29 March 2016

# ClientEarth's contribution to the European Ombudsman public consultation on the transparency of trilogues

ClientEarth's contribution to the European Ombudsman's public consultation on transparency of trilogues is twofold, it first relies on the complaint (attached to this e-mail) we lodged on 12 October 2015 about the practice of the Commission, the Council and the European Parliament with regard to the holding of informal "trilogue meetings" in relation to the adoption of the 7th EU Environmental Action Programme (7th EAP)[1] and the review of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (EIA Directive). In this complaint, ClientEarth argued that in both proceedings the trilogue meetings took place before the vote in plenary in the European Parliament and therefore before the adoption of the Parliament's first reading position. The complaint explained that this practice breaches Articles 294 and 15 TFEU, Articles 10(3) and 11 TEU.

Second, the complaint challenged the decisions to refuse disclosure, during the negotiations, of documents pertaining to the discussions taking place during these meetings. The refusals to provide access to the substance of the discussions were according to ClientEarth in breach of the Aarhus Convention, Regulation 1367/2006 and Regulation 1049/2001. ClientEarth therefore considered both aspects of this practice to be a case of maladministration by the three institutions.

In summary, the grounds of ClientEarth's complaint were the following:

First ground: Misapplication of Articles 294 and 15 TFEU, Articles 10(3) and 11 TEU.

Second ground: Misapplication of Article 4(3) of Regulation 1049/2001.

Third ground: Misapplication of Article 11 of Regulation No 1049/2001 and 4 of Regulation 1367/2006.

We note that the European Ombudsman refused to open an investigation as she had already opened her own-initiative inquiry on the transparency within trilogues but agreed to take the arguments provided therein into account within the public consultation organised on the transparency of trilogues. We therefore refer to our complaint attached to this e-mail. We will also reply to the questions asked.

**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.**

The EU legislative process as negotiated through trilogues is not sufficiently transparent. Neither the content of the discussion contained in the four column tables, encapsulating the position of the three institutions involved, nor the minutes of the meetings are disclosed by the Council until the end of the process; that is when a compromise text is adopted. There is no transparency as to what the institutions are discussing or the positions of each Member of the European Parliament (MEP) attending the meetings or of representatives of the Member

[1] Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet".

States and the Commission. The minutes of these meetings and the dates at which they will be held are not made public either.

In the law-making process set out in the EU Treaty, trilogue meetings are not foreseen. In effect, the trilogue meetings fuse two stages of the EU legislative process described in the Treaty into one, by merging the separate discussions and hearings in the European Parliament (EP) and then those of Council. This prevents public participation from taking place and makes the discussion between the three institutions completely opaque.

Trilogue negotiations are now commonplace and systematically take place before the European Parliament has held a plenary vote on the legislation in question, as in the case of the 7th EAP and the EIA Directive. Indeed, although the Parliament has not adopted its first reading position officially, the Council and the European Parliament have already agreed on the final draft. The political process is concluded through the trilogue meetings and validated formally by first reading votes in the EP and the Council. The same process is taking place for the proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

Within the adoption of this directive, the institutions discussed among other things, how trade secrets should be defined and what could constitute a trade secret. Information on the impacts of certain substances and products on the environment and on public health could fall under the scope of this definition. They also discussed what exceptions should be allowed in relation to the right of industry to sue anyone unlawfully disclosing, using or acquiring a trade secret and what should constitute a legitimate interest that would justify the disclosure of such a secret. This includes the activity of whistleblowers, journalists, NGOs and workers. Whether public authorities should fall under the scope of the directive or not was also a matter under discussion. Therefore crucial issues were discussed, all of which will have an impact on the type of information that industry will have to disclose or will have the right to withhold, and the way disclosure of such information will be treated.

Matters such as these must be discussed in public. as they concern citizens' rights to know, the environment they live in as well as their health.

Trilogue meetings, in which only very few members of the European Parliament take part, cannot replace the participation of the public and of all MEPs in the discussion on Commission legislative proposals. The very few documents which the three institutions disclose (see our complaint) clearly demonstrate that the Parliamentary feedback, which the Members of Parliament who participate in the trilogue discussions give to their colleagues in the relevant Committee, is insufficient to allow them to form an opinion on the arguments exchanged, on the vigour with which positions of some members of Parliament were defended during the trilogue negotiations and why the representatives of the European Parliament in the trilogue meetings accepted or rejected the compromise text.

Contrary to the trilogue meetings practice, the Treaties stress the obligation for institutions to act transparently. Article 15 TFEU provides that "*[i]n order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible*". Article 10(3) TEU states that "*[e]very citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*". Article 11 TEU adds that "[t*]he institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions*

*shall maintain an open, transparent and regular dialogue with representative associations and civil society*". Article 15(2) TEFEU also requires the EP and the Council to hold their meetings in public *"when considering and voting on a draft legislative act*." Public discussion of legislative proposals is the essence of democratic decision-making and contributes to making decision-makers accountable.

This legal framework undeniably requires EU institutions to be transparent and do their utmost to involve the public in the adoption of their decisions. The practice of holding trilogue meetings runs contrary to these commitments. They are an additional stage in the legislative process that adds confidentiality and opaqueness. The three institutions therefore breach the transparency requirements of the agreement.

Even if the interinstitutional agreement provided for the organisation of trilogues, it could not circumvent the provisions of the EU Treaties setting out the different stages of the legislative process and stressing its public and transparent nature.

**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.**

The Court of Justice of the EU has explained in a very clear way why transparency is needed within the EU legislative process. In joined cases C-39/05 and C-52/05, the Court draws from recital 2 and 6 of the Regulation 1049/2001's preamble to conclude that:

"*openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.*

*It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for Member States should be made directly accessible*[2]."

This has been confirmed in case C-280/11P[3] with regard to the transparency on the positions adopted by Member States. Given the lack of trust there is in EU institutions and in the EU as a whole, there is an increased need to inform the public of what decisions are adopted, by whom and how. A transparent process would not allow or at least make it more difficult for the national governments to claim that all the bad decisions are made "by Brussels" when the reality is that they actively participate in the adoption of all EU legislation adopted in Brussels.

[2] Joined cases C-39/05 P and C-52/05P, *Sweden and Turco v Council*, ECLI:EU:C:2008:374, paras. 46-47.
[3] Council v Access-Info-Europe, ibid.

MEPs also come under a lot of criticism at national level for their lack of participation in the work of the EP. Almost nothing is known and said at national level about the positions adopted by MEPs in Brussels. This contributes to the lack of interest, trust and knowledge of the EU citizens about the EU and a lack of understanding of what the EU brings to them. The discussions related to the referendum organised in the UK are a good example of the misconception the public may have of what the EU does and does not do and is responsible for.

