

Recommendation of the European Ombudsman in the inquiries into complaints 803/2012/TN and 369/2013/TN against the European Commission

Recommendation

Case 803/2012/TN - Opened on 23/05/2012 - Recommendation on 29/06/2015 - Decision on 28/07/2016 - Institutions concerned European Commission (Draft recommendation partly accepted by the Institution) | European Commission (No further inquiries justified) |

Case 369/2013/TN - Opened on 26/04/2013 - Recommendation on 29/06/2015 - Decision on 28/07/2016 - Institutions concerned European Commission (Draft recommendation partly accepted by the Institution) | European Commission (No further inquiries justified) |

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

The case concerns requests for public access to documents related to the European Commission's investigation of an allegedly irregular shipment of live bluefin tuna in the Mediterranean. The Commission argued that public access would undermine its investigation and the requests were therefore refused. Having analysed the issue, both on the basis of the Aarhus Convention and the EU public access rules, the Ombudsman does not consider that the Commission has given valid reasons for refusing access. She therefore recommends that the Commission grant access to the documents.

The background to the complaints

1. Bluefin tuna is an endangered species. In 2010, the complainant, Greenpeace, sent the Commission information about an allegedly irregular shipment of live bluefin tuna from Tunisia to a tuna farm in Malta [1], which prompted the Commission to start investigating the matter. A month later, the complainant requested public access to the documents [2] relating to the Commission's investigation. The Commission refused to grant such access [3], arguing that public access to the documents would undermine the protection of the purpose of investigations. The complainant brought this refusal to the Ombudsman's attention in complaint 803/2012/TN.

2. In 2012, the complainant again submitted a request to the Commission for access to documents concerning the matter, this time for documents which had been drawn up or



received after the first request was made. The Commission rejected this request as well [4] . This led the complainant to submit another complaint (369/2013/TN) to the Ombudsman.

3. At the time of the complainant's first access request, the Commission had asked Malta to open an administrative inquiry based on Article 102(2) of the Fisheries Control Regulation [5] . The Commission can do so if it considers that irregularities have occurred in the implementation of the rules governing the common fisheries policy or that the existing control provisions and methods in particular Member States are not effective. At the time of the second access request, Malta was in the process of implementing an action plan drawn up by the Commission under Article 102(4) of the Fisheries Control Regulation. The Commission draws up such an action plan if the administrative inquiry by the Member State does not lead to a removal of the irregularities or if the Commission identifies shortcomings in the control system of the Member State in question.

The inquiry

4. The Ombudsman opened inquiries into both complaints, in which the complainant alleged that the Commission had wrongly applied Regulation 1049/2001, the Aarhus Regulation [6] and the Aarhus Convention [7] when handling and refusing the requests for access to documents containing environmental information.

5. In support of complaint 803/2012/TN, the complainant argued that:

1) The *Petrie* ruling [8] , referred to by the Commission in its decision refusing access, is not applicable to this case because:

a. A right to confidentiality in relation to infringements of environmental law is not permissible under the Aarhus Convention and the Aarhus Regulation; and

b. The opening of infringement proceedings is remote and hypothetical;

2) The Commission wrongly denied the possibility of partial access;

3) The Commission wrongly dismissed the overriding public interest in disclosure; and

4) The Commission breached the applicable time-limits for handling the request for access.

6. In support of complaint 369/2013/TN, the complainant argued that the Commission:

5) Violated Article 4(4)(c) of the Aarhus Convention through an invalid interpretation and application of the notion of "*enquiry of criminal or disciplinary nature*" to administrative inquiries;

6) Violated Article 4(4)(a) of the Aarhus Convention through an invalid interpretation applying



confidentiality beyond the scope of the applicable national law;

7) Violated Article 4 of Regulation 1049/2001 by applying the notion of " *inspection, investigation or audit* " in the context of Article 102(4) of the Fisheries Control Regulation and by referring to the impact on ICCAT [9] dealings;

8) Erroneously applied the *TGI* ruling [10] ;

9) Erroneously interpreted and applied Article 113 of the Fisheries Control Regulation;

10) Erroneously interpreted Article 102(2), in connection with the instruments in Title XI and Article 108, of the Fisheries Control Regulation; and

11) Failed to take into consideration the principle of sincere cooperation under Article 4 TEU.

7. The complainant claimed that the Commission should provide access to the requested documents without further delay.

8. In the course of the inquiries, the Ombudsman received the opinions of the Commission on the complaints and, subsequently, the comments of the complainant in response to the opinions. The Ombudsman also carried out an inspection of the Commission's file concerning case 803/2012/TN. The Ombudsman's recommendation takes into account the arguments and opinions put forward by the parties.

Alleged wrongful refusal to grant public access

Arguments presented to the Ombudsman in case 803/2012/TN

(i) On the applicability of the

Petrie

judgment

9. According to the complainant, a right to confidentiality in relation to infringements of environmental law is not permissible under the Aarhus Convention or the Aarhus Regulation.

10. The complainant pointed out that the *Petrie* ruling was issued before the EU became a party to the Aarhus Convention. The *Petrie* ruling is based on the argument that confidential dialogue, rather than public scrutiny and criticism, is more likely to induce Member States to comply voluntarily with their legal obligations. The complainant argued that the Aarhus Convention establishes a different system. A key objective of the Aarhus Convention is, it



stated, to allow citizens to hold public authorities to account for their enforcement of, and compliance with, environmental law.

11. The complainant went on to state that, according to case-law of the Court of Justice, "*the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements*" [11]. The complainant argued that the *Petrie* ruling "*is not sufficiently restrictive to be permissible under Article 6(1) of the Aarhus Regulation read in light of the Aarhus Convention*".

12. The complainant also argued that the opening of infringement proceedings, which, according to the Commission, could ensue as a result of the inquiry under the Fisheries Control Regulation, was, at that point in time, remote and hypothetical. According to the complainant, a request for an administrative inquiry is not, as argued by the Commission, "*a preliminary administrative stage of the infringement investigation*". Infringement proceedings against Malta were thus, at that time, a remote and hypothetical possibility.

13. The complainant referred to the Ombudsman's Draft Recommendation in case 271/2000/(IJH)JMA [12], which concerned access to reports prepared at the request of the Commission regarding compliance of two Member States with Community Directives on waste. The Draft Recommendation read as follows:

"An interpretation of the scope of 'inspections and investigations', as suggested by the Commission, could preclude public disclosure of any document held by the institution which might be relevant for its role of guardian of the Treaty ... Accordingly, whole categories of documents whose content relates to Member States' compliance with Community law, and hence which may give factual or legal elements to the Commission in order to consider instituting infringement proceedings in the future, could be barred from public access.

It could also call into question public access to one of the most effective tools for monitoring the application of EC environmental law: the Commission and Member States' reports on the implementation of certain Directives relating to the environment. The publication and large distribution of these documents among the public have been widely praised by the Commission, even though their contents relate to the evaluation of Member States' compliance with Community law, and thus, can lead the Commission to institute infringement procedures."

14. According to the complainant, this case raises concerns which are similar to those voiced by the Ombudsman in the Draft Recommendation referred to above. Denying the public access to a large number of documents was not the intention of the *Petrie* ruling, which concerned access to letters of formal notice and reasoned opinions only.

15. In its opinion, the Commission pointed out that, at the time of signing the Aarhus Convention, the Community annexed the following statement of interpretation: "[t]he Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field



covered by the Convention ." The Aarhus Convention is applicable to the EU institutions and bodies through the Aarhus Regulation. Articles 3 and 6 of the Aarhus Regulation are particularly relevant as regards requests for access to environmental information. Both provisions refer explicitly to Regulation 1049/2001, which constitutes the legal framework for handling all requests for public access.

16. According to the Commission, Article 6(1) of the Aarhus Regulation takes into account the specific provision of the Aarhus Convention regarding disclosure of information relating to emissions into the environment. The Commission argued, however, that this provision does not apply to the request made by the complainant. First, the documents to which access was requested do not contain information relating to emissions into the environment and, second, the 'automatic' overriding public interest does not apply to investigations, in particular those concerning possible infringements of EU law.

17. As regards the restrictive application of exceptions to public access, this is not specific to the Aarhus Regulation, but is a general principle, as the EU Courts have repeatedly stated in judgments concerning decisions taken under Regulation 1049/2001. The Commission, therefore, considered that it could validly rely on the exception to public access laid down in the third indent of Article 4(2) of Regulation 1049/2001.

18. The Commission stated that the application of the *Petrie* ruling to environmental information was confirmed by the General Court in the *LPN* ruling [13] , which concerned a request for access to environmental information contained in documents relating to infringement proceedings. The Court held that the Commission did not err in law by relying on a general presumption that disclosure of the documents would have undermined the purpose of the investigation [14] .

19. In respect of the complainant's argument that the opening of infringement proceedings against Malta is remote and hypothetical, the Commission stated that, at the time the complainant's confirmatory application was being handled, the Commission requested the Maltese authorities to open an administrative inquiry based on Article 102(2) of the Fisheries Control Regulation, following the identification of irregularities in the control of the bluefin tuna fishery. The Maltese authorities submitted their final report on the administrative inquiry on 11 February 2011. On 12 September 2011, the Commission took a decision establishing an action plan to overcome shortcomings in the Maltese fisheries control system. At the time it submitted its opinion on complaint 803/2012/TN, the Commission was still monitoring the implementation of this action plan.

20. The Commission argued that the procedure it followed, comprising an administrative inquiry and subsequently the drawing up and monitoring of an action plan to overcome shortcomings, is very similar in nature to infringement proceedings. In both cases, the purpose of the investigation is to ensure compliance with EU law. The Commission considered that disclosure of the requested documents would have undermined the purpose of the ongoing investigation, namely, to overcome shortcomings in the fisheries control system. According to the Commission, all the documents to which access was denied concern the findings of



irregularities which led to a decision requesting the Maltese authorities to open an administrative inquiry. The documents relate to the early stage of a process which, at the time, was still ongoing.

21. In its observations on the Commission's opinion, the complainant stated that, in a recent ruling [15], the General Court underlined that "[t]he Aarhus Convention was signed by the European Community and subsequently approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124 p 1). The institutions are accordingly bound by that convention, which prevails over secondary community legislation. It follows that the validity of Regulation No 1367/2006 may be affected by the fact that it is incompatible with the Aarhus Convention" [16]. According to the complainant, the Commission is thus bound to interpret and apply the Aarhus Regulation and Regulation 1049/2001 in accordance with the Convention.

22. The complainant therefore maintained that access to environmental information may be refused only on grounds that are compatible with the Aarhus Convention. It also maintained that the Aarhus Convention does not allow environmental information to be withheld in order to resolve irregularities in the implementation of EU environmental law "amicably" and "in a climate of confidence". This would run counter to the Aarhus Convention's objective of empowering citizens and non-governmental organisations to hold public authorities effectively to account for their enforcement of and compliance with environmental law.

23. According to the complainant, none of its arguments is affected by the *LPN* ruling. In the *LPN* ruling, the General Court did not consider the question of whether the *Petrie* ruling is compatible with the Aarhus Convention. It merely confirmed that the *Petrie* ruling is compatible with the Aarhus Regulation. According to the complainant, the *LPN* ruling did not extend the principle laid down in the *Petrie* judgment to all documents related to an investigation. The *LPN* case, like the *Petrie* case, concerned a request for access to documents forming part of the file of ongoing infringement proceedings.

24. The complainant disagreed with the Commission's view that the procedure in relation to Malta, based on the Fisheries Control Regulation, is very similar in nature to infringement proceedings and that, as a consequence, it could likewise be presumed that disclosure of documents would undermine the purpose of the investigation.

25. The complainant noted, in this respect, that the procedure under Article 102 of the Fisheries Control Regulation is very different from infringement proceedings both in its nature and objectives. Its purpose is to resolve implementation issues in cooperation with Member States, whether they are due to failures on the part of the Member State concerned or to external challenges. No sanctions are envisaged. The procedure under Article 102 of the Fisheries Control Regulation consists of four stages. First, the Member State must provide the Commission with any relevant information it requests on the implementation of the Regulation. Second, if the Commission considers that irregularities have occurred or that the existing control provisions and methods in a Member State are not effective, it informs the Member State concerned. The Member State must then conduct an administrative inquiry in which Commission officials may participate. Third, the Member State concerned informs the



Commission of the results of the inquiry and presents a report to the Commission. Finally, if the administrative inquiry does not lead to the removal of the irregularities, the Commission draws up an action plan together with the Member State. The Member State must take all necessary measures to implement the action plan.

26. The complainant considered it questionable whether any of the steps under Article 102 of the Fisheries Control Regulation, except for the second, could be considered to constitute an 'investigation' under the terms of Article 4(2) of Regulation 1049/2001, let alone an investigation analogous to infringement proceedings.

27. According to the complainant, the Commission stated that, at the time it rejected the confirmatory application, the second and third steps under Article 102 of the Fisheries Control Regulation had been completed, given that the Maltese authorities had submitted the final report of the administrative inquiry on 11 February 2011. Moreover, at the time of the complaint to the Ombudsman, the fourth and final step had also been completed, since an action plan was drawn up on 12 September 2011. The complainant thus argued that the investigative process was closed and not, as the Commission maintained, in its "*early stages*". The monitoring of Malta's implementation of the action plan cannot be considered to constitute an 'investigation'.

28. The complainant also pointed out that Malta is under a duty of sincere cooperation with the Commission as regards the implementation of the action plan. The mere circumstance that the Commission fears that Malta may breach this obligation unless there is a "*climate of confidence*" is not, in the complainant's view, a sufficient reason to depart from the general rule of openness enshrined in Article 1 of the Treaty on European Union.

