



## Décision dans l'affaire OI/10/2014/RA - Transparence des négociations sur le Partenariat transatlantique de commerce et d'investissement (TTIP)

Décision

**Affaire** OI/10/2014/RA - **Ouvert le** 29/07/2014 - **Décision le** 06/01/2015 - **Institution concernée** Commission européenne ( Poursuite de l'enquête non justifiée ) |

La Commission européenne négocie actuellement, au nom de l'Union européenne, un vaste accord de partenariat en matière de commerce et d'investissement avec les États-Unis (le Partenariat transatlantique de commerce et d'investissement – TTIP). Les négociations ont suscité un intérêt public sans précédent étant donné les répercussions économiques, sociales et politiques potentielles du TTIP.

L'objectif de l'enquête ouverte par la Médiatrice est de garantir que le public pourra suivre les progrès de ces négociations dans la mesure du possible et contribuer à orienter leur issue. En juillet 2014, la Médiatrice a présenté un premier ensemble de suggestions à la Commission. Au cours de son enquête, elle a également recueilli les idées du public pour assurer une plus grande transparence des négociations ainsi qu'un meilleur accès à ces dernières. En réponse également aux inquiétudes exprimées par le Parlement européen et la société civile, la Commission a exposé, en novembre 2014, une série de mesures de transparence ambitieuses.

La Médiatrice propose aujourd'hui à la Commission dix nouvelles suggestions liées à des textes de négociation communs, à l'adoption d'une approche plus proactive concernant la divulgation des documents du TTIP et à l'amélioration de la transparence des réunions sur cet accord. La Médiatrice considère qu'en suivant ces suggestions, la Commission garantirait une plus grande légitimité au processus de négociation du TTIP et renforcerait la confiance du public dans celui-ci.

The background to the own-initiative inquiry

**1.** This inquiry concerns the European Commission's efforts to make the Transatlantic Trade and Investment Partnership ('TTIP') negotiations transparent and accessible to the public. The Commission is currently negotiating this agreement on behalf of the Union. If agreed, TTIP will reputedly be the biggest bilateral free trade agreement in history. It will shape future rules and standards in areas such as food safety, cars, chemicals, pharmaceuticals, energy, the environment and the workplace.

The inquiry

**2.** The Ombudsman noted, when she launched this inquiry [1], that the Commission had made real efforts to make the TTIP negotiating process transparent and to promote public



participation. The Commission had released many documents and produced lists of meetings in relation to TTIP. At the same time, there were delays in replying to some requests for TTIP documents. Concerns had also been expressed about certain external stakeholders receiving privileged access and about the unauthorised disclosure of documents.

**3.** The Ombudsman pointed out that a proactive approach to transparency could make the negotiating process more legitimate in the eyes of citizens. In her letter opening this inquiry, she made a range of suggestions, encouraging the Commission to publish documents proactively and to make information about meetings available.

**4.** The Ombudsman then conducted a public consultation, inviting ideas to help the Commission make the talks more transparent and accessible. The Ombudsman also received the Commission's opinion in this case. The Ombudsman's decision takes this material into account.

Arguments presented to the Ombudsman

**5.** The Ombudsman received 315 submissions to her public consultation mailbox and more than 6 000 emails in total on this issue. The public consultation report is available on the Ombudsman's website [2] .

**6.** In its opinion [3] , the Commission responded to the two questions posed by the Ombudsman, namely: (a) What learning has the Commission achieved from the access to documents requests it has dealt with up to now in relation to TTIP? (b) Could the Commission explain whether it has a policy of sharing certain negotiating documents selectively with privileged stakeholders? The Commission also responded to the Ombudsman's suggestions in relation to (i) publishing documents on its website; (ii) establishing a public register of TTIP documents; (iii) ensuring that it can deal with documents from third parties in a transparent way; (iv) publishing online lists of meetings with stakeholders; and (v) the measures it has taken in relation to confidential TTIP documents.

**7.** In brief, the Commission stated that it would:

- Publish and regularly update a list of TTIP documents shared with the Parliament and Council and come back, in 2015, to the issue of publishing on-line TTIP related documents released following access to document requests.
- Start asking organisations, which provide written papers to the Commissioner responsible for TTIP, if they agree to the publication of documents either as delivered or in a non-confidential version.
- Publish information on all meetings held on relevant issues by Members of the Commission, cabinet members or Directors-General with organisations and self-employed individuals.
- Review arrangements for access by the EU institutions to trade policy-related information and documents.

