



Besluit in zaak OI/8/2015/JAS - Besluit van de Europese Ombudsvrouw met voorstellen na haar strategisch onderzoek OI/8/2015/JAS over de transparantie van Trilogen

Besluiten

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Dit strategisch onderzoek betreft de transparantie van een belangrijk informeel onderdeel van het Europees wetgevingsproces, namelijk, de transparantie van “ **Trilogen** ”.

De twee wetgevende organen van de EU, het Europees Parlement en de Raad van de Europese Unie, nemen wetgeving aan naar aanleiding van een voorstel van de Europese Commissie. Gedurende dit proces onderhandelen beide medewetgevers, geassisteerd door de Commissie, in de zogenoemde **Triloog** , hetgeen **informele vergaderingen** zijn tussen vertegenwoordigers van de drie betrokken instellingen. Tijdens een triloog proberen het Parlement en de Raad overeenstemming te bereiken over een gezamenlijke tekst, gebaseerd op hun initiële standpunten, waarover daarna gestemd wordt in overeenstemming met de formele wetgevingsprocedure. Trilogen zijn erg effectief gebleken in het bereiken van dergelijke overeenkomsten en de meeste wetgeving wordt tegenwoordig op deze wijze aangenomen. De Europese Unie is een **representatieve democratie** waar burgers het recht hebben om hun vertegenwoordigers **verantwoording te vragen** voor de politieke keuzes die zij namens hen maken. Burgers hebben ook het recht om deel te nemen aan het democratische proces van de EU. De transparantie van Trilogen is een sleutel element om de effectiviteit van deze rechten te garanderen en om de gemaakte wetten van de EU te legitimeren. Het Europees Hof van Justitie heeft gesteld dat de mogelijkheid voor EU burgers om de overwegingen betreffende wetgevende acties te weten te komen, een voorwaarde is voor de effectieve uitoefening van hun democratische rechten.

Alhoewel het Europees wetgevingsproces in het algemeen behoorlijk transparant is, ook in vergelijking met veel lidstaten, heeft dit onderdeel van het proces tot zorgen geleid over de balans tussen de effectiviteit van Trilogen en de transparantie daarvan. In het licht van het voorgaande heeft de Europese Ombudsvrouw een **strategisch onderzoek** geopend. Zij heeft onderzocht welke informatie en documenten **proactief openbaar** zouden moeten worden gemaakt en op welk moment, zodat burgers hun rechten kunnen uitoefenen.

Transparantie van Trilogen is een essentieel onderdeel van de legitimering van het



Europees wetgevingsproces . Burgers moeten in staat zijn om de prestaties van hun vertegenwoordigers te controleren tijdens dit essentiële onderdeel van het wetgevingsproces. Burgers hebben ook informatie nodig over de onderwerpen waarover gediscussieerd wordt tijdens trilogieën, om in staat te zijn om op effectieve manier deel te nemen aan het wetgevingsproces. De Ombudsvrouw verwelkomt de vooruitgang die tot dusver geboekt is om de transparantie van trilogieën te verbeteren: desalniettemin stelt zij voor dat de drie instellingen de volgende documenten en informatie openbaar maken: de **datums waarop Trilogieën plaatsvinden , initiële standpunten** van de drie instellingen, algemene **agenda's van Trilogieën , " vier-kolommen" documenten , definitieve compromis teksten , Trilogieën notities** welke reeds openbaar zijn gemaakt, **lijsten van de betrokken politieke besluitvormers** en zover als mogelijk **een lijst van ieder ander document dat op de agenda komt** tijdens de onderhandelingen. Al deze documenten zouden beschikbaar moeten worden gemaakt op een gebruiksvriendelijke en gemakkelijk te verstane **gezamenlijke database** . Ook al zouden sommige documenten wellicht al beschikbaar kunnen worden gesteld terwijl de Trilogieën-onderhandelingen **nog bezig zijn** , kunnen de instellingen het misschien in het algemeen belang achten om bepaalde typen documenten enkel proactief publiekelijk toegankelijk te maken **na afloop** van de onderhandelingen.

Summary

*This strategic inquiry concerns the transparency of an important informal part of the EU legislative process, namely, the transparency of " **Trilogues** ".*

*The EU's two legislative bodies, the European Parliament and the Council of the European Union, enact legislation following a proposal by the European Commission. During this process, both co-legislators, assisted by the Commission, often negotiate in so-called **Trilogues** , which are **informal meetings** between representatives of the three institutions involved. During a Trilogue, Parliament and Council try to agree a common text, based on their initial positions, which is then voted on according to the formal legislative procedure. Trilogues have proven to be very effective at reaching such agreements, and most legislation is now adopted this way.*

*The European Union is a **representative democracy** , where citizens have the right to hold their representatives **accountable** for the political choices made on their behalf. Citizens also have the right to **participate** in the EU's democratic process. The transparency of Trilogues is a key element in ensuring that these rights are made effective and in legitimising the laws made by the EU. The EU Court of Justice has stated that the ability of EU citizens to find out the considerations that underpin legislative action is a precondition for the effective exercise of their democratic rights.*

While the EU legislative process in general is quite transparent, including in comparison to many Member States, this part of the process has raised concerns about the balance between the efficiency of the Trilogue process and its transparency.

