

**Comments of the Commission in reply to further suggestions from the European Ombudsman in her closing decision**  
**- Ref. OI/10/2014/RA**

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The Commission appreciates the European Ombudsman's call for a more proactive approach to transparency and welcomes the suggestions made in the final report on her own-initiative inquiry OI/10/2014/RA. Some of these suggestions were already addressed in the Communication to the Commission on transparency in TTIP negotiations of 25 November 2014<sup>1</sup> (hereafter 'the Communication on transparency') or in the Commission's reply to the Ombudsman, and are already being implemented by the Commission; others need further reflection.

This reply addresses each recommendation that the European Ombudsman made taking into account, in particular, both the overall objective of transparency and some of the more operational issues raised in these suggestions.

1. *Inform the US of the importance of making, in particular, common negotiating texts available to the EU public before the TTIP agreement is finalised. The Commission should also inform the US of the need to justify any request by them not to disclose a given document. The Commission needs to be convinced by this reasoning.*

From a general perspective, the European Commission (hereafter 'the Commission') fully agrees with the importance of providing as much information as possible to a broad public on the ongoing negotiations with the United States and their possible outcome. The Commission has underlined this clearly in its recent Communication on transparency in particular with regard to the TTIP negotiations. This is the motivation for its publication on 7 January 2015 of eight EU 'textual proposals' (legal texts) and a number of new position papers, in addition to already published negotiation material and other relevant information. The Commission has also prepared explanatory material for each negotiation subject and a 'Reader's Guide' to better explain to non-experts the technical terminology of each document and so make it more accessible to the general public. Moreover, it is now common practice for the Commission to publish the full text of trade agreements at the moment they are stabilised i.e. at initialling which is well before the finalisation of the Agreement through signature and ratification, as was done, for example, with the Free Trade Agreement between the EU and Canada (CETA)<sup>2</sup>.

**However, in the context of an international negotiation, the Commission's political commitment to transparency is limited to its own documents.** While it is true that under the rules on Access to Documents, the Commission decides on a case-by-case basis which

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<sup>1</sup> [http://ec.europa.eu/news/2014/docs/c\\_2014\\_9052\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf)

<sup>2</sup> [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

documents that it holds can be released or not, in doing so it must also consider and to the extent possible respect the position of its negotiating partners and – linked to this - the potential risks to the EU's international relations. In this context, the US have explicitly asked for the EU not to release documents prepared by them or “consolidated texts” containing texts emanating from them. This is an important factor to be taken into account in any case-by-case assessment of specific requests. This is not unusual in international relations. The EU needs to take into account the position of its negotiating partner regarding a possible publication of texts belonging to this partner; just as we would expect them to take our positions into account in considering requests under their own access-to-document rules.

Since the start of the negotiations, the Commission has continuously discussed the issue of transparency with the US. In order to ensure mutual trust, the EU and the US have exchanged letters on the arrangements for handling sensitive negotiating documents. In his reply<sup>3</sup> to a letter<sup>4</sup> sent by the EU TTIP Chief Negotiator, the Chief US Negotiator has explicitly requested a confidential treatment of the negotiation documents due to their sensitive nature in order to *“enable mutual trust between negotiators and for each side to preserve positions taken for tactical reasons with regard to third countries with which [the EU and the US] are or could be negotiating in the future”*.

It is important to underline that the US has a different practice to the EU when it comes to sharing the documents. The US right to enact its own regulation in this area, although different from the EU one, is to be respected. Respect for each Party's right to regulate is indeed an essential principle the Commission intends to fully respect throughout the TTIP negotiations.

Thus, as already explained in the Communication on transparency of 25 November 2014<sup>5</sup>, the Commission will not publish any US documents or common negotiating documents (the so-called consolidated texts which are jointly owned) without the explicit agreement of the US. At the same time, the Commission is committed to ensuring wide access to these documents for the European Parliament and the EU Member States, and is already engaged with both co-legislators on practical modalities to attain this aim.

The Commission will also continue discussing possible future transparency initiatives with its partners, including the US, and will draw its attention to the views expressed by the European Ombudsman.