(ii) On the possibility of granting partial access

29. According to the complainant, the Commission's response to its confirmatory application makes it clear that its files contain a range of documents relating to the consignment of bluefin tuna at issue. The Maltese authorities provided these documents, which include catch documentation, observer reports, pre-notifications, authorisations and commercial information.

30. The complainant pointed out that the Ombudsman has repeatedly expressed the view that the exception based on inspections and investigations should be applied to documents drawn up *in the course* of an investigation connected to an infringement proceeding only [17]. According to the complainant, the annexes to the letters sent by the Maltese authorities were clearly drawn up independently of the Commission's administrative inquiry. The Commission thus erred in finding that the documents at issue are covered by the exception in their entirety.

31. In its opinion, the Commission maintained its view that all the documents are entirely covered by the exception aimed at protecting the purpose of the investigation.

(iii) On the question whether there is an overriding public



interest in disclosure

32. According to the complainant, Atlantic bluefin tuna is an ecologically and culturally important resource, which has been fished down to less than 15% of its originally abundant stocks. The EU, which takes over half of the total global catch, bears an important share of the responsibility for this state of affairs.

33. The complainant disagreed with the Commission's stance that this issue can best be solved in a confidential context. The complainant argued that high seas fish stocks are not private property, but a shared resource. The public is entitled to expect that the Member States and fishermen who have the privilege of exploiting this shared resource do so whilst respecting the conditions attached to their quota. This is all the more true as large amounts of public money are invested both in the modernisation of the vessels used and to rein in the illegal activities carried out by these vessels.

34. According to the complainant, the climate of trust which is most at risk at present is that between the European citizens on the one hand, and the Commission and infringing Member States on the other. It contended that bluefin tuna is at risk of extinction due to rampant illegal conduct. The public interest in verifying that Member States are now properly enforcing the rules, and that the Commission is credibly monitoring them, clearly outweighs any expectation of confidentiality that public authorities may have regarding suspected failures to uphold the law.

35. In its opinion, the Commission acknowledged that the protection of bluefin tuna is undoubtedly a matter of public interest. In its view, however, what has to be considered is whether disclosure of the documents requested would serve a public interest that would outweigh the public interest in eliminating shortcomings in the fisheries control system. The Commission considered that, on balance, the public interest in ensuring a swift and full implementation of the action plan prevails.

(iv) On the applicable time limits

36. According to the complainant, the Commission substantially exceeded the prescribed time limits in dealing with both the original request for access and the confirmatory application.

37. The complainant noted that, in total, the Commission identified in its files six relevant documents, each containing a number of annexes. According to the complainant, only two of these documents, a letter conveying the complainant's communications of 20 and 21 March 2010 to the Maltese authorities, and the Maltese authorities' response, existed on 4 May 2011, that is to say, the day on which the Commission extended the initial time limit "*in view of the number of documents applied for*". According to the complainant, although the number of documents was thus very small, the Commission refused access to them, providing only perfunctory reasons. In the complainant's view, there was therefore clearly no need for an extension of the time limit.



38. In its opinion, the Commission acknowledged that there were excessive delays in its handling of both the original application for access and the confirmatory application. It apologised.

Arguments presented to the Ombudsman in case 369/2013/TN

On Article 4(4)(c) of the Aarhus Convention

39. The complainant pointed out that Article 4(4)(c) of the Aarhus Convention, as ratified by the EU, allows institutions to withhold information on investigations only if disclosure would harm "*the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature*". The complainant argued that the Commission could not qualify an administrative inquiry, based on Article 102 of the Fisheries Control Regulation, as a criminal or disciplinary investigation. As in complaint 803/2012/TN, the complainant argued that the Aarhus Regulation and Regulation 1049/2001 have to be read in light of the provisions of the Aarhus Convention, having regard to its text and its objective. The Aarhus Convention stipulates that in order to attain its objective, "*each Party shall guarantee the rights of access to information in accordance with the provisions*" of the Convention. The complainant thus contended that in this case, the Commission could not, without infringing the Aarhus Convention, rely on Article 4(2) of Regulation 1049/2001 to deny access to environmental information by claiming that disclosure would undermine the protection of the purpose of inspections, investigations and audits. By ratifying the Aarhus Convention, the EU committed itself to refuse access to environmental information only if such access would adversely affect "*the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature*". Consequently, the Commission should have interpreted Article 4(2) of Regulation 1049/2001 as encompassing exclusively "*inspections, investigations and audits*" taking place in the context of proceedings of a "*criminal and disciplinary nature*". According to the complainant, this is the sole interpretation ensuring the compatibility of EU secondary legislation with the Aarhus Convention. The Commission should therefore have concluded that, since the proceedings under Article 102 of the Fisheries Control Regulation do not lead to any sort of sanction, they are not of a criminal or disciplinary nature and, therefore, do not justify any restriction of public access.

40. In its opinion, the Commission argued that, in assessing the request for access, it applied both Regulation 1049/2001 and the Aarhus Regulation which renders the Aarhus Convention applicable to the EU institutions and bodies. The Commission considered that it correctly applied Article 6(1) of the Aarhus Regulation. Furthermore, the Commission maintained its view that the documents concerned are covered by the exception to public access set out in the third indent of Article 4(2) of Regulation 1049/2001, which aims at protecting the purpose of the investigations. The Commission justified its decision by explaining in detail the procedure under the Fisheries Control Regulation. The Commission did not agree with the complainant's view that, at the time when the confirmatory decision was taken, the investigation under the Fisheries Control Regulation was no longer ongoing. In fact, the Commission considered that the



investigation was still open at the time it submitted its opinion, given that it had not yet issued a final evaluation regarding Malta's compliance.

On Article 4(4)(a) of the Aarhus Convention

41. The complainant noted that, in order to further justify its refusal to grant access, the Commission pointed out that Article 4(4) of the Aarhus Convention allows refusal when the disclosure of documents " *would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided under national law* ". In this context, EU law is the 'national law' to which the provision refers.

42. According to the complainant, the drawing up and monitoring of action plans, under the Fisheries Control Regulation, is not protected as such by confidentiality. In the context of Article 102 proceedings, EU law provides for the confidentiality of *data* , but not for the confidentiality of the proceedings (and the related documents).

43. The complainant argued, in addition, that the Court of Justice has stated, in a ruling concerning Directive 2003/4 [18] which renders the Aarhus Convention applicable to Member States, that in order for this exception to be relied upon, a clear definition of 'proceedings' is necessary: " *public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in Article 4(2) of Directive 2003/4 can be invoked, which means in particular that national law must clearly establish the scope of the concept of 'proceedings' of public authorities referred to in that provision* " [19] . According to the complainant, this reasoning applies (with the necessary changes) in relation to the application of the Aarhus Convention to the EU institutions. The Commission was therefore not entitled to base its refusal to grant access to the requested documents on Article 4(4)(a) of the Aarhus Convention.

On applying the notion of "

inspection, investigation or audit

" in Article 4 of Regulation 1049/2001 in the context of Article 102(4) of the Fisheries Control Regulation

44. The complainant considered that the Commission erred in qualifying its assessment of the implementation of the action plan, drawn up in accordance with Article 102(4) of the Fisheries Control Regulation, as an investigation for the purpose of Article 4(2) of Regulation 1049/2001.

45. According to the complainant, Article 102 of the Fisheries Control Regulation defines the basic procedure that Member States and the Commission must follow in order to ensure the correct implementation of the Common Fisheries Policy (CFP) and the effectiveness of national control provisions and methods. The procedure comprises four stages and provides the Commission and the Member States with an administrative instrument to redress irregularities



that may affect the implementation of the CFP. The procedure entails (i) an exchange of information between the Member State concerned and the Commission, followed, where appropriate, by (ii) an assessment of such information and, when necessary, the launching of an " *administrative inquiry* " aimed at removing irregularities or at improving the effectiveness of the control provisions and methods in force in the Member State concerned.

46. The complainant argued that, unlike Article 258 TFEU, Article 102 of the Fisheries Control Regulation does not aim at establishing infringements of EU law, and/or the liability of the Member State concerned. Its main goal is to ensure the full achievement of the CFP objectives through the optimisation of the EU fisheries management. Indeed, should the Commission find, either on the basis of the report on the administrative inquiry or of the results of verifications and inspections, that irregularities or shortcomings persist at national level, the consequence provided for by the Fisheries Control Regulation is the drawing up of an action plan, the purpose of which is to address the irregularities or shortcomings found.

47. On this basis, the complainant considered that the Commission erred in qualifying the activities envisaged by Article 102 of the Fisheries Control Regulation as 'investigations'. It thus also erred in considering the related documents to be covered by Article 4(2) of Regulation 1049/2001. For the purpose of Article 102 of the Fisheries Control Regulation, the Commission may conduct specific investigative acts such as verifications, autonomous inspections or audits as provided for by Articles 98, 99 and 100 of the same Regulation. However, in the complainant's view, this does not justify the application of Article 4(2) of Regulation 1049/2001 to each and every administrative activity carried out under Article 102 of the Fisheries Control Regulation. On the contrary, a rigorous interpretation of Article 4(2) of Regulation 1049/2001 leads to the conclusion that it applies solely to activities that are strictly investigative.

48. The complainant considered that, in any case, even if the procedural stages leading to the drawing up of the action plan were to be qualified as investigations for the purpose of Regulation 1049/2001, it stems from the wording, structure and logic of Article 102 of the Fisheries Control Regulation that, once the Commission and the Member States have acquired all the necessary information and drawn up the action plan, it must be considered that this investigation has been concluded and, most importantly, that its purpose has been achieved. Thus, there is no objective justification for the Commission's refusal to provide access to the documents concerned, because with the drawing up of the action plan, the administrative procedure is finalised: its outcome is that the Member State concerned becomes subject to the additional obligation of adopting all the measures that are necessary to implement the plan. The Commission will then carry out its general duty of overseeing the application of EU law on the basis of Article 17 TEU.

49. The complainant thus put forward the view that: i) the procedure in Article 102(4) of the Fisheries Control Regulation does not qualify as an inspection, investigation or audit; ii) in any case, there was no fully ongoing investigation at the moment when the Commission took its decision on the access request; and iii) the disclosure of the requested documents would not have any detrimental effect on the protection of the purpose of the administrative procedure mentioned above.



50. According to the complainant, the Commission's argument that disclosure of the documents would affect the EU's interests in relation to other ICCAT contracting parties is purely hypothetical and unrelated to the exception to public access set out in the third indent of Article 4(2) of Regulation 1049/2001.

51. In its opinion, the Commission maintained the view that the documents concerned are covered by the exception to public access set out in the third indent of Article 4(2) of Regulation 1049/2001, which aims at protecting the purpose of the investigations. The Commission again justified its decision to refuse access by explaining in detail the procedure under the Fisheries Control Regulation.

52. In addition, the Commission did not agree with the complainant that, at the time the confirmatory decision was taken, its investigation under the Fisheries Control Regulation was no longer ongoing. In fact, the Commission considered the investigation still open at the time it submitted its opinion, given that it had not yet issued a final evaluation on Malta's compliance.

53. In its observations, the complainant maintained the view put forward in its complaint that the follow-up procedure set out in Article 102 of the Fisheries Control Regulation cannot be qualified as an investigation for the purpose of applying Regulation 1049/2001. Independently from its qualification under Regulation 1049/2001, the follow-up procedure had in any case reached its goal and was concluded by means of the 'action plan' adopted by the Commission in September 2011.

54. The complainant further observed that the Commission adopted the 'action plan' on 12 September 2011. If there is an 'ongoing investigation' into Malta's compliance with the 'action plan', as the Commission argued, it is a new and different procedure from the one under Article 102 of the Fisheries Control Regulation. There is therefore no justification for the Commission to deny access to the documents that led to the adoption of the 'action plan', as the 'action plan' is a binding EU act, predating the opening of the investigation into Malta's compliance with it.

55. The complainant considered the Commission's position to be unacceptable, since it would not only limit access to the documents of an investigation, but also restrict public knowledge of Commission decisions that Member States are called to implement. The complainant argued that a decision prescribing measures to address shortcomings in a Member State's administrative system is not, by definition, an investigative act but an expression of the Commission's regulatory powers.

56. The complainant further argued that by making the unverifiable claim that an investigation is open and ongoing, the Commission is denying access to documents for an unlimited period of time, in view of an event (the opening of infringement proceedings under Article 258 TFEU or the launching of the procedures set out in Title XI of the Fisheries Control Regulation) which is uncertain and depends solely on the Commission's discretion, without any public scrutiny. According to the complainant, this is in open contrast with the transparency principle.



On the application of the

TGI

ruling

[20]

57. The complainant noted that the Commission sought to apply the *TGI* ruling to the request for access by drawing a parallel between Article 102 of the Fisheries Control Regulation and state aid control. However, according to the complainant, the control mechanisms under the Fisheries Control Regulation differ significantly from state aid and infringement investigations in so far as access to documents is concerned. Chapter II of the Fisheries Control Regulation lays down rules for the protection of 'data' (not 'documents'), notably with a view to protecting individuals (Article 112) and the confidentiality of professional and commercial secrets (Article 113). Apart from these rules, the Fisheries Control Regulation does not create any legal obstacle to the disclosure of 'documents', which is governed by Regulation 1049/2001.

