



Deċiżjoni fil-każ 865/2008/OV - Allegazzjoni ta' żball amministrattiv li jikkonċerna l-kwoti tas-sajd għall-Punent tal-Iskozja

Deċiżjoni

Każ 865/2008/OV - Miftuħa fil- 09/04/2008 - Rakkomandazzjoni dwar 16/02/2009 - Deċiżjoni fil- 15/01/2010

Sabiex tiġi protetta s-sostenibbiltà tal-industrija tas-sajd fl-UE, il-legiżlatur tal-UE jista' jadotta miżuri biex jillimita l-isforzi tas-sajd f'kull parti tal-UE. Fir-Regolament tal-Kunsill, l-iffissar tan-numru ta' ġranet tas-sajd fl-ibħra tal-Komunità għas-sena 2007, in-numru ta' ġranet allokat għal kategorija speċifika ta' bastimenti li jistadu fil-Punent tal-Iskozja tnaqqas b'10% - minn 280 jum fl-2006 għal 252 jum. Bħala riżultat, l-Assoċjazzjoni Clyde Fishermen, li tirrappreżenta s-sajjieda fiż-żona kkonċernata, irrikorriet għall-għajjuna tal-Ombudsman. Il-kwerelanta allegat li t-tnaqqis imsemmi kien ir-riżultat ta' żball amministrattiv imwettaq mill-Kummissjoni Ewropea fin-'Non-Paper' li fformat il-baži tad-diskussjonijiet fir-rigward ta' din il-kwistjoni fil-Kunsill. Skont il-kwerelanta, il-Kummissjoni żbaljat meta skambjat il-kolonna rilevanti li jikkonċernaw il-Punent tal-Iskozja u l-Baħar tat-Tramuntana f'tabella li tistabbilixxi t-tnaqqis propost.

Fl-opinjoni tagħha, il-Kummissjoni sostniet li t-tnaqqis imsemmi kien diskuss u approvat mill-Istati Membri u ma kien irriżulta ebda żball amministrattiv.

Wara eżaminazzjoni mill-qrib tan-"Non-Paper", l-Ombudsman sab li, għalkemm it-tabella msemmija kienet tinkludi proposta għat-tnaqqis tal-ġranet tas-sajd għall-Punent tal-Iskozja, l-ispjegazzjonijiet mogħtija fin-"Non-Paper" ma kienu jipprevedu ebda tnaqqis bħal dan. L-Ombudsman b'hekk ikkonkluda li fil-fatt kien irriżulta żball amministrattiv. Għalhekk, huwa għamel abbozz ta' rakkomandazzjoni lill-Kummissjoni, fejn stedinha tirrikonoxxi l-iżball u, safejn kien għadu possibbli, tieġu miżuri korrettivi.

Il-Kummissjoni rrifjutat l-abbozz tar-rakkomandazzjoni. Hija tenniet l-argument tagħha li l-proposta rilevanti kienet saret b'mod maħsub u kienet ibbażata fuq evidenza xjentifika li wriet li l-merluzz fil-Punent tal-Iskozja kien jinsab fi stat kritiku. Il-Kummissjoni qalet ukoll li n-"Non-Paper" ma kinitx rilevanti, minħabba li kienet sostitwita mill-proposta formali tagħha għar-Regolament tal-Kunsill. Barra minn hekk, anki li kieku rriżulta xi żball, ma jibqax possibbli li jittieġdu miżuri korrettivi.

Fid-deċiżjoni tiegħu, l-Ombudsman irrimarka li l-fatt li n-"Non-Paper" kienet issostitwita mill-proposta legiżlattiva formali tal-Kummissjoni ma kienx jimplika li ma kienx għad hemm f'tieġa li tiġi eżaminata l-amministrazzjoni hażina possibbli fir-rigward tan-"Non-Paper".



L-Ombudsman sab ukoll li l-evidenza disponibbli wriet li l-korpi esperti kienu rrakkomandaw li ma jinqabadx merluzz fl-2007 kemm fil-Punent tal-Iskozja kif ukoll fil-Baħar tat-Tramuntana. Madankollu, in-'Non-Paper' tal-Kummissjoni għażlet li ma tmurx għal projbizzjoni totali, iżda pproponiet li għandu jsir tnaqqis fir-rigward tal-flotot li huma responsabbli għall-akbar impatt fuq l-istokkijiet tal-merluzz. Fir-rigward tal-Punent tal-Iskozja, il-Kummissjoni kkunsidrat li dan kien japplika għal daww il-flotot li huma responsabbli għal aktar minn 50 tunnellata ta' qabdi ta' merluzz. Madankollu, il-kategorija tal-bastimenti kkonċernati mill-każ preżenti ma kinitx tidher li taqa' f'dak il-grupp. Għalhekk, l-Ombudsman ikkonferma l-fehma tiegħu li kien jidher li sar żball amministrattiv. Minħabba li l-argumenti tal-Kummissjoni li jikkonċernaw in-nuqqas ta' possibbiltà li tittieħed azzjoni rimedjali kienu jidhru li huma raġonevoli, l-Ombudsman għalaq il-każ b'rimarka kritika.

