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Teil 2 - Daten

An Public consultation OI/10/2014

Thema TTIP-Konsultation

Sehr geehrte Damen und Herren,

vielen Dank für Ihre Initiative, eine öffentliche Konsultation zum Thema Transparenz bei TTIP durchzuführen.

Der Verbraucherzentrale Bundesverband e.V. (vzbv), der zu den Mitgliedsorganisationen des Europäischen Dachverbandes der Verbraucherorganisationen BEUC gehört, teilt und unterstützt ausdrücklich die Maßnahmenvorschläge für mehr Transparenz und öffentliche Beteiligungsmöglichkeiten, die BEUC in der gemeinsamen Stellungnahme bereits eingereicht hat und die wir hier nur vorsorglich als Anlage zufügen.

Inhalt Mehr Information, die wir bei TTIP in den letzten Monaten und Wochen erlebt haben, ist nicht zu verwechseln mit Transparenz. Seit Verhandlungsbeginn erfüllte lediglich die - auch erst nach öffentlichem Druck erfolgte - Einrichtung der Advisory Group bei der EU-Kommission, die Konsultation zum Investorenschutz der EU-Kommission und die kürzliche Veröffentlichung des EU-Verhandlungsmandats ansatzweise Transparenzanforderungen. Bei einem Abkommen, das nach dem Verhandlungsmandat nahezu jeden Wirtschafts- und Lebensbereich berühren kann, ist es für die Zivilgesellschaft ein nicht hinnehmbarer Zustand, dass die Information und Beurteilung von Positionierungen der Verhandlungsführer abhängig von dem Umstand ist, ob Papiere geleakt werden.

Wir appellieren daher, dass die Vorschläge der Europäischen Verbraucherorganisationen, denen viele internationale Praxisbeispiele zugrunde liegen, für mehr Transparenz und Beteiligung der Öffentlichkeit im weiteren Verhandlungsverlauf von TTIP, aber auch von anderen internationalen Handels- und Investitionsschutzabkommen, aufgegriffen werden.

Mit freundlichen Grüßen

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The Consumer Voice in Europe

TRANSPARENCY & ENGAGEMENT IN THE TTIP: How to improve EU trade negotiations' accountability to the public

Contact: **Clelia Imperiali** – [REDACTED]

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IN A NUTSHELL: OUR PROPOSALS FOR IMPROVEMENT

Public access to documents

Negotiations for a Transatlantic Trade and Investment Partnership (TTIP) should feature a website where the European Commission (EC) and the Council of the European Union (Council) timely publish the following documents¹:

- Negotiating directive (mandate).
- Initial EU position papers on all sectors covered by the mandate.
- Draft offer proposals on all non-strictly tariff-related topics (at least on the EU side if legal restrictions exist in the counterpart to make them public too).
- Consolidated texts, prior to each negotiation round and as they will appear on the negotiators' table, in order to allow the public to track their evolution
- Detailed agendas and reports of the negotiation rounds.
- List of all meetings held by the negotiators with stakeholders, in order to discourage excessive influence of stronger and more resourced ones.
- Stakeholders' letters and any other submission/contribution received by the negotiators, in order for the public to track which and how much they have been taken into account in the negotiations.

Stakeholders' consultation

Public consultations are to be held:

- During the phase preceding the launch of the negotiations, as it already happens, but also:
- On the negotiating directive, as soon as the EC receives it from the Council.
- On the initial position papers, to be produced by the EC on every sector included in the mandate.
- On the final consolidated text prior to its initialling.

The EC must ensure that the results of the public consultations are fully reflected in the orientation the negotiations take.

The role of the Advisory Group (AG)

To fulfil its advisory role, the functioning of the AG has to undergo the following modifications:

- Texts available to the public and being developed for future negotiation rounds must be presented in a timely manner as to allow members of the AG, and their experts, to provide timely and detailed feedback before each round.
- The physical reading room in the Charlemagne building has to be moved to an online secured access tool (e.g. ECAS), allowing comments and modifications in track changes, so that members of the AG, and their experts, can access the texts.

¹ Which? does not agree with the full list of proposals.

- Experts nominated as issue-specific alternates of the AG members must have access to the online secured access tool.
- The EC has to respond to comments and proposals for modification made by the AG and their alternates.
- The AG has to be granted the same access to consolidated texts as the Council and the European Parliament (EP).

Involvement of other EU institutions

The EP, as well as the Council, are to be kept informed and contribute to the negotiation process. However, current rules governing the details of such consultation differ substantially and are not known by the public (e.g. agendas of the TPC meetings and those of the relevant monitoring groups within the EP, list of documents available to the EP and the Council, definition of whom within both institutions have access to them). Detailed rules governing such processes must be public in order for these institutions, and for national authorities if involved, to be fully accountable to the citizens they represent.

