



European Scrutiny Committee

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From: Sir William Cash MP

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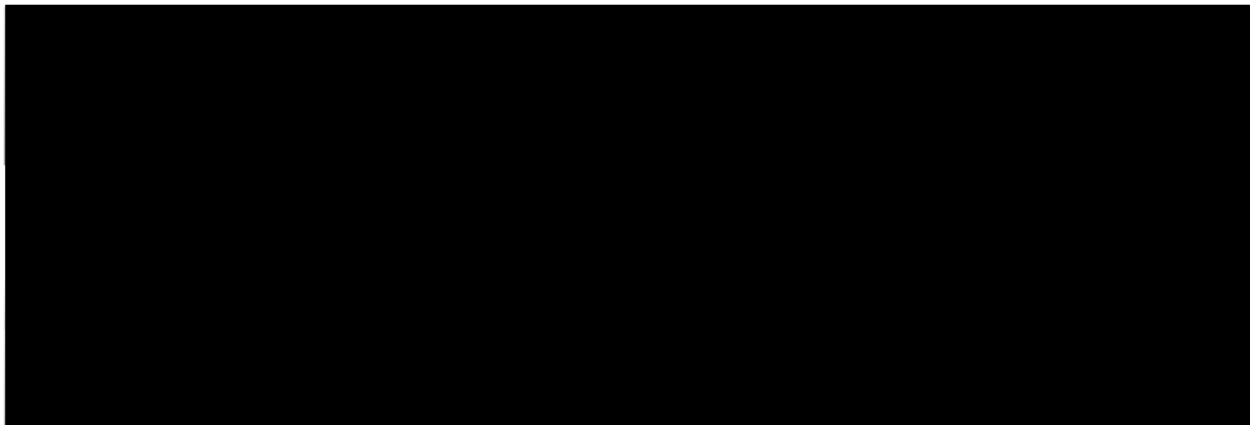
Date d'arrivée



Your inquiry into the transparency of trilogues: submission of the European Scrutiny Committee of the UK House of Commons

The European Scrutiny Committee of the House of Commons has decided to respond to your public consultation on the transparency of trilogues. As Chairman of the Committee, I attach the Committee's submission (dated 9 March), based on the questions outlined for the public consultation.

We look forward to learning the outcome of the consultation and the inquiry in due course. In the meantime, please do not hesitate to contact Committee staff who have been dealing with the submission with any queries: the Committee clerk, [REDACTED] ([REDACTED]) and the Committee's Assistant Legal Adviser [REDACTED]



CHAIRMAN

SUBMISSION OF THE EUROPEAN SCRUTINY COMMITTEE OF THE HOUSE OF COMMONS TO THE EU OMBUDSMAN'S INQUIRY INTO TRILOGUES

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.

1.1 As a national Parliamentary committee tasked with the role of scrutinising EU documents, we agree with the submission made by the EU Affairs Committee of the Dutch House of Representatives¹: that the trilogue process is not transparent in terms the timing, duration and substance of the negotiations and that reliance on national Governments for sight of limited documentation can be problematic both in terms of consistency and confidentiality restrictions. We further agree that these issues make the task of scrutinising both the legislative process and the Government's position more difficult. As most legislative proposals are agreed at the First Reading stage², transparency of trilogues preceding transparency of those early agreements is critical to the EU democratic legitimacy. In this respect we ask the Ombudsman to note the following:

- Our predecessor Committee said in its Report on "Reforming the European Scrutiny System in the House of Commons"³ that: "The establishment of the ordinary legislative procedure as the norm of EU decision-making presents serious challenges for all national scrutiny systems, given that the vast majority of legislation is agreed to at the first reading stage. The unpredictable nature of first reading deals and trilogue negotiations can render scrutiny at national level difficult, if not impossible".⁴
- It also noted that "Concerns have been expressed about the impact of these closed negotiations from all sides". It then cited evidence given to the Committee by Sir Jon Cunliffe (at the time, the UK's Permanent Representative to the EU). He observed that "the [European] Parliament at President level has tried to constrain the first reading process ... there is a feeling that the Parliament as a whole is unaware of what is happening." The then Committee also observed that the Parliament had amended its Rules of Procedure to provide for the plenary to approve negotiating mandates prior to trilogues taking place and also set out how the trilogue process should be conducted from the European Parliament side."⁵
- In addition, our predecessors observed: "Proposals may change significantly as a result of compromise agreements negotiated with the European Parliament after the relevant EP Committee has scrutinised the Council's 'common position' or 'general approach' and

