

## **Decision of the European Ombudsman closing the inquiry into complaint 1777/2014/PHP on the European Commission's handling of a request for public access to documents concerning TTIP**

Decision

**Case 1777/2014/PHP - Opened on 21/11/2014 - Decision on 30/10/2015 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned a request for access to documents related to the Transatlantic Trade and Investment Partnership ( *TTIP* ) negotiations. *The Commission refused access to certain documents on the grounds of the protection of international relations and the decision-making process. The complainant turned to the Ombudsman and argued that the Commission had failed to justify the exceptions invoked and its view that there was no overriding public interest in disclosing the requested documents.*

The Ombudsman inquired into the issue and found that the Commission's decision to refuse access to the requested documents was well-founded. In addition, the Ombudsman noted that the complainant's underlying concerns had been comprehensively examined by the Ombudsman in her own-initiative inquiry on the transparency of the TTIP negotiations. She has therefore decided to close the case.

## **The background to the complaint**

1. On 4 August 2014, the complainant, a Spanish citizen, made a request under Regulation 1049/2001 [1] for access to documents concerning the negotiations of the Transatlantic Trade and Investment Partnership ("TTIP"). In particular, the complainant requested access to the consolidated texts proposals, "non-papers" and draft text proposals of the following chapters: (i) Energy and Raw Materials; (ii) Financial Services, and (iii) Services and Investments, Intellectual Property and Public Procurement Services.

2. In its reply dated 13 August 2014, the Commission identified 23 documents falling under the scope of the request. The Commission provided the complainant with the links to three documents (already public at that time) and refused access to the remainder of the documents, invoking one of the exceptions of Regulation 1049/2001, namely the protection of international relations. [2]



3. On 24 August 2014, the complainant sought a review (known as a "confirmatory application") of this decision. Relying on the judgment of the Court of Justice in Case C- 350/12 P, [3] the complainant argued that the exceptions in Regulation 1049/2001 should be interpreted and applied strictly, and that, where an exception is invoked, the Commission must clarify how the disclosure of a document could undermine the interest protected by that exception. That risk could not, however, be purely hypothetical. The complainant considered that, in this case, there was an overriding public interest that justified the disclosure of the documents.

4. In its confirmatory decision of 30 September 2014, the Commission reiterated its position that it could not grant access to the requested documents, relying on (i) the protection of international relations and (ii) the protection of the decision-making process. [4]

5. On 17 October 2014, dissatisfied with the Commission's position, the complainant lodged the present complaint with the Ombudsman.

## **The inquiry**

6. The Ombudsman opened an inquiry into the complaint and identified the following allegation and related claims:

### **Allegation**

The Commission failed to sufficiently justify the application of the exceptions in Regulation 1049/2001 and to take into due consideration the recent judgement of the Court of Justice in Case C-350/12 P.

### **Claims**

1) The Ombudsman should verify whether total or partial access to the requested documents should be granted.

2) The Commission should grant access to the requested documents in light of the Ombudsman's findings.

7. In the course of the inquiry, the Ombudsman received the opinion of the Commission on the complaint and, subsequently, the comments of the complainant in response to the Commission's opinion. The Ombudsman also inspected the Commission's file on this case, including the documents covered by the access request. In conducting the inquiry, the Ombudsman has taken into account the arguments and opinions put forward by the parties.

## **Allegation that the Commission failed to sufficiently justify the application of the exceptions invoked and to**



## **take into account recent case law**

### **Arguments presented to the Ombudsman**

**8.** The complainant argued that the Commission had deliberately ignored the Court's judgment in Case C-350/12 P and had applied the exceptions of Regulation 1049/2001 to all the requested documents automatically and without making a distinction between them.

**9.** In its opinion, the Commission argued that it had explained in detail the application of the two exceptions relied upon, and had referred to the lack of an overriding public interest as well as to the reasons for not granting partial access. Furthermore, contrary to the complainant's view, the Commission stated that it had taken into account the reasoning of the Court in Case C-350/12 P.