**8.** The Commission also announced that it is ready to examine whether these steps could be extended over time to other negotiations.

The Ombudsman's assessment



## Preliminary remarks

**9.** The Treaty on European Union provides for decisions to be taken as openly as possible and as closely as possible to the citizen. Moreover, in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies must conduct their work as openly as possible. Traditional methods of conducting international trade negotiations, however, are characterised by confidentiality and limited public participation. Those traditional methods are ill-equipped to generate the legitimacy necessary for the TTIP agreement, which, in its most ambitious form, could result in a transatlantic single market, with binding rules in a wide range of areas impacting on citizens' daily lives.

**10.** The responses to the Ombudsman's public consultation confirm that citizens expect and demand the right to know and to participate when it comes to TTIP. The Ombudsman's suggestions outlined below aim to help the Commission to meet these public demands as far as possible and thereby ensure that the negotiations and eventual possible agreement enjoy legitimacy and public trust. Given the fate of the ACTA (Anti-Counterfeiting Trade Agreement) [4], the Ombudsman believes that considerations of effectiveness should also lead the Commission to take these suggestions on board as the negotiations proceed.

### A. Greater public access to negotiating documents

**11.** The Commission has made real efforts to improve the transparency of the TTIP negotiating process. It has, for the first time, made available certain categories of negotiating documents. Of major significance is the Commission's communication of 25 November 2014 [5] which provides that the Commission will make public all the EU negotiating texts that it shares with Member States and Parliament (for example, formal negotiating proposals on the "rules" part of the trade agreement). The Commission has also, in the context of TTIP, published a range of initial EU negotiating positions.

**12.** The Commission is leading by example in this regard. In its communication of 25 November 2014, the Commission stated that its action will have a direct impact on the Council, since publishing EU negotiating texts will in practice make public also the content of negotiation directives decided by the Council (which have already been published by the Council for the TTIP negotiations, but are not yet public for other on-going trade and investment negotiations).

**13.** The Ombudsman recognises that the Commission needs to create a context in which it can negotiate effectively with the US on TTIP, so as to deliver the best possible deal for the Union and its citizens [6]. This may mean that the Commission can legitimately keep confidential certain information and documents, at least during certain stages of the negotiations. However, in order to uphold the legitimacy of the negotiating process, any policy of non-disclosure must be duly justified.



**14.** The present inquiry does not seek to identify which concrete documents relating to the TTIP negotiations should or should not be made public [7] . It is, however, appropriate to underline that the Commission must interpret any exceptions to the fundamental right of public access to documents restrictively. If it chooses to refuse to grant public access to TTIP documents, the Commission must put forward specific arguments, based on the content of the documents and the negotiating context, with particular emphasis on the timing of disclosure [8] . If disclosure of a document, at a particularly sensitive point in the negotiations, would harm legitimate interests, access to that document may validly be denied at that time.

**15.** In its communication of 25 November 2014, in which the Commission committed to making public certain EU negotiating texts, the Commission also stated that there "*should be no intention to publish*" any US documents or common negotiating documents without the explicit agreement of the US. While, as noted above, the Ombudsman cannot, without having seen specific documents, guide the Commission as to precisely which TTIP documents should or should not be made public, it is necessary to take a view on the above statement.

**16.** EU rules on public access to documents [9] provide, in relation to third-party documents [10] , such as documents originating from the US, for the third party to be consulted with a view to assessing whether an exception to public access applies, unless it is clear that the document shall or shall not be disclosed. There is nothing to prevent the Commission from choosing to consult with the US also in relation to documents drawn up with US negotiators, such as common negotiating documents.

**17.** In a letter, dated 5 July 2013 [11] , entitled 'Arrangements on TTIP negotiating documents', the Chief EU negotiator for TTIP (a Commission Director) confirmed to the Chief US negotiator that the Commission will consult with the US regarding release of information [12] in order to assist it in coming to a view on the sensitivity of the document.

**18.** When carrying out such consultations, the Commission should, however, bear in mind that it is always legally obliged to comply with the rules on public access to documents set out in Regulation 1049/2001. A careful reading of the aforementioned letter establishes that it does not contain any commitment on the side of the EU, which would limit the full application of Regulation 1049/2001 [13] .

