Ombudsman's analysis of the Commission's follow-up reply in OI/10/2014/RA on transparency and public participation in the TTIP negotiations

OI/10/2014/RA

NOTE ON FOLLOW-UP

Institution: European Commission

Case OI/10/2014/RA: Transparency and public participation in relation to the Transatlantic Trade and Investment Partnership ('TTIP') negotiations

The European Commission is currently negotiating, on behalf of the European Union, a wide-ranging trade and investment partnership agreement with the United States (the Transatlantic Trade and Investment Partnership - TTIP). The negotiations have attracted unprecedented public interest, given the potential economic, social and political impact TTIP may have.

In July 2014, the Ombudsman opened an own-initiative inquiry aimed at ensuring that the public can follow the progress of these talks and contribute to shaping their outcome. In her opening letter to the Commission, the Ombudsman presented a first set of suggestions to help make the negotiations more transparent and accessible. The Ombudsman also gathered ideas from the public during her inquiry. Following concerns also expressed by the European Parliament and civil society, the Commission outlined, in November 2014, a range of ambitious transparency measures.

In her decision of 6 January 2015, the Ombudsman put forward ten further suggestions to the Commission in relation to greater proactive disclosure of TTIP documents, common negotiating texts, and enhanced transparency of TTIP meetings. The Ombudsman considered that by following these suggestions, the Commission would ensure that the TTIP negotiating process can enjoy greater legitimacy and public trust.

In its follow-up response, which is available on the Ombudsman's website, the Commission confirmed that it is building on its more proactive approach to publishing TTIP documents and outlined the full range of actions it has taken to inject greater transparency into the negotiations.

The Ombudsman welcomes the fact that the Commission has engaged positively with

her in this area of key importance to citizens. She applauds the fact that the Commission is leading by example and is convinced that the ambitious transparency agenda it has set for TTIP augurs well for future trade and investment negotiations.

In particular, the Ombudsman has underlined, from the outset of this inquiry, the importance of proactive publication of TTIP documents. The Commission has, in the meantime, stepped up its proactive transparency policy, notably following its Communication of 25 November 2014. For the first time, the Commission has published specific legal proposals while negotiating a bilateral trade agreement. In the Commission's own words, " *in practical terms, most important negotiating documents on TTIP will be publicly available soon after they have been presented in the negotiations* ".

While more can be done to increase public awareness of the content and implications of TTIP – and particularly when consolidated texts of EU and US positions come close to being finalised – the Ombudsman is pleased with the way in which the Commission has further moved to build on the transparency measures already put in place. Her analysis below identifies a number of areas for reflection, which she trusts the Commission will find useful as it proceeds with the negotiations. The Ombudsman further commends the European Parliament and civil society groups who have also pushed for more transparency. She points out that the democratic responsibility now lies with the elected representatives to scrutinise the negotiations on behalf of their constituents, engage with European citizens and decide the future of TTIP.

As part of this inquiry, the Ombudsman also made a number of suggestions to the Commission in relation to the transparency of meetings and contacts with interest representatives. While significant progress was made during the inquiry, notably as a result of two Commission decisions [1] adopted on 25 November 2014, there is still room for improvement. The Ombudsman will continue to monitor developments closely, most probably via an own-initiative inquiry to examine, one year on, the possibility of extending the transparency obligations that entered into force for Commissioners, members of Cabinet and Directors-General on 1 December 2014. In particular, the Ombudsman remains unconvinced about the reluctance to publish names of individuals who meet Commission representatives and will continue to pursue this issue.
Follow-up to each suggestion made by the Ombudsman:
1. Inform the US of the importance of making, in particular, common negotiating texts available to the EU public before the TTIP agreement is finalised. The Commission should also inform the US of the need to justify any request by them not to disclose a given document. The Commission needs to be convinced by this reasoning.

In its follow-up reply, the Commission confirms that it will continue to discuss possible future transparency initiatives with its partners, including the US, and will draw its attention to the views expressed by the Ombudsman. This is an important first step in addressing the Ombudsman's suggestion.

