Decision of the European Ombudsman in his inquiry into complaint 2393/2011/RA against the European Parliament

Decision
Case 2393/2011/RA - **Opened on** 21/12/2011 - **Decision on** 22/07/2013 - **Institution concerned** European Parliament (No maladministration found) |

The background to the complaint

1. The present inquiry concerns a refusal by the European Parliament to grant the complainant, an association of 28 digital civil rights associations from 18 European countries known as European Digital Rights (EDRi), public access under Regulation 1049/2001 [1] to documents relating to the negotiation process leading up to the finalisation of the Anti-Counterfeiting Trade Agreement (hereinafter 'ACTA'). ACTA is an international agreement establishing standards for the enforcement of intellectual property rights in the internet era [2] .

2. According to the complainant, the European Commission sent to Parliament drafts of the ACTA agreement, as well as reports of the ACTA negotiations, after each negotiating round. On 11 May 2011, the complainant sent a letter to the Chair of Parliament's International Trade Committee (the INTA Committee), requesting the release of all documents on ACTA provided to the Committee by the Commission. It submitted a further request for access to documents on 24 August 2011. In that request, it asked for copies of all preparatory documents in possession of the INTA Committee with regard to ACTA.

3. Parliament registered this request on 29 August 2011 and dealt with it as an initial application for public access to documents. Parliament then informed the complainant that it had identified 24 documents falling within the scope of its request and was considering the different documents in cooperation with the Commission and the Council of the EU. It was therefore obliged to extend the time limit for reply, provided for in Article 7(1) of Regulation 1049/2001, by another 15 days to 10 October 2011.

4. Parliament replied in substance to the complainant on 29 September. It pointed out that it did not participate in the ACTA negotiation process and, as a result, did not have in its possession all the preparatory documents. It explained that, following the entry into force of the Lisbon Treaty and the signature of the Framework Agreement on relations between the European Parliament and the European Commission [3] , it had been provided with oral briefings by the Commission concerning the ACTA negotiations, while the Chair of the INTA Committee had obtained some preparatory documents [4] . Parliament stated that, given the obligation of confidentiality imposed by the aforementioned Framework Agreement [5] , it

could not unilaterally release third-party classified documents. Parliament added that, pursuant to Article 4(4) of Regulation 1049/2001, it consulted the Commission and the Council with a view to providing the widest possible disclosure of the documents received from the other institutions.

5. Parliament then listed the documents in its possession which fell within the scope of the complainant's request. They were as follows:

a) **Draft consolidated text of ACTA** (seven documents listed as a.1-7; two of these documents had already been made public and were annexed to Parliament's reply).

Parliament stated that the parties to ACTA [6] agreed that negotiation documents would only be made public with the unanimous support of all the parties to ACTA. By compromising the signature and conclusion of ACTA, the release of the other documents would therefore undermine the protection of international relations, as provided for in Article 4(1)(a), third indent, of Regulation 1049/2001.

b) **Reports of the negotiating rounds** (three documents listed as b.1-3; redacted versions of the three documents were enclosed).

Parliament made the following comments in relation thereto. It pointed out that, while it had been duly briefed after every round of negotiations, reporting had not always been in written form. Parliament reiterated that the ACTA partners had reaffirmed the importance of maintaining the confidentiality of their respective positions in the negotiations. It pointed out that ACTA had not yet been signed and that arbitration was still taking place at country level at the time. Parts of these documents described and addressed the Commission's negotiating position vis-à-vis the other ACTA partners, as well as the Commission's reflections on the positions of the other ACTA partners. Release of this information would seriously affect the EU's relations with third countries, namely, its ACTA partners, thereby undermining the protection of the public interest as regards the EU's international relations. Consequently, these parts were also covered by the aforementioned exception.

c) **Notes and internal working papers** (fourteen documents listed as c.1-14; full access was provided to four of these documents; partial access was provided to another four, while access was refused to the six remaining documents).

Parliament pointed out that these documents were internal notes and contained information on the EU's negotiating guidelines, as well as the Commission's view on the position of other ACTA partners. Release of the relevant elements would, it said, have a detrimental effect on the atmosphere of mutual trust and would limit the prospect for future cooperation, thereby compromising the signature of the agreement and the ratification procedure by each of the national Parliaments, including the consent vote which it, too, had to take. On this basis, Parliament insisted that the aforementioned exception applied to certain documents as a whole and partially to others. In addition, and taking into consideration that the decision-making procedure concerning ACTA had not at that stage been concluded, access to these parts had also to be refused on the basis of Article 4(3) of Regulation 1049/2001, it

said.