It is transparency that prevents undue pressure and conflicts of interests, not confidentiality and secrecy.

**3. The institutions have described what they're doing about the proactive publication of trilogue documents[5]. In your opinion, would the proactive release of all documents exchanged between the institutions during trilogue negotiations, for example "four-column tables"[6], 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.**

The agenda and the names of the participants must be published ahead of the meeting. The minutes and the four-column tables must be published as soon as they are drafted.

The proactive release of the four-column tables and other documents after the adoption of a compromise agreement does not ensure greater transparency. The Council already discloses these tables on request once the compromise text is agreed upon. This does not allow public participation since the discussion is closed. The decisions reached following discussion within an exclusive and closed group cannot be considered as having been adopted following a democratic process. In the *Turco* case, the Court of Justice referred to the "*advantages stemming ... from increased openness, in that it enables citizens to participate more closely in the decision-making process* ...".

The Court also stated that "*such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated increases the transparency and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001*". The use of the words "are being debated" demonstrates that the Court requires that information is provided while the discussion is on-going.

Participating in a process implies that it is on-going and that input can be provided to stir reflection and debate, which should be reflected in the final decision. This in turn strengthens the legitimacy and public support for the decisions made. Once that process is over and the decision is taken, no participation can take place anymore. Arguing as the EU institutions do empties the Court's rulings in the *Turco* and *Access-Info-Europe* cases of their substance and meaning.

**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?**

Trilogue meetings should be open and transparent and the participants should agree in advance to have their positions disclosed.

We recall that the European Parliament adopted a resolution on access to documents that calls on the Commission, the Council and Parliament "*to ensure the greater transparency of informal trilogues, by holding the meetings in public, publishing documentation including calendars, agendas, minutes, documents examined, amendments, decisions taken, information on Member State delegations and their positions and minutes, in a standardised and easy accessible online environment, by default and without prejudice to the exemptions listed in Article 4(1) of Regulation (EC) No 1049/2001*" (point 28).

Only informing the public that trilogues will take place and when would not be sufficient. The agendas and list of participants must also be published ahead of the meetings.

**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.**

The "pressure" referred to exists, but is not relevant, and should certainly not be used to make the decision-making process confidential. Confidentiality allows even more pressure from vested interests, which have easier access to EU institutions than simple citizens or even NGOs. What is defined as external pressure is in fact also public input, including comments from civil society, constituting democratic debate. It is the intent of the Treaty and of Regulation 1049/2001 to create this debate and public participation within legislative processes. The "sphere of confidence" also referred to by EU institutions with the aim of finding a compromise would not be jeopardised if the process of the trilogue was transparent. It is possible that pressure would be exercised, but Article 4(3) of Regulation 1049/2001 does not provide that documents must be kept confidential in order to avoid any pressure. Nor does it provide that the decision-making process must be cleared of any interferences.

The Court has clarified that: "*As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it*."[4]

The same reasoning must apply here. The institutions must remain impartial and put a stop to undue external pressure while accepting that diverging opinions and criticism can be expressed.

[4] C-39/05P and C-52/05P, para 64.

**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. Disclosure of the mandate would allow the public to know what will be discussed during these meetings and what the institutions have decided to refuse discussing and to compromise on, and what the red lines are and why. That is necessary to hold our decision-makers accountable.

**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?**

The documents could be placed on the website of the legislative observatory of the EP where all the other documents related to the adoption of a directive/regulation are. Having all the documents published in one place would make it much easier to find them and to have an overview of the positions of the different stakeholders.

**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?**

No. The drafting of the directives and regulations matters as well and often reflects the political decisions taken. This process should therefore also be transparent.

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

12 October 2015

# Complaint to the European Ombudsman - Failure to provide access to documents adopted within trilogue meetings

1. This complaint is twofold. First, it is about the practice of the Commission, the Council and the European Parliament with regard to the holding of informal "trilogue meetings" in relation to the adoption of the 7th EU Environmental Action Programme (7th EAP)[1] and the review of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. In both proceedings the trilogue meetings took place before the vote in plenary in the European Parliament and therefore before the adoption of the Parliament's first reading position. This is evidenced by the date of the minutes of the meetings and of the summaries of the first reading positions in both proceedings which state that "the amendments adopted in plenary are the result of an agreement negotiated between the European Parliament and the Council". However, the Commission was also part of the discussion as demonstrated by the minutes of the meetings. As will be explained in more detail below, this practice breaches Articles 294 and 15 TFEU, Articles 10(3) and 11 TEU.

2. Second, the complaint challenges the decisions to refuse disclosure, during the negotiations, of documents pertaining to the discussions taking place during these meetings. The refusals to provide access to the substance of the discussions breach the Aarhus Convention, Regulation 1367/2006 and Regulation 1049/2001. ClientEarth therefore considers both aspects of this practice to be a case of maladministration by the three institutions.

3. In summary, the grounds of ClientEarth's complaint are the following:

4. First ground: Misapplication of Articles 294 and 15 TFEU, Articles 10(3) and 11 TEU.

5. Second ground: Misapplication of Article 4(3) of Regulation 1049/2001.

6. Third ground: Misapplication of Article 11 of Regulation No 1049/2001 and 4 of Regulation 1367/2006.

7. We will in the first part lay down the facts and detail the requests ClientEarth made and the replies received from the three institutions in both legislative processes. We will then in a second part provide the legal arguments according to which the practice and replies from the institutions constitute instances of maladministration.

[1] Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet".

# I. Facts

## Access within the adoption of the 7th EAP

8. According to Article 192(3) TFEU, EU environmental action programmes shall be adopted according to the ordinary legislative procedure. The Commission published its proposal on the 7th EAP in November 2012[2]. Contrary to the requirements of Article 294 TFEU, the European Parliament did not organise a proper and formal first reading of the proposal. Rather, it entered into trilogue meetings, i.e. confidential, non-public discussions with the Council and the Commission with the objective of finding a compromise text which could be accepted within a short period of time. The negotiations led to the adoption of the 7th EAP on 20 November 2013[3].

### Application addressed to the European Commission

9. By email of 14 June 2013, ClientEarth asked the Commission to have access to the documents which contained information discussed during the trilogue meetings on the 7th EAP, the preparatory documents concerning those meetings, the documents which the Commission had obtained in this regard, as well as the minutes of the meetings which were used by the Commission to report back[4].

