

**Submission to the consultation of the EU Ombudsman on the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations**

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Bruxelles, 30 October 2014**

*1. Please give us your views on what concrete measures the Commission could take to make the TTIP negotiations more transparent. Where, specifically, do you see room for improvement? (We would ask you to be as concrete as possible in your replies and also to consider the feasibility of your suggestions, in light of the timeframe of the negotiations. It would be most helpful if you could prioritise your suggestions.)*

Our submission is based on two assumptions about the TTIP negotiations deriving from communications and texts made available to the public by the Commission:

- TTIP has little resemblance with traditional trade agreements. Its main goal is not commercial, in the sense of tariff elimination for goods and market access for services. Its main goal is the achievement of regulatory coherence and convergence, with the view to extend the EU internal market into the transatlantic realm. TTIP has, hence, potentially strong reverberations on how EU internal market rules are established and/or implemented;
- TTIP is a strategic project. Given that the USA is a strong negotiation partner with established legal traditions, it can be expected that TTIP leads to changes which impacts the daily lives of EU citizens and the way the European institutions work. Any assurance that nothing will change is utterly in contradiction with the strategic nature assigned to TTIP.

Measures relating to information for the Parliament

The Commission regards international trade negotiations as venues dealing with sensitive commercial positions whose publication would harm the interests of the European Union. This constitutes the base for the classification of information as confidential. However, Article 218(10) TFEU establishes the prerogative of the European Parliament to be "immediately and fully informed at all stages of the procedure of negotiations on international agreements". The information requirement arising under Article 218(10) TFEU is prescribed in order to ensure that Parliament is in a position to exercise democratic scrutiny of the European Union's external action. The procedural rule laid down in that provision constitutes an essential procedural requirement within the meaning of the second paragraph of Article 263 TFEU and its infringement leads to the nullity of the measure thereby vitiated; that rule is an expression of the democratic principles on which the European Union is founded - the Parliament's involvement in the decision-making process is the reflection, at EU level, of the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly [1].

The applicable regime regarding the handling of EU Confidential Information (EUCI) is to a large degree fixed in Annex II to the Inter-Institutional Framework Agreement between the Commission and the European Parliament. It is assumed that this Framework Agreement will be subject to review by the new Commission and the newly elected European Parliament. Such revision should take due account of new trade negotiation realities as embodied by the

TTIP and be concluded as fast as possible in order to have a bearing on the on-going TTIP negotiations.

The Commission should consider suggesting to Parliament the following changes to the Inter-Institutional Framework Agreement relating to international trade negotiations:

- giving Parliament the right to re-classify EUCI marked "confidential" or higher to the EUCI level "restraint" for all documents which do not contain sensitive business information;
- giving Parliament the right to re-classify EUCI marked "restraint" to the non-EUCI level "limited" for all documents which have a bearing on existing EU legislation or the implementation of existing legislation. Documents marked "limited" shall be available to all MEPs, staff and assistants;
- giving Parliament the right to de-classify to the status "public" all documents relating to fundamental rights, public health, environment and other overriding public interest;
- for all documents remaining EUCI marked confidential or higher, Reading Rooms in the Parliament shall be accessible to all MEPs, their assistants and Parliament staff with a "need to know".

Alternatively to the review of the Inter-Institutional Framework Agreement, the Commission could agree to an ad-hoc arrangement with Parliament on the handling of information relating to the TTIP negotiations.

#### Measures relating to information for the public

As noted in Recital 2 of the Preamble to Regulation No 1049/2001, increased openness has the advantage to enable citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system [2].

With a change of the Inter-Institutional Framework Agreement regarding TTIP document handling as outlined above, it will become a task for the European Parliament to guarantee the information for national Parliaments in the Member States and the general public. In the meantime, the Commission should improve transparency by:

- a publicly available listing of all documents presented by the TTIP parties or resulting from TTIP negotiations, specifying the date, the confidentiality status and the receivers of the documents. Publicly available documents should be hyperlinked;
- a calendar of activities in the preparation of upcoming TTIP negotiation rounds, indicating for specific thematic issues a contact person to whom public suggestions and contributions should be addressed;
- the publication of consolidated negotiation texts - which come into existence at present, at least for certain TTIP chapters -, in case they relate to fundamental rights, public health, environment and other overriding public interest. Other consolidated negotiation texts should be made public as soon as Parliament considers that a basic level of agreement between the two partners has been reached.

2. *Please provide examples of best practice that you have encountered in this area (for example, in particular Commission Directorates-General or other international organisations) that you believe could be applied throughout the Commission.*

In the realm of negotiations of international agreements, the Commission has provided a positive example of transparency with its 2010 decision to release a pre-decisional/deliberative draft of ACTA [3]. The release enabled public discourse and confirmed the role of Parliament as a continuously engaged partner. Subsequently, the 2012 decision to refer ACTA to the European Court of Justice [4], even if late in a partly derailed process, showed a capacity and willingness of the Commission to react to public critique by involving an independent assessment of fundamental rights implications and compatibility with the Treaties. We regard this as a contribution and "best practice" to increase the respect for the political decision of the Parliament.