6. On 7 October 2011, the complainant submitted a confirmatory application to Parliament, stating that he wished, " *in particular* ", to obtain a copy of the document which had been " *leaked* " into the public domain in February 2010 and which, he maintained, contained " *the digital chapter* " (emphasis added). With a view to helping to identify the document, the complainant cited a footnote 6 containing the following text: " *An example of such a policy is providing for the termination in appropriate circumstances of subscriptions and accounts in the service provider's system or network of repeat infringers.* "

7. Parliament replied to the complainant's confirmatory application on 31 October 2011. It interpreted the confirmatory application as a request for only one document, namely, the document described by the complainant as containing " *the digital chapter* ". Parliament identified that document as the "Note for the attention of the 133 Committee (12 October 2009) - *Draft chapter on Enforcement procedures in the Digital Environment* sent by the US" (which was document c.11 in the third category of documents listed in Parliament's response to the complainant's initial application). Parliament confirmed its decision to refuse access to this document on the basis of Article 4(1)(a), third indent, of Regulation 1049/2001, which pertains to the protection of international relations, and Article 4(3) of Regulation 1049/2001, which pertains to the protection of the institution's decision-making process.

8. With regard to the protection of international relations (Article 4(1)(a), third indent, of Regulation 1049/2001), Parliament stated that there was a real risk that disclosure of the document could affect relations between the EU and other ACTA contracting parties. The requested document refers in full to the negotiation position of the US, which was communicated to Parliament by the Commission with a view to enabling Parliament to prepare its vote on ACTA. Relevant MEPs had the opportunity to consult the document, while necessary precautionary measures were taken to ensure its strict confidentiality. According to Parliament, disclosure of the document would jeopardise the EU's international relations with the US, as it would put into question the confidentiality of the negotiations and risk undermining trust in the EU's negotiation and ratification mechanisms. Moreover, disclosure of preparatory documents stemming from third countries which were forwarded to the EU institutions in the context of confidential negotiations would jeopardise the EU's relations and further ability to negotiate with these countries, as the EU might find itself in a situation where its contracting partners would become more reluctant to transmit confidential documents to it. Parliament also referred to the fact that ACTA had not yet been ratified by national Parliaments and that the ACTA contracting parties had agreed that negotiation documents would only be made public with the unanimous support of all.

9. With regard to the exception in Regulation 1049/2001 pertaining to the protection of the institution's decision-making process (namely, Article 4(3) of Regulation 1049/2001), Parliament pointed out that, at that date, it had not yet given its consent to ACTA. Disclosure of the requested document at that stage would therefore jeopardise the ongoing decision-making process within Parliament. Parliament further noted that it could not identify any overriding public interest that would justify disclosure.

10. Finally, with regard to the complainant's reference to a " *leaked* " version of the document, Parliament stated that the fact that a copy of a document (authentic or not) had been placed, without the prior consent of its author, on the Internet in no way altered Parliament's assessment. If unauthorised publication were automatically to imply the obligation to disclose a document, the effect would be to circumvent the protection of the public interest implied by non-disclosure. Concerning the publication of a document on Parliament's website, this was, said Parliament, " *a copy article from a leaked source in the USA, provided as information to the members of the Parliament's delegation for relations with the USA* ". Parliament added that it was not for it to judge the authenticity of the leaked document as it was not the author of the document. In any event, a request to judge the authenticity of a leaked document falls outside the scope of the right of access to documents, as provided for in Article 15 TFEU and Regulation 1049/2001.

11. The complainant turned to the Ombudsman on 2 December 2011.
The subject matter of the inquiry
12. The complainant alleged that Parliament failed to put forward valid justifications under Regulation 1049/2001 for not providing access to the documents in question.

13. The complainant claimed that the relevant documentation should be published immediately or, in any event, within an adequate period of time before Parliament votes on ACTA.

14. In its observations on Parliament's opinion in this case, the complainant asked that the Ombudsman verify whether the Commission had a mandate from the Council to enter into an agreement that negotiation documents would only be made public with the unanimous support of all contracting parties.

15. The Ombudsman notes that the present inquiry concerns the European Parliament. While the scope of his inquiry cannot, at this stage, be extended to cover the European Commission, he will address the issue of the confidentiality agreement below.
The inquiry
16. The complaint was submitted to the Ombudsman on 2 December 2011. On 22 December, the Ombudsman opened an inquiry by asking Parliament for an opinion.

17. The Ombudsman's letter to Parliament requesting its opinion included the following questions: (i) Could Parliament provide its views as regards the relevance of the fact that the ACTA negotiations have now been concluded? (ii) In the event Parliament still considers that access should be denied, can it explain what future circumstances (such as the ratification of ACTA by the contracting parties) would be relevant as regards the issue of public access? (iii) The Vice-President of Parliament has stated to the complainant that the ACTA contracting parties agreed that negotiation documents would only be made public with the unanimous support of all contracting parties. Could Parliament provide the Ombudsman with a copy of the agreement between the ACTA contracting parties not to disclose the negotiation documents or (if it has no such copy) with a detailed explanation as regards the content of that agreement? Could Parliament also comment on how such an agreement can be reconciled with the Treaty provisions on transparency and with the provisions of Regulation

1049/2001?

