Recommendation of the European Ombudsman in case 452/2018/AMF on the European Commission’s failure to disclose information on the existence of EU Pilot dialogues and to publish proactively Member State reports on the implementation of the Fisheries Control Regulation

The case concerns a refusal by the European Commission to give an environmental NGO general information about discussions between the Commission and Member States regarding their potential non-compliance with the EU's Fisheries Control Regulation. The complainant also asked the Commission to publish proactively Member State reports on how they implemented the Fisheries Control Regulation.

The Ombudsman considers that the Commission is wrong not to provide the complainant with the information it requested and makes a recommendation in that regard. The Ombudsman also suggests that the Commission proactively publish Member State reports on the implementation of the Fisheries Control Regulation.

Background to the complaint

1. The complainant is a non-governmental organisation active in the area of environmental law. In January 2017, it asked the European Commission for public access, under the EU rules on public access to documents (Regulation 1049/2001) [1], to all reports submitted by the EU Member States regarding how they applied the Fisheries Control Regulation [2]. This Regulation aims to ensure compliance with the Common Fisheries Policy [3]. The complainant also asked for information on whether there were ongoing EU Pilot [4] dialogues with any Member States on potential breaches of the Fisheries Control Regulation.

2. The Commission gave full public access to the reports. With regard to the ongoing EU Pilot dialogues, the Commission stated that there were “some cases of this nature”, but insisted that it could not give access to any documents relating to these cases as they were covered by an exception to the right of public access [5].
3. The complainant contacted the Commission again, arguing that the reports submitted by the Member States are ‘environmental information’ [6] and that the Commission therefore has an obligation actively to disseminate them under EU rules on access to information in environmental matters (the Aarhus Regulation) [7]. The complainant also clarified that it was not asking for full access to the documents regarding EU Pilot dialogues, but only for information on the existence of specific EU Pilot dialogues related to the Fisheries Control Regulation, such as which Member States were involved and which legal provisions had allegedly been breached.

4. The Commission replied to the complainant in March 2017, stating that it had transferred the information request and the request for proactive publication of the Member States’ reports to the relevant departments.

5. As it did not receive any further information from the Commission, the complainant turned to the Ombudsman in February 2018.

The inquiry

6. The Ombudsman opened an inquiry into the following aspects of the complaint:

1) The Commission failed to disclose information relating to the existence of EU Pilot dialogues about potential breaches of the Fisheries Control Regulation.

2) The Commission fails to publish proactively the Member States’ reports on the implementation of the Fisheries Control Regulation.

7. As a first inquiry step, the Ombudsman asked the Commission to reply to the complainant’s requests. The Commission replied in May 2018. The Ombudsman also received the comments of the complainant in response to the Commission’s reply. The Ombudsman also, in the meantime, received the Commission’s replies in two other inquiries (OI/5/2016/AB and 367/2017/CEC [8]) concerning issues directly relevant to this case.

8. On this basis, notably the fact that the Commission has taken a position in the context of OI/5/2016/AB on the extent to which information can be disclosed on EU Pilot dialogues, the Ombudsman is proceeding directly to a recommendation on the first aspect of the case [9]. The Ombudsman is also mindful that the complainant submitted its first request to the Commission on this matter in January 2017.

On the refusal to disclose information about the existence of EU Pilot dialogues

Arguments presented to the Ombudsman
9. The Commission considers that disclosure of specific documents related to EU Pilot dialogues is not possible under EU rules on public access to documents, because such disclosure would undermine the protection of the purpose of the investigations [10] and the "general principle of confidentiality [11]". As regards the complainant’s information request, it limited itself to stating that in 2017 there were 12 on-going files against 8 Member States for breaches of provisions of the Control Regulation. The Commission also stated that information on its decisions on infringement proceedings is published on its website [12].

10. The complainant considers that the Commission's reply does not adequately address its request to be informed of which Member States are involved and which legal provisions have allegedly been breached. In the complainant's view, there is an overriding public interest in the requested information being disclosed.

The Ombudsman's assessment leading to a recommendation

11. EU Pilot dialogues are potentially of great interest to citizens, particularly when they relate to the protection of human rights, the environment and the single market. It is therefore necessary to balance the risk of harming the climate of mutual trust between the Member States and the Commission, which makes pre-infringement tools effective, with the benefits of increasing public scrutiny of these issues of major interest. In the context of her strategic inquiry on the timeliness and transparency in the European Commission’s handling of infringement complaints [13], the Ombudsman found that the fact that there is no public list of EU Pilot dialogues makes it difficult for citizens to submit requests for access to documents, including after a case has been closed. The Ombudsman therefore suggested that the Commission should make the list of ongoing EU Pilot dialogues publicly available and indicate in that list the status of each file.

