

**Comments of the Commission on the European Ombudsman's own-initiative inquiry
- Ref. OI/10/2014/RA**

I. THE INQUIRY

By letter of 29 July 2014 the European Ombudsman announced her decision to open an own-initiative inquiry concerning transparency and public participation in relation to the Transatlantic Trade and Investment Partnership (TTIP) negotiations.

The European Ombudsman wanted to know what the Commission learned from past access-to-documents requests on TTIP and whether the Commission has a policy of sharing certain negotiating documents selectively with privileged stakeholders. She also put forward some suggestions in that respect.

II. COMMENTS TO GENERAL REMARKS OF THE OMBUDSMAN

Ensuring the highest possible degree of transparency is clearly very important for the Commission. Over the last two years, the Commission has taken a significant number of new initiatives aimed at improving transparency surrounding trade negotiations, particularly for TTIP. The Commission has made available on-line a comprehensive set of information materials covering nearly all elements of the negotiations and has also made an unprecedented outreach on TTIP towards both the Member States and the European Parliament, whilst at the same time reinforcing its transparency towards, and consultation opportunities for, civil society. Therefore it appreciates that the Ombudsman acknowledges the real efforts that have been made to enhance the transparency of the TTIP negotiating process and to promote public participation. It welcomes the comments of the European Ombudsman as an input to on-going reflections on the overall issue of transparency and takes note of her suggestions on further possible steps to improve transparency and public participation.

Before responding to the specific questions and suggestions made by the Ombudsman, the Commission would like to respond to the concerns expressed with regard to the delays encountered in replying to access-to-documents requests related to TTIP.

Since January 2013, the responsible Commission service (Directorate General for 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.

Furthermore, six confirmatory requests for access to TTIP-related documents have been lodged since January 2013. Responding to such requests can encounter delays, given the need to consult the service which dealt with the initial reply, and, in case of confidential documents, to organise the practical modalities for gaining access to them.

The Commission acknowledges and regrets that in some cases delays have been encountered in handling TTIP-related access-to-documents requests.

The Commission recognises that access to documents is not only a right, it is also good policy. Maximising transparency around the TTIP negotiations is important to inform EU citizens, allay fears and build a wider base of support for these on-going talks. This has been underlined by President Juncker as a priority for the Commission and by individual Commissioners during their hearings before the European Parliament.

Against this backdrop, the Commission wishes to assure the Ombudsman that every effort has been and is being made to ensure that requests for access to documents are handled as rapidly and efficiently as possible and within the time-limits prescribed in the Regulation. Indeed, as indicated below, the Commission is of the view that real improvements have been made, enabling the Commission to speed up the time needed for handling all but the most complex and open-ended requests.

III. OPINION OF THE COMMISSION REGARDING THE OMBUDSMAN'S SUGGESTIONS

1. What learning has the Commission achieved from the access to documents requests it has dealt with up to now in relation to TTIP?

Since the first wave of access-to-documents requests related to TTIP, and based on this first experience, procedures were gradually established aimed at improving and speeding up the management of these requests.

First, the Commission noticed that 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. It also noticed that applicants expressed considerable interest in meeting reports and correspondence with industry.

The Commission furthermore noted that some requests are similar to past applications and has streamlined the sharing of information internally about past answers and, where applicable, the reasons for withholding all or parts of documents under Regulation 1049/2001. This allows for the faster handling of requests, by the speedy identification of documents and allows those handling new requests to quickly identify material already released, consider whether the circumstances justifying the full or partial withholding of information still apply and to focus on the identification and assessment of any new documents.

Furthermore, given that the pressure of handling access to documents requests falls on the same administrative entities engaged in the TTIP (and often other) negotiations, staff have been made aware of the need to give due priority to handling of these (and other) requests.

These various steps have enabled the Commission to reduce delays in replying to TTIP requests. That said, the complexity of such requests, often involving eight or more administrative entities within the service and also across the Commission, the exceptional pressure on these same entities in the framework of the negotiations, the overall volume of

requests for trade-related documents handled by the Commission¹ (of which TTIP documents are only one part) and the comparatively open-ended way in which many requests are formulated mean that it has not been possible to eliminate delays completely beyond those foreseen in the Regulation.

For this reason, the Commission has, in some cases, sought to come to a fair solution with the applicants with regard to the timing for the handling of their request (also taking into account whether other requests have been lodged by the same organisation), whilst in others, with the agreement of the applicant, the Commission has dealt with the request in several successive stages, so as to allow for the speedy transmission of part of the requested documents.

1.1. The Commission could consider making available on its website the many documents it has now released in response to the access to documents requests it has dealt with in relation to TTIP.

The Commission can see certain advantages in the approach proposed by the Ombudsman, if it were to allow the public to find information without needing to table requests to the Commission; 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 by the same or different applicants. 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 disproportional.

Moreover, those considerations cannot be limited to the area of TTIP alone. Given the cross-cutting nature of the proposal, potentially all documents released under Access to Documents rules could be published, but this requires further reflection on the part of the Commission's central services. The Commission will reflect further on this issue and intends to return to it early in 2015 when it will respond to the Ombudsman findings in the inquiry.

1.2. The Commission could consider establishing a public register of TTIP documents held by it, in line with Article 11 of Regulation 1049/2001.

The Commission's public documents register currently provides access to certain categories of texts, primarily legislative or policy documents of general application with COM, C and SEC numbers and other categories such as the agendas and minutes of Commission meetings. These documents are normally published at the time of their adoption. For others, the register provides a link, enabling the applicant to introduce a request for access to documents under Regulation 1049/2001. A substantial number of requests which the Commission receives come via this link in the register.

