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Sent: 31 October 2014 16:59
To: Consultation-OI-10-2014
Subject: [EOWEB] TTIP consultation
Attachments: ttip consultation vf (pdf).pdf

Categories: To be registered according to Rosita; submitted to AR on 03.11.2014

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To Public consultation OI/10/2014
Date Friday, October 31, 2014 4:59:11 PM CET

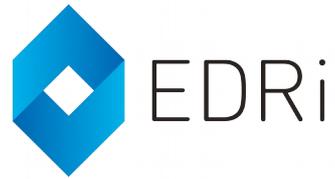
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To Public consultation OI/10/2014
Subject TTIP consultation
Content



PROTECTING DIGITAL FREEDOM

EDRi's response to the European Ombudsman public consultation on transparency in the TTIP Negotiations

As the European Ombudsman acknowledged, "concerns have been raised about key documents not being disclosed, about delays, and about the alleged granting of privileged access to [Transatlantic Trade and Investment Partnership (TTIP)] documents to certain stakeholders."¹ [European Digital Rights](#) (EDRi) thus welcomes her initiatives to open investigations on both the European Commission and the Council of the European Union to ensure that transparency and public participation in the TTIP negotiations.

Within that context, the European Ombudsman launched a [public consultation](#) in relation to the transparency of the TTIP negotiations. This public consultation solely concerns the European Commission practices and does not address the substance of the TTIP negotiations. Yet, EDRi would like to encourage the European Ombudsman to extend her inquiries and recommendations to other Free Trade Agreements (FTAs). In fact, citizens, academics, civil society organisations and other actors have already raised concerns regarding other agreements including, but not limited to, the Trade in Services Agreement (TISA), the Comprehensive Trade and Economic Agreement (CETA) or other bilateral FTAs.² Likewise, the European Ombudsman should emphasise her recommendation to the European Parliament. In response to a complaint by EDRi, on 28 January 2014, she "advised the Parliament to ensure that the Commission and the Council do not sign confidentiality agreements in the future that could undermine Parliament's ability to deliberate openly on such issues."³ Furthermore, EDRi encourages the Ombudsman to ensure that the President of the Parliament stands by his commitment of not repeating the failures of the Anti-Counterfeiting Trade Agreement (ACTA).⁴

1 <http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>

2 See http://ec.europa.eu/enterprise/policies/international/files/ongoing-trade-negotiations_en.pdf

3 http://europa.eu/rapid/press-release_EO-14-1_en.htm?locale=EN

4 <https://edri.org/ttip-european-ombudsman-warns-european-institutions-learn-acta-negotiations/>. See also a complaint launched by FFII to the European Ombudsman in this regard: <http://acta.ffii.org/?p=2252>

I. Concrete measures the European Commission could implement for the TTIP negotiations to be more transparent. Where do we, specifically, see room for improvement?

Months before the first round of negotiations, many civil society organisations, including EDRi, insisted that “the European Union and United States release, in timely and ongoing fashion, any and all negotiating or pre-negotiation texts.”⁵ The Commission has improved, albeit from a very low base, and most of its actions have been neither meaningful nor sufficient.⁶

According to Article 1 of the Treaty on the European Union (TEU), in the EU “decisions are taken as openly as possible and as closely as possible to the citizen”. Article 15(1) of the Treaty on the Functioning of the European Union (TFEU) further develops such duty. It reads as follows:

“In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible. ”

Even if the European Commission has made minor attempts to show greater transparency, these in no way justify its position of keeping key negotiation documents confidential and maintaining a restricted policy regarding access to documents in general. The European Commission is not being “as openly as possible”. More openness is possible and needed. EDRi has identified at least four areas of improvement. These are:

1. Access to documents
2. Public participation and accountability
3. Means of communication
4. Conflict of interests

1. ACCESS TO DOCUMENTS

Before the start of the negotiations, Mr. Ignacio García Bercero, EU Chief Negotiator for TTIP, explained his US counterpart that TTIP documents could be kept in secret for up to 30 years⁷. EDRi considers the justification regarding secrecy is unacceptable, unjustified and disproportionate.

Access to documents is a fundamental right embedded in Article 42 of the Charter of Fundamental Rights of the European Union. Article 52(1) specifies that restrictions to fundamental rights and freedoms must be prescribed by law and need to pass the necessity and proportionality tests. Therefore, Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents⁸ has to be interpreted in a way compliant with the Fundamental rights and freedoms recognised under the EU Charter of Fundamental Rights.

