

## **Decision 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**

Decision

**Case 452/2018/AMF - Opened on 05/04/2018 - Recommendation on 19/06/2019 - Decision on 16/12/2019 - Institution concerned** European Commission ( Maladministration found ) |

The case concerned 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 found that the Commission was wrong not to provide the complainant with the information it requested and made a recommendation in that regard. The Ombudsman also suggested that the Commission proactively publish Member State reports on the implementation of the Fisheries Control Regulation. The Commission accepted the Ombudsman's suggestion but rejected the Ombudsman's recommendation.

The Ombudsman therefore closed the inquiry with a finding of maladministration.

## **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 failed 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.

## The Ombudsman's recommendation on the refusal to disclose information about the existence of EU Pilots

8. The Ombudsman considered that the Commission’s refusal to make public **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 - constituted maladministration. She therefore made a recommendation [9] that **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.**

9. In its reply to the Ombudsman's recommendation, the Commission stated that the EU Courts have recognised that there is a general presumption of confidentiality of the documents exchanged between the Commission and Member States in the context of EU Pilot dialogues. This confidentiality is necessary to ensure the proper functioning of ongoing procedures and to ensure that their objectives are not compromised [10] . According to the Commission, such a general presumption allows the integrity of the procedure to be preserved by limiting the interference of third parties [11] .

10. The Commission considers that the identity of the Member States involved and the legal provisions that have allegedly been breached in an EU Pilot dialogue are part of the files covered by the general presumption of confidentiality. There is therefore a present and concrete risk of compromising the nature and objectives of an EU Pilot dialogue if that information were to be disclosed.

11. The Commission *"is not in favour of systematic publication of the list of ongoing dialogues, as such a publication could alter the informal nature of [EU Pilot] dialogue [s], making [them] less fruitful"*. The Commission considers this to be of particular importance in the area of the Common Fisheries Policy, given that the EU Pilot dialogues in this area concern a *"great number of exchanges of a highly technical nature"*. The information provided by Member States in this context is an essential tool for the Commission to assess the potential breach of EU law and it is a basis for discussions with the Member States concerned on ways to address problems. If the good cooperation with Member States is jeopardized, the procedures would be slowed down and the solutions would be delayed.

12. Given that some EU Pilot dialogues are only requests for clarifications, the Commission considers that it would be unfair to Member States to publish information about the existence of such procedures, as the public would think that there is a breach of EU law. According to the Commission, this negative public perception would be likely even with a disclaimer clarifying that the opening of an EU Pilot case does not create any presumption that there has been an infringement of EU law.

13. The Commission acknowledges that the information on the existence of EU Pilot dialogues and the identity of the Member State involved is information that is already provided to complainants who complain about a Member State breaching EU law [12] . The Commission is of the view, however, that the fact that a complainant can make this information public does not justify systematic publication. Being a complainant in a given case confers additional rights to that person and an additional right of access to information. The general public will not necessarily have the same right of access to information as the complainant in a given case.

14. The complainant argues that any general presumption of confidentiality should be interpreted strictly [13] . Therefore, in the present case, the general presumption of



confidentiality that applies to the *documents* exchanged between the Commission and the Member States should not extend to the *information on the mere existence* of EU Pilot dialogues. The complainant adds that, if the general presumption of confidentiality is applied to protect the integrity of the procedure, as the Commission argues, this would be inconsistent with the Commission's current practice of publishing information on ongoing infringement procedures.

**15.** The complainant is not convinced by the Commission's argument about the risk of interfering with the informal nature of EU Pilot dialogues. In the complainant's view, the general public is "*perfectly capable of understanding the need for dialogue between the Commission and the Member States on the application of EU law*". By publishing information on the existence of EU Pilot dialogues the Commission would rather reassure the public that it is carrying out its duty to ensure the correct application of EU law.

## The Ombudsman's assessment after the recommendation

**16.** The Ombudsman regrets that the Commission has not accepted her recommendation.

**17.** The EU Courts have recognised the existence of a general presumption of confidentiality **of the documents** exchanged between the Commission and Member States in the context of EU Pilot dialogues. However, the Ombudsman is not convinced by the Commission's argument that this general presumption of confidentiality extends to **information about the existence** of EU Pilot dialogues. The information that the complainant requested was limited to the list of ongoing EU Pilot dialogues related to the Fisheries Control Regulation, which Member States were involved in and the legal provisions that have allegedly been breached.

