

## Afgørelse i sag 910/2018/THH om Europa-Kommissionens afslag på aktindsigt i sin vurdering af de sanktionsordninger, som medlemsstaterne anvender til at håndhæve den fælles fiskeripolitik

Afgørelse

**Sag 910/2018/THH - Indledt den 25/05/2018 - Afgørelse af 23/05/2019 - Den vedrørte institution** Europa-Kommissionen ( Ingen fejl eller forsømmelser fundet ) |

Klagen vedrørte Europa-Kommissionens afslag til en NGO på fuld aktindsigt i tre dokumenter vedrørende Kommissionens vurdering af de sanktionsordninger, som EU's medlemsstater anvender for at sikre overensstemmelse med EU's fælles fiskeripolitik.

Ombudsmanden fandt, at afslaget på aktindsigt i dokumenterne var berettiget som følge af behovet for at beskytte såvel igangværende undersøgelser og revisioner som Kommissionens beslutningsproces.

Ombudsmanden fandt derfor ingen tilfælde af fejl eller forsømmelser og afsluttede undersøgelsen.

## Background to the complaint

1. Following the adoption of Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (Regulation 1224/2009), [1] the European Commission (the Commission) assessed the sanctioning systems Member States had put in place to ensure compliance with the Regulation.

2. On 5 October 2017, the complainant, a non-governmental organisation, asked the Commission to give it public access [2] to the “ *assessment of the sanctioning systems of the EU Member States to evaluate their effectiveness with respect to the implementation of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system to ensure compliance with the rules of the common fisheries policy* ”.

3. The Commission identified the following three documents as falling within the scope of the complainant’s request:



- Report: Assessment of the Member States' sanctioning systems for infringements of Common Fisheries Policy rules (the Report)
- Assessment of the Member States' Sanctioning Systems for infringements of Common Fisheries Policy rules: country fiches (the Assessment document)
- Overview table of Member States' sanctioning practises (the Overview table)

4. On 16 November 2017, the Commission refused public access to the requested documents on the ground that their disclosure would undermine the protection of the purpose of inspections, investigations and audits. [3]

5. On 3 December 2017, the complainant filed a request for review, a so-called “ *confirmatory application* ”.

6. On 9 May 2018, having not received a decision from the Commission, the complainant filed a complaint with the Ombudsman, seeking full public access to the requested documents.

7. The Ombudsman opened an inquiry and contacted the Commission. Following this, on 31 May 2018, the Commission adopted its decision, a so-called “ *confirmatory decision* ”, granting partial access to the Report and refusing public access to the Assessment document and the Overview table. In doing so, the Commission relied on the need to protect the purpose of investigations, [4] the decision-making process [5] and the privacy and integrity of individuals [6] as provided for in Regulation 1049/2001.

8. On 10 July 2018, the complainant responded to the Commission's confirmatory decision disagreeing with its findings and indicating a wish to continue to pursue the complaint against the Commission.

## The inquiry

9. The Ombudsman opened an inquiry into the Commission's refusal to grant access to its assessment of the sanctioning systems of the EU Member States under Regulation 1224/2009.

10. In the course of the inquiry, the Ombudsman received from the Commission and the complainant additional views and comments. The Commission also provided to the Ombudsman a copy of the requested documents.

## Arguments presented to the Ombudsman

### Protection of the purpose of inspections, investigations and audits



## The Commission's arguments

11. The Commission explained that the requested documents constitute the “ *initial assessment of the degree of the compliance of the Member States* ” with Regulation 1224/2009, “ *drawn up by the Commission in the framework of its ongoing investigation, under Articles 96 to 102 of Regulation 1224/2009, into the sanctioning systems of maritime Member States for infringements of the Common Fisheries Policy rules* ”. According to the Commission, the initial assessment identified failures in compliance, and was a first step and a basis for in-depth verifications, inspection and audit missions, which led to compliance dialogues with the relevant Member States preceding infringement procedures. [7]

12. The Commission emphasises that the investigations and audits are ongoing and that, in terms of compliance tools, it has initiated informal procedures with the objective of leading the Member States to comply voluntarily with Regulation 1224/2009. These take the form of action plans, [8] which - according to the Commission's latest update provided to the Ombudsman in the course of the inquiry - remain ongoing, and EU Pilot procedures, [9] which have been launched. The unsuccessful informal procedures have led to the opening of infringement procedures. The Commission noted that “ *a Member State may be subject to more than one procedure at the same time, depending on the topic concerned* ”.