58. Furthermore, according to the complainant, the *TGI* ruling envisaged the possibility of relying on a general presumption that the institution may refuse access to a certain category of documents, but construed this presumption narrowly. In the context of infringement proceedings based on Article 258 TFEU, that presumption applies only when an investigation is effectively opened and, therefore, a Member State's right of defence is called into question. The complainant considered that the Commission could not validly claim that, at the time of refusing access, an investigation procedure was open and ongoing under the Fisheries Control Regulation. The Commission and Malta had already drawn up the action plan and the Member State was simply obliged to implement it. The Fisheries Control Regulation does not open any window for further negotiations on the content of the plan. It simply requires national administrations to ensure compliance therewith.

59. Consequently, Malta could not claim that such compliance depended on the condition that third parties be prevented from accessing the file. Neither could it be claimed, at that stage of the procedure, that granting access to the requested documents would have affected a Member State's procedural rights. Such rights would have come into play only if the Commission had opened infringement proceedings under Article 258 TFEU or one of the administrative proceedings which, under the Fisheries Control Regulation, may lead to a limitation of a Member State's capacity to exploit its stocks. The complainant therefore argued that the Commission erred in law when it considered that it could rely on a general presumption that all the documents concerned were covered by the exemption to access laid down in Article 4(2) of Regulation 1049/2001.

On the interpretation and application of Article 113 of the Fisheries Control Regulation

60. The complainant maintained that the Commission was not entitled to refuse access to the requested documents, unless they contained some of the data listed in Article 113 of the



Fisheries Control Regulation. Furthermore, when applying Article 113(1) and (2) of the Fisheries Control Regulation, the Commission should have clearly stated which rules on professional and commercial secrecy were specifically applicable and why the communication of certain data would have infringed those rules. In any case, as stipulated in Article 4(6) of Regulation 1049/2001, the Commission had the duty to provide access to a redacted version of the documents, removing all confidential data.

61. Concerning the application of Article 113(4) of the Fisheries Control Regulation, the complainant argued that its scope is not as wide as was argued by the Commission. The relevant confidentiality rule applies only to the communication of data, to the extent that disclosure would undermine the scope of inspections or investigations. In addition, even if the Commission were right in qualifying the proceedings as an 'investigation', it could not have relied on Article 113(4) of the Fisheries Control Regulation. The proceedings were closed at the time when the Commission refused access to the documents. Thus, disclosure could not have undermined their scope.

62. In its opinion, the Commission stated that in its decision refusing access, it had also analysed the possibility of granting partial access and the possible overriding public interest in disclosure, as required by established case-law.

On the interpretation of Article 102(2), in connection with the instruments in Title XI and Article 108, of the Fisheries Control Regulation

63. In its decision refusing access, the Commission stated that, in the event that the cooperative compliance tools under the Fisheries Control Regulation did not result in Malta definitively and voluntarily remedying its compliance failure, the Commission could make use of the instruments listed under title XI, such as the cancellation of financial assistance or the closure of fisheries, and the emergency measures provided for in Article 108.

64. The complainant argued that these measures follow a decision-making process which is separate and distinct from that envisaged by Article 102 of the Fisheries Control Regulation. The measures referred to by the Commission are not envisaged as sanctions for a failure to implement an action plan drawn up under Article 102, but may be imposed following separate proceedings which were not open at the time when the Commission refused access to the documents concerned. At the time of refusing access, the Commission's activities were limited to monitoring the implementation of the action plan.

65. In any case, the complainant argued, the documents to which it had requested access belonged to another administrative procedure, which had been closed. In addition, the Commission failed to explain how disclosure of the action plan would affect Malta's correct implementation of the plan.



On the principle of sincere cooperation under Article 4 TEU

66. According to the complainant, Member States are bound by a duty of sincere cooperation which requires them to comply with EU legislation fully and unconditionally. Accordingly, Malta's obligation to comply with the action plan drawn up by the Commission cannot be dependent on confidentiality. Nor can it be suspended in reaction to third parties' access to documents. The complainant strongly believed that public scrutiny is not an obstacle to full implementation of EU law but on the contrary, in a Union based on the rule of law and the principle of transparency, public scrutiny helps to ensure compliance with the law.

67. In its observations, the complainant added that the Commission is relying on the exception relating to investigations with a view to creating and maintaining " *a bilateral framework of confidence and trust* " with Malta, based on the assumption that this would encourage compliance with the common fisheries policy. Nevertheless, as a matter of fact, over two years after the adoption of the 'action plan', the Commission was still unable to ensure that Malta was complying with the Fisheries Control Regulation.

68. The complainant contended that this long delay, without evidence of improvements in Malta's implementation of EU law, calls into question the validity of the Commission's approach and supports the complainant's view that, in a modern democracy, transparency and accountability are essential to ensuring that public authorities are under pressure to fully respect the law.

On the *ClientEarth*

ruling

69. In its observations, the complainant stated that it is aware that the *ClientEarth* [21] ruling might have an impact on the Ombudsman's decision in this case. The complainant pointed out, however, that the case is under appeal. In any case, the facts of the present case differ significantly from those in the *ClientEarth* case. *ClientEarth* had sought access to a number of studies that the Commission had required in order to assess Member States' compliance with EU environmental legislation. The complainant has requested access to the 'action plan' and to the documents that justified its adoption, not to documents related to the assessment of Malta's compliance with the 'action plan'.

The Ombudsman's assessment leading to her recommendation

70. The assessment begins with (i) the question of the delays by the Commission in handling the complainant's requests. Next, the assessment considers (ii) the possible relevance of Article 113 of the Fisheries Control Regulation to the requests. The main parts of the assessment deal



with (iii) the relationship between EU public access rules and the Aarhus Convention and (iv) the interpretation and application of the relevant rules to the specific documents in question. Under (iii), the Ombudsman examines, in particular, the relevant case-law of the EU Courts concerning infringement proceedings. The Ombudsman finds that this case-law does not apply to the procedure under Article 102 of the Fisheries Control Regulation. Under (iv), the Ombudsman finds that, regardless of whether the Article 102 procedure constitutes an 'investigation' for the purposes of the third indent of Article 4(2) of Regulation 1049/2001, the Commission has not provided adequate reasons to justify its refusal to grant public access to the documents in question.

Delays

71. The Ombudsman notes that the Commission has acknowledged and apologised for the excessive delays incurred in dealing with the requests for access. The Ombudsman therefore considers this aspect to be resolved.

Article 113 of the Fisheries Control Regulation

72. Article 113 of the Fisheries Control Regulation reads as follow:

" 1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.

2. The data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent.

3. The data referred to in paragraph 1 shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.

4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:

(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;

(b) the commercial interests of a natural or legal person, including intellectual property;



(c) court proceedings and legal advice; or

(d) the scope of inspections or investigations;

shall be subject to applicable rules on confidentiality. Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.

5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.

6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.

7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters. "

73. In the Ombudsman's view, the wording and structure of Article 113 of the Fisheries Control Regulation show that it is intended to complement, and not replace, the provisions of Regulation 1049/2001 as regards the fundamental right of access to documents held by EU institutions. The first three paragraphs of the Article regulate the use that the Member States and the Commission can make of specific kinds of information ("data") obtained and exchanged among them " *within the framework of the Regulation* ". The fourth paragraph of the Article, which aims to ensure the secure handling of such data, clearly draws inspiration from the exceptions to public access envisaged by Regulation 1049/2001. Together with the fifth paragraph, it seeks to ensure that the relevant interests protected by Regulation 1049/2001 in the context of requests for access to documents held by the Commission and other EU bodies are not harmed by the relaying of data between the persons and authorities involved in implementing the Fisheries Control Regulation. Article 113 thus assumes rather than excludes, the application of Regulation 1049/2001 to requests addressed to the Commission for public access to documents containing data obtained under the Fisheries Control Regulation.

EU public access rules and the Aarhus Convention

74 . In the complainant's view, its requests for access should have been assessed on the basis of the Aarhus Convention, to which the EU is a party. The complainant argued that the EU public access rules that the Commission applied to its requests for access are not in conformity with the Aarhus Convention.

75. Regulation 1367/2006 ("the Aarhus Regulation") lays down rules for applying the provisions



of the Aarhus Convention to the EU institutions. The Aarhus Regulation provides that Regulation 1049/2001 shall apply to requests for access to environmental information held by the EU institutions [22] , subject to certain special provisions contained in section 6(1) of the Aarhus Regulation as regards the exceptions to access laid down in Article 4 of Regulation 1049/2001.

76 . As an EU institution, the Commission must follow the case-law of the EU Courts as regards the relationship between EU law and the Aarhus Convention. The Ombudsman notes, in particular, the judgment of the General Court in *ClientEarth* [23] and of the Court of Justice in *LPN and Finland* [24] . Even though it is true, as the complainant points out, that the *ClientEarth* judgment is under appeal, the Commission must apply the General Court's judgment pending the judgment of the Court of Justice on the appeal.

77 . The applicant in *ClientEarth* argued that the Aarhus Convention does not allow any exception to the right of access to documents intended to protect the purpose of investigations other than those of a criminal or disciplinary nature (Article 4(4)(c) of the Convention). In its judgment in that case, the General Court assessed whether EU access rules, as set out in Regulation 1049/2001 and the Aarhus Regulation, infringed Article 4(1), (2) and (4) of the Aarhus Convention.

78 . In *ClientEarth* , the General Court found that the Aarhus Convention does not prevent the European Union legislature from providing for an exception to the principle of access to the documents of the institutions relating to the environment where those documents pertain to infringement proceedings, which form part of the constitutional mechanisms of European Union law, as established by the Treaties. The Court pointed out that the Aarhus Convention, and in particular Article 4(4)(c) thereof, was manifestly designed to be applicable principally to the authorities of the States which are contracting parties thereto and uses concepts appropriate to them, as is apparent from the reference to the framework of national legislation in Article 4(1) thereof. On the other hand, the Convention does not take into account the specific features which are characteristic of institutions of regional economic integration, which may nonetheless accede to the Convention. The Court considered that it would be illogical if the Aarhus Convention were to provide for exceptions for the benefit of some contracting parties, namely the States, while precluding the application of similar exceptions by other contracting parties, namely, institutions of regional economic integration, which include the European Union for the purposes of that Convention.

79 . In *LPN and Finland v Commission* , the Court of Justice found that the manner in which the two sentences of Article 6(1) of the Aarhus Regulation are drafted and their structure indicate clearly the express intention of the legislature to remove infringement procedures from the scope of Article 6(1) of the Aarhus Regulation as a whole.

80 . When it comes to the application of the third indent of Article 4(2) of Regulation 1049/2001, the relevant case-law of the EU courts provides, in principle, for less extensive public access to documents related to *infringement proceedings* [25] . The case-law lays down that the Member State should be entitled to expect the Commission to observe confidentiality during the stage of



the initial investigation of a possible breach of EU law (which may lead the Commission to initiate formal infringement procedures), given that the aim of such an initial investigation is for the Member State to comply voluntarily with EU law through negotiations with the Commission [26] . In respect of *infringement proceedings* , the case-law also allows for a general presumption that disclosure of the documents in the administrative file would, in principle, undermine the protection of the purpose of the investigation [27] .

81 . The Ombudsman draws two conclusions from the above-mentioned case-law of the EU courts. First, nothing in that case-law suggests that the fact that the Commission assessed the complainant's requests for access on the basis of Regulation 1049/2001 and the exceptions contained therein constituted an instance of maladministration. Second, in order to ascertain whether the Commission applied Regulation 1049/2001 correctly to the complainant's requests, it is important to determine whether the documents in question relate to infringement proceedings , given the relatively wide exemption from disclosure that the case-law of the EU courts affords to such documents.

82. According to the Commission, investigations under Article 102 of the Fisheries Control Regulation are very similar to infringement proceedings. In the Commission's view, the investigations under Article 102 require a climate of trust in order to ensure constructive cooperation with the Member States, aiming at their voluntary compliance with EU law on fisheries.

83. The Ombudsman notes, however, that the way in which Article 113(6) of the Fisheries Control Regulation is formulated, referring to "*proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy*", unambiguously indicates that opening infringement proceedings is a possible subsequent, but clearly separate, measure. Given that it would not make any sense to take the same kind of measures twice, the procedures set out in the Fisheries Control Regulation must reasonably and logically be different from infringement proceedings.

84. More specifically, the Ombudsman understands that the procedure under Article 102 of the Fisheries Control Regulation has the specific aim of obliging Member States to comply with common fisheries policy objectives, that is, the conservation and management of fisheries resources. The manner in which this purpose is to be achieved is not the same under the Fisheries Control Regulation and in the context of infringement proceedings. Article 102 of the Fisheries Control Regulation sets out a detailed, step-by-step procedure for assessing and addressing irregularities. In addition, if the procedure under Article 102 of the Fisheries Control Regulation ends with an action plan, such a plan must reasonably be very detailed as regards what needs to be done, in what manner and within what time frame. In the Ombudsman's view, although the procedure under Article 102 of the Fisheries Control Regulation is clearly based on cooperation between the Commission and the Member State concerned, the detailed procedure provided for therein leaves much less room for discretion and political negotiations , during which a climate of confidence could be instrumental to reaching a solution, than in cases of infringement proceedings. In other words, and most importantly, Article 102 of the Fisheries Control Regulation clearly obliges the Member State concerned to cooperate and such



cooperation is not contingent on the Member States' willingness to cooperate [28] .

85. The Ombudsman notes, furthermore, that the Fisheries Control Regulation gives the Commission investigatory powers that are similar to those of state authorities, given that the Commission officials are expressly empowered to carry out inspections on the ground in the Member States [29] .