**19.** In the letter, dated 5 July 2013, the Chief EU negotiator stated that the application of any exception to public access shall be assessed on a case-by-case basis, depending on the content of the documents. The Ombudsman points out that, with regard to the exception to public access relating to international relations, this exception does not apply simply because the subject matter of a document *concerns* international relations. Rather, 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.

**20.** 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. However, no public interest as regards international relations exists in complying with unreasoned or unreasonable requests not to disclose documents. To consider otherwise would imply that the international partner would have an unfettered veto over the disclosure of *any* such document in the possession of the EU institutions [14] .

**21.** The Ombudsman is thus of the view that if a US request not to disclose a document is reasoned, and that reason is based on legitimate interests of the US, the Commission should take that request into account when examining whether it should release the document. The US authorities cannot, however, expect that any proper relationship with the EU would be "undermined" simply because the EU refuses to comply with an unreasoned or unreasonable request from the US. In this context, the mere fact of US displeasure that a document would be released, is not sufficient to activate the exception in relation to undermining the public interest as regards international relations.

**22.** The Ombudsman stresses, in relation to the above, that any unwillingness to justify properly decisions not to disclose TTIP documents could have considerable negative consequences. The right of EU citizens to have public access to documents held by EU institutions is a fundamental right aimed at ensuring that they can participate in EU decision-making and hold the EU and its institutions to account. This right deepens the democratic nature of the EU and its institutions. Responses to the Ombudsman's public consultation have made clear the importance that stakeholders attach to documents, such as consolidated texts containing EU and US positions. Accordingly, **it is vital that the Commission 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.**

**23.** 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.

**24.** Finally on this issue, some respondents to the Ombudsman's public consultation argued that, at the very least, Members of the European Parliament (MEPs) should be in a position to scrutinise the draft and final versions of the agreement on behalf of their constituents. While Parliament's access to documents is not part of this inquiry, the Ombudsman welcomes the Commission's announcement, also of 25 November 2014, that it will broaden access to certain negotiating documents to all MEPs. The Ombudsman recognises the special democratic responsibility of MEPs in scrutinising the negotiations on behalf of their constituents.

## **B. More proactive disclosure of documents**

**25.** Citizens are increasingly aware that TTIP will produce rules that impact on them in a



manner analogous to how legislation impacts on them. There is therefore significant public interest in documents generated as a result of the TTIP negotiations, as confirmed by the responses to the Ombudsman's consultation. The Commission provides further proof of this interest in its opinion. Since January 2013, DG Trade has replied to 30 TTIP-related initial requests for access to documents. It gave (full or partial) access to 520 out of 807 documents assessed.

**26.** The Commission's opinion also suggests that those applicants for access to documents are, by and large, satisfied with how the Commission has dealt with their request. Only 20% opted to ask the Commission to reconsider its response to their initial application [15]. To date, only one individual has subsequently lodged a complaint to the Ombudsman.

**27.** The Commission has dealt well with many of the requests for access to documents on TTIP. However, the large number of such requests leads the Ombudsman to question whether it would not be more efficient and effective for the Commission to examine the issue of access, where possible, from the outset. To do this, the Commission needs a process that has, as its underlying assumption, that the public wants access to all TTIP documents [16]. **The Commission should 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 .**

**28.** Such a proactive approach does not imply that the Commission would have to release more documents than would have been released had the Commission merely waited to receive requests. However, such "front-loading" would (i) give citizens access to relevant documents at the earliest moment possible and without needing to ask for them, thus making the exercise of the fundamental right of access simpler; (ii) ensure that the Commission is and is seen to be as transparent as possible about the TTIP documents it holds and what can and cannot be proactively disclosed; (iii) underline to citizens the Commission's determination to respond to a legitimate need for greater information on the TTIP negotiations; and (iv) enhance the legitimacy of the TTIP process and, more broadly, the Commission and the EU.

**29.** Furthermore, the proactive approach should prove no more resource-intensive than waiting to receive requests. The responses to the Ombudsman's public consultation suggest that the Commission is going to receive requests for access to these documents anyway and will thus have to analyse the documents in question at some stage. The approach recommended by the Ombudsman simply involves the relevant analysis being done at an earlier stage.

**30.** It was also with a view to making the exercise of the citizen's fundamental right of public access simpler, and ensuring that the Commission is transparent about the documents it



holds, that the Ombudsman suggested, in her letter opening this inquiry, that the Commission establish a public register of TTIP documents.

