

A copy of my recommendation will be sent to the complainant.

Yours sincerely,

Emily O'Reilly  
European Ombudsman

Enclosure: • Recommendation to the Council of the EU

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European Ombudsman

Emily O'Reilly  
European Ombudsman

## 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)

Made in accordance with Article 3(6) of the Statute of the European Ombudsman<sup>1</sup>

*The complaint concerned the transparency of the decision-making process in the Council of the EU, leading to the adoption of the annual regulations setting total allowable catches (TACs) of certain fish stocks in the Northeast Atlantic for 2017, 2018 and 2019. The complaint was submitted by an environmental law organisation.*

*The complainant was concerned that the Council (1) failed to record the positions of Member States expressed in Council 'preparatory bodies' of national civil servants and Ambassadors, as well as in meetings of the Council of Ministers, (2) failed to provide timely access to legislative documents, and (3) has in place an incomplete register of documents that is difficult to use.*

*The Ombudsman is of the view that the documents in question are in fact legislative documents. In addition, the documents contain environmental information, as defined in the Aarhus Regulation. Wider and more timely access should therefore be granted to such documents.*

*The Ombudsman also found that the Council had not demonstrated that disclosing the documents in question would seriously affect, prolong or complicate the decision-making process.*

*The Ombudsman therefore recommends that the Council should proactively make available documents related to the adoption of the TAC Regulation at the time they are circulated to Member States or as soon as possible thereafter.*

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<sup>1</sup> Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.



## Background to the complaint

1. The complaint concerns the transparency of the decision-making process in the Council of the EU (Council), which leads to the adoption of the annual regulations setting catch limits, referred to as 'total allowable catches' (TACs), for certain fish stocks. TACs aim, among other things, to maintain fish stocks at sustainable levels, which is a fundamental objective of the EU's **Common Fisheries Policy Regulation**<sup>2</sup> (CFP Regulation).<sup>3</sup>

2. The present case relates to the transparency of the process for the adoption of the TAC Regulations for the Northeast Atlantic for 2017, 2018 and 2019.

3. A TAC Regulation is adopted by the Council following a procedure set out in the Treaty on the Functioning of the European Union (TFEU)<sup>4</sup>. In line with this procedure, each year the European Commission prepares the proposal for the annual TAC Regulations, based on scientific advice from advisory bodies. It usually adopts its proposal for the Northeast Atlantic TAC in **late October or early November**. Following this, national civil servants meet weekly in one of the 'preparatory bodies' of the Council<sup>5</sup>, the Working Party on Internal Fisheries Policy, to discuss the Commission's proposal. Based on these preparatory discussions, the Committee of Permanent Representatives (Ambassadors in COREPER) holds negotiations on the proposal about one week before the Agriculture and Fisheries Council, at which the final TAC Regulation is adopted by the attending ministers. This takes place usually in **mid-December**.

4. The complainant, the environmental law organisation ClientEarth, analyses each year how the TAC proposals and the final TAC Regulation comply with the requirements of the CFP Regulation. The Commission or the Council may propose or adopt TACs that are at odds with the applicable scientific advice only if they can provide evidence that respecting the scientific advice would pose serious social and economic risks for the fishing fleets and communities involved.

5. For its annual analysis, the complainant requires a range of information. To this end, between 2017 and 2019, it made several requests for public access to documents<sup>6</sup> held by the Council relating to the decision-making process leading to the adoption of the TAC Regulation.

6. The Council disclosed certain documents to the complainant but withheld other documents with a view to protecting the related decision-making process,

<sup>2</sup> Regulation (EU) No 1380/2013 on the Common Fisheries Policy: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R1380&from=EN>

<sup>3</sup> More information on TACs: [https://ec.europa.eu/fisheries/cfp/fishing\\_rules/tacs\\_en](https://ec.europa.eu/fisheries/cfp/fishing_rules/tacs_en).

<sup>4</sup> Article 43(3) of the TFEU.

<sup>5</sup> The Council is supported by the Committee of Permanent Representatives of the Governments of the Member States to the European Union (COREPER) and more than 150 highly specialised working parties and committees, known as the 'Council preparatory bodies'. These bodies cover specific policy areas or subjects and, among other things, prepare the Council's positions. <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/>.