The Court of Justice of the European Union has adopted the approach mentioned above. On 3 July 2014, the Court encouraged disclosure of documents unless a set of conditions are respected.⁹ Some experts have seen this ruling as the confirmation of the need to move TTIP negotiations out of the shadows. In the words of Mr. Steven Peers, professor of EU law and human rights law of the University of Essex, “[t]his judgment makes it possible to apply for any documents which include legal advice on the TTIP negotiations, with a very good chance of success.”¹⁰ Nonetheless, the

5 <http://www.citizen.org/IP-out-of-TAFTA>

6 See, for instance <https://www.accessnow.org/blog/2014/07/23/ttip-negotiations-transparently-opaque>

7 http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151621.pdf

8 http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf

9 Case C-350/12P, *Council v in't Veld*, 3 July 2014

10 <http://www.euractiv.com/sections/euro-finance/ttip-documents-could-be-made-public-after-eu-court-ruling-303288>

Commission continues to refuse to be as transparent as it could be. Among the documents published in the DG Trade's website, there is one entitled "We're listening and engaging".¹¹ In that document, the Commission says that "[i]n any negotiation, partners need to build trust. For that they need a degree of confidentiality". On 15 July 2014, Commissioner De Gucht admitted before the plenary of the European Parliament that when he meets his "counterpart, Ambassador Froman, we **prefer** to do it without TV cameras being present".¹² In order to justify such statement, he employed a similar wording of the "We're listening and engaging document". EDRi considers such argumentations to be deliberately vague and unjustified.

In a letter sent to Mr. José Manuel Barroso, the European Ombudsman stated that "[b]y seeking solutions to a range of practical issues, we can promote efficient and effective administration, thereby reducing the need for individual requests and complaints to the Commission and the Ombudsman."¹³ EDRi agrees with such assertion and encourages the European Ombudsman to pursue such goals.

Therefore, EDRi strongly recommends the implementation of the following measures:

- **Open the negotiations to the public;**
- **Publish all the documents**, such as the negotiating texts at the different stages of the negotiation (which should be updated on a regular basis); the documents transferred to the US, third parties and/or to external experts and vice versa; the documents shared with other Institutions, Bodies or Agencies; the documents shared by stakeholders that the Commission may take into account;
- Provide minutes and agendas of meetings with all stakeholders;
- Publish any other relevant documents to ensure transparency and permit accountability.
- Create a complete and comprehensive **registry** of ALL documents, including those published under a Freedom of Information request. The registry should be managed by the Commission in compliance with Article 11 of the Regulation No.1049/2001.
- Create a **timeline** including all the steps in the negotiations and the documents published. For instance, the Commission can inspire itself from the timeline proposed by MEP Marietje Schaake¹⁴ or the one set up by Access¹⁵, which is an EDRi member.

1.2. Documents published

The Commission should invest effort in being more open to releasing documents as a consequence of freedom of information requests. In several responses given to Freedom of Information requests, various DGs have stated the following:

"You have lodged your application via the AsktheEU.org website. Please note that this is a private website which has no link with any institution of the European Union. Therefore the European Commission cannot be held accountable for any technical issues or problems linked to the use of this system."

In order to avoid similar liability disclaimers on the side of the European Commission and further burden for the Institution, the Commission should maintain an online registry online with all the documents related to the TTIP negotiations, as explained before. The current Commission's TTIP website is not satisfactory in this regard. It does not offer a **comprehensive database with all the documents**. Perhaps that is why the European Ombudsman wrote a letter recommending the European Commission to "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

11 http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152276.pdf

12 <http://audiovisual.europarl.europa.eu/Page.aspx?id=1487>

13 <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html.bookmark>

14 <http://www.marietjeschaake.eu/2014/09/ttip-timeline-2/>

15 http://cdn.knightlab.com/libs/timeline/latest/embed/index.html?source=0Arh-CC2Pi0s2dFJXMkg5REZONGFwRVkzdWdXdK1hT2c&font=Bevan-PotanoSans&maptype=toner&lang=en&start_zoom_adjust=2&height=400

TTIP". In the footnote, Ms. Emily O'Reilly specifies that "[m]any of these documents have been made available via www.asktheeu.org¹⁶ but it could be helpful if the Commission published them in well-defined categories on its website."¹⁷

EDRi welcomes this recommendation. In addition, we want to stress that by "all documents", EDRi does not refer to mere summaries, agendas or minutes with no specific information or "propaganda texts", but to substantive documents, not altered any way when released to the public. As stated in the EU Integrity System report conducted by Transparency International, "[s]econdary legislation binds the EC to provide public access to all documents (**not information**) it holds –subject to exceptions"¹⁸ (emphasis added). For instance, the Commission could make **press releases** or (find a way to show) when publishing more document or making changes in their website.