INTRODUCTION

TTIP negotiations are experiencing a record-breaking level of attention from media and the public: EU and US negotiators are facing growing demands from civil society, especially concerning transparency and the way consultation with stakeholders is being handled. Yet, demands for more transparency are usually answered by both sides with the argument that TTIP features the most transparent and inclusive trade negotiations in history and with the counter-demand for feasible and concrete inputs on how to improve the current settings.

This paper takes up the challenge: it explains why transparency and stakeholders' consultation are so important in TTIP and in XXI century trade negotiations in general, it assesses the (non-) effectiveness of existing tools and it offers concrete proposals for enhancing current procedures. It also provides a review of existing transparency and consultation means used in other trade fora, a list of best practises to draw lessons from and an overview of parallel steps towards an improved scenario, thanks to the European Court of Justice (ECJ) rulings and European Ombudsman's initiatives. The paper concentrates on initiatives that are important for improving the participation of stakeholders representing societal interests. Although more transparency is also key in the processes concerning consultation with the European Parliament and other institutional actors, it is not BEUC's role to provide suggestions towards it. Moreover, the paper focuses on concrete proposal on the EU side but the ideas brought forward can also serve as an inspiration for improving the US system. There should be reciprocity in the levels of transparency and the EU should ask all his trade partners to commit to high standards of openness and stakeholders involvement.

WHY TRANSPARENCY IS SO IMPORTANT

Greater transparency in the TTIP negotiations is not simply advisable because of the positive effects that meaningful inputs by stakeholders can have on the content of the agreement. Much more than that, transparency is needed for the negotiations themselves not to fail: the current public debate is focused more on lack of transparency, fuelling harsh critiques from the public, rather than on the content. More openness and accountability would allow to shift the discussions and to save the talks from early opposition to the agreement as such.

The record-breaking level of attention from media and the public towards the TTIP negotiations can be explained by the following factors:

1. The high level of trade flows between the TTIP partners as a world percentage and the template-setting potential of the agreement for future trade deals: TTIP can create a real Trans-Atlantic single market, it will affect trade flows of both EU and US partners and its provisions are likely to be taken as a model for future negotiations. What is agreed here will set the benchmarks and levels of ambition of many future agreements.
2. The awareness of civil society in both parties: both the EU and the US are mature democracies where public policies are developed through a sophisticated decision-making and regulatory process which entail stakeholders' participation at different levels and stages. Trade negotiations do not undergo the same scrutiny by stakeholders and public opinion despite continuing expanding their coverage and affecting regulations and wider public interest policies.
3. The unprecedented coverage of TTIP (and coetaneous agreements) is indeed the fundamental reason why 'this time is different': given the progressive reduction of tariff barriers worldwide, today trade negotiations are more and more often aiming at reducing so-called Non-Tariff Barriers (NTBs), entering the delicate terrain of regulatory frameworks to explore further ways of liberalising trade flows. Since regulations touch upon a much broader system of rules designed to protect and inform citizens, and often developed through lengthy processes to strike the balance between interested parties, any ambitious deal on these matters needs to be negotiated in full openness and transparency with the public. As said, failure to do so might lead to a final veto over it not over the content but over the means of the negotiations themselves.

The combination of the above factors should have prompted a clear strategy from the EU on how to enhance transparency and accountability with the public vis-à-vis the expanded scope and depth of the agreements.

Instead of this, DG TRADE has continued following the classical negotiation approach of national governments over tariff issues, even when dealing with regulatory affairs: non-public discussions, possibly conducted with some privileged stakeholders² but certainly without the not-for-profit part of civil society and the Advisory Group, which are informed through channels whose consultative value and effectiveness is scarce, if any.

This approach is proving dangerously inadequate in the context of the current political situation in the EU. We have seen the failure of ACTA, which was vetoed by the EP, and we will see this happening again with the TTIP if all EU institutions don't engage in a transparent way with the public: a deal touching regulations which have a deep impact on the daily life of millions of citizens needs to be negotiated at the sun light and with the involvement of regulators and representative stakeholders. If not, it risks being opposed even before the discussions get to the substance and despite the potential benefits it can bring.

From the perspective of a consumer representative, once the discussions become more transparent and move to the substance, it will clearly become essential to be able to provide decision makers at the EU and Member States level with meaningful inputs to take well-informed decisions, in order to assess whether potential benefits for consumers are factually included in the agreement and whether potential risks are present or safeguarded against.

BACKGROUND

EC Current framework

Transparency and involvement of stakeholders in EU trade negotiations normally rely on the following three instruments³:

- ✓ **Public consultations**
- ✓ **Impact assessments**
- ✓ **Civil society dialogue meetings**

In parallel to this, the EC has the duty to report regularly to the Trade Policy Committee (TPC) of the Council and to the EP (Article 207.3 TFUE).

