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To: Consultation-OI-10-2014
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Sender

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Part 2 - Data

To Public consultation OI/10/2014
Subject Public consultation in relation to the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations
Content Please find EPHA's contribution joined



Mrs Emily O'Reilly, European Ombudsman
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Brussels, 30 October 2014

Open letter for the attention of Mrs Emily O'Reilly, European Ombudsman

Subject: Public consultation in relation to the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations

1. Please give us your views on what concrete measures the Commission could take to make the TTIP negotiations more transparent. Where, specifically, do you see room for improvement? (We would ask you to be as concrete as possible in your replies and also to consider the feasibility of your suggestions, in light of the timeframe of the negotiations. It would be most helpful if you could prioritise your suggestions.)

Since the TTIP negotiations started, some positive steps have been made by the Directorate-General for Trade of the European Commission (DG Trade) to improve information transparency and stakeholder input into the TTIP negotiations. The publication of many of the position papers, the eventual official publication of the EU negotiating mandate, the creation of an evenly-balanced Advisory Group and the briefing-cum-input sessions that take place during each negotiating round have all marked good progress. However, these measures have been largely ad-hoc initiatives, prompted by increased pressure from civil society, and some of the parliamentary parties – and not part of a well-thought out overall strategy that should, incidentally, also apply to all such negotiations to which the Commission is a party. *The TTIP is being held up to the world as a template for future trade agreements, a such it is also an excellent opportunity to create a new template for consistent and realistic transparency strategies for Free Trade Agreements.* An overall strategy and published procedure will satisfy both the spirit and the letter of article 15 of the Treaty on the Functioning of the European Union (TFEU). There are some good practice examples to use as models from other negotiations and international institutions, some examples of which are given in answer to question 2.

Specifically, we recommend as essential elements of a coherent transparency process the following measures, which build on our previous letters and position papers, as well as the important improvements recently advocated by the European Ombudsman:

- Public access to the TTIP contents documents

The documents should be posted on a dedicated website in a timely manner and include negotiating directives (mandates), initial EU position papers on all sectors covered by the mandate, draft EU offer legal text proposals on all non-strictly tariff-related topics, consolidated texts (i.e. EU and U.S. offers combined) prior to each negotiation round, as well as detailed agendas and detailed reports on the outcomes of each round.

We are aware that the U.S. side denies public access to negotiating documents beyond a handful of pre-approved, mostly business, expert committee members and many advocates are also calling for full transparency and similar measures to the U.S. negotiators. In the meantime, the EU side should lead by example.

The single most important transparency reform around the TTIP negotiations would be to make the negotiating texts public. This reform is more important than all others combined. We strongly favour the release of the entire negotiating text in connection with each negotiating round, with clarity on which parties proposed specific language. However, incremental steps would be much preferable to no release. These might include scrubbing the text so that it is not clear which party made a proposal; more episodic release of the negotiating text; or exclusion of certain elements of text, such as those covering proposed tariff reductions. Transparency and publication is most important in the areas where the negotiations are most novel, and not closely based on other trade agreements, such as the proposed chapter on regulatory coherence.

- Public access to information on the process
The Commission should publish lists of all meetings held by the negotiators with stakeholders, in order to discourage excessive influence of stakeholders that have large resources in terms of funding and number of lobbyists. Any policy submissions and contributions received by the negotiators should be published. The publication by the Office of the United States Trade Representative (USTR) of all the stakeholder submissions to its original pre-negotiation consultation is a good practice in this respect, and has enabled stakeholders to learn each-others positions at an early stage in the negotiations.
- Meaningful consultations with the public
Providing the documents outlined above are made available, public consultations should take place at key stages of the negotiations: prior to the launch; on the draft mandate (negotiating directive) before its final approval by the Council; on the initial policy position papers on the subjects covered by the mandate; and on the final draft consolidated legal text, prior to initialling by the parties. The stakeholder expectations will naturally be that the results of these public consultations are fully reflected in the positions that the negotiators take.
- Role and input of the DG Trade expert Advisory Group (AG)
This group has been set up with a mandate to provide TTIP negotiators with high quality expert advice on subjects being negotiated. However, the scope of the work of the AG has been limited and it only has been able to give pre-negotiation comment on one draft text – the chapter on Sanitary and Phytosanitary (SPS) issues – ahead of the 7th round of negotiations. Restricted papers are only available in the reading room located within DG Trade, which puts non-Brussels based members of the AG at a considerable disadvantage. The AG is also being denied access to merged EU-U.S. legal texts, which renders any input it may have increasingly meaningless as negotiations progress, and end up being used as a transparency whitewash. We therefore propose that: texts being developed for future negotiation rounds must be presented in good time to allow AG members, and their experts, to provide detailed comments before each round; the AG should have access to TTIP merged