THE BACKGROUND TO THE COMPLAINT

1. The present complaint was submitted by a fishermen's association based in Scotland. At the time of the complaint's submission, the association had 68 members, all of which own fishing vessels and the majority of which are based in south-west Scotland.
2. In December 2002, the Council adopted, as part of the EU's annual fishing plan for 2003, a sub-plan whose objective was to restore healthy and sustainable stocks of cod in areas including the West of Scotland and the North Sea. This sub-plan was entitled the Cod Recovery Plan (CRP) and aimed to reduce the number of allocated fishing days for certain groups of vessels. The limitations of fishing activity are reviewed each year by the Council, on the basis of a proposal submitted by the Commission. Fishing areas in the West of Scotland have been covered by such limitations since 2003.
3. The category to which the present complaint relates concerns fishing vessels which use a type of fishing gear called a demersal trawl. The operative mesh size of the net used for such a trawl is between 70 and 90 mm. According to the fishing track records reported during 2002, such vessels had a catch in which cod, plaice and sole represented less than 5 % of the total landed. In official documents, this category of vessels is referred to as '4.a.ii/8.1.d'.
4. For the year 2006, table I ('Maximum days a vessel may be present in 2006 within an area by fishing gear') of Annex IIA to Council Regulation 51/2006 [1] allocated 280 fishing days to this category of vessels operating in either the West of Scotland or the North Sea. In the relevant table, the West of Scotland allocation is found in column 2.d, whereas the equivalent North Sea allocation is found in column 2.b-2. For the year 2007, Annex IIA to Council Regulation 41/2007 [2] reduced the fishing days for this category of vessels to 252 (10 % less than in 2006) as regards the West of Scotland. In contrast, the number of fishing days for the North Sea remained at 280 days.
5. The Commission had originally suggested a 25 % cut in fishing days. This proposal was based on an evaluation of the number of cod catches reported by each Member State. The said evaluation was carried out by the Scientific, Technical and Economic Committee for Fisheries (STECF).
6. On 23 November 2006, during a meeting of the Council Working Group dedicated to



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

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

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

9. Finally, within the framework of a *third compromise*, the Commission agreed to apply a reduction rate of only 10 % to devices falling within the 4.a.ii/8.1.d category. Consequently, it was envisaged in Council document 17046/06 to limit the fishing activity of vessels falling within this category to 252 fishing days. This figure is reflected in table 1 of Annex IIA to Regulation 41/2007, which was adopted by the Council on 21 December 2006. In January 2007, the Scottish Administration informed the complainant of the Council meeting's outcome. However, no clarifications were given regarding the reduction in fishing days for category 4.a.ii/8.1.d.

10. The complainant, which was unhappy about this change, wrote to the Scottish Administration in January 2007. The latter replied by providing the complainant with a copy of the Commission's Non-Paper No 3. As regards the calculation contained in that document, the Scottish Administration expressed the view that an error had been made. More particularly, it pointed out that the figures for the 4.a.ii/8.1.d category of vessels in columns 2.b (namely 280 fishing days) and 2.d (252 fishing days) of Table I of Annex IIA to Regulation



41/2007 should have been interchanged and that this error was not noticed during the final negotiations at the relevant Council meeting in December 2006. The Scottish Administration further pointed out that the same error occurred in relation to the 4.a.v/8.1.d category of vessels, where the information in the two columns was also interchanged. As the error was administrative rather than political, the Administration considered that it should be corrected by administrative action rather than by political intervention.

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

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

THE SUBJECT MATTER OF THE INQUIRY

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

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

- The complainant alleged - and claimed that the Commission should accept - that it made an administrative error, that is, used the wrong figures in two columns, when recommending to the Council to reduce for the year 2007 the number of fishing days for vessels of category "4.a.ii/8.1.d" from 280 to 252 for the West of Scotland.
- The complainant claimed that the Commission should take appropriate steps to rectify the error it had made.

THE INQUIRY

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

16. On 16 February 2009, the Ombudsman made a draft recommendation to the Commission. The Commission sent its detailed opinion on 18 June 2009. The detailed opinion



was forwarded to the complainant, which sent its observations on 20 July 2009.

THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS

Preliminary remarks

17. In his letter to the Commission of 9 April 2008 opening the inquiry, the Ombudsman pointed out that the present complaint concerned an alleged administrative error in relation to a proposal made by the Commission, which formed the basis of a regulation subsequently adopted by the Council. According to ex-Article 195 of the EC Treaty (which became Article 228 of the Treaty on the Functioning of the European Union), the Ombudsman can only investigate instances of maladministration. He is, therefore, not entitled to examine the merits of Community legislation. However, the complainant argued that the present case concerned an *administrative* error in the Commission's proposal. The Ombudsman, therefore, considered that, at first sight, it would be possible to distinguish between the Regulation as such and the production of certain data which were ultimately included in the Regulation. In these circumstances, the Ombudsman considered it appropriate to open an inquiry in order to clarify the issue. In his letters to the Commission and the complainant, the Ombudsman indicated that he would, therefore, not make his final decision on whether the present complaint fell within his mandate until he had received the Commission's opinion.

18. In its opinion, the Commission did not comment on the above or question the admissibility of the complaint [3]. In these circumstances, the Ombudsman takes the view that the present complaint does in fact fall within his mandate.

A. Allegation of an administrative error and corresponding claim

Arguments presented to the Ombudsman

19. The complainant alleged that the Commission made an administrative error, that is, used wrong figures in two columns, when recommending to the Council to reduce for the year 2007 the number of fishing days for vessels of category 4.a.ii/8.1.d from 280 to 252 for the West of Scotland. It claimed that the Commission should take appropriate steps to rectify the error it made.

