

European Ombudsman's public consultation on the transparency of the Transatlantic Trade and Investment Partnership (TTIP) negotiations

Response of the European Consumer Organisation (BEUC)

28/10/2014

- 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).**

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.

However, the current compromise solution still does not meet minimum satisfactory level of transparency and engagement with stakeholders. BEUC believes feasible changes based on best practices are possible. The European Ombudsman has recently advocated for some important improvements¹ and we would like to support and build up on those proposals adding other viable suggestions.

There is need for a comprehensive EU vision on transparency in trade negotiations and the Commission should define and publish this strategy so that all stakeholders, institutional or not, are aware of which are the rules in place and who has access to which documents, in what circumstances and with what consequences.

The proposals listed below need to be implemented and 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:

A. Public access to documents:

Drawing from the experience of the negotiations for the Free Trade Area of the Americas (see below) and WIPO's Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (see below), the TTIP ones should feature a website where the Commission – and the Council in the case of the mandate - timely publishes the following documents²:

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

² Which? does not agree with the full list of proposals.

- Negotiation directives (mandates)³,
- 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 stakeholders⁴,
- 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.

B. 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 public access to documents are fulfilled, the following must be ensured:

- Public consultations are to be held:
 - Prior to the launch of the negotiations, as it already happens, but also:
 - On the negotiating directive, as soon as the Commission receives it from the Council,
 - On the initial position papers, to be produced by the European Commission on every subject included in the negotiating directive,
 - 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 and provide full explanations for when this does not take place.

C. 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 negotiation'⁵. The scope of work has so far been largely limited to access to paper copies only of EU position papers and post-round reports in a Brussels-based reading room. With the only exception of the early version of the SPS chapter, whose EU draft has been made available just ahead of the 6th Round in the reading room for one expert per member of the AG, accompanied by the respective member, no expert of the member organisations can read the documents and provide feedback. 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

³ The TTIP mandate, leaked soon after its release in June 2013, was finally published by the Council only in October 2014, after repeated requests from the civil society, the Commission and the European Ombudsman (<http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54634/html.bookmark>). This is 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.

⁴ <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html.bookmark>

⁵ <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=11459&no=1>

kind of impact the AG may truly have on the negotiations, and to which extent the AG risks being a tool to white wash non-transparent processes.

Proposals for change:

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

D. Involvement of other EU institutions:

The Parliament and 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 Parliament and the Council, definition of whom within both institutions have access to what). 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.

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.

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. In fact, it gives the possibility to browse and consult a vast array of negotiation texts: 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 members⁶.

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.

⁶ https://docs.wto.org/dol2fe/Pages/FE_Browse/FE_B_003.aspx

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 later but more quickly (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 negotiations 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 meetings⁷.

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 negotiations⁸. 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 internet⁹ and a webcasting service allowed the general public to watch in streaming the negotiation sessions¹⁰. Stakeholders' working groups were set up and progress on their activities was made as well available online¹¹.

The result has been an agreement judged as balanced by negotiators and civil society representatives¹², who had the possibility to submit their comments throughout the process and contributed effectively to the final outcome of the process.

FTAA

The Free Trade Area for the Americas (FTAA) represented an attempt to extend NAFTA to all Northern and Southern American countries. It was launched in 1994 and came into a stall in mid-2000s, in parallel with the beginning of the stalemate in Doha negotiations. 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 negotiations¹³.

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 scrutiny¹⁴. 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

⁷ http://www.wto.org/english/res_e/reser_e/ersd201214_e.pdf

⁸ <http://infojustice.org/archives/30027>

⁹ http://www.wipo.int/meetings/en/details.jsp?meeting_id=28722

¹⁰ http://www.wipo.int/webcasting/en/?event=vip_dc

¹¹ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=122314

¹² <http://us.creativecommons.org/archives/852>

¹³ <http://keionline.org/node/715>

¹⁴ http://www.ftaa-alca.org/ftaadrafts_e.asp

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 contribution¹⁵.

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 attention¹⁶.

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.

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

We believe transparency in the TTIP negotiations is essential simply because the lack of it:

- Does not allow negotiators to have a full picture and reach a balanced agreement which takes into account the trade-offs between benefits and repercussions on all concerned sectors and stakeholders,
- Fuels public opposition to the agreement as such that may well determine its failure, even before its merits are discussed.

The reasons why public and media attention is so high on these negotiations, and therefore ambitious improvements in transparency and stakeholders' involvement is necessary, are the following:

- A. 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 with 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.
- B. 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 process which entail stakeholders' participation at different levels and stages. Trade negotiations do not undergo the same scrutiny by stakeholders and public opinion but continue expanding their coverage affecting wider public interest policies which normally undergo a much more transparent and scrutinised process.
- C. The unprecedented coverage of TTIP (and coetaneous agreements) is indeed the fundamental reason why 'this time is different': 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

¹⁵ http://www.ftaa-alca.org/Alca_e.asp

¹⁶ http://www.ftaa-alca.org/SPCOMM/SOC/cs24r1_e.asp

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.

Instead of developing a clear strategy on how to enhance transparency and accountability with the public, very much needed given the above combination of factors, DG TRADE has continued following the classical negotiation approach of national governments over market access issues even on regulatory affairs: non-public discussions, possibly conducted with some stakeholders¹⁷ but certainly without the not-for-profit part of civil society, which is 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 European Parliament, 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.

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¹⁷ <http://www.ombudsman.europa.eu/cases/correspondence.faces/en/54633/html - bookmark> (point 2).