10. The Commission sent a holding reply on 9 July.

11. On 19 August 2013, the Commission identified ten documents which fell under the scope of the request[5]. It granted full access to two documents and partial access to three other documents. It refused disclosure of the five remaining documents, invoking Article 4(3), first and second subparagraphs, of Regulation 1049/2001.

12. Partial access was granted to minutes of three trilogue meetings. The minutes contained a list of the participants; highlights of the discussions; "next steps" to be undertaken by the date of the next meeting and an indicative list of the points agreed. The section on "detailed discussions" containing the actual discussion between the three institutions was completely deleted in all three documents.

13. ClientEarth introduced a confirmatory application on 16 August 2013 and, as this application overlapped with the Commission's answer, it sent a second confirmatory application on 6 September, arguing in detail, why the requested documents should be disclosed in whole[6].

14. The Commission answered by email of 17 October 2013[7]. It disclosed some insignificant parts of the "detailed discussion" in the meeting documents of 23 May, 6 June and 19 June 2013 and of the so-called GRI-fiches documents[8]. Most of the information is redacted, which makes it impossible for the reader to be informed about the actual arguments used by the

[2] Commission, COM (2012) 710.
[3] Decision 1386/2013, OJ 2013, L 354 p.171.
[4] Annex 1
[5] Annex 2
[6] Annex 3
[7] Annex 4
[8] Annex 5

institutions during the discussion on the adoption of the programme and to know what is at stake.

15. The Commission argued with regard to the meeting reports drafted by the Commission after the trilogues within the adoption of the 7th EAP that their disclosure would seriously undermine the protection of the decision-making process pursuant to Article 4(3), first paragraph, of Regulation 1049/2001 in the following ways:

- The aim of the meetings is to find ground for compromise between the institutions. As long as the inter-institutional decision-making process has not been finalised, disclosure to the public of the positions expressed in the trilogues would entail a reasonably foreseeable and specific risk of putting the inter-institutional decision-making process under external pressure, thereby, jeopardising the delicate compromises reached.
- Parts of the documents reflect the position of individual representatives or delegations. Disclosure at this stage, which would allow identification of the delegations that have adopted positions on the subject still under discussion, would jeopardise this process. Such disclosure would seriously narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussions.
- The meeting reports reflect interpretations by Commission staff of positions expressed by the other institutions' delegations, in the framework of meetings that were not open to the public. The reports were drafted for internal Commission purposes only in the expectation that they would remain confidential. They were not submitted for approval to the other two institutions. If the Commission were to disclose these documents unilaterally, in contradiction with the negative position on disclosure by the Council, this would have the effect of seriously prejudicing the climate of mutual confidence necessary for the effectiveness of the Commission's actions and leverage in its interinstitutional negotiations with the Council and the Parliament.
- The minutes from the EP are different in scope and degree of detail from those of the Commission. Whilst the Parliament's feedback notes only reflect the final outcome of the discussions and not the content of the discussions as such, the Commission trilogue reports contain details about the positions of the respective institutions and their individual representatives and delegations.

16. Moreover, the documents were disclosed in October when the meetings had taken place in May, i.e. five months later. It is evident that in these circumstances the partial disclosure was no longer of any use ; it was too late to participate in the process as the European Parliament was about to adopt its first reading position and, meanwhile, the negotiations had been progressing.

## Application addressed to the Council

17. On 17 June 2013, ClientEarth asked to have access to the documents which were listed in the Council's public register with regard to the adoption of the 7th EAP[9]. The requested documents were listed in that message and consisted of documents related to the preparation of the informal trilogue, comments from Member States, examination of the ENVI Committee amendments, the revised Presidency text and the documents with regards to the trilogue meetings that had taken place since the one that had been mentioned in the register.

[9] Annex 6

18. On 8 July 2013, the Council gave access to some documents and declared that with regard to the others, ClientEarth would be notified later of a decision in their regard.[10]

19. On 7 August 2013, the Council gave access to the requested documents, including the four column document[11]. These documents contained the notes on the preparation of the trilogues, the revised presidency text, examination of the ENVI Committee amendments, and comments from some Member States. Access was granted to "delegations' positions, but excluding those parts which enable the delegations concerned to be identified". The Council declared that it was essential that delegations were able to express their views freely so that the Council could find compromise solutions and achieve progress on delicate questions. Full disclosure at this stage would jeopardise this process since it could seriously narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussions. This could seriously undermine the Council's decision-making process. Access was therefore refused pursuant to Article 4(3) first subparagraph of Regulation 1049/2001.

20. The Council declared that the documents in question and any other document relating to the adoption of the 7th EAP "shall be made available to the public in full after the final adoption of the act, unless their content is covered by Article 4(1), (2) or (3), second subparagraph" of Regulation 1049/2001.

21. ClientEarth introduced a confirmatory application against this decision to withhold the delegations' identity[12]. It refuted the Council's argument, referring in particular to the judgment of the Court in case T-233/09[13]. The Council extended the time limit for an answer by email of 6 September 2013; it argued that the original date for an answer was 27 September and that this date was postponed until 18 October 2013. Not having received a final answer, ClientEarth sent a reminder on 29 November 2013. In the meantime, on 20 November 2013, the 7th EAP was formally adopted.

22. By email of 4 December 2013[14], the Council informed ClientEarth that "(F)ollowing the final adoption of this decision [Decision 1386/2013], you may have access to these documents". Subsequently, the requested documents were disclosed in full, that is with the names of the delegations.

## Application addressed to the European Parliament

23. By email of 14 June 2013[15], ClientEarth asked the European Parliament to disclose the following documents:

- the minutes of the trilogue meetings that took place with regard to the 7th EAP;
- documents which demonstrate that the negotiating team reported back to the Parliament's Environment Committee on the outcome of the trilogue meetings.
-

[10] Annex 7
[11] Annex 8
[12] Annex 9
[13] Case T-233/09, Access-Info-Europe v. Council, ECLI:EU:T:2011:105
[14] Annex 10
[15] Annex 11

24. On 8 July 2013, the European Parliament sent a holding reply. By email of 12 July 2013[16], it transmitted the following information:

- "internal feedback notes on the three trilogues;
- the link to webstreaming recordings of the ENVI committee meetings where feedback was given (http://www.europarl.europa.eu/ep-live/en/committees/search?committee=ENVI 19-20 June and 29-30 May);
- the link to the Minutes of ENVI committee meetings http://www.europarl.europa.eu/committees/en/envi/minutes.html#menuzone (the minutes of the specific dates - not yet adopted - should be available soon)".
-

25. The three "internal feedback notes" indicate the identity of the participants at the trilogue meetings of 22 May, 6 June and 19 June 2013, the agenda of the trilogue meetings and a "summary"[17]. This summary lists a large number of amendments by their numbers which are Presidency proposals for compromise that the European Parliament accepted. The actual texts of the amendments are not reproduced. It is therefore only a list of the amendment numbers. In addition to these, there is a one sentence "conclusion" on several other amendments.

