

JASMONTAITE Inga

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

European Ombudsman TTIP consultation

Introduction

ClientEarth welcomes the decision by the European Ombudsman in July 2014 to launch the own-initiative inquiries OI/10/2014/RA and OI/11/2014/RA and the opportunity to respond to the public consultation in relation to the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations.

ClientEarth has transparency at the heart of its work. Through our Aarhus Centre, we focus on the effective implementation of the three pillars of the Aarhus Convention: access to information; public participation in decision-making; and access to justice. We fully supported the letter of 19 May 2014 to Commissioner de Gucht from Friends of the Earth, Europe - "Civil Society call for full transparency about the EU-US trade negotiations". Together with Friends of the Earth Europe, European Federation of Journalists, European Environmental Bureau and Corporate Europe Observatory, we were party to the access request (GESTDEM 2014/0884) relating to a number of TTIP documents which have been rejected by the Commission.

Our responses to the European Ombudsman's specific questions are set out below. However, we would also draw the Ombudsman's attention to the legal context in which these issues of transparency should be considered.

A number of key provisions of the EU Treaties demonstrate the policy and orientation of the EU towards the issue of access to information. Article 1(2) of the Treaty of the European Union (TEU) establishes the fundamental principle that: "This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen". In like vein, Article 15 of the Treaty on the Functioning of the European Union (TFEU) expands on these basic tenets stating that: "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible". Finally, the same concept is reiterated in the Charter of Fundamental Rights of the European Union. The governing principle is access, although exceptions are possible.

This policy and orientation finds detailed legal articulation in Regulation 1049/2001. Recitals 1 and 2 specifically reiterate the principle set out in Article 1 TEU and confirm that "[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and 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".

Moreover, it should be noted that specific measures apply in relation to environmental information. Regulation 1367/2006 is designed to apply the provisions of the Aarhus Convention

to EU institutions and bodies. The regulation introduces wider transparency obligations and more limited possibilities for exceptions than may apply under Regulation 1049/2001. Because the Regulation derives from the EU's international obligations under the Aarhus Convention, it must be interpreted and applied in light of the provisions of the Convention. It is essential to note that, given the scope of the TTIP negotiations and the sectors and measures under discussion, health and environmental regulations are the main target of the regulatory coherence chapter and, inevitably, environmental issues arise in almost every aspect of the process.

Although there is a clear legal framework within which the EU institutions and bodies can be called on to demonstrate transparency and openness, our experience shows that where there is any reluctance or hesitation on the part of an institution to make documents available, the institution may exploit opportunities for delay. Complaints about refusals may, of course, be referred to the European Ombudsman; but if an applicant wishes to enforce rights and clarify legal obligations, the only option is to pursue the matter by way of court action. Delay inevitably removes the potential of using information to engage in decision-making in a constructive and timely way, and court proceedings involve significant resource costs which civil society organisations cannot afford.

We would, therefore, strongly urge that the Ombudsman makes clear to the institutions that non-compliance with their clear legal obligations is *prima facie* maladministration. Arrangements should be put in place which would pre-empt the need for complaints to be made. Given the daily evolution of the TTIP negotiations, the institutions should be called on as a matter of urgency to develop mechanisms which will facilitate and not hinder transparency. It should not be necessary for civil society to resolve this unsatisfactory position through court proceedings.

Specific Questions

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).

We would draw the Ombudsman's attention to the existing legal obligation established in Regulation 1049/2001 to establish a register of documents.

Regulation 1049/2001 (Articles 11 and 12) contain specific provisions regarding the mechanisms for access to documents which was due to be operational by 3 June 2002. Article 11 provides that each institution shall provide public access to a register of documents. The basic characteristics of the register include that: Access to the register should be provided in electronic form (Article 11(1)); references to documents shall be recorded in the register without delay (Article 11(1)); and, for each document, the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and short description of the content of the document and the date it was received or drawn up and recorded in the register (Article 11(2)). Article 12 describes the ways in which the documents themselves can be made directly accessible to the public.

In order to ensure full transparency, such a register should be comprehensive and include at least: Negotiating mandates; EU position papers; documents received from the US negotiators; consolidated texts prior to each negotiation round; detailed agendas for and reports of the outcome of each negotiation round; lists of all meetings held by negotiators or other officials with all stakeholders; and documents submitted by all stakeholders to the negotiators. Apart from the list of documents, details should also be provided of the source of the document, date of receipt etc.

If there is any proposal to apply one of the disclosure exceptions to a document or to redact any part of it, then full explanation of the rationale should be provided in the register. In addition, the Ombudsman should be given the opportunity to review and comment on the proposal.

We would also suggest that the Commission's TTIP website enables easy access to this information and that opportunities for consultations are increased, well publicised and responded to.

We also consider it essential that disclosure mechanisms are established without delay so that the European Parliament is fully enabled to perform its critical constitutional role in international agreements.

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.

We would refer the Ombudsman to the letter of 19 May 2014 referred to above and also to the detailed submissions of other respondents, e.g. Foundation for Free Information Infrastructure.

We also suggest that note is taken of the work of the Aarhus Convention Task Force on Public Participation in International Forums and its work in applying the Almaty Guideline to the work of international fora concerned with environmental matters.

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

Transparency is not an end itself. It is a tool through which decision-makers are made more accountable for their actions. In the case of TTIP, decision-makers are negotiating a trade, investment and regulatory agreement which is being promoted as being in the interest of EU citizens.

As mentioned above, Regulation 1049/2001 expressly acknowledges that 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.

Case law of the European Court of Justice, particularly the Turco case (Joined Cases C-39/05 P and C-52/05 Sweden and Turco v Council), provides judicial endorsement for these principles. The Court confirmed (para. 46) that openness in that respect contributes to strengthening

democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. That citizens are able to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.

It is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in the institutions by allowing divergences between various points of view to be openly debated. It is, in fact, rather a lack of information and debate which 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 process as a whole. (ibid. para 59).

Greater transparency in the negotiation process will shift the attention to the merits of the TTIP and allow citizens and concerned groups to express their concern directly. It would improve the debate and free expression of opinions around the TTIP.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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