

## **Decision on the European Commission's refusal to give public access to documents concerning an audit of pelagic and tuna fisheries in Ireland (case 757/2022/MIG)**

Decision

**Case 757/2022/MIG - Opened on 06/05/2022 - Decision on 16/09/2022 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned the refusal of the European Commission to grant the complainant public access to documents concerning a Commission audit and an administrative inquiry by the Irish authorities, which prompted the Commission to revoke the Irish control plan for the weighing of fishery products. The Commission argued that the follow-up to the audit was still ongoing and that disclosing the documents would undermine the protection of the purpose of inspections, investigations and audits.

The Ombudsman verified that the Irish authorities have not yet implemented the recommendations made by the Commission and, thus, have not yet resolved the shortcomings it identified. This means that the follow-up to the audit is still ongoing. Given that the Commission might open infringement proceedings against Ireland if these shortcomings are not sufficiently addressed, the Ombudsman considered it reasonable for the Commission to rely on a general presumption of non-disclosure. The Ombudsman also found that the complainant's arguments were not such as to establish that there is an overriding public interest in disclosure.

In view of this, the Ombudsman concluded that the Commission's refusal to give public access to the documents at issue was justified and closed her inquiry finding no maladministration.

## **Background to the complaint**

1. The European Union (EU) has through its Common Fisheries Policy [1] put in place a set of rules for the sustainable management of European fishing fleets and conservation of fish stocks.

2. To ensure that these rules are applied correctly, the EU has established a fisheries control system. [2] This system includes the monitoring and registration of catches of fish that are extracted from the seas and oceans. To that end, the system provides, for example, for the



weighing of catches of fish *before* their transport from the port to a facility on land. By way of derogation, weighing *after* transport may be allowed, if the Member State concerned adopts a corresponding control plan that appropriately addresses the risk of mis-recording the weight of fish landed. That plan has to be approved by the European Commission.

3. Ireland established such a control plan that was approved by the Commission in 2012. [3] Under that plan, Ireland was allowed to authorise that fishery products be weighed after transport from the place of landing to an approved facility on land under certain conditions.

4. In March 2018, the Commission carried out an audit on the systems the Irish authorities had put in place to control the weighing of fish and catches of tuna. The audit identified several shortcomings and the Commission asked Ireland to conduct an administrative inquiry into the matter. The Irish authorities carried out an administrative inquiry and, in December 2019, submitted their final report to the Commission. Based on its assessment of the data provided, the Commission concluded that Ireland had not resolved the majority of shortcomings identified. As an immediate measure, the Commission revoked its approval of the Irish control plan in April 2021. [4]

5. In May 2021, the complainant, an organisation representing Irish fishermen, asked the Commission to grant public access [5] to documents concerning its audit and the administrative inquiry conducted by the Irish authorities. It said that, as parties adversely affected by the revocation of the Irish control plan, its members urgently needed to access the information contained in these documents to understand the basis of that decision and to be able to exercise their right of access to the court.

6. The Commission identified 21 documents and refused to give access, arguing that the documents are covered by a general presumption of non-accessibility based on the need to protect the purpose of inspections, investigations and audits [6] .

7. In July 2021, the complainant asked the Commission to review its decision to refuse access (by making a ‘confirmatory application’). It argued that the Commission should disclose the requested documents to ensure transparency and accountability in its decision-making.

8. In October 2021, the Commission issued a confirmatory decision, maintaining its refusal to grant public access.

9. Dissatisfied with the Commission’s final decision, the complainant turned to the Ombudsman in April 2022.

10. The complainant has also made similar requests, seeking access to the documents at issue, to two Irish authorities who refused their disclosure.

## The inquiry



11. The Ombudsman opened an inquiry into the Commission's refusal to grant public access to the documents requested by the complainant.

12. In the course of the inquiry, the Ombudsman inquiry team reviewed the 21 documents at issue as well as the complainant's exchanges with the Irish authorities as regards the access requests it made at national level. Furthermore, the inquiry team met with representatives of the Commission to obtain further information on how it had dealt with the complainant's access request and on the state of play of the follow-up to the Commission's audit and the administrative inquiry conducted by the Irish authorities. [7] The Ombudsman then shared a copy of the meeting report with the complainant, and, subsequently, received the complainant's comments on the report.

## Arguments presented

13. In its confirmatory decision, **the Commission** argued that it can be presumed that disclosure of the documents would undermine the purpose of its audit. Specifically, the follow-up to the audit was still ongoing. As such, disclosure of the documents would negatively affect the dialogue with the Irish authorities. It would reduce the willingness by the national authorities concerned to participate constructively in the ongoing investigations and alter the bilateral nature of the dialogue. Thereby, it would deprive the Irish authorities of their lawful expectation of sincere cooperation on the part of the Commission and expose the relevant Commission departments to the foreseeable risk of coming under outside pressure.