## Access within the review of the EIA Directive

### Application addressed to the European Commission

26. On 10 December 2013, ClientEarth submitted a request under Regulation 1049/2001 to the Commission for access to "*the reports/minutes adopted following the last trilogue meetings (5, 26 November and 10 December) and technical meetings (11 and 15 November) that have taken place with regard to the review of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. These documents include the preparatory documents for the meetings as well as the documents received by the Commission in relation to the matter discussed."* [18]

27. On 14 January 2014, the Commission extended the time-limit to another 15 working days[19].

28. On 3 February 2014, the Commission replied informing that it was able to identify the following documents as falling under the scope of the request[20]:

29. 1. Four reports prepared after the informal trilogue meetings with the European Parliament and the Council;

30. 2. One report prepared by the European Parliament after the technical meetings;

[16] Annex 12
[17] Annex 13
[18] Annex 14
[19] Annex 15
[20] Annex 16

31. 3. Ten compromise texts prepared by the Council Presidencies between May and December 2013;

32. 4. Three four-column tables prepared by the Council Secretariat with view of the informal trilogue meetings with the European Parliament and the Council;

33. 5. Two GRI fiches prepared in view of the meeting of the Inter-Institutional Regulations Group (GRI) that ensures the coordination of all Commission activities in the field of Inter-institutional relations.

34. They refused to grant access to the ten compromise texts prepared by the Council Presidencies and the three four column tables prepared by the Council Secretariat.

**35.** The Commission argued that they had consulted the Council about their documents pursuant to Article 4(4) of Regulation 1049/2001 which had objected to their disclosure. The Commission indicated that the decision-making procedure was still on-going and the agreement on the file was still pending, awaiting the vote of the European Parliament's plenary. The disclosure of the document would therefore seriously undermine the institution's decision-making process in accordance with Article 4(3) first subparagraph of Regulation 1049/2001. The Commission found the Council's reasoning valid. **The Commission found that there was no overriding public interest in disclosure *pursuant to Article* 4(3) of Regulation 1049/2001.**

**36.** They granted partial access to the four reports prepared after the informal trilogue meetings and the two "GRI fiches".

37. **On 24 February 2014, ClientEarth** submitted **a confirmatory application**[21] requesting the Commission to reconsider the decision not to provide full access to the requested documents on the following grounds:

38. a. so many parts of the documents had been deleted that the information provided did not allow the reader to know the content of the discussion that had taken place within these meetings. The partial access provided therefore amounted to no access to information on the positions adopted by the EU institutions within the review of this directive and on the decisions that were being taken on this crucial matter.

39. b. The Commission did not provide any arguments as to how the decision-making process would be seriously undermined for the purpose of Article 4(3) first subparagraph of Regulation 1049/2001.This was purely hypothetical.

40. c. The decision-making process of the EU institutions would not be undermined by disclosure of these documents.

41. d. The process leading to the review of the directive is a legislative process. Article 12 of Regulation 1049/2001 stresses the fact that legislative documents should be made directly accessible through public registers. This is confirmed by Article 4 of Regulation 1367/2006.

[21] Annex 17

42. e. The trilogue procedure is not provided for by the EU Treaties and yet it is completely confidential. Disclosing information only once the law is adopted is in breach of the Aarhus Convention, Regulation 1367/2006 and Regulation 1049/2001 as interpreted by the EU Courts.

43. f. Even if disclosure would undermine the internal decision-making process of these institutions, there is an overriding public interest in making these documents publicly accessible.

**44. On 31 March 2014, the Commission gave access to all** of **the requested documents**[22]**.** They indicated that the Council and the European Parliament agreed with disclosure. T**hey considered that** the **exceptions of Article 4 of Regulation 1049/2001 no longer applied.** Indeed, the review process of the directive was almost fully completed since the European Parliament had adopted their first reading position on 12 March and had reached an agreement with the Council through the trilogue meetings.

## Application addressed to the Council

45. On 10 December 2013, ClientEarth made a request to the Council to access the same documents as those requested from the Commission[23].

46. On 10 January 2014, the Council extended the time-limit by another 15 working days.[24]

47. On 22 January 2014,[25] the Council explained that the documents consisted of notes from the General Secretariat of the Council to the Permanent representatives Committee or to Delegations concerning the preparation for the informal trilogues; a Presidency debriefing on the outcome of one of the trilogue meetings and another briefing containing an analysis of the final compromise text with a view to an agreement. These documents included the four column document. They granted partial access to notes concerning the preparation of the trilogues and refused to grant access to the documents containing the Presidency debriefing and the analysis of the final compromise text as well as the four column documents.

48. The Council considered that "*at that stage when no formal agreement exists, full disclosure of the preparatory Council documents, in particular positions suggested by the Presidency and the agreed mandate for the Presidency for the purpose of the trilogue meetings would be premature*." The council further argued that "*These positions were taken strictly with the aim and in the context of achieving a first reading agreement on a very sensitive file*". The Council concluded that full disclosure of the information contained in the documents "*could cause one or the other institution to backtrack from any tentative compromises reached and thereby seriously compromise the conclusion of a final agreement on this subject*."

49. The Council concluded that there was no evidence suggesting the existence of an overriding public interest in disclosure. It concluded that in accordance with Article 4(3) first subparagraph of Regulation 1049/2001 "*until the formal adoption of the act by the two co-legislators*" the documents had to remain confidential.

[22] Annex 18
[23] Annex 19
[24] Annex 20
[25] Annex 21

50. On 12 February 2014, ClientEarth submitted a confirmatory application requesting the Council to reconsider its decision not to provide full access to the requested documents on the following grounds[26]:

51. a. The information withheld is the Council's position in view of the second and third trilogue meetings as well as the comments and compromise proposals made in the four columns table. The Presidency proposals to the delegations in view of the first, second and third trilogues are also kept confidential. As a result, the Council's and Presidency's respective positions within the negotiations are not made public during the trilogue process, the aim of which is to achieve a first reading agreement on a very important file.

52. b. The risk of having the decision-making undermined is purely hypothetical. The use of the word “could” demonstrates that the Council is purporting allegations that cannot justify the use of Article 4(3) of Regulation 1049/2001.