Transparency and openness ought to be the default and not the exception in the negotiations. The greater the transparency, the greater accountability of public authorities – to the benefit of democracy and good policy-making.

Insofar as, exceptionally, some documents, or parts of documents need to be withheld, such decisions should be automatically reviewed by the Ombudsman, as if they had been subject to a complaint.

2. PUBLIC PARTICIPATION AND ACCOUNTABILITY

Articles 9 et seq. of the TEU emphasise the importance of democratic participation in the functioning of the European Union, which can be exercised directly or indirectly.

2.1. Involvement of Parliamentarians

The President of the European Parliament, Mr. Martin Schulz, argued that "whoever wants to win greater trust must make the contents of negotiations public".¹⁹

On 15 July 2014, Mr. De Gucht argued before the European Parliament that "[t]here has never been a trade agreement conducted in as much transparency as this one [f]or a number of reasons: **it is only since the Treaty of Lisbon that this Parliament has the competence to ratify agreements.** As long as you did not have that competence obviously that was different, and now we have to adapt to that new situation, but I would claim that we have been doing this with a lot of diligence." (emphasis added).

Also on that occasion, Mr. De Gucht claimed that "[a]t the start of this Commission we agreed that all the documents that we give to the Member States and to the European Council, we would also give to the European Parliament." However, that situation does not seem to be the one the Parliament is experiencing. Article 218(10) TFEU states that "[t]he **European Parliament shall be immediately and fully informed at all stages of the procedure.** However, several MEPs have complained for not having access to the documents. Having meetings with a reduced number of parliamentarians, mainly through the INTA Committee²⁰ (although the European Parliament has 750 members) and establishing reading rooms of restricted access do not seem to comply with the Treaty. This interpretation can be extracted from Case C-658/11 European Parliament v Council of 24 June 2014 in which the European Court of Justice ruled that

16 Like our most recent one: http://www.asktheeu.org/en/request/ttip_meetings_stakeholder_expens/new

17 http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html.bookmark#_ftn4

18 http://www.transparencyinternational.eu/wp-content/uploads/2014/04/EU_Integrity_System_Report.pdf

19 <http://www.euractiv.com/sections/trade-industry/schulz-ttip-there-will-be-no-secret-negotiations-301952>

20 http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152276.pdf

"[i]f the Parliament is not immediately and fully informed at all stages of the procedure in accordance with Article 218(10) TFEU, including that preceding the conclusion of the agreement, it is not in a position to exercise the right of scrutiny which the Treaties have conferred on it" (cf. paragraph 86).

In the same vein, and due to the broad scope TTIP is acquiring, it is likely that it will be a mixed agreement.²¹ That means that **National representatives** must also have a say. Nevertheless, most national parliaments barely discuss this issue and are being kept in the fog as well.

By virtue of the above, the European Commission shall change its engagement method with the European and National parliaments to achieve further transparency and avoid a case before the CJEU. More precisely, the Commission should:

- **Not discriminate** among the MEPs.
- **Open the meetings** it has with other EU and national authorities **to the public**. Full online streaming is the most effective way to do so.
- **Immediately and fully inform the European Parliament** in all stages of the negotiations. That is, share ALL the documents of the negotiations (including detailed minutes of verbal discussions) or at least leave the (real) possibility for all MEPs to have access to documents.
- Set up **effective and adequate mechanisms** to ensure the Commission gets adequate and complete feedback from parliamentarians.

2.2. TTIP Advisory Group

On 27 January 2014, the European Commission issued a press release announcing the establishment of the TTIP Advisory Group.²² We do not understand how the experts were appointed nor why the number was limited to 14 members (and more recently to 16) nor the value of discussing an agreement when the discussants do not have proper access to the texts in question.²³ We also do not understand why the Commission did not open up to more civil society organisations.

The Commission asserts the group "[o]perates in line with standard Commission rules on expert groups".²⁴ However, those rules are not concrete or transparent enough to clarify our doubts. The terms of reference of the Advisory Council do not shed much light either.²⁵ Such concerns go along with the own-inquiry initiated by the European Ombudsman on the composition and transparency of the Commission's expert groups in May 2014. As Ms. O'Reilly stated, "it is of utmost importance for these groups to be balanced work as transparently as possible so that the public can trust and scrutinise their work."²⁶ EDRi supports this approach.

