

Draft recommendation of the European Ombudsman in his inquiry into complaint 865/2008/OV against the European Commission

Recommendation

Case 865/2008/OV - Opened on 09/04/2008 - Recommendation on 16/02/2009 - Decision on 15/01/2010

(Made in accordance with Article 3(6) of the Statute of the European Ombudsman [1])

THE BACKGROUND TO THE COMPLAINT

1. The present complaint was submitted by the Clyde Fishermen's Association (CFA), based in Scotland. The CFA has 68 members, all of which own fishing vessels and the majority of which are based in south-west Scotland.
2. In December 2002, the Council adopted, as part of the EU's annual fishing plan for 2003, a sub-plan whose objective was to restore healthy and sustainable stocks of cod in areas including the West of Scotland and the North Sea. This sub-plan was entitled the Cod Recovery Plan (CRP) and aimed to reduce the number of allocated fishing days for certain groups of vessels. The limitations of fishing activity are reviewed each year by the Council, on the basis of a proposal submitted by the Commission. Fishing areas in the West of Scotland have been covered by such limitations since 2003.
3. The category to which the present complaint relates concerns fishing vessels which use a type of fishing gear called a demersal trawl. The operative mesh size of the net used for such a trawl is between 70 and 90 mm. According to the fishing track records reported during 2002, such vessels had a catch in which cod, plaice and sole represented less than 5 % of the total landed. In official documents, this category of vessels is referred to as '4.a.ii/8.1.d'.
4. For the year 2006, table I ('Maximum days a vessel may be present in 2006 within an area by fishing gear') of Annex IIA to Council Regulation 51/2006 [2] allocated 280 fishing days to this category of vessels operating in either the West of Scotland or the North Sea. In the relevant table, the West of Scotland allocation is found in column 2.d, whereas the equivalent North Sea allocation is found in column 2.b-2. For the year 2007, Annex IIA to Council Regulation 41/2007 [3] reduced the fishing days for this category of vessels to 252 (10 % less than in 2006) as



regards the West of Scotland. In contrast, the number of fishing days for the North Sea remained at 280 days.

5. The Commission had originally suggested a 25 % cut in fishing days. This proposal was based on an evaluation of the number of cod catches reported by each Member State. The said evaluation was carried out by the Scientific, Technical and Economic Committee for Fisheries (STECF).

6. On 23 November 2006, during a meeting of the Council Working Group dedicated to fisheries, the Commission informed the Member States about the draft proposal which it would submit to the Council for adoption at its meeting in December. The Commission listed the categories of fishing gear which would be affected, including category 4.a.ii/8.1.d.

7. On 30 November 2006, at a further meeting of the Council Working Group dedicated to fisheries, the Commission submitted *Non-Paper No 3*, a discussion document which was considered to be a starting point for further negotiations with the Member States. The purpose of the calculations set out in the Non-Paper was to identify the fishing gear which accounted for the highest proportions of cod caught annually. The examination was divided into two parts. The first identified those devices which caught more than a specific tonnage of cod (for instance, more than 500 tonnes for the North Sea). The second related to the North Sea and Skagerrak only, and examined the number of cod individuals caught. The Non-Paper included a table which did not specify the maximum number of fishing days, but did indicate the categories which would be affected by the reduction in the number of fishing days. The corresponding boxes were highlighted grey in the table.

8. As regards the 4.a.ii/8.1.d category of vessels, and in agreement with the Commission, Council document 16991/06 was submitted to the Member States for discussion relating to a *first compromise*. This envisaged limiting the fishing activity in the West of Scotland to 210 fishing days, that is to say, 25 % less than in 2006. In this document, the number of 210 fishing days figured in the box which was highlighted grey in the table appearing on page 12 of the Commission's Non-Paper No 3, and corresponding to the West of Scotland. For the box corresponding to the North Sea, which was not highlighted grey in the same table, document 16991/06 proposed no reduction in the number of fishing days as compared to the number in 2006, which was 280. As regards several other categories of vessels, other boxes in Council document 16991/06, corresponding to the boxes highlighted in grey in the Commission's Non-Paper No 3, also envisaged reductions, albeit at different rates, for one or more geographical areas. Within the framework of a *second compromise*, the Commission agreed to limit the proposed reduction of fishing days for vessels corresponding to the 4.a.ii/8.1.d category in the West of Scotland to 12 %, namely, to 246 fishing days.