*Against this background, the European Ombudsman opened a **strategic inquiry** . She examined which information and documents should be made **proactively available to the public** , and at what point in time, so that citizens can make use of their rights.*



Trilogue transparency is an essential element of EU law-making legitimacy. Citizens must be in a position to scrutinise the performance of their representatives during this key part of the legislative process. Citizens also require information on the topics under discussion during Trilogues to be able to participate effectively in the legislative process.

*The Ombudsman welcomes the progress so far on improving the transparency of Trilogues; however she proposes that the three institutions make the following documentation and information publicly available: **Trilogue dates**, **initial positions** of the three institutions, **general Trilogue agendas**, **“four-column” documents**, **final compromise texts**, **Trilogue notes** that have been made public, **lists of the political decision makers involved** and as far as possible a **list of other documents tabled** during the negotiations. All of these should be made available on an easy-to-use and easy-to-understand **joint database**. While some documents could be made available while Trilogue negotiations are **ongoing**, the institutions might consider it necessary in the public interest to provide proactive public access to certain types of documents only **after negotiations have ended**.*

The background

- 1.** This strategic inquiry concerns the transparency of " **Trilogues** ", the informal part of the EU legislative process by which Parliament and Council, the " **co-legislators** ", reach agreement on proposed legislation. This important part of the process is based on direct, face-to-face negotiations between the co-legislators, assisted by the Commission.
- 2.** The **European Parliament**, the members of which are directly elected by, and democratically accountable to, EU citizens, and the **Council of the European Union**, comprised of Ministers from every Member State, who are democratically accountable to their national Parliaments and to the citizens of their Member States, adopt EU legislation after deliberating on a proposal submitted to them by the **European Commission**. Parliament and Council can amend or, if they so wish, reject entirely the Commission's proposals. During their deliberations on the proposed legislation, the co-legislators also take into account each other's positions with a view to finding common ground. If agreement is reached, the EU legislation is adopted.
- 3.** The EU Treaties contain detailed rules governing how such agreements should be reached between the co-legislators. The formal process by which agreement is reached can be, however, complex and time-consuming. It involves, potentially, multiple stages of deliberations and votes. Formal meetings between the co-legislators (carried out in a "Conciliation Committee") can occur, but only at the very end of the process. This can make for a lengthy and difficult process.
- 4.** The co-legislators have, however, explored and implemented more flexible means of reconciling positions on proposed legislation, which take the form of Trilogues. **Trilogues** are informal negotiations between representatives of Parliament and Council, assisted by the Commission, aimed at reaching agreement on legislation, normally at an early stage of the legislative process. In Trilogues, representatives of the co-legislators negotiate **directly** with each other to bridge any differences in views. Trilogues, which are not open to the public, can occur at any stage during the legislative procedure once the Commission has presented



a proposal. If the negotiations are successful, a compromise text is presented to the plenary of Parliament and the Council. If each co-legislator formally approves the compromise text, it becomes law.

5. While trilogues are not expressly foreseen in the Treaties, they have proven an extremely effective and efficient means of reaching agreement between the co-legislators. Indeed, most legislation is now adopted with the help of Trilogues, following the debates, amendments and voting of both legislators to form their initial positions. The use of several rounds of formal deliberations (or “readings”) has become the exception rather than the rule.

6. The structured Trilogue system is an improvement on even more informal means relied on in the past using verbal negotiations, which did not allow for an appropriate level of democratic oversight.

7. Of the many democratic principles enshrined in the EU Treaties, two have particular relevance in the context of the present inquiry. First, in accordance with Article 10 of the Treaty on European Union, “ *the functioning of the Union shall be founded on **representative democracy*** “. A representative democracy not only requires that those who adopt legislation are elected; it also implies that citizens are effectively empowered to hold their elected representatives **accountable** for the specific choices made by their representatives on their behalf. Second, citizens have “ *the right to **participate** in the democratic life of the Union* ”, a principle enshrined also in Article 10 of the Treaty of European Union, which further states that “ *decisions shall be taken as openly and as closely as possible to the citizen* ”.

8. With a view to ensuring that these principles are applied, the EU Treaties require that the legislative process be transparent. Citizens can hold their elected representatives to account only if they know what choices and what compromises their representatives have made on their behalf. Citizens can participate in a real and substantive manner in the legislative process only if they can voice their opinions in an informed way. If the Union institutions can ensure that these principles are complied with, they will be seen by citizens to be more accountable and inclusive and, thus, more legitimate.

9. Against this background, the Ombudsman opened this strategic inquiry into the transparency of Trilogues. The inquiry aims to support the co-legislators, who are ultimately responsible for determining how the EU’s democratic principles can and should be applied in the context of Trilogue negotiations.