**10.** The Commission also said that, in line with the Communication to the Commission of 25 November 2014, [5] some of the documents requested by the complainant were published on the Commission's website on 7 January 2015. In addition, the Commission reiterated its intention to publish the EU negotiation texts shared with the Member States and the Parliament, which would imply publishing the so-called "textual proposals" unless one of the exceptions of Regulation 1049/2001 applied, on a case-by-case basis.

**11.** Finally, with regard to the suggestion to reconsider providing partial access to the document on "Regulatory Co-operation on Financial Regulation" raised by the Ombudsman's representatives during the inspection, the Commission said that the document in question was not a textual proposal yet, given that the EU was in the process of defining its position on the matter. However, once the EU's position was clear and a formal textual proposal was made to the US, the Commission promised that it would be made public. Moreover, the Commission argued that granting partial access would result in disclosing the EU's analysis and tactical negotiating position.

**12.** In its observations, the complainant repeated that the Commission's approach was not in line with the judgment in Case C-350/12 P. He disputed the Commission's understanding of its "wide discretion" for the purpose of determining the disclosure of documents, [6] given its inconsistency with the right to receive information without interference by public authorities [7] and the principle of transparency. He also argued that, by relying on the exceptions of Regulation 1049/2001, the Commission's real intention was to effectively prevent citizens from knowing and participating in a matter of public interest.

### **The Ombudsman's assessment**

**13.** As a preliminary remark, the Ombudsman notes that last year, in the context of her own-initiative inquiry OI/10/2014/RA concerning the TTIP negotiations, she presented a first set of suggestions to the Commission, followed by ten further suggestions included in her decision



closing the inquiry (hereinafter the "Closing Decision"). The scope of the own-initiative inquiry was broader than assessing particular refusals of access to documents requests, and its aim was to ensure that the TTIP negotiating process enjoyed greater transparency and public trust. [8]

**14.** The present complaint concerns whether, with regard to the complainant's request for access to documents, the Commission's decision to deny access to the requested documents was sufficiently justified and was consistent with the recent case law of the EU Courts.

**15.** In her Closing Decision, the Ombudsman recognised the need to create a context in which negotiations may be conducted effectively. This implies that it will be legitimate, at certain points, to keep certain information and documents confidential, for example, during certain stages of the negotiations. However, the Ombudsman also highlighted that the non-disclosure of documents must be properly justified and that any exceptions to the fundamental right of public access to documents must be interpreted restrictively. As regards the exception on international relations, the Ombudsman pointed out that it does not apply simply because the subject matter of a document concerns international relations. On the contrary, based on the content of that document, the Commission must show that its disclosure would undermine the protection of the public interest as regards international relations.

**16.** In the present case, the Ombudsman takes the view that the Commission has complied with this standard. Indeed, the Ombudsman notes that when referring to the exception on international relations in its confirmatory decision, the Commission said that the documents to which access was denied were all negotiating documents and that their disclosure would undermine the EU's negotiating position. The Commission contended that the success of the negotiations was, to a significant extent, dependent on protecting the parties' strategies and objectives and on keeping mutual trust between them. Moreover, the Commission considered that the disclosure of the documents could undermine the EU's position not only as regards the present TTIP negotiating process, but it could also negatively affect future bilateral negotiations. In the Ombudsman's view, having inspected the documents, the Commission's explanation appears to be reasonable and comprehensive.

**17.** Accordingly, the Ombudsman is satisfied that the Commission was justified in its conclusion that all of the documents at issue are protected by the exception in relation to international relations. This exception is not subject to an overriding public interest test, so the public interest does not have to be further considered. As all of the documents are covered by the international relations exception, it is not necessary to consider whether all, or some, of the documents are also covered by the separate exception which seeks to protect the decision-making process.

**18.** In addition, the Ombudsman considers that, contrary to the complainant's assertion, the Commission did not disregard the recent case law of the EU Courts. Indeed, the EU Courts have taken the view that where access to a document is refused on the basis of Article 4(1)(a) of Regulation 1049/2001, the institution remains obliged to explain how disclosure could specifically and actually undermine the interest protected by an exception. Moreover, the risk of the interest being undermined must be reasonably foreseeable and not purely hypothetical. [9]



**19.** In this respect, in its confirmatory decision, the Commission re-stated its commitment to transparency as regards international negotiations, as attested by the TTIP documents already made public. However, the Commission explained that some of the documents requested were negotiating documents that contained direct and indirect references to the US' negotiating position. The Commission pointed out that the US negotiating documents had not been made public and that disclosing them unilaterally from the EU side could seriously undermine the mutual trust between the parties.