13. The Commission has explained that the ongoing investigations and informal procedures consist of cooperation and dialogues with the Member States as to the correct application of EU law and the conformity of national legislation with EU law. The Commission stressed that the investigations and informal procedures were triggered by the initial assessment and, thus, that the requested documents constitute a part of their files. Following the individual examination of the requested documents, the Commission considered that their disclosure would jeopardise the investigative activities and the mutual trust and good faith within the dialogues, which are crucial for the Member States' voluntary compliance with EU rules without having to initiate infringement procedures. The Commission referred to the judgement in the case of *Petrie*, where the General Court held that the Member States have a right to expect confidentiality in the Commission's investigations that could lead to infringement procedures . [10] The Commission noted that this applies, in particular, to the ongoing infringement procedures, as found in the case *Liga para Protecção da Natureza*, [11] and to the ongoing EU Pilot procedures, based on the case *Spirlea*. [12] The Commission also relied on Article 113(2) of Regulation 1224/2009, which states that “ *the data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access...* ”

14. The Commission informed the Ombudsman that, in relation to the Member States in which action plans, EU Pilot procedures and infringement procedures are not currently ongoing, “ *audits have been and will continue to be carried out* ”. The Commission argued that, having examined the documents individually, it had concluded that disclosure of the documents at issue would undermine the integrity of the ongoing audits. [13] Furthermore, it noted that the documents in question have not been made available to the Member States concerned.



15. Similarly, again on the basis of an individual assessment of the documents, the Commission also concluded that full disclosure would undermine the purpose of the ongoing investigations and follow-up action. The Commission therefore refused full public access. [14]

## The complainant's arguments

16. The complainant argues that the Commission has misapplied the rules concerning the exemption from public disclosure of the documents. It considers that the Commission's reasons for non-disclosure do not relate to the actual content of the requested documents, but rather to a comparison of EU Pilot procedures with action plans. Referring to the *Verein für Konsumenteninformation v Commission* case, [15] the complainant stressed that the Commission must assess whether an exception to disclosure applies by reference to the actual information contained in the documents.

17. As regards the parts of the requested documents that do not form part of EU Pilot or infringement procedures, the complainant argued that the mere possibility that an investigation may lead to an EU Pilot or infringement procedure is “ *very hypothetical and uncertain* ” and is not a sufficient justification for non-disclosure. [16] It stressed that a justification for non-disclosure “ *must demonstrate how disclosure would seriously and effectively undermine an ongoing investigation and that such risk is reasonably foreseeable* ”, which it claimed the Commission had failed to provide.

18. Additionally, the complainant argued that the Commission had failed to identify what kind of information it had obtained in line with Article 113(2) of Regulation 1224/2009 and to inform the complainant as to whether it had consulted the Member States in that regard.

## Protection of the decision-making process

### The Commission's arguments

19. The Commission explained that its decision was based on the fact that investigations and follow-up action had not yet been taken and that such investigations and follow-up action could subsequently lead to additional action in the future. It considered that disclosure of the documents at issue would subject the ongoing investigations and procedures to “ *undue outside interference* ”, recognised by the General Court as a reason for non-disclosure of documents. [17] It noted that the Court held that such non-disclosure applies to “ *documents directly linked to the decision-making process* ” and stressed that the same principle is applicable to the requested documents which contain information on “ *the course of the respective investigations, future procedural steps and the investigation strategy followed by the Commission* ”. Therefore, the Commission considered that the disclosure of the requested documents would undermine its decision-making process. [18]



## The complainant's arguments

**20.** The complainant argued that the Commission misapplied the exception concerning the protection of the decision-making process. It argued that, while the Commission invoked two exceptions (namely, the protection of investigations and the protection of the decision-making process) on the same ground, it failed to put forward reasons for the protection of two different interests. In the light of this, in the complainant's view, the Commission had failed to establish that the disclosure would specifically and effectively undermine its decision-making process and that the risk identified was reasonably foreseeable.

**21.** The complainant stressed that the Commission's statement that external pressure would undermine its decision-making process was insufficient as a justification for applying the exception. The complainant argued that the Commission must establish that external pressure or influence would be such as to risk " *impeding that institution's capacity to act in a fully independent manner and exclusively in the general interest or seriously to affect, prolong or complicate the proper conduct of that institution's internal discussions and decision-making process*". [19]

**22.** The complainant also argued [20] that the exception for the protection of the decision-making process must be applied strictly, especially as regards documents containing environmental information. The complainant argued that this applied here as, in its view, the requested documents contain environmental information within the meaning of the Aarhus Regulation [21] and stressed that the EU institutions are accordingly obliged to disclose them publicly. [22]

## Overriding public interest in disclosure

### The Commission's arguments

**23.** The Commission acknowledged that whilst a certain public interest in disclosure exists, it considered the interest to be a " *general consideration* " that lacks " *specific argumentation evidencing that the principle of transparency is of especially pressing concern in the case in question* ".