86. For these reasons, the Ombudsman considers that the case-law of the EU Courts relating to the application of the third indent of Article 4(2) of Regulation 1049/2001 to the special case of documents relating to infringement proceedings is not relevant to the documents in the present case. In particular, the reasoning of the General Court in the *ClientEarth* ruling, which was based on the peculiarities of the institutions of regional economic integration, does not apply to this case. The Member State concerned is thus not automatically entitled to expect the Commission to observe confidentiality during the procedure under the Fisheries Control Regulation and there is no general presumption that disclosure of documents would undermine the protection of the purpose of the procedure under Article 102 of the Regulation.

The interpretation and application of the relevant rules to the specific documents in question

87. Article 102 of the Fisheries Control Regulation (entitled "Follow-up of verification, autonomous inspection and audit reports") reads as follows:

" 1. Member States shall provide the Commission with any relevant information as that [sic] may request on the implementation of this Regulation. In submitting a request for information, the Commission shall specify a reasonable time limit within which the information is to be supplied.

2. If the Commission considers that irregularities have occurred in the implementation of the rules of the common fisheries policy or that the existing control provisions and methods in particular Member States are not effective it shall inform the Member States concerned, which shall then conduct an administrative inquiry in which Commission officials may participate.

3. The Member States concerned shall inform the Commission of the results of the inquiry and forward a report to the Commission drawn up not more than three months after the Commission's request. This period may be extended by the Commission, on a duly reasoned request from the Member State, for a reasonable delay.

4. If the administrative inquiry referred to in paragraph 2 does not lead to the removal of the irregularities or if the Commission identifies shortcomings in the control system of a Member State during the verifications or autonomous inspections referred to in Articles 98 and 99 or in the audit referred to in Article 100, the Commission shall establish an action plan with that Member State. The Member State shall take all necessary measures to implement that action plan. "



88. According to Article 4(4)(c) of the Aarhus Convention, a request for environmental information may be refused if disclosure would adversely affect the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature . The Ombudsman does not consider the procedure undertaken by the Commission under the Fisheries Control Regulation to be of a criminal or disciplinary nature, given that the Commission will not, in the event of non-compliance, impose sanctions [30] but conservation measures [31] .

89. On the basis of the above, the Ombudsman considers that the third indent of Article 4(2) of Regulation 1049/2001, interpreted in light of Article 4(4)(c) of the Aarhus Convention, cannot be relied upon to refuse access to the environmental information at issue in this case.

90. As will be shown in the following paragraphs, the Ombudsman considers that the result of her examination would be the same even if, contrary to the analysis above, the procedure under Article 102 of the Fisheries Control Regulation is considered to constitute an 'investigation' falling within the third indent of Article 4(2) of Regulation 1049/2001.

91 . In principle, all documents of the EU institutions should be accessible to the public [32] . Any exception to the right of access must be interpreted and applied strictly. The risk of the protected interest concerned being undermined must be reasonably foreseeable and not purely hypothetical [33] . The fact that a document concerns an 'investigation' within the meaning of the third indent of Article 4(2) of Regulation 1049/2001 cannot by itself justify the application of that exception, since the exception applies only if disclosure of the documents concerned would endanger the completion of investigations [34] .

The first access request

92. The Ombudsman notes that at the time of the complainant's first request for access, the Commission had asked Malta to open an administrative inquiry [35] . The Commission made its request by means of Commission Decision C(2010)7791 of 12 November 2010, informing Malta of identified irregularities in the control of activities and requesting it to open an administrative inquiry based on Article 102(2) of Council Regulation (EC) No 1224/2009. The investigation activities were thus, in the Ombudsman's view, not yet completed at that point in time.

93. However, the fact that the investigation was still ongoing does not necessarily imply that its completion would be endangered by public access to related documents . The Ombudsman considers that the documents listed by the Commission as falling within the scope of the request must logically contain primarily facts, such as existing licences, quantities of fish caught, transferred, caged and so on, as well as information on procedures. The next step towards completion of the investigation would be the Maltese authorities' report on the administrative inquiry, and the Commission's subsequent evaluation of that report. Such a report and subsequent evaluation would, again, logically contain primarily facts and conclusions reached on the basis of those facts, with little room for discretion and negotiations (if any).



94. It should be noted in this regard that, under Article 102 of the Fisheries Control Regulation, the Member State concerned is *obliged* to conduct an administrative inquiry if such an inquiry is requested by the Commission and the Member State is *obliged* to inform the Commission of the results of the inquiry. In contrast with infringement proceedings, as regards a legal instrument that *requires* Member States to cooperate with the Commission, the General Court has ruled that such cooperation is not contingent on the Member State's willingness to cooperate [36] . The Ombudsman therefore does not agree with the Commission's view, which in substance is that the procedure under Article 102 of the Fisheries Control Regulation requires secrecy in order to obtain the Member States' voluntary cooperation and that disclosure of related documents would thus harm its purpose.

95. On the basis of the above, the Ombudsman considers that the Commission has not provided a convincing explanation as to how disclosure of the documents supporting the request for an administrative inquiry would, at that stage, endanger the completion of the investigation activities. This conclusion is without prejudice to the possible obligation to refuse access to certain data contained in these documents, in application of other exceptions provided for by Article 4 of the Aarhus Convention and contained in Article 4 of Regulation 1049/2001.

The second access request

96. At the time of the second access request, Malta was in the process of implementing the action plan that had been drawn up following the administrative inquiry [37] . Given that such an action plan contains deadlines for addressing listed issues, it is clear that its implementation must be monitored by the Commission. The Ombudsman therefore considers it reasonable to consider that the investigation was still ongoing at that point in time also [38] . Again, however, the fact that the investigation was still ongoing does not necessarily imply that its completion would be endangered by public access to related documents. The action plan must logically be based on earlier findings of fact (see paragraph 93 above). Such facts may possibly be embarrassing for the Member State concerned. This is not, however, a valid reason for not disclosing them. In addition, the nature of the action plan, which contains deadlines for addressing identified issues, would appear to give the Member State even less leeway than it may have had at earlier stages of the investigation.

97. Again, under Article 102 of the Fisheries Control Regulation, the Member State concerned is *obliged* to implement the established action plan. The Member State's cooperation in this regard is not contingent on its willingness to cooperate [39] .

98. The Ombudsman, therefore, cannot see how disclosure of the action plan itself could possibly jeopardise the purpose of the Article 102 procedure undertaken by the Commission, which is to ensure Malta's compliance with the rules on fisheries. Nor has the Commission provided a convincing explanation as to how disclosure of the documents leading to the action plan would, at that stage, endanger the completion of the procedure. On the contrary, one may reasonably suppose that public disclosure of documents related to the procedure could actually



favour or facilitate compliance with EU law and policy of fisheries through the robust involvement of public opinion and civil society. The Ombudsman is reinforced in this view by the finding of the General Court in *Schlyter v Commission* that making the action plan public would rather act as an incentive for it to be given due consideration by the Member State concerned, given that any departure from that action plan would have to be explained by that Member State [40] .

99. The Ombudsman therefore considers that regardless of whether the procedure under Article 102 of the Fisheries Control Regulation is considered to constitute an "enquiry of a criminal or disciplinary nature" according to Article 4(4)(c) of the Aarhus Convention or an "investigation" for the purposes of the third indent of Article 4(2) of Regulation 1049/2001, the Commission has failed to justify its refusal to give public access to the documents requested by the complainant. This conclusion is without prejudice to the possible obligation to refuse access to certain data contained in these documents, in application of other exceptions provided for by Article 4 of the Aarhus Convention and contained in Article 4 of Regulation 1049/2001.

100. The Ombudsman will therefore recommend to the Commission that it grant access to the documents concerned, in particular the action plan, or that it provide valid reasons for not doing so.

The recommendation

On the basis of the inquiry into these complaints, the Ombudsman makes the following recommendation to the Commission:

The Commission should grant access to the requested documents, in particular the action plan, or provide valid reasons for not doing so.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 30 September 2015. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Emily O'Reilly European Ombudsman Strasbourg, 29/06/2015

[1] As tuna cannot be bred in captivity, wild tuna are captured, caged and then towed to tuna farms where they are fattened for slaughter.

[2] 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.

[3] On the basis of the third indent of Article 4(2) of Regulation 1049/2001, which lays down that access to a document shall be refused where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

[4] Again on the basis of the third indent of Article 4(2) of Regulation 1049/2001.

[5] Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, OJ 2009 L 343, p. 1.

[6] Regulation (EC) No 1367/2006 of the European Parliament and 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, OJ 2006 L 264, p. 13.

[7] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [Link]

[8] Case T-191/99 *David Petrie and others v Commission* [2001] ECR II-3677.

[9] ICCAT, the International Commission for the Conservation of Atlantic Tunas, is an inter-governmental fishery organisation responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and its adjacent seas. See: www.iccat.int [Link]

[10] C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885.

[11] Case C-286/02 *Bellio F.Ili Srl v Prefettura di Treviso* [2004] ECR I-3465, paragraph 33; Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52.

[12] Paragraph 2.6.

[13] Case T-29/08 *Liga para Protecção da Natureza (LPN) v European Commission* [2011] ECR II-6021.

[14] *Ibid* , in particular, paragraphs 113 to 120.

[15] Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* , judgment of 14 June 2012, not yet published in the ECR.

[16] *Ibid* , paragraph 52.



[17] Decision of the European Ombudsman on complaints 271/2000/(IJH)JMA and 277/2000/(IJH)JMA against the European Commission, paragraph 2.7; Decision of the European Ombudsman on complaint 790/2003/GG against the European Commission, paragraph 1.4; and Decision of the European Ombudsman on complaint 2290/2004/IP against the European Commission, paragraph 2.11, all available at: <http://www.ombudsman.europa.eu/en/cases/home.faces> [Link]

[18] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, OJ 2003 L 41, p. 26.

[19] Case C-204/09 *Flachglas Torgau GmbH v Germany*, judgment of 14 February 2012, not yet published in the ECR, paragraph 63.

[20] Case C-139/07 P *Commission v Technische Glaswerke Ilmenau*, cited in footnote 11 above.

[21] Case T-111/11 *ClientEarth v Commission*, judgment of 13 September 2013, not yet published in the ECR.

[22] Recital 15 of the Preamble to, and Article 3 of, the Aarhus Regulation.

[23] Case T-111/11, *ClientEarth v Commission*, cited in footnote 22 above, paragraphs 91-99.

[24] Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, judgment of 14 November 2013, not yet published in the ECR, paragraph 65.

[25] See, for example, Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, cited in footnote 26 above, paragraph 55.

[26] Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 120-121, and case-law cited therein.

[27] Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, cited in footnote 26 above, paragraph 65.

[28] See Case T-402/12 *Schlyter v Commission*, judgment of 16 April 2015, not yet published in the ECR, paragraphs 69 and 71.

[29] See Articles 96-100 of the Fisheries Control Regulation, cited in footnote 6 above.

[30] Sanctions can, however, be imposed by the Member States:
http://ec.europa.eu/fisheries/cfp/control/infringements_sanctions/index_en.htm

[31] The conservation of fisheries resources is explicitly referred to in many of the Articles found



in Title XI of the Fisheries Control Regulation, which lays down measures to ensure compliance by Member States with common fisheries policy objectives.

[32] Recital 11 of the preamble to Regulation 1049/2001.

[33] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraphs 43 and 63.

[34] See, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk* [2006] ECR II-2023, paragraphs 105 and 109.

[35] Among the documents identified by the Commission as falling within the scope of the request were: a letter of 15 April 2010 from the Commission addressed to the Maltese authorities following Greenpeace's reports; the reply from the Maltese authorities, dated 28 April 2010, including annexes such as bluefin tuna catch documents, observer reports from Tunisia and Malta, inspection reports for vessels Aretuza and Leovita; letter dated 14 June 2010 from the Commission to the Maltese authorities pointing out inconsistencies in the provided documents; e-mail from the Maltese authorities requesting an extension of the deadline for replying to the Commission's letter; reply of 21 June 2010 from the Maltese authorities, including annexes such as authorisation from Tunisia, Malta inspection report on bluefin tuna transfer from vessels Mohsen and Alexandre to vessels Leovito and Aretuza, ICCAT transfer declarations between catching vessels and tugs to farm in Tunisia, caging declarations for caging in Malta, Malta inspection reports for Aretuza and Leovito, observers' reports from the bluefin tuna harvest on 7 and 8 April 2010, observations from the operator; e-mail exchange on 10 June 2010 between the Commission and the ICCAT Secretariat on the authorisation status of the vessel Mohsen and Alexandre.

[36] Case T-402/12 *Schlyter v Commission* , cited in footnote 30 above, paragraphs 69 and 71.

[37] Among the documents identified by the Commission as falling within the scope of the request were: the Commission's decision requesting Malta to open an administrative inquiry; the final report on the administrative inquiry from the Maltese authorities; the Commission's evaluation of the final report, communicated to Malta; the Commission Decision establishing an action plan; correspondence between Malta and the Commission concerning identified irregularities in the control of bluefin tuna activities in Malta.

[38] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* , cited in footnote 36 above, paragraph 110.

[39] Case T-402/12 *Schlyter v Commission* , cited in footnote 30 above, paragraphs 69 and 71.

[40] Case T-402/12 *Schlyter v Commission* , cited in footnote 30 above, paragraph 74.

The case concerns requests for public access to documents related to the European Commission's investigation of an allegedly irregular shipment of live bluefin tuna in the



Mediterranean. The Commission argued that public access would undermine its investigation and the requests were therefore refused. Having analysed the issue, both on the basis of the Aarhus Convention and the EU public access rules, the Ombudsman does not consider that the Commission has given valid reasons for refusing access. She therefore recommends that the Commission grant access to the documents.