The TTIP negotiations feature also another instrument of cooperation with stakeholders, the already mentioned **Advisory Group** (AG), a group of experts set up by DG TRADE in January 2014 to provide "high quality advice in the areas being negotiated"⁴.

² <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html>. bookmark (point 2).

³ An interesting [Trade Watch pilot project](#) was proposed during the negotiations for the 2014 Budget procedure but finally not approved (http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/dv/2014_inta_budg_amends_txt/2014_inta_budg_amends_txt_en.pdf).

⁴ http://europa.eu/rapid/press-release_IP-14-79_en.htm.

Moreover, prior to the start of the negotiations, another body called the High-Level Working Group on Jobs and Growth (HLWG), led by the U.S. Trade Representative and the EU Commissioner for Trade⁵, had been set up. While few information on the composition and the activities of the group is available⁶, the recommendations made by the HLWG in its final report of February 2013⁷ guided the negotiating directive granted to the EC in June 2013.

Public consultations

On issues related to trade negotiations, as well as to other EU policies, the EC publishes open online questionnaires for seeking the opinion of the public. Citizens and stakeholders have normally twelve weeks to reply and these calls are usually launched at very earlier stages, even before the EC is given the negotiating mandate by the Council. For TTIP, in parallel with the works of the HLWG, in 2012 the EC launched 3 public consultations respectively on the EU-US HLWG itself⁸, the future of EU-US trade and economic relations⁹ and on regulatory issues¹⁰. In April 2014, following the wave of critiques from the public over the possible inclusion of an Investor-State Dispute Settlement mechanism (ISDS) in the TTIP, DG TRADE launched a public consultation on ISDS¹¹ and investment protection in TTIP. Quite unusually, the provisions proposed as a template were taken from the text of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) which at that time had not yet been finalised nor made public. Negotiations on the related TTIP chapter have been officially suspended until the results are known, in November 2014. Finally, in July 2014 another consultation-survey has been launched on SMEs¹², whose original 2-week deadline for submission has been postponed to December 2014.

In order to make public consultations effective, a crucial issue is "to ensure that all relevant stakeholders are both aware of and able to contribute"¹³. Indeed, while the EC Guidelines acknowledge that stakeholder consultation is a Treaty obligation, they also recognize the fact that "not all interest groups are equally able to take part in consultations or express their views" and therefore "specific efforts" might be needed from the EC.

⁵ http://ec.europa.eu/enterprise/policies/international/cooperating-governments/usa/jobs-growth/index_en.htm

⁶ For a comprehensive appraisal: <http://www.corporateeurope.org/trade/2013/06/who-scripting-eu-us-trade-deal>

⁷ http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf

⁸ http://trade.ec.europa.eu/consultations/index.cfm?consul_id=160

⁹ http://trade.ec.europa.eu/consultations/index.cfm?consul_id=169

¹⁰ http://trade.ec.europa.eu/consultations/?consul_id=170

¹¹ http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

¹² http://trade.ec.europa.eu/consultations/index.cfm?consul_id=181

¹³ http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iaq_2009_en.pdf.

With regards to the public consultation on ISDS and investment protection for instance, the official statement by outgoing Commissioner for Trade Karel De Gucht¹⁴ affirming that multiple identical replies will count as one does not go in the right direction: the fact that many individual citizens have submitted the same responses prepared by expert organisations to a highly technical questionnaire demonstrates the strong willingness of the public to participate, despite the highly technical nature of the questionnaire. Dismissing it would represent an unacceptable breach in the accountability of the EC towards citizens.

With regards to regulatory cooperation in the context of TTIP, the possible design of additional consultation procedures within the institutional framework for regulatory cooperation, would be positive in theory but has to be handled with care: while more general public consultations are needed at different stages and input-feeding mechanisms throughout the whole course of the negotiations (see section on proposals), the creation of parallel procedures in the regulatory process might lead to strongest and more resourced interest groups having yet more influence in the EU policy making and would take away from the EU yet another slice of its regulatory sovereignty¹⁵.

Impact assessments

Trade Sustainability Impact Assessments (SIA) are undertaken “to identify the potential economic, social and environmental impacts of a trade agreement”¹⁶. They are conducted by external consultants following a formal tendering process. On the basis of the identified impacts the Commission sets out its policy objectives during the negotiations. Despite the proclaimed openness of the consultation process during Trade SIAs, stakeholder views might not be sufficiently gathered from a substantially representative part of the society or, even if so, enshrined in the structure and outcome of the SIA because the consultation channels consist of e-mails to non-specified recipient lists, networks of experts, civil society dialogue meetings and organisation of conferences where no structured system of accountable input-delivery from a sufficiently representative range of stakeholders is envisaged.

It is also essential that Impact Assessments, as well as Public Consultations’ processes, inform political decisions but do not replace them by lifting policy makers from their responsibilities. The EC should not refer to their results for simply refraining from action or from engaging itself towards an approach that complies with more global societal needs¹⁷.