¹ Submission dated 3 February 2016. Hereafter we refer to the Dutch House of Representatives

² Over the whole of the 2009-14 legislature, 85% of legislative proposals were agreed at first reading, 8% at early second reading, 5% at second reading and 2% at third reading (conciliation). From July 2014 – February 2016, the corresponding figures are 80% (first), 15% (early second), and 5% (second). Source: [EP website](#). The impetus of achieving a first reading deal may also explain why trilogues, including all the break-out sessions, are often conducted until late at night and on consecutive nights in order to achieve consensus – this may not be conducive to achieving optimum outcomes.

³ Twenty fourth Report, HC 109-I (2013-14), 28 November 2013.

⁴ See previous footnote, para 73.

⁵ See previous footnote, para 74.

significant new provisions may emerge at a late stage during trilogue negotiations which have never been subject to scrutiny, for example the European Parliament amendments on bankers' bonuses which arose as part of the EU CRD IV negotiations".⁶ It is worth noting that such significant changes are not the subject of a revised Impact Assessment, unless requested by the relevant EP committee, leaving national Parliaments (and Governments) unable to identify how costly or burdensome they will be.

- Commenting that national Parliamentary scrutiny has struggled to keep pace with these changes, our predecessors stated: "In our Report on the 2008–09 Session, published in January 2010,⁷ we commented that we were: "particularly concerned about the use of 'informal trilogues', a forum for confidential and binding negotiations, as part of the first reading agreement process. Informal trilogues consist of a representative of the relevant European Parliament committee (usually the rapporteur), the Commission, and the Presidency. No other Member State is present, so it is difficult for governments to follow the course of trilogue negotiations and to feed in their views, but it is well-nigh impossible for national parliaments to do so at any appropriate point. Once a compromise text has been agreed in an informal trilogue, the chair of COREPER writes to the chair of the European Parliament committee informing them of the agreed compromise. Neither the Council nor the European Parliament may change a text agreed in an informal trilogue. In practice, we ourselves are not told of trilogue changes until too late – once the negotiation is concluded"⁸.
- Our predecessors then focussed on making recommendations in the 2013 Report to encourage Government best practice in providing us with a copy of limited trilogue texts on a confidential basis and also summaries that could be placed in the public domain. However, we would be supportive of any action at EU institutional level to release summaries of institutional positions (the four columned documents) and, preferably, well before the conclusion of trilogues (note our observations at 3.2).

1.2 We also note that the issue of transparency of trilogues is of wider concern:

1.2.1 The Commission has included the transparency of trilogues among the issues to be discussed with the context of agreeing the proposed Interinstitutional Agreement (IIA):

- The IIA, as originally proposed, notes that the EU institutions would co-ordinate the legislative process and transparency by making public "their preparatory and legislative work ... in an appropriate fashion" and by ensuring "an appropriate degree of transparency of the legislative process, including of trilateral negotiations between the three institutions".
- We said in our conclusion to our first Report⁹ on the IIA: "our predecessor Committee drew the attention of the House to the difficulties of scrutiny due to the prevalence of

⁶ See previous footnote, Para 75.

⁷ Sixth Report, HC 267, (2009-10), 6 January 2010, paragraph 21.

⁸ Twenty fourth Report, HC 109-I (2013-14), 28 November 2013, para 76.

⁹ First Report, HC 342-I (2015-16), chapter 1 (21 July 2015)

documents being classified as *Limité*. This makes scrutiny of trilogue negotiations involving the European Parliament, the Council and the Commission particularly difficult. Increased transparency during the legislative process would alleviate this difficulty, but we note, with disappointment, that paragraph 28 of the proposed IIA retains the equivocation of its 2003 predecessor as to the obligation of the institutions to be transparent in respect of trilogue negotiations. In this context we also draw the attention of the House to the fact that the European Ombudsman has opened an inquiry into the transparency of trilogues based on her concern that they be conducted in a manner which can be reconciled with the requirements as to the transparency of the legislative procedure, set out in Article 15(2) and (3) TFEU”.

- In our second Report¹⁰, we noted that the latest version of the IIA¹¹ “makes little significant improvement to the transparency of the EU legislative process, which is also a matter of concern. This issue is likely to remain in the public domain due to the inquiry currently being undertaken by the EU Ombudsman into the transparency of trilogues”. This issue was one of a number of issues concerning Better Regulation which was debated in European Committee on 8 February 2016.¹²

1.2.2 The CJEU has indicated in its judgment in *Access Info*¹³ that there is no automatic non-disclosure of Council documentation. In other words, the Member States negotiating positions are not always wholly or partially sensitive and can, in any event, be redacted selectively.