With regard to the making available of common negotiating texts before the TTIP agreement is finalised, the Commission states that it is now common practice for it to publish the full

text of trade agreements at the moment they are stabilised i.e. at initialling, which is well before the finalisation of the agreement through signature and ratification. While this is most welcome, the Ombudsman understands that it will no longer be possible to modify the text of the agreement, in any meaningful way, after it has been initialled. As outlined in paragraph 23 of the Ombudsman's decision in this case: *"Early publication of common negotiating texts would allow for timely feedback to negotiators in relation to sections of the agreement that pose particular problems. The Ombudsman assumes that it is preferable to learn of such problems sooner rather than later, so that they can be tackled effectively."* It would therefore be most useful if the Commission, in its ongoing discussions with the US, could pursue the possibility of disclosing "stabilised" chapters of the agreement. [2]

The Ombudsman understands that any such disclosure will only ever provide a partial picture of the overall agreement. However, being as transparent as possible throughout the process is the best way of ensuring an informed debate about the final agreement text, when it is published, and to promote understanding of how the negotiators arrived at that final text.

With regard to the extent to which the US should provide reasons for requesting that certain documents not be disclosed, the Commission again points out that it will not publish any US documents or common negotiating documents (the so-called consolidated texts which are jointly owned) without the explicit agreement of the US. The Commission explains that the US has asked the EU not to release documents prepared by them or "consolidated texts" containing texts emanating from them. Specifically, the Chief US Negotiator has explicitly requested a confidential treatment of the negotiation documents due to their sensitive nature in order to *"enable mutual trust between negotiators and for each side to preserve positions taken for tactical reasons with regard to third countries with which* [the EU and the US] *are or could be negotiating in the future"* . [3] According to the Commission, *"this is an important factor to be taken into account in any case-by-case assessment of specific requests"* .

The Commission further states that its **political** commitment to transparency is limited to its own documents (emphasis added). The Commission is therefore aware that its legal obligation, under Regulation 1049/2001, extends to any document in its possession, including US documents [4] . The Commission explains, in this regard, that it decides on a case-by-case basis which documents it holds can be released or not. In doing so, it must also consider and, to the extent possible, respect the position of its negotiating partners and – linked to this - the potential risks to the EU's international relations.

In her decision, the Ombudsman underlined the need for the Commission to adequately justify any policy of non-disclosure. For example, it is necessary to show, based on the content of a requested document, that its disclosure would *undermine* the public interest as regards international relations. No public interest as regards international relations exists in complying with unreasoned or unreasonable requests not to disclose documents.

In principle, the explanation provided above by the Chief US Negotiator could constitute a valid reason for non-disclosure. It is, however, important in the context of responding to specific requests for public access to bear in mind the specific content of the document in

question and the passage of time. As such, unless it is obvious that the above reason can be invoked to justify the non-disclosure of a particular document, the Commission should at least ask the US whether that reason still applies in the case at hand.

Finally, the Commission explains that it is committed to ensuring wide access to these documents for the European Parliament and the EU Member States, and is already engaged with the co-legislators on practical modalities to attain this aim. The Ombudsman recognises the special democratic responsibility of elected representatives, at the European and national levels, in scrutinising the negotiations on behalf of their constituents. However, citizens are increasingly aware that TTIP will produce rules that impact on them in a manner analogous to how legislation impacts on them. While there may always be circumstances in which elected representatives will have privileged access, the direct involvement of citizens should be encouraged and facilitated to the greatest extent possible, as it is in the EU legislative process.

While the Commission's reply is largely satisfactory, the Ombudsman encourages it to pursue its discussions on transparency with the US and, in particular, to pursue the possibility of disclosing, for example, stabilised chapters of the agreement as the negotiations proceed.

2. Carry out an assessment as regards whether a TTIP document can be made public as soon as the document in question has been finalised internally and at regular and pre-determined intervals thereafter (including, but not limited to, when the document is tabled in the negotiations). If no exception applies, the document in question should be published proactively by the Commission. If a document cannot be made public proactively, the document reference (and, if possible, its title) should be made public, along with an explanation as to why the document cannot be made available.

