



Trilogues and transparent law-making - European Ombudsman - Opening Address

European Ombudsman - Opening Address Monday, 28 September 2015

Good morning everybody and welcome. I'm delighted that so many of you accepted our invitation to this event which demonstrates, I think, that the European Ombudsman's interest in this issue is shared by many people and across many sectors both public and private.

Let me start by welcoming our speakers: Mr. Malcolm Harbour, no stranger to this building, having been elected as a Member for the first time in 1999, and indeed no stranger to the topic of our discussion today, having chaired the Internal Market Committee in Parliament for many years.

I would also like to welcome Vicky Marissen from PACT European Affairs, European Law Professor Alberto Alemmano, and Jorgo Riss, representing Greenpeace Europe. And I am very grateful to James Crisp from Euractiv for agreeing to moderate our event.

Today is International Right to Know Day and this is the 6th annual Ombudsman event marking this very important day in the democratic life of the EU. This building is about law-making but this event is about a very specific part of that – the trilogue – a word I think I can confidently state is barely known or understood outside the bubble we all inhabit. My inquiry into Trilogues concerns one single aspect of that procedure, their transparency and whether the balance between trilogue efficiency and trilogue accountability is set where it should be.

Trilogues are now a key part of the EU legislative process. After a proposal by the Commission and initial consideration by the legislators, it is increasingly in trilogues that legislation is finally negotiated and decided upon. It is where deals are done that affect over 500 million Europeans and frequently the fortunes of businesses not just in Europe but also globally. Major pieces of legislation on matters ranging from President Juncker's Investment Plan to mobile phone roaming charges are finalised during trilogues.

A key aspect of legislating in a democratic society is the transparency of the process and this is recognised by the EU treaties. It legitimises the legislative process by ensuring that elected representatives can be held accountable for the choices they make on behalf of the citizens they represent. Transparency also allows citizens to take part in the legislative process and by doing so they become part of the legitimising process. Citizens of a democracy agree to be bound by laws – in essence, they buy into laws - that have been openly negotiated and



consented to.

While these principles are clear-cut, the precise manner by which they can be applied to a legislative process, and specifically, how they can be applied to trilogues, is an open question, and a difficult question.

I will not attempt any answers today although it should be noted that the EU institutions do already, in general, achieve high standards in terms of transparency and ethics. Nonetheless, I have opened an inquiry, as a form of mapping exercise to see whether those already high standards could be improved. This was prompted by concerns expressed, across many sectors, about a perceived lack of transparency in the process.

My inquiry can be understood as an effort to facilitate a discussion about how trilogues can be made more transparent but also about where non-disclosure of documents needs to be maintained. I will engage in this discussion with an open mind and I hope that all stakeholders will do likewise. I also anticipate that as greater scrutiny and awareness of EU law-making becomes inevitable, I am likely to receive more transparency complaints in this area. By looking at the issue systemically, I hope therefore to limit that as much as possible.

As European Ombudsman I try to assist the institutions in ensuring that the work that they do is carried out as transparently as possible. In this work, I am guided by the Treaty provisions on transparency, the fundamental right of public access to documents as contained in the Charter, as well as Regulation 1049/2001 which gives effect to this right as regards documents held by the Parliament, Council and Commission.

In this context, I am conscious of the very special importance that obtaining access to documents relating to the adoption of EU legislation can have for citizens in a democratic legal order, such as the EU. Openness contributes to strengthening democracy by allowing citizens to follow and understand the institution's decision-making process in legislative procedures. Citizens are entitled to scrutinise all relevant decisions which have formed the basis of a particular legislative act. Citizens are entitled to hold their representatives accountable for their performance during a legislative process. This requires knowledge and understanding of the various considerations underpinning legislation which will affect their lives. This is arguably all the more important in the EU context, given the distance that EU citizens already feel from the centre where decisions are made about them. Euro scepticism is enabled by lack of knowledge or understanding and the reaction frequently is suspicion and even hostility.

The arguments in favour of granting wider access to documents where the institutions are acting in their legislative capacity are particularly compelling and put eloquently by Advocate General Cruz Villalon in his Opinion in the *Access Info Europe* case, as follows:

"Law-making is an activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, 'transparent'".

"Otherwise" , he continues, "it would not be possible to ascribe to 'law' the virtue of being the



expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict."

The Commission has made what I would call "the business case" for greater transparency in its Communication on Better Regulation published in May. It said:

"Opening up policy-making (...) ensures that policies are based on the best available evidence and makes them more effective."

The Commission adds that *"(...) particularly in the final stages of negotiations, deals are found without taking full account of the direct and indirect impacts that compromise amendments may trigger."*

As Malcolm Harbour and Members of this European Parliament know best, it can also be said that facilitating a public debate about draft legislation, proposed by the Commission, that is at times contentious, controversial and complex can only be good for democracy.