9. Finally, within the framework of a *third compromise*, the Commission agreed to apply a reduction rate of only 10 % to devices falling within the 4.a.ii/8.1.d category. Consequently, it was envisaged in Council document 17046/06 to limit the fishing activity of vessels falling within this category to 252 fishing days. This figure is reflected in table 1 of Annex IIA to Regulation 41/2007, which was adopted by the Council on 21 December 2006. In January 2007, the



Scottish Administration informed the complainant of the Council meeting's outcome. However, no explanations were given regarding the reduction in fishing days for category 4.a.ii/8.1.d.

10. The complainant, which was unhappy about this change, wrote to the Scottish Administration in January 2007. The latter replied by providing the complainant with a copy of the Commission's Non-Paper No 3. As regards the calculation contained in that document, the Scottish Administration expressed the view that an error had been made. More particularly, it pointed out that the figures for the 4.a.ii/8.1.d category of vessels in columns 2.b (namely 280 fishing days) and 2.d (252 fishing days) of Table I of Annex IIA to Regulation 41/2007 should have been interchanged and that this error was not noticed during the final negotiations at the relevant Council meeting in December 2006. The Scottish Administration further pointed out that the same error occurred in relation to the 4.a.v/8.1.d category of vessels, where the information in the two columns was also interchanged. As the error was administrative rather than political, the Administration considered that it should be corrected by administrative action rather than by political intervention.

11. Throughout 2007, discussions continued with the Commission on this issue. However, the Commission's services refused to accept that an error had been made. In November 2007, the complainant wrote to UK Ministers, to Commissioner Borg (Fisheries and Maritime Affairs) and to the Commission's Director-General for Fisheries and Maritime Affairs, seeking their assistance to have the alleged injustice rectified.

12. In their replies to the complainant of 10 and 21 January 2008, the Commissioner and the Director-General pointed out that the 4.a.ii/8.1.d category of vessels had contributed substantially to the catch of juvenile cod in the West of Scotland and therefore constituted a candidate for reductions in the fishing activity. According to them, this had been discussed and approved by the Member States during the Council meeting of December 2006. The Commissioner also pointed out that the figures had been checked again and that it appeared that no mistake had been made.

THE SUBJECT MATTER OF THE INQUIRY

13. According to the complainant, the Commission based its reply on the conclusions contained in its Non-Paper No 3 to demonstrate that the reduction of fishing days for the 4.a.ii/8.1.d category of vessels in the West of Scotland was correct. However, these conclusions did not relate to the West of Scotland but to the North Sea. The complainant referred to messages sent by the Commission to the UK Permanent Representation, which were forwarded to the Scottish Administration. With regard to the criterion relating to the number of cod individuals caught (based on mortality of young fish), the complainant submitted that it was not applied to the West of Scotland, but rather to the North Sea/Skagerrak.

14. On 25 March 2008, the complainant turned to the Ombudsman. The complainant's allegation and claim were as follows:

- The complainant alleged - and claimed that the Commission should accept - that it made an



administrative error, that is, used the wrong figures in two columns, when recommending to the Council to reduce for the year 2007 the number of fishing days for vessels of category "4.a.ii/8.1.d" from 280 to 252 for the West of Scotland.

- The complainant claimed that the Commission should take appropriate steps to rectify the error it had made.

THE INQUIRY

15. The complaint was forwarded to the Commission for an opinion. The Commission sent its opinion on 27 June 2008. The opinion was forwarded to the complainant, which sent its observations on 18 August 2008.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

16. In his letter to the Commission of 9 April 2008 opening the inquiry, the Ombudsman pointed out that the present complaint concerned an alleged administrative error in relation to a proposal, made by the Commission and forming the basis of a regulation subsequently adopted by the Council. According to Article 195 of the EC Treaty, the Ombudsman can only investigate instances of maladministration. He is therefore not entitled to examine the merits of Community legislation. However, the complainant argued that the present case concerned an *administrative* error in the Commission's proposal. The Ombudsman therefore considered that, at first sight, it would be possible to distinguish between the Regulation as such and the production of certain data which were ultimately included in the Regulation. In these circumstances, the Ombudsman considered it appropriate to open an inquiry in order to clarify the issue. In his letters to the Commission and the complainant, the Ombudsman indicated that he would therefore not make his final decision on whether the present complaint fell within his mandate until he had received the Commission's opinion.