Article I. The background to the complaints

1. Bluefin tuna is an endangered species. In 2010, the complainant, Greenpeace, sent the Commission information about an allegedly irregular shipment of live bluefin tuna from Tunisia to a tuna farm in Malta [1] , which prompted the Commission to start investigating the matter. A month later, the complainant requested public access to the documents [2] relating to the Commission's investigation. The Commission refused to grant such access [3] , arguing that public access to the documents would undermine the protection of the purpose of investigations. The complainant brought this refusal to the Ombudsman's attention in complaint 803/2012/TN.

2. In 2012, the complainant again submitted a request to the Commission for access to documents concerning the matter, this time for documents which had been drawn up or received after the first request was made. The Commission rejected this request as well [4] . This led the complainant to submit another complaint (369/2013/TN) to the Ombudsman.

3. At the time of the complainant's first access request, the Commission had asked Malta to open an administrative inquiry based on Article 102(2) of the Fisheries Control Regulation [5] . The Commission can do so if it considers that irregularities have occurred in the implementation of the rules governing the common fisheries policy or that the existing control provisions and methods in particular Member States are not effective. At the time of the second access request, Malta was in the process of implementing an action plan drawn up by the Commission under Article 102(4) of the Fisheries Control Regulation. The Commission draws up such an action plan if the administrative inquiry by the Member State does not lead to a removal of the irregularities or if the Commission identifies shortcomings in the control system of the Member State in question.

Article II. The inquiry

4. The Ombudsman opened inquiries into both complaints, in which the complainant alleged that the Commission had wrongly applied Regulation 1049/2001, the Aarhus Regulation [6] and the Aarhus Convention [7] when handling and refusing the requests for access to documents containing environmental information.

5. In support of complaint 803/2012/TN, the complainant argued that:

1) The *Petrie* ruling [8] , referred to by the Commission in its decision refusing access, is not



applicable to this case because:

a. A right to confidentiality in relation to infringements of environmental law is not permissible under the Aarhus Convention and the Aarhus Regulation; and

b. The opening of infringement proceedings is remote and hypothetical;

2) The Commission wrongly denied the possibility of partial access;

3) The Commission wrongly dismissed the overriding public interest in disclosure; and

4) The Commission breached the applicable time-limits for handling the request for access.

6. In support of complaint 369/2013/TN, the complainant argued that the Commission:

5) Violated Article 4(4)(c) of the Aarhus Convention through an invalid interpretation and application of the notion of "*enquiry of criminal or disciplinary nature*" to administrative inquiries;

6) Violated Article 4(4)(a) of the Aarhus Convention through an invalid interpretation applying confidentiality beyond the scope of the applicable national law;

7) Violated Article 4 of Regulation 1049/2001 by applying the notion of "*inspection, investigation or audit*" in the context of Article 102(4) of the Fisheries Control Regulation and by referring to the impact on ICCAT [9] dealings;

8) Erroneously applied the *TGI* ruling [10] ;

9) Erroneously interpreted and applied Article 113 of the Fisheries Control Regulation;

10) Erroneously interpreted Article 102(2), in connection with the instruments in Title XI and Article 108, of the Fisheries Control Regulation; and

11) Failed to take into consideration the principle of sincere cooperation under Article 4 TEU.

7. The complainant claimed that the Commission should provide access to the requested documents without further delay.

8. In the course of the inquiries, the Ombudsman received the opinions of the Commission on the complaints and, subsequently, the comments of the complainant in response to the opinions. The Ombudsman also carried out an inspection of the Commission's file concerning case 803/2012/TN. The Ombudsman's recommendation takes into account the arguments and opinions put forward by the parties.



Article III. Alleged wrongful refusal to grant public access

Section 3.01 Arguments presented to the Ombudsman in case 803/2012/TN

(i) On the applicability of the

Petrie

judgment

9. According to the complainant, a right to confidentiality in relation to infringements of environmental law is not permissible under the Aarhus Convention or the Aarhus Regulation.

10. The complainant pointed out that the *Petrie* ruling was issued before the EU became a party to the Aarhus Convention. The *Petrie* ruling is based on the argument that confidential dialogue, rather than public scrutiny and criticism, is more likely to induce Member States to comply voluntarily with their legal obligations. The complainant argued that the Aarhus Convention establishes a different system. A key objective of the Aarhus Convention is, it stated, to allow citizens to hold public authorities to account for their enforcement of, and compliance with, environmental law.

11. The complainant went on to state that, according to case-law of the Court of Justice, "*the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements*" [11]. The complainant argued that the *Petrie* ruling "*is not sufficiently restrictive to be permissible under Article 6(1) of the Aarhus Regulation read in light of the Aarhus Convention*".

12. The complainant also argued that the opening of infringement proceedings, which, according to the Commission, could ensue as a result of the inquiry under the Fisheries Control Regulation, was, at that point in time, remote and hypothetical. According to the complainant, a request for an administrative inquiry is not, as argued by the Commission, "*a preliminary administrative stage of the infringement investigation*". Infringement proceedings against Malta were thus, at that time, a remote and hypothetical possibility.

13. The complainant referred to the Ombudsman's Draft Recommendation in case 271/2000/(IJH)JMA [12], which concerned access to reports prepared at the request of the Commission regarding compliance of two Member States with Community Directives on waste. The Draft Recommendation read as follows:

"An interpretation of the scope of 'inspections and investigations', as suggested by the Commission, could preclude public disclosure of any document held by the institution which



might be relevant for its role of guardian of the Treaty ... Accordingly, whole categories of documents whose content relates to Member States' compliance with Community law, and hence which may give factual or legal elements to the Commission in order to consider instituting infringement proceedings in the future, could be barred from public access.

It could also call into question public access to one of the most effective tools for monitoring the application of EC environmental law: the Commission and Member States' reports on the implementation of certain Directives relating to the environment. The publication and large distribution of these documents among the public have been widely praised by the Commission, even though their contents relate to the evaluation of Member States' compliance with Community law, and thus, can lead the Commission to institute infringement procedures. "

14. According to the complainant, this case raises concerns which are similar to those voiced by the Ombudsman in the Draft Recommendation referred to above. Denying the public access to a large number of documents was not the intention of the *Petrie* ruling, which concerned access to letters of formal notice and reasoned opinions only.

15. In its opinion, the Commission pointed out that, at the time of signing the Aarhus Convention, the Community annexed the following statement of interpretation: "[t] he Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention ." The Aarhus Convention is applicable to the EU institutions and bodies through the Aarhus Regulation. Articles 3 and 6 of the Aarhus Regulation are particularly relevant as regards requests for access to environmental information. Both provisions refer explicitly to Regulation 1049/2001, which constitutes the legal framework for handling all requests for public access.

16. According to the Commission, Article 6(1) of the Aarhus Regulation takes into account the specific provision of the Aarhus Convention regarding disclosure of information relating to emissions into the environment. The Commission argued, however, that this provision does not apply to the request made by the complainant. First, the documents to which access was requested do not contain information relating to emissions into the environment and, second, the 'automatic' overriding public interest does not apply to investigations, in particular those concerning possible infringements of EU law.

17. As regards the restrictive application of exceptions to public access, this is not specific to the Aarhus Regulation, but is a general principle, as the EU Courts have repeatedly stated in judgments concerning decisions taken under Regulation 1049/2001. The Commission, therefore, considered that it could validly rely on the exception to public access laid down in the third indent of Article 4(2) of Regulation 1049/2001.

18. The Commission stated that the application of the *Petrie* ruling to environmental information was confirmed by the General Court in the *LPN* ruling [13] , which concerned a request for access to environmental information contained in documents relating to infringement proceedings. The Court held that the Commission did not err in law by relying on a general



presumption that disclosure of the documents would have undermined the purpose of the investigation [14] .

19. In respect of the complainant's argument that the opening of infringement proceedings against Malta is remote and hypothetical, the Commission stated that, at the time the complainant's confirmatory application was being handled, the Commission requested the Maltese authorities to open an administrative inquiry based on Article 102(2) of the Fisheries Control Regulation, following the identification of irregularities in the control of the bluefin tuna fishery. The Maltese authorities submitted their final report on the administrative inquiry on 11 February 2011. On 12 September 2011, the Commission took a decision establishing an action plan to overcome shortcomings in the Maltese fisheries control system. At the time it submitted its opinion on complaint 803/2012/TN, the Commission was still monitoring the implementation of this action plan.

20. The Commission argued that the procedure it followed, comprising an administrative inquiry and subsequently the drawing up and monitoring of an action plan to overcome shortcomings, is very similar in nature to infringement proceedings. In both cases, the purpose of the investigation is to ensure compliance with EU law. The Commission considered that disclosure of the requested documents would have undermined the purpose of the ongoing investigation, namely, to overcome shortcomings in the fisheries control system. According to the Commission, all the documents to which access was denied concern the findings of irregularities which led to a decision requesting the Maltese authorities to open an administrative inquiry. The documents relate to the early stage of a process which, at the time, was still ongoing.

21. In its observations on the Commission's opinion, the complainant stated that, in a recent ruling [15] , the General Court underlined that "[t] he Aarhus Convention was signed by the European Community and subsequently approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124 p 1). The institutions are accordingly bound by that convention, which prevails over secondary community legislation. It follows that the validity of Regulation No 1367/2006 may be affected by the fact that it is incompatible with the Aarhus Convention " [16] . According to the complainant, the Commission is thus bound to interpret and apply the Aarhus Regulation and Regulation 1049/2001 in accordance with the Convention.

22. The complainant therefore maintained that access to environmental information may be refused only on grounds that are compatible with the Aarhus Convention. It also maintained that the Aarhus Convention does not allow environmental information to be withheld in order to resolve irregularities in the implementation of EU environmental law " amicably " and " in a climate of confidence ". This would run counter to the Aarhus Convention's objective of empowering citizens and non-governmental organisations to hold public authorities effectively to account for their enforcement of and compliance with environmental law.

23. According to the complainant, none of its arguments is affected by the *LPN* ruling. In the *LPN* ruling, the General Court did not consider the question of whether the *Petrie* ruling is compatible with the Aarhus Convention. It merely confirmed that the *Petrie* ruling is compatible



with the Aarhus Regulation. According to the complainant, the *LPN* ruling did not extend the principle laid down in the *Petrie* judgment to all documents related to an investigation. The *LPN* case, like the *Petrie* case, concerned a request for access to documents forming part of the file of ongoing infringement proceedings.

24. The complainant disagreed with the Commission's view that the procedure in relation to Malta, based on the Fisheries Control Regulation, is very similar in nature to infringement proceedings and that, as a consequence, it could likewise be presumed that disclosure of documents would undermine the purpose of the investigation.

25. The complainant noted, in this respect, that the procedure under Article 102 of the Fisheries Control Regulation is very different from infringement proceedings both in its nature and objectives. Its purpose is to resolve implementation issues in cooperation with Member States, whether they are due to failures on the part of the Member State concerned or to external challenges. No sanctions are envisaged. The procedure under Article 102 of the Fisheries Control Regulation consists of four stages. First, the Member State must provide the Commission with any relevant information it requests on the implementation of the Regulation. Second, if the Commission considers that irregularities have occurred or that the existing control provisions and methods in a Member State are not effective, it informs the Member State concerned. The Member State must then conduct an administrative inquiry in which Commission officials may participate. Third, the Member State concerned informs the Commission of the results of the inquiry and presents a report to the Commission. Finally, if the administrative inquiry does not lead to the removal of the irregularities, the Commission draws up an action plan together with the Member State. The Member State must take all necessary measures to implement the action plan.

26. The complainant considered it questionable whether any of the steps under Article 102 of the Fisheries Control Regulation, except for the second, could be considered to constitute an 'investigation' under the terms of Article 4(2) of Regulation 1049/2001, let alone an investigation analogous to infringement proceedings.

27. According to the complainant, the Commission stated that, at the time it rejected the confirmatory application, the second and third steps under Article 102 of the Fisheries Control Regulation had been completed, given that the Maltese authorities had submitted the final report of the administrative inquiry on 11 February 2011. Moreover, at the time of the complaint to the Ombudsman, the fourth and final step had also been completed, since an action plan was drawn up on 12 September 2011. The complainant thus argued that the investigative process was closed and not, as the Commission maintained, in its "*early stages*". The monitoring of Malta's implementation of the action plan cannot be considered to constitute an 'investigation'.

28. The complainant also pointed out that Malta is under a duty of sincere cooperation with the Commission as regards the implementation of the action plan. The mere circumstance that the Commission fears that Malta may breach this obligation unless there is a "*climate of confidence*" is not, in the complainant's view, a sufficient reason to depart from the general rule of openness enshrined in Article 1 of the Treaty on European Union.



(ii) On the possibility of granting partial access

29. According to the complainant, the Commission's response to its confirmatory application makes it clear that its files contain a range of documents relating to the consignment of bluefin tuna at issue. The Maltese authorities provided these documents, which include catch documentation, observer reports, pre-notifications, authorisations and commercial information.

30. The complainant pointed out that the Ombudsman has repeatedly expressed the view that the exception based on inspections and investigations should be applied to documents drawn up *in the course* of an investigation connected to an infringement proceeding only [17]. According to the complainant, the annexes to the letters sent by the Maltese authorities were clearly drawn up independently of the Commission's administrative inquiry. The Commission thus erred in finding that the documents at issue are covered by the exception in their entirety.

31. In its opinion, the Commission maintained its view that all the documents are entirely covered by the exception aimed at protecting the purpose of the investigation.

(iii) On the question whether there is an overriding public interest in disclosure

32. According to the complainant, Atlantic bluefin tuna is an ecologically and culturally important resource, which has been fished down to less than 15% of its originally abundant stocks. The EU, which takes over half of the total global catch, bears an important share of the responsibility for this state of affairs.

