

Decision of the European Ombudsman closing his inquiry into complaint 2187/2012/ANA against the European Commission

Decision

Case 2187/2012/ANA - **Opened on** 22/11/2012 - **Decision on** 12/09/2013 - **Institution concerned** European Commission (Settled by the institution) |

The background to the complaint

1. The present complaint is about public access to documents under Regulation 1049/2001 [1] .
2. On 12 September 2012, the complainant made a request for access under Regulation 1049/2001 to the European Commission's Directorate-General Maritime Affairs and Fisheries (hereinafter, 'DG MARE') for access to a 'Non-paper to the Committee for Fisheries and Aquaculture: Development of a TAC ('Total Allowable Catch') for sea bass' (hereinafter, the 'non-paper') of May 2012. The complainant also asked for access to all documentation relevant to the preparation of the document concerned and to any documents that the Commission subsequently received concerning the non-paper.
3. By e-mail of 19 October 2012, the Commission explained to the complainant that the non-paper was prepared using information from the International Council for the Exploration of the Sea ('ICES') stock assessments in 2004 and 2011. The Commission pointed out that the latest catch figures were taken from the draft 2013 advice and that these figures are publicly available on the ICES website [2] .
4. The Commission identified nine documents that it had received concerning the non-paper. These documents contained data and advice on sea bass and responses to the non-paper from Member States. The Commission granted access to these documents to the complainant.
5. Moreover, the Commission informed the complainant that it had at its disposal the draft minutes of the meeting of the Expert Group on Fisheries Control but was unable to grant access to them. This was because the internal Commission procedures for the adoption of the minutes had not yet been finalised and the draft minutes, therefore, fell within the exception of Article 4(3) of Regulation 1049/2001. The Commission stated that it would reassess its position when the adoption of the minutes was finalised.



6. By e-mail of 22 October 2012, the complainant thanked the Commission for the documents it had provided him with. However, he pointed out that the ICES advice recommends sea bass conservation measures other than a TAC and quotas. The complainant observed that, in March 2012, the WGNEW [3] had also made recommendations along these lines. However, two months later, the Commission's non-paper set out the basis of a TAC and quota regime. The complainant explained that his request of 12 September 2012 sought an explanation for this change of policy. The complainant emphasised that he was aware of the contents of the documents the Commission referred to but that the explanation he sought could not be found there. In view of this, the complainant stated that "[y] *our response is inadequate and I would again request you to supply what I sought according to the terms of Regulation (EC) No 1049/2001*".

7. On 26 October 2012, the Commission informed the complainant that, as regards the document he requested, namely, the minutes of the meeting of the Expert Group on Fisheries Control, its adoption was imminent and the Commission expected soon to be in a position to disclose it. The Commission reiterated that Regulation 1049/2001 explicitly foresees that documents cannot be disclosed whilst internal decision-making is ongoing. It reassured the complainant that his request would be given the utmost attention.

8. By e-mail of the same day, the complainant expressed his dissatisfaction with the Commission's reply. He explained that he did not ask for anything concerning a pending decision. He simply asked for background information on a document that had been in the public domain since May 2012.

9. By e-mail of 30 October 2012, the complainant clarified to the Commission that he asked for the disclosure of documents associated with the preparation of the non-paper on the development of a TAC for sea bass. These should precede the publication of the non-paper. He further stated that, at this stage, he was not interested in any subsequent documents. He requested the Commission to re-examine his request.

10. On 31 October 2012, the complainant lodged the present complaint with the European Ombudsman.

The subject matter of the inquiry

11. The Ombudsman opened an inquiry into the following allegation and claim made by the complainant.

Allegation:

In handling the complainant's request for access to the background documents relevant to the preparation of the non-paper on the development of a TAC for sea bass, the Commission failed



to comply with its transparency obligations under Regulation 1049/2001.

Claim:

The Commission should grant access to the background documents relevant to the preparation of the non-paper on the development of a TAC for sea bass.