17. In its opinion, the Commission did not comment on the above or question the admissibility of the complaint [4]. In these circumstances, the Ombudsman takes the view that the present complaint does in fact fall within his mandate.

A. Allegation of an administrative error and corresponding claim

Arguments presented to the Ombudsman

18. The complainant alleged that the Commission made an administrative error, that is, used wrong figures in two columns, when recommending to the Council to reduce for the year 2007



the number of fishing days for vessels of category 4.a.ii/8.1.d from 280 to 252 for the West of Scotland. It claimed that the Commission should take appropriate steps to rectify the error it made.

19. In its opinion, the Commission stated that during the Annex II revision process, the evolution in the number of fishing days for vessels falling under the 4.a.ii/8.1.d category was based on criteria supported by scientific and technical evidence. According to the data provided by the Member States and analysed by the STECF, the vessels belonging to the 4.a.ii/8.1.d category caught more than 50 tonnes of cod in the West of Scotland. Of these cod, more than 10 000 individuals were aged one [5] and more than 4 000 individuals were aged two during 2005, the year of reference. During the same year, cod aged one and two represented more than 95 % of all those cod individuals caught in the West of Scotland by 4.a.ii/8.1.d. vessels. Both prior to the Council Working Group meetings and during discussions held in the Council Working Group, in the COREPER and in the Council plenary, all elements were submitted to the Member States at different stages of the negotiation. The reduction in the number of fishing days for vessels belonging to the 4.a.ii/8.1.d category in the West of Scotland were made pursuant to reduction rates agreed during those stages in the negotiation. At the end of the process, the third compromise was adopted by the Member States.

20. The Commission concluded that the decision adopted by the Council in December 2006 was the result of an in-depth discussion between the Member States and the Commission, backed by the latest available scientific and technical evidence. It therefore disagreed with the complainant's allegation that an administrative error had occurred either in relation to the Commission's proposal or during the adoption process. The Commission therefore requested the Ombudsman to close the case.

21. In its observations, the complainant accepted that the table in Non-Paper No 3 contained the relevant box highlighted grey. The complainant also accepted that the first, second and third compromises proposed reductions in the relevant category. It stressed, however, that the table and the compromises had only been made available to it at that point in time. Neither they, nor Non-Paper No 3, were made available to it prior to the adoption of Regulation 41/2007.

22. In the complainant's view, the Commission could not disregard what was contained in its own Non-Paper No 3. The Commission had provided no explanations as to why there was no reference in the text of the Non-Paper to category 4.a.ii/8.1.d concerning the West of Scotland. The complainant queried whether the Commission might have confused, as regards the West of Scotland, category 4.a.ii/8.1.d with 4.a. iv /8.1.d, which was identified on page three of the said Non-Paper. An exercise relating to cod individuals caught was indeed referred to there, but this was in relation to the North Sea. In this exercise, category 4.a.ii/8.1.d was identified as catching more than 400 000 cod individuals in the North Sea. The Non-Paper therefore suggested that a reduction in the number of fishing days should be made in relation to the North Sea for vessels falling under the 4.a.ii/8.1.d category. Notwithstanding this recommendation, the box corresponding to the said category was not highlighted grey in the table on page 12 of Non-Paper No 3, nor was such a reduction envisaged in the compromises discussed during the Council meetings. With respect to the North Sea, Regulation 41/2007 provided for no reduction



for 2007 in the number of fishing days that category 4.a.ii/8.1.d enjoyed, as compared to 2006.

23. The complainant submitted that the Commission made it clear that the case for reductions was made in the text of Non-Paper No 3. It added, however, that no reference to category 4.a.ii/8.1.d could be found in this text in relation to the West of Scotland. If, as the Commission argued, the data relating to cod fishing in the West of Scotland were provided by the Member States and analysed by the STECF and if, as a result, a proposal for a reduction in the number of fishing days were needed, this proposal should have been made in Non-Paper No 3. The complainant underlined that the Commission had not explained why no such proposal was made in the Non-Paper as regards the West of Scotland. In contrast, the Non-Paper contained a clear reference to the relevant category in relation to the North Sea, with an equally clear recommendation for reduction. This was, however, subsequently not adopted.