33. The complainant disagreed with the Commission's stance that this issue can best be solved in a confidential context. The complainant argued that high seas fish stocks are not private property, but a shared resource. The public is entitled to expect that the Member States and fishermen who have the privilege of exploiting this shared resource do so whilst respecting the conditions attached to their quota. This is all the more true as large amounts of public money are invested both in the modernisation of the vessels used and to rein in the illegal activities carried out by these vessels.

34. According to the complainant, the climate of trust which is most at risk at present is that between the European citizens on the one hand, and the Commission and infringing Member States on the other. It contended that bluefin tuna is at risk of extinction due to rampant illegal conduct. The public interest in verifying that Member States are now properly enforcing the rules, and that the Commission is credibly monitoring them, clearly outweighs any expectation of confidentiality that public authorities may have regarding suspected failures to uphold the law.

35. In its opinion, the Commission acknowledged that the protection of bluefin tuna is undoubtedly a matter of public interest. In its view, however, what has to be considered is



whether disclosure of the documents requested would serve a public interest that would outweigh the public interest in eliminating shortcomings in the fisheries control system. The Commission considered that, on balance, the public interest in ensuring a swift and full implementation of the action plan prevails.

(iv) On the applicable time limits

36. According to the complainant, the Commission substantially exceeded the prescribed time limits in dealing with both the original request for access and the confirmatory application.

37. The complainant noted that, in total, the Commission identified in its files six relevant documents, each containing a number of annexes. According to the complainant, only two of these documents, a letter conveying the complainant's communications of 20 and 21 March 2010 to the Maltese authorities, and the Maltese authorities' response, existed on 4 May 2011, that is to say, the day on which the Commission extended the initial time limit "*in view of the number of documents applied for*". According to the complainant, although the number of documents was thus very small, the Commission refused access to them, providing only perfunctory reasons. In the complainant's view, there was therefore clearly no need for an extension of the time limit.

38. In its opinion, the Commission acknowledged that there were excessive delays in its handling of both the original application for access and the confirmatory application. It apologised.

Arguments presented to the Ombudsman in case

369/2013/TN

On Article 4(4)(c) of the Aarhus Convention

39. The complainant pointed out that Article 4(4)(c) of the Aarhus Convention, as ratified by the EU, allows institutions to withhold information on investigations only if disclosure would harm "*the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature*". The complainant argued that the Commission could not qualify an administrative inquiry, based on Article 102 of the Fisheries Control Regulation, as a criminal or disciplinary investigation. As in complaint 803/2012/TN, the complainant argued that the Aarhus Regulation and Regulation 1049/2001 have to be read in light of the provisions of the Aarhus Convention, having regard to its text and its objective. The Aarhus Convention stipulates that in order to attain its objective, "*each Party shall guarantee the rights of access to information in accordance with the provisions*" of the Convention. The complainant thus contended that in this case, the Commission could not, without infringing the Aarhus Convention, rely on Article 4(2) of Regulation 1049/2001 to deny access to environmental information by claiming that disclosure would undermine the protection of the purpose of inspections, investigations and audits. By ratifying the Aarhus Convention, the EU committed itself to refuse access to environmental information only if such



access would adversely affect " *the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature* ". Consequently, the Commission should have interpreted Article 4(2) of Regulation 1049/2001 as encompassing exclusively " *inspections, investigations and audits* " taking place in the context of proceedings of a " *criminal and disciplinary nature* ". According to the complainant, this is the sole interpretation ensuring the compatibility of EU secondary legislation with the Aarhus Convention. The Commission should therefore have concluded that, since the proceedings under Article 102 of the Fisheries Control Regulation do not lead to any sort of sanction, they are not of a criminal or disciplinary nature and, therefore, do not justify any restriction of public access.

40. In its opinion, the Commission argued that, in assessing the request for access, it applied both Regulation 1049/2001 and the Aarhus Regulation which renders the Aarhus Convention applicable to the EU institutions and bodies. The Commission considered that it correctly applied Article 6(1) of the Aarhus Regulation. Furthermore, the Commission maintained its view that the documents concerned are covered by the exception to public access set out in the third indent of Article 4(2) of Regulation 1049/2001, which aims at protecting the purpose of the investigations. The Commission justified its decision by explaining in detail the procedure under the Fisheries Control Regulation. The Commission did not agree with the complainant's view that, at the time when the confirmatory decision was taken, the investigation under the Fisheries Control Regulation was no longer ongoing. In fact, the Commission considered that the investigation was still open at the time it submitted its opinion, given that it had not yet issued a final evaluation regarding Malta's compliance.

On Article 4(4)(a) of the Aarhus Convention

41. The complainant noted that, in order to further justify its refusal to grant access, the Commission pointed out that Article 4(4) of the Aarhus Convention allows refusal when the disclosure of documents " *would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided under national law* ". In this context, EU law is the 'national law' to which the provision refers.

42. According to the complainant, the drawing up and monitoring of action plans, under the Fisheries Control Regulation, is not protected as such by confidentiality. In the context of Article 102 proceedings, EU law provides for the confidentiality of *data* , but not for the confidentiality of the proceedings (and the related documents).

43. The complainant argued, in addition, that the Court of Justice has stated, in a ruling concerning Directive 2003/4 [18] which renders the Aarhus Convention applicable to Member States, that in order for this exception to be relied upon, a clear definition of 'proceedings' is necessary: " *public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in Article 4(2) of Directive 2003/4 can be invoked, which means in particular that national law must clearly establish the scope of the concept of 'proceedings' of public authorities referred to in that provision* " [19] . According to the complainant, this reasoning applies (with the necessary changes) in relation to the application of the Aarhus Convention to the EU institutions. The Commission was therefore not entitled to



base its refusal to grant access to the requested documents on Article 4(4)(a) of the Aarhus Convention.

On applying the notion of "*inspection, investigation or audit*" in Article 4 of Regulation 1049/2001 in the context of Article 102(4) of the Fisheries Control Regulation

44. The complainant considered that the Commission erred in qualifying its assessment of the implementation of the action plan, drawn up in accordance with Article 102(4) of the Fisheries Control Regulation, as an investigation for the purpose of Article 4(2) of Regulation 1049/2001.

45. According to the complainant, Article 102 of the Fisheries Control Regulation defines the basic procedure that Member States and the Commission must follow in order to ensure the correct implementation of the Common Fisheries Policy (CFP) and the effectiveness of national control provisions and methods. The procedure comprises four stages and provides the Commission and the Member States with an administrative instrument to redress irregularities that may affect the implementation of the CFP. The procedure entails (i) an exchange of information between the Member State concerned and the Commission, followed, where appropriate, by (ii) an assessment of such information and, when necessary, the launching of an "*administrative inquiry*" aimed at removing irregularities or at improving the effectiveness of the control provisions and methods in force in the Member State concerned.

46. The complainant argued that, unlike Article 258 TFEU, Article 102 of the Fisheries Control Regulation does not aim at establishing infringements of EU law, and/or the liability of the Member State concerned. Its main goal is to ensure the full achievement of the CFP objectives through the optimisation of the EU fisheries management. Indeed, should the Commission find, either on the basis of the report on the administrative inquiry or of the results of verifications and inspections, that irregularities or shortcomings persist at national level, the consequence provided for by the Fisheries Control Regulation is the drawing up of an action plan, the purpose of which is to address the irregularities or shortcomings found.

47. On this basis, the complainant considered that the Commission erred in qualifying the activities envisaged by Article 102 of the Fisheries Control Regulation as 'investigations'. It thus also erred in considering the related documents to be covered by Article 4(2) of Regulation 1049/2001. For the purpose of Article 102 of the Fisheries Control Regulation, the Commission may conduct specific investigative acts such as verifications, autonomous inspections or audits as provided for by Articles 98, 99 and 100 of the same Regulation. However, in the complainant's view, this does not justify the application of Article 4(2) of Regulation 1049/2001 to each and every administrative activity carried out under Article 102 of the Fisheries Control Regulation. On the contrary, a rigorous interpretation of Article 4(2) of Regulation 1049/2001 leads to the conclusion that it applies solely to activities that are strictly investigative.

48. The complainant considered that, in any case, even if the procedural stages leading to the drawing up of the action plan were to be qualified as investigations for the purpose of Regulation 1049/2001, it stems from the wording, structure and logic of Article 102 of the Fisheries Control Regulation that, once the Commission and the Member States have acquired



all the necessary information and drawn up the action plan, it must be considered that this investigation has been concluded and, most importantly, that its purpose has been achieved. Thus, there is no objective justification for the Commission's refusal to provide access to the documents concerned, because with the drawing up of the action plan, the administrative procedure is finalised: its outcome is that the Member State concerned becomes subject to the additional obligation of adopting all the measures that are necessary to implement the plan. The Commission will then carry out its general duty of overseeing the application of EU law on the basis of Article 17 TEU.

49. The complainant thus put forward the view that: i) the procedure in Article 102(4) of the Fisheries Control Regulation does not qualify as an inspection, investigation or audit; ii) in any case, there was no fully ongoing investigation at the moment when the Commission took its decision on the access request; and iii) the disclosure of the requested documents would not have any detrimental effect on the protection of the purpose of the administrative procedure mentioned above.

50. According to the complainant, the Commission's argument that disclosure of the documents would affect the EU's interests in relation to other ICCAT contracting parties is purely hypothetical and unrelated to the exception to public access set out in the third indent of Article 4(2) of Regulation 1049/2001.

51. In its opinion, the Commission maintained the view that the documents concerned are covered by the exception to public access set out in the third indent of Article 4(2) of Regulation 1049/2001, which aims at protecting the purpose of the investigations. The Commission again justified its decision to refuse access by explaining in detail the procedure under the Fisheries Control Regulation.

52. In addition, the Commission did not agree with the complainant that, at the time the confirmatory decision was taken, its investigation under the Fisheries Control Regulation was no longer ongoing. In fact, the Commission considered the investigation still open at the time it submitted its opinion, given that it had not yet issued a final evaluation on Malta's compliance.

53. In its observations, the complainant maintained the view put forward in its complaint that the follow-up procedure set out in Article 102 of the Fisheries Control Regulation cannot be qualified as an investigation for the purpose of applying Regulation 1049/2001. Independently from its qualification under Regulation 1049/2001, the follow-up procedure had in any case reached its goal and was concluded by means of the 'action plan' adopted by the Commission in September 2011.

54. The complainant further observed that the Commission adopted the 'action plan' on 12 September 2011. If there is an 'ongoing investigation' into Malta's compliance with the 'action plan', as the Commission argued, it is a new and different procedure from the one under Article 102 of the Fisheries Control Regulation. There is therefore no justification for the Commission to deny access to the documents that led to the adoption of the 'action plan', as the 'action plan' is a binding EU act, predating the opening of the investigation into Malta's compliance with it.



55. The complainant considered the Commission's position to be unacceptable, since it would not only limit access to the documents of an investigation, but also restrict public knowledge of Commission decisions that Member States are called to implement. The complainant argued that a decision prescribing measures to address shortcomings in a Member State's administrative system is not, by definition, an investigative act but an expression of the Commission's regulatory powers.

56. The complainant further argued that by making the unverifiable claim that an investigation is open and ongoing, the Commission is denying access to documents for an unlimited period of time, in view of an event (the opening of infringement proceedings under Article 258 TFEU or the launching of the procedures set out in Title XI of the Fisheries Control Regulation) which is uncertain and depends solely on the Commission's discretion, without any public scrutiny. According to the complainant, this is in open contrast with the transparency principle.

On the application of the *TGI* ruling [20]

57. The complainant noted that the Commission sought to apply the *TGI* ruling to the request for access by drawing a parallel between Article 102 of the Fisheries Control Regulation and state aid control. However, according to the complainant, the control mechanisms under the Fisheries Control Regulation differ significantly from state aid and infringement investigations in so far as access to documents is concerned. Chapter II of the Fisheries Control Regulation lays down rules for the protection of 'data' (not 'documents'), notably with a view to protecting individuals (Article 112) and the confidentiality of professional and commercial secrets (Article 113). Apart from these rules, the Fisheries Control Regulation does not create any legal obstacle to the disclosure of 'documents', which is governed by Regulation 1049/2001.

58. Furthermore, according to the complainant, the *TGI* ruling envisaged the possibility of relying on a general presumption that the institution may refuse access to a certain category of documents, but construed this presumption narrowly. In the context of infringement proceedings based on Article 258 TFEU, that presumption applies only when an investigation is effectively opened and, therefore, a Member State's right of defence is called into question. The complainant considered that the Commission could not validly claim that, at the time of refusing access, an investigation procedure was open and ongoing under the Fisheries Control Regulation. The Commission and Malta had already drawn up the action plan and the Member State was simply obliged to implement it. The Fisheries Control Regulation does not open any window for further negotiations on the content of the plan. It simply requires national administrations to ensure compliance therewith.

59. Consequently, Malta could not claim that such compliance depended on the condition that third parties be prevented from accessing the file. Neither could it be claimed, at that stage of the procedure, that granting access to the requested documents would have affected a Member State's procedural rights. Such rights would have come into play only if the Commission had opened infringement proceedings under Article 258 TFEU or one of the administrative proceedings which, under the Fisheries Control Regulation, may lead to a limitation of a



Member State's capacity to exploit its stocks. The complainant therefore argued that the Commission erred in law when it considered that it could rely on a general presumption that all the documents concerned were covered by the exemption to access laid down in Article 4(2) of Regulation 1049/2001.

