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Ways to improve efficiency and transparency in trilogues and EU law-making

Background memo for the public hearing
'Trilogues and transparent law-making'
on 28th September 2015 organised by the European Ombudsman

Efficient law-making must not only be done, but must also be seen to be done

This fundamental legal adage is just as valid for law-making as it is in a judicial context. And the adage must even be stronger at EU level than at national level. Why? Because the EU legislates on the basis of a 'delegation' of competences by Member States, i.e. EU citizens. The EU consistently has to demonstrate it is using this delegation of competence appropriately. The gap between the citizens and the EU is wide – wider than at national or regional level. Everyone knows this and most EU decision-makers want to combat this. However, they will do the exact opposite as long as trilogues remain as systematic as today and conducted the way they currently are.

Trilogues: efficient perhaps, but detrimental to the quality of legislation

EU decision-making has grown increasingly complex due to an increased number of Member States and a trend towards a more inter-governmental approach in particular. Trilogues have proven to be an efficient way of getting legislation adopted. Today, the use of trilogues is systematic. No-one these days even asks the question whether or not trilogues should be held on a specific legislative file.

But has EU decision-making actually become more efficient? In general terms, the **bulk of legislation is now adopted in first reading (currently 85%-87%)** and it is generally fair to say that a large amount of legislation therefore has been adopted more rapidly. Although efficiency and speed of adoption are key aspects in decision-making, other even more important factors are threatened by trilogues. The obvious ones are: democracy, accountability and transparency. This is rightly criticised.

However, on a more operational level, other concerns arise. The quality of legislation and the degree of precision in legislation has decreased. Is this a problem? Certainly, because it generates legal uncertainty, which is the antithesis of any legal system. **Along the same lines, the use of delegated and implementing acts (secondary legislation) has grown massively.** Although the need for these types of acts is beyond question, there has been a very strong tendency in recent years to use these acts not only when they are needed, but also to delay and push contentious or politically sensitive matters of key interest for adoption at a later date. In effect, these acts are used as political rather than legal tools.

Trilogues: all kind of shapes and sizes

As indicated, trilogues are systematic. There are some trilogues that you see announced in the press. In parallel however, there are more technical trilogues, 'informal trilogues' if you will, which take place with even more restricted groups of people 'to help advance the compromise'.

On top of this, three-way meetings tend to be held when the drafting of legislation is on-going or when parliamentary committees and Council working group meetings are still on-going. **There is a trend towards advancing 'three-way discussions/trilogues' even further upstream in the legislative process, by-passing the legislative process even more, making it even more opaque.**

I tend to refer to this as the **'cascade effect'**: from the normal phases of the ordinary legislative procedure (with conciliation meetings at the end), down to trilogues after EP and Council discussions and positions, down to three-way discussions as early as in the drafting phase. It is a dangerous cascade and can be compared to another one: legislation, secondary legislation (delegated/implementing acts), soft law (guidance, etc.), the latter being often as problematic as the first.

In its proposal for an inter-institutional agreement, the Commission envisages the following in Point 25: *"Where appropriate, the three institutions may agree to coordinate efforts to accelerate the legislative adoption process, both during each institution's internal preparatory steps and during the inter-institutional negotiations."*

This sentence seems to point in the direction of even earlier coordination, possible three-way meetings, and this has to be stopped.

The Commission should not be the 'master' of trilogues

What about the trilogues' composition, currently including a Council delegation (led by the rotating Presidency), a Parliament delegation and a Commission delegation? Parliament and Council, as co-legislators, have a natural place at the table, but what about the EU Commission? Does it need to be present in trilogues, to what extent, and in what role?

The fact that the Commission is present in trilogues stems indirectly from the EU treaties, which provides in the article describing the ordinary legislative procedure (Article 294 TFEU) that *'the Commission shall take part in the Conciliation committee's proceedings'*. Another reason is of course the legal right of the Commission to reject amendments proposed during the ordinary legislative procedure.