<sup>6</sup> In line with the EU's rules on public access to documents. Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049>.



by making use of an exception under the EU law on public access to documents (Regulation 1049/2001)<sup>7</sup>. Among other documents, the Council did not disclose minutes of the meetings of preparatory bodies, as well as information on the positions taken by Member States in meetings of the Agriculture and Fisheries Council, COREPER and the preparatory bodies. According to the complainant, this meant it could not carry out its analysis effectively.

7. Dissatisfied with the outcome of its requests, the complainant turned to the Ombudsman on 8 April 2019.

## The inquiry

8. The Ombudsman opened an inquiry into the complainant's concerns that the Council:

- 1) failed to record the positions of Member States expressed in relevant meetings of the Working Party on Internal Fisheries Policy, the Committee of Permanent Representatives (COREPER) and the Agriculture and Fisheries Council;
- 2) failed to provide timely public access to legislative documents, proactively and upon request; and
- 3) has not put in place a complete and user-friendly register of documents.

9. In the course of the inquiry, the Ombudsman's inquiry team **inspected the documents held by the Council** relating to the decision-making process for adopting the annual TAC Regulations for 2018 and 2019. **The Ombudsman also received a written reply from the Council** on the complaint and, subsequently, the comments of the complainant in response to the Council's reply.

## 1. Recording Member State positions

### Arguments presented to the Ombudsman

*By the complainant*

10. The complainant argued that the Council failed to disclose sufficiently detailed records of the discussions that took place at relevant meetings of the working party, COREPER and the Agriculture and Fisheries Council during the decision-making process leading to the adoption of the TAC Regulations for 2017 and 2018. The complainant contended that, to respect the purpose of Regulation 1049/2001 and ensure it is applied effectively, EU institutions must draw up minutes of relevant meetings. However, the Council had stated that it did not have any such records concerning the meetings of the working party in 2017 and 2018. For 2019, the complainant was granted access to documents

<sup>7</sup> Article 4(3) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents.



containing the '*outcome of proceedings*' of working party meetings, which do not indicate the positions of Member States and, in the complainant's view, therefore did not fulfil the purpose of Regulation 1049/2001.

**11.** The complainant noted that the meetings of the relevant Agriculture and Fisheries Councils<sup>8</sup> were closed to the public. The complainant further noted that the records of the 2016 and 2017 Council meetings merely state that political agreement was reached, but do not give any details on the different positions held by Member States or of the arguments made or the evidence presented.

**12.** At the same time, the complainant acknowledged that documents exist that contain positions of Member States that were expressed at various points in the decision-making process. In particular, the complainant referred to written comments made by the representatives of individual Member States on the Commission proposal following (or ahead of) working party meetings. The complainant also referred to documents drawn up by the General Secretariat of the Council containing the opinions of Member States on the Commission proposal. These documents are **commonly referred to as 'the bible'**.

*By the Council*

**13.** During the inspection meeting with the Ombudsman's inquiry team, the Council's representatives confirmed that working party meetings are recorded in a document described as an '*outcome of proceedings*'. They stated that this is an administrative document, which is concise and does not contain the positions of individual Member States. The Council's representatives explained that the Agriculture and Fisheries Council meetings have plenary debates, but that informal discussions take place on the margins of the meetings. The minutes of these Council meetings reflect the plenary debates, but not the informal discussions. The Council's representatives confirmed that, like the outcome of proceedings documents for working party meetings, these minutes are brief and do not contain the different positions of Member States.

**14.** However, the Council's representatives also confirmed that documents do exist that contain the positions of Member States, such as the written comments they submit and the different versions of 'the bible' (see above). The Council's representatives explained that its General Secretariat normally drafts the initial version of 'the bible' after the first three working party meetings (towards the end of November). This initial version is then updated, normally twice, to reflect the evolving discussions in the preparatory bodies, before the TAC Regulation is adopted by the Agriculture and Fisheries Council, normally in December.

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<sup>8</sup> The meetings of the Agriculture and Fisheries Council took place on 12-13 December 2016, 11-12 December 2017 and 17-18 December 2018.