14. Given this general presumption of non-accessibility, the Commission also considered that it did not have to assess whether partial access could be granted.

15. Finally, the Commission said that the interests mentioned by the complainant are either private or too general in nature. The Commission thus concluded that there is no overriding public interest in disclosure.

16. **The complainant** argued that, since the Commission's audit report has been finalised and the decision revoking the Irish control plan has been taken, the goal of the Commission's audit has been achieved and there is no longer a need to protect the audit procedure. The complainant thus considered that the Commission should have at least granted access to parts of the documents, redacting those parts that are relevant to a decision that has yet to be taken.

17. The complainant also contended that the Commission's argument that it needs to preserve the relationship with the Member State concerned is inconsistent with the fact that it did not consult the Irish authorities before taking a decision on its access request.

18. Finally, the complainant reiterated that there is an overriding public interest in disclosure.

19. During the meeting with the Ombudsman inquiry team, **the Commission** clarified that it had not consulted the Irish authorities, because it considered that a general presumption of



non-disclosure applied to all documents at issue.

**20.** The Commission also said that the majority of the shortcomings identified by the audit had not yet been resolved and that follow-up action was still ongoing. For example, the Irish authorities still need to submit a revised control plan, which it expects to receive by the end of the year. Furthermore, the Commission explained that the follow-up action is interlinked with other ongoing matters, such as issues with past quota consumption.

**21.** The Commission stated that, in case the Irish authorities failed satisfactorily to implement the recommendations it had made and thus to address the shortcomings it identified in the context of the audit, it might become necessary to launch formal infringement proceedings against Ireland.

**22.** Lastly, the Commission said that the applicable rules on the EU's fisheries control system require confidentiality. [8]

## The Ombudsman's assessment

**23.** The EU courts have recognised that EU institutions may refuse requests for public access to documents based on a 'general presumption' of non-disclosure for certain categories of documents. [9] This means that the institution concerned does not have to examine the documents in question individually, that is, it does not have to assess how disclosure of the documents would specifically and individually undermine the protected interest. Rather, the institution may assume that, because the documents in question fall within a certain category, disclosure of any of them would undermine the protected interest.

**24.** One of these categories includes documents related to infringement proceedings at the 'pre-litigation stage'. [10]

**25.** The Commission is responsible for overseeing the effective application, implementation and enforcement of EU law by the Member States. [11] In the event that a Member State fails to fulfil an obligation under the EU Treaties, the Commission can take measures (infringement proceedings) to bring the 'infringement' to an end. To avoid formal infringement proceedings, where possible, the Commission has introduced the 'EU Pilot' procedure, a mechanism that allows for resolving problems arising in relation to non-compliance with EU law at an early stage (the pre-litigation stage).

**26.** The Court of Justice also found that if the Commission receives a request for public access to documents during its consultations with the Member State it can rely on a general presumption of non-disclosure even if it later on decides not to open infringement proceedings (for example, because the Member States sufficiently addresses relevant shortcomings during the pre-litigation stage). [12]

**27.** The Commission in this case argued that, should Ireland fail to address the shortcomings



identified in the audit it conducted, the need to open formal infringement proceedings may arise. The Commission also credibly explained that the Irish authorities are still in the process of implementing the recommendations it has made in this context, and that drawing up a revised control plan is only one aspect of this process. In addition, the Commission explained that the audit procedure is interlinked with other ongoing matters.

**28.** The Ombudsman thus notes that the follow-up to the Commission's audit is still ongoing and that no definitive decision on whether the Commission will open infringement proceedings against Ireland has yet been taken.

**29.** The Ombudsman also notes that the rules governing the control system for ensuring compliance with the rules of the Common Fisheries Policy require confidentiality on the part of the Commission.

**30.** The Ombudsman therefore finds that it was reasonable for the Commission to rely on a general presumption of non-disclosure, as releasing the documents at issue, at this stage, could undermine the efforts to complete the follow-up to the audit as well as possible infringement proceedings. While it is understandable that one could believe the investigation had ended to the extent that the Commission had adopted a decision revoking its approval of the Irish control plan (paragraph 4 above), the inquiry has shown that this matter cannot be isolated from the on-going follow-up. As the law currently stands, the Commission can therefore validly rely on a general presumption of non-disclosure.

**31.** Applicants for access to documents can seek to rebut the presumption of non-disclosure, for example, by establishing that there is an overriding public interest in disclosure. [13]

**32.** The complainant, an organisation representing Irish fishermen, said that its members are affected by the Commission's decision to revoke the Irish control plan. It argued that it needed the information in the audit report to understand the basis of that decision and to enable its members to exercise their right of access to the court. The complainant also contended that the Commission should disclose the requested documents to ensure transparency and accountability in its decision-making.