On the interpretation and application of Article 113 of the Fisheries Control Regulation

60. The complainant maintained that the Commission was not entitled to refuse access to the requested documents, unless they contained some of the data listed in Article 113 of the Fisheries Control Regulation. Furthermore, when applying Article 113(1) and (2) of the Fisheries Control Regulation, the Commission should have clearly stated which rules on professional and commercial secrecy were specifically applicable and why the communication of certain data would have infringed those rules. In any case, as stipulated in Article 4(6) of Regulation 1049/2001, the Commission had the duty to provide access to a redacted version of the documents, removing all confidential data.

61. Concerning the application of Article 113(4) of the Fisheries Control Regulation, the complainant argued that its scope is not as wide as was argued by the Commission. The relevant confidentiality rule applies only to the communication of data, to the extent that disclosure would undermine the scope of inspections or investigations. In addition, even if the Commission were right in qualifying the proceedings as an 'investigation', it could not have relied on Article 113(4) of the Fisheries Control Regulation. The proceedings were closed at the time when the Commission refused access to the documents. Thus, disclosure could not have undermined their scope.

62. In its opinion, the Commission stated that in its decision refusing access, it had also analysed the possibility of granting partial access and the possible overriding public interest in disclosure, as required by established case-law.

On the interpretation of Article 102(2), in connection with the instruments in Title XI and Article 108, of the Fisheries Control Regulation

63. In its decision refusing access, the Commission stated that, in the event that the cooperative compliance tools under the Fisheries Control Regulation did not result in Malta definitively and voluntarily remedying its compliance failure, the Commission could make use of the instruments listed under title XI, such as the cancellation of financial assistance or the closure of fisheries, and the emergency measures provided for in Article 108.

64. The complainant argued that these measures follow a decision-making process which is separate and distinct from that envisaged by Article 102 of the Fisheries Control Regulation. The measures referred to by the Commission are not envisaged as sanctions for a failure to implement an action plan drawn up under Article 102, but may be imposed following separate proceedings which were not open at the time when the Commission refused access to the documents concerned. At the time of refusing access, the Commission's activities were limited to monitoring the implementation of the action plan.



65. In any case, the complainant argued, the documents to which it had requested access belonged to another administrative procedure, which had been closed. In addition, the Commission failed to explain how disclosure of the action plan would affect Malta's correct implementation of the plan.

On the principle of sincere cooperation under Article 4 TEU

66. According to the complainant, Member States are bound by a duty of sincere cooperation which requires them to comply with EU legislation fully and unconditionally. Accordingly, Malta's obligation to comply with the action plan drawn up by the Commission cannot be dependent on confidentiality. Nor can it be suspended in reaction to third parties' access to documents. The complainant strongly believed that public scrutiny is not an obstacle to full implementation of EU law but on the contrary, in a Union based on the rule of law and the principle of transparency, public scrutiny helps to ensure compliance with the law.

67 . In its observations, the complainant added that the Commission is relying on the exception relating to investigations with a view to creating and maintaining " *a bilateral framework of confidence and trust* " with Malta, based on the assumption that this would encourage compliance with the common fisheries policy. Nevertheless, as a matter of fact, over two years after the adoption of the 'action plan', the Commission was still unable to ensure that Malta was complying with the Fisheries Control Regulation.

68 . The complainant contended that this long delay, without evidence of improvements in Malta's implementation of EU law, calls into question the validity of the Commission's approach and supports the complainant's view that, in a modern democracy, transparency and accountability are essential to ensuring that public authorities are under pressure to fully respect the law.

On the *ClientEarth* ruling

69 . In its observations, the complainant stated that it is aware that the *ClientEarth* [21] ruling might have an impact on the Ombudsman's decision in this case. The complainant pointed out, however, that the case is under appeal. In any case, the facts of the present case differ significantly from those in the *ClientEarth* case. *ClientEarth* had sought access to a number of studies that the Commission had required in order to assess Member States' compliance with EU environmental legislation. The complainant has requested access to the 'action plan' and to the documents that justified its adoption, not to documents related to the assessment of Malta's compliance with the 'action plan'.

Section 3.02 The Ombudsman's assessment leading to her recommendation

70 . The assessment begins with (i) the question of the delays by the Commission in handling



the complainant's requests. Next, the assessment considers (ii) the possible relevance of Article 113 of the Fisheries Control Regulation to the requests. The main parts of the assessment deal with (iii) the relationship between EU public access rules and the Aarhus Convention and (iv) the interpretation and application of the relevant rules to the specific documents in question. Under (iii), the Ombudsman examines, in particular, the relevant case-law of the EU Courts concerning infringement proceedings. The Ombudsman finds that this case-law does not apply to the procedure under Article 102 of the Fisheries Control Regulation. Under (iv), the Ombudsman finds that, regardless of whether the Article 102 procedure constitutes an 'investigation' for the purposes of the third indent of Article 4(2) of Regulation 1049/2001, the Commission has not provided adequate reasons to justify its refusal to grant public access to the documents in question.

Delays

71. The Ombudsman notes that the Commission has acknowledged and apologised for the excessive delays incurred in dealing with the requests for access. The Ombudsman therefore considers this aspect to be resolved.

Article 113 of the Fisheries Control Regulation

72. Article 113 of the Fisheries Control Regulation reads as follow:

" 1. Member States and the Commission shall take all necessary steps to ensure that the data collected and received within the framework of this Regulation shall be treated in accordance with applicable rules on professional and commercial secrecy of data.

2. The data exchanged between Member States and the Commission shall not be transmitted to persons other than those in Member States or Community institutions whose functions require them to have such access unless the Member States transmitting the data give their express consent.

3. The data referred to in paragraph 1 shall not be used for any purpose other than that provided for in this Regulation unless the authorities providing the data give their express consent for the use of the data for other purposes and on condition that the provisions in force in the Member State of the authority receiving the data do not prohibit such use.

4. Data communicated in the framework of this Regulation to persons working for competent authorities, courts, other public authorities and the Commission or the body designated by it, the disclosure of which would undermine:

(a) the protection of the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;

(b) the commercial interests of a natural or legal person, including intellectual property;



(c) court proceedings and legal advice; or

(d) the scope of inspections or investigations;

shall be subject to applicable rules on confidentiality. Information may always be disclosed if this is necessary to bring about the cessation or prohibition of an infringement of the rules of the common fisheries policy.

5. The data referred to in paragraph 1 shall benefit from the same protection as is accorded to similar data by the national legislation of Member State receiving them and by the corresponding provisions applicable to Community institutions.

6. This Article shall not be construed as an obstacle to the use of the data, obtained pursuant to this Regulation, in the framework of legal actions or proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy. The competent authorities of the Member State transmitting the data shall be informed of all the instances where those data are utilised for these purposes.

7. This Article shall not prejudice the obligations pursuant to international conventions concerning mutual assistance in criminal matters. "

73. In the Ombudsman's view, the wording and structure of Article 113 of the Fisheries Control Regulation show that it is intended to complement, and not replace, the provisions of Regulation 1049/2001 as regards the fundamental right of access to documents held by EU institutions. The first three paragraphs of the Article regulate the use that the Member States and the Commission can make of specific kinds of information ("data") obtained and exchanged among them " *within the framework of the Regulation* ". The fourth paragraph of the Article, which aims to ensure the secure handling of such data, clearly draws inspiration from the exceptions to public access envisaged by Regulation 1049/2001. Together with the fifth paragraph, it seeks to ensure that the relevant interests protected by Regulation 1049/2001 in the context of requests for access to documents held by the Commission and other EU bodies are not harmed by the relaying of data between the persons and authorities involved in implementing the Fisheries Control Regulation. Article 113 thus assumes rather than excludes, the application of Regulation 1049/2001 to requests addressed to the Commission for public access to documents containing data obtained under the Fisheries Control Regulation.

EU public access rules and the Aarhus Convention

74 . In the complainant's view, its requests for access should have been assessed on the basis of the Aarhus Convention, to which the EU is a party. The complainant argued that the EU public access rules that the Commission applied to its requests for access are not in conformity with the Aarhus Convention.

75. Regulation 1367/2006 ("the Aarhus Regulation") lays down rules for applying the provisions of the Aarhus Convention to the EU institutions. The Aarhus Regulation provides that



Regulation 1049/2001 shall apply to requests for access to environmental information held by the EU institutions [22] , subject to certain special provisions contained in section 6(1) of the Aarhus Regulation as regards the exceptions to access laid down in Article 4 of Regulation 1049/2001.

76 . As an EU institution, the Commission must follow the case-law of the EU Courts as regards the relationship between EU law and the Aarhus Convention. The Ombudsman notes, in particular, the judgment of the General Court in *ClientEarth* [23] and of the Court of Justice in *LPN and Finland* [24] . Even though it is true, as the complainant points out, that the *ClientEarth* judgment is under appeal, the Commission must apply the General Court's judgment pending the judgment of the Court of Justice on the appeal.

77 . The applicant in *ClientEarth* argued that the Aarhus Convention does not allow any exception to the right of access to documents intended to protect the purpose of investigations other than those of a criminal or disciplinary nature (Article 4(4)(c) of the Convention). In its judgment in that case, the General Court assessed whether EU access rules, as set out in Regulation 1049/2001 and the Aarhus Regulation, infringed Article 4(1), (2) and (4) of the Aarhus Convention.

78 . In *ClientEarth* , the General Court found that the Aarhus Convention does not prevent the European Union legislature from providing for an exception to the principle of access to the documents of the institutions relating to the environment where those documents pertain to infringement proceedings, which form part of the constitutional mechanisms of European Union law, as established by the Treaties. The Court pointed out that the Aarhus Convention, and in particular Article 4(4)(c) thereof, was manifestly designed to be applicable principally to the authorities of the States which are contracting parties thereto and uses concepts appropriate to them, as is apparent from the reference to the framework of national legislation in Article 4(1) thereof. On the other hand, the Convention does not take into account the specific features which are characteristic of institutions of regional economic integration, which may nonetheless accede to the Convention. The Court considered that it would be illogical if the Aarhus Convention were to provide for exceptions for the benefit of some contracting parties, namely the States, while precluding the application of similar exceptions by other contracting parties, namely, institutions of regional economic integration, which include the European Union for the purposes of that Convention.

79 . In *LPN and Finland v Commission* , the Court of Justice found that the manner in which the two sentences of Article 6(1) of the Aarhus Regulation are drafted and their structure indicate clearly the express intention of the legislature to remove infringement procedures from the scope of Article 6(1) of the Aarhus Regulation as a whole.

80 . When it comes to the application of the third indent of Article 4(2) of Regulation 1049/2001, the relevant case-law of the EU courts provides, in principle, for less extensive public access to documents related to *infringement proceedings* [25] . The case-law lays down that the Member State should be entitled to expect the Commission to observe confidentiality during the stage of the initial investigation of a possible breach of EU law (which may lead the Commission to



initiate formal infringement procedures), given that the aim of such an initial investigation is for the Member State to comply voluntarily with EU law through negotiations with the Commission [26] . In respect of *infringement proceedings* , the case-law also allows for a general presumption that disclosure of the documents in the administrative file would, in principle, undermine the protection of the purpose of the investigation [27] .

81 . The Ombudsman draws two conclusions from the above-mentioned case-law of the EU courts. First, nothing in that case-law suggests that the fact that the Commission assessed the complainant's requests for access on the basis of Regulation 1049/2001 and the exceptions contained therein constituted an instance of maladministration. Second, in order to ascertain whether the Commission applied Regulation 1049/2001 correctly to the complainant's requests, it is important to determine whether the documents in question relate to infringement proceedings , given the relatively wide exemption from disclosure that the case-law of the EU courts affords to such documents.

82. According to the Commission, investigations under Article 102 of the Fisheries Control Regulation are very similar to infringement proceedings. In the Commission's view, the investigations under Article 102 require a climate of trust in order to ensure constructive cooperation with the Member States, aiming at their voluntary compliance with EU law on fisheries.

83. The Ombudsman notes, however, that the way in which Article 113(6) of the Fisheries Control Regulation is formulated, referring to "*proceedings subsequently undertaken for failure to respect the rules of the common fisheries policy* ", unambiguously indicates that opening infringement proceedings is a possible subsequent, but clearly separate, measure. Given that it would not make any sense to take the same kind of measures twice, the procedures set out in the Fisheries Control Regulation must reasonably and logically be different from infringement proceedings.

84. More specifically, the Ombudsman understands that the procedure under Article 102 of the Fisheries Control Regulation has the specific aim of obliging Member States to comply with common fisheries policy objectives, that is, the conservation and management of fisheries resources. The manner in which this purpose is to be achieved is not the same under the Fisheries Control Regulation and in the context of infringement proceedings. Article 102 of the Fisheries Control Regulation sets out a detailed, step-by-step procedure for assessing and addressing irregularities. In addition, if the procedure under Article 102 of the Fisheries Control Regulation ends with an action plan, such a plan must reasonably be very detailed as regards what needs to be done, in what manner and within what time frame. In the Ombudsman's view, although the procedure under Article 102 of the Fisheries Control Regulation is clearly based on cooperation between the Commission and the Member State concerned, the detailed procedure provided for therein leaves much less room for discretion and political negotiations , during which a climate of confidence could be instrumental to reaching a solution, than in cases of infringement proceedings. In other words, and most importantly, Article 102 of the Fisheries Control Regulation clearly obliges the Member State concerned to cooperate and such cooperation is not contingent on the Member States' willingness to cooperate [28] .



85. The Ombudsman notes, furthermore, that the Fisheries Control Regulation gives the Commission investigatory powers that are similar to those of state authorities, given that the Commission officials are expressly empowered to carry out inspections on the ground in the Member States [29] .