¹⁴ <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20140722-1500-COMMITTEE-INTA>.

¹⁵ BEUC’s comprehensive response to the EC public consultation on Impact Assessment Guidelines and Stakeholder Consultation can be found here: http://www.beuc.org/publications/beuc-x-2014-071_mgo_consultation_on_impact_assessment.pdf

¹⁶ http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127974.pdf

¹⁷ BEUC’s comprehensive response to the EC public consultation on Impact Assessment Guidelines and Stakeholder Consultation can be found here: http://www.beuc.org/publications/beuc-x-2014-071_mgo_consultation_on_impact_assessment.pdf

Finally, the results of impact assessments and the way they are communicated are clearly crucial for informing not only negotiators but also for shaping public opinion and debate over the same negotiations. The economic study carried out by the EC contractor in 2013 on TTIP¹⁸ is based on an economic model which presents possible scenarios related to higher or lower levels of ambition (i.e. lowering of tariffs and, mainly, NTBs reductions). The study results are presented in a misleading way in that they mainly focus on the most ambitious scenario contemplated – unlikely to happen, especially given the slow progress of negotiations in crucial regulatory cooperation sectors – and pay little or underestimated acknowledgement to the possible negative effects that the conclusion of the agreement might lead to. The communication strategy of the Commission has availed this approach rather than trying to present a balanced picture. BEUC has raised its concerns with Commissioner De Gucht¹⁹ and is commissioning an alternative economic study to look at the economic aspects not sufficiently/objectively analysed by the CEPR study.

Civil society dialogue meetings

DG TRADE organises regular meetings and briefings open to all stakeholders from non-for-profit organisations to industry representatives. The meetings are intended to provide an update on the status of ongoing negotiations or relevant trade dossiers and a Q&A session is foreseen after the presentations of negotiators or relevant officials.

A list of the meetings can be found on the EC website, where usually a list of the attendees is published²⁰. Updates on current bilateral negotiations and on other trade files have been held more seldom than the current debriefing sessions on the TTIP negotiations. Stakeholders can ask their questions during the normally 2-hour long conferences but the interaction is limited in time and content constrained. Moreover, the speakers are not anyhow committed to take into account the inputs received.

In addition to the 2-hour event, the TTIP negotiations have also featured stakeholders' events where organisations can register and make short presentations in front of representatives of the different negotiating teams.

This dialogue is an interesting step towards more engagement with the public but it remains an instrument of limited effectiveness if meetings take place just AFTER the negotiation rounds and if suggestions arisen during the discussions are not taken into account. Indeed, despite the declared objectives of an enhanced information sharing forum finalised at improving the policy-making outcomes²¹, no assessment procedure for verifying that the collected inputs are practically transposed into the negotiating texts/final legislation/agreements is in place. The effectiveness of the whole effort is therefore debatable.

¹⁸ http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf

¹⁹ http://www.beuc.org/publications/beuc-x-2014-036_mgo_joint_letter_to_mr_de_gucht_on_economic_figures-final.pdf

²⁰ <http://trade.ec.europa.eu/civilsoc/meetlist.cfm>

²¹ http://trade.ec.europa.eu/civilsoc/csd_proc.cfm

The TTIP Advisory Group

In January 2014 the Commission decided to set up an Advisory Group (AG) to “provide the negotiation team with expert advice on aspects of TTIP”²². The Advisory group falls under the category of expert groups or similar entities registered in the Transparency registry of the EC²³. This body represents a novelty as recent trade negotiations did not foresee any group with the same characteristics and is another follow-up by the EC of requests for more engagement with stakeholders. The Group is composed of a selected group of industry and civil society organisations²⁴ who is intended to be representative of all stakeholders involved and has signed a confidentiality agreement with the Commission over the information shared with the group. The AG includes 16 members and consumer interests are represented by BEUC Director General Monique Goyens and Ms Benedicte Federspiel, member of EESC, ECCG and the TACD European Steering Committee.

The AG meets once a month to discuss the developments of the negotiations. During the meetings negotiators make brief presentations and experts are able to ask questions. Members only, and one alternate for each of them who was nominated while the group was set up, have access to a reading room where EU position papers and text proposals should be made available for their perusal.

While the constitution of the AG can be seen as a step forward towards more involvement of stakeholders in the negotiation process, its functioning is still to be developed and made really effective complying with its initial mandate to **provide expert advice** to the Commission. Its members are briefed by EC officials, but no structured mechanism for feeding inputs into the negotiation process is envisaged. It is not clear whether and how comments and inputs provided during the discussions are guiding at all the EC negotiation positions during the rounds.