The strategic inquiry

10. This strategic inquiry is about the **proactive transparency of Trilogues** . Specifically, it examines which information and documents may be made proactively available to the public, and at what point in time. The inquiry is not concerned with how the institutions structure the legislative process nor with how they organise Trilogues. Neither does the inquiry involve how the institutions deal with individual requests for public access to specific Trilogue documents.

11. As a first step, the Ombudsman asked Parliament, Council and Commission to reply to a set of questions about Trilogues. The Ombudsman inspected two closed Trilogue files,



namely the files on the Mortgage Credit Directive [1] and on the Clinical Trials Regulation [2] in order to form a clear view of how Trilogue negotiations function and the types of documents normally tabled during a Trilogue negotiation. After analysing the institutions' replies, and reflecting on the file inspections, the Ombudsman launched a **public consultation**. The submissions received from citizens, NGOs, academics and national Parliaments overwhelmingly made the case for enhanced Trilogue transparency, but some also raised concerns about the premature release of documents citing the potential harm that could be done to the negotiations at a sensitive time. The Ombudsman takes this feedback into account in presenting her assessment [3].

12. While the inquiry was under way, Parliament, Council and Commission concluded a new Interinstitutional Agreement on Better Law-Making, which includes a strong commitment to legislative transparency [4]. The Ombudsman welcomes and encourages these efforts.

13. Finally, the Ombudsman thanks all those who contributed to the public consultation and the three institutions for their sincere and constructive cooperation during the course of this inquiry.

The Ombudsman's assessment

14. The Ombudsman will start by outlining why there is a need for a transparent Trilogue process. She will draw conclusions from this need for transparency, and explain what it could and should mean in practical terms, considering the institutions' legitimate need to reach agreements on legislative proposals. Finally, she will make proposals on how the institutions could improve the public's trust in, and understanding of, the process by proactively providing information, ideally in a user-friendly joint public register.

A. The need for transparency

Democratic accountability

15. In a **representative democracy**, citizens elect representatives to act on their behalf in decision-making processes, most importantly, in the process of making laws. Citizens then hold their representatives to account for how they perform, most notably at elections. This applies equally to Members of the European Parliament (MEPs, who are held accountable for the choices they make in elections to the European Parliament) and to Member States' Ministers (who can be held to account through national elections or via their **national Parliaments**).

16. In order to form a view on how their representatives perform, citizens must be able to inform themselves about the choices their representatives have made on their behalf. Real democratic accountability would become impossible if citizens were unable to find out about the positions taken by their representatives during a legislative process. The legislative process in a representative democracy therefore requires, if the representative democracy is to function properly, a high level of transparency. Indeed, the EU Court of Justice has stated that the ability of EU citizens " *to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights* " [5].

17. Accountability is not limited to information on how representatives cast their votes. It



encompasses the representatives' arguments made for and against a particular legislative proposal. This is not only to the benefit of the citizens, who gain a better understanding of the issues at hand, but also to the benefit of the representatives, who can rely on citizens having a deeper understanding of the complexities of their work. These considerations apply to Trilogues as well.

18. More and more EU legislation—85% during the last parliamentary term (2009-14), up from 29% only two terms earlier—is passed at the first stage, reducing the need for several rounds of formal deliberations and votes (called “readings”). This increase in the adoption of legislation at first reading is, in no small way, due to the ability of the co-legislators to reach agreement with each other through Trilogue negotiations.

19. Each co-legislator will be more willing to negotiate in good faith with the other co-legislator during the Trilogue if it believes that the agreement reached will then be formally adopted unchanged. Thus, changes to the text during the subsequent formal procedure (the vote in Parliament and the consideration by Council) are uncommon. What happens in Trilogue negotiations is therefore key for the eventual content of much legislation.

20. It follows that when citizens wish to scrutinise the work of their representatives, be they MEPs or national Ministers, they must be in a position to scrutinise their participation in this key part of the legislative process. Even if a particular MEP or Member State representative is not directly involved in a given Trilogue negotiation, that representative may **endorse** the outcome of a Trilogue negotiation when voting to approve the legislative text in the formal procedure. Citizens must thus be empowered to scrutinise that Trilogue process in order to appraise the work of the MEPs and national Ministers.

21. The EU Treaties also emphasise the special role of **national Parliaments** in the adoption of EU legislation. During the Ombudsman's public consultation, several national Parliaments expressed concerns about the transparency of Trilogues [6]. National Parliaments must be empowered to exercise democratic scrutiny of the positions their governments take in the course of the EU legislative process. Citizens of Member States can then hold their national Parliaments to account for how they carry out that important role. If this chain of accountability is broken, trust in EU law-making and trust in the EU will suffer. Sufficient transparency regarding Trilogue negotiations is an important element in ensuring that national Parliaments can effectively exercise their role. It also underpins the very necessary democratic connection between what happens in the Member States and what happens in the EU institutions, particularly when it comes to law-making that impacts on every EU citizen.