**20.** As the Ombudsman pointed out in her Closing Decision, there is a public interest in maintaining the trust and confidence of any international partner of the EU which makes reasonable and well-grounded requests for the non-disclosure of documents, based on the need to protect legitimate interests of the international partner. The Commission itself mentioned in its opinion that if the US requests confidentiality, the EU needs to take it into account. The Ombudsman agrees. In the present case, however, it has not been established to what extent the Commission conferred with the US in relation to the documents in question. The Ombudsman notes, however, that the confirmatory decision in this case was taken before the Commission submitted its follow-up reply to the Ombudsman's Closing Decision, where it dealt with this matter. Therefore, there is no need to further pursue this issue in the context of the present inquiry.

**21.** The Ombudsman's services verified during the inspection that, apart from the documents that were already public at the time, the documents to which access was refused were indeed negotiating documents. As noted in the Ombudsman's Closing Decision, disclosure of documents may be validly denied where, at a sensitive point during the negotiations, it would harm legitimate interests. Notwithstanding the above, in her Closing Decision the Ombudsman also pointed out that the Commission should assess whether a TTIP document can be made public as soon as the document is finalised internally; where it cannot be disclosed at that point, the Commission should subsequently re-assess the situation regarding disclosure at regular and pre-determined intervals.

**22.** In this regard, during the Ombudsman's inspection, the Commission was requested to consider whether it could grant partial access to one of the documents ("Non-paper on Regulatory Co-operation on Financial Regulation"). In its opinion, the Commission duly explained that the document in question was not a formal textual proposal at the time. However, it stated that once the formal textual proposal was submitted to the US, the document would be made public. The Commission mentioned that providing *meaningful* partial access to the document at that stage would unavoidably reveal the EU's analysis and negotiating strategy.

**23.** The Ombudsman notes that, as the Commission announced in its opinion, the Commission's dedicated website on the EU negotiating texts on TTIP [10] now contains several documents regarding regulatory cooperation . [11] The Commission also appears to regularly update the content of that website.

**24.** The Ombudsman therefore considers that the Commission has now adopted a more



proactive attitude towards enhancing transparency, in line with the commitment announced on 25 November 2014 of publishing the TTIP EU negotiating texts shared with the Council and the European Parliament, after having passed them on to its negotiating partner.

**25.** In light of the foregoing, and on the basis of the arguments and evidence at her disposal, the Ombudsman takes the view that there has not been any maladministration on the part of the Commission. This decision is also made in the light of the analysis, conclusions and suggestions made within the context of the Ombudsman's own-initiative inquiry OI/10/2014/RA.

## Conclusion

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

**There was no maladministration by the Commission.**

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

Emily O'Reilly

Strasbourg, 30/10/2015

[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 L 145/43 31.5.2001, hereinafter "Regulation 1049/2001")

[2] Article 4(1)(a), third indent of Regulation 1049/2001

[3] Judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, C-350/12 P of 3 July 2014, ECLI:EU:C:2014:2039

[4] Article 4(1)(a), third indent, and Article 4(3), first subparagraph of Regulation 1049/2001

[5] Communication to the Commission on transparency in TTIP negotiations (C(2014) 9052 final)

[6] Judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, C-350/12 P of 3 July 2014, ECLI:EU:C:2014:2039, para.63

[7] Article 11 Charter of Fundamental Rights of the European Union



[8] The full text of the decision and the documents related to the Ombudsman's investigation are available at:

<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark>

[9] Judgment of the Court of Justice of 3 July 2014, *Council v in 't Veld*, C-350/12 P of 3 July 2014, ECLI:EU:C:2014:2039, para.64

[10] Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

[11] In particular: "Revised EU proposal on Regulatory Cooperation - Explanatory note", "Detailed explanation on the EU proposal for a Chapter on Regulatory Cooperation", "Introduction to the EU legal text on Regulatory Cooperation in TTIP" and "Textual proposal on regulatory cooperation in TTIP"