20. In its opinion, the Commission stated that, during the Annex II revision process, the evolution in the number of fishing days for vessels falling under the 4.a.ii/8.1.d category was based on criteria supported by scientific and technical evidence. According to the data provided by the Member States and analysed by the STECF, the vessels belonging to the 4.a.ii/8.1.d category caught more than 50 tonnes of cod in the West of Scotland. Of these cod, more than 10 000 individuals were aged 1 [4] and more than 4 000 individuals were aged 2 during 2005, the year of reference. During the same year, cod aged 1 and 2 represented more than 95 % of all those cod individuals caught in the West of Scotland by 4.a.ii/8.1.d. vessels. Both prior to the Council Working Group meetings and during discussions held in the Council Working Group, in the COREPER and in the Council plenary, all elements were



submitted to the Member States at different stages of the negotiation. The reduction in the number of fishing days for vessels belonging to the 4.a.ii/8.1.d category in the West of Scotland was made pursuant to reduction rates agreed during those stages in the negotiation. At the end of the process, the third compromise was adopted by the Member States.

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

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

23. In the complainant's view, the Commission could not disregard what was contained in its own Non-Paper No 3. The Commission provided no explanations as to why there was no reference in the text of the Non-Paper to category 4.a.ii/8.1.d concerning the West of Scotland. The complainant queried whether the Commission might have confused, as regards the West of Scotland, category 4.a.ii/8.1.d with 4.a. iv /8.1.d, which was identified on page three of the said Non-Paper. An exercise relating to cod individuals caught was indeed referred to there, but this was in relation to the North Sea. In this exercise, category 4.a.ii/8.1.d was identified as catching more than 400 000 cod individuals in the North Sea. The Non-Paper, therefore, suggested that a reduction in the number of fishing days should be made in relation to the North Sea for vessels falling under the 4.a.ii/8.1.d category. Notwithstanding this recommendation, the box corresponding to the said category was not highlighted grey in the table on page 12 of Non-Paper No 3, nor was such a reduction envisaged in the compromises discussed during the Council meetings. With respect to the North Sea, Regulation 41/2007 provided for no reduction for 2007 in the number of fishing days allotted to category 4.a.ii/8.1.d, as had been done in 2006.

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



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

The Ombudsman's assessment leading to a draft recommendation

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

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

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



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

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

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

31. In its opinion, the Commission stated that it suggested a 25 % decrease in the number of fishing days for the 4.a.ii/8.1.d category of vessels and subsequently agreed to decrease the proposed reduction to 12 % and later to 10 %. However, the Commission, in its opinion, did not comment on the possible inversion of the two columns. It merely stated that its proposal for the reduction of fishing days for vessels belonging to the 4.a.ii/8.1.d category in the West of Scotland was based on criteria supported by scientific and technical evidence pertaining to data provided by the Member States and analysed by the STECF. It did not address the question as to why this was not mentioned in its Non-Paper No 3. The Commission also did not provide any explanations as to why the North Sea fleet of this category of vessels, which it identified in the table on page 3 of the Non-Paper, was not indicated during the negotiations and in the final Regulation as potentially affected by the reduction in the table on page 12.

32. It further appeared from Council documents 16991/06 and 17046/06, which served as a basis for the various negotiations within the Council, that subsequent reductions were also applied to other categories of vessels for which boxes were highlighted grey in the



Commission's Non-Paper No 3, albeit at different rates than those which were applied to the 4.a.ii./8.1.d category of vessels. It appeared that the reduction in the number of fishing days for the 4.a.ii./8.1.d category of vessels, contained in Council documents Nos 16991/06 and 17046/06 and in the table in Annex IIA to Council Regulation 41/2007, simply reflected the proposals put forward by the Commission at the relevant stages of the procedure, within the framework of the three compromises.

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

34. On the basis of the above considerations, the Ombudsman made the following draft recommendation to the Commission:

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

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

The arguments presented to the Ombudsman after his draft recommendation

35. In its detailed opinion, the Commission stated that the legal rules governing the legislative process for the adoption of the annual regulation limiting fishing activity are laid down in Council Regulation (EC) No 2371/2002 ('the Basic Regulation') [5] . It pointed out that, in particular, Article 20 of the Basic Regulation establishes a specific procedure, whereby the Council, on a proposal from the Commission, decides on catch and/or fishing effort limits and on the allocation of fishing opportunities among Member States. Article 4 of the Basic Regulation requires that all measures governing access to waters and resources and the sustainable pursuit of fishing activities shall be established taking into account, in particular, the reports of the STECF. In parallel, for stocks lying outside safe biological limits, Article 5 of the Basic Regulation requires the Council to adopt priority measures in the form of recovery plans. The provisions of Council Regulation (EC) No 423/2004 [6] concerning the CRP made,



among others, the cod stock in the West of Scotland subject to a recovery plan.

36. On 20 October 2006, the report of the Advisory Committee on Fishery Management (ACFM) of the International Council for the exploration of the Sea (ICES) became available. It described cod in the West of Scotland as being in a critical state and advised that no fishery on this cod stock should take place in 2007. The STECF's sub-group on fishing effort management met from 5 to 9 June 2006 and from 9 to 13 October 2006 in order to analyse the data provided by Member States. In doing so, it also assessed, in the light of available information on the state of the different fish stocks, the impact of different vessel categories on the stocks subject to the CRP and the ensuing implications for the effort limitations envisaged for 2007. The STECF provided the Commission with its findings and advice during a meeting held in November 2006 [7]. This showed, among other things, that the 4.a.ii/8.1.d category of vessels in the West of Scotland would be a clear candidate for a reduction in fishing effort for 2007.

37. In the legislative process which resulted in the adoption of Regulation 41/2007 by the Council on 21 December 2006, preliminary discussions were held in the Council Working Party on Internal Fisheries Policy. The issue concerning effort limitations, including those for category 4.a.ii/8.1.d, was discussed at two Working Party sessions on 23 and 30 November 2006. Discussions at the latter session proceeded on the basis of Non-Paper No 3, which the Commission's services had prepared for this purpose. This paper contained calculations regarding the impact of different vessel categories on the cod stocks subject to the CRP and indications of categories that might warrant a reduction in the number of fishing days for 2007.