Public participation

22. Democracies accept and encourage their citizens' wish to participate in the democratic process not only at the ballot box, but also through public debates on the merits of legislative proposals. Such debates strengthen the democratic legitimacy of adopted



legislation, as citizens feel that they have an opportunity to have their views heard. A public debate can also improve the content of legislation, as **stakeholders** put forward arguments for and against, making for better informed legislative decision-making. The EU Treaties explicitly recognise the merits of public participation in the Union's democratic life, and seek to foster an open and transparent dialogue between the institutions, stakeholders and citizens.

23. Specific mechanisms already exist to ensure such participation at EU level in advance of the making of a legislative proposal by the Commission. These mechanisms include European citizens' initiatives [7], stakeholder consultations [8] and public consultations [9]. These mechanisms, if properly applied, help increase the level of citizen participation in the wider legislative process, at least up to the point at which the Commission makes a proposal for legislation. The European Economic and Social Committee and the Committee of the Regions also advise on EU legislation. The two co-legislators can then choose whether, and the extent to which, they should have regard to these views when deliberating, amending, negotiating and voting on legislation.

24. Public participation requires a transparent legislative process. Much of the process is already transparent. Parliament, for example, debates, amends and votes its initial position at committee stage in public, while the Council makes many documents produced by its working groups proactively available. However, discussions between the co-legislators behind closed doors—without adequate documentation being made publicly available—risk the creation of public suspicion and uncertainty, and may hinder informed debate about its content. Public trust can be weakened if citizens have concerns that only certain **privileged groups**, so-called insiders, have access to information and are empowered to participate closely in the legislative process [10]. As a relatively small number of people are directly involved in Trilogue negotiations, the need for transparency becomes even more acute in the context of democratic legitimacy.

25. It is important, in this context, to counter any fear that certain interest groups enjoy a greater degree of information about Trilogue negotiations, through privileged access to documents and to the participants in the negotiations. Increasing **public** disclosure of information, by making available to all citizens and all stakeholders information, which some may fear is enjoyed only by the well-resourced, can help reassure the broader public that there is indeed a "level playing field".

26. Concerns have been expressed that increased transparency will result in more "lobbying" of public representatives. The implication is that "lobbying" of public representatives is a problem. In the Ombudsman's view, "lobbying" is legitimate, and problematic only if it is the privilege of a well-connected and well-resourced few. If, however, information is made available to all, equally, this concern is somewhat addressed.

27. "Lobbying" may also be problematic if it occurs at a time when public representatives require some space to deliberate and debate on proposed legislation. However, as will be addressed below, this makes the case even stronger for the appropriate and timely availability of information to all. Ultimately, public participation, in a manner which takes



account of other legitimate needs, can only strengthen the democratic process and its outputs.

28. The Ombudsman however does appreciate the concerns and challenges increased lobbying can present, and repeats her call for a strong, reliable and mandatory Transparency Register as a 'central transparency hub' around which several EU administrative systems would connect [11]. Legislators and citizens both want to know who is lobbying in the EU and have a reliable and easy-to-use tool to find out the required background information on any interest group, and be assured that groups are fully compliant with the Transparency Register Code of Conduct [12].

The legitimate need to ensure the effective organisation of the legislative process

29. Accountability to citizens and participation of citizens are of paramount importance to the legitimacy of the democratic process. At the same time, representative democracies, such as the EU, give elected representatives the responsibility, and mandate, to negotiate the content of legislation on behalf of citizens. For this to function properly, elected representatives must have some privileged space to negotiate. 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 a debate amongst democratically elected representatives (for example, by seeking to intervene from a public gallery while a debate is ongoing).

30. It is therefore necessary to balance the interest in having a transparent process with the legitimate need to ensure a privileged negotiating space. While the right of the public to participate in the legislative process must be protected and fostered, the precise mechanisms by which this right is exercised may need to be circumscribed in some situations. In such cases, however, it is even more important that the public is provided afterwards with all the information necessary to understand and scrutinise the process that has occurred.

31. In making proposals on the practical arrangements necessary to ensure that the principles of democratic accountability and public participation are well-served in relation to Trilogues, the Ombudsman acknowledges the public interest in allowing the legislative process to operate effectively and efficiently. Ultimately, a process in which participants are given no opportunity to deliberate for a period in private, will serve little purpose if it is incapable of producing results. However, the extent of such private deliberations must be proportionate to the actual sensitivity of the issues under discussion.

B. Transparency of Trilogues

32. The Ombudsman has identified three core issues, related to the transparency of Trilogues that arise for citizens: citizens need to know if Trilogue negotiations are taking place on a legislative proposal; they need general information about the content of those negotiations; and they need to know who is taking part in the negotiations. The Ombudsman will make proposals on how to improve the transparency of the Trilogue process by focusing



on documents that address these core issues.

33. As a preliminary point, the Ombudsman acknowledges that the EU institutions already publish significant information and documentation in relation to the legislative process and certain Trilogues. Unfortunately, much of this publicly available information is often spread across different databases and websites as there is no shared institutional space where citizens might more easily access all relevant documentation.

34. While experts and insiders may and do trace and locate this dispersed information, for most citizens useful access is difficult. This, regrettably, increases the 'mystique' of Trilogues, discouraging citizens from engagement and thus diminishing their democratic rights. Increased efforts should therefore be made to consolidate such information as the failure to do so risks reinforcing the access gap between expert insiders and ordinary citizens.