53. c. The internal decision-making process of the Council would not be seriously undermined by disclosure.

54. d. The fact that the file discussed is a very sensitive one is not an argument to keep the Council’s position confidential.

55. e. The process leading to the adoption of the review of the EIA Directive is a legislative process. Article 12(2) of Regulation 1049/2001 stresses the fact that "legislative documents" should be made directly accessible through the public registers.

56. f. The trilogue procedure is not provided for by the EU Treaties and yet it is completely confidential. Disclosing information only once the law is adopted is in breach of the Aarhus Convention, Regulation 1367/2006 and Regulation 1049/2001 as interpreted by the EU Courts.

57. On 27 March 2014, the Council granted full access to the documents[27]. Justification for this decision is that the "*Council has taken account of the current stage of the negotiations and the fact that the European Parliament has voted on this proposal on 12 March 2014 and that the adoption by the Council is expected to intervene in the coming weeks*". The Council adds that "*having regard to the current state of play of the legislative file concerned, full public access may now be granted to the requested documents*".

### Application addressed to the European Parliament

58. On 10 December 2013, ClientEarth made a request to the European Parliament to access the same documents as those requested from the Commission and the Council[28].

59. On 10 January 2014, the European Parliament provided partial access to the documents they had identified as corresponding to the request[29]. These were four feedback notes they drafted after trilogue meetings disclosing the EP statements in the negotiations on several topics. They stated that since the request had also been made to the two other institutions,

[26] Annex 22
[27] Annex 23
[28] Annex 24
[29] Annex 25

they only disclosed the Parliament's statements as reported in these documents and not the ones of the two other institutions, namely the Commission and the Council.

60. The Parliament did not even justify why only partial access was provided, nor did they specify the exceptions under Regulation 1049/2001 that had been applied.

61. On 31 January 2014, ClientEarth submitted a confirmatory application requesting the Parliament to reconsider the decision not to provide full access to the requested documents on the following grounds[30]:

62. a. In withholding the positions of the Commission and the Council, the European Parliament does not disclose the requested information about the discussion that took place within the trilogue meetings. We therefore consider that our request has not been satisfied.

63. b. An institution can only refuse access to information if it falls under the scope of an exception in accordance with Article 4 of Regulation 1049/2001. The fact that the documents reveal the positions of the other institutions is not a reason allowed by the regulation and the Aarhus Convention not to disclose information.

64. c. Because of the redaction of sentences, the notes are incomprehensible.

65. d. Article 5 of Regulation 1367/2006 requires a certain standard of "quality of the environmental information" disclosed.

66. e. The process leading to the adoption of the review of the EIA Directive is a legislative process. Article 12 (2) of Regulation 1049/2001 stresses that "legislative documents" should be made directly accessible through the public registers. This is confirmed by Article 4 of Regulation 1367/2006.

67. f. The EP has not provided access to the requested information pertaining to the technical meetings that took place between the trilogues and that are mentioned in the feedback notes of the trilogue meetings provided by the EP.

68. On 5 February 2014, the Parliament replied that they had invited ClientEarth to refer back to them in case further assistance was required, and that by doing so they gave us the opportunity to enlarge our research should we need so[31]. Therefore they were not considering ClientEarth's correspondence of 31 January as a confirmatory application.

69. It also stated that since the two other institutions had provided ClientEarth with the requested documents, they would also disclose the entirety of their documents.

70. Despite having been eventually provided with all the documents it had requested, ClientEarth lodges this complaint with the European Ombudsman because the practice of the three EU institutions to hold informal trilogue meetings and not disclose information on the content of these negotiations before the formal adoption of the legislative text in question, is a case of maladministration. This maladministration is exemplified by the procedure concerning the adoption of the 7th EAP and the review of the EIA Directive. However, it is a continued, systematic practice of the three institutions in all legislative files.

[30] Annex 26
[31] Annex 27

71. As explained in more detailed below, the contested decisions breach the rules on access to documents contained in Regulation 1049/2001, the Aarhus Convention, Regulation 1367/2006 and the EU Treaties.

# 1 2. Grounds of complaint

## 1.1 First ground: Misapplication of Article 294, 10(3), 11 and 15(1)(2) TFEU and of the interinstitutional agreement on better law making

72. Article 294(3) TFEU provides that "*The European Parliament shall adopt its position [on a legislative proposal of the Commission] at first reading and communicate it to the Council*". This Parliament position is then available on the internet and published in the EU Official Journal. In this way, each European citizen has the possibility to learn how the elected representatives reacted to the Commission's proposal. When the position of the Parliament plenary is prepared, each individual Member of the European Parliament (MEP) has the possibility to introduce amendments, participate in discussions and bring thereby his opinion to the knowledge of his parliamentary colleagues. The Commission proposal is thus subject to detailed discussion within the EP, within the different political groups and among the different MEPs. These discussions allow the public at large to be informed about the arguments exchanged, the position of the different political groups and of the MEPS and the interests at stake before the Council adopts its position and the directive is adopted.

*73.* The same holds true for the adoption of the Council's position. Article 294(4) and (5) provide that "*If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.*

74. *If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament*."

75. Article 15(2) TFEU specifies that "*The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act*." Public discussion of legislative proposals is the essence of democratic decision-making and contributes to making decision-makers accountable.

76. The trilogue meetings are therefore not foreseen by the EU Treaties and prevent this public participation from taking place and make the discussion between the three institutions completely opaque. In effect, the trilogue meetings fusion the two stages of the legislative process described above into one. Trilogue negotiations are now commonplace and systematically take place before the EP has held a plenary vote on the legislation in question, as in the case of the the 7th EAP and the EIA Directive. Indeed, although the Parliament had not adopted its first reading position officially, the Council and the European Parliament had already agreed on the final draft. The political process was concluded through the trilogue meetings and validated formally by first reading votes in the EP and the Council.

77. The trilogue meetings, where only very few members of the European Parliament take part - according to the extracts which were transmitted to ClientEarth, four members were present at the first meeting, two at the second and three at the third - cannot replace the participation

of the public and of all MEPs in the discussion on Commission legislative proposals. The documents which the three institutions disclosed to ClientEarth clearly demonstrate that the Parliamentary feedback, which the members of Parliament who participate in the trilogue discussions give to their colleagues in the Environment Committee, is insufficient to allow them to form an opinion on the arguments exchanged, on the vigour with which positions of some members of Parliament were defended during the trilogue negotiations and why the representatives of the European Parliament in the trilogue meetings accepted or rejected the compromise text.