Experts work under strict confidentiality rules, with access to a reading room where only EU negotiating documents are available, in a non-complete and non-timely manner. At the time this paper is being written, U.S. documents are not available and EU documents are so only in part and often only at a very late stage (often just a few days before becoming public or after having been submitted to the U.S. counterpart). No draft consolidated text has been made available at the time of this paper to the AG²⁵ and no expert from the member organisations is allowed to access the reading room²⁶, which is located at the EC premises and provides with paper-copy documents only, with the only possibility to take notes on a water-marked paper (no IT tools admitted).

²² <http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/>

²³ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=faq.faq&aide=2>

²⁴ http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152102.pdf

²⁵ AG members have been informed by DG TRADE that consolidated text will be shared only with the EP and the Council.

²⁶ One exception has been made in July 2014 allowing every organisation to bring one expert into the reading room, accompanied by the respective AG representative, to read the draft EU SPS chapter (an no other documents).

Taken into consideration the practical arrangements above described, the actual possibility for members to provide meaningful advice and that the latter is duly taken into account and reflected in the EU position is therefore very limited. As long as these conditions persist, the AG will not be able to match the requirements of its mandate.

It could be useful here to compare the AG settings with the system of the USTR Advisory Committees created since 1974. Although not much information is public²⁷, the committees are intended to provide direct input to the US Trade Representative or his designee, not just on trade negotiations but on all trade dossiers at the attention of the US policy-makers²⁸. Concerns have been raised by several members over the overall scarce involvement of member organisations, the sporadic recurrence of the meetings of non-industry-focused committees and the predominance of industry organisations²⁹. Moreover, the purely consultative nature of these bodies still makes their opinion, strictly speaking, not legally binding.

However, even these unfortunate settings offer a best-practice for the EU system to be followed, in that USTR Advisory Committees feature a secured online facility for accessing documents which could already make a difference in improving the works of the EU AG.

The role of the European Parliament

Prior to the Treaty of Lisbon, the Common Commercial Policy of the EU was led mainly by the Council and the EC. After 2009, the EP powers over trade negotiations have been enhanced as to align the European directly-elected assembly with the other institutions as a co-legislator. However, as far as the negotiations for trade agreements is concerned, the advancements have been substantially more modest. Despite going in the right direction, they indeed do not yet fill the democratic gap that had existed for years over the negotiation and conclusion of such agreements and much depends (and will continue depending) on the capacity of the Parliament itself to progressively define, interpret and assert its new competences³⁰.

Article 207(3) TFUE establishes that the EC must inform both the EP and the Council on the progress of trade negotiations. The duty to inform the EP is linked to its faculty to reject the final agreement, as laid down by Article 218(6) TFUE governing the procedure for the EP consent over the conclusion of international agreements.

The extent to which the EP has exercised its right to be informed has progressively grown since 2009 and the interpretation over this right will ultimately determine the level of influence of the co-legislator.

²⁷ USTR and US Mission to the EU officials have not provided additional info on frequency and list of the meetings, sharing of confidential documents and other issues, despite repeatedly asked by BEUC in written. Basic and incomplete information can be found at: <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees>

²⁸ <http://www.ustr.gov/sites/default/files/1979%20TEPAC%20Charter%20for%202013.pdf>

²⁹ On 4 February 2014, the American federation of Labour and Congress of Industrial Organisations (AFL-CIO) sent a letter to the US Senate and the USTR addressing the shortcomings of the USTR advisory committee system.

³⁰ [http://www.europarl.europa.eu/RegData/etudes/briefinq_note/join/2014/522336/EXPO-JOIN_SP\(2014\)522336_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefinq_note/join/2014/522336/EXPO-JOIN_SP(2014)522336_EN.pdf)

As it is the case of other trade dossiers, the channel for the EC to inform the EP is the dialogue of EC officials with designated Monitoring Groups, composed of EP Members (usually of the INTA Committee), political advisors and EP staff in charge of the dossier. The composition of Monitoring Groups is not public and it is often quite varied.

As far as TTIP is concerned, also the EP-EC inter-institutional arrangement foresees a reading room. However, no public information is available on which texts are available (compared to those available for the Council and the AG), whom exactly is entitled to read them and under which conditions. At the time this paper is being written, the EP is engaging in a reflection on how to reshape/improve/expand the functioning of these tools.

The role of the Trade Policy Committee (TPC)

The TPC is a special committee set up on the basis of Article 207(6) TFUE, establishing that trade negotiations have to be conducted by the EC “in consultation with” a special committee appointed by the Council. The TPC is composed of member states’ officials. Its full meetings are attended by Director-Generals while the deputy ones by Permanent Representation counsellors. The TPC meets every Friday (normally just once a month with its full members’ composition). As far as trade negotiations are concerned, it is a key actor in shaping the negotiation mandate as proposed by the EC to the Council and it hosts meetings with EC negotiators on the progress of the ongoing trade talks. In liaising with the TPC, the EC makes sure that the final outcome of trade negotiations is balanced in respect of national interests so that it will not encounter strong opposition by Member States.