24. The complainant submitted that the fact that the Member States in general, and the United Kingdom in particular, failed to notice that an error had been made, did not excuse the Commission's administrative error. It agreed with the Commission that reductions proposed needed to be based on scientific evidence. The complainant added that if any further evidence were required for its allegation that an administrative error had occurred, as a result of confusion between categories and between areas, it was provided by the fact that the same error was repeated in respect of category 4.a.v/8.1.d. The complainant concluded by inviting the Ombudsman to require the Commission to take steps to reverse the effect of the error.

The Ombudsman's assessment

25. The Ombudsman notes that the 252 fishing days allocated to vessels falling under the 4.a.ii/8.1.d category for the West of Scotland in Annex IIA of Regulation 41/2007 (compared to 280 days for 2006) was the result of a Commission proposal which was subsequently adopted by the Council. The relevant Commission document in this respect is the Commission's *Non-Paper No 3 of 30 November 2006*, which was discussed at the Working Group of the Council on the same day and which formed the basis for further discussions between the Member States.

26. The Non-Paper lists the main changes suggested by the Commission as regards Annexes IIA, IIB, IIC of Regulation 51/2006. The parts that are relevant for the present inquiry are pages 2 to 4 of the Non-Paper, as well as page 12, which contains the draft table with the planned maximum fishing days in 2007 for the different categories of vessels in the following four geographical areas, (1) Kattegat, (2) the North Sea, subdivided in three sub-columns (including Skagerrak), (3) the Irish Sea, and (4) the West of Scotland. The table in the Non-Paper did not yet contain the exact figures for the maximum fishing days, since the reduction rate was still the subject of inter-departmental consultation. However, the boxes concerning those categories and areas for which a reduction in the number of fishing days was proposed by the Commission were highlighted grey. As regards the 4.a.ii/8.1.d category, the box corresponding to the West of Scotland was grey, meaning that a reduction was proposed from the 280 days at sea set for 2006.



27. According to the Non-Paper, the reduction in fishing days that emerged from the interpretation of the CRP could be made more efficient if it were applied only to the fleets accounting for the majority of fish mortality. On this basis, the fleets accounting for cod catches (in tonnes) beyond a given threshold were selected. The thresholds themselves depended on the total amount of cod caught in the four areas concerned. On the basis of the data gathered by the STEC, four geographical tables were established corresponding to the four geographical areas and listing the categories of vessels which surpassed the thresholds in tonnes (pages 2 to 3 of the Non-Paper). As regards the West of Scotland (for which the fixed threshold was 50 tonnes of cod), the 4.a.ii/8.1.d category of vessels was not listed in this table. This meant that it was not among the categories of vessels catching more than 50 tonnes of cod and would thus not come into consideration for a possible reduction in fishing days.

28. The four geographical tables in the Non-Paper were followed by a fifth table (on page 4). This table only concerned the North Sea and Skagerrak, for which a second exercise was carried out to select fishing devices catching more than 400 000 cod individuals. Such an approach also made it possible to include also a criterion based on the mortality of young fish. In this table, the 4.a.ii/8.1.d and the 4.a.v/8.1.d categories of vessels were highlighted in bold, meaning that a reduction in numbers of fishing days was to be proposed for them. The Non-Paper concluded as follows:

" It was therefore suggested that the above-mentioned gears should account for the reduction advocated by the [Commission's] services, while the other gears would remain at the same level as in 2006. The corresponding net figures for days at sea are not yet shown in table 1 of the next chapter, since the reduction rate is still subject to inter-departmental consultation ".

29. On the basis of the above, it thus appears that the reduction in the number of fishing days for the 4.a.ii/8.1.d category of vessels suggested by the Commission concerned only the North Sea and Skagerrak. However, in the table with the planned maximum number of fishing days appearing on page 12 of the Non-Paper, the box highlighted grey was the one corresponding to the column marked (d) for the West of Scotland and not to the column marked (b) for the North Sea and Skagerrak. It therefore appears that, as regards the 4.a.ii/8.1.d category of vessels, the table on page 12 of the Non-Paper wrongly reflected the Commission's conclusions on pages 3 and 4 of the Non-Paper. The Ombudsman therefore concludes that an administrative error did in fact occur. Besides, the same error appears to have occurred as regards the 4.a.v/8.1.d category of vessels. Although the table on page 4 of the Non-Paper also identifies this category of vessels in the North Sea and Skagerrak as potentially affected by the reduction, the table on page 12 does not highlight it in grey but rather indicates that the vessels of this category in the West Scotland could be potentially affected by the reduction. This is the reason why the complainant considers that the two columns for the West of Scotland and the North Sea and Skagerrak seem to have been interchanged.