“Trilogue calendars”

35. A key aspect of transparent law-making is knowing when discussions are taking place. Citizens can follow the life cycle of an EU legislative proposal through separate public websites [13] but these websites do not include comprehensive information on individual Trilogue negotiations, in particular ongoing and forthcoming Trilogues. Parliament and Commission acknowledged in their replies to the Ombudsman that Trilogues are not systematically announced publicly. Parliament also outlined the efforts it is making to provide more information.

36. The Ombudsman believes that publishing **Trilogue dates** in advance would greatly benefit transparency. Even if Trilogues are not formally part of the legislative procedure, their acknowledged centrality in the process makes the case for meeting publication necessary. The institutions' Joint Declaration on Trilogues recognises this, providing that Trilogues shall be announced, where practicable [14]. Some information is already made public, through Parliament Committees [15] and the Council's Permanent Representatives Committee (COREPER) [16], where recent or future Trilogues are announced. This information is then part of the meeting minutes or of the relevant video stream. However, it can be difficult to find if not linked to websites covering the entire procedure. This again makes the case for the creation of a shared institutional space for the public dissemination of such basic but critical information.

37. The institutions themselves would benefit from publishing Trilogue dates. Since the formal procedure stops during Trilogue negotiations, legislative databases contain large gaps during which the process appears dormant [17]. By making such information available, the institutions show that progress is being made.

The Ombudsman proposes that the institutions make publicly available a “Trilogue calendar” identifying forthcoming Trilogues. They should also refer to Trilogues in databases on legislative files.



38. As the institutions' replies have shown, the necessary information is already available internally. The Ombudsman believes that a public Trilogue calendar can be created without being overly formalistic and rigid—citizens are capable of understanding that dates can change, and that not every single meeting can be announced in advance (such as those convened at short notice). If necessary, the calendar could be marked as 'draft'.

39. Any administrative difficulty in relation to compiling such a calendar is not a reason for preventing citizens from following the progress of a legislative procedure. Such basic information is a precondition for engagement.

Institutions' "initial positions"

40. The EU legislative procedure begins with a Commission proposal which is then submitted to the co-legislators—Parliament and Council—and made public. Before Trilogue negotiations begin, each co-legislator agrees internally on its own **position** on the proposal, that is, on changes if any it would make to the Commission's text. These "initial positions" then serve as the starting point for the negotiations.

41. On Parliament's side, the position is either agreed by the relevant Committee or by the full Parliament, the Plenary, following debating, amending, and voting on, the text in public. On Council's side, it is COREPER or the Ministers themselves who agree on the initial position. The Trilogue's goal is then to agree on an acceptable compromise text based on these positions. Meanwhile, the Commission assists the Trilogue negotiations, by explaining and, if it feels the need, defending the merits of its proposal. The Commission may also withdraw a proposal in exceptional circumstances.

42. If citizens are to scrutinise how their representatives performed, they need to be able to compare the outcome of the process with their representatives' initial position, so that, if necessary, they can ask why positions changed and be reassured that the process took all interests and considerations into account. This is true for the legislative process in general, and this must also be true for the informal but very decisive process of the Trilogue.

43. Trilogue negotiations between the institutions begin only **after** the co-legislators have established their initial positions. Making these positions available to the public proactively would therefore not harm the negotiators' capacity to negotiate during the Trilogue itself. The opening positions also provide citizens with a clear view of the parameters of the detailed negotiations that are about to take place.

44. The Parliament's position is already always made public while publication by the Council happens occasionally. The publication—even if intermittent on the part of the Council—implicitly recognises that this does not undermine the capacity to negotiate. What remains to be done is the **systematic publication** of the initial positions on every legislative proposal.

45. Publication should be independent of the internal level at which the position has been



agreed. In the Council, for example, some initial positions are agreed at levels below that of Minister. Citizens understand that the document contains the institution's **non-binding opening position**, and that this position is likely (if not certain) to change during the negotiations in order to arrive at an agreement. This happens also in many Member State Parliaments where changes to a government proposal are visible to the citizen. While there are particular challenges in the EU interinstitutional setting, such challenges cannot negate a citizen's right to appropriate engagement with the law-making process. Publication of such initial positions can include statements clarifying that these are opening positions only.

The Ombudsman proposes that both co-legislators make proactively available, before Trilogue negotiations begin, their positions on the Commission proposal, regardless of the level at which the position has been adopted internally and regardless of the legislative proposal.

Trilogue agendas

46. While meeting calendars and opening positions are important, an informed public debate will occur only if information is made available about the aspects of a proposal currently under discussion. The institutions should promote such informed debate by publishing **Trilogue agendas**.

47. The institutions already produce agendas for individual Trilogues. These agendas usually outline which specific part of the legislative proposal will be discussed at the respective meeting. It should therefore be possible for the institutions to provide the public with a more general summary version of this agenda, focusing on the main points for discussion at the Trilogue. Information would be provided to the public **without revealing individual strategies, or compromising negotiations**.

