



22 City Road  
Finsbury Square  
London  
EC1Y 2AJ  
Tel: +44 (0) 20 7448 7100  
Email: [info@thewma.co.uk](mailto:info@thewma.co.uk)  
Website: [www.thewma.co.uk](http://www.thewma.co.uk)

European Ombudsman  
1 avenue du Président Robert Schuman  
CS 30403  
F - 67001 Strasbourg Cedex  
France

### **Trilogues consultation: a response from the Wealth Management Association<sup>1</sup>**

The Wealth Management Association (WMA) welcomes the opportunity to respond to the European Ombudsman's consultation regarding the transparency of the trilogue process. Over the past five or so years, we have followed the progress of a number of European Commission proposals for Directives and Regulations impacting the retail wealth management industry, and we feel well placed to comment on the way trilogues operate. We also raised concerns about the transparency of trilogues in our response to the UK HM Treasury's 2014 Review of the Balance of Competencies in regard to financial services and the free movement of capital<sup>2</sup>, where we suggested that the lack in understanding of the context in which final form legislation is agreed leads many to question whether due process is properly respected, or whether agreements simply take the form of 'horse-trading' between EU institutions. Whilst due process may well be followed during trilogues, transparency is key in ensuring that this is known to be the case.

The European Ombudsman has stated that it is not interested in issues concerning any specific legislative proposal. However, as an example of the problems that can occur as a result of the limited transparency surrounding trilogues, we would point the Ombudsman to the way in which trilogues for the MiFID II package, comprising Directive 2014/65/EU ("MiFID

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<sup>1</sup> The Wealth Management Association (WMA) is a trade association that represents 184 wealth management firms (full members) and associate members who provide professional services to our full member firms. WMA member firms look after over £670 billion of wealth for over 4 million retail investors. Our full members deal in stocks, shares and other financial instruments for individuals, trusts and charities through a range of services spanning execution only, advisory and discretionary fund management. The WMA exists to support its members and their clients through education and engagement, advocacy and influence, research and analysis, and by playing an active role as a facilitator and thought leader. WMA member firms operate across more than 580 sites, employing over 32 000 staff. These firms also run over 5.5 million client portfolios and carry out over 20 million trades a year.

<sup>2</sup> See: [http://www.thewma.co.uk/uploads/files/29/balance\\_of\\_competencies\\_17.01.14.pdf](http://www.thewma.co.uk/uploads/files/29/balance_of_competencies_17.01.14.pdf).

II”) and Regulation (EU) No 600.2014 (“MiFIR”), agreed the final text of MiFID II Article 24(3). Here, the final form text was markedly different from the texts put forward by the European Commission, Parliament and Council, and is causing wealth management firms difficulties in understanding how to meet its requirements. Transparency of the negotiating positions of each party prior to the trilogue itself could have helped ensure that the final form text not only meant that clients would be properly informed of a firm’s costs and charges, but also that the requirements could be met by firms on whom those obligations fall. Moreover, the legal requirement to undertake a cost-benefit analysis, required when the European Commission puts forward new proposals, is not met in trilogue changes, even of the magnitude of the MiFID II amendments referred to here. As a result, not only are best practice and the law compromised, but the outcome, as in the MiFID II case, is often not suitable for the range of business models to which it applies. This is the sort of issue that we hope increased transparency of trilogues can help address and prevent in the future.

Our responses to the Ombudsman’s specific questions are included below.

**1. In your opinion, is the way in which EU legislation is negotiated through the trilogue process sufficiently transparent? Please give brief reasons for your answer.**

We believe that the trilogue process is not sufficiently transparent. We have already offered above the example of the MiFID II trilogues where parts of the final form text bear little resemblance to the texts of any of the EU institutions, so it is unclear how it has been arrived at. Post-trilogue disclosure is welcomed, but knowledge of the negotiating positions of each EU institution prior to trilogues (even on a summary basis) is needed to address this concern and understand why the final text is as it is.

We fully support the production and release of the “four-column tables” used to record the texts of each of the negotiating parties as well as agreed final texts. These are especially useful and effective in terms of transparency when reviewing trilogue discussions, and help to increase our understanding of the negotiation process; however, pre-trilogue transparency would significantly improve the transparency of the trilogue process.

**2. Please explain how, in your view, greater transparency might affect the EU legislative process, for example in terms of public trust in the process, the efficiency of the process or other public interests.**

At the moment, decisions arising out of the trilogue process can seem like political horse-trading, rather than being the outcome of proper discussion and due process between the institutions involved. Greater transparency of processes, decision-making practices and disclosure of related documentation can serve only to increase trust and confidence in the EU. Similarly, increased disclosure on legislative processes and the intricacies involved in decision-making would no doubt engender greater democratic accountability. This very important concept is often lamented as being in ‘deficit’ in the EU context, a problem that is at the heart of many public complaints about the EU and that needs to be rectified.