The European Commission argues that "[t]he purpose of the group is to provide the EU negotiating team with expert advice on aspects of TTIP". Nevertheless, at the round of debates organised on 2 October 2014 by the European Movement International (EMI), Ms. Monique Goyens, Director General of BEUC and Member of the TTIP Advisory Group, publicly complained before Mr. Commissioner De Gucht that the TTIP Advisory Group does not sit around the negotiation table and

21 That was confirmed by Mr. Ignacio García Berceiro, EU Chief Negotiator for TTIP, at a Breakfast debate hosted by Mr. Daniel Caspary and Prof. Dr. Godelieve Quisthoudt-Rowohl (EPP MEPs) on 15 October 2014 at the European Parliament.

22 http://europa.eu/rapid/press-release_IP-14-79_en.htm

23 According to term No. 11 of the Terms of Reference (cf. http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152103.pdf), the Chair is enabled to bring other external experts to the meetings. What are the safeguards put in place to do that?

24 See <http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>

25 http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152103.pdf

26 <http://www.ombudsman.europa.eu/en/press/release.faces/en/54301/html.bookmark>

does not get adequate feedback on negotiations. Likewise, she complained about the reading room, whose restrictions are excessive and outdated. Ms. Goyens also regretted that the Advisory Group does not have access to any US documents and that the members of the group have never been asked to give any concrete advice. Hence, EDRi questions the functioning of the Advisory Group.

If the Commission is not more transparent, it will not earn the legitimacy needed. The establishment of an Advisory Group would only be a good step in the right direction if it has safeguards and much greater transparency is ensured. Therefore, the Commission should:

- Disclose more **details regarding the composition, appointment and role** of the Advisory Group;
- **Regularise the recourse to other external experts**; and
- If the Commission wants to receive expertise, then it will have to **further involve the Advisory Group** and address the complaints raised;
- **Include more civil society representatives** within its experts groups, bringing more transparency and clarity as to their appointment, role and conditions of the service;

2.3. Reading rooms

As explained before, only a few people has access to some (not all) documents through reading rooms, some with, some without the “right” to take notes. The reading rooms arrangement was agreed by the Commission at the initiative of the US and took effect as of the 6th round of negotiations. Access is not solely restricted in number, but also materially and substantially. Electronic devices are not allowed and “the privileged readers” cannot share any information with third parties according to MEP Heidi Hautala.²⁷ “While a ban on taking notes in the reading room was lifted on 3 September, this is not in any way near enough”, stated the European United Left/Nordic Green Left European Parliamentary Group.²⁸

Member states representatives “receive similar treatment”, although access to additional rooms in US embassies in Europe may be possible.²⁹ And members of the Advisory Group are also invited to reading rooms with no better conditions, as evidenced by the testimony of Ms. Monique Goyens referred to above.

In sum, the situation is the following: the Commissioner for Trade himself, Mr. De Gucht, claimed to be against reading rooms and blamed the US for it³⁰; Member states have complained to the Commission about this practice³¹; several MEPs have repeatedly complained about it and some of them participated in a demonstration in front of the reading room to protest³²; and, of course, civil society organisations like EDRi fully oppose it. What are the institutional arrangements between the EU and the US on the establishment of reading rooms? How can we be sure that the Commission has done all it could to prevent this situation? Why should the Commission concede to such antidemocratic practices that go against the Treaty, of which it is supposed to be guardian? Does this mean that the Commission has permitted or is going to permit this unacceptable malpractice in other FTA negotiations with other countries or international organisations?

The European Commission should at provide details on the constitution of the reading rooms and the commitments it has reached with the US in this regard. We see no alternative but to ask the European Ombudsman to rule that **the reading rooms mechanism is contrary to EU law**, as evidenced above.

27 <http://ttip2014.eu/blog-detail/blog/TTIP%20ECJ%20Transparency.html>

28 <http://www.guengl.eu/news/article/access-denied-meps-stage-ttip-reading-room-demonstration>

29 <http://ttip2014.eu/blog-detail/blog/TTIP%20ECJ%20Transparency.html>

30 Karel De Gucht stated before the Parliament on 15 July 2014: “I am against reading rooms. I do not like them.” The Problem is the US, he affirmed. Cf. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140715+ITEM-009+DOC+XML+V0//EN&language=EN>

31 <http://ttip2014.eu/blog-detail/blog/TTIP%20ECJ%20Transparency.html>

32 <http://www.guengl.eu/news/article/access-denied-meps-stage-ttip-reading-room-demonstration>

2.4. Public consultations

The European Commission claims having launched three public consultations before the start of the negotiations. The Investor-to-state dispute settlement (ISDS) consultation constitutes the fourth one.