**24.** The Commission stressed that non-governmental organisations' statutory aims are of a " *general application* " and do not constitute an overriding public interest. [23] In this regard, the Commission considered that " *no specific interest or background of an applicant can be taken into account* " when processing requests for access to documents. [24]

**25.** The Commission said that, under the Aarhus Regulation, [25] an exemption applies to the overriding public interest in the case of documents that concern investigations. Since the documents at issue in this case are tools in the ongoing investigations, the Commission



considered that an overriding public interest did not exist.

26. Moreover, the Commission stressed the fact that the documents at issue concern an administrative, rather than a legislative procedure; it is in relation to the latter in which the Court has established a requirement for wider openness.

27. The Commission argued that the balance between transparency on the one hand and the protection of ongoing investigations and decision-making processes on the other is achieved by providing information to the public in press releases and publications on the Commission's website. The Commission emphasised that the relevance of Commission press releases has been recognised by the General Court. [26]

## The complainant's arguments

28. The complainant considered that the Commission had failed to identify the overriding public interest which, the complainant said, does exist in disclosure of the documents at issue. It argued that the correct implementation of Regulation 1224/2009 is crucial in order to ensure sustainable fishing activities. This is especially the case in the context of overfished fishing stocks within the EU. The complainant argued that a number of failures have been established in the implementation of Regulation 1224/2009, as well as in the Commission's application of sanctions to ensure compliance with Regulation 1224/2009. It referred to several reports [27] , in particular the Special Report [28] of the European Court of Auditors on EU fisheries control that stated that “ *sanctions applied were not always dissuasive, proportionate and effective* ”, as well as that they “ *did not always prevent infringements from recurring* ”. The complainant is of the view that the current environmental situation is “ *extremely worrying* ” and that the consequences could be “ *disastrous* ” for marine biodiversity.

29. The complainant argued that the need for public disclosure of the requested documents is even more pressing since Regulation 1224/2009 is currently being revised. It said that the new reform aims at improving the current system, especially in order to strengthen enforcement by the Member States. However, the complainant argued that the Commission's impact assessment contains only general sentences justifying the revision of the sanctioning regime and that the Parliament and the Council are conducting the legislative procedure without having all available information before them. Therefore, the complainant argues that more information must be made available to civil society organisations which would then be able to make the public, including legislative bodies, aware of the situation, and take other action through strategic litigation in the Member States. The complainant noted that civil society organisations play a vital role in the enforcement of EU environmental law, something which the complainant considers has been confirmed in the Seventh Environmental Action Programme. [29]

30. The complainant is concerned that the Commission has not provided enough information on the action it is taking, in particular as regards ongoing EU Pilot procedures. It argued that the Commission's reference to the Court's recognition of the relevance of press releases only concerns documents that are part of infringement procedures. Additionally, the complainant



referred to the Commission's communication "*EU Law: Better Results Through Better Application*" [30] in which the Commission expressed its intention to prioritise certain infringements over others. The complainant is of the view that, in line with this policy, the Commission will continue to refuse public access to the documents at issue in this complaint, relying on the justification of the possibility of opening infringement procedures, whilst at the same it will not open any such procedures since the Common Fisheries Policy is not the Commission's priority.

## The Ombudsman's assessment

**31.** The Ombudsman established that the requested documents comprise an initial assessment of the Member States' sanctioning systems for infringements of the Common Fisheries Policy rules. The Commission informed the Ombudsman that, on the basis of this initial assessment, action plans, Pilot procedures and infringement procedures remain ongoing. The Commission also noted that "*a Member State may be subject to more than one procedure at the same time, depending on the topic concerned*". As regards the Member States in relation to which the above-mentioned procedures are not currently ongoing, the Commission stated that "*audits have been and will continue to be carried out*".

**32.** The Ombudsman notes that the Commission carried out an individual examination of the documents at issue and finds that it provided a sufficient explanation of the redactions. The Commission granted public access to the parts of the Report which provide general information on the Commission's assessment and findings on the Common Fisheries Policy; it refused public access to the parts of the Report which contain the assessment on the Member States' compliance with Regulation 1224/2009, as well as to the whole Assessment document and Overview table.