A list of full and deputy members as well as the agendas of the meetings are not public, while the dates of the latter can be consulted on the Council’s website³¹.

In the case of the TTIP negotiations, also TPC members have been given access to a reading room, supposedly the same as for the EP but timing, quality and quantity of documents shared is not clear either. Recently, discussions have taken place for the opening of reading rooms with access to US documents in European capitals for national government officials. At the time this paper is being written, no decision has been circulated publicly to this regard.

As outlined in the proposals section, rules concerning the practical involvement of all EU institutions in the negotiation process should be made public in order to clarify which rules are in place and to make every institution more accountable in its respective role.

³¹ <http://www.consilium.europa.eu/meetings/calendar-of-meetings>

RECENT DEVELOPMENTS

ECJ rulings regarding the disclosure of documents

With the exception of the tardive publication of the TTIP mandate in October 2014³², the mandate as well as negotiation papers and EU institutions' legal opinions have not been made public during EU trade negotiations so far. In July 2014, a European Court of Justice (ECJ) case³³ instructed the EC to be more transparent about TTIP negotiations. In the case involving the EP Member Sophie in't Veld against the Council, the ECJ clearly stated that access to documents related to international agreements should be ensured, unless it is demonstrated that disclosure would undermine the conduct of negotiations. The ECJ sent a clear signal that EU institutions cannot abuse the argument that negotiations of international agreements require documents to remain secret. Although the Court did not go as far as imposing disclosure as the rule, it has set out a certain number of conditions which must be met for the documents to remain undisclosed:

- i. First of all, the risk that disclosure would damage negotiations should be specific and foreseeable. Hypothetical fears about the possible impact of transparency on the negotiating power of the EU will not suffice to refuse access to documents.
- ii. Secondly, the EC will need to make an assessment between the public interest in access to the documents and the need to protect the international relations of the EU. The EC will also have to consider the advantages of increased openness, including the possibility for EU citizens to participate more closely in the decision-making process and to guarantee that the administration enjoys greater legitimacy.
- iii. Thirdly, any exception to the general principle of access to documents must be interpreted and applied strictly. Regulation 1049/2001 on access to documents was adopted with the aim of conferring on the public as wide a right of access as possible. Therefore, any restriction must be exceptional and duly justified.

This ruling confirms the need for an easier and fairer access right to documents of the Union by every European citizen, as established by the EU Charter of Fundamental Rights, including those related to trade negotiations.

³² The mandate, leaked soon after its release in June 2013, was published by the Council only in October 2014, after repeated requests from the civil society, the Commission the European Ombudsman and the Italian Presidency. This is certainly a positive sign for a timely publication of the mandate in future negotiations but one which is arrived far too late for the TTIP ones.

³³ http://www.alde.eu/uploads/media/judgment_03072014.pdf

European Ombudsman's requests for transparency & public consultation

On 29 July 2014, the European Ombudsman, Emily O'Reilly, has opened 2 own-initiative inquiries asking the Council and the EC respectively for the publication of the EU mandate for the TTIP negotiations and proposing to the Commission a number of measures to ensure public access to negotiation documents and thorough information on meetings with stakeholders³⁴. Such initiatives have certainly proved determinant for the recent publication of the TTIP mandate.

The concrete proposals put forward by the Ombudsman concerning transparency and access to documents, on which the Commission will have to give its view, are very relevant:

1. Publication on the Commission's website of all the documents released so far following the numerous requests by civil society organisations at www.asktheeu.org, creation of a registry of TTIP documents (to be made available taking into account the considerations made already by the ECJ in the in't Veld case) and encouragement towards the publication of stakeholders opinions and inputs sent to the Commission in a confidential form.
2. Online publication of all the meetings with stakeholders held by EC officials while reinforcing measures to keep confidential documents of classified nature that need to be so.

In order to complement these initiatives, the European Ombudsman office has also opened a public consultation on transparency in TTIP, asking the public for concrete measures that they envisage would improve the transparency of the negotiations³⁵.

The responses to the Ombudsman's enquiries as well as those from the citizens to the public consultations and the measures that Emily O'Reilly will suggest in return, have a crucial importance in the public debate on transparency in the TTIP.

BEST PRACTICES

WTO

Although multilateral trade negotiations under the Doha Round are now stalled, the WTO website still offers a practical example of publicity of discussions, where citizens are able to read documents and get information on the progress of the talks. A vast array of negotiation texts can be consulted online: initial draft proposals, compromise texts, national submissions and minutes of most of the meetings, offering for consultation 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 members³⁶.