2. *Carry out an assessment as regards whether a TTIP document can be made public as soon as the document in question has been finalised internally and at regular and pre-determined intervals thereafter (including, but not limited to, when the document is tabled in the negotiations). If no exception applies, the document in question should be published proactively by the Commission. If a document cannot be made public*

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<sup>3</sup> [http://www.ustr.gov/sites/default/files/US%20signed%20conf%20agmt%20letter\\_0.pdf](http://www.ustr.gov/sites/default/files/US%20signed%20conf%20agmt%20letter_0.pdf)

<sup>4</sup> [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151621.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151621.pdf)

<sup>5</sup> [http://ec.europa.eu/news/2014/docs/c\\_2014\\_9052\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9052_en.pdf)

*proactively, the document reference (and, if possible, its title) should be made public, along with an explanation as to why the document cannot be made available.*

Since the beginning of the negotiations in 2013, the Commission has published a wide range of EU position papers for different chapters and other texts pertaining to the negotiations.

Given the renewed emphasis on transparency and the important number of requests for TTIP documents, the Commission assessed proactively relevant negotiation documents to see if they could be published or whether their publication could harm the EU's interest in the ongoing negotiations. This is something which is also taken into account during the life of the negotiations. However, committing, for the future, to the systematic screening and publication of details of documents that it judges cannot be released and preparing a justification for each individual document, or parts of those documents, would represent a disproportionate burden on the Commission services. Moreover, this would also lead to an inefficient use of public resources, because considerable time would be spent on documents related to topics or negotiation strategies that may end up being discarded in the actual negotiation process.

The Commission is committed to continuing its proactive approach as regards the appropriate marking or classification of documents, while recognising that a climate of trust is needed to successfully conclude these negotiations in the best interest of EU citizens. **The Commission will in any case be making public a list of all TTIP documents which are being shared with the Council and the European Parliament, hence giving an indication of what documents exist beyond those which are being made public.**

Regarding the suggested more proactive publication of TTIP documents, the Commission respectfully points out that the first set of EU proposals for legal texts in the TTIP negotiations were published on 7 January 2015. For the first time, the Commission published specific legal proposals while negotiating a bilateral trade agreement and delivering on the promise it made in November 2014 in its transparency initiative. **Other documents developed during the course of the negotiations will be considered automatically for similar publication.**

3. *Ensure that the list of TTIP documents to be made available on its dedicated website on trade policy is comprehensive.*

As indicated above, the Commission is currently preparing a comprehensive list of those TTIP documents shared with the Council and the European Parliament in 2013 and 2014, as already mentioned in the Communication on transparency and the Commission's first reply to the Ombudsman.

This list will be comprehensive, and also include details of EU Restricted Documents. **This list will be updated periodically, including as regards the change in the status or classification of earlier documents.**

4. *Publish on its website the many TTIP documents it has already released in response to access-to-documents requests.*

This is a cross-cutting issue that raises a general question as regard the Commission's handling of access-to-document requests. The Commission is currently examining ways of more systematically making available, through its Documents Register, those documents to which access has already been provided in response to specific requests for access under Regulation 1049/2001. Should any decision be made in this respect in the future, the Commission will inform the European Ombudsman about any new applicable modalities.

5. *Take into account the relevant suggestions outlined in the 'Public participation' section of the Ombudsman's public consultation report.*

The Commission has identified three main categories in the public participation section: **TTIP Advisory Group, public consultations and stakeholder involvement.**

a) TTIP Advisory Group

From a general perspective, it has to be noted that most of the suggestions mentioned in this part of the report are either already implemented or the Commission is working on a practical way to do so in the short-term.

On 27 January 2014, a specific TTIP Advisory Group was launched. The group consists of 16 members with different perspectives and different expertise to offer, drawing expertise from the different sectors of civil society. The group's role is consultative, with the aim to examine specific issues which may arise during the TTIP negotiations in their fields of expertise, and to provide feedback to EU negotiators. **The group operates in line with the Commission's standard Rules on Expert Groups. Full details of the group's role, its composition as well as its meetings, including agendas and meeting reports, have been published on the TTIP website<sup>6</sup> and in the Commission's public Register of Expert Groups.** The Group is briefed in detail on progress in the negotiations, including where relevant regarding general information on the US approach in the negotiations (although the public, written reports of the meetings do not capture all the details to avoid revealing particular elements of negotiating strategies).