In its reply, the Commission says that, given the renewed emphasis on transparency and the important number of requests for TTIP documents, the Commission assessed proactively relevant negotiation documents to see if they could be published or whether their publication could harm the EU's interest in the ongoing negotiations. This is something which is also taken into account during the lifetime of the negotiations, it says. Other documents developed during the course of the negotiations will be considered automatically for similar publication. The Commission is committed to continuing its proactive approach as regards the appropriate marking or classification of documents.

The Commission, however, argues that a *"systematic screening and publication of details of documents that it judges cannot be released and preparing a justification for each individual document, or parts of those documents"* would represent a disproportionate burden. Moreover, this would also lead to an inefficient use of public resources, because considerable time would be spent on documents related to topics or negotiation strategies that may end up being discarded in the actual negotiation process.

As stated at the outset of this inquiry, its purpose was, among other things, to seek solutions to a range of practical issues to promote efficient and effective administration, thereby reducing the need for individual requests and complaints to the Commission and the

Ombudsman. The continuous assessment now being carried out by the Commission as regards whether or not a document can be made public adequately addresses the Ombudsman's suggestion. The Ombudsman was not in any way encouraging the Commission to engage in a futile, bureaucratic exercise. Rather, her suggestion was based on making the Commission's life easier in terms of being able to react to access to documents requests rapidly and indeed to pre-empt them by proactively publishing negotiating documents. The Commission is now doing so.

The Ombudsman welcomes the continuous assessment now being carried out by the Commission.

3. Ensure that the list of TTIP documents to be made available on its dedicated website on trade policy is comprehensive.

In its follow-up reply, the Commission announced that it will be making public a list of all TTIP documents which are shared with the Council and Parliament, hence giving an indication of what documents exist beyond those which are being made public. This list will be comprehensive, and also include details of EU Restricted Documents. The list will be updated periodically, including as regards the change in the status or classification of earlier documents.

On 20 March 2015, the Commission published this list of TTIP documents that it shared with the Council and Parliament in 2013 and 2014 [5] .

The Ombudsman very much welcomes this development, which she believes should facilitate the Commission's handling of access to documents requests. As she outlined in her decision, it would be reasonable, and in line with the rules on public access, for the Commission to respond to imprecise requests for access to documents by referring the applicant to the list of TTIP documents so that the applicant can clarify the request.

While the vast majority of the documents listed are now publicly available, the list contains the titles of some documents that have been shared with Council and Parliament but which are not publicly available: by way of example, 'TTIP: List of EU and US negotiating documents', shared with Council and Parliament on 21/3/2014, 5/6/2014, 25/7/2014, 9/10/2014. By listing such documents, the Commission is at least facilitating requests for public access to them.

It should also be noted that, as announced in the Commission's Communication on transparency, dated 25 November 2014, the list contains TTIP documents **shared with Council and Parliament** (emphasis added). It does not currently contain other important negotiating documents, notably consolidated texts. These texts exist in a range of areas, such as telecommunications and SMEs. A publicly available list of consolidated texts would also be useful, even if the Commission's current view is that the documents themselves cannot be publicly disclosed.

The Ombudsman welcomes the publication of the list of TTIP documents shared with Parliament and Council. She encourages the Commission to be even more ambitious and to seek to list other

important TTIP documents, notably consolidated texts that exist.

4. Publish on its website the many TTIP documents it has already released in response to access to documents requests.

The Commission replied that this is a cross-cutting issue that raises a general question as regards its handling of access-to-document requests. It is, however, currently examining ways of more systematically making available, through its Documents Register, those documents to which access has already been provided in response to specific requests under Regulation 1049/2001.

While the Ombudsman welcomes this news, it is important to recall that she made this suggestion already in her letter to the Commission opening the inquiry. Having reviewed (via asktheeu.org) the type of document the Commission disclosed in response to access to documents requests, the Ombudsman's view was that these documents should be published by the Commission.