³⁴ <http://www.ombudsman.europa.eu/en/press/release.faces/en/54636/html.bookmark>

³⁵ <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/56100/html.bookmark>

³⁶ https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_003.aspx

For the Trade Facilitation Package agreed at Bali in December 2013 and not yet approved by the General Council, for instance, the reader can easily consult documents updated to the last 2-3 weeks on: proposed meeting agendas and minutes of the meetings, communications by member States on national commitments, draft bracketed texts as well as those agreed upon, chairman's reports, daily bulletins and any other communication forwarded by member states, in 3 different languages.

WTO negotiations have not always been as they look like today and the urgency for WTO practices' external transparency became evident only in the late 1990s, following the Seattle Ministerial Conference (1999) and leading to the General Council Decision of 2002 on Procedures for the Circulation and Derestriction of WTO Documents. Since then, more documents have been made available and the restricted ones are made public more quickly later (in two rather than six months).

Other significant steps have been the 2006 communication to the WTO staff by the Director-General Pascal Lamy illustrating an outreach programme to further enhance WTO practices for transparency and engagement with NGOs and civil society, and the enhanced role of the Chairperson of negotiation groups who, since the launch of the Doha Round, has contributed to facilitate the dissemination of information to the public via, for example, detailed minutes of the meetings³⁷.

WIPO

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 an interesting example of openness and transparency in international negotiations³⁸. 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 timely published on internet³⁹ and a webcasting service allowed the general public to watch in streaming the negotiation sessions⁴⁰. Stakeholders' working groups were set up and progress on their activities was made as well available online⁴¹.

The result has been an agreement judged as balanced by negotiators and civil society representatives⁴², who had the possibility to submit their comments throughout the process and contributed effectively to the final outcome of the process.

³⁷ http://www.wto.org/english/res_e/reser_e/ersd201214_e.pdf

³⁸ <http://www.infojustice.org/archives/30027>

³⁹ http://www.wipo.int/meetings/en/details.jsp?meeting_id=28722

⁴⁰ http://www.wipo.int/webcasting/en/?event=vip_dc

⁴¹ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122314

⁴² <http://us.creativecommons.org/archives/852>

FTAA43

The negotiations for a Free Trade Area for the Americas (FTAA) were launched in 1994 and represented an attempt to extend NAFTA to all Northern and Southern American countries. Despite the failure of reaching a final agreement, FTAA turned to be one of the best examples of how trade negotiations can be open and subject to public scrutiny along the whole course of the negotiations.

An FTAA-dedicated website was created and the whole draft agreement text was published there every time negotiators reached consensus on a new version, sharing the progress made and opening it to public scrutiny⁴⁴. The FTAA website contains an impressive array of information ranging from dozens of written submissions by civil society organisation to detailed information on the instructions and timelines received by each negotiation group, to info on the chairmanship of each negotiation group for each negotiation round. The homepage itself includes a highlight inviting civil society to have its say and presenting its views on every aspect of the agreement via a written contribution⁴⁵.

Negotiators also identified and spread best practices concerning civil society consultation efforts at national and local level, in order to encourage the intensification of consultations in all negotiating countries: the example of Canada, with a series of two-way communication instruments for ensuring citizen's involvement and a trade negotiations-dedicated website with a section on FTAA deserves particular attention⁴⁶.

FTAA was a very ambitious project which would have entailed profound repercussions on the economies of the whole American continent and its relations with their economic partners. It is not a coincidence that negotiators chose to operate aiming at gathering the highest possible involvement and consensus from civil society. Regardless the merits and desirability of the project itself, it has not and it wouldn't certainly have encountered the fierce opposition from civil society that the lack of transparency of the TTIP negotiations is fuelling today.

OUR DEMANDS

Existing impact assessments, stakeholders' consultations undertaken under the Civil Society Dialogue (CSD) and post-round briefing sessions with the negotiators are all important tools for transparent trade negotiations. Moreover the Commission, despite more as a scattered reaction to critiques than as part of a broader and forward-looking strategy, has also started publishing online several EU position papers.

⁴³ <http://keionline.org/node/715>

⁴⁴ http://www.ftaa-alca.org/ftaadrafts_e.asp

⁴⁵ http://www.ftaa-alca.org/Alca_e.asp

⁴⁶ http://www.ftaa-alca.org/SPCOMM/SOC/cs24r1_e.asp

However, the current compromise solution still does not meet minimum satisfactory level of transparency and engagement with stakeholders. A comprehensive strategy is highly needed and we believe feasible options based on existing best practices exist: while public consultations must collect inputs from the whole public at given stages of the process (i.e. scoping exercise phase, negotiating directive, final draft consolidated text), concrete inputs must be sought and incorporated along all the course of the negotiations by expert groups which must be representative as to the broadest possible range of societal interests. All this in the context of a transparent process, as also advocated by the European Ombudsman⁴⁷.