78. Contrary to the trilogue meetings practice, the Treaties stress the obligation for institutions to act transparently. Article 15 TFEU provides that "*In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible*". Article 10(3) TEU states that "*Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen*". Article 11 TEU adds that "[t*]he institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society*".

79. This legal framework undeniably requires EU institutions to be transparent and do their utmost to involve the public in the adoption of their decisions.

80. Article 295 TFEU allows the conclusion of interinstitutional agreements. However, the interinstitutional agreement on better law-making[32] does not provide any reference to trilogue meetings. Rather, it emphasises the obligation to act transparently. Article 2 provides that the three institutions "*agree to promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process*."

81. Article 6 states that "*The three institutions will keep each other permanently informed about their work throughout the legislative process. This information will be based on appropriate procedures, including dialogue between the European Parliament, in committee and plenary, and the Council Presidency and the Commission*." It is logical and necessary that the institutions keep each other informed about the work done within a legislative process. However, informing does not mean negotiating and taking definitive decisions.

82. More specifically, the agreement contains a section on "Greater transparency and accessibility". Article 10 provides that "*The three institutions confirm the importance which they attach to greater transparency and to the increased provision of information to the public at every stage of their legislative work, whilst taking into account their respective rules of procedure*".

83. The practice of holding trilogue meetings runs contrary to these commitments. They are an additional stage in the legislative process that adds confidentiality and opaqueness. The three institutions therefore also breach the transparency requirements of the agreement.

84. Even if the interinstitutional agreement provided for the organisation of trilogues, it could not circumvent the provisions of the EU Treaties setting out the different stages of the legislative process and stressing its public and transparent nature.

[32] European Parliament Council Commission Interinstitutional Agreement on Better Law-making (2003/C 321/01).

85. The practice of trilogue meetings therefore breaches the EU Treaties and the interinstitutional agreement on better law-making.

## 1.2 Second ground: Misapplication of Article 4(3) of Regulation 1049/2001

86. With regard to the process leading to the adoption of the 7th EAP, we will only address the Commission's arguments since the two other institutions provided access to the requested documents. We will however, make some comments on the type of information provided by the Council and the European Parliament.

87. With regard to the review of the EIA Directive we will address the arguments of the three institutions.

## 1.3 Primary argument: Reports following trilogue meetings are legislative documents for the purpose of Article 12 of Regulation 1049/2001

88. Regulation 1049/2001 gives a right of access to documents held by the EU institutions. This right exists in particular when documents are generated during a legislative procedure. Article 12 of the Regulation first requires the institutions to make documents directly accessible and second creates a specific regime for legislative documents:

89. "*1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institutions concerned.*

90. *2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are leally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible*."

91. The processes leading to the adoption of the Decision on the 7th EAP and the review of the EIA Directive are both legislative processes.

In joined cases C-39/05 and C-52/05, the Court draws from recital 2 and 6 of the Regulation's preamble to conclude that "*openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.*

92. *It is also worth noting that, under the second subparagraph of Article 207(3) EC, the Council is required to define the cases in which it is to be regard as acting in its legislative capacity, with a view to allowing greater access to documents in such cases. Similarly, Article 12(2) of Regulation No 1049/2001 acknowledges the specific nature of the legislative process by providing that documents drawn up or received in the course of procedures for the adoption*

*of acts which are legally binding in or for Member States should be made directly accessible*[33]."

93. This has been confirmed in case C-280/11P[34].

94. The requested documents contain the detail of the discussions between the three institutions within legislative processes that must be provided while the process is ongoing to allow transparency and public participation. Disclosing the information once the law is adopted does not comply with Regulation 1049/2001 as interpreted by the EU courts.

95. Point 28 of the European Parliament resolution on access to documents calls on the Commission, the Council and Parliament "*to ensure the greater transparency of informal trilogues, by holding the meetings in public, publishing documentation including calendars, agendas, minutes, documents examined, amendments, decisions taken, information on Member State delegations and their positions and minutes, in a standardised and easy accessible online environment, by default and without prejudice to the exemptions listed in Article 4(1) of Regulation (EC) No 1049/2001*".

96. The detailed discussion that took place between the Council, the European Parliament and the Commission during the trilogue meetings that is kept confidential by the Commission is precisely what the public should have access to. The decisions reached following discussion within an exclusive and closed group cannot be considered as having been adopted following a democratic process. Confidence and trust among institutions do not ensure transparency and democracy.

97. It is common practice at national level in democratic states that the adoption of laws is discussed in public. The position of each institution is publicly debated. There is no reason justifying a difference at EU institutional level. On the contrary, EU directives and regulations apply to 28 Member States, their adoption should therefore be subject to full transparency and openness.

## 1.4 Secondary argument: The misapplication of Article 4(3), first paragraph, of Regulation 1049/2001

98. Regulation 1049/2001 provides for some exceptions to the right of access to documents, including Article 4(3). However, according to settled case-law, these exceptions have to be interpreted strictly. It is settled case-law that if an institution refuses access it must explain how disclosure of the document could specifically and actually undermine the interest protected by the exception. Moreover, the risk of that interest being undermined must be reasonably foreseeable and must not be purely hypothetical.[35]

99. In case C-280/11, the Court also recalled that within a legislative process "*public access to the entire content of Council documents constitutes the principle, or general rule, and that that principle is subject to exceptions which must be interpreted and applied strictly*"[36].

[33] Joined cases C-39/05 P and C-52/05P, *Sweden and Turco v Council*, ECLI:EU:C:2008:374, paras. 46-47.
[34] Council v Access-Info-Europe, ibid.
[35] Case C-506/08P, *Sweden v Commission and MyTravel Group Inc*, ECLI:EU:C:2011:496, paragraph 76 and the case-law cited.
[36] C-280/11P, para. 35

100. First, the "external pressure" referred to by the Commission is not relevant. What the Commission defines as external pressure is in fact public input, comments from civil society, constituting democratic debate. It is the intent of the Treaty and Regulation 1049/2001 to create this debate and public participation within legislative processes. The "sphere of confidence" also referred to by the Commission with the aim of finding a compromise would not therefore be jeopardised if the process of the trilogue was transparent. It is possible that pressure would be exercised but Article 4(3) of the regulation does not provide that documents must be kept confidential in order to avoid any pressure. Nor does it provide that the decision-making process must be cleared of any interferences.