38. On 5 December 2006, the Commission presented its legislative proposal for what would become Regulation 41/2007. This marked the formal start of deliberations and negotiations at the Council. The Commission's proposal was to reduce the number of fishing days for the 4.a.ii/8.1.d category of vessels operating in the West of Scotland by 25 %, that is, from 280 days in 2006 to 210 days in 2007. In contrast, the Commission's proposal envisaged that the number of fishing days for the same vessel category in the North Sea (280 days) should remain unchanged.

39. In the further legislative process, the proposal for the reduction in the number of fishing days for the 4.a.ii/8.1.d category of vessels in the West of Scotland underwent some changes. In the *first compromise*, the reduction remained at 25 %. In the *second compromise*, the Commission agreed to a reduction by 12 % (resulting in 246 days). In the *final compromise*, which was adopted as a 'package deal', the Commission agreed to a reduction rate of 10 %. The Council thus fixed the maximum number of fishing days for this category of vessels in the West of Scotland at 252 days for the 2007 management period (1 February 2007 to 31 January 2008).

40. The Commission further stated that, when the complainant queried the reduction in fishing days in the West of Scotland, the Scottish Administration provided it with a copy of Non-Paper No 3 and surmised that the Commission committed an administrative error when proposing the fishing effort reduction in question. The Scottish Administration saw what is



considered to be an error in the fact that Non-Paper No 3 indicated, on page 12, a reduction in the number of fishing days for the 4.a.ii/8.1.d category of vessels for the West of Scotland. However, on page 4, the Non-Paper argued for a reduction in the fishing effort for the same category of vessels - not in the West of Scotland, but in the North Sea.

41. The Commission argued that the reasoning developed both in the complaint and in the Ombudsman's draft recommendation exclusively focused on Non-Paper No 3, which its services made available to the Member States represented in the Council in the early stages of the legislative process. According to the Commission, the Ombudsman wrongly characterised the Non-Paper as the Commission document that was relevant for the legislative process. In fact, the relevant document was not the Non-Paper, but the formal legislative proposal which the Commission adopted and forwarded to the Council on 5 December 2006. The Commission took the view that the Non-Paper had absolutely no status in the legislative process. It pointed out that a Non-Paper is a very informal means of conveying written information. In international practice, Non-Papers are largely used as an aid mémoire for points that have been made or will be made. They are not for quotation or attribution because they do not represent an authoritative statement that would commit the originating delegation's country in any way. In the Commission's practice, Non-Papers are often used in complex legislative processes as an off-the-record or unofficial means of: (i) acquainting Member States with complex and sensitive topics at the earliest possible stage of the process; (ii) exploring possible avenues with Member States at that stage; and (iii) facilitating both the drawing up of the Commission's legislative proposal, as well as subsequent deliberations and negotiations at the Council. In the Commission's view, due to their entirely unofficial nature, Non-Papers and discussions conducted on that basis could not be held against it. Moreover, they could in no way limit the margin of discretion which it has when choosing between possible options for its formal legislative proposals.

42. The Commission further argued that, since Non-Papers were only working documents created by its services and understood as such by all parties involved in the legislative process, such papers only reflect the state of play at a given moment in time. Therefore, they may not be comprehensive and may also contain inconsistencies. Looked upon in isolation from other elements of the legislative process in question, Non-Paper No 3 indeed appeared to contain such contradictions. As a matter of fact, the inconsistency mentioned by the complainant in the present case, namely, the lack of detailed considerations, in the main body of the Non-Paper, regarding the reduction of the number of fishing days for the 4.a.ii/8.1.d category of vessels in the West of Scotland, was not the only one contained in Non-Paper No 3. There was a similar discrepancy between the figures on page 2, suggesting a reduction in fishing days for the 4.a.iii/8.1.a category of vessels when fishing in the Kattegat, and the table on page 11, which instead proposed a reduction for the 4.a.iv/8.1.a category of vessels. The Commission, however, maintained that any inconsistencies contained in Non-Paper No 3 could not have affected the complainant in any way. This was not only because the Non-Paper had no legal status, but also because it ceased to exist after the adoption and presentation of the Commission's formal legislative proposal of 5 December 2006. From that moment on, Non-Paper No 3 became devoid of any effect. Neither the legislative proposal, nor the Regulation itself simply mirror Non-Paper No 3 or, for that matter, any of the documents used for their preparation. Contrary to what the



complainant argued and the Ombudsman accepted as demonstrated, the Commission's services thoroughly checked and, where appropriate, corrected the figures contained in the preparatory documents before including them in the formal legislative proposal for Regulation 41/2007. In this context, the Commission highlighted that the inversion in Non-Paper No 3 between categories 4.a.iii/8.1.a and 4.a.iv/8.1.a as regards fishing in the Kattegat was corrected in its formal proposal.

43. The Commission underlined that its proposal for a reduction of fishing days for the 4.a.ii/8.1.d category of vessels in the West of Scotland was made deliberately on the basis of the scientific advice received from ICES and the scientific, technical and economic advice drawn up by the STECF. Due regard was also given to the complex economic and social conditions surrounding the fishery in question. As regards the Regulation itself, the discussions at the Council concerning this legislative proposal repeatedly touched upon this very point and, as the negotiations progressed, the percentage of reduction initially proposed by the Commission was decreased from 25 % to 10 %.