**33.** The Ombudsman considers that, since the ongoing investigations, audits and procedures are based on the initial assessment and are carried out in the form of dialogues with the Member States, it is at least reasonably foreseeable that full disclosure of the requested documents would have a negative impact on the mutual trust and good faith in the exchange of views between the Commission and the Member States as regards potential failures in the Member States' implementation of the relevant rules. As a result of this, the purpose of identifying shortcomings, as well as the Member States' voluntary compliance with Regulation 1224/2009, would be undermined.

**34.** The Ombudsman notes that the Commission is currently carrying out audits and/or taking action in relation to a number of Member States. She also notes that informal procedures which were unsuccessful have already led to infringement procedures. She considers that this supports the argument that the Commission is addressing this issue and does not appear to be reluctant to initiate formal procedures against Member States. In the light of this, the Ombudsman finds that the Commission was justified in refusing full public access to the documents at issue, in order to protect the purpose of investigations under Regulation 1049/2001. [31]





**35.** The Ombudsman also notes that, since the investigations and various procedures are still ongoing, final decisions on the Member States' compliance with Regulation 1224/2009 have not yet been taken. The Ombudsman considers that it is reasonable to conclude that disclosure of information which serves as guidelines and strategy would create external pressure on the Commission's investigations, as well as on the Commission's dialogues with Member States. On this ground, the Ombudsman agrees with the Commission's conclusion that full public disclosure of the requested documents could, at this time, undermine its decision-making process [32] .

**36.** The Ombudsman notes that the Commission refused public access to the names and contact details of non-senior staff within the Commission, applying the exception for the protection of personal data. [33] The complainant did not challenge the Commission's redactions in this regard. The Ombudsman finds these redactions to be justified and in line with Regulation 1049/2001.

**37.** The Ombudsman has considered the arguments for and against the existence of an overriding public interest in disclosure in this case. Her view is that the public interest in disclosure in this case is *not* sufficient to constitute an *overriding public interest* , given the weight of the arguments concerning the realistic prospect of disclosure undermining the protection of ongoing inspections, investigations and audits, and taking account of the relevant case-law in this regard. In the light of the ongoing status of the investigations in this case, the arguments in favour of an overriding public interest here do not trump those in favour of the protection of the interests at stake. The Commission must be given the space to pursue its investigations successfully and to completion.

**38.** The Ombudsman has sympathy for the complainant's arguments in favour of an overriding public interest in disclosure stemming from the revision of the legislative framework in this area and the need for the public and civil society to participate effectively in the ongoing legislative process. Nevertheless, on balance, she considers that this does not constitute an overriding public interest in this case. Public disclosure of the details of current action being taken under the existing legal framework will not obviously inform the case for revision of that legal framework.

**39.** The Ombudsman also notes that, in the Aarhus Regulation, the legislator has excepted from the provision deeming that an overriding interest exists in cases where the information requested relates to emissions into the environment, situations where there are ongoing investigations, in particular those concerning possible infringements of Community law. [34]

**40.** The present case does not concern emissions, but, nevertheless, the Ombudsman considers that the inclusion of this specific provision by the legislator supports the conclusion that the bar for finding an overriding public interest in disclosing documents in any case where there are ongoing investigations and infringement procedures is particularly high. In her opinion, that high bar is not met in this case.





## Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

**There was no maladministration by the European Commission.**

The complainant and the European Commission will be informed of this decision .

Emily O' Reilly

European Ombudsman

Strasbourg, 23/05/2019

[1] Council Regulation 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R1224&from=EN> [Link]

[2] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R1049&rid=1> [Link]

[3] As set out in Article 4(2) third indent of Regulation 1049/2001

[4] Article 4(2) third intent of Regulation 1049/2001

[5] Article 4(3) first subparagraph of Regulation 1049/2001

[6] Article 4(1)(b) of Regulation 1049/2001

[7] In accordance with Article 258 of the Treaty on the Functioning of the European Union

[8] In accordance with Article 102(4) of Regulation 1224/2009

[9] According to the Commission, the EU Pilot procedure “ *is an informal dialogue between the Commission and the Member State concerned on issues related to potential non-compliance* ”



with EU law, prior to launching a formal infringement procedure ”

[10] Judgment of 11 December 2001 in *Petrie v Commission* , T-191/99, EU:T:2001:284, at paragraph 68, available at