30. In its opinion, the Commission stated that it suggested a 25 % decrease in the number of fishing days for the 4.a.ii/8.1.d category of vessels and subsequently agreed to decrease the proposed reduction to 12 % and later to 10 %. However, the Commission, in its opinion, did not comment on the possible inversion of the two columns. It merely stated that its proposal for the



reduction of fishing days for vessels belonging to the 4.a.ii/8.1.d category in the West of Scotland was based on criteria supported by scientific and technical evidence pertaining to data provided by the Member States and analysed by the STECF. It did not address the question as to why this was not mentioned in its Non-Paper No 3. The Commission also did not provide any explanation as to why the North Sea fleet of this category of vessels, which it had identified in the table on page 3 of the Non-Paper, was not, during the negotiations and in the final Regulation, indicated as potentially affected by a reduction in the table on page 12.

31. It further appears from Council documents 16991/06 and 17046/06, which served as a basis for the various negotiations within the Council, that in relation to other categories of vessels for which boxes were also highlighted grey in the Commission's Non-Paper No 3, subsequent reductions were also applied, albeit at rates that differed from those which were applied to the 4.a.ii/8.1.d category of vessels. It appears that the reduction in the number of fishing days for the 4.a.ii/8.1.d category of vessels contained in Council documents Nos 16991/06 and 17046/06 and in the table in Annex IIA to Council Regulation 41/2007 simply reflected the proposals put forward by the Commission at the relevant stages of the procedure, within the framework of the three compromises.

32. On the basis of the above, it appears that the Commission's error in the table of its Non-Paper No 3 was repeated in the Council documents. Although the Commission argued that the final decision adopted by the Council was the result of an in-depth discussion among the Member States, there is nothing to suggest that this discussion concerned the basis of the whole proposal, that is, the question as to which areas should be covered by the proposed reduction in fishing days for vessels of this category. If the Council had considered this issue, it would be most difficult to explain how the Commission's mistake could have been overlooked. As a matter of fact, this mistake was quite obvious. This is evidenced by the stark contradiction between the indications on pages 3 and 4 of the Commission's Non-Paper No 3 proposing the coverage of the 4.a.ii/8.1.d category of vessels in the North Sea and not in the West of Scotland and the table on page 12 of the Non-Paper (and the subsequent Council documents reflecting these indications), where the areas concerned were exactly the opposite, namely, for the West of Scotland and not for the North Sea.

B. Conclusion

The Ombudsman notes that, at the time when the complainant submitted the present complaint, the year 2007, which forms the subject of the contested reduction in fishing days, had already elapsed.

It is thus not clear whether it is still possible for the Commission to rectify its error, as the complainant claims it should do. The Commission has not addressed this issue. However, it cannot be excluded that such a possibility still exists, particularly if one considers that the mistake that occurred might have knock-on effects in years to come.

The Ombudsman therefore makes the following draft recommendation to the Commission:



The Commission should acknowledge that it committed an administrative error by suggesting, in the box included on page 12 of its Non-Paper No 3, that the number of fishing days for vessels falling under category 4.a.ii/8.1.d should be reduced as regards the West of Scotland, even though the substantive considerations set out in this Non-Paper show that the Commission did not consider that such a reduction was necessary.

The Commission should, as far as is still possible, take the appropriate measures to rectify the said error.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 30 April 2009. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 16 February 2009

[1] 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.

[2] Council Regulation (EC) No 51/2006 of 22 December 2005 fixing for 2006 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, OJ 2006 L 16, p. 1.

[3] Council Regulation (EC) No 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, OJ 2007 L 15, p. 1.

[4] The Ombudsman would like to point out that, in a similar case (1102/2008/(SL)OV), which also concerned an alleged administrative error regarding a Commission Regulation, the Commission informed the Ombudsman that it had taken measures to correct the error.

[5] The references aged 1 and aged 2 relate to the mortality of young fish.