The Ombudsman remains convinced that this would constitute an efficiency gain but, in light of the Commission's point that this is a horizontal issue, will not pursue it in the context of the present follow-up, apart from making the following general point. Going forward on this issue, the Commission should have regard to Article 12 of Regulation 1049/2001 on direct access. In other words, if, in response to a request for public access, the Commission discloses documents that it realises it should already have made directly accessible, those documents should be published on its website as a matter of urgency.

5. Take into account the relevant suggestions outlined in the 'Public participation' section of the Ombudsman's public consultation report.

The 'public participation' section of the Ombudsman's public consultation report contained a wide range of suggestions made by respondents. By way of example, some respondents called for more public consultations to be conducted by the Commission. Outlining the resource implications, the Commission explained its tailored approach to consultation, which involves choosing the type of approach best suited to the particular issue on which views are sought. The Ombudsman agrees that the Commission should adopt a tailored approach and use the means of public participation most suited.

Some respondents also called on the Commission to publish a more detailed report of the TTIP negotiating rounds. In its reply, the Commission states that it now publishes a substantial report after each negotiating round. This replaces the summary “state of play” document that was published earlier.

A number of suggestions were made in relation to the work of the TTIP Advisory Group. In reply, the Commission said that it will continue developing the working methods of the Group in consultation with the members, and looks forward to further involvement of additional experts, for example in “sub-group” meetings on specific topics (this point was raised in responses to the Ombudsman's public consultation). Following the Ombudsman's

report, the Commission raised these issues with the TTIP Advisory Group in January 2015 and is currently discussing with the group how this can be taken forward.

The Commission further states that it provides the Group with comprehensive information allowing it to play its advisory role effectively, including via regular meetings before and after each round, and through access to classified EU documents via a secure reading room. With regard to access to consolidated texts, the Commission has raised this question with the US, but the US remains opposed to this. The US underlines its different practice of interaction with similar advisory groups that also exist on its side, albeit with a different structure and legal basis.

It is difficult to reconcile this position with the point made elsewhere in the Commission's response that *"respect for each Party's right to regulate is indeed an essential principle the Commission intends to fully respect throughout the TTIP negotiations."* As explained by the Commission, the US has a different practice to the EU when it comes to sharing the documents. The US right to enact its own regulation in this area, although different from the EU one, is to be respected. The same clearly applies to the EU.

As the Commission explains, the TTIP Advisory Group operates in line with the Commission's standard Rules on Expert Groups. Rule 11(5) of the horizontal rules for Commission expert groups provides that the obligation of professional secrecy set out in the Treaties, and the rules implementing them, apply. In addition, the provisions of the Commission's rules on security regarding the protection of EU classified information, laid down in the Annex to Commission Decision 2001/884/EC, ECSC, Euratom, apply to expert groups.

Moreover, the Advisory Group's Terms of Reference [6] specifically provide, under the heading 'Confidentiality', that:

"19. Members of expert groups and their representatives, as well as invited experts and observers, shall comply with the obligations of professional secrecy laid down by the Treaties and their implementing rules, as well as with the Commission's rules on security regarding the protection of EU classified information, laid down in the Annex to Commission Decision 2001/844/EC. Should they fail to respect these obligations, the Commission may take all appropriate measures.

20. Certain information provided to the group by the Commission shall be treated as confidential. The Chair will make clear when this is the case. In particular, non-public EU documents related to the negotiations (including but not limited to negotiating documents) and non-public details about the negotiating positions of either party, shall be treated as confidential.

21. Members of the group agree to protect this confidential information, and to use their best efforts to prevent it being disclosed to any person outside the TTIP Advisory Group or the EU TTIP negotiating team, or from falling into the possession of others, or into the public domain."

In the light of these specific safeguards, it is not evident why the Commission would so readily accede to the US position on this issue.

The Ombudsman broadly welcomes the Commission's follow-up in this area. The Commission could, however, further examine the possibility of providing access to consolidated texts to the TTIP Advisory Group.