With regard to online access to information, the Commission already provides the Group with comprehensive information allowing the Group to play its advisory role effectively, **including via regular meetings before and after each round, and through access to classified EU documents via a secure reading room.** More convenient means of accessing these documents are being explored by the Commission, but any new steps will have to take full account of the level of classification and sensitivity of any information, and internal rules governing how such information can be shared outside the Commission.

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<sup>6</sup> [http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#/advisory-group](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#/advisory-group)

With regard to access of the TTIP Advisory Group to consolidated texts, the Commission has raised this question with the US, but the US remains opposed to this. The US underlines its different practice of interaction with similar advisory groups that also exist on its side, albeit with a different structure and legal basis.

The Commission will continue developing the working methods of the Group in consultation with the members, and looks forward to further involvement of additional experts, for example in “sub-group” meetings on specific topics. Following your report, the Commission has already raised these issues with the TTIP Advisory Group in January 2015 and is currently discussing with the group practical steps how this can be taken forward. Any new working methods that may be adopted in the future will be also published on the TTIP website.

#### b) Public consultations

The Commission believes that conducting public consultations at each stage of the negotiations as suggested, would be disproportionate in terms of resources required. The Commission would like to underline that it has already consulted the public five times on different aspects of the TTIP negotiations<sup>7</sup>. Moreover, there are a number of other channels through which such policy input can be collected from different stakeholders, including from the general public. Such consultation processes are a way of enriching and informing our policy positions, but they cannot override the negotiating directives the Commission received from the Council for the TTIP negotiations. The Commission would also like to remind that the TTIP negotiating directives (the so-called “mandate”) has been made public by the Council already in October 2014.

We will nevertheless continue to use different ways and means to listen to different stakeholders, and, in particular, to the Member States and the European Parliament, the EU co-legislators that have an institutional role to play in the ratification process of any trade and investment agreement to which the EU is Party, choosing the type of approach best suited to the particular issue on which views are sought.

The Commission will also continue to organise stakeholder events and meetings in the framework of the Civil Society Dialogue and, as needed, will organise more focussed sessions on specific subjects such as the recent stakeholder meeting on chemicals<sup>8</sup>. Finally, it will also continue to actively participate in events organised by various organisations in different parts of the Union, the US and other suitable international fora. The Commission will continue to

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<sup>7</sup> Before the launch of the TTIP negotiations the European Commission ran three public consultations. One general and one detailed public consultation on what kind of trade and economic relations the EU should have with the United States, as well as one public consultation on the specifics of regulatory cooperation. During the negotiations the Commission consulted the public on the investment protection provisions and ran a specific consultation for European SMEs.

<sup>8</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1192>

take into account the results of these consultations and contacts, and carefully consider the views expressed by all interested parties.

### c) Stakeholder involvement

The Commission's current practice regarding outreach and engagement with stakeholders already responds to many of the proposals made to the Ombudsman. Of course, its capacity to pursue current and future activities must be matched to its overall priorities and the available resources.

The Commission or its US counterpart (depending on the venue of the negotiating round) is systematically organising **stakeholder events** in the week of the negotiating round. Between negotiating rounds, the Commission organises regular **dedicated civil society meetings**. The meetings allow the Commission to debrief on the previous round and to hear suggestions from participants about what should be discussed in the future.

Moreover, in the Communication on transparency of 25 November 2014, the Commission has committed to:

- report more extensively on the outcome of negotiating rounds;
- prepare additional on-line material that explains its negotiating positions and approaches;
- increase engagement with Civil Society and the citizens, at political and working level, in Brussels and within Member States;
- increase communication and outreach efforts (including in social media) alongside increased direct engagement with citizens.