**31.** As part of its 25 November 2014 communication, the Commission announced that it would publish and update on a regular basis a list of (unclassified) TTIP documents that are shared with Parliament and Council. This will be done via its dedicated website on trade policy. Consideration will also be given to including classified documents in the list.

**32.** The Ombudsman welcomes this announcement and **strongly encourages the Commission to ensure that the list of TTIP documents to be made available on its dedicated website on trade policy is comprehensive** . The Commission has explained that, in dealing with requests for access to TTIP documents, considerable time was dedicated to reviewing a large number of files and e-mails to identify material which may fall within the scope of a given request. The Commission further referred to the complexity of such requests, often involving eight or more administrative units within the Commission; the exceptional pressure on these same people in the framework of the negotiations; the overall volume of requests for trade-related documents handled by the Commission (of which TTIP documents are only one part) [17] ; and the comparatively open-ended way in which many requests are formulated. The Ombudsman finds that these explanations make the case for a comprehensive list of TTIP documents even more pressing. It would be reasonable, and in line with the rules on public access, for the Commission to respond to imprecise requests by referring the applicant to the list of TTIP documents so that the applicant can clarify the request.

**33.** Finally, the Ombudsman reiterates the suggestion she made, at the outset of this inquiry, that **the Commission should publish on its website the many TTIP documents it has already released in response to access to documents requests** .

**34.** In its reply to this suggestion, the Commission explains that it can see certain advantages if it were to allow the public to find information without needing to submit requests; on the other hand, under such circumstances it would be helpful to set in place the necessary procedural guarantees to ensure that such publication would remove the need for the Commission to identify the same documents in future requests. Were the Commission to adopt such a practice, its introduction should be gradual and linked to the adaptation of current IT tools, to automate the process of publishing such information and ensure that any associated workload is not disproportionate.

**35.** The Commission further explains that these considerations cannot be limited to TTIP. Given the cross-cutting nature of the proposal, potentially all documents released under access to documents rules could be published. This requires further reflection on the part of the Commission's central services. The Commission will reflect further on this issue and return to it early in 2015 when it will respond to the Ombudsman's findings in this inquiry.

**36.** The Ombudsman notes that, in its resolution of 11 March 2014 on public access to documents [18] , Parliament called on the institutions to put in place public document registers with clear and accessible structures, good search functionality, regularly updated



information on new documents produced and registered, inclusion of references to non-public documents and, to assist public users, guidance on the types of documents held in a given register. The Commission should follow-up on this call from Parliament, as a priority in relation to TTIP documents. It is indeed important that the Commission make the relevant documents, or at least a reference to them, available in a structured manner so that the public can easily identify the documents they are most interested in. The Commission could also publish a webpage with links to frequently requested documents or documents that have been downloaded most.

## C. More balanced and transparent public participation

**37.** Improving the extent and intensity of citizens' participation in the work of the EU institutions enhances the democratic nature of the Union. Citizen participation is especially important in areas, such as TTIP, having a close connection to the legislative process.

**38.** Transparency facilitates citizen participation by ensuring access to information and the means to take part in the process of governance to which citizens are subject. In the context of TTIP, the public can help shape the final agreement only if they are informed throughout the process and thus empowered to contribute to it in a timely way.

**39.** The references in the Treaty on European Union to *"an open, transparent and regular dialogue"*, to views being exchanged *"publicly"* and to *"coherent and transparent"* actions underscores that the process of participation itself should not be shielded from public scrutiny.

**40.** The Commission has actively sought to enhance public participation in relation to TTIP. As recognised by respondents to the Ombudsman's public consultation, the Commission has adopted a number of innovative approaches to the more structured forms of participation, such as establishing an Advisory Group and holding stakeholder briefings during and at the end of negotiating rounds. The proactive transparency measures it has embraced, such as publishing initial position papers, are also conducive to encouraging effective participation.

**41.** The report on the Ombudsman's public consultation contains a number of further practical steps the Commission could take to promote participation. By way of example, the Commission could organise more frequent issue-specific stakeholder meetings [19]. **The Ombudsman encourages the Commission to take into account the relevant suggestions outlined in the 'Public participation' section of her public consultation report .**

**42.** In addition to the more structured forms of participation, there are less structured forms involving, for the most part, bilateral meetings and correspondence with the Commission. An overwhelming number of responses to the Ombudsman's public consultation raised concerns about the perceived corporate dominance of meetings and contacts with the Commission in relation to TTIP and the need for greater transparency in this regard.