18. On 28 March 2012, Parliament sent its opinion, which was forwarded to the complainant with an invitation to submit observations. The complainant submitted observations on 27 July 2012.
The Ombudsman's analysis and conclusions

A. Allegation that Parliament failed to put forward valid justifications for not providing access to the documents and related claim

Arguments presented to the Ombudsman

19. The complainant stated that Parliament failed to act in line with the legitimate and reasonable expectations that members of the public have in light of how the institution has acted in the past. It mentioned, in this regard: (i) the European Parliament Written Declaration 12/2010 on the lack of a transparent process for the Anti-Counterfeiting Trade Agreement (ACTA) and potentially objectionable content [7] ; (ii) the European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, in particular paragraph 4 [8] ; (iii) the European Parliament resolution of 24 November 2010 on the Anti-Counterfeiting Trade Agreement (ACTA), in particular paragraph F [9] ; and (iv) the Cashman Report on public access to European Parliament, Council and Commission documents, in particular paragraph 26.

20. As outlined in its initial approaches to Parliament for the documents in question, the complainant argued that Article 32 of the Vienna Convention on the Law of Treaties [10] provides that recourse can be had to the preparatory works of a Treaty in order to determine meaning when this is unclear [11] . According to the complainant, an opinion on ACTA, produced by Parliament's Legal Service, attempts to explain that this only applies when the documents are publicly available. This implies, said the complainant, that the meaning of ACTA could change if any of the EU's negotiating partners were, at any stage in the future, to make the preparatory documents available. As a result, as things then stood, the EU was proposing to bind itself to an international agreement, the meaning of which was unclear and which may change, based on factors entirely outside the EU's control. According to the complainant, this analysis put the documents squarely inside the scope of the *Turco* case-law [12] .

21. The complainant further argued that as the text of at least one of the documents had been published by Parliament on its website — although it had since been withdrawn — it was not tenable to argue that publication of that document, at least, would endanger international relations.

22. In its opinion, Parliament challenged the scope of the Ombudsman's inquiry, namely, that it covers documents in the European Parliament's file on ACTA and not only the

document that Parliament dealt with in its response to the complainant's confirmatory application. Parliament insisted that the complainant's confirmatory application referred exclusively to the denial of access to one single document. This document was identified as the "Note for the attention of the 133 Committee (12 October 2009) - *Draft chapter on Enforcement procedures in the Digital Environment* sent by the US". As to the remaining documents to which access was partially or fully denied in response to the complainant's initial application, Parliament insisted that no confirmatory application was ever lodged by the complainant pursuant to Article 7(2) of Regulation 1049/2001.

23. In Parliament's view, the subject matter of a complaint to the Ombudsman may not lie outside the subject matter of a confirmatory application for access to documents. Were it to be otherwise, Article 8 of Regulation 1049/2001, which provides that remedies (court proceedings or a complaint to the Ombudsman) are open to the applicant " *after a total or partial refusal following the confirmatory application* ", would be deprived of its purpose. According to Parliament, this provision implies that the scope of an admissible allegation is determined by the response to a confirmatory application. The complainant cannot, therefore, invoke new arguments when resorting to the above-mentioned remedies. Parliament further argued that, pursuant to Article 2(4) of the European Ombudsman's Statute, any complaint submitted to the latter " *must be preceded by the appropriate administrative approaches to the institutions and bodies concerned* ". Any complaint going beyond the subject matter of a confirmatory decision under Article 7(2) of Regulation 1049/2001 is therefore inadmissible.

24. Parliament thereby understood the complainant's reference to " *documents in the European Parliament dossier on the Anti-Counterfeiting Trade Agreement* " in the context of its decision on the complainant's confirmatory application not to grant access to document c.11.

25. Parliament expressed the view that its justification for not providing access to document c.11 is in line with the legal requirements of Article 4 of Regulation 1049/2001 and with the relevant case-law. In its response to the confirmatory application, Parliament provided information on the subject of the document concerned and substantiated, in detail, why its disclosure would undermine the protection of the public interests of the EU as regards international relations and the ongoing decision-making process. Parliament pointed out that, according to well-established case-law, the institutions enjoy a wide margin of discretion when determining whether the disclosure of documents would undermine the public interests listed in Article 4(l)(a) of Regulation 1049/2001 [13] .

26. In response to the arguments put forward by the complainant, first, that Parliament failed to act in line with the legitimate and reasonable expectations that members of the public have in light of how the institution has acted in the past, Parliament stated that, whilst striving for maximal transparency, Parliament has, at the same time, to respect the obligations imposed by Regulation 1049/2001 concerning documents in its possession, in particular when the exceptions invoked in this case are at stake. These obligations underlie the Framework Agreement on relations between the European Parliament and the European Commission, in particular points 23 and ff., Annex II on Forwarding of confidential information to Parliament, and Annex III on Negotiation and conclusion of international

agreements [14] .