To name a few concrete examples of how the abovementioned has materialised so far:

- The Commission now publishes a substantial report after each negotiating round, replacing a summary “state of play” document that was published earlier.
- On 7 January 2015 the Commission services published legal texts and position papers with explanatory documents for the wider public to understand the scope of each chapter of the negotiations.
- The Commissioner for Trade has multiplied her visits to the Member States and is systematically meeting a broad range of stakeholders during these visits (see recent visits to Germany, Austria and France).
- Commission services and the Commissioner's Cabinet members are participating in a wide range of public conferences, hearings or other events in the Member States. An example for these events is the “TTIP Citizens’ Dialogue” in Germany organised by the non-partial organisation “Europa Union”, with support from a wide range of civil

society organisations, as well as the German Government and the Representation of the European Commission in Germany.<sup>9</sup>

- 6.-8. *Extend the transparency obligations in relation to meetings with professional organisations or self-employed individuals, in the context of TTIP, to the levels of Director, Head of Unit and negotiator. This should include the names of all those involved in such meetings.*

*Proactively publish meeting agendas and records of meetings it holds on TTIP with business organisations, lobby groups or NGOs.*

*Examine how to extend, to levels below the level of Commissioner, the obligations (including in relation to the Transparency Register) aimed at ensuring an appropriate balance and representativeness in its meetings with professional organisations or self-employed individuals on TTIP. These obligations might, for example, be extended to the levels of Director, Head of Unit and negotiator.*

As part of its new transparency initiative, since 1 December 2014, the Commission publishes information on all meetings with business and non-governmental organisations or self-employed individuals. This applies to Commissioners, their Cabinet Members<sup>10</sup> and to Directors-General. The two decisions adopted<sup>11</sup> were the result of a political assessment of what constitutes a proportionate response to balancing the needs of transparency and accountability (based on the level of responsibility exercised), the protection of personal data, the need to minimise any administrative burden and to ensure effective policy delivery. The Commission felt that the appropriate balance does not require the publication of the agendas and records of such meetings. This is without prejudice to requests for such information made under the Access to Document Regulation 1049/2001.

The Commission believes that it is too early to come back on that assessment, which can only be judged in the light of experience. For this reason, it also does not consider for the time being any further extension of the obligations stemming from its two abovementioned decisions of 25 November 2014.

**Moreover, the Commission has a concern with one aspect of the proposed recommendation, namely that it should proactively publish the names of all those involved in such meetings.** The Commission believes that such an approach would raise **issues of data protection and privacy**. Regarding personal data the Commission must take into account the Regulation 45/2001, and the case law of the EU, where in this respect the Court of Justice has emphasized in case C-465/00 (*Rechnungshof*)<sup>12</sup> that *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of*

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<sup>9</sup> <http://www.europa-union.de/ttip-buergerdialoge/>

<sup>10</sup> This refers to members of the Commissioner's cabinet in the function group AD (Administrator).

<sup>11</sup> C(2014) 9048 and Decisions (C(2014) 9051 of 25.11.2014.

<sup>12</sup> Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, paragraph 73.

“private life”. Consequently in line with the Regulation 45/2001 and case law the Commission can only publish the names of persons who have explicitly agreed on this publication, or if one of the other conditions mentioned in Article 5 of Regulation 45/2001 is fulfilled.

9. *Confirm that all submissions from stakeholders made to it in the context of TTIP will be published unless the sender gives good reasons for confidentiality and provides a non-confidential summary for publication.*

The Commission is ready to invite stakeholders, i.e. business organizations, lobby groups and NGOs that submit papers relating to TTIP to the Commission, to indicate whether the relevant document can be published or whether they can also submit to it a non-confidential version for publication. A public statement to this aim can be made on the dedicated TTIP website. However, except in the case of specific requests under the Access to Document Regulation 1049/2001, the Commission does not have legal grounds to insist on being given reasons for a specific refusal to publish nor question reasons that may be given to it in this regard.

10. *Ensure that documents that are released to certain third party stakeholders are released to everyone, thereby ensuring that all citizens are treated equally.*

While the Commission agrees with this recommendation, it would like to underline that it has a clear practice, where it is able to share documents proactively, to do so with all third party stakeholders. **There are no civil society groups or organisations that get privileged access ahead of others.** The updated TTIP website facilitates us ensuring such even-handed access. The Commission is clear about its approach regarding the sharing of classified documents with the European Parliament, and Council; and the TTIP Advisory Group. Finally, with the implementation of the Communication on transparency, the Commission plans to publish EU legal texts and EU position papers on the rules and regulatory pillars of the TTIP agreement after they have been shared with the EU co-legislators and presented to the US in the negotiations. **In practical terms, most important negotiating documents on TTIP will be publicly available soon after they have been presented in the negotiations.**