legal texts; documents should be made available for comment on a secure online platform (this is currently the practice for the USTR approved advisory committee members); and the European Commission must respond to comments and proposals for modification made by the AG. Finally, it must also be clear how the Commission has integrated the advice in to the negotiation process and if not, then why.

- Involvement of the European Parliament and the Council of the EU

It is of course imperative that both institutions are kept informed and contribute to the negotiations. But the rules of engagement for both are unclear to the public – e.g. list of documents available to them; who within each institution has access to documents; as well as agendas and minutes of meetings held ‘in camera’. We urge that the rules governing engagement in the TTIP of these institutions, and the national authorities involved, be made public as they must be fully accountable to the citizens they represent. Additionally, key directorates and agencies should also be transparently involved in developing DG Trade negotiating positions, and in the public consultative process. Of particular importance to this process would be directorates responsible for health and safety, employment, agriculture, food systems and all kinds of services.

It is crucial to stress that all the proposals listed above need to be adopted and assessed together, as they each contribute to a more credible and more widely accepted, democratic trade deal.

2. Please provide examples of best practice that you have encountered in this area (for example, in particular Commission Directorates-General or other international organisations) that you believe could be applied throughout the Commission.

The Free Trade Area for the Americas (FTAA) was launched in 1994 and stalled in the mid-2000s. Despite its failure to reach a final agreement, and while it fell well short of a transparency ideal, the FTAA negotiations were far more open and subject to public scrutiny along the whole course of the negotiations than TTIP. An FTAA-dedicated website was created and the whole draft agreement texts were published every time negotiators reached consensus on a new version, sharing progress made and opening it to public scrutiny. The FTAA website contains an impressive array of information ranging from dozens of written submissions by civil society organisations to detailed information on the instructions and timelines received by each negotiation group, to information on the chairmanship of each negotiation group for each negotiation round. The homepage itself includes a section inviting civil society to have its say and presenting its views on every aspect of the agreement via a written contribution.

The World Trade Organisation (WTO)’s website offers a practical example public discussions, where citizens are able to read documents and get information on the progress of the talks. It also gives the possibility to browse and consult a vast array of negotiation texts – including initial draft proposals, compromise texts, national submissions and minutes of most of the meetings – offering consultation opportunities on the texts at different stages, from the version on the table of the negotiators to the final compromise agreed and the comments made by WTO members. WTO negotiations have not always been as they look like today and the urgency for the WTO practices of external transparency became evident only in the late 1990s, following the mass demonstrations at the Seattle Ministerial Conference (1999) which led to the General Council Decision of 2002 on Procedures for the Circulation and Derestriction of WTO Documents.

The World Intellectual Property Organisation (WIPO)’s negotiations on the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, finalised in June 2013, offers a good model of openness and transparency in international negotiations. Agendas of the meetings, lists of participants, draft clauses, decisions on admission of observers and progressive reports on the negotiations, as well as the progressively

updated draft text were published on the internet, and a webcasting service allowed the general public to watch streamed negotiation sessions. Stakeholders' working groups were set up and progress on their activities was made available online. The result was an agreement judged as balanced by negotiators and civil society representatives, who had had the possibility to submit their comments throughout the process and contributed effectively to the final outcome of the process.