27. According to Parliament, the EU and its negotiating partners ensured a large degree of transparency during the ACTA negotiations. The Commission kept the public informed about the objectives and evolution of the negotiations by releasing summary reports after each negotiation round, as well as updated summaries on the state of play of the negotiations, and by organising stakeholders' consultation meetings. Parliament confirmed that it would pursue this open approach in the framework of its public deliberations leading to the vote in plenary concerning the conclusion of ACTA by the Council. However, even when a decision is taken in public, Parliament said, the underlying documents can be of a non-public nature. These are two very different issues.

28. Parliament argued, second, that Article 32 of the Vienna Convention on the Law of Treaties could not be interpreted as creating an obligation on the Commission or Member States to make public all preparatory documents leading to the adoption of an international agreement.

29. Third, as to the legal relevance of the *Turco* case-law to the present case, Parliament recalled the Ombudsman's decision in case 90/2009/(JD)OV [15] . Moreover, Parliament noted that the *Turco* case-law was not established in the context of the exceptions provided for in Article 4(1) of Regulation 1049/2001.

30. Finally, with regard to the complainant's arguments in relation to the publication of the " *leaked* " document on Parliament's website, Parliament reiterated its position, as outlined in its response to the complainant's confirmatory application, that the fact that a document has been placed on the Internet without the prior consent of its author in no way alters its, that is, Parliament's, assessment.

31. With regard to the questions put by the Ombudsman in his letter opening the inquiry, Parliament replied as follows: First, on the relevance of the conclusion of the ACTA negotiations, Parliament stated that the decision-making process, as referred to in the first paragraph of Article 4(3) of Regulation 1049/2001, is far from concluded. The ratification of ACTA is still ongoing, it said. On 2 February 2012, Parliament was seized by the Council, in accordance with Article 218 TFEU, whereby its consent was requested. Deliberations within the competent committee, in this case the INTA Committee, began on 29 February 2012. The safeguarding of the due ratification of international agreements between the EU and third countries, even after negotiations have ended, is a matter of public interest, said Parliament. It furthermore had to be stressed that, as ACTA is a " *mixed agreement* " to be concluded between the EU, its Member States and third countries, disclosing document c.11 at this stage would jeopardise the complex procedure of ratification, as it would raise concerns amongst the EU's third country contracting partners with respect to the correctness and the conduct of the ratification process led by the EU and its Member States.

32. According to Parliament, the signing of ACTA by the EU in Tokyo on 26 January 2012 entailed several legal obligations for the EU vis-à-vis its contracting partners. It followed from international law that, once an international agreement has been signed, the contracting

parties are, by law, expected to refrain from any action that might jeopardise its final ratification. There therefore existed *a priori* not only a legitimate interest but also a legal obligation for the EU to promote final ratification of the agreement by its competent political bodies and by other contracting parties and to refrain from any action which may jeopardise achieving this goal. The compromise reached on ACTA could be jeopardised if the respective positions of the ACTA partners and the EU were now revealed, said Parliament.

33. By way of conclusion on this question, Parliament pointed out that international agreements are based on a process, the confidentiality of which must be protected even after the negotiations have ended. There is a concrete risk that disclosure of preparatory documents would prejudice not only relations with third countries in the context of ACTA, but also any other negotiation to be conducted by the EU in the future. Indeed, any future negotiating partner of the EU could doubt the EU's reliability with regard to the confidentiality of negotiations, if preparatory documents concerning the position of one of the EU's contracting partners were released to the public, despite the existence of a confidentiality agreement.

34. In response to the Ombudsman's second question concerning future circumstances which would be relevant as regards the issue of public access, Parliament stated that any application for access to documents under Regulation 1049/2001 had to be evaluated in light of the circumstances prevailing at the moment when it is lodged. Any of the circumstances the Ombudsman referred to, such as ratification of ACTA, may have an impact on the legal assessment under Regulation1049/2001. However, Parliament was not in a position to anticipate any decision to be taken at a later date on an application for public access to document c.11.

35. As regards the ACTA contracting parties' policy to maintain the confidentiality of documents during the process of negotiation and ratification and the Ombudsman's request for a copy of the confidentiality agreement, Parliament pointed out that, according to the Ombudsman's decision in case 90/2009(JD)OV [16] , the Ombudsman is already in possession of the relevant document [17] .