## The Ombudsman's assessment

**15.** In order for EU citizens to exercise their right<sup>9</sup> to participate in the democratic process of the EU and for EU decisions to be taken *“as openly and as closely as possible to the citizen”*<sup>10</sup>, it is essential for the public to have access to the various options and positions that are being discussed. This not only enables interested stakeholders with relevant expertise to provide input to decision-makers, it also ensures that Member State representatives can be held accountable, discouraging them from ‘blaming Brussels’ for decisions they have taken themselves, or taking sole credit for popular EU initiatives.

**16.** Based on these considerations, the Ombudsman recommended<sup>11</sup>, in February 2018, that the Council General Secretariat should systematically record the identity of Member State governments when they express positions in Council preparatory bodies. She considered it particularly problematic that, in some cases, Member States are not identified when they take a position.

**17.** At the same time, the Ombudsman recognises that there needs to be a certain degree of flexibility regarding what type of documents are required to take account of the variety of subjects under discussion in the different types of preparatory bodies.

**18.** The annual TAC Regulation for the Northeast Atlantic is adopted within a very short time period: about **30 working days**. During this period, working party meetings take place every week. The Ombudsman acknowledges that the weekly drafting of extensive minutes, which record the positions of Member States, might be disproportionate in a situation where the Council’s General Secretariat is already working under very tight deadlines.

**19.** Against this background, the Ombudsman considers it reasonable that the General Secretariat should produce documents, notably in the form of ‘the bible’, that capture the discussions (including the positions of individual Member States) of several working party meetings. Documents like ‘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, like the complainant, need in order to influence the ongoing decision-making process. In this particular context therefore, such an approach seems proportionate and justified.

**20.** To the extent that the documents contain information which reflects the positions taken by Member States, the document should identify the Member State(s) taking the position set out. The name should not be redacted when the document is made public. As explored further below, the extent to which these documents are made available in a timely manner is of particular importance.

**21.** In light of the above, the Ombudsman finds no maladministration regarding this aspect of the complaint.

<sup>9</sup> Articles 1 and 10(3) of the Treaty on European Union (TEU).

<sup>10</sup> Article 15(2) of the TFEU.

<sup>11</sup> Recommendation of the European Ombudsman in case OI/2/2017/TE on the transparency of the Council legislative process: <https://www.ombudsman.europa.eu/en/recommendation/en/89518>.



## 2. Public access to legislative documents

### Arguments presented to the Ombudsman

*By the complainant*

**22.** The complainant argued that the Council failed to make documents related to the adoption of the annual TAC Regulation publicly available while the decision-making process was ongoing - both proactively and upon request.

**23.** The complainant stated that, over the past three years, the Council listed many of the documents related to the adoption of the TAC Regulation on its public register of documents. However, these documents (with the exception of the Commission proposal) are not made available for the public to download **until after the decision-making process has come to an end.**

**24.** The complainant is also concerned that the Council deliberately delayed the reply to its four requests for public access to documents related to the adoption of the 2019 TAC Regulation. The complainant submitted these requests in November and December 2018, while the decision-making process was ongoing. However, due to the Council's delay in replying, the documents were released only **after the final 2019 TAC Regulation had been adopted.**

**25.** The complainant contended that documents related to the adoption of the TAC Regulation must be considered "*legislative documents*" within the meaning set out in Regulation 1049/2001. Such documents, the complainant argued, must be made directly accessible to the greatest possible extent, subject to certain exceptions provided for in the regulation.<sup>12</sup> Furthermore, the complainant maintained that the documents in question relate to measures aimed at protecting biological diversity and therefore constitute "*environmental information*", as defined in the 'Aarhus Regulation'<sup>13</sup>. As such, any exception to public access provided for under Regulation 1049/2001 must be interpreted in a restrictive way.

*By the Council*

**26.** The Council argued that documents related to the adoption of the TAC Regulation cannot be considered "*legislative documents*" within the meaning of Regulation 1049/2001. The Council took the view that the Lisbon Treaty introduced a clear distinction between legislative and non-legislative acts. According to the TFEU,<sup>14</sup> acts adopted following a 'legislative procedure' only can be considered legislative acts. However, the TAC Regulation follows a separate procedure<sup>15</sup> than that set out in the Treaties for adopting 'legislative

<sup>12</sup> Article 12(2) of Regulation 1049/2001.

<sup>13</sup> Regulation 1367/2006 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: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006R1367>

<sup>14</sup> Article 289 TFEU.