Indeed, openness and publication of negotiating texts is the norm in many multilateral negotiations. Other United Nations bodies that are subject to transparency procedures include the Codex Alimentarius Commission, the United Nations Framework for Convention on Climate Change, and the World Health Organization's Framework Convention on Tobacco Control. In all these, observers, including external stakeholders, attend sessions and provide submissions on request by the parties.

We would like to refer to the recent judgment the European Court of Justice (ECJ) in case C-350/12¹ in which the ECJ ruled that access to documents relating to international activity would not be automatically exempt from EU transparency requirements. While the Court Decision is a good starting point, it does not yet go quite far enough as it excludes negotiating documents, those relating to strategy or those revealing the positions of foreign parties. This judgment makes it possible to apply for any documents which include legal advice on the TTIP negotiations, with a very good chance of success. This might include advice on controversial issues such as genetically modified organisms and data protection. In addition, the Council and Commission can still refuse access to any part of the legal advice which is mentioned in that mandate.²

As regards reports about meetings which are not open to the public, we believe that the publication of relevant meetings reports in line with the Chatham House rules would enhance transparency while fully respecting the confidentiality rules. The Committee on National Alcohol Policy and Action (CNAPA) composed of Member States representatives could serve as a good example.³

3. Please explain how, in your view, greater transparency might affect the outcome of the negotiations.

There are four fundamental reasons why full disclosure of information and process around the TTIP negotiation will have an impact on its outcome:

- Meaningful input by those directly affected by the negotiations will result in more balanced provisions of the agreement and adoption of highest standards as well as a win-win situation – good for health and healthcare, consumers, environment and workers, and also good for business. It will set a benchmark for other negotiations. All this providing the stakeholder input is taken on board.
- A more open process with more public review and comment of actual negotiating texts will avoid unintended outcomes. We oppose inclusion of any provisions on investor-state dispute settlement (ISDS), but even advocates of ISDS say that more recent proposals are improvements over earlier variants. Many of the problems in those original texts could have

¹[C-350/12 Judgment of the Court \(First Chamber\) 3 July 2014](#). Appeal — Access to documents of the institutions — Regulation (EC) No 1 049/2001.

² [\[Press release\] A win for transparency: EPHA calls for TTIP negotiating documents to be opened to public scrutiny](#)

³ See the CNAPA website here: http://ec.europa.eu/health/alcohol/events/index_en.htm#anchor2_more. As a good practice, they produce a flash report right after the meeting (see. the example of the 4-5 March 2014 meeting here http://ec.europa.eu/health/alcohol/docs/ev_20140304_mi_en.pdf) and later on a more detailed summary report (http://ec.europa.eu/health/alcohol/docs/ev_20140304_mi2_en.pdf).

been avoided with more public scrutiny. Similarly, the Anti-Counterfeiting Trade Agreement (ACTA) included provisions that would have had unintended consequences and were discovered only upon publication. In the TTIP negotiations, we see many possibilities for such unintended outcomes, especially in the novel text being negotiated in the regulatory coherence chapter.

- There has been a lot of citizen action against the TTIP, many of it based on political viewpoints against free trade or liberalisation which greater transparency may not assuage. However, many of the citizen's concerns are exactly based around the lack of transparency. There is a lot of truth in the adage that 'knowledge is power'. Withholding information about this trade agreement that has the potential to change European social protection models for good is disempowering and creates a climate of fear around the whole agreement. Greater transparency may not lead to more support per se, but it will result in a more educated and reasonable debate and greater democracy in the negotiation processes. This could go a long way to ensuring a win-win not only for the business community but ordinary citizens too.

In order to preserve the values of democracy, and accountability in the European Union, we need more transparency at each step of the negotiations. Only in this way can we ensure that free trade agreements: not just the TTIP, do not harm the health, environment or working conditions in the affected countries.

The European Public Health Alliance (EPHA) is the European Platform bringing together public health organisations representing health professionals, patients groups, health promotion and disease specific NGOs, academic groupings and other health associations. www.eph.org