36. In Parliament's view, there was no contradiction between the confidentiality agreement and the Treaty provisions on transparency, as well as the provisions of Regulation 1049/2001. The confidentiality agreement merely spelt out Article 4(l)(a), third indent, of Regulation 1049/2001 with regard to international negotiations. The ACTA parties agreed that, whilst aiming to ensure transparency and a fair amount of information to the public, documents exchanged between the parties would not be made public unless the parties agreed. This joint understanding was adopted informally by consensus and subsequently recorded in writing. What this agreement did, said Parliament, was to spell out the expectation of all ACTA parties that the atmosphere of mutual trust, which is essential for any international negotiations, in particular when they deal with politically and economically sensitive topics, would be respected with regard to the ACTA negotiating texts. This approach, said Parliament, is fully in line with the EU institutions' obligations with regard to transparency, as Article 4(1)(a), third indent, of Regulation 1049/2001 explicitly recognises the need for specific confidentiality in the context of the EU's international relations. The

exception provided for in Article 4(l)(a), third indent, of Regulation 1049/2001 was therefore rightly invoked in the reply to the complainant's request, in order to safeguard the due ratification process and to protect the EU's credibility vis-à-vis its international partners.

37. Even in the absence of an ACTA confidentiality agreement, access to the non-disclosed documents or parts thereof would have to be denied on the basis of the exception in Regulation 1049/2001 pertaining to international relations, in order not to compromise the mutual trust required between the parties and not to undermine the outcome of the process. The agreement constituted therefore only one of the factors indicating why disclosure of the relevant documents would undermine the protection of the public interest as regards international relations.

38. In its observations on Parliament's opinion, the complainant disagreed that the scope of its confirmatory request was unclear.

39. On the substance of Parliament's reply, the complainant insisted that Parliament's reliance on Article 4(1)(a), third indent, and Article 4(3) of Regulation 1049/2001 could not be valid, since non¤redacted versions of some of the documents in question were subsequently made available by the Commission and the Council [18] . For example, on 4 July 2012, the Council published on its website a series of previously restricted documents concerning criminal sanctions in ACTA. If the justifications advanced by Parliament were valid, said the complainant, none of these documents could have been published. The fact that they were proves that Parliament's reliance on the exceptions in Article 4 of Regulation 1049/2001 was disproportionate. Contrary to Parliament's assertions, the publication of some of the documents that it refused to grant full access to had not led to any negative consequences.

40. Finally, the complainant disagreed with Parliament's analysis that there was a legal obligation for the EU to promote final ratification of ACTA by its competent political bodies and to refrain from any action which may jeopardise achieving this goal. The complainant's understanding of this particular provision of international law was that signatories may not act in a way contrary to the signed agreement. This, it said, was somewhat different from Parliament’s assessment that signatories need to " *promote final ratification* ".

The Ombudsman's assessment

The scope of the inquiry

41. Parliament is of the view that the scope of the Ombudsman's inquiry should be limited to document c.11 in its list of 29 September 2011. In support of this view, it argued that the complainant's confirmatory application referred exclusively to the denial of access to this document. The complainant disagreed that the scope of its confirmatory request was unclear.

42. The Ombudsman notes that the complainant's confirmatory application begins "[f] *urther*

to your letter of 29 September, EDRi would indeed like to submit a reasoned request for Parliament's position to be reconsidered ". It goes on to say that "[i] *n particular we would like to obtain a copy of the document that 'leaked' into the public domain* ...".

43. The Ombudsman's view is that the complainant's confirmatory application should have been interpreted as a request to Parliament to reconsider its refusal to grant full access to all of the documents listed in response to the complainant's initial application. However, while Parliament certainly misunderstood the complainant's confirmatory application, the Ombudsman considers that it did so in good faith. This notwithstanding, the Ombudsman finds that it was not in the interests of transparency and good administration for Parliament to insist on its interpretation of what the complainant wished to obtain when the complainant's complaint to the Ombudsman made clear that it sought access to all of the documents in question [19] . In the Ombudsman's view, it would have been overly formalistic to expect the complainant to submit an additional request for public access in response to Parliament's decision to limit its response to his confirmatory application to one document.

Transparency in the Union

44. The Ombudsman has repeatedly stated that transparency is an essential aspect of good democratic governance. Transparency makes it possible for citizens to scrutinise the activities of public authorities, evaluate their performance, and call them to account. As such, openness and public access to documents form an essential part of the institutional checks and balances that mediate the exercise of public power and promote accountability. Transparency also facilitates citizens' participation in public activities by ensuring access to information and the means to take part in the process of governance to which they are subject [20] .

45. Recital 2 of Regulation 1049/2001 explains that openness enables 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. That recital also states that openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

46. The right of access to documents is itself a fundamental right, provided for in Article 42 of the Charter. This fundamental right is given effect in Regulation 1049/2001.

47. In view of the objectives pursued by Regulation 1049/2001, in particular the aim of ensuring the widest possible access to documents held by the Council, the Parliament and the Commission, any exceptions to the right of access to documents have to be interpreted strictly [21] .

