



European Ombudsman

Emily O'Reilly
European Ombudsman

Mr Uwe Corsepius
Secretary-General
Council of the European Union
BE-1048 Brussels

Strasbourg, 29/07/2014

Re: Own-initiative inquiry OI/11/2014/MMN concerning transparency and public participation in relation to the Transatlantic Trade and Investment Partnership ('TTIP') negotiations — the Council of the EU

Dear Mr Corsepius,

The ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations are of significant public interest given their potential impact on the lives of citizens. As European Ombudsman, what is of particular concern to me is the extent to which the public can follow the progress of these talks and contribute to shaping their outcome.

Against this background, I note that the basis on which the European Commission has been asked to negotiate on behalf of the Union, namely the EU negotiating directives, has not been published proactively by the Council. Nor, to my knowledge, has the Council reacted positively to any application it may have received for public access to this document under Regulation 1049/2001¹.

While I remain ready to deal with any complaint that might be submitted to me in the event of a refusal of such an application, I thought that it would be helpful, both for the Council and for citizens, for me to engage in dialogue on this matter with the Council through an own-initiative inquiry.

To my mind, a high level of transparency of the aims and objectives of the European Union constitutes a precondition for a successful outcome of the TTIP negotiations. The reason is expressed clearly in the following passage from a judgment of the Court of Justice: *"a lack of information and debate ... 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*

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.



process as a whole"². Conversely, a proactive approach to transparency could enhance the prospects of success by enhancing the legitimacy of the negotiating process in the eyes of citizens.

The Ombudsman, in line with the Court, recognises that, in the context of international negotiations, certain documents must remain confidential³. It may well be the case that convincing arguments can be put forward for the non-disclosure of documents relating to negotiations when those negotiations are ongoing. However, such arguments must be specific in nature, relating to the content of a document and the negotiating context, with particular emphasis on the timing of disclosure.

As you surely know, the negotiating directives seem, in fact, to be easily accessible on the Internet. While the case-law provides that unauthorised disclosure should not determine the question of public access under Regulation 1049/2001, it would be unduly formalistic to ignore the availability of the document for purposes of the present own-initiative inquiry.

The 17-page document contains sections on the nature and scope of the TTIP, a preamble and general principles, objectives, provisions about market access, regulatory issues and non-tariff barriers, and rules, the institutional framework and final provisions. The document does not go into great detail on any of these subjects and some are dealt with at a very high level of generality⁴. In these circumstances, it is not immediately apparent how its disclosure would undermine the protection of any of the public or private interests provided for in Article 4 of Regulation 1049/2001.

Specifically with regard to the exception in Regulation 1049/2001 based on the protection of the public interest as regards international relations, a preliminary analysis suggests that public disclosure of the document would not now (i) damage mutual trust between the negotiators; (ii) inhibit the development of free and effective discussions in the context of the negotiations; and/or (iii) reveal strategic elements of the negotiations either to the other negotiating party or to third parties.⁵ The fact that a year has passed since the document was adopted needs to be taken into account in this regard. One would assume that the EU has, at this stage, communicated to the US, and indeed to other third countries, what it believes should be negotiated upon in the context of TTIP. As such, it is difficult to see how disclosure of the negotiating directives would undermine the protection of this interest. I would add, in this regard, that the General Court has found 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.⁶

I understand that the Council may fear that releasing this document would set a precedent for future negotiations, or for similar documents in the context of these ongoing negotiations. In my view, such fears would be

² Joined Cases C-39/05 P and C-52/05 *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 59 (emphasis added). While this case concerned a legislative procedure, the Court's statement seems equally relevant in the present context.

³ See, by way of example, the Ombudsman's decisions in cases 2393/2011/RA and 90/2009/OV.

⁴ For instance, the section on 'Market Access' contains the following sub-sections: trade in goods, trade in services and establishment, investment protection and public procurement.

⁵ See Case T-301/10 *Sophie in 't Veld v Commission* (judgment of 19 March 2013). See also Case T-529/09 *Sophie in 't Veld v Council* (judgment of 4 May 2012); upheld on appeal, Case C-350/12 P *Council v Sophie in 't Veld* (judgment of 3 July 2014).

⁶ Case T-233/09 *Access Info Europe v Council* [2011] ECR II-73, paragraph 74.



misplaced because each case must be treated on its own merits. If it can be established that one of the exceptions set out in Article 4 of Regulation 1049/2001 applies to a particular document, based on its specific content, access can be validly refused.

I hope that the Council will find these reflections useful if it receives an application for public access to the negotiating directives. However, in the interests of transparency, good administration, the effective use of resources and, ultimately, encouraging public trust, I also invite the Council to consider proactively publishing the document in question. By doing so, it would help promote public trust, which is a key element in ensuring the eventual success of the negotiations.

I would appreciate it if you would give the Council's opinion on the matter as soon as possible and by 30 September 2014 at the latest. Please note that this opinion will be published on my website.

Should your services require any further information concerning this own-initiative inquiry, please do not hesitate to contact Mr Martín Martínez Navarro (tel. +33 3 88 17 24 01), the legal officer responsible for this case.

Finally, I have today also addressed an own-initiative inquiry to the Commission in relation to TTIP. A copy of my letter to the Commission is enclosed, for the Council's information.

Yours sincerely,

Emily O'Reilly

cc: Mr José Manuel Barroso, President of the European Commission

Enclosure: Copy of the Ombudsman's letter to the Commission in own-initiative inquiry OI/10/2014/MMN