48. The agenda will, however, be relevant only if published before the relevant Trilogue meeting. Where time constraints prevent publication before the meeting, publication should take place shortly afterwards.

The Ombudsman proposes that the institutions make available general summary agendas before or shortly after Trilogue meetings.

"Four-column" documents and final compromise text

49. One key document has emerged as the main Trilogue working tool: the "**four-column document**". This document combines the initial positions of the three institutions—set out in the first three columns—with a fourth column—the **compromise text**, as it evolves during the discussions, frequently on a line by line or paragraph by paragraph basis. As the negotiations progress, more and more of the fourth column is filled in. The completed and agreed upon fourth column constitutes the **final compromise text**, which is made public and must then be adopted in the formal procedure by each co-legislator if it is to become



law. The evolving four-column document therefore tracks a Trilogue's progress. It is in effect the full "map" of the informal, but decisive, Trilogue negotiation process.

50. Access to the evolving versions of the four-column document would allow the public to follow how a final text has emerged from the institutions' different starting positions. The Ombudsman notes from her inspections that a new version of the four-column document is usually produced for each Trilogue meeting. Citizens could, by examining these versions of the four-column documents, understand where and when representatives reached a compromise by agreeing to wording that differed from their initial position. The document also enables representatives to present and explain their negotiating positions and successes. The document will show where compromises have been reached, including where win-win solutions have been found.

51. What is vital for the citizen is the opportunity for accountability that such a "map" provides. Publishing such documents provides clear and detailed insights into the Trilogue process and is a necessary part of democratic accountability.

52. The Ombudsman understands the particular challenges and sensitivities within the EU system of interinstitutional negotiations. However, efforts to overcome such challenges must be made to allow the effective exercise by citizens of their democratic rights.

53. The key question is precisely **when** four-column documents should be proactively disclosed.

54. It is arguable that the interest in well-functioning Trilogue negotiations temporarily outweighs the interest in transparency **for as long as the Trilogue negotiations are ongoing**. In complex Trilogue negotiations—the files that the Ombudsman examined were complex—a concession may be made by one co-legislator on one part of the draft in the expectation that concessions may be made by the other co-legislator at a later stage. Such early concessions may, however, be withdrawn or amended depending upon the outcome of later negotiations. If, at a point where tangible results have yet to be obtained in return, the concessions that have been made are immediately made public, there is a risk that such concessions would become, at least in the eyes of observers, "set in stone". The public, which might not be aware of the delicate negotiating strategies of the co-legislators regarding such concessions, could be seriously misled. Facing such a risk, participants might refrain from making any serious concessions. Thus, early disclosure could potentially damage the negotiation process.

55. When the negotiations have been concluded, public scrutiny cannot have a direct impact **on the negotiations**, though it may affect the fate of the legislation itself. Public scrutiny is mainly focused on the final agreed text, which today is already publicly available before adoption. It is a principle of participatory democracy that legislation is subject to such scrutiny **before being adopted**.

56. However, the public should also be able to understand the main negotiation steps leading to the Trilogue compromise, by having **access as far as possible to the**



four-column documents as soon as possible after the negotiations have been concluded . While these documents are evolving and exchanged informally often during a Trilogue, the four-column documents of main public interest are those drafted ahead of each Trilogue meeting. These documents also provide helpful information to citizens **wishing to hold elected representatives accountable** . They may also be useful to researchers and historians **wishing to understand more fully the intentions of legislators**.

The Ombudsman proposes that the institutions make proactively available four-column documents, including the final agreed text, as soon as possible after the negotiations have been concluded.

Trilogue notes

57. The three institutions do not currently produce **joint Trilogue minutes** ; the representatives limit themselves to producing their own notes for the purposes of reporting back to their respective institution. Such documents often cover the institution's **negotiation strategy** and **critically assess the other institutions' positions**. Proactively releasing such information could, depending on the specific content of such notes, potentially harm the negotiations and lead to undocumented reporting. The Ombudsman thus acknowledges that such internal reports may not easily be made **proactively** available. Interested citizens can, however, request access to these documents in accordance with the **EU's public access to documents law** [18] . The institutions may then assess, **on a case-by-case basis** , whether there are any grounds to refuse disclosure.

58. Some internal reporting is, however, made **publicly available** , for example through Parliament Committee meeting minutes or videos as well as COREPER summary records. Such information should be included in any relevant database in order to ensure that it is easily accessible to all interested citizens.

The Ombudsman proposes that the institutions include, in legislative databases and calendars covering Trilogues, links to any minutes or videos of the institutions' public meetings where a Trilogue has been discussed.

Lists of participants

59. In order to hold their representatives to account, citizens need to know who the representatives involved in the legislation are. Trilogues are attended by representatives from Parliament, Council and Commission. These representatives are, on Parliament's side, a number of **Members** [19] from all political groups and the **Chair** of the relevant Committee; on the Council side, the responsible national **Minister** or **senior national civil servants** , such as the Permanent Representative, of the Member State currently holding the rotating Council Presidency [20] ; and on the Commission side, the responsible **Commissioner** [21] or other **high level Commission officials** . The political representatives are often supported by staff members. In some cases, several dozen people can attend a Trilogue.