44. The Commission rejected the complainant's argument that the only logical explanation behind the Commission's proposal to reduce fishing days for the 4.a.ii/8.1.d category of vessels in the West of Scotland was that it inadvertently inverted the two columns corresponding to the North Sea and the West of Scotland in the table on page 12 of Non-Paper No 3. This was in light of the fact that, on pages 3 and 4 of the said Non-Paper, the argument for reduction was made only with regard to the North Sea. The Commission rebutted the "*inversion theory*" on several accounts. Such confusion between the two geographical areas was inconceivable for all those who were conversant with questions relating to fisheries management. In fact, this matter concerned two very distinct fish stocks and the relevant sets of data and scientific advice were different. Both the Commission's services and the Member States represented in the Council were conversant with those topics. Furthermore, the Commission wished to point out that the discussion in Non-Paper No 3 of a possible reduction in the North Sea only showed that, at the time of that analysis, its services also envisaged the North Sea as a potential target for the measure in question. The absence in Non-Paper No 3 of a detailed examination with regard to the number of cod individuals caught by the 4.a.ii/8.1.d category of fishing vessels in the West of Scotland could not be construed as evidence that the Commission did not act intentionally and on the basis of a well-founded choice to reduce fishing effort for that particular category of vessels in the West of Scotland. As a matter of fact, the report of the STECF Sub-group on fishing effort management clearly showed that this category of vessels had the second biggest impact on the mortality of juvenile cod individuals aged 1 and 2 after the 4.a.v/none category, which was also proposed for reduction [8].

45. The Commission underlined that the unfavourable scientific advice for the cod stock in the West of Scotland made the 4.a.ii/8.1.d category of vessels in that geographical area a clear candidate for a reduction in fishing effort for 2007. This advice was known to everyone involved in the legislative process - even in the early stages in November 2006. The findings of the STECF Sub-group on fishing effort management regarding the said vessel category in the West of Scotland were also common knowledge. Consequently, there was no reason to back up the indications on page 12 of Non-Paper No 3 concerning the possible reduction in



the fishing days for that category of vessels with separate tables and arguments in the main body of the paper.

46. As regards the treatment of the same vessel category in the North Sea, the Commission drew attention to the fact that STECF's scientific advice for 2007 with regard to mixed fisheries gave a very pessimistic assessment of both cod stocks, but was clearly stricter for the West of Scotland than for the North Sea. The scientific advice recommended, for the West of Scotland, " without *catch and discards of cod in subarea VI* ", while the recommendation for the North Sea was " minimal *bycatch or discards of cod* " (emphasis added by the Commission) [9] . This difference in the respective scientific advice was a decisive factor to explain why, in the end, and in anticipation of the legislator's wide discretion when assessing a complex matter in the field of fisheries policy, the Commission did not propose a reduction of fishing days for the 4.a.ii/8.1.d category of vessels for the North Sea.

47. As regards the Ombudsman's recommendation that the Commission should take appropriate rectifying measures " *as far as is still possible* ", the latter stated that redress would be impossible in any event. According to the Commission, the impossibility of redress did not only result from the fact, as already highlighted by the Ombudsman, that " *the year 2007, which forms the subject of the contested reduction in fishing days, has already elapsed.* " Any redress or rectification would above all require an amendment of Regulation 41/2007, which the Council adopted on 21 December 2006. However, the Commission had no power to amend that Regulation.

48. The only means of redress left to the Commission would be to submit a legislative proposal for a corresponding amendment of Regulation 41/2007. However, and for the substantive reasons set out above, the Commission saw no basis for any such legislative proposal. The Commission added that, if it were to make such a proposal, it would be most uncertain whether it would obtain the required majority at the Council. In the Commission's view, this clearly showed that this case fell within the realm of policy and could thus not be tackled by means of administrative considerations and mechanisms.

49. The Commission dismissed the complainant's view that fishing effort reductions in one year could have knock-on effects for future allocations. According to the Commission, the only objective guidance in respect of fisheries management in the Community was the scientific, technical and economic advice assessing the state of stocks and recommending measures to ensure their sustainable exploitation. It was the bad state of the cod stock in the West of Scotland area which led to maintenance of the same fishing effort limitation in 2008 and not any knock-on effects from 2007. In these circumstances, it was unlikely, if not excluded, that the Council would ever be prepared to amend the measures taken for 2007 at this juncture.

50. Finally, the Commission drew attention to the fact that, even if redress by an action on its part were possible, this would not be necessary in the present instance. According to the Commission, the data in its possession showed that the average number of fishing days of the 136 UK vessels operating in the West of Scotland in 2007 was 118.79. This was well below



the 252 fishing days which were allowed under Regulation 41/2007. Consequently, the complainant did not suffer any actual damage as a result of the reduction in the number of fishing days for 2007.

51. The Commission concluded by stating that it did not fail to respect any rule or principle incumbent upon it in the present case which would justify a finding of maladministration. Therefore, it could neither accept the Ombudsman's draft recommendation, nor acknowledge that it committed an administrative error in this case. Accordingly, the Commission submitted that the complaint should be rejected as unfounded.

52. In its observations, the complainant pointed out that, while it was widely known that the cod stock was giving rise to serious concern, there was no indication that the 4.a.ii/8.1.d category of vessels contributed to the poor situation of the cod stock. The complainant clarified that the Scottish authorities did not surmise that the Commission had committed an administrative error. It was only after the inconsistencies in the Non-Paper were drawn to their attention that they were forced to the same conclusion as the complainant and, later, the Ombudsman.