12. The Commission replied to the Ombudsman’s suggestion by stating that, "given the informal nature of the 'EU Pilot' dialogues with Member States on possible infringements of EU law, the Commission is concerned that a systematic publication of the list of ongoing dialogues and their respective status would risk altering the nature of that dialogue, potentially making it less fruitful".

13. In this case, the complainant requested information about the existence of EU Pilot dialogues. The complainant did not request full public access to the documents related to the ongoing EU Pilot dialogues. Only in case of full disclosure of EU Pilot documents can it be argued that it is reasonably foreseeable that there would be a negative impact on the mutual trust and good faith in the exchange of views between the Commission and the Member States.

14. When the Commission opens an EU Pilot dialogue following a complaint about a Member State breaching EU law, the Commission has committed itself to inform the complainant. [14] This means that, at the very least, one, and potentially several members of the public, will
know that there is an EU Pilot dialogue with a particular Member State about a specific issue. When it is a non-governmental organisation making the complaint, the likelihood is that such information will be disseminated more widely. The Ombudsman thus fails to see how making this limited information available to the wider public, on a more consistent basis, in the form of a list of ongoing EU Pilot dialogues, would alter the nature of the dialogue, making it less fruitful (to use the words of the Commission). The Commission can easily address its own concern in this regard by making it clear, when publishing this information about EU Pilot dialogues, that an EU Pilot dialogue is an early step in the procedure, aimed at resolving the issue. It can also state that opening an EU Pilot case does not create any presumption that there has been an infringement of EU law by the Member State. In this context, the Commission has not shown that increased transparency would have a detrimental effect on the EU Pilot dialogues.

15. In light of the above, the Ombudsman finds that the Commission's refusal to make public the limited information relating to the existence of EU Pilot dialogues about potential breaches of the Fisheries Control Regulation, information which it already provides to complainants in EU Pilot cases, constitutes maladministration. She therefore makes a corresponding recommendation below, in accordance with Article 3(6) of the Statute of the European Ombudsman.

16. Regarding the Commission's delay in replying to the complainant on this matter, the Ombudsman finds it regrettable that the Commission replied to the complainant only after the Ombudsman opened an inquiry.

On the refusal to publish proactively the Member States’ reports on the implementation of the Fisheries Control Regulation

Arguments presented to the Ombudsman

17. The Commission points out that the Fisheries Control Regulation obliges the Member States to submit reports to the Commission every five years, on the basis of which the Commission has to report to the European Parliament and the Council [15]. However, the Fisheries Control Regulation does not establish an obligation to publish proactively the Member States' reports. The Commission has complied with its obligations by drawing up and publishing a report to the European Parliament and the Council, together with a Staff Working Document [16].

18. The Commission is of the view that the main aim of the Fisheries Control Regulation is to enforce an effective monitoring system designed to ensure compliance with all the rules of the Common Fisheries Policy. The main aim of the Fisheries Control Regulation is not to protect or improve the environment. Therefore, the Fisheries Control Regulation is not, strictly speaking, part of what could be defined as environmental law and does not implement
EU environmental legislation like, for example the Birds or the Habitats directives.

19. The complainant considers that the Member States' reports are environmental information. The reports contain information on measures and activities affecting, or likely to affect, elements of the environment. The reports also contain information on the implementation of environmental legislation. Under the Aarhus Regulation, the Commission therefore has an obligation actively to disseminate the reports [17]. The aim of the Fisheries Control Regulation is to ensure effective compliance with the Common Fisheries Policy. The Common Fisheries Policy includes the conservation of marine and fresh water biological resources, it contributes to the protection of the marine environment and aims at limiting the environmental impacts of fishing activities [18].

The Ombudsman's assessment

20. Although the Fisheries Control Regulation does not oblige the Commission to publish proactively the reports in question, the Aarhus Regulation foresees that EU institutions shall make “environmental information progressively available” [19]. The EU Common Fisheries Policy aims, among other things, to ensure that fishing is environmentally sustainable [20]. Given the purpose of the Fisheries Control Regulation, the Ombudsman agrees with the complainant that the Member States' reports on the implementation of the Fisheries Control Regulation constitute information on measures or activities designed to protect elements of the environment, such as marine areas and biological diversity [21]. This view is supported by the fact that, in the context of a previous Ombudsman inquiry concerning access to documents provided by Member States to the Commission in the framework of an investigation under the Fisheries Control Regulation, the Commission acknowledged that the requested documents contained environmental information [22].