101. The Court has clarified that: "*As regards the possibility of pressure being applied for the purpose of influencing the content of opinions issued by the Council's legal service, it need merely be pointed out that even if the members of that legal service were subjected to improper pressure to that end, it would be that pressure, and not the possibility of the disclosure of legal opinions, which would compromise that institution's interest in receiving frank, objective and comprehensive advice and it would clearly be incumbent on the Council to take the necessary measures to put a stop to it*."[37]

102. The same reasoning must apply here. The institutions must remain impartial and put a stop to undue external pressure while accepting that diverging opinions and criticism can be expressed.

103. Contrary to the Commission's argument, transparency in the process could in fact enhance the institutions' ability to find a better compromise, one that is nourished by input from civil society. The Commission does not demonstrate how the process would be undermined and how the compromise reached would be jeopardised. It relies on mere assertions which are unsubstantiated by any solid arguments and evidence.

104. Second, the Commission states that identification of the positions put forward by individual representatives and delegations present at the meetings would jeapordise the decision-making process. However, individual representatives and delegations act on behalf of the institutions they work for and the governments they represent, not in their personal capacity. The individual representatives from the Commission defend the Commission's position and act within the mandate and the boundaries that have been decided by the Commission as a whole. Their positions should therefore not be protected. According to the Commission's reasoning, no position of any institutions would ever be disclosed as institutions and governments are always represented by individuals. ClientEarth respects the right of the Commission to withhold personal information on its staff, but this cannot justify a refusal to disclose the Commission's negotiating position in the trilogue meetings. Likewise, in Case C-280/11, the Court of Justice held that the identity of delegations within the Council cannot be kept confidential. The identities of MEPs should also a fortiori be disclosed as they are representing the citizens.

105. The Council argues along the same vein: "These positions were taken strictly with the aim and in the context of achieving a first reading agreement on a very sensitive file". First, the Council did not explain why the review of the EIA Directive was of a particular sensitive nature. The review of the EIA Directive was not more sensitive than any other legislative file. According to the Council's reasoning, legislative files would all be too sensitive to be carried

[37] C-39/05P and C-52/05P, para 64.

out transparently. This completely contradicts the case-law of the Court, Article 12 of Regulation 1049/2001 and is not based on any substantiated grounds.

106. Second, the fact that the context and aim of the process was to achieve a first reading agreement is precisely why the Council's decision is in a breach of Article 4(3) of Regulation 1049/2001. The Council seems to consider that this stage of the legislative process is meaningless and not worth communicating when, in fact, it is the most decisive for the adoption of a directive. The fact that both the Parliament's and the Council's first reading positions are now adopted within the trilogue meetings, rather than according to the transparent procedure set out in the Treaty, makes it even more important that the content of trilogue discussions are disclosed. The Council's arguments therefore plead more in favour of transparency than confidentiality.

107. Further, to demonstrate that the documents requested were not of a particularly sensitive nature, the Court ruled in case C-280/11 that "*not only was the requested documents created as part of the legislative process, but it does not belong to any category of documents in respect of which Regulation No 1049/2001 recognises an interest that specifically merits being protected, such as the category for legal opinions*[38]". The Court adds that "*the proposals for amendment or re-drafting made by the four Member State delegations ... are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive -not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever*."[39]

108. The same considerations apply in the present cases. The trilogue meetings should therefore be held on the premises that they are open and transparent and that the participants agree to have their positions disclosed.

109. The Court has also rejected the argument according to which disclosure would narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussion and the risk that disclosure could cause one or the other institution to backtrack from compromises reached as argued both by the Commission and the Council. In Turco, the document at stake was a legal opinion from the Council's legal service, but the ruling is still relevant for other type of documents adopted within legislative processes. The Court stressed that "*as regards the Commission's arguments that it could be difficult for an institution's legal service which had initially expressed a negative opinion regarding a legislative act in the process of being adopted subsequently to defend the lawfulness of that act if its opinion had been published, it must be stated that such a general argument cannot justify an exception to the openness provided for by Regulation No 1049/2001*".

110. The same must hold true about disclosure of minutes of trilogue meetings. Disclosure of positions of the institutions within these meetings does not prevent them from changing them eventually, providing appropriate explanations are provided.

111. Third, on the disclosure by the Commission of the other institutions' positions, the Commission should nevertheless ensure that its own position is provided. The public can, as ClientEarth did, ask the other institutions for their positions. However, for the sake of good

[38] para. 62
[39] para. 63

administration, there should be a centralised system ensuring that coordinated minutes of these meetings are accessible to give holistic information about the process.

112. Moreover, the Commission cannot allege that "*the reports were drafted for internal, Commission purposes only, in the expectation that they would remain confidential*". The Commission should be fully aware of the requirements under Article 12 of Regulation 1049/2001 and of the need to act openly and transparently within legislative processes. In addition, the reports contain information about external meetings attended by the Commission with other EU institutions not about internal discussions within the Commission. Information about external activities of EU institutions staff should be public information.The reports cannot therefore be considered as having been drafted for internal use. Article 4(3) of the regulation is thus misapplied. Even if they had been drafted for internal use still the Commission should explain how its decision-making process would seriously be undermined by disclosure.

113. With regard to the Commission's last argument on the difference between its notes and those taken by the EP, it is precisely to the information contained in the Commission's notes that the public should have access, namely the content of the discussion, the detail about the positions of the respective institutions and the delegations. The public is entitled to know what the EU institutions discuss, negotiate and decide.

114. The same arguments apply to the decision to withhold the four column tables enshrining the positions of the European Parliament and of the Council.

115. Considering the above, the Commission and the Council have failed to explain how disclosure of the documents could specifically and actually undermine the interest protected by the exception. The risk of the decision-making process being seriously undermined is therefore purely hypothetical and not reasonably foreseeable and has therefore also breached their duty to duly motivate its decision as provided by Article 296 TFEU.

116. We do, however, accept the Commission's arguments with regard to the GRI fiches and no longer ask to access them.

## Lack of clarity and completeness of the information

117. We welcomed within the adoption of the 7th EAP the fact that the Parliament provided us with access to the requested documents. However, the fact that the text of the amendments were not reproduced made it very difficult to understand the discussion that had taken place and the decisions adopted. For the information to be complete and comprehensible, the Parliament should have attached the texts of the amendments or the directive as amended. Otherwise, it is just a succession of numbers without any meaning. The aim of having access to these documents is that the public understands the decisions that are being adopted and is able to provide input, support or opposition to some of the compromises that are being made. The format of the Parliament's reply does not allow genuine transparency and public participation.

118. The Council gave access to the documents pertaining to the adoption of the 7th EAP listed in their public register but these were not minutes of the meetings, they were notes in preparation of the meetings. These contain a good deal of information on the positions of the Member States but do not encapsulate the discussion within the meetings.