Increased transparency might be achieved through the release of negotiating positions before trilogues and brief minutes explaining the reasoning behind the decisions reached after trilogues.

**3. The institutions have described what they're doing about the proactive publication of trilogue documents. In your opinion, would the proactive release of all documents exchanged between the institutions during trilogue negotiations, for example "four-column tables", after the trilogue process has resulted in an agreement on the compromise text, ensure greater transparency? At which stage of the process could such a release occur? Please give brief reasons.**

We recognise that EU institutions already publish a significant amount of information on their websites about their legislative and administrative duties, and we fully support this. We also welcome the European Parliament's proposals to make documents related to the trilogue process more publicly available after it has adopted its decision in plenary. Publication of the "four-column tables" would also be highly beneficial in further understanding the specific concerns of each institution, and how the final legislative text has been arrived at. As this is a working document, we recognise that it can change over time as negotiations progress, but nevertheless its publication before each trilogue meeting would help improve transparency of the process.

It must be underlined that the publication of pre and post trilogue documentation will ensure far greater transparency of the EU legislative system. Trilogue meetings are rightly criticised for their lack of transparency: they are held behind closed doors, little is known of the positions of each institution during the negotiations, and little is published about the negotiations themselves. Overall, inadequate information filters through to those stakeholders whom are most directly affected. Proactive publication of all documents including the "four column tables" will help to improve stakeholders' understanding of the issues under discussion and will improve the EU's legislative process democratic accountability significantly.

**4. What, if any, concrete steps could the institutions take to inform the public in advance about trilogue meetings? Would it be sufficient a) to publicly announce only that such meetings will take place and when, or b) to publish further details of forthcoming meetings such as meeting agendas and a list of proposed participants?**

We recognise the difficulties involved in publicly announcing the dates of trilogue meetings due to late changes in dates and times, and concerns over pre-meeting influence on proposed participants. However, in terms of transparency of the trilogue process, which is the principal aim of the Ombudsman's current consultation, the disclosure of agendas and the dates and times of proposed meetings would significantly enhance trilogue transparency. Disclosure of participants would also be helpful, although this need only be in higher level terms, rather than the names of individuals.

**5. Concerns have been expressed that detailed advance information about trilogue meetings could lead to greater pressure on the legislators and officials involved in the negotiations from lobbyists. Please give a brief opinion on this.**

We understand the concern that detailed information published in advance of trilogue meetings could increase lobbying from those industries affected by the draft legislation. However, those EU institutions involved in trilogues are public servants and must consider how they can become more accessible and accountable to the full range of stakeholders across all Member States, and ensure their active participation in relation to legislation that impacts their industries throughout the legislative process. Indeed, publication of information

about what is to be discussed in trilogues can help ensure that stakeholders offer their expertise on specific points rather than in a more general manner.

The transparency register and EU institutional discretion on expert access can also help to manage concerns about undue pressure being placed on legislators and officials involved in trilogues.

**6. In your opinion, should the initial position ("mandate") of all three institutions on a legislative file be made publicly available before trilogue negotiations commence? Briefly explain your reasons.**

Yes, all three institutions should make these negotiation mandates available before trilogue negotiations begin. These would not only substantially increase the transparency of trilogues, but can help industry stakeholders understand the complexity of the process. And they can ensure any major concerns are raised and dealt with before the final legislative text is agreed. Given the lack of any cost-benefit analysis process for amendments made to Commission proposals by the Council or the European Parliament – and indeed during the trilogue process itself – being aware of the possible outcomes of trilogues in advance can ensure major concerns are formally raised before such decisions are finalised.

**7. What, if any, concrete measures could the institutions put in place to increase the visibility and user-accessibility of documents and information that they already make public?**

We would like to see a central database, or a “one-stop-shop”, that covers all documentation in relation to trilogues. The EU has already succeeded in developing such a central database: EUR-Lex, which is widely used by law practitioners and the public at large. Creating such a “one-stop-shop” would greatly improve accessibility to the range of documentation that forms the basis of EU decision making practices and its outcomes, and will reduce further calls for greater transparency.

**8. Do you consider that, in relation to transparency, a distinction should be made between "political trilogues" involving the political representatives of the institutions and technical meetings conducted by civil servants where no political decisions should be taken?**

Yes.

Although interested parties are likely to be more aware of the EU’s decision-making processes, greater transparency of whether a trilogue is intending to make policy decisions or deal with the technical implementation of an agreed point is necessary. Knowing that a trilogue is focussing on technical matters rather than policy would also reduce any inappropriate lobbying by industry groups concerned with political matters, as well as ensuring they can offer their technical know-how when necessary.

**9. Please comment on other areas, if any, with potential for greater trilogue transparency. Please be as specific as possible.**

No comment.

**The Wealth Management Association**

31 March 2016