60. Accountability demands that the names of participants with **political responsibility** for the decisions taken are made known to the public. These are, primarily, the Parliamentarians, Ministers and Commissioners, that is, the **politicians present**. In some Trilogues, however, institutions are represented not by politicians, but by senior civil servants. While MEPs are always present representing Parliament in a Trilogue, the Member State holding the Presidency of the Council does not always send the responsible Minister nor does the Commission always send the responsible Commissioner. If authority to take **decisions** is delegated from politicians to senior civil servants, the latter's identities should also be proactively disclosed.

61. The Ombudsman notes that Trilogues are often preceded or followed by so-called "**technical meetings**". These are meetings attended by civil servants from the three institutions concerned who have expertise on the files at issue. These technical meetings either do organisational planning or discuss technical points of the legislative proposal. The Ombudsman has noted the importance of such meetings in terms of ensuring that sometimes complex technical points are clarified. The outcome of such technical meeting must, however, be endorsed by the political decision-makers in the following Trilogue. As the political responsibility for such "technical meetings" lies with the institution's political representatives, it may not therefore be necessary to disclose proactively the names of those civil servants.

The Ombudsman proposes that the institutions make proactively available a list of the representatives who are politically responsible for decisions taken during a Trilogue, such as the MEPs involved, the responsible Minister from the Council Presidency and the Commissioner in charge of the file. If the power to take decisions is delegated to civil servants, their identities should also be disclosed proactively.

Other Trilogue documents

62. Institutions should make as many Trilogue documents as possible directly available to citizens as early as possible. The Ombudsman considers her proposals to be a rational and appropriate **starting point** for the proactive provision to citizens of information critical to the effective exercise of their democratic rights under the Treaties.

63. Citizens and researchers should, however, also be able to obtain **additional information on Trilogues** of particular interest to them. They can make **individual requests** to the institutions under public access law [22] and the Ombudsman encourages the institutions to grant the **widest possible access** to such documents, which are, essentially, "legislative documents" [23]. These documents can include documents tabled during Trilogue negotiations and documents tabled during technical meetings preceding or following Trilogue negotiations.

The Ombudsman proposes that, for the purposes of facilitating requests for public access to documents, the institutions make available as far as possible lists of



documents tabled during Trilogue negotiations.

64. This would increase Trilogue transparency by allowing citizens to identify what kind of documents formed the basis of their representatives' decisions. If and when the institutions grant access to such additional documents on request, they should also make copies of such documents proactively available online.

C. Joint database

65. The newly agreed Interinstitutional Agreement [24] provides for Parliament, Council and Commission to work together to establish a **dedicated joint database on the progress of legislative files**. The Ombudsman welcomes and encourages this initiative. As her inquiry has shown, it is not only important that information on the legislative process, including Trilogues, be made available, but also that this information is **easily and readily accessible to citizens, preferably on one single platform and with 'open data' capabilities**. The information value to citizens is multiplied as more documents are linked to a single platform—a “one stop shop”—eliminating the need to search through different websites and databases.

66. In the context of Trilogues, such a platform could include Trilogue dates, initial positions of the three institutions, general Trilogue agendas, “four-column” documents, final compromise texts, Trilogue notes that have been made public, lists of the political decision makers involved and as far as possible a list of other documents tabled during the negotiations.

The Ombudsman encourages the institutions to work together to make as much Trilogue information and documentation as possible publicly available through an easy-to-use and easy-to-understand joint database.

D. Concluding remarks

67. Trilogues have become a key feature of the EU legislative process. Information on Trilogues is information on how the laws governing the lives of over 500 million citizens are eventually adopted. If citizens are to participate effectively in the democratic life of the European Union, by holding their representatives to account, and by voicing their opinion, then they need access to this information. If citizens perceive the process by which EU law is adopted as accessible and transparent, their trust in the EU, and its institutions, will increase. This goes to the heart of EU law-making legitimacy.

68. The Ombudsman is aware of the very careful judgment calls that must be made in order to strike the right balance between transparency and other legitimate and important **public interests**. She is also aware of the particular challenges and sensitivities involved in reaching compromises on legislative proposals. She has no doubt, however, that greater Trilogue transparency will lead to a legislative process that is more open to all sections of society, is well-informed, and ultimately, is more legitimate in the eyes of European citizens. This inquiry was concluded at a period of marked uncertainty for the EU. While no one can predict the outcome of the fallout of that uncertainty, any move to increase the transparency



and therefore to further the legitimacy of the EU institutions can serve only to support the democratic values proclaimed in the Treaties upon which the EU is founded and is guided by.

69. The Ombudsman hopes that the proposals for transparency will be deliberated with great care by the three institutions and viewed as a rational, balanced contribution to an important EU matter. She is aware of genuine concerns that greater transparency might paradoxically result in less, as some of those involved in Trilogues might be tempted to return to more informal and unrecorded negotiating methods. She trusts however that what she has observed as the desire of all three institutions to make even greater efforts to increase citizen trust—particularly at this time—will ensure that this will not happen.