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.

2.1 We agree with the Dutch House of Representatives that greater transparency will enhance the democratic legitimacy of the EU and make the workings of the institutions more accessible to the EU citizen. It is important to realise that public trust is dependent on the EU legislative process affording a comparable level of transparency to national legislative processes with which EU citizens will be more familiar. For example, in the UK legislative process differences of opinion between the two Chambers are dealt with

¹⁰ Twenty-Second Report, HC 342-xxi (2015-16), chapter 1 (3 February 2016)

¹¹ The proposed Interinstitutional Agreement, originally published in May 2015, was subject to negotiations leading to the “political endorsement” of a “final provisional” text by the General Affairs Council on 15 December 2015 of a document now entitled “Interinstitutional Agreement on Better Law-Making” was given “political endorsement”. This text remains to be considered by the Constitutional Affairs Committee of the European Parliament, with an expectation of a vote at a March plenary session of the European Parliament. A formal vote in the Council is now scheduled for 16 February

¹² See <http://www.publications.parliament.uk/pa/cm201516/cmgeneral/euro/160208/c/160208s01.pdf>

¹³ C-280/11P, Council v Access Info Europe, 17 October 2013. The CJEU stated that “it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature”.

formally on the basis of written amendments which are published, and available on the Parliamentary website and are debated in public.

2.2 Noting that this question addresses not just trilogues, but the transparency of the overall EU legislative process, we draw the Ombudsman's attention to oral evidence provided by Professor Simon Hix to our predecessor Committee's inquiry "Reforming the European Scrutiny System in the House of Commons"¹⁴:

- Drawing an analogy with national legislative processes, he said when asked about transparency of documentation relevant to the EU legislative process: "In my opinion, once the Commission has put out the door a draft directive or draft regulation, anything beyond that point that proposes amendments to it should be in the public domain, because these are legislative scrutiny documents. That is how it would be in Congress. That is how it is for anything the European Parliament produces as any report in a Committee or anything. That should be the equivalent standard for the Council. I do not understand why there is one standard for the European Parliament and one standard for the Council. The standards should be the same".¹⁵
- He also underlined the importance of the Council's role as a co-legislator and the need for increased openness: "The Council I still think is an incredibly secretive institution. With VoteWatch, it is so much easier to track the European Parliament. Some of you are, understandably, sceptical of the European Parliament, but from our point of view as people interested in trying to provide information about what is actually going on in the legislative process, the European Parliament is streets ahead of the Council. The Council operates primarily very much as a diplomatic body, rather than seeing itself as a legislative body."¹⁶

2.3 The Committee has decided to undertake a short inquiry into the transparency of Council decision making to explore this further.

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.

3.1 We agree with the position of the Dutch House of Representatives that formal and regular publication of the trilogue agenda would enhance national Parliaments' ability to scrutinise their own Government's position (in terms of proactively seeking updates from Government), may be of wider interest to members of the national Parliament and improve overall public visibility.

3.2 We also agree that at the very least, the four columned document should be published as soon as possible on the completion of negotiations as this assists national Parliaments in assessing how closely the institutions are following their mandates (assuming all

¹⁴ Twenty fourth Report, HC 109-I (2013-14), 28 November 2013.

¹⁵ Evidence Session before the Committee, 12 June 2013, Q440, Professor Simon Hix

¹⁶ See previous footnote: Q431, Professor Simon Hix

mandates will be made available prior to the negotiations – see our answer to 6). Although the optimum position would be for four columned tables to be published as trilogues progress, we recognise that it would be a material and manageable improvement for the purposes of national Parliamentary scrutiny to be able to compare the initial mandates of all three institutions with the final four columned document.

3.3 We set out some examples of where access to the four columned document or a Government summary of the document has assisted our scrutiny:

3.3.1 The Committee was assisted by the provision of a Government summary of a final four columned document once trilogues has completed in the case of the proposed Data Protection package ¹⁷(see our Report).¹⁸

3.3.2 Even better transparency was achieved through the public release in December 2015 of the four columned table used in trilogue negotiations of the proposed Directive on shareholders' rights and corporate governance¹⁹. Although this development was justified not least by the fact that the EP had already made its informal position public, it was significant because the table was placed in the public domain before the final completion of trilogues (which are still ongoing). That significance should be viewed in the context of the Council's own submission to this inquiry where it has said that:

- after final adoption of a legislative act, it makes the four column documents available to the public via the public register;
- before then, the documents can be made available to the public in response to a request under the Regulation 1049/2001, unless the Council's General Secretariat considers that the requested disclosure would seriously undermine the ongoing decision-making process (a ground for refusal under Article 4 of the Regulation, unless overriding public interest can be established).