53. The complainant argued that the Commission's argument that Non-Paper No 3 had no legal standing was irrelevant, given that, in its opinion of 27 June 2008, the Commission relied on what it then understood the Non-Paper to contain as the basis for inviting the Ombudsman to reject the complaint. While the Non-Paper might have been superseded in the legislative process, the Commission could not pretend that it contained a justification for a reduction in the number of days to be applied to the 4.a.ii/8.1.d category of vessels in the West of Scotland. Similarly, it could not ignore the fact that the Non-Paper contained a justification for a reduction in the same gear combination in the North Sea/Skagerrak, which was subsequently not proposed. The complainant stressed that it did not complain of the lack of detailed considerations in the main body of the Non-Paper No 3 relating to the reduction in the number of fishing days for this category in the West of Scotland. In contrast, it complained of the absence of any such considerations.

54. The complainant argued that the question to be considered by the Ombudsman was not whether the Non-Paper had any legal effect, but whether the relevant passage in Regulation 41/2007 was the result of an administrative error. In order to judge whether or not this was the case, reference needed to be made to the Non-Paper, unless some plausible alternative was provided. However, no such plausible alternative was indicated. The fact that another error was discovered could not support the view that an error did not occur in this case. The complainant underlined that the Commission did not provide any of the evidence to which it referred in order to justify the reduction in the number of fishing days for the 4.a.ii/8.1.d category of vessels for the West of Scotland. It was impossible, therefore, for a conclusion in respect of this category to be reached, let alone for a proposal to be made.

55. The complainant argued that the Commission wanted both itself, that is, the complainant, and the Ombudsman to believe that an administrative error could not have occurred because any confusion between the geographical areas involved was inconceivable. However, it was a relatively simple and common occurrence to insert highlights and figures



in an incorrect column. The Ombudsman must decide whether he could accept the suggestion that the outcome was nevertheless justified on the basis of knowledge which was available to the Commission but which did not appear in the Non-Paper. The same document of course contained a well argued case for a reduction in the same category in the North Sea. In this context, to suggest that a reduction in the North Sea was not pursued, on the grounds that the number of days available to fish was somehow relevant to the discards of cod, "*stretched the boundaries of incredulity to breaking point*".

56. The complainant stated that the Commission should tread more warily when it imputes knowledge to other parties. In its detailed opinion, the Commission suggested that the unfavourable scientific advice to which it referred "*was known to everyone involved in the legislative process even at the early stages in November 2006*". The complainant underlined that it was and remains in complete ignorance as to why the 4.a.ii/8.1.d category of vessels was a justified candidate for a reduction in fishing days in the West of Scotland. It added that neither the officials of the Scottish authorities, nor those of the UK administrations had attempted to justify the reduction other than by reference to the Non-Paper.

57. The complainant concluded that the Commission had failed to address the substance of the draft recommendation. It accepted, however, that it was now impossible to refund the vessels concerned, not only given the passage of time, but also since the basis on which fishing effort was managed had been radically amended. In its view, however, honour could be saved if the Commission were to acknowledge that it would have carried out such a refund if it had been in a position to do so. The complainant, therefore, asked the Ombudsman to reject the further representations of the Commission and to confirm his draft recommendation.

The Ombudsman's assessment after his draft recommendation

58. The Ombudsman's draft recommendation was based on the finding that the Non-Paper No 3 contained an error. It is true that this Non-Paper was only a preparatory document and that it was superseded by the Commission's subsequent formal proposal of 5 December 2006 for a Council Regulation. In the Ombudsman's view, however, this does not imply that there is no longer any need or possibility to examine possible maladministration concerning the Non-Paper. The Ombudsman notes that the relevant Non-Paper proposed, on page 12, a reduction in the number of fishing days for the category concerned in the West of Scotland. Even though the extent of the proposed reduction was subject to a number of changes during the subsequent legislative process, the principle of the reduction as such was not affected by these amendments. Nevertheless, this principle had been laid down in the Non-Paper. The Commission's argument that any inconsistencies contained in Non-Paper No 3 could not have affected the complainant, because this document ceased to exist after the adoption and presentation of the Commission's formal legislative proposal of 5 December 2006, is thus not convincing.

59. As regards the Commission's argument that the Non-Paper in question had no status in the legislative process and that it was a mere informal and off-the-record discussion document, the Ombudsman acknowledges that Non-Papers do not constitute formal



documents. He considers, however, that the informal nature of Non-Papers does not mean that any administrative errors they contain should be considered irrelevant. In the present case, the relevant Non-Paper clearly served as the basis for discussions in the Council. The Commission confirmed this in its opinion of 27 June 2008, where it stated that, on 30 November 2006, it had submitted the Non-Paper to Member States and that this document was " *considered as a starting point for further discussions with Member States.* "

60. In its detailed opinion on the draft recommendation, the Commission admitted that there was what it referred to as an inconsistency in the Non-Paper No 3, given that the main body of the Non-Paper (namely, its pages 3 and 4) did not contain any detailed considerations as regards the reduction in the number of fishing days for the 4.a.ii./8.1.d category of vessels for the West of Scotland, which was mentioned in the table on page 12. The Commission added that the Non-Paper contained a further inconsistency regarding a different matter, and stressed that this other inconsistency was corrected in its legislative proposal of 5 December 2006. It appears that the Commission thus wished to argue that the fact that the reduction for the West of Scotland proposed on page 12 of the Non-Paper was not modified in the legislative proposal showed that the relevant proposal was made deliberately. This argument is not without merit. The Ombudsman notes, however, that the correction of the other inconsistency as such only proves that the issue concerned by this inconsistency was reconsidered. In the absence of further indications to that effect, this correction does not prove that the indication concerning the 4.a.ii./8.1.d category of vessels for the West of Scotland on page 12 of the Non-Paper was deliberate.