Does this justify its presence? Maybe, but the Commission is not on an equal footing with Council and Parliament during the ordinary legislative procedure; Parliament and Council being the only legislators. It therefore would make sense to have the Commission intervene in trilogues only when there is a need to facilitate reconciliation of the EP and Council's respective positions – but not systematically. Furthermore, **when the Commission participates, it should in no case hold the pen for drafting the minutes or filling in the fourth column**, which seems to be a regular practice. This task should remain the full responsibility and privilege of the legislators.

Trilogues: too many, too fast

Two other points deserve comment: the frequency of trilogue meetings and the aftermath of trilogues, i.e. formal adoption by Council and Parliament.

- In the heat of the moment, trilogues take place once a week or even twice a week. This frequency is probably intended to keep the pressure on and help push for a deal. For multiple reasons however, this high frequency is detrimental. The pressure to conclude can often lead to trade-offs and poorly thought-out agreements with a risk of superficiality, inaccuracy and unworkable solutions that need remedying afterwards. The time pressure also makes it near impossible to publish updated four-column documents, which should be a minimum requirement. It also increases the tendency to 'delegate' the note-taking to the Commission staff.

- What is also of great concern is that the EP plenary and the Council often – after concluding a deal in trilogue – do not bother having a genuine debate or discussion prior to formally adopting the agreement. All too often, they merely rubberstamp the trilogue compromise which then becomes final legislation. This again is a serious short-cut in the ordinary legislative procedure and must be opposed.

Potential solutions

I am not a believer in stopping trilogues altogether. The tool as such is not necessarily a bad one, but the way it is used today has become unacceptable. Again, a parallel can be drawn with delegated and implementing acts: they are useful and necessary tools when used correctly and for what they actually intend to do.

A genuine solution to trilogues requires an in-depth reform of the EU decision-making system to equip it with an efficient and operational legislative procedure. Regrettably, no-one seems inclined to have this discussion at this point.

What can and must change in the meantime?

1. **The systematic use of trilogues has to disappear: European Parliament and Council must evaluate whether in a particular situation trilogues are a plus** for reaching agreements and, if so, they must publicly explain the reasons why.

2. Trilogues can be used but only after adoption of an EP report in plenary (after lead and opinion-giving committee discussions and votes) and a Council political agreement/general approach. **Earlier three-way meetings should either be banned or announced publicly**, as well as the outcome of their talks.

3. When agreeing on the organisation of trilogues, Council and Parliament must decide on the **Commission's involvement**: presence during all trilogues, presence upon request or no presence but kept informed. By no means should Council or Parliament agree to the Commission holding the pen during meetings, let alone updating the four-column document itself. This is a legislator's task if any.

4. **A cap must be put on the number of trilogues and their frequency**: leaving sufficient time between discussions can be very beneficial for generating well thought-out compromises (e.g. a maximum of 1 trilogue per fortnight). It may also be worth considering capping the number of trilogues and agreeing that if a compromise is not reached within that maximum number of trilogue meetings, the 'normal' ordinary legislative procedure should resume. Announcing the timetable of trilogue meetings upfront can go hand-in-hand.

5. **Four-column documents should become public** and be published on a dedicated website for consultation by everyone; if this is deemed impossible, at the very least detailed minutes of the meeting should be made public relatively soon after it takes place and no later than 4 days ahead of a new trilogue meeting.

6. **The fact that Parliamentary committees** (lead AND opinion-giving committees)

are informed of progress during trilogues should become standard practice. Furthermore, this should mean more than merely being informed. It should mean discussion about the negotiations.

7. The EU culture is one of debate and the legislative procedure was conceived this way. Debates after trilogue agreements are rare these days. It is however **crucial for both the European Parliament and the Council of Ministers to return to this practice by having a genuine debate on the final outcome of negotiations** and determining whether second reading is appropriate. As legislators, this is their fundamental task.

The negotiations on the **inter-institutional agreement are an excellent opportunity to make substantial progress** and return to a form of EU decision-making that is efficient yet sufficiently transparent to earn the confidence of EU citizens, business and interest groups.

However, what the EU genuinely needs in the mid-to-long term is one single, clear, coherent, uniform and mandatory Code of Procedures, as we at PACT have been calling for since 2012 in articles setting out our concerns over the EU legal order (see www.pacteurope.eu/publications).