48. The examination required for the processing of a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception is not in itself sufficient to justify the application of that exception [22] . In

principle, the application of an exception can be justified only if the institution has previously determined that access to the document would specifically and actually undermine the protected interest (if the protected interest is the decision-making process within the institution, it must be determined that access to the document would specifically and actually *seriously* undermine the protected interest [23]). In addition, the risk of the protected interest being (seriously) undermined must be reasonably foreseeable and not purely hypothetical [24] . For example, it is not sufficient that a document concerns the decision-making process within an institution; it must be reasonably foreseeable and not purely hypothetical that the public disclosure of the document would seriously undermine that decision-making process. The examination carried out by an institution to determine that a protected interest would be (seriously) undermined by public disclosure of a requested document must be apparent from the reasoning set out in the decision limiting public access [25] .

49. The General Court has pointed out [26] that the importance, for EU citizens, of the matter to which the requested documents relate plays a role when it comes to determining whether disclosure of the said documents would really cause harm [27] . Moreover, as confirmed by the Court of Justice, "[i] *t is in fact …* **a lack of information** *and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole* " [28] . (emphasis added)

The exception in Regulation 1049/2001 pertaining to the protection of international relations

50. Parliament invoked two exceptions in Regulation 1049/2001 in order to refuse access to documents in this case: (i) Article 4(l)(a), third indent, of Regulation 1049/2001 concerning the protection of the public interest with regard to international relations; and (ii) Article 4(3) providing for the protection of the institution's decision-making process.

51. The Court of Justice has held in connection with the application of the substantive exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation 1049/2001 by an institution that " *that institution must be recognised as enjoying a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest* ", given that " *the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision … a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation* " [29] .

52. In its judgment of 19 March 2013 in Case T-301/10 *in 't Veld v Commission* , the General Court ruled on the extent to which Article 4(1)(a), third indent, of Regulation 1049/2001 applied to certain ACTA negotiation documents [30] . In sum, the Court found that the Commission was entitled to rely on the exception in Regulation 1049/2001 pertaining to the

protection of international relations in order to refuse full access to most of the documents requested by the applicant in that case.

53. The Ombudsman notes Parliament's arguments in this case, according to which the documents relate to international relations. The Ombudsman recalls that it is not sufficient for a document to concern an interest protected by an exception. The application of an exception can be justified only if the institution has previously determined that access to the document would specifically and actually undermine the protected interest. In addition, the risk of the protected interest being undermined must be reasonably foreseeable and not purely hypothetical.

54. Parliament invoked, in this regard, the agreement between the ACTA contracting parties not to disclose the negotiation documents. It should be noted that, also in Case T-301/10 referred to above, the Commission, in refusing access to the documents in question, referred to the agreement of the negotiating parties to protect the confidentiality of the negotiating positions. However, as pointed out by the Court, it did not in any way invoke that agreement in opposition to the access request as a legally binding agreement that required it, by law, to refuse that request. On the contrary, the Commission legally based its refusal of access solely on Article 4(1)(a), third indent, of Regulation 1049/2001 [31] .

55. Similarly in the present case, Parliament did not limit itself to invoking the confidentiality agreement but argued, as far as document c.11 was concerned, that it had identified a real risk that disclosure of the document in question could affect relations between the EU and other ACTA contracting parties insofar as their negotiation positions are concerned. Parliament explained that the requested document refers in full to the negotiation position of the US, which was communicated to Parliament by the Commission with a view to enabling Parliament to prepare its vote on ACTA. According to Parliament, disclosure of the document would jeopardise the EU's international relations with the US, as it would put into question the confidentiality of the negotiations and risk undermining trust in the EU's negotiation and ratification mechanisms. Moreover, disclosure of preparatory documents stemming from third countries which were forwarded to the EU institutions in the context of confidential negotiations would jeopardise the EU's relations and further ability to negotiate with these countries, as the EU might find itself in a situation where its contracting partners would become more reluctant to transmit confidential documents to it. Parliament also referred to the fact that ACTA has not yet been ratified by national Parliaments.

56. In light of the recent judgment of the General Court in Case T-301/10 *in 't Veld v Commission* [32] , the Ombudsman finds that the reasons advanced by the Parliament are sufficient to show that it is reasonably foreseeable and not purely hypothetical that disclosure of the documents in question could undermine the protection of the public interest as regards international relations.

57. With regard to the various arguments advanced by the complainant to support its request for access to the documents in question [33] , the Ombudsman notes that these arguments relate to the benefits of public access and not to the harm test that must be carried out to determine whether the protection of the public interest as regards

international relations would be undermined as a result of disclosure. Such benefits might be relevant as regards establishing the existence of a public interest in disclosure, However, while Regulation 1049/2001 allows the public interest in disclosure to be taken into account as regards its Article 4(2) and Article 4(3), with a view to establishing whether there is an overriding public interest in disclosure, no such balancing exercise is foreseen under Article 4(1) of Regulation 1049/2001.

58. In view of the foregoing, the Ombudsman finds that the complainant's allegation that Parliament failed to put forward valid justifications under Regulation 1049/2001 for not providing access to the documents cannot be upheld. Similarly, its claim must be rejected.