¹ Since January 2013, the Commission services have handled 484 trade-related initial requests for access to documents, further to which (full or partial) access was granted to 1738 documents.

The issue of whether the scope of coverage of the register should be extended is an open question for the Commission; however, developing a new comprehensive register only for TTIP-related documents would not represent a sound and rational management of Commission resources. The Commission rather aims at a clear, user-friendly and harmonised approach to access to trade documents.

Notwithstanding the above, the Commission will publish regularly from the beginning of December, via its dedicated website on trade policy, a list of (unclassified) TTIP documents, that are shared with the European Parliament and the Council. However, decisions on the full or partial release of such documents would continue to be assessed on a case by case basis under Regulation 1049/2001, so as to ensure full compliance with that Regulation. Consideration will also be given to whether to include classified documents in such a list, and if so, how to describe them as it may not always be appropriate or possible in view of their classification to publish their full title (without revealing the content which their classification is intended to protect).

1.3. The Commission could consider inviting third parties, such as business organisations and interest groups, who send documents to it in relation to TTIP, to also submit non-confidential versions of those documents that could be made publicly available. The public could thus immediately access such non-confidential versions, notwithstanding the right to request public access to the full version.

Following this suggestion, the Commission 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 non-confidential version of it) can be published.

These documents could be published on the Commission's dedicated webpages covering TTIP. In line with Regulation 1049/2001, actual publication will be conditional on the agreement of the third party, unless it is clear that the documents can or cannot be disclosed.

Once again this approach could potentially have broader implications for the Commission and so its practical impact should be considered in the light of the TTIP experience.

2. Could the Commission explain whether it has a policy of sharing certain negotiating documents selectively with privileged stakeholders?

The Commission does not have a policy of sharing negotiating documents selectively with privileged stakeholders. The Commission has an established practice of sharing negotiating documents with the European Parliament and with the Council. Furthermore, for TTIP, the Commission also 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. This group has been set up to advise the Commission on specific aspects of TTIP, bringing together a balanced collection of expertise from different organisations to support the negotiating process. However, this group acts in an expert (institutional) context and cannot be equated to a group of privileged stakeholders.

2.1. *The Commission could consider establishing and publishing online lists of meetings it holds with stakeholders relating to TTIP, as well as the related documents.*

President Juncker has included such an approach in his mission letter to each Member of the incoming Commission inviting them 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”. This engagement is not specific to the TTIP. The Commission confirmed this approach on 25 November 2014, with effect from 1 December 2014.

2.2. *The Commission could consider reinforcing the measures it has taken to effectively ensure that confidential TTIP documents, which should not be made public, are indeed not disclosed to any third party. Please could the Commission explain the experience gained so far in applying these measures and whether, in light of that experience, it is considering additional measures?*

The Commission shares the concern of the Ombudsman regarding the steady stream of leaks of classified (“Restreint UE”) and sensitive TTIP documents, starting with the negotiating directives and the Council's authorisation to launch the TTIP negotiations.

These documents have been shared only with the European Parliament and the Council, as well as with the TTIP Advisory Group (see above), under specific, restrictive arrangements seeking to prevent the unauthorised disclosure of the information, in line with the marking/classification of the documents.

To the best of its knowledge, the Commission has not been the source of leaks of any of the TTIP documents so far. With regard to TTIP documents containing US and EU positions, so-called “consolidated texts”, access is currently possible via a reading room either within the Commission for Member States or within the European Parliament for MEPs. The modalities for access to these reading rooms have been discussed and agreed with the European Parliament, however the Commission is reviewing current arrangements with a view to further facilitating access for the institutions whose active involvement in this review process is also desirable. Whenever the Commission becomes aware of the unauthorised disclosure of information, particularly classified information, shared with the Council and the European Parliament, it draws this to the attention of the two institutions at the level of the respective Council and Parliament committees following trade matters.

While the Commission could consider upgrading the level of classification of the information, it does not believe the level of risk associated with the unauthorised disclosure of the information would justify such a step. Moreover, the additional constraints resulting from such a classification would make it harder for both the Commission and the European Parliament/the Council to play their respective roles, which involves guidance, consultation and eventual approval of agreements by the Council and the European Parliament in an efficient and effective manner.

IV. CONCLUSION

The Commission is strongly committed to operating in a transparent, open and accountable manner and to fully respecting its obligations under Regulation 1049/2001, including the need to respond to applications within the appropriate time limits.

The Commission has taken a significant number of new initiatives aimed at improving transparency surrounding trade negotiations, particularly for TTIP. This would be strengthened by the steps identified above and which can be summarised in the following four steps:

- Publish and regularly update a list of TTIP documents shared with the EP and Council's trade policy committee and come back next year to the issue of publishing on-line TTIP related documents released pursuant to 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 non-confidential version.
- Publish information on all meetings held by Members of the Commission, cabinet members or Directors-General with organisations and self-employed individuals on issues relating to policy-making and implementation in the Union, as decided by the Commission on 25 November 2014 (as per C(2014) 9051 and C (2014) 9048).
- Review arrangements for access by the EU institutions to trade policy-related information and documents.

The Commission is ready to examine whether these steps could be extended over time to other negotiations, but it will have to do this within the context of the overall approach to transparency that will be set out by the Commission over the months ahead, and to which this inquiry is a valid contribution.