61. The Commission's argument that the discussions in the Council concerning its legislative proposal repeatedly touched upon the proposed reduction of fishing days for the 4.a.ii./8.1.d category of vessels in the West of Scotland. As the negotiations progressed, the percentage of reduction initially proposed by the Commission was decreased from 25% to 10%. The Ombudsman notes from Council documents 16991/06 and 17046/06 that the Council indeed considered the percentages of the reductions for the different categories of vessels for which boxes had been highlighted in grey in the Commission's Non-Paper No 3. He also notes that, depending on the category of vessels, the percentages of reduction changed at rates different from those which were applied to the 4.a.ii./8.1.d category of vessels in the West of Scotland. It would thus appear that the Council discussed the reductions per category and that, as regards the 4.a.ii./8.1.d category of vessels in the West of Scotland, it considered that the initial reduction of 25% should be reduced to 10%. The Ombudsman would like, however, to point out that the fact that the Council considered that a reduction was necessary regarding the 4.a.ii./8.1.d category of vessels in the West of Scotland does not mean that the Commission's Non-Paper No 3, which served as the institution's basis for the proposal to that effect, could not possibly have contained an error.

62. As regards the Commission's argument that confusion between the two geographical areas concerned, namely, the West of Scotland and the North Sea, was inconceivable for anyone conversant with fisheries management, the Ombudsman notes that such an argument essentially postulates that no error could possibly have occurred. However, this question needs to be assessed in light of the facts of the case, and not by invoking a general theory. In the absence of other supporting elements for this position, the Commission's



argument fails to convince.

63. As regards the Commission's argument that fishermen in the West of Scotland did not suffer any damage as a result of the reduction in the number of fishing days for 2007, given that, from the data available to it, it appeared that the average number of fishing days of the 136 UK vessels operating in the West of Scotland was 118.79 in 2007 and thus in any event much less than the 252 days foreseen in Annex IIA of Regulation 41/2007, the Ombudsman notes that the complainant did not call this figure into question in its observations. He considers, however, that the fact to which the Commission referred does not mean that the Ombudsman could or should no longer consider the error which he believes to have occurred in the Non-Paper.

64. The Ombudsman notes that the main argument used by the Commission to show that its proposal for a reduction in the number of fishing days for the 4.a.ii/8.1.d category of vessels in the West of Scotland was made deliberately is that the proposal was in conformity with scientific advice.

65. As regards this advice, the Commission referred to an ACFM report, which had become available in October 2006. According to the Commission, this report described cod in the West of Scotland as being in a critical state and advised that no fishery on this cod stock should take place in 2007. The Commission did not submit this report to the Ombudsman. However, he found a copy of the report on the ICES website. In that report, the ICES did in fact advise a zero catch of cod in 2007 in the West of Scotland [10] .

66. The Commission further referred to discussions that took place from 5 to 9 June 2006 and from 9 to 13 October 2006 within the STECF's Sub-group on fishing effort management. It also pointed to the findings that the STECF subsequently provided to it in a first report during a meeting held in November 2006 [11] . According to the Commission, the information provided by the STECF showed, among other things, that the 4.a.ii/8.1.d category of vessels in the West of Scotland would be a clear candidate for a reduction in fishing efforts for 2007. The Commission also quoted from a second STECF report [12] .

67. The Ombudsman notes that the relevant reports of the STECF were not submitted to him by the Commission. However, he was able to find a version of the second of these reports on the internet. From this report [13] , it emerges that ICES advised a zero catch of cod in 2007 in the West of Scotland, on the grounds that cod was in a critical state, and that the STECF agreed with ICES' advice. In so far as the West of Scotland was concerned, a zero catch of cod ("*without catch and discards of cod*") was recommended. As regards the North Sea, the ICES advised that fishing for cod should be suspended until an initial recovery of the cod Spawning Stock Biomass (SSB) was established. The STECF agreed with this advice. As regards the North Sea, it, therefore, recommended a zero catch of cod ("*with minimal bycatch or discards of cod*").

68. The Ombudsman notes that, in its detailed opinion, the Commission further submitted that the report of the STECF Sub-group on fishing effort management concerning the meetings of June and October 2006 clearly showed that the category of vessels concerned by



the present case had the second biggest impact on the mortality of juvenile cod individuals aged 1 and 2, after the 4.a.v/none category which was also proposed for reduction. The Ombudsman was not able to verify this information, given that (i) no copy of the relevant report was submitted to him and (ii) this report could not be found on the internet.

69. Although the Ombudsman has thus not been provided with all the evidence on which the Commission appears to have relied, he considers that the scientific advice would indeed appear to have entitled the Commission to propose that no cod be caught in 2007 in the West of Scotland and in the North Sea. On this basis, it cannot be excluded that the Commission would have been entitled to propose a reduction in the fishing effort of the 4.a.ii/8.1.d category of vessels for the West of Scotland.

70. The Ombudsman notes, however, that the approach set out by the Commission in its Non-Paper is based on a different premise. As a matter of fact, the Commission states the following:

" The Commission's services suggest that the reduction in fishing days that emerges from the interpretation of the cod recovery plan and from the Policy Statement can be made more efficient if it is applied only to the fleets amounting for most of the fishing mortality of cod.

According to this reasoning, the fleets accounting for cod catches (in t) beyond a given threshold were selected. The thresholds were chosen depending on the magnitude of total cod catches in the area concerned, and were: 500 t for the North Sea and Skagerrak, 100 t for the Irish Sea and 50 t for the Kattegat and the West of Scotland. The following tables were built up, based on the data gathered by STECF sub-group on the analysis of fishing effort, and included in the STECF report that can be found in the STECF website. "

It is thus clear that the Commission considered that, as far as the West of Scotland was concerned, reductions were only to be proposed for fleets whose catches accounted for more than 50 tonnes of cod.