The inquiry

12. On 22 November 2012, the Ombudsman asked the Commission to submit an opinion on the complainant's allegation and claim.

13. By e-mail dated 28 November 2012, the Commission informed the complainant that the internal procedures for the adoption of the minutes of the meetings of the Expert Group on Fisheries Control had now been finalised and that it was in a position to release the requested documents. The Commission attached a copy of the Minutes of the Meetings of 27 June 2012 and 27 September 2012 on the development of a TAC for sea bass.

14. By e-mail of the same day, the complainant informed the Commission and the Ombudsman that the disclosed documents were not the documents he had asked for, given that they post-dated the adoption of the non-paper. The complainant clarified that, as outlined in his earlier correspondence, his request was for public access to documents which pre-date the non-paper and, hence, could be taken into account in its preparation.

15. On 14 March 2013, the Commission sent its opinion, which was forwarded to the complainant for observations. On 22 March 2013, the complainant submitted his observations.

16. On 8 August 2013, the Ombudsman's services contacted the complainant, in order to discuss the possibility of seeking a friendly solution with the Commission. The Ombudsman's services outlined the contents of the draft proposal for a friendly solution that the Ombudsman was considering as follows: "*taking into account the Ombudsman's findings, the Commission could consider: (i) identifying the documents it took into account in the preparation of the non-paper to the Committee for Fisheries and Aquaculture which dealt with the development of a TAC for sea bass; (ii) re-examining the complainant's request for access to these documents without delay; and (iii) granting the complainant access to them*". The complainant indicated that he would be ready to accept such a friendly solution.

17. On 12 August 2013, the Commission informed the Ombudsman that it had sent a further reply to the complainant, with which it had enclosed additional documents. On 14 August 2013, the complainant sent observations on the Commission's further reply, putting the Ombudsman in copy. On 22 August 2013, the Commission replied to the complainant's further observations. On 30 August 2013, the complainant sent his final observations on the Commission's reply and put the Ombudsman in copy.



The Ombudsman's analysis and conclusions

A. Allegation that the Commission failed to comply with its transparency obligations under Regulation 1049/2001 and the claim that it should grant access to the requested documents

Arguments presented to the Ombudsman

18. In his complaint, the complainant clarified that he asked for the disclosure of documents associated with the preparation of the non-paper on the development of a TAC for sea bass. These documents should therefore precede the publication of the non-paper.

19. In its opinion, the Commission argued that, in addressing the complainant's request of 12 September 2012, it had fully complied with its transparency obligations under the relevant provisions of Regulation 1049/2001. The Commission argued that it made available to the complainant all existing documents related to his request.

20. The Commission observed that, subsequently, in an e-mail dated 10 December 2012, the complainant further clarified the precise focus of his interest. It added that it would assess this request on the basis of the available pertinent elements and inform the complainant accordingly.

21. In his observations, the complainant confirmed his view that his request had not been adequately dealt with, because the documents associated with the preparation of the non-paper were still missing.

22. In this regard, the complainant argued that crucial documents that were needed to understand the non-paper were still missing. Specifically, based on a number of working and study group reports on sea bass in the last decade, the ICES advice and the WGNEW report, all of which emphasised different conservation measures, the complainant argued that the fact that the non-paper favoured a TAC for sea bass was not a logical or natural continuation of policy to date. Furthermore, reservations about the introduction of a TAC for sea bass had been expressed by the Member States both in their written responses and at the meetings of the Expert Group on Fisheries Control. Thus, in the complainant's view, the Commission appeared to promote a management mechanism which ran counter to the tide of scientific opinion but was not prepared to reveal the reasoning behind its stance. The complainant argued that clarity and transparency must always be paramount and that the Commission should explain the process that led to the adoption of the non-paper, which had brought uncertainty into the future management of fishery of sea bass.