43. In her letter opening this inquiry, the Ombudsman made a number of suggestions to the Commission aimed at addressing these issues of balance and transparency. Specifically, the Ombudsman suggested that the Commission consider establishing and publishing online lists of meetings it holds with stakeholders relating to TTIP, as well as the related documents.

44. In its opinion, the Commission noted that President Juncker had invited each Member of the incoming Commission to *"make public all the contacts and meetings we hold with professional organisations or self-employed individuals on any matter relating to EU policy-making and implementation"*. The Commission confirmed this new policy for Commissioners, members of Cabinet and Directors-General, with effect from 1 December 2014, in decisions of 25 November 2014 [20]. The Ombudsman publicly welcomed this development.

45. To build on this first step, the Ombudsman would make the following suggestion: **The Commission should, at least in the context of TTIP, extend these transparency obligations in relation to meetings with professional organisations or self-employed individuals, to the levels of Director, Head of Unit and negotiator. This should include the names of all those involved in such meetings.**

46. Also of importance is the content of what interest representatives discuss with the Commission and the documents they exchange with it. The Commission itself confirmed that applicants for access to TTIP documents expressed considerable interest in meeting reports and correspondence with industry.

47. The Ombudsman welcomes the Commission's response to the suggestion she made in this regard. Specifically, the Commission announced that it is ready to ask business organisations, lobby groups or NGOs that submit papers to the Member of the Commission responsible for the TTIP negotiations, whether the paper (or a non-confidential version of it) can be published. The Ombudsman believes that **the Commission should go further and confirm that all submissions will be published unless the sender gives good reasons for confidentiality and provides a non-confidential summary for publication. Moreover, the Commission should proactively publish meeting agendas and records of meetings it holds on TTIP with business organisations, lobby groups or NGOs.**

48. The Ombudsman also asked the Commission whether it has a policy of sharing certain negotiating documents selectively with privileged stakeholders whom it considers can play a role in shaping the EU's negotiating position on certain subjects. The Commission replied that it does not. It explained that it has an established practice of sharing negotiating documents with the European Parliament and with the Council. Furthermore, for TTIP, the Commission shares, with the members of the dedicated TTIP Advisory Group, the EU's negotiating documents, which have been shared with Member States and the European Parliament. However, that group acts in an expert (institutional) context and cannot be equated to a group of *"privileged stakeholders"*, it said.

49. The Commission did, however, express its own concern in relation to what it refers to as the *"steady stream of leaks of classified ("Restreint UE") and sensitive TTIP documents"*.



**50.** The Ombudsman highlights that her question to the Commission sought to determine if TTIP documents are selectively shared with non-institutional third party stakeholders, such as industry groups, civil society organisations or individuals. Her question did not concern what should be the appropriate policy regarding the disclosure of documents to institutional actors, such as the Parliament and the Council. The Ombudsman underlines that Parliament and Council are not third parties to these negotiations. They cannot therefore be equated to a group of "privileged stakeholders". As regards disclosure to what the Ombudsman referred to as "privileged stakeholders", the Ombudsman has seen no concrete evidence to call into question the Commission's unequivocal affirmation that it does not have a policy of disclosure in favour of "privileged stakeholders". The Ombudsman expects that the Commission will **ensure that documents that are released to certain third party stakeholders are released to everyone, thereby ensuring that all citizens are treated equally.**

**51.** With regard to balanced representation, the Ombudsman welcomes the statement, outlined in the 'Working Methods of the European Commission 2014-2019' [21], that Members of the Commission should seek to ensure an appropriate balance and representativeness in the stakeholders they meet. The Working Methods also provide that, as a rule, Members of the Commission must not meet professional organisations or self-employed individuals that are not registered in the Transparency Register.

**52.** While these steps are indeed laudable, **the Commission should 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.**

## **The benefits of greater transparency**

**53.** The Ombudsman's report on the public consultation describes in detail the impact that respondents believe greater transparency will have on the TTIP negotiations and on the agreement itself. That impact is deemed to be overwhelmingly positive, ranging from enhanced legitimacy, heightened trust, an educated debate, and a better agreement in substance.