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=7FBF7224A7E9D3317AF9EFB2FE024BB3?text=&docid=109285&pageIndex=0&doclang=EN&mode=lst&dir=asc>  
[Link]

[11] Judgment of 9 September 2011 in *Liga para a Protecção da Natureza (LPN) v Commission* , T-29/08,

EU:T:2011:448, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=109285&pageIndex=0&doclang=EN&mode=lst&dir=asc>  
[Link]

[12] Judgment of 11 May 2017 in *Sweden and Spirlea v Commission* , C-562/14 P, EU:C:2017:356, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=190582&pageIndex=0&doclang=EN&mode=lst&dir=asc>  
[Link]

[13] In accordance with Article 4(2) third indent of Regulation 1049/2001

[14] Again, in accordance with Article 4(2) third indent of Regulation 1049/2001

[15] Judgment of 13 April 2005 in *Verein für Konsumenteninformation v Commission* , T-2/03, ECLI:EU:T:2005:125, at paragraph 73, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=60314&pageIndex=0&doclang=EN&mode=lst&dir=asc>  
[Link]

[16] Referring to the judgement of 16 July 2015 in *ClientEarth v Commission* , C-612/13 P, ECLI:EU:C:2015:486, in particular at paragraph 79, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=165903&pageIndex=0&doclang=EN&mode=lst&dir=asc>  
[Link]

[17] Judgment of 11 December 2014 in *Saint-Gobain Glass Deutschland GmbH v Commission* , T-476/12, EU:T:2014:1059, in particular at paragraphs 80 and 88, available at

<http://curia.europa.eu/juris/liste.jsf?num=T-476/12&language=EN#> [Link]

[18] In accordance with Article 4(3) first subparagraph of Regulation 1049/2001

[19] Judgment of 4 September 2018 in *ClientEarth v Commission* , C-57/16 P, ECLI:EU:C:2018:660, at paragraph 108, available at

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=205322&pageIndex=0&doclang=EN&mode=lst&dir=asc>  
[Link]

[20] Relying on the *Saint-Gobain Glass* case, above



[21] See 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, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1367&from=EN> [Link]

[22] In accordance with Articles 4(1), 11(1) and 12

[23] Judgment of 14 November 2013 in *Liga para a Protecção da Natureza (LPN) and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 95

[24] Judgment of 1 February 2007 in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 43, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=66056&pageIndex=0&doclang=EN&mode=lst&dir=> [Link]

[25] Article 6(1) of Regulation 1367/2006

[26] Judgment of 23 January 2017 in *Association Justice & Environment, z.s. v Commission*, T-727/15, ECLI:EU:T:2017:18, at paragraph 60, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=187061&pageIndex=0&doclang=EN&mode=lst&dir=> [Link]

[27] European Environmental Agency's Report No 2/2015, available at: <https://www.eea.europa.eu/publications/state-of-europes-seas> [Link]; Report from the Commission to the European Parliament and the Council, Implementation and evaluation of Regulation (EC) 1224/2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy as required under Article 118, SWD(2017) 134 final; Report from the European Parliament, How to make fisheries controls in Europe uniform (2015/2093(INI)); Client Earth's report 'Slipping through the net – The control and enforcement of fisheries in France, Ireland, the Netherlands, Poland, Spain and the UK (England)' published in September 2017; OSPAR Convention, 2017 Intermediate Assessment, available at: <https://oap.ospar.org/en/ospar-assessments/intermediate-assessment-2017/key-messages-and-highlights/> [Link]

[28] Special Report No 08/2017: EU fisheries controls: more efforts needed of 30 May 2017, available at: [https://www.eca.europa.eu/Lists/ECADocuments/SR17\\_8/SR\\_FISHERIES\\_CONTROL\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR17_8/SR_FISHERIES_CONTROL_EN.pdf) [Link]

[29] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a



General Union Environment Action Programme to 2020 ‘ *Living well, within the limits of our planet*’, at paragraph 65 of the Annex. Available at  
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN> [Link]

[30] Communication from the Commission of 23 December 2016: *EU law: Better results through better application* C/2016/8600, OJ C 18, 19.1.2017, p. 10–20, available at  
[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN) [Link]

[31] Article 4(2) third indent of Regulation 1049/2001

[32] Article 4(3) first subparagraph of Regulation 1049/2001

[33] Article 4(1)(b) of Regulation 1049/2001

[34] Article 6(1) of Regulation 1367/2006