21. In reply to a suggestion made by the Ombudsman in the context of another inquiry [23], the Commission stated that it was not legally obliged to publish the documents in question in that case proactively [24]. In its reply in that inquiry, the Commission also put forward the view that proactive publication of documents would generate a significant volume of work, which would be disproportionate to the interest of the general public in highly technical documents.

22. The Ombudsman is still not convinced by the Commission’s argument that it is not legally obliged to publish environmental information proactively [25]. It is clear that the General Court’s reasoning in the case referred to by the Commission was limited to documents falling within the scope of an exception to public access. In this case, the Commission has granted full public access to the Member States’ reports on the basis of access requests. This means that they can be fully disclosed without harming any of the interests protected under the EU rules on public access to documents. None of the exceptions to public access thus applies to the reports.

23. The Ombudsman acknowledges the Commission's argument about the work burden that a proactive publication of highly technical documents would entail. However, this argument
does not apply to documents to which public access is systematically requested and granted. The Ombudsman cannot see how proactive publication of this type of document would lead to a significant increase in the volume of work of the Commission. This is all the more so given that the reports in question are produced only every five years.

24. The Ombudsman acknowledges that it is not entirely clear whether the provision to make “environmental information progressively available” imposes a clear legal obligation on the Commission systematically to publish information proactively [26]. However, in order to give effect to the active dissemination of environmental information foreseen in the Aarhus Regulation and bearing in mind the principles of good administration, the Ombudsman will suggest that the Commission proactively publish the Member States’ reports on the implementation of the Fisheries Control Regulation.

Recommendation

On the basis of the inquiry into this complaint, the Ombudsman makes the following recommendation to the Commission:

The European Commission should disclose information on the existence of EU Pilot dialogues related to the Fisheries Control Regulation, that is, the identity of the Member States involved and the legal provisions that have allegedly been breached.

The Commission and the complainant will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 15 September 2019.

Suggestion for improvement

The Ombudsman suggests that the Commission proactively publish the Member State reports on the implementation of the Fisheries Control Regulation.

Emily O’Reilly European Ombudsman

Strasbourg, 19/06/2019


[2] Regulation 1224/2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, available here:

“Article 118. Reporting obligations.

1. Every five years, Member States shall transmit a report to the Commission on the application of this Regulation. “


[4] EU Pilot is an informal dialogue between the Commission and a Member State on issues related to potential non-compliance with EU law. The purpose of “EU Pilot” is to remedy breaches of EU law at an early stage, thereby avoiding the need to launch a formal infringement procedure.

[5] See Article 4 (2), third indent of Regulation (EC) No 1049/2001 : “The institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.”

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006R1367

[7] In accordance with article 4(1) of the Aarhus Regulation and articles 11(1), 11(2) and 12 of Regulation 1049/2001.

[8] See Decision of the European Ombudsman setting out suggestions following her strategic inquiry OI/5/2016/AB on timeliness and transparency in the European Commission’s handling of infringement complaints, available at:

Decision of the European Ombudsman in case 367/2017/CEC on the European Commission’s alleged wrongful refusal to grant public access to conformity checking studies in the field of EU environmental law
[9] The Ombudsman is making a suggestion for improvement on the second aspect of the case, based on the contacts we have had with the Commission in the context of 367/2017/CEC.


http://curia.europa.eu/juris/document/document.jsf;jsessionid=3C8F684DCC649096ACBAE0E6256EC4AD?text=&docid=190582&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3088738


[14] "Following registration, a complaint can be examined further in cooperation with the Member State concerned. The Commission will inform the complainant thereof in writing." See Point 7 in the Annex to the Communication from the Commission. EU law: Better results through better application. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN


[16] COM(2017) 192 final and SWD(2017) 134 final. Available at:


[17] Under articles 4(1) and 4(2) of the Aarhus Regulation


https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1380

[19] See footnote 6


[21] See article Article 2(1)(d) of the Aarhus Regulation:

“[..] environmental information’ means any information in written, visual, aural, electronic or any other material form on:
(i)

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;

(ii)

factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);

(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;

(iv) reports on the implementation of environmental legislation”.


[24] The Commission noted that the EU Courts have ruled that “the Aarhus Convention and [the Aarhus Regulation] provide for public access to environmental information either on request or as part of active dissemination by the authorities and institutions concerned. However, since authorities and institutions may refuse a request for access to information where that information falls within the scope of a number of exceptions, it necessarily follows that they are under no obligation to actively disseminate that information”. See Judgement of the General Court of 13 September 2013 in case T-111/11 Client Earth v European Commission, paragraph 28. Available at: http://curia.europa.eu/juris/liste.jsf?num=T-111/11&language=EN

[25] See point 47 of Ombudsman’s decision in case 367/2017/CEC (link in footnote 18)