EDRi believes the Commission should:

- **Carefully and diligently analyse the more than 150,000 responses provided.** We expect nothing but a **detailed and comprehensive assessment** of the responses, going beyond the preliminary statistical analysis launched. The report cannot be reduced to mere statistics or make unfounded generalisations. We understand the complexity of the task, but difficulties are not an excuse not to provide a high-quality analysis.
- **Act according to the responses** obtained as part of the public consultations. The Commission needs to demonstrate it actually listens and engages with EU citizens and their representatives.
- **Launch more public consultations** so as to address the concerns raised by the public opinion, and deal with the responses in a meaningful way.

2.5. 'Civil society Dialogues'

The Commission allegedly organises 'civil society' 'dialogues' after the official rounds of negotiations. EDRi feels the need to make use of the dictionary to express why we consider there is room of improvement in this area as well.

According to Dictionary.com, **civil society** could be defined as "the aggregate of non-governmental organisations and institutions that manifest interests and will of citizens". In other words, civil society does not represent private interests, but the "interests and will of citizens". However, EDRi is confused about the Commission's criteria for considering certain actors as "civil society".

On 4 November 2014, the European Commission organises the fourth "dialogue" with "civil society". The list provided of members attending the meetings is a step towards further transparency, indeed. However, when one goes quickly through the list, we see certain organisations which do not fit within the definition provided above.³³ Significant sums of public money are being spent for "Civil Society" to go to these events. Yet, we are not sure whether some organisations can actually be considered as civil society. Just to mention a few examples, the American Chamber of Commerce to the European Union, FoodDrinkEurope, DigitalEurope, European Services Forum or BusinessEurope are included in that list. A study shows that the alleged "civil society organisations" are among the lobby industry groups which lobby DG Trade the most.³⁴ Allowing non-truly "civil society organisations" within a "Civil Society Dialogue" is worrisome and unacceptable. Entitling the event that way is misleading under the circumstances described.

On the other hand, Dictionary.com defines **dialogue** as "an exchange of ideas or opinions on a particular issue, especially a political or religious issue, with a view to reaching an amicable agreement or settlement".³⁵ EDRi believes the "Civil society Dialogues" proposed by the Commission do not fall within any reasonable definition of a dialogue. First, the "dialogues" consist of a generic briefing from the US and the Commission side. At the end, the public is only to ask a few questions (as compared to those we could raise). The responses to the questions have been vague and do not clarify the uncertainty surrounding the TTIP negotiations. As evidenced above, not only "civil society" is present, but a variety of commercial stakeholders. Due to the big diversity among the participants, the possibility for an actual debate on specific issues is not possible.

33 <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11433>

34 See a study conducted by CorporateEurope showing who lobbies the most DG Trade:
<http://corporateeurope.org/international-trade/2014/07/who-lobbies-most-ttip>

35 <http://dictionary.reference.com/browse/dialogue>

Therefore, EDRi would like to propose the following measures to solve this:

- The Commission should **clarify the criteria** for considering organisations as part of “civil society” and revisit the structure of its “dialogues” to ensure that, unlike at present, a dialogue is possible.
- Changing the names of the meetings would not be a solution. The Commission should rather ensure the establishment of a **true Dialogue with Civil society**. Unfortunately, civil society organisations do not often have the resources (beyond simple travel costs) to engage with the Commission as much as it would be necessary to counterbalance industry lobbies.
- **More meetings** (including roundtables and debates) should be conducted with civil society.
- Reports from the state of play of negotiations should **not remain vague, but rather concentrate in specific issues and ask civil society organisations to engage in providing their input** in finding solutions.

3. MEANS OF COMMUNICATION

The European Commission should be clear and consistent in the way it communicates. We would like to mention three examples.

First, the wording used in the Commission's TTIP website is misleading. For instance, it is stated that

“On this page you'll find:

- a **wide range** of TTIP documents – **including summaries**, and the EU's negotiating **guidelines and opening positions**” (emphasis added).

However, as demonstrated throughout this response, due to the significance and scope of the TTIP, we doubt that “over 50” online documents³⁶ can be considered sufficient. Moreover, EDRi wants to emphasise that we do not consider it appropriate to substitute the actual documents by “summaries”, “guidelines” or “opening positions”.