<sup>15</sup> Based on Article 43(3) TFEU.





acts'. As such, documents produced in the process of adopting the TAC Regulation cannot be considered "legislative" in nature.

**27.** The Council maintained that **the highly technical and complex discussions surrounding the decision on the TAC Regulation means a different approach to transparency is required, when compared with legislative matters.**

**28.** During the inspection meeting the Council's representatives further argued that releasing documents, such as 'the bible', before the final TAC Regulation is adopted, would undermine the ongoing decision-making process<sup>16</sup>.

**29.** Regarding the delay in disclosing documents upon request, the Council's representatives stated that the team dealing with access to document requests had experienced a high workload during the relevant period. They explained that the relevant unit in the Council General Secretariat needs to make a case-by-case assessment of every document requested and also consults with the relevant Directorates-General to decide whether the documents can be released. Therefore, the Council is often not in the position to reply to access to document requests within the initial deadline of 15 working days, especially when requests concern a large number of documents.

**30.** With regard to the proactive disclosure of these documents, the Council maintained that its Rules of Procedure (CRP) which set out the rules for proactive disclosure of Council documents, do not contain an obligation to proactively disclose these documents.

## The Ombudsman's assessment

### *Nature of the documents*

**31.** As noted above, the EU Treaties require **all** EU decisions to be taken "as openly and as closely as possible to the citizen".<sup>17</sup> This requirement is reflected in Regulation 1049/2001, which is based on the assumption that "openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system".<sup>18</sup> In line with this assumption, "[t]he institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned".<sup>19</sup> In other words, **all** documents that fall under the definition of a 'document' in Regulation 1049/2001, independent of their nature, must be made directly accessible "as far as possible". Access to documents may be restricted only where one (or several) of the exceptions set out in Regulation 1049/2001 applies<sup>20</sup>.

<sup>16</sup> In doing so, it referred to the exception set out in Article 4(3) of Regulation 1049/2001.

<sup>17</sup> Articles 1 and 10(3) TEU.

<sup>18</sup> Recital 2 of Regulation 1049/2001.

<sup>19</sup> Article 12(1) of Regulation 1049/2001.

<sup>20</sup> Article 4 of Regulation 1049/2001.



32. The concept of participatory democracy, as recognised by the EU Treaties,<sup>21</sup> implies that information should be made available to the public in order to allow interested parties to debate, comment on and possibly criticise or welcome legislative and policy options that are being considered.

33. Regulation 1049/2001 provides 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** on the Member States, must be considered 'legislative documents' and must be made directly accessible **to the greatest possible extent**, subject to the applicable exceptions.<sup>22</sup> **This broader definition of legislative documents has been confirmed by the Court of Justice of the EU** in a judgment of 2018:

*"it is apparent from Article 12(2) of Regulation No 1049/2001 ... 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".<sup>23</sup>*

34. The annual TAC Regulations are legally-binding on the Member States. The Ombudsman therefore takes the view that documents relating to the adoption of the annual TAC Regulation fall within the broad definition of 'legislative documents' under Regulation 1049/2001 and should, accordingly, subject to the applicable exceptions be made directly accessible.

35. Moreover, the Ombudsman shares the complainant's view that the documents in question contain environmental information, within the meaning of the **Aarhus Regulation**.

36. The Aarhus Regulation defines environmental information as including any information in written, visual, aural, electronic or any other material form on measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect or protect the environment, such as biological diversity.<sup>24</sup>

37. As one of the main aims of the TAC Regulation is to maintain fish stocks at a sustainable level, it must be understood to constitute a measure designed to protect biological diversity. Documents relating to the decision-making process leading to the adoption of the annual TAC Regulation therefore contain information on a measure likely to affect biological diversity. They clearly qualify as 'environmental information', within the definition under the Aarhus Regulation.

<sup>21</sup> Articles 1(2) and 10(3) TEU.

<sup>22</sup> Article 12(2) and Recital 6 of Regulation 1049/2001.

<sup>23</sup> Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/16, para. 85: <http://curia.europa.eu/juris/liste.jsf?num=C-57/16&language=en>.

<sup>24</sup> Article 2(1)(d)(i) and (iii) of Regulation 1367/2006.