23. In its further reply of 8 August 2013, the Commission explained that there was an



established practice of 'frontloading' each year, that is to say, informing Member States of the possible contours of the Commission's annual proposal on fishing opportunities with a view to obtaining their opinions. Once the subject matter for 'frontloading' is identified, having due regard to the scientific advice, the Commission's services need to prepare a non-paper. The contents of the non-paper are essentially factual: they relate to the state of the stock and the data available on the fishery (notably catches/landings by flag on record). The Commission argued that there was therefore no document giving specific instructions to draft a non-paper on sea bass. That non-paper was prepared in accordance with standard practice and in a manner that in no way pre-judged the Commission's ultimate decision on what to propose to the Council. The Commission enclosed additional documents relating to the procedure that was followed in the 'frontloading' exercise leading to the proposal for a TAC for sea bass in 2012.

24. In his further observations of 14 August 2013, the complainant argued that it remained unclear who made the proposal for a TAC for sea bass and on what basis, taking into account that the scientific advice to which the Commission referred to favoured measures other than a TAC for sea bass.

25. In its final reply, the Commission explained that, for the purposes of the 'frontloading' exercise, the only question to be addressed was whether, in light of the most up-to-date advice, there were any stocks not subject to a TAC. Having regard to the significant improvement in the numbers of stocks that the ICES was able to report in late 2011, the Commission considered that, indeed, sea bass could be a candidate for a TAC. The Commission clarified that the 'frontloading' exercise that was triggered as a result does not concern its duty to examine other measures needed to provide an appropriate response to the management needs of a fish stock, such as technical measures, spatial planning, fleet management, etc. Such considerations are not taken up in the 'frontloading' exercise because, in accordance with Article 43(3) TFEU, any potential measures other than TACs are excluded from the scope of the annual fishing opportunities regulation and must be adopted on the basis of other instruments subject to a different procedure (Article 43(2) TFEU). The Commission added that, while the ICES did not specifically recommend a TAC for sea bass, it did however make the recommendation to the effect that "*catches should not be allowed to increase in 2012*", which fully justified the option of a TAC within the scope of the Commission's tasks in respect of the annual fisheries management cycle.

26. In his final observations, the complainant stressed that, in its final reply, the Commission gave him precisely the information he had been seeking. He thanked the Ombudsman for his efforts in reaching a satisfactory conclusion in the matter.

The Ombudsman's assessment

27. As a preliminary remark, the Ombudsman considers it appropriate to note that his inquiry into the present complaint concerns the Commission's handling of the complainant's request for access to the background documents relevant to the preparation of the non-paper on the development of a TAC for sea bass in light of Regulation 1049/2001. The Commission granted



the complainant access to a number of documents. It is useful to recall in this respect that requests for access pursuant to Regulation 1049/2001 concern existing documents. However, uncertainty emerged in the course of the inquiry as to whether, in addition to the documents to which the Commission had already granted access, any additional documents falling within the complainant's request actually existed.

28. In its further submissions, the Commission provided additional information to explain why there were no additional background documents leading to the adoption of the non-paper on the development of a TAC for sea bass that could be disclosed to the complainant. In doing so, the Commission also elaborated on how the relevant non-paper had been drawn up. In his final observations, the complainant explained that he was satisfied with the explanations the Commission had provided and thanked the Ombudsman for his intervention.

29. In light of the above, the Ombudsman finds that the Commission has taken steps to settle the matter to the complainant's satisfaction. He therefore closes the case.

B. Conclusion

On the basis of his inquiry into this complaint, the Ombudsman closes it with the following conclusion:

Following the Ombudsman's inquiry, the Commission has taken steps to settle the matter to the complainant's satisfaction.

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

P. Nikiforos Diamandouros

Done in Strasbourg on 12 September 2013

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents OJ 2001 L 145, p. 43.

[2] <http://www.ices.dk/Pages/default.aspx> [Link]

[3] The WGNEW is the Working Group on Assessment of New MoU Species. The main task of the WGNEW is to provide information on the new species covered by the MoU between the ICES and the EU: sea bass, striped red mullet, red gurnard, grey gurnard, turbot, brill, dab, flounder, lemon sole, witch flounder, pollack and blue jack mackerel.