**54.** The Ombudsman is aware of arguments that, given the complexity of the issues involved in TTIP, greater transparency could lead to confusion and misunderstandings among citizens. In the Ombudsman's view, such arguments are profoundly misguided. The only effective way to avoid public confusion and misunderstanding is more transparency and a greater effort proactively to inform public debate. In her view, the Commission should, if it considers that a document is open to misinterpretation, simply provide the necessary explanations when it releases the document. It should also engage with those who express legitimate concerns.

**55.** More broadly, if the public is reassured, in relation to TTIP, that it has been (i) informed



of the facts; (ii) empowered to understand what is at stake; and (iii) allowed to communicate its concerns, questions and suggestions and received a reasoned response, the Union's democratic credentials and legitimacy will be enhanced and trust in its institutions will be strengthened.

#### Conclusion

In closing this inquiry, the Ombudsman welcomes the Commission's response to date and makes the following set of further suggestions. The Commission should :

- 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.**
- 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.**
- 3. Ensure that the list of TTIP documents to be made available on its dedicated website on trade policy is comprehensive .**
- 4. Publish on its website the many TTIP documents it has already released in response to access to documents requests.**
- 5. Take into account the relevant suggestions outlined in the 'Public participation' section of the Ombudsman's public consultation report.**
- 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.**
- 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.

**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 will be informed of this decision. The Commission should indicate how and when it will implement each measure that has been suggested. As the negotiations are ongoing, it would be helpful if the Commission could follow-up within two months, by 6 March 2015.

Emily O'Reilly

Strasbourg, 06/01/2015

[1] The Ombudsman's letter to the Commission requesting its opinion can be found at:  
<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54633/html.bookmark>

[2] The report can be found at:  
<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58643/html.bookmark>

[3] The Commission's opinion can be found at:  
<http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58450/html.bookmark>

[4] 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 Member States. As far as EU ratification was concerned, Parliament's consent was required. On 4 July 2012, Parliament voted to reject ratification of ACTA.

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

[6] By way of example, the Commission explains, in its communication of 25 November 2014, that EU market opening offers on tariffs, services, investment and procurement should not, in principle, be made public, as they are the essence of the confidential part of the negotiations.

[7] The Ombudsman recently opened an inquiry relating to the Commission's refusal to release a number of specific TTIP documents. The Ombudsman will take a view on the disclosure of those specific documents in the context of that inquiry. See case 1777/2014/PL, available at:  
<http://www.ombudsman.europa.eu/cases/caseopened.faces/en/58372/html.bookmark>.

[8] The passage of time normally tends to render the disclosure of a particular document less likely to be harmful.

[9] 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.

[10] Common negotiating documents are not third party documents.

[11] [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151621.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151621.pdf)

[12] With regard to what is meant by "*information*", the Commission refers back to paragraph a) of the letter in question which reads as follows: "*All documents related to the negotiation or development of the TTIP Agreement, including negotiating texts, proposals of each side, accompanying explanatory material, discussion papers, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, are provided and will be held in confidence, in accordance with EU law and relevant procedures.*"

[13] The Ombudsman notes that the ACTA contracting parties agreed that negotiating documents would only be made public with the unanimous support of all contracting parties. The Ombudsman understands that no such confidentiality agreement has been signed in the context of TTIP.

[14] Regulation (EC) No 1049/2001 specifically gives to EU Member States the possibility to limit the right of public access to documents originating from them. The extent of this possibility has been clarified by the Court of Justice in Case C-64/05 P, *Sweden v Commission*, [2007] ECR I-11389. In the Ombudsman's understanding, Regulation 1049/2001 should not be interpreted so as to give a greater possibility to third countries to limit the citizen's fundamental right of public access to documents.

[15] The Commission dealt with 6 confirmatory applications.

[16] See, for example, the categories outlined in section 3 of the Ombudsman's public consultation report. The Ombudsman notes, however, that those categories do not include non-papers (documents designed to stimulate discussion on a particular issue but which do not represent the official position of the institution), concept papers and others that the Commission has drawn up in relation to TTIP.

[17] Since January 2013, the Commission has handled 484 trade-related initial requests for access to documents, further to which (full or partial) access was granted to 1 738 documents. Against the background of these statistics, the Commission's statement that it is ready to examine whether the steps it has announced in relation to TTIP "*could be extended over time to other negotiations*" is welcome.

[18] Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0203>

[19] See, for example, the meeting organised by the Commission on 25 November 2014 on chemicals, before which the Commission published relevant documents.



[20] 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.

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