Importance is to be stressed on the fact that the initiatives summarized at the beginning of this paper and listed below in more detail need to be assessed in combination because they complement each other and only together they would lead as an end-result to a more credible trade deal, contributing to its acceptance by policy makers, stakeholders and the public at large.

Public access to documents

Drawing from as the experience of the negotiations for the FTAA and WIPO's Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, the TTIP ones should feature a website where the EC timely publishes the following documents⁴⁸:

- Negotiating directive (mandate)
- Initial EU position papers on all sectors covered by the mandate.
- Draft offer proposals on all non-strictly tariff related topics (at least on the EU side if legal restrictions exist in the counterpart to make them public too).
- Consolidated texts prior to each negotiation round, as they will appear on the negotiators' table, in order to allow the public to track their evolution
- Detailed agendas and detailed reports of the negotiation rounds.
- List of all meetings held by the negotiators with stakeholders, in order to discourage excessive influence of stronger and more resourced stakeholders⁴⁹.
- Stakeholders' letters and any other submission/contribution received by the negotiators – in order for the public to track which and how much they have been taken into account in the negotiations.

⁴⁷ <http://www.ombudsman.europa.eu/press/release.faces/en/54636/html.bookmark>

⁴⁸ Which? does not agree with the full list of proposals.

⁴⁹ As highlighted by the European Ombudsman letter to the EC President:
<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html.bookmark>

Stakeholders' consultation

Existing channels of consultation with stakeholders, currently feature major shortcomings when it comes to availability of documents and effectiveness of input-feeding means into the process.

Provided that the above suggestions on access to documents are fulfilled, the following points must be ensured:

- Public consultations are to be held:
 - o During the phase preceding the launch of the negotiations, as it already happens, but also.
 - o On the negotiating directive, as soon as the Commission receives it from the Council.
 - o On the initial position papers, to be produced by the European Commission on every subject included in the negotiating directive.
 - o On the final draft consolidated text prior to initialling.

The European Commission must ensure that the results of the public consultations are fully reflected in the orientation the negotiations take.

The role of the Advisory Group (AG)

The AG mandate is to 'provide EU TTIP negotiators with high quality technical and practical advice on areas under negotiation⁵⁰. The scope of work has so far been largely limited to access EU position papers in a reading room, and some updates on the negotiations. In only one instance, ahead of the 7th Round (29/09-03/10) an EU draft text has been made available for the AG to provide feedback ahead of negotiation meetings – the SPS chapter. How the feedback was addressed and treated remains to be seen.

At the time this paper has been written, at least five consolidated texts (i.e. merged EU-US offers) seem to have been tabled and brought to the negotiating table but they have not been shared with the AG. Questions therefore arise on what kind of advice and what kind of impact the AG may truly have on the negotiations, and to which extent it risks being a tool to white wash non-transparent processes.

Our proposals for change:

- o Texts available to the public and being developed for future negotiation rounds must be presented in a timely manner as to allow members of the AG, and their experts, to provide timely and detailed feedback before each round.
- o The physical reading room in the Charlemagne building has to be moved to an online secured access tool (e.g. ECAS), allowing comments and modifications in track changes, so that members of the AG, and their experts, can access the texts.

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<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=11459&no=1>

- Experts nominated as issue-specific alternates of the AG members must have access to the online secured access tool.
- The EC has to respond to comments and proposals for modification made by the AG and their alternates.
- The AG has to be granted the same access to consolidated texts as the Council and the EP.

Involvement of other EU institutions

The European Parliament, as well as the Council of the European Union, are to be kept informed but current rules governing the details of such consultation (agendas of the TPC meetings and the relevant monitoring groups of the Parliament, list of documents available to the Parliament and the Council, definition of whom within both institutions have access to them) differ substantially and are not known to the public. The publication of detailed rules governing the consultation with the European Parliament, the Council and national authorities, if any (currently taking place in different reading rooms under different rules), must be public because these institutions have the duty to be accountable to the citizens they represent.

CONCLUSIONS

TTIP's success, as the final report of the High-Level Working Group on Jobs and Growth (HLWG) suggested in February 2013, will be measured by its level of ambition on the capacity of the parties to discuss and reduce their regulatory divergences.

However, since regulations touch upon not just tariffs but a much broader system of rules designed to protect and inform citizens, and often developed through time as a result of long and difficult processes to strike the balance between interested parties, any ambitious deal on these matters needs to be negotiated in full openness and transparency with the public. Failure to do so might lead to a final veto over it not because of the content but because of the means of the negotiations themselves.

Concrete suggestions drawn from existing best practices have been presented in this paper in order to improve the accountability of negotiators towards citizens. The timid improvements made so far are not sufficient to guarantee that a balanced deal is concluded. And the lack of further enhancements will ultimately bring to a deadly opposition to the agreement which will deprive both the EU and the US side of the potential benefits that a carefully negotiated TTIP might bring.

END