The proposals

On the basis of the inquiry, the Ombudsman makes the following proposals to Parliament, Council and Commission:

- **The Ombudsman proposes that the institutions make publicly available a “Trilogue calendar” identifying forthcoming Trilogues. They should also refer to Trilogues in databases on legislative files.**
- **The Ombudsman proposes that both co-legislators make proactively available, before Trilogue negotiations begin, their positions on the Commission proposal, regardless of the level at which the position has been adopted internally and regardless of the legislative proposal.**
- **The Ombudsman proposes that the institutions make available general summary agendas before or shortly after Trilogue meetings.**
- **The Ombudsman proposes that the institutions make proactively available four-column documents, including the final agreed text, as soon as possible after the negotiations have been concluded.**
- **The Ombudsman proposes that the institutions include, in legislative databases and calendars dealing with Trilogues, links to any minutes or videos of the institutions’ public meetings where a Trilogue has been discussed.**
- **The Ombudsman proposes that the institutions make proactively available a list of the representatives who are politically responsible for decisions taken during a Trilogue, such as the MEPs involved, the responsible Minister from the Council Presidency and the Commissioner in charge of the file. If the power to take decisions is delegated to civil servants, their identities should also be disclosed proactively.**
- **The Ombudsman proposes that, for the purposes of facilitating requests for public access to documents, the institutions make available as far as possible lists of documents tabled during Trilogue negotiations.**
- **The Ombudsman encourages the institutions to work together to make as much Trilogue information and documentation as possible publicly available through an easy-to-use and easy-to-understand joint database.**

This Decision and the Ombudsman’s proposals will be communicated to Parliament, Council and Commission. The Ombudsman asks the institutions to inform her of any action they have taken in relation to her proposals by 15 December 2016.

Strasbourg, 12/07/2016



Emily O'Reilly

European Ombudsman

[1] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ 2014 L 60, p. 34.

[2] Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, OJ 2014 L 158, p. 1.

[3] The Ombudsman's opening letters to the institutions, the institutions' replies, the Ombudsman's inspection reports and the submissions by the public in response to the Ombudsman's public consultation can be found here:

<http://www.ombudsman.europa.eu/en/cases/case.faces/en/46048/html.bookmark>

[4] Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ 2016 L 123, p. 1 (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.123.01.0001.01.ENG).

[5] Judgment in *Sweden and Turco v Council* , Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

[6] Namely, the Dutch *Tweede Kamer* , the British *House of Commons* and *House of Lords* , the French *Assemblée nationale* and the Romanian *Senat* (submissions available at:

<http://www.ombudsman.europa.eu/en/cases/case.faces/en/46048/html.bookmark>).

[7] Information available at: <http://ec.europa.eu/citizens-initiative/public/welcome>

[8] Information available at:

http://ec.europa.eu/smart-regulation/stakeholder-consultation/index_en.htm

[9] Information available at: http://ec.europa.eu/yourvoice/consultations/index_en.htm

[10] The Ombudsman's public consultation has shown that this view is indeed held by many different actors, be they NGOs, business associations, or citizens.

[11] For more information, see the Ombudsman's letter on the Transparency Register to the President of the European Commission of 26 May 2016, available at:

<http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/67708/html.bookmark>

[12] Information available at:



<http://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en>

[13] Notably EUR-Lex (<http://eur-lex.europa.eu/collection/legislative-procedures.html>), Parliament's Legislative Observatory (<http://www.europarl.europa.eu/oeil/home/home.do>) and Council's codecision database (<http://www.consilium.europa.eu/en/documents-publications/ordinary-legislative-procedure/>).

[14] Point 9 of the Joint Declaration of the European Parliament, the Council and the Commission of 13 June 2007 on practical arrangements for the codecision procedure (Article 251 of the EC Treaty), OJ 2007 C 145, p. 5. (available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20150909+ANN-19+DO>).

[15] Committees specialised on certain aspects of Parliament activity (for example, environment, agriculture, trade) tasked with preparing the work of Parliament's Plenary. They are made up of Members of Parliament and debate publicly: <http://www.europarl.europa.eu/committees/en/home.html>

[16] The Committee tasked with preparing the work of the Council. It is made up of the Permanent Representatives (Ambassadors) or Deputy Permanent Representatives of the 28 Member States: <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/>

[17] For example, all three databases mentioned in footnote 13 contain gaps of almost a year concerning the Clinical Trials Regulation and the Mortgage Credit Directive. Trilogues negotiations were under way during this period.

[18] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

[19] Full list available at: <http://www.europarl.europa.eu/meps/en/full-list.html>

[20] More information available at: <http://www.consilium.europa.eu/en/council-eu/presidency-council-eu/>

[21] List and roles available at: https://ec.europa.eu/commission/2014-2019_en

[22] See footnote 18.

[23] Regulation 1049/2001 refers to "legislative documents" as being "*documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States*".

[24] See footnote 4.