71. The table for the West of Scotland on page 3 of the Non-Paper consequently listed those categories that catch more than 50 tonnes of cod. This table lists three categories, which together (and according to the figures indicated there) account for 72.5 % of the overall cod catch (including both cod landings and cod discards) in that area. Category 4.a.ii/8.1.d is not mentioned in this table. This can only mean that this category accounted for less than 50 tonnes of cod caught and, therefore, was not envisaged as requiring a limitation in the fishing effort.

72. Moreover, the Non-Paper specifies as follows:

" In the case of the North Sea and Skagerrak, a second exercise was done to select fishing gear catching more than 400 000 cod individuals, which permitted to include also a criterion based on mortality of young fish (table below). This allowed to identify gears 4a_{ii} and 4a_v using special condition IIA81d (historical records of less than 5%), shown in bold print in the table below. "



73. This statement makes clear that the impact on the mortality of juvenile cod individuals aged 1 and 2 was not considered at all as regards the West of Scotland in general and category 4.a.ii/8.1.d in particular.

74. In view of the above, the Ombudsman cannot but confirm his finding that the proposal for a reduction in the fishing effort for category 4.a.ii/8.1.d in the West of Scotland, which is made on page 12 of the Non-Paper, finds no basis in the explanatory part of this document. In his view, the Commission thus committed an administrative error by suggesting, in the box included on page 12 of its Non-Paper No 3, that the number of fishing days for vessels falling under category 4.a.ii/8.1.d should be reduced as regards the West of Scotland, even though the substantive considerations set out in the Non-Paper show that the Commission did not consider that such a reduction was necessary.

75. Besides, if the Commission's Non-Paper had indeed been based on the scientific evidence to which the Commission referred, it would be even more difficult to understand why no limitations at all were proposed for the North Sea, even though page 4 of the Non-Paper stated that such limitations ought to be implemented. However, this issue is not covered by the present inquiry.

76. Nevertheless, the Ombudsman considers it useful to add a more general remark. The reasoning set out above, which is also the reasoning the Ombudsman developed in his draft recommendation, and which corresponds to the views put forward by the complainant, is based on the finding that the Commission committed an administrative error in its Non-Paper No 3. To put it more simply, the Ombudsman considered it likely that, on page 12 of its Non-Paper, the Commission had indicated that a reduction was needed in the West of Scotland as regards category 4.a.ii/8.1.d. However, on the basis of what it stated on page 3 of the same document, the Commission did not intend to pursue such a reduction. In its detailed opinion, however, the Commission resolutely argued that no such mistake had occurred and that its proposal had been made deliberately. If this account of events were correct, it would mean that the proposal the Commission made on page 12 of the Non-Paper and, subsequently, in its formal legislative proposal of 5 December 2006, was not in conformity with the very approach it claimed to have adopted, which was set out on pages 3 and 4 of its Non-Paper. This would mean that there was a stark contradiction between the action proposed and the reasons on which the proposal was based. The Ombudsman therefore considers it reasonable to assume that this is not the way the facts of the present case ought to be explained.

77. As regards the complainant's claim that the Commission should take appropriate measures to rectify the error, the Commission has explained why it considers that, if an error had indeed occurred, it would now be impossible to take rectifying measures. The Ombudsman considers these explanations convincing.

78. On the basis of the considerations above, the Ombudsman takes the view that, by failing to acknowledge that it committed an administrative error, the Commission has missed a good opportunity to acknowledge an instance of maladministration. However, given that it no longer appears possible to rectify the error that occurred, the Ombudsman considers that



there is no need to make a special report to Parliament concerning this case. The Ombudsman will, however, make a critical remark below.

B. Conclusion

79. On the basis of his inquiry into this complaint, the Ombudsman closes it with the following critical remark:

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

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

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 15 January 2010

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

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

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

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

[5] Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ 2002 L 358, p. 59.

[6] Council Regulation (EC) No 423/2004 of 26 February 2004 establishing measures for the



recovery of cod stocks, OJ 2004 L 70, p.8.

[7] STECF, 2006. Report of the STECF Sub-group on fishing effort management, Barza d'Ispra, Italy, 5-9 June 2006, and Lisbon, Portugal, 9-13 October 2006, STECF Report, JRC (ed.), Ispra.

[8] STECF, 2006. Report of the STECF Sub-group on fishing effort management, Barza d'Ispra, Italy, 5-9 June 2006, and Lisbon, Portugal, 9-13 October 2006, STECF Report, JRC (Ed.), Ispra, p. 108.

[9] STECF, 2006. Review of scientific advice for 2007 - part 2, advice for fish stocks other than deep-water resources and stocks in the Baltic Sea; STECF report, JRC (ed.), Barza d'Ispra, pp. 265-267.

[10] <http://www.ices.dk/committe/acom/comwork/report/2006/oct/cod-scow.pdf> , section " 5.4.21 Cod in Division VIa (West of Scotland) " of the report, p. 154.

[11] STECF, 2006. Report of the STECF Sub-group on fishing effort management, Barza d'Ispra, Italy, 5-9 June 2006, and Lisbon, Portugal, 9-13 October 2006, STECF Report, JRC (ed.), Ispra.

[12] STECF, 2006. Review of scientific advice for 2007 - part 2, advice for fish stocks other than deep-water resources and stocks in the Baltic Sea; STECF report, JRC (ed.), Barza d'Ispra, pp. 265-267.

[13] See footnote 11. The Ombudsman notes that the report he found on the STECF website (<https://stecf.jrc.ec.europa.eu/docs>) mentioned the dates 23-27 October 2006 and was an " Advance copy pending SEC number ". The report to which the Commission referred in the footnote of its detailed opinion appears to be a different version.