**33.** While the Ombudsman understands that the complainant would like to prepare any court action well, this constitutes according to case law clearly a private (rather than a public) interest. However, a private interest is not such as to set aside the public interest in protecting the Commission's investigation that may result in infringement proceedings. The EU courts have also clarified that general considerations regarding transparency are not sufficient to establish an overriding public interest. [14]

**34.** The Commission's refusal to give access to the documents at issue did not, in any case, prevent the complainant from taking court action. Information on the shortcomings identified by the Commission, which led to the revocation of the control plan, for example, that there have been irregularities concerning the weighing of landed fish, is already publicly available. [15]



35. In addition, the Ombudsman notes that the Irish authorities, in their correspondence with the complainant, argued that disclosure of the documents at issue might lead to exploitation of potential weaknesses of the Irish control system and that it might jeopardise their ongoing consultations with the Commission.

36. The Ombudsman also notes that, where a document originates from a third-party author (such as a Member State), EU institutions are not obliged to consult the author, if it is clear that the document cannot be disclosed. [16]

37. The Ombudsman therefore considers that the Commission was justified in refusing to give access to the documents at issue.

### **Conclusion**

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

**There was no maladministration by the European Commission in refusing public access to the requested documents.**

**However, the Ombudsman encourages the Commission to reconsider whether it can make the two reports public, once the follow-up to its audit has been finalised.**

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

Emily O'Reilly European Ombudsman

Strasbourg, 16/09/2022

[1] For more information, visit:

<https://www.europarl.europa.eu/factsheets/en/sheet/114/the-common-fisheries-policy-origins-and-development> [Link].

[2] Council Regulation 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy:

<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009R1224> [Link].

[3] See: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32012D0474> [Link].

[4] Commission Implementing Decision revoking the approval of the Irish control plan submitted for the weighing of fishery products in accordance with Article 61(1) of Council Regulation (EC) No 1224/2009 (C(2021) 2423):

<https://www.sfpa.ie/LinkClick.aspx?fileticket=izZtPGYimLE%3D&portalid=0&resourceView=1> [Link]; For more information, visit:



<https://www.sfpa.ie/LinkClick.aspx?fileticket=VkjVEF46H4w%3D&portalid=0&resourceView=1>  
[Link].

[5] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission

documents:

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

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

[7] The meeting report is available at:

<https://www.ombudsman.europa.eu/doc/inspection-report/159757> [Link].

[8] Article 101 of Council Regulation 1224/2009 (cited above).

[9] See, for example, judgment of the Court of 14 November 2013, *LPN and Finland v Commission*, cases C-514/11 P and C-605/11 P, paragraphs 55, 65-68:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CJ0514&qid=1661257928667>  
[Link].

[10] Ibid, paragraph 65.

[11] Article 17(1) of the Treaty on European Union and Article 258 of the Treaty on the Functioning of the European Union.

[12] Judgment of 11 May 2017, *Sweden and Spirlea v Commission*, C-562/14 P., paragraph 45:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0562&qid=1661257976036>  
[Link].

[13] *LPN and Finland v Commission*, cited above, paragraph 66.

[14] Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, paragraphs 128 - 131:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0127&qid=1661328163711>  
[Link].

[15] See, for example, Commission Implementing Decision, cited above, paragraphs 2 to 4:

*“(2) In 2018, the Commission carried out an audit in Ireland aimed at monitoring the implementation of the control plan. The findings of that audit identified irregularities, subsequently confirmed also by the administrative inquiry conducted by the Irish competent authority, which revealed that Ireland has failed to ensure effective implementation of the*



*control plan in accordance with the obligations arising from the Regulation (EC) No 1224/2009.*

*(3) In particular, the operators did not have in place a “weighing system fit for purpose”, as provided for under point 5 of the control plan and the audit identified manipulation of weighing systems. Moreover, although aware of those shortcomings, Ireland did not take appropriate measures to address such noncompliance, in particular by withdrawing the permission to weigh after transport as foreseen in point 8 of the control plan. Consequently, the control plan does not minimise the risk of systematic manipulation of weighing pelagic catches in Ireland and the under-declaration of catches by operators.*

*(4) Therefore, Ireland could not guarantee an effective control of landed quantities of catches and minimise the risk of noncompliance with the rules of the common fisheries policy. The failure to ensure appropriate weighing also puts at risk the accuracy of the data reported that are essential for control purposes and monitoring of the uptake of fishing quotas.”*

[16] Article 4(4) of Regulation 1049/2001.