Secondly, the **mandate** deserves particular attention. The mandate dates back to 17 June 2013. However, it was officially published on 9 October 2014,³⁷ i.e. 16 months later. The delay in publishing the Directives for the negotiation on the TTIP is unacceptable. Hence, after the document was already in the public domain for an extended period of time due to leaks, we are not as “delighted” as Mr. Commissioner De Gucht claimed to be by the publication of the mandate.³⁸

On 15 July 2014, Commissioner De Gucht seemed to acknowledge that the document was already available to the public as a leak. At a debate he had before the plenary of the European Parliament, he stated “[b]y the way, everybody has it.³⁹ It is on the Internet.”⁴⁰ Therefore, we welcome its publication not because it may contribute to greater transparency⁴¹, but because there was no need for the document to still remain as a “classified” document.

Thirdly, discussions around the inclusion or not of **ISDS** have been far than clear.⁴²

All the contradictions, misinformation and, in general, lack of transparency and clarity surrounding the TTIP --and other FTAs-- should stop. Accordingly, EDRi believes the European Ombudsman

36 http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152276.pdf

37 <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>

38 http://europa.eu/rapid/press-release_STATEMENT-14-306_en.htm

39 The leaked EU negotiation mandate, found on the website of the S2B network was available more than one year ago <http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU-TTIP-Mandate-from-bfmtv-June17-2013.pdf> [18-09-2013]

40 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140715+ITEM-009+DOC+XML+V0//EN&language=EN>

41 <http://www.ombudsman.europa.eu/en/press/release.faces/en/58057/html.bookmark>

42 See for instance <https://edri.org/eu-commissioner-isds-consultation-outright-attack/>

should **recommend the Commission to be clear, precise and consistent** in its position regarding the TTIP negotiations and not to claim to be transparent or clear when it does not appear to be the case.

4. CONFLICT OF INTERESTS

While the access to the documents has been the most criticised aspect, the Commission shall ensure that none of its staff has any conflict of interests whatsoever, starting from the top positions.

EDRi has raised concerns about the impartiality **the new EU Trade Commissioner**, Ms. Cecilia Malmström, showed towards the US as EU Commissioner for Home Affairs. Evidence shows she was always there to protect the US to the detriment of EU citizens fundamental rights and freedoms.⁴³ What is more, despite compromising document found, "Ms. Malmström is here to stay",⁴⁴ with all the consequences this may entail. The majority of the European Parliament has given her a vote of confidence. We hope the new Commissioner shall improve her previous performance as part of the Commission and respects her duty not to undermine the fundamental rights and freedoms of the citizens.

EDRi welcomes the European Ombudsman's involvement in **revolving door cases**. For instance, on 23 September 2014, she "called on the European Commission to make its review processes on "revolving doors" cases more robust to avoid conflicts of interest."⁴⁵ The TTIP negotiations may not be exempt from revolving door cases.⁴⁶ In order to prevent any type of corruption and revolving door cases, EDRi encourages the European Ombudsman to initiate an own-initiative inquiry on potential cases involving the TTIP negotiations for the Commission to implement the recommendations of Ms. O'Reilly.

Overall, when documents are not accessible, public participation is not fully ensured; communication from public authorities and their officials is not consistent; and conflicts of interests are not clearly resolved, the position of the European Commission is undermined. The Commission can and should change that situation.

II. Examples of best practice that the Commission could apply.

First, DG Trade and other Directorates-General involved in the TTIP negotiations should start by making sure the institution itself and its staff respect the administrative codes. Secondly, concrete international organisation best practices could help the Commission.

1. ADMINISTRATIVE CODES

The European Commission is bound by the **European Code of Good Administrative Behaviour**⁴⁷, which clarifies the obligations of the Institutions and their staff in their relations with the public.

43 For more information about our concerns, see <https://edri.org/enditorial-malmstrom-always-there-to-protect-us/>

44 See the story compromising the transparency and integrity of Ms. Malmström and her staff at <https://edri.org/despite-compromising-document-malmstrom-stay/>

45 <http://www.ombudsman.europa.eu/press/release.faces/en/56332/html.bookmark>

46 See for instance the case of ex-senior official of DG Agriculture, Mr. João Pacheco, who was (at least to a certain extent) involved in discussions on TTIP: <http://corporateurope.org/revolving-doors/2014/06/commissions-new-revolving-door-case-real-litmus-test>

47 www.ombudsman.europa.eu/showResource?resourceId=1370850557353_code_2013_EN.pdf&type=pdf&download=true&lang=en

Accordingly, the Commission shall:

- Act **in accordance with the law** and "ensure that the decisions which affect the rights or interests of individuals have a basis in law" (cf. Article 4);
- Comply with the principle of **proportionality** (cf. Article 6);
- Be **consistent** in its administrative behaviour and follow its normal practice (cf. Article 10);
- Respect the "**right to be heard and to make statements**" when a decision affects the rights or interests of individuals (cf. Article 16);
- "**Avoid making decisions which are based on brief or vague grounds**, or which do not contain an individual reasoning" (cf. Article 18.2);

Furthermore, the European Commission has its own **Code of Good Administrative Behaviour**⁴⁸, which goes in line with the aforementioned principles. The European Commission cannot depart from it when negotiating TTIP.