6. Extend the transparency obligations in relation to meetings with professional organisations or self-employed individuals, in the context of TTIP, to the levels of Director, Head of Unit and negotiator. This should include the names of all those involved in such meetings.

7. Proactively publish meeting agendas and records of meetings it holds on TTIP with business organisations, lobby groups or NGOs.

8. Examine how to extend, to levels below the level of Commissioner, the obligations (including in relation to the Transparency Register) aimed at ensuring an appropriate balance and representativeness in its meetings with professional organisations or self-employed individuals on TTIP. These obligations might, for example, be extended to the levels of Director, Head of Unit and negotiator.

It should be noted that, in her opening letter to the Commission, the Ombudsman suggested that the Commission consider — for the remainder of the negotiations and to the extent possible — establishing and publishing online lists of meetings it holds with stakeholders relating to TTIP, as well as the related documents. The Ombudsman then made the above suggestions in her decision.

The Commission replied that, since 1 December 2014, it publishes information on all meetings with business and non-governmental organisations or self-employed individuals. This applies to Commissioners, their Cabinet Members and to Directors-General. These two decisions were the result of a political assessment of what constitutes a proportionate response to balancing the needs of transparency and accountability (based on the level of responsibility exercised), the protection of personal data, the need to minimise any administrative burden and to ensure effective policy delivery. The Commission felt that the appropriate balance does not require the publication of the agendas and records of such meetings. This is without prejudice to requests for such information made under Regulation 1049/2001, it said.

In the Commission's view, it is too early to come back on the above assessment, which can only be judged in the light of experience. For this reason, it is currently not contemplating any further extension of the aforementioned obligations. Moreover, the Commission has a concern with one aspect of the proposed recommendation, namely that it should proactively publish the names of all those involved in such meetings. In line with Regulation 45/2001 and case law, the Commission can only publish the names of persons who have explicitly agreed to this publication, or if one of the other conditions mentioned in Article 5 of Regulation 45/2001 is fulfilled.

In the Ombudsman's view, data protection should not be used as an automatic obstacle to public scrutiny of lobbying activities in the context of TTIP. As an issue of general policy, it would be in the interests of transparency, and in particular in the interests of promoting participatory democracy, for the Commission systematically to inform interest representatives, in advance of meetings with Commission staff members, that the Commission intends to release the names of interest representatives. Any interest representative would, in that context, have the possibility of exercising their right to object to the release of their personal data on compelling legitimate grounds relating to his or her particular situation [7] .

More specifically, rather than relying on Article 5(d) ('consent') of Regulation 45/2001, the Commission could use as a legal basis Article 5(a) of Regulation 45/2001 which provides that personal data may be processed if it is *"necessary for the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in the institution or body"* . The Commission would, as such, be giving effect to the principle of openness and, specifically, to Article 15(1) TFEU which obliges EU institutions, bodies, offices and agencies to conduct their work as openly as possible. The aforementioned Commission decisions would need to be revised to make clear to data subjects the Commission's intention to disclose names. Such publication is necessary and proportionate in relation to the aim pursued: one can argue that if the purpose pursued by the persons concerned is to seek to influence EU policy making, it is not excessive for their names to be disclosed. As personal data should not be disclosed if, given particular circumstances, there is a reason to assume that disclosure would prejudice the legitimate interests of a given data subject, the individual should be given the right to object [8] .

With regard to agendas and records, the Ombudsman understands that, already now, the Commission is receiving a significant number of requests for public access to the agendas and records of the meetings in question. In the interest of the most effective use of resources, the Commission may therefore wish to reflect on the value of proactively publishing such material, notably in relation to TTIP meetings.

Finally, the issue of ensuring an appropriate balance and representativeness as regards meetings with stakeholders is, as far as the Ombudsman is concerned, intrinsically linked to making available information about such meetings. As outlined in the 'Working Methods of the European Commission 2014-2019' [9] , the Commission further links this issue to registration in the Transparency Register. It does not, however, comment specifically on this in its follow-up reply.