59. Notwithstanding this finding, and in the interests of good administration, the Ombudsman will deal with the complainant's arguments in relation to the confidentiality agreement. The Ombudsman is conscious of the fact that Parliament itself did not sign the confidentiality agreement. His understanding is that the Commission, which represented the EU in the ACTA negotiations, made this commitment on behalf of the Union. The Ombudsman notes, in this regard, that Article 13, paragraph 2 of the Treaty on European Union, states that "[t] *he institutions shall practice mutual sincere cooperation* ". Parliament was therefore bound by the confidentiality agreement.

60. As set out in paragraph 17 above, the Ombudsman asked Parliament how such an agreement can be reconciled with the Treaty provisions on transparency and with the provisions of Regulation 1049/2001. The Ombudsman does not wish to imply by this question that it is never possible to make such agreements. In his view, however, careful consideration should be given to the temporal and material scope of such agreements, particularly in cases where the issue will be submitted to the EU's legislative bodies for ratification.

61. With regard to the material scope of such a commitment, the Ombudsman recalls that the correct application of Regulation 1049/2001 involves a concrete assessment of the document in question. It is difficult to see how this obligation can be complied with where a blanket commitment not to disclose documents has been made. The Ombudsman notes, in this regard, that parts of some of the documents have indeed been disclosed.

62. With regard to the temporal scope of such a commitment, the Ombudsman's considered opinion is that, once the negotiations have ended on an issue such as ACTA and the international agreement has been submitted to the legislature for the purpose of ratification, it would run counter to the principles set out in the *Turco* case-law [34] for the Union to make a commitment to limit public access during that period of time. In his view, serious consideration should be given by any EU body that makes such a commitment to ensure that it does not undermine the principles essential to a democratic EU that underpin the *Turco* case-law.

63. In light of the above, the Ombudsman will make a further remark to Parliament inviting it to consider whether it would be appropriate to advise other institutions to consider carefully the scope of any future commitments made to third countries on behalf of the EU.

The exception in Regulation 1049/2001 pertaining to the protection of the institution's decision-making process

64. As Parliament validly invoked one exception under Regulation 1049/2001, there is no reason to pursue this issue further.

B. Conclusions

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

There has been no maladministration by Parliament in this case.

The complainant and Parliament will be informed of this decision.
Further remark

Given that Parliament's application of Regulation 1049/2001 is affected by commitments such as the one entered into by the Commission in this case, Parliament, as a political body, could intervene with the Commission and the Council with a view to ensuring that, in future, the very nature of Parliament, which is openly to deliberate on such issues, is not undermined.

P. Nikiforos Diamandouros

Done in Strasbourg on 22 July 2013

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

[2] ACTA was signed on 26 January 2012 by the EU and 22 of its Member States. As ACTA contained criminal enforcement provisions, it had to be signed and ratified by the EU and by all 27 Member States. As far as EU ratification is concerned, Parliament's consent was required, in accordance with Article 218 of the Treaty on the Functioning of the EU. On 4 July 2012, Parliament voted to reject ratification of ACTA.

[3] OJ 2010 L 304, p. 47.

[4] Section III of the Framework Agreement entitled "Constructive dialogue and flow of information" contains a sub-section (ii) entitled "International agreements and enlargement",

which details the respective roles of the Commission and Parliament in these areas and the flow of information between them. Annex III to the Framework Agreement lays down detailed arrangements for the provision of information to Parliament concerning the negotiation and conclusion of international agreements.

[5] Annex II to the Framework Agreement is entitled "Forwarding of confidential information to Parliament".

[6] The contracting parties of ACTA are the European Union, Australia, Canada, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland and the United States.

[7] Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+WDECL+P7-DCL-2010-0012+

Paragraph 2 of the Declaration states: "[The European Parliament] [d] *eclares that the Commission should immediately make all documents related to the ongoing negotiations publicly available.* "

[8] Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML

Paragraph 4 reads as follows: "[The European Parliament] [c] *alls on the Commission and the Council to engage proactively with ACTA negotiation partners to rule out any further negotiations which are confidential as a matter of course and to inform Parliament fully and in a timely manner about its initiatives in this regard; expects the Commission to make proposals prior to the next negotiation round in New Zealand in April 2010, to demand that the issue of transparency is put on the agenda of that meeting and to refer the outcome of the negotiation round to Parliament immediately following its conclusion.* "

[9] Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:099E:FULL:EN:PDF
Paragraph F reads as follows: "[w] *hereas, after strong representations by Parliament, the level of transparency of the ACTA negotiations was fundamentally improved and, since the negotiating round in New Zealand, Parliament has been fully informed of the course of the negotiations; and whereas it took cognisance of the negotiated text one week after the conclusion of the last round in Japan...* ".