## 1.5 Third arguments : Misapplication of the overriding public interest test of Article 4(3) first paragraph of Regulation 1049/2001 and failure to state reasons

119. Even if the decision-making process would be undermined, there would anyway be an overriding public interest in disclosure of the documents for the reasons set out below. The Council just states that there was no evidence suggesting the existence of an overriding public interest in disclosure. The Commission seeks to demonstrate that there is no overriding public interest in disclosing the documents with reference to the fact that the public already has full access to the Commission proposal, the amendments proposed by the EP's Environmental Committee, and the policy options considered by the Commission as reflected in the Impact Assessment.

120. However, the proposal and the impact assessment are adopted at a different stage of the decision-making process to the trilogue meetings. Impact assessments are carried out before the legislative proposal is adopted, while trilogue meetings are held in order to reach a compromise between the three institutions and adopt the final text of the directive. The information contained in the requested documents is thus very different to that available in the documents referred to by the Commission. This argument of the Commission must be rejected outright.

*121.* More worryingly, the Commission completely distorts the Turco rulings from the Court of Justice. Indeed, the Commission states that "*in accordance with the principles of representative democracy and democratic control (Article 10(1) TEU), citizens are represented by the institutions of the Union and not directly, and the scrutiny of the result of inter-institutional negotiations should mainly occur ex post and not during the negotiation process. These principles should guide the interpretation of Regulation 1049/2001, whose main objective is to reinforce openness and democracy, but within certain limits. Indeed, a direct and continuous interference of the public with on-going legislative processes would seriously compromise those processes and the functioning of the structures of representative democracy of the Union."*

122. This interpretation of the Turco ruling and the EU Treaty could not be more wrong and should be corrected in the strongest way by the European Ombudsman.

123. In fact, the Court referred to the "*advantages stemming ... from increased openness, in that it enables citizens to participate more closely in the decision-making process* ...".

124. The Court also stated that "such an overriding public interest is constituted by the fact that disclosure of documents containing the advice of an institution's legal service on legal questions arising when legislative initiatives are being debated [emphasis added] increases the transparency *and openness of the legislative process and strengthens the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No 1049/2001*". The use of the words "are being debated" demonstrates that the Court requires that information is provided while the discussion is on-going.

125. Participating in a process implies that it is on-going and that input can be provided in order to have influence. Participation is defined and understood as the action of taking part in something. Once that process is over and the decision is taken, no participation can take place anymore. Arguing as the Commission does empties the Court's ruling in the Turco case of its substance and meaning.

126. The Commission's interpretation of Article 10(2) TFEU is also incorrect. Article 10(2) TFEU states that, "*Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens*".

127. Therefore, these institutions cannot take decisions that impact the lives of EU citizens in secret and claim confidentiality. The Commission does not explain why, according to the concepts of representative democracy and democratic control, it is in the public interest for the institutions to act in confidentiality and only inform the citizens to which they are accountable once their decisions are finally adopted. The Commission misinterprets the link between the two concepts.

128. As stated above, even if disclosure of the requested documents would undermine the decision-making process of the institutions, the documents should nevertheless be disclosed as there is an overriding public interest in disclosure.

129. The review of the EIA directive will affect the lives of every single person living in the EU and possibly abroad because of the impact it will have on the environment they live in as well as their health. The trilogue negotiations effectively decide how the industrial projects' impacts on the EU people's environment will be assessed under the directive, how they can be avoided and compensated for or not. The public has the right to know the considerations that influence these decisions and be able to comment, participate, oppose or support the decisions before they are finalised. This right should be upheld by the institutions involved in this process. We refer to the arguments we put forward in our confirmatory application with regard to the existence of an overriding public interest in disclosing the requested information about the 7th EAP.

130. Keeping the Commission's and the Council's positions confidential prevents the organization of democratic debate and prevents Member State governments from being accountable to their electorate with regard to the decisions they adopt at EU level. We see very clearly that citizens all over the EU require greater transparency and more democratic behaviour from their representatives, in order to maintain confidence in the EU institutions and their activities. The secrecy which the Council and the Commission maintain with regard to the content of trilogue meetings will only increase "Eurosceptic" opinion, to the detriment of the Council, the Member States and the EU as a whole.

131. The practice of the three institutions to hold informal meetings (trilogue meetings) on legislative proposals and to release the complete documents of the these meetings (minutes, position papers etc) only after the end of the legislative procedure in question, breaches Article 12 and 4(3) first paragraph of Regulation 1049/2001.

### 1.6 Third ground: Misapplication of Article 11 of Regulation 1049/2001 and 4 of Regulation 1367/2006

132. The three institutions should actively disseminate the documents used within the trilogue meetings as well as the reports and minutes following the meetings and make these directly accessible to the public through their registers. As already mentioned, Article 12 of Regulation 1049/2001 requires the institutions to provide access to documents held by institutions and in particular, legislative documents, through the public registers.

133. Article 4 of Regulation 1367/2006 confirms that obligation in environmental matters with stronger wording:

134. "*Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and* ***systematic dissemination to the public****, in particular by means of computer telecommunication and/or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation (EC) No 1049/2001*."

135. Listing the number of documents adopted and used within the meetings is not enough, the actual documents must be provided.

136. Actively disseminating information will reduce the access to documents requests and in turn the workload of the institutions. Publishing the documents is required and necessary, especially since the meetings are usually organised within a very short time-frame. Meetings generally take place once every week. Making access to documents requests therefore does not allow the public to have access to the documents in time to be able to react, comment and take part in the decision-making process.

137. By not actively disseminating all the relevant documents, the institutions breach Article 11 of Regulation 1049/2001 and 4 of Regulation 1367/2006.

## Conclusion

138. The practice of the three institutions of holding informal meetings on legislative proposals and releasing the relevant documents in their entirety (minutes, position papers etc) only after the end of the legislative procedure in question constitutes maladministration and is incompatible with Articles 15(2) and 294 TFEU and Articles 12, 4(3) first paragraph of Regulation 1049/2001. The institutions have also breached their duty to duly motivate their decisions as provided by Article 296 TFEU.

139. The institutions have also breached Article 11 of Regulation 1049/2001 and Article 4 of Regulation 1367/2006.

140. In addition to being more transparent in giving access to the minutes of the trilogue meetings and the relevant supporting documents used by the institutions to adopt first reading positions, there should be greater consistency within institutions on the information they provide about each meeting. The institutions should also ensure a more coordinated

approach among the three institutions to report on the meetings so the public has access to a more holistic access to the discussion taking place on pieces of legislation.