At the same time, I am very mindful of the need to preserve *"the effectiveness of the institutions' decision-making process"*, as the legislature put it in Regulation 1049/2001 on public access to documents. I am also mindful of the fact that the EU is a representative democracy, where elected representatives are given the responsibility and privilege to negotiate, with each other, on the content of legislation. It is important that these politicians be allowed to do their job as elected representatives. To give one simple analogy: it would be contrary to the very essence of representative democracy if third parties, wishing to participate directly in a parliamentary debate, were to interrupt their elected representatives taking part in that debate. There is always, in a representative democracy, a privileged space for debate reserved to elected representatives. How does that principle translate in the context of trilogues? This morning's discussion will hopefully begin to suggest some answers.

In the end, of course, I make recommendations only. It will be up to the democratically elected MEPs, to the Member States in the Council and to the Commission, in accordance with their respective roles under the Treaties, to determine to what extent they make public documents related to trilogues. They are examining this issue in their discussions aimed at reaching a new Inter-institutional Agreement on Better Regulation. I welcome and encourage these efforts.

I am, in this context, very mindful of the specific role that I have been elected by Parliament to fulfil under the Treaty and under the Charter. The European Ombudsman is expected to, within its mandate, support our emerging European citizenship. Transparency, democratic accountability and public trust are central to that citizenship. Regulation 1049/2001, which specifically mandates the Ombudsman to examine issues of public access to documents in the possession of the three main institutions, itself puts greater emphasis on the transparency of the legislative process.



As regards this particular inquiry, we are in the early days. I have described this first phase as a “mapping exercise”, which should allow my Office, as an independent institution, to identify the documents relating to trilogues and obtain a full overview of them. The institutions’ opinions that we hope to receive soon will complement this mapping exercise. Without the genuine and constructive input from those within the institutions who work to support the trilogues process on a daily basis, I will not be able to offer constructive recommendations for improvement. I also welcome of course any input from Members of Parliament or representatives of the Member States.

And then also I hope to receive many responses to the public consultation that we will subsequently launch. I would like to use this opportunity to invite all of you not only to voice your thoughts today, but also to participate in this process. Then, and only then, will I be able to take a well-informed position on this issue and make constructive recommendations.

I think, however, that it is useful to state already now that my inquiry does not seek to bring about full disclosure of each and every document related in some way to the process. That would not be helpful and it is not what the law provides for. The inquiry does not aim at ensuring that absolutely everything discussed in trilogues be documented, written down, or otherwise noted. This is absurd, as these are negotiations.

The inquiry also does not seek to shape how trilogues are organised. If negotiators want to deliberate with 3, 30 or 300 participants in the room, even at three in the morning, that is not my concern. It is up to the democratically elected MEPs, to the Member States in the Council and to the Commission, in accordance with their respective roles under the Treaties, to determine how they organise trilogues.

As I have emphasised already, I am on a transparency fact-finding mission and I have an open mind. And today, I hope to learn from you on some of these matters, for example:

- 1.** At what stage of the process could certain documents be released, if at all?
- 2.** Could increased transparency concerning trilogues actually prove harmful to the trilogue process?
- 3.** Is there a risk that greater transparency, at the wrong time, will simply provide greater lobbying opportunities for well-resourced private interests to the detriment of the average citizen? Or slow down the process or bring it to a halt entirely in some cases?
- 4.** To what extent is it even possible to put forward useful suggestions in relation to trilogues, given that they involve an ad-hoc process which can vary from trilogue to trilogue depending on the Parliamentary committee, the Council Presidency or even the Commission DG involved?
- 5.** Is the lack of transparency more apparent than real? Does the appearance of limited transparency stem from the fact that the three institutions separately publish relevant information and documents relating to what is, very often, and necessarily, a complex



process? Would a single online portal containing information about the EU legislative process enable citizens to obtain access to legislative documents and to understand them better as many within the institutions have already called for?

6. What difference can technology make? Over the summer, the European Data Protection Supervisor developed its own smartphone application to allow interested members of the public to follow developments in the ongoing data protection reform debate. Is there potential there?

These are only some of the possible questions to be asked. I am sure that you will identify more, and I am sure the panel will also have some excellent contributions. I look forward to the discussion.

Ultimately, I hope we can agree that there are possible improvements to the trilogue process. Hopefully we can agree that while the EU legislative machine works, successfully agreeing complex legislation, this in the end is a question of public trust.

Given events in Europe over recent years, we all know public trust in the European Union is more important than ever.

Thank you again for attending.

I now hand over to James, our moderator.