86. For these reasons, the Ombudsman considers that the case-law of the EU Courts relating to the application of the third indent of Article 4(2) of Regulation 1049/2001 to the special case of documents relating to infringement proceedings is not relevant to the documents in the present case. In particular, the reasoning of the General Court in the *ClientEarth* ruling, which was based on the peculiarities of the institutions of regional economic integration, does not apply to this case. The Member State concerned is thus not automatically entitled to expect the Commission to observe confidentiality during the procedure under the Fisheries Control Regulation and there is no general presumption that disclosure of documents would undermine the protection of the purpose of the procedure under Article 102 of the Regulation.

The interpretation and application of the relevant rules to the specific documents in question

87. Article 102 of the Fisheries Control Regulation (entitled "Follow-up of verification, autonomous inspection and audit reports") reads as follows:

" 1. Member States shall provide the Commission with any relevant information as that [sic] may request on the implementation of this Regulation. In submitting a request for information, the Commission shall specify a reasonable time limit within which the information is to be supplied.

2. If the Commission considers that irregularities have occurred in the implementation of the rules of the common fisheries policy or that the existing control provisions and methods in particular Member States are not effective it shall inform the Member States concerned, which shall then conduct an administrative inquiry in which Commission officials may participate.

3. The Member States concerned shall inform the Commission of the results of the inquiry and forward a report to the Commission drawn up not more than three months after the Commission's request. This period may be extended by the Commission, on a duly reasoned request from the Member State, for a reasonable delay.

4. If the administrative inquiry referred to in paragraph 2 does not lead to the removal of the irregularities or if the Commission identifies shortcomings in the control system of a Member State during the verifications or autonomous inspections referred to in Articles 98 and 99 or in the audit referred to in Article 100, the Commission shall establish an action plan with that Member State. The Member State shall take all necessary measures to implement that action plan. "

88. According to Article 4(4)(c) of the Aarhus Convention, a request for environmental information may be refused if disclosure would adversely affect the ability of a public authority to



conduct an inquiry of a criminal or disciplinary nature . The Ombudsman does not consider the procedure undertaken by the Commission under the Fisheries Control Regulation to be of a criminal or disciplinary nature, given that the Commission will not, in the event of non-compliance, impose sanctions [30] but conservation measures [31] .

89. On the basis of the above, the Ombudsman considers that the third indent of Article 4(2) of Regulation 1049/2001, interpreted in light of Article 4(4)(c) of the Aarhus Convention, cannot be relied upon to refuse access to the environmental information at issue in this case.

90. As will be shown in the following paragraphs, the Ombudsman considers that the result of her examination would be the same even if, contrary to the analysis above, the procedure under Article 102 of the Fisheries Control Regulation is considered to constitute an 'investigation' falling within the third indent of Article 4(2) of Regulation 1049/2001.

91 . In principle, all documents of the EU institutions should be accessible to the public [32] . Any exception to the right of access must be interpreted and applied strictly. The risk of the protected interest concerned being undermined must be reasonably foreseeable and not purely hypothetical [33] . The fact that a document concerns an 'investigation' within the meaning of the third indent of Article 4(2) of Regulation 1049/2001 cannot by itself justify the application of that exception, since the exception applies only if disclosure of the documents concerned would endanger the completion of investigations [34] .

The first access request

92. The Ombudsman notes that at the time of the complainant's first request for access, the Commission had asked Malta to open an administrative inquiry [35] . The Commission made its request by means of Commission Decision C(2010)7791 of 12 November 2010, informing Malta of identified irregularities in the control of activities and requesting it to open an administrative inquiry based on Article 102(2) of Council Regulation (EC) No 1224/2009. The investigation activities were thus, in the Ombudsman's view, not yet completed at that point in time.

93. However, the fact that the investigation was still ongoing does not necessarily imply that its completion would be endangered by public access to related documents . The Ombudsman considers that the documents listed by the Commission as falling within the scope of the request must logically contain primarily facts, such as existing licences, quantities of fish caught, transferred, caged and so on, as well as information on procedures. The next step towards completion of the investigation would be the Maltese authorities' report on the administrative inquiry, and the Commission's subsequent evaluation of that report. Such a report and subsequent evaluation would, again, logically contain primarily facts and conclusions reached on the basis of those facts, with little room for discretion and negotiations (if any).

94. It should be noted in this regard that, under Article 102 of the Fisheries Control Regulation, the Member State concerned is *obliged* to conduct an administrative inquiry if such an inquiry is requested by the Commission and the Member State is *obliged* to inform the Commission of the results of the inquiry. In contrast with infringement proceedings, as regards a legal



instrument that *requires* Member States to cooperate with the Commission, the General Court has ruled that such cooperation is not contingent on the Member State's willingness to cooperate [36] . The Ombudsman therefore does not agree with the Commission's view, which in substance is that the procedure under Article 102 of the Fisheries Control Regulation requires secrecy in order to obtain the Member States' voluntary cooperation and that disclosure of related documents would thus harm its purpose.

95. On the basis of the above, the Ombudsman considers that the Commission has not provided a convincing explanation as to how disclosure of the documents supporting the request for an administrative inquiry would, at that stage, endanger the completion of the investigation activities. This conclusion is without prejudice to the possible obligation to refuse access to certain data contained in these documents, in application of other exceptions provided for by Article 4 of the Aarhus Convention and contained in Article 4 of Regulation 1049/2001.

The second access request

96. At the time of the second access request, Malta was in the process of implementing the action plan that had been drawn up following the administrative inquiry [37] . Given that such an action plan contains deadlines for addressing listed issues, it is clear that its implementation must be monitored by the Commission. The Ombudsman therefore considers it reasonable to consider that the investigation was still ongoing at that point in time also [38] . Again, however, the fact that the investigation was still ongoing does not necessarily imply that its completion would be endangered by public access to related documents. The action plan must logically be based on earlier findings of fact (see paragraph 93 above). Such facts may possibly be embarrassing for the Member State concerned. This is not, however, a valid reason for not disclosing them. In addition, the nature of the action plan, which contains deadlines for addressing identified issues, would appear to give the Member State even less leeway than it may have had at earlier stages of the investigation.

97. Again, under Article 102 of the Fisheries Control Regulation, the Member State concerned is obliged to implement the established action plan. The Member State's cooperation in this regard is not contingent on its willingness to cooperate [39] .

98 . The Ombudsman, therefore, cannot see how disclosure of the action plan itself could possibly jeopardise the purpose of the Article 102 procedure undertaken by the Commission, which is to ensure Malta's compliance with the rules on fisheries. Nor has the Commission provided a convincing explanation as to how disclosure of the documents leading to the action plan would, at that stage, endanger the completion of the procedure. On the contrary, one may reasonably suppose that public disclosure of documents related to the procedure could actually favour or facilitate compliance with EU law and policy of fisheries through the robust involvement of public opinion and civil society. The Ombudsman is reinforced in this view by the finding of the General Court in *Schlyter v Commission* that making the action plan public would rather act as an incentive for it to be given due consideration by the Member State concerned, given that any departure from that action plan would have to be explained by that Member State



[40] .

99. The Ombudsman therefore considers that regardless of whether the procedure under Article 102 of the Fisheries Control Regulation is considered to constitute an "enquiry of a criminal or disciplinary nature" according to Article 4(4)(c) of the Aarhus Convention or an "investigation" for the purposes of the third indent of Article 4(2) of Regulation 1049/2001, the Commission has failed to justify its refusal to give public access to the documents requested by the complainant. This conclusion is without prejudice to the possible obligation to refuse access to certain data contained in these documents, in application of other exceptions provided for by Article 4 of the Aarhus Convention and contained in Article 4 of Regulation 1049/2001.

100. The Ombudsman will therefore recommend to the Commission that it grant access to the documents concerned, in particular the action plan, or that it provide valid reasons for not doing so.

Article IV. The recommendation

On the basis of the inquiry into these complaints, the Ombudsman makes the following recommendation to the Commission:

The Commission should grant access to the requested documents, in particular the action plan, or provide valid reasons for not doing so.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, the Commission shall send a detailed opinion by 30 September 2015. The detailed opinion could consist of the acceptance of the draft recommendation and a description of how it has been implemented.

Strasbourg, 30/06/2015

Emily O'Reilly

European Ombudsman

[1] As tuna cannot be bred in captivity, wild tuna are captured, caged and then towed to tuna farms where they are fattened for slaughter.

[2] 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.

[3] On the basis of the third indent of Article 4(2) of Regulation 1049/2001, which lays down that



access to a document shall be refused where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

[4] Again on the basis of the third indent of Article 4(2) of Regulation 1049/2001.

[5] Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, OJ 2009 L 343, p. 1.

[6] Regulation (EC) No 1367/2006 of the European Parliament and 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, OJ 2006 L 264, p. 13.

[7] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [Link]

[8] Case T-191/99 *David Petrie and others v Commission* [2001] ECR II-3677.

[9] ICCAT, the International Commission for the Conservation of Atlantic Tunas, is an inter-governmental fishery organisation responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and its adjacent seas. See: www.iccat.int [Link]

[10] C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885.

[11] Case C-286/02 *Bellio F.Ili Srl v Prefettura di Treviso* [2004] ECR I-3465, paragraph 33; Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52.

[12] Paragraph 2.6.

[13] Case T-29/08 *Liga para Protecção da Natureza (LPN) v European Commission* [2011] ECR II-6021.

[14] *Ibid*, in particular, paragraphs 113 to 120.

[15] Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission*, judgment of 14 June 2012, not yet published in the ECR.

[16] *Ibid*, paragraph 52.

[17] Decision of the European Ombudsman on complaints 271/2000/(IJH)JMA and 277/2000/(IJH)JMA against the European Commission, paragraph 2.7; Decision of the



European Ombudsman on complaint 790/2003/GG against the European Commission, paragraph 1.4; and Decision of the European Ombudsman on complaint 2290/2004/IP against the European Commission, paragraph 2.11, all available at:

<http://www.ombudsman.europa.eu/en/cases/home.faces> [Link]

[18] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, OJ 2003 L 41, p. 26.

[19] Case C-204/09 *Flachglas Torgau GmbH v Germany*, judgment of 14 February 2012, not yet published in the ECR, paragraph 63.

[20] Case C-139/07 P *Commission v Technische Glaswerke Ilmenau*, cited in footnote 11 above.

[21] Case T-111/11 *ClientEarth v Commission*, judgment of 13 September 2013, not yet published in the ECR.

[22] Recital 15 of the Preamble to, and Article 3 of, the Aarhus Regulation.

[23] Case T-111/11, *ClientEarth v Commission*, cited in footnote 22 above, paragraphs 91-99.

[24] Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, judgment of 14 November 2013, not yet published in the ECR, paragraph 65.

[25] See, for example, Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, cited in footnote 26 above, paragraph 55.

[26] Case T-36/04 *API v Commission* [2007] ECR II-3201, paragraph 120-121, and case-law cited therein.

[27] Joined Cases C-514/11 P and C-605/11 P *LPN and Finland v Commission*, cited in footnote 26 above, paragraph 65.

[28] See Case T-402/12 *Schlyter v Commission*, judgment of 16 April 2015, not yet published in the ECR, paragraphs 69 and 71.

[29] See Articles 96-100 of the Fisheries Control Regulation, cited in footnote 6 above.

[30] Sanctions can, however, be imposed by the Member States:
http://ec.europa.eu/fisheries/cfp/control/infringements_sanctions/index_en.htm

[31] The conservation of fisheries resources is explicitly referred to in many of the Articles found in Title XI of the Fisheries Control Regulation, which lays down measures to ensure compliance by Member States with common fisheries policy objectives.



[32] Recital 11 of the preamble to Regulation 1049/2001.

[33] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraphs 43 and 63.

[34] See, to that effect, Joined Cases T-391/03 and T-70/04 *Franchet and Byk* [2006] ECR II-2023, paragraphs 105 and 109.

[35] Among the documents identified by the Commission as falling within the scope of the request were: a letter of 15 April 2010 from the Commission addressed to the Maltese authorities following Greenpeace's reports; the reply from the Maltese authorities, dated 28 April 2010, including annexes such as bluefin tuna catch documents, observer reports from Tunisia and Malta, inspection reports for vessels Aretuza and Leovita; letter dated 14 June 2010 from the Commission to the Maltese authorities pointing out inconsistencies in the provided documents; e-mail from the Maltese authorities requesting an extension of the deadline for replying to the Commission's letter; reply of 21 June 2010 from the Maltese authorities, including annexes such as authorisation from Tunisia, Malta inspection report on bluefin tuna transfer from vessels Mohsen and Alexandre to vessels Leovito and Aretuza, ICCAT transfer declarations between catching vessels and tugs to farm in Tunisia, caging declarations for caging in Malta, Malta inspection reports for Aretuza and Leovito, observers' reports from the bluefin tuna harvest on 7 and 8 April 2010, observations from the operator; e-mail exchange on 10 June 2010 between the Commission and the ICCAT Secretariat on the authorisation status of the vessel Mohsen and Alexandre.

[36] Case T-402/12 *Schlyter v Commission* , cited in footnote 30 above, paragraphs 69 and 71.

[37] Among the documents identified by the Commission as falling within the scope of the request were: the Commission's decision requesting Malta to open an administrative inquiry; the final report on the administrative inquiry from the Maltese authorities; the Commission's evaluation of the final report, communicated to Malta; the Commission Decision establishing an action plan; correspondence between Malta and the Commission concerning identified irregularities in the control of bluefin tuna activities in Malta.

[38] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* , cited in footnote 36 above, paragraph 110.

[39] Case T-402/12 *Schlyter v Commission* , cited in footnote 30 above, paragraphs 69 and 71.

[40] Case T-402/12 *Schlyter v Commission* , cited in footnote 30 above, paragraph 74.