38. The Ombudsman notes that the Aarhus Regulation aims to ensure that environmental information is progressively made available and is disseminated to the public in the widest possible manner. The purpose of this is to promote more effective public participation in the decision-making process, thereby increasing the accountability of decision making and contributing to public awareness and support for the decisions taken.<sup>25</sup>

39. To this end, the Aarhus Regulation provides that the exception in Regulation 1049/2001, whereby access to a document may be refused if disclosure would seriously undermine the institution's decision-making process<sup>26</sup>, **has to be interpreted in a restrictive way when it comes to environmental information.**<sup>27</sup> The public interest served by disclosing the requested information should be taken into account<sup>28</sup>, with the aim being to promote greater transparency of environmental information.

40. The fact that the documents contain important environmental information is therefore reason enough for concluding that they should be released in a timely manner.

*Timely access to the documents*

41. The public can participate effectively in the decision-making process only if the relevant documents are made directly accessible in a timely manner.

42. At the inspection meeting, the Ombudsman's inquiry team confirmed that documents exist that relate to the adoption of the 2018 and 2019 TAC Regulation, at least from the end of November onwards. These documents (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, like the complainant, need in order to influence the ongoing decision-making process.

43. At the same time, the Ombudsman's inquiry team confirmed that, while the decision-making process was ongoing, the Council did not make available various documents related to the adoption of the TAC Regulations for 2018 and 2019.<sup>29</sup> Instead, documents were systematically marked as 'LIMITE', meaning the documents are internal and are not to be made directly accessible to the public. Recipients of documents that bear the 'LIMITE' marking are expected to ensure that such documents are not disclosed outside the Council.

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<sup>25</sup> Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/18, para. 98: <http://curia.europa.eu/juris/liste.jsf?num=C-57/18&language=en>.

<sup>26</sup> Article 4(3) of Regulation 1049/2001.

<sup>27</sup> Article 6(1) second sentence of Regulation 1367/2006; see also Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/18, para. 100: <http://curia.europa.eu/juris/liste.jsf?num=C-57/18&language=en>.

<sup>28</sup> See footnote n.27.

<sup>29</sup> Those documents that the Council did make available were documents, like the Commission's proposal, that have to be made available in line with the Council's rules of procedure, see Articles 11(3) and (5), Annex II.



44. As the Ombudsman has previously emphasised,<sup>30</sup> restrictions on access to legislative documents should be both exceptional and limited in duration to what is absolutely necessary. The LIMITE classification should apply only to those documents that, at the time they are assessed, are covered by one of the exceptions provided for in Regulation 1049/2001.

45. The Ombudsman also notes that, given the very short time period over which the annual TAC Regulation is adopted, the process under Regulation 1049/2001 for requesting public access is unsuitable to secure the necessary level of transparency. Even if the Council granted access to documents within the initial timeframe of 15 working days, this would make it very difficult for those requesting the documents to use them to participate effectively in the decision-making process, since the positions may have changed in the intervening period. Should the Council extend the deadline by 15 additional working days, or should it initially refuse to grant access (and the requester ask that the Council review its decision), the decision-making process would have ended before access was ultimately granted.

46. The Ombudsman therefore takes the view that the **decision-making process leading to the adoption of the TAC Regulation can be sufficiently transparent only if the Council makes the relevant documents available proactively, in line with Article 12 of Regulation 1049/2001**. This would mean making such documents directly accessible to the public at the time they are circulated, or soon thereafter.

47. The Council argued that disclosing documents, such as 'the bible', before the final TAC Regulation is adopted, would undermine the ongoing decision-making process. It therefore invoked the corresponding exception in Regulation 1049/2001<sup>31</sup> to withhold access to the documents.

48. The Ombudsman is not convinced by this argument. It is integral to the democratic rights of EU citizens that interested members of the public or other stakeholders are afforded the opportunity to express their views on the different options discussed in the context of EU decision making, **in particular on environmental matters**.<sup>32</sup> The Council has not demonstrated that disclosing the documents in question would affect negatively, prolong or complicate the decision-making process.<sup>33</sup>

49. The Council's argument, that the main stakeholders in the area of fisheries are already consulted by the Commission and Member States during the decision-making process, does not guarantee sufficient transparency. It does not insure that all interested members of the public or other stakeholders can effectively participate in the discussion.

<sup>30</sup> Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, para. 36, available at: <https://www.ombudsman.europa.eu/en/special-report/en/94921>.