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?

¹⁷ (1) Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 5853/12;(2) Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, 5833/12.

¹⁸ Twenty-second Report, HC 342-xxi (2015-16), chapter 3 (3 February 2016)

¹⁹ Proposal for a Directive amending Directive 2007/36 as regards the encouragement of long-term shareholder engagement and Directive 2013/34 as regards certain elements of the corporate governance statement, 8847/14, COM (14) 213. See further, letter of 18 December 2015 from Baroness Neville-Rolfe to Sir William Cash, appending the four column table.

4.1 We support the idea advanced by the Dutch House of Representatives that centralised tools for tracking legislative progress, such as EU-LEX, should be used to keep the public informed of the progress of trilogues (though we consider the EP's Legislative Observatory to be a superior example). The public may be familiar with using comparable legislation tracking tools used for national legislation. See, an example from the UK Parliament website, where the legislative tracker also links to available documentation for all stages of the legislative process: <http://services.parliament.uk/bills/2015-16/psychoactivesubstances.html>

4.2 Option (b) is preferable in terms of affording greater transparency. Related to the question of the disclosure of a list of participants, we would like to make the related point that the sizeable number of attendees at trilogue meetings (which we understand can be in the region of 40) would seem to argue for greater transparency²⁰.

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.

5.1 We agree with the Dutch House of Representatives. Affording greater information to national Parliaments/Chambers and the public can only serve to level the playing field in terms of any advantage that lobbyists already have. We also agree that lobbyist pressure should be tackled through regulation aimed at lobbying itself, rather than by depriving national Parliaments and the public of more information.

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.

6. 1 Yes, given that the EP mandate is already available prior to trilogues²¹, it would seem consistent for the other two institutional mandates of the Commission and Council to be similarly made available. We agree with the Dutch House of Representatives that the focus should be on the Council in this respect. This is because the Commission has at least set out its position in the Explanatory Memorandum to its proposal, whereas it is quite often the case that the Council's General Approach is still classified as "limité" before and during trilogues.

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?

7.1 Please see our answer to 4.1, supporting our Dutch colleagues' idea of incorporating the progress of trilogues and any available documentation into an EU centralised legislative tracker such as EU-LEX.

8. Do you consider that, in relation to transparency, a distinction should be made between "political trilogues" involving the political representatives of the institutions

²⁰ Even bearing in mind that we understand that all participants are reminded of the need for confidentiality.

²¹ We understand that in some circumstances this can just comprise the draft Report of the relevant EP Committee on the EP's 1st reading position, without plenary support.

and technical meetings conducted by civil servants where no political decisions should be taken?

8.1 We consider that there is some comparison to be made here between formal meetings of Council (with Ministers) and COREPER: often the “technical” preparatory work of COREPER is so advanced that it only requires rubber-stamping by the Council of Ministers²². If technical meetings of civil servants in trilogues follow this same model, then there is less reason to draw a distinction. However, we recognise the point made by our Dutch colleagues that extension of the same transparency requirements for political meetings to technical meetings could result in disproportionate administrative burdens.

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

²² As our predecessors noted in their Scrutiny Inquiry Report: “Coreper is described by the EU’s official website as occupying “a pivotal position in the Community decision-making system, in which it is both a forum for dialogue (among the Permanent Representatives and between them and their respective national capitals) and a means of political control (guidance and supervision of the work of the expert groups).”The influence and power which it exercises on legislation is demonstrated by the fact that the agendas for Council meetings reflect the progress made in Coreper, consisting of A items, which are normally approved without discussion following agreement within Coreper, and B items, for discussion...” This, and other evidence taken, led the previous Committee to conclude “the current process of Council decision-making and the role of Coreper and UKRep greatly obscures the position of individual Member States, and it is clear that Governments fall back on consensus if they know they are likely to be outvoted. This raises serious questions, given that some of the issues being decided would be the subject of an Act of Parliament if taken through domestic legislation” (see paragraphs 82 and 99)