As regards practices in other countries, we notice that transparency in trade negotiations is handled in vastly different modes, indicating that the bottom line is not a presumed need for confidentiality of business matters, but rather specific historical circumstances, such as a public consensus about the issues under negotiation. This may explain why the negotiations for the North America Free Trade Agreement (NAFTA) and the Free Trade Agreement of the Americas (FTAA) in the 1990s had a higher degree of transparency than the US Administration concedes nowadays, under conditions of increased scepticism towards the scope of free trade, in the negotiations for the Trans-Pacific Partnership Agreement (TPP) or the very TTIP.

Particularly the FTAA negotiations could be regarded as "best practice". Its website hosted a timely update of the last version of the consolidated negotiation text, which we consider the most important document in any negotiation. It also actively invited civil society to contribute its views on every aspect of the agreement.

As regards international organizations, it is worth noting that transparency tends to be higher, if negotiations are not conducted under the heading of trade. During the WHO negotiations on a Convention of Tobacco Control - an issue touching on vested trade and business interests - the minutes of the meetings of the Governing Body remained fully available on the Internet. It established the principle of "Access to non-confidential documentation and such other documentation as the Director General may see fit to make available through such special distribution facilities as WHO may establish" (YJ underlining).

We regard the process towards the Marrakesh Treaty of WIPO to facilitate access to published works for the blind, concluded in June 2013, as "best practice" of transparency in an international trade-related negotiation. This Treaty deals with copyright exceptions and therefore intervenes in trade-related aspects to Intellectual Property Rights, which were in parallel negotiated in the highly secretive ACTA process. WIPO provided for the timely publication of the consolidated negotiation texts, streamed the negotiation sessions and facilitated the set-up of stakeholder working groups, whose deliberations were also published on the website.

The WTO has incrementally increased its transparency efforts in the last ten years. Its latest negotiation process on a Trade Facilitation Agreement had as standard practice that the

consolidated negotiation text was made public via its website after each negotiation round and prior to the following negotiation round [5].

*3. Please explain how, in your view, greater transparency might affect the outcome of the negotiations.*

Greater transparency might facilitate that the final outcome of the TTIP negotiations will get support from a broad majority in the Parliament. Broad parliamentary majorities range from 60-80% of Parliament's component members, which implies agreement cross party lines and includes support also from smaller groups like the Greens/EFA.

In order to reach a broad parliamentary majority for a final TTIP agreement, the Parliament (including the Greens/EFA) needs to be able to both express informed concerns and evaluate whether concerns has been taken into account throughout the negotiations. We believe that such continuous involvement follows from Article 218 (10) TFEU.

To be able to conduct this work, as the Ombudsman has remarked [6], it is necessary for the Parliament to organise its commitments with the Commission and the Council with a view to ensure that the very nature of Parliament is not undermined. Indeed, the essential procedural requirements of the Treaties and the scrutiny obligations incumbent on the Parliament must be coherently interpreted in the light of the Principle of Openness under EU law.

Regarding the more content specific dimension of the question how greater transparency might affect the outcome of the TTIP negotiations, two different strands should be indicated as having a largely positive effect:

- greater transparency facilitates the supply of unsolicited additional analytical resources to the Commission. This is important since DG Trade as leader of the TTIP negotiations is accustomed to a range of analytical input providers from the business community which has little capacity and interest to analyse the possible effects of regulatory cooperation and convergence on institutional levels reaching from EU agencies to communal administrations. We have to keep in mind that TTIP is uncharted waters also for the Commission. Its biased contacts to the business sector is unhelpful at best, detrimental to a good outcome of the negotiations at worst;

- greater transparency initials the access to any kind of independent analytical resources for Parliament. Neither the staff of the political groups, nor the internal services of Parliament are designed to cope with the magnitude and depth of the issues at stake in the TTIP negotiations. We depend on access to analytical capacities from outside the Parliament in order to be able to judge about specific proposals and their translation in a legal text. This is the routine way of working of Parliament for all legislative dossiers, where drafts and the amending process are public. But access to analytical capacities is prohibited if key negotiation documents are available only in Reading Rooms or as personally assigned paper copies. As more transparency is granted to the general public, such access to analytical resources can happen freely, unsolicited and unbiased.

We would like to underline that the capacity of Parliament to thoroughly understand negotiating texts must be strengthened at an early stage of the negotiation procedure, when inputs can still be taken into account. ACTA is a warning example for the effects of transparency granted at a too late stadium of the negotiating process.

On a footnote: the reasons of transparency leading to better outcomes seem so compelling that the question is justified how the motive of business confidentiality can be evocated to uphold the current situation of in-transparency, even more so since TTIP largely deals with regulatory issues for which the EU has established procedures of public transparency.

[1] Case C-658/11 *Parliament v Council* ECLI:EU:C:2014:2025, paras. 79-81

[2] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* ECLI:EU:C:2008:374, para.45

[3] [http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc\\_146029.pdf](http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf)

[4] [http://europa.eu/rapid/press-release\\_MEMO-12-128\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-128_en.htm)

[5] [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=\(%20@Symbol=%20tn/tf/w/165\\*](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20tn/tf/w/165*)

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[6] See the further remark in the [Decision of the European Ombudsman in his inquiry into complaint 2393/2011/RA against the European Parliament](#)