[10] Vienna Convention on the Law of Treaties of 23 May 1969, which entered into force on 27 January 1980: United Nations, Treaty Series, vol. 1155, p. 331.

[11] Article 32 of the Vienna Convention on the Law of Treaties reads as follows:

" *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting

from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable. "

[12] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723.

[13] See Case C¤266/05 P *Sison* v *Council* [2007] ECR I¤1233, paragraphs 34 to 36.

[14] See footnotes 4 and 5 above.

[15] See the decision of the European Ombudsman in case 90/2009/(JD)OV, available at: http://www.ombudsman.europa.eu/cases/decision.faces/en/5146/html.bookmark . See, in particular, paragraph 26, wherein the Ombudsman examined the extent to which the Turco case-law applies to documents relating to ACTA.

[16] See footnote 15 above, paragraph 22 of the decision.

[17] Parliament attached a copy of the agreement " *for the attention of the Ombudsman only* ". In light of Article 4.4 of the Ombudsman's Implementing Provisions, according to which the institution's opinion shall not include any information or documents which the institution concerned regards as confidential, this copy was returned to Parliament and does not form part of the file in this case.

[18] According to the complainant, redacted documents that were subsequently made available by the Commission include the Commission's report of the 7th Round of negotiations, Guadalajara, 26-29 January 2010 (document b.3 in Parliament's numbering). Copies of the non-redacted documents were given to an MEP, and the Commission raised no objection to their publication. According to the complainant, they are on its website at: http://www.edri.org/files/01Paris_December_2008.pdf , http://www.edri.org/files/02Rabat_July_2009.pdf , http://www.edri.org/files/03Seoul_November_2009.pdf and http://www.edri.org/files/04Guadalajara_January_2010.pdf .

[19] In its complaint to the Ombudsman, the complainant referred to " *documents* ". The Ombudsman notes Parliament's statement in paragraph 24 above, according to which it understood the complainant's reference to " *documents* " as being to the document dealt with in Parliament's reply to his confirmatory application. The Ombudsman is surprised to note that Parliament understands a reference to documents to mean one document.

[20] The Ombudsman notes the statement made by Parliament in its opinion that, even when a decision is taken in public, the underlying documents can be of a non-public nature. According to Parliament, "[t] *hese are two very different issues* ". The Ombudsman finds this to constitute a misunderstanding of the principle and purpose of transparency. One of the

major aims of transparency is to help those subject to the laws and decisions that have been adopted to understand why those laws and decisions take the shape that they do. In order to do so, it is necessary to gain access to the information, contained in documents that underpin those laws and decisions. It is of course possible that some of the underlying documents can be withheld, but this is only after a concrete assessment has been carried out to determine if there are public or private interests that must be protected.

[21] Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, paragraph 66,; and Case C-266/05 P *Sison v Council* [2007] ECR I-1233, paragraph 63.

[22] Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 45.

[23] Whereas the exceptions provided for in Article 4(1) and 4(2) of Regulation 1049/2001 apply if the protected interest would be " *undermined* " by the disclosure of the document, Article 4(3) of Regulation 1049/2001 only applies if the interest in question, namely, the institution's decision-making process, would be " *seriously undermined* ".

[24] Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 56.

[25] Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraph 69.

[26] Case T-233/09 *Access Info Europe v Council* [2011] ECR II-73, paragraph 74.

[27] In this regard, it should be recalled that Parliament's vote on ACTA on 4 July 2012 followed extensive public debate. Furthermore, the Commission decided on 22 February 2012 to refer ACTA to the Court of Justice of the EU to see whether it is compatible with the EU's obligations in terms of the protection of fundamental rights and freedoms, in particular freedom of expression and information, the fundamental right to the protection of privacy and personal data, and the right to property.

[28] Joined Cases C-39/05 P and C-52/05 *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 59.

[29] Cases C ¤266/05 P *Sison v Council* [2007] ECR I¤1233, paragraphs 34 to 36, and T¤362/08 *IFAW Internationaler Tierschutz-Fonds gGmbH v Commission* , not yet published in the ECR, paragraph 104, among others.

[30] Case T-301/10 *in 't Veld v Commission* , judgment of 19 March 2013, not yet published in the ECR.

[31] Case T-301/10, *in 't Veld v Commission* , judgment of 19 March 2013, not yet published in the ECR, paragraph 118.

[32] Case T-301/10, *in 't Veld v Commission* , judgment of 19 March 2013, not yet published in the ECR, paragraph 118-121.

[33] See, in particular, paragraph 20 above in relation to the Vienna Convention on the Law of Treaties.

[34] See Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723. According to the Court of Justice, "[t] *he possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.* " See paragraph 46. The Ombudsman agrees with Parliament's statement set out in paragraph 29 above that the *Turco* case-law was not established in the context of the exceptions provided for in Article 4(1) of Regulation 1049/2001. It was, however, established in the context of legislative procedures, which is what would make it relevant to the ratification stage of this procedure.