On the other hand, the European Commission committed itself to follow the **Interinstitutional agreement on better law-making**.⁴⁹ Although the legislative process is of a different nature from the conclusion of a trade agreement, the Commission ought to be consistent with its commitment on transparency under provision No. 10 of the Interinstitutional agreement. It reads as follows:

"The three Institutions confirm the **importance** which they attach **to greater transparency and to the increased provision of information to the public at every stage of their legislative work**, whilst taking into account their respective rules of procedure. They will ensure in particular that public debates at political level are broadcast as widely as possible through the systematic use of new communication technologies such as, inter alia, satellite broadcasting and Internet video-streaming."

2. INTERNATIONAL BEST PRACTICE

Finally, the European Commission could build upon the models of several International organisations and extend them for the negotiations of trade agreements like TTIP. That way the Commission could show that it has truly learnt from the failed ACTA. In the words of Dr. Michael Geist,

"In November 2009, as a response to demands for more transparency, the ACTA partners released a joint statement claiming that "it is accepted practice during trade negotiations among sovereign states to not share negotiating texts with the public at large, particularly at earlier stages of the negotiation."

Yet a closer examination of similar international IP negotiations reveals that ACTA's opaque approach was not "an accepted practice", but rather was out-of-step with many other global norm-setting exercises. The WTO, WIPO, WHO, UNCITRAL, UNIDROIT, UNCTAD, OECD, Hague Conference on Private International Law, and an assortment of other conventions were all far more open than ACTA".

"Had the negotiations followed more conventional global norms, it is much more likely that the final text would better account for the remaining substantive concerns."⁵⁰

Evidence shows international organisations are neither exempt of criticism. However, we see examples of better practice among various international organisations. On 19 May 2014, EDRI

48 http://ec.europa.eu/transparency/code/docs/code_en.pdf

49 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003Q1231%2801%29&from=EN>

50 Geist, M., *The Trouble with ACTA: An Analysis of the Anti-Counterfeiting Trade Agreement*, European Parliament Policy Department DG External Policies, 2012, available at http://www.europarl.europa.eu/RegData/etudes/workshop/join/2012/457105/EXPO-INTA_AT%282012%29457105_EN.pdf (pp. 25 et seq.)

joined forces with other civil society organisations to call for greater transparency and public accountability in an open letter sent to Commissioner De Gucht. We hereby would like to reiterate what we had already stated:

“[T]here are several examples of international negotiation processes, which provide a greater degree of openness to civil society than the negotiations on TTIP do, and whereby negotiating documents are disclosed.

Examples include:

- The **World Trade Organisation (WTO)**: Even the WTO, which is regularly the subject of criticisms by civil society and member states, makes submissions made by member states in the negotiations, as well as offers, and reports by committee chairs available on its website.⁵¹

-The **United Nations Framework for Convention on Climate Change (UNFCCC)**: The negotiating texts and submissions from the parties are circulated before the negotiations start. Observers, including external stakeholders, attend the sessions, and can provide submissions on request by the parties.⁵²

- The **World Intellectual Property Organisation (WIPO)**: Draft negotiating documents are being released all along the process. Meetings are open to the public, and webcasted.⁵³

- The **Aarhus Convention**: Meetings of the governing body and its subsidiary bodies are as a rule public. Accredited observers can participate in meetings of parties and in drafting groups working in collaboration with parties to develop text during the negotiations. They have the same speaking rights as parties.^{54**55}

III. How greater transparency might affect the outcome of the negotiations.

TTIP is more than a traditional trade agreement. Mr. Ignacio García Bercero, EU Chief Negotiator for TTIP, made such claim at a Breakfast debate hosted by Mr. Daniel Caspary and Prof. Dr. Godelieve Quisthoudt-Rowohl (EPP MEPs) on 15 October 2014. The scope of the agreement is so broad, that it has the potential to impact infinite aspects and interests of EU citizens and more importantly, have an impact over fundamental rights and freedoms of EU citizens. Consequently, transparency is critical for the TTIP to be considered legitimate by EU citizens and all actors which have a stake. Greater transparency in the negotiations will “help ensure that the public can follow the progress of these talks and contribute to shaping their outcome”, the European Ombudsman argued.⁵⁶ We agree.