<sup>31</sup> Article 4(3).

<sup>32</sup> Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/18, para. 101: <http://curia.europa.eu/juris/liste.jsf?num=C-57/18&language=en>.

<sup>33</sup> Judgment of the Court (Grand Chamber) of 4 September 2018, *ClientEarth v Commission*, C-57/18, para. 108: <http://curia.europa.eu/juris/liste.jsf?num=C-57/18&language=en>.



50. In light of the above, the Ombudsman finds that the Council's systematic classification of documents related to the adoption process of the annual TAC Regulations for 2018 and 2019 as LIMITE constitutes maladministration. She therefore makes an appropriate recommendation, in accordance with Article 3(6) of the Statute of the European Ombudsman.

### 3. Completeness and accessibility of the register

#### Arguments presented to the Ombudsman

51. The complainant argued that the Council's register of documents is incomplete and not user-friendly. In particular, the complainant identified several documents related to the adoption of the TAC Regulation that are not included in the register and/or are difficult to find because they do not have an 'inter-institutional code'.<sup>34</sup> In particular, the complainant referred to the outcome of proceedings documents, records of working party meetings and relevant non-papers<sup>35</sup> submitted by the Commission.

52. The complainant also stated that the register does not necessarily allow members of the public to identify the documents to which they seek access. While documents are listed in the register according to their internal document number and title, many documents have the same title (mostly that of the Commission proposal).

53. At the inspection meeting, the Council's representatives explained that, normally, all 'standard documents' (ST documents) are listed on the Council's register of documents and should have an inter-institutional code. The outcome of proceedings documents, which record working party meetings, do not have an inter-institutional code, as different legislative and/or non-legislative files (with different inter-institutional codes) may be discussed in one meeting.

#### The Ombudsman's assessment

54. At the inspection, the Ombudsman's inquiry team confirmed that:

- Several documents related to the adoption of the TAC Regulations for 2018 and 2019, do not bear an inter-institutional code, which makes it very difficult to find them in the register. This includes documents such as certain Commission non-papers<sup>36</sup>, all outcome of proceedings documents from the working party and some versions of 'the bible'<sup>37</sup>.

<sup>34</sup> The inter-institutional code links documents to a specific file, thus making it easier to search for or find them.

<sup>35</sup> A 'non-paper' refers to an informal document tabled during negotiations with the purpose of finding agreement on contentious issues - without necessarily representing the position of the authoring body (the Commission, the Presidency of the Council or individual Member States).

<sup>36</sup> Document numbers: ST 14316 2017 INIT, ST 14317 2017 INIT, and ST 14649 2018 INIT.

<sup>37</sup> Document numbers: ST 14385 2018 INIT and ST 14385 2018 REV 1.



- The Council makes use of ‘working documents’ (as opposed to ST documents), which do not have a separate entry in the register of documents. Instead, the Council General Secretariat publishes quarterly, and for each working party, a ST document on the public register that contains a list of working documents that the General Secretariat disseminated to the working party during the relevant time period. Furthermore, working documents do not bear an inter-institutional code linking them to a specific file.
- The titles of documents listed in the register often have the name of the Commission proposal only, meaning it is difficult to know what the document is about.

55. The Ombudsman has already taken the view that having a complete and accessible public register is key to transparency.<sup>38</sup> To enable the public to exercise fully the right to access documents, all documents **produced and/or circulated in preparatory bodies should be listed in a public register**, irrespective of their format and whether they are fully or partially accessible or not accessible at all. In addition, in order to enable the public to access these documents, they must be easy to find on the Council’s website. Only through a complete and accessible register of documents can the public get a proper overview of deliberations taking place in preparatory bodies.

56. The Ombudsman therefore suggested that *“the Council list all types of documents in its public register, regardless of their format and of whether they are fully or partially accessible or not accessible at all”*. The Ombudsman confirms her finding and the related suggestion that has already been made.

## Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes 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 Council and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Council shall send a detailed opinion by 27 January 2020.

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<sup>38</sup> Special Report of the European Ombudsman in strategic inquiry OI/2/2017/TE on the transparency of the Council legislative process, para. 28, available at: <https://www.ombudsman.europa.eu/en/special-report/en/94921>



Emily O'Reilly  
European Ombudsman

Strasbourg, 25/10/2019