**18.** The Commission refers to a "*great number of exchanges of a highly technical nature*", adding that the information provided by Member States in this context is an essential tool for the Commission to assess the potential breach of EU law and is a basis for discussions with the Member States concerned on ways to address problems. The Ombudsman reiterates that the complainant has not sought access to "*exchanges of a highly technical nature*", but rather to very limited information about the Member States and provisions at issue in ongoing EU Pilot dialogues.

**19.** As already stated by the Ombudsman in the context of another inquiry [14], EU Pilot dialogues concern areas such as human rights, environment or the single market, areas which are of great interest to citizens and businesses. Therefore, it is necessary to balance the risk of harming the climate of mutual trust which makes pre-infringement tools effective, and the benefits of increasing public scrutiny on issues of potential major importance. In addition to allowing citizens to use their right of access to documents more effectively, information about the existence of EU Pilot dialogues would lead to increased public scrutiny, which could have a positive impact on the timely handling of cases. The Ombudsman therefore maintains her view that publishing limited information on the existence of EU Pilot dialogues, such as which Member States are involved and the legal provisions that have allegedly been breached,



without publishing any related document, would help enhance the transparency of the Commission's action without undermining any public interest. The climate of mutual trust between the Commission and the Member States does not seem to have been damaged by the fact that this information is already provided to those whose complaints lead to an EU Pilot dialogue. Even if complainants have a specific right to obtain certain information, the fact remains that the information is being released.

**20.** The Ombudsman therefore confirms the finding of maladministration and closes the case.

## The Ombudsman's suggestion for improvement on the refusal to disclose information about the existence of EU Pilots

**21.** 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 suggested that **the Commission proactively publish the Member State reports on the implementation of the Fisheries Control Regulation.**

## The Ombudsman's assessment after the suggestion for improvement

**22.** The Commission agreed to the Ombudsman's suggestion and stated that it will publish all future Member State reports on the implementation of the Fisheries Control Regulation [15] . Before publication, the Commission will ask the consent of the Member States to publish certain data contained in the reports [16] .

**23.** The Ombudsman welcomes the fact that the Commission has accepted her suggestion for improvement.

## Conclusion

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

**The Ombudsman welcomes the fact that the Commission has accepted her suggestion for improvement .**

**The Ombudsman maintains the finding of maladministration regarding the Commission's refusal to make public limited information relating to the existence of EU Pilot dialogues about potential breaches of the Fisheries Control Regulation.**

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



Emily O'Reilly

European Ombudsman Strasbourg, 16/12/2019

[1] Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. Available here:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R1049> [Link]

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

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:343:0001:0050:EN:PDF> [Link]

*"Article 118. Reporting obligations.*

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

[3] See [https://ec.europa.eu/fisheries/cfp\\_en](https://ec.europa.eu/fisheries/cfp_en) [Link]. The Common Fisheries Policy is a set of rules for managing European fishing fleets and for conserving fish stocks. It gives all European fishing fleets equal access to EU waters and fishing grounds and allows fishermen to compete fairly.

[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."*

[6] Within the meaning of Article 2(1)(d) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (the Aarhus Regulation). Available here:

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



[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: <https://www.ombudsman.europa.eu/en/decision/en/83646> [Link]

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 <https://www.ombudsman.europa.eu/en/decision/en/103197> [Link]

[9] The recommendation, with the Ombudsman's full assessment of the case, can be found here: <https://www.ombudsman.europa.eu/en/recommendation/en/115440> [Link]

[10] Judgement of the Court (fourth Chamber) of 11 May 2017, *Kingdom of Sweden v European Commission*, Case C-562/14 P, paragraphs 39 and 45 Available at: <http://curia.europa.eu/juris/liste.jsf?jsessionid=FB2029476BDB9FC491E548C9E04989A2?num=C-562/14&language> [Link]

[11] Judgement of the General Court of 4 October 2019, *Daimler AG v European Commission*, Case T-128/14, paragraph 139. Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=T-128/14> [Link]

[12] “ *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](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC0119(01)&from=EN) [Link]

[13] Judgement of the Court (Second Chamber) of 16 July 2015, case *Client Earth v Commission* C-612/13 P. Available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=DEA98F6EDA593BB356468C6D809F119E?text=&docid=61213> [Link]

[14] See point 36 of 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 (footnote 8).

[15] The next reports covering the period 2015-2019 are due in the first semester 2020 and will therefore be published shortly thereafter on the Commission website: [https://ec.europa.eu/fisheries/cfp/control\\_en](https://ec.europa.eu/fisheries/cfp/control_en) [Link]

[16] In accordance with the judgement of the General Court of 3 May 2018, *Republic of Malta v*



*European Commission*, Case T-653/16, paragraph 154. Available at:  
<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-653/16> [Link]