The European Ombudsman has also argued that “a proactive approach to transparency could enhance the prospects of success of the TTIP negotiating process by enhancing its legitimacy in the eyes of citizens.”⁵⁷ Her claim goes in line with recital 2 of the Regulation No. 1049/2001:

51 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx

52 http://unfccc.int/parties_and_observers/ngo/items/3667.php

53 <http://www.wipo.int/policy/en/index.html#bodies>

54 Aarhus Convention Task Force on Public Participation in International Forums, Innovations in Public Participation in International Forums –Advanced Draft, 23 February 2011, (“Innovations draft”), available at <http://tacd.org/wp-content/uploads/2014/05/Joint-civil-society-call-for-full-transparency-in-TTIP-19-May-2014-signed-by-TACD.pdf>

55 See the open letter here: <http://tacd.org/wp-content/uploads/2014/05/Joint-civil-society-call-for-full-transparency-in-TTIP-19-May-2014-signed-by-TACD.pdf>

56 <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/56100/html.bookmark>

57 <http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/54633/html.bookmark>

“Openness enables citizens to **participate more closely** in the decision-making process and guarantees that the administration enjoys **greater legitimacy** and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.”

Evidence shows access to the content of the TTIP negotiations is very limited. If the European Commission worries about hyperbolic or inaccurate criticism, it should provide clearer, more accurate and specific information about negotiating documents, reports and minutes of any exchange made orally or in writing. The European Commission cannot expect citizens, civil society organisations, associations, trade unions, companies (SMEs included) or any other actors with a stake to be satisfied with the past and current practices of the European commission in trade agreements negotiations if transparency measures are not meaningful. As the European Parliament agreed in its resolution of 23 May 2013 on EU trade and investment negotiations with the United States of America, it recalled

“the need for **proactive outreach and continuous and transparent engagement by the Commission with a wide range of stakeholders**, including business, environmental, agricultural, consumer, labour and other representatives, throughout the negotiation process, in order to **ensure fact-based discussions**, build **trust** in the negotiations, **obtain proportionate input** from various sides, and **foster public support by taking stakeholders' concerns into consideration**.”⁵⁸

On the other hand, the European Commission seems concerned by **not committing the same mistakes as in ACTA**.⁵⁹ In ACTA, we saw what restrict rules on confidentiality and lack of transparency caused: hundreds of thousands of people protested against it, many actors with a stake like EDRi fought against it and, ultimately, the negotiations failed. The European Commission has taken some steps to allegedly be more transparent, but are the actions taken truly transparent? As shown throughout this response, there is room for a lot of improvement. The European Commission is the Guardian of the Treaties. If the Guardian of the Treaties does not vest its efforts to be more transparent, who will?

Transparency has proven to be **beneficial for the development of trade** itself. That is the conclusion reached by the Organisation for Economic Cooperation and Development (OECD) in its Trade Policy Paper No. 153, 'Quantitative Evidence on Transparency in Regional Trade Agreements'⁶⁰:

“[C]ountries that opt for a comprehensive transparency agenda can expect to gain substantial increases in intra-regional trade. Moreover, the findings suggest that the readiness of trading partners to adhere to transparency norms is influenced by the quality of home institutions, which is consistent with a view that strengthening governance and regulatory capacities can contribute to a broader diffusion of transparency practices in international trade. Overall, the results of the analysis suggest that transparency should remain an important element of the trade agenda, both at the regional and multilateral levels.”

Finally, in case the European Commission does not **implement the recommendations** of the European Ombudsman or any of the concrete measures proposed above, we expect a detailed response from the Commission. We expect the Commission to make a public, written decision based in law and provide a non-vague, legitimate and proportionate justification for the sake of transparency in the TTIP negotiations. In that sense, the New Commission shall be far more transparent.

In the end, the European Court of Justice could always give its opinion as to whether an agreement

58 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0227+0+DOC+XML+V0//EN>

59 See for instance, http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151673.pdf

60 See the Paper here: <http://www.oecd-ilibrary.org/docserver/download/5k450q9v2mg5.pdf?expires=1414237601&id=id&accname=guest&checksum=2BE4CC0329D55458DAFE5F10400364CB>

is compatible with the Treaties or not. The Treaty is clear. A Member State, the European Parliament, the Council or the Commission itself “may obtain the opinion” of the Court. If the CJEU found the agreement incompatible with the Treaties, the agreement would not enter into force. It would have to be amended or, worst case scenario, the Treaties would have to be revisited (cf. Article 218(11) TFEU).