The Ombudsman will continue to monitor developments closely, most probably via an own-initiative inquiry to examine, one year on, the possibility of extending the transparency obligations that entered into force for Commissioners, members of Cabinet and Directors-General on 1 December 2014. In particular, the Ombudsman remains unconvinced about the reluctance to publish names of individuals who meet Commission representatives and will continue to pursue this issue.

9. Confirm that all submissions from stakeholders made to it in the context of TTIP will be published unless the sender gives good reasons for confidentiality and provides a non-confidential summary for publication.

The Commission replied that it is ready to invite stakeholders, i.e. business organizations, lobby groups and NGOs that submit papers relating to TTIP to the Commission, to indicate whether the relevant document can be published or whether they can also submit to it a non-confidential version for publication. A public statement to this aim can be made on the dedicated TTIP website, it said. The Commission further states that *"except in the case of specific requests under Regulation 1049/2001, the Commission does not have legal grounds to insist on being given reasons for a specific refusal to publish nor question reasons that may be given to it in this regard"* .

The Ombudsman notes the Commission's view that it only has legal grounds to insist on being given reasons for a specific refusal to publish (or to question such reasons) in the context of Regulation 1049/2001. Principles of good administration suggest, however, that the Commission can and should go further. There should be no right or expectation that one can interact in confidence with an EU public administration, such as the Commission, unless there are duly justified reasons. This follows from the principle of openness, as well as principles of good administration and good governance.

The Ombudsman welcomes the fact that the Commission stands ready to encourage stakeholders to interact with it in a public manner and calls on it to make the relevant statement available on its website as soon as possible.

10. Ensure that documents that are released to certain third party stakeholders are released to everyone, thereby ensuring that all citizens are treated equally.

The Commission says that it has a clear practice, where it is able to share documents proactively, to do so with all third party stakeholders. There are no civil society groups or organisations that get privileged access ahead of others. The updated TTIP website facilitates the Commission in ensuring such even-handed access, it says.

The Ombudsman welcomes this clear statement from the Commission.

[1] See Commission decision C(2014) 9051 final of 25 November 2014 on the publication of information on meetings held between Members of the Commission and organisations or self-employed individuals and Commission decision C(2014) 9048 final of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or self-employed individuals.

[2] While the Ombudsman recognised in her decision that the Commission needs to create a context in which it can negotiate effectively with the US on TTIP, some areas of the "negotiations" would seem to lend themselves more readily to protection than others

(namely areas described by the Commission as *"the essence of the confidential part of the negotiations"* such as tariffs, services, investment and procurement). Other areas could usefully be pursued as far as disclosing stabilised chapters is concerned. By way of example, already at the end of the sixth round of negotiations, which finished on 18 July 2014, the Chief EU negotiator spoke of *"finalizing consolidated texts in areas such as SMEs or trade facilitation."* The Commission's report on the eighth round of negotiations further provided as follows in relation to customs and trade facilitation: *"Discussions confirmed progress of the previous rounds and focused on reviewing and further consolidating the text of the chapter."* See, respectively, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1132 and http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153175.pdf

[3] http://www.ustr.gov/sites/default/files/US%20signed%20conf%20agmt%20letter_0.pdf

[4] The Ombudsman notes that, in response to suggestion 9 below, the Commission says that " **except in the case of specific requests under Regulation 1049/2001,** *the Commission does not have legal grounds to insist on being given reasons for a specific refusal to publish nor question reasons that may be given to it in this regard*" . (emphasis added)

[5] http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153263.pdf

[6] http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152103.pdf

[7] Article 18 of Regulation 45/2001.

[8] For further information on such an approach, see the paper produced by the European Data Protection Supervisor entitled "Public access to documents containing personal data after the *Bavarian Lager* ruling" and, more specifically, Section III thereof, entitled "The proactive approach".

[9] See Communication from the President to the Commission - The Working Methods of the European Commission 2014-2019, C(2014) 9004.