UNIVERSITY *of* LIMERICK

O L L S C O I L   L U I M N I G H

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European Ombudsman public consultation on the transparency of trilogues

Dear Sir or Madam,

Please find attached my comments regarding the points raised by the European Ombudsman's public consultation on the transparency of trilogues.

Yours sincerely,

Frank Häge

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.**

No, the main issue is that, in many instances, it is not clear what the positions of the legislative institutions are when they enter trilogue negotiations. In some instances, documents detailing the initial positions of legislative institutions do not exist. And even when they do, it is almost impossible for the non-expert to identify and find them. My experience in teaching students about EU policy making processes also indicates that the non-correspondence between the elaborate formal procedure and actual decision making processes is extremely confusing; not at last because the Commission's and the EP's databases providing legislative process information (Eur-Lex and legislative observatory) do not clearly indicate when a decision has been reached through a trilogue but maintain the fiction of the process following the formal procedure formulated in the Treaties.
As a result of missing policy positions for the institutions at the start of negotiations, responsibility for policy outcomes cannot be attributed to one or the other. In fact, looking only at the institutions' databases and documents linked from there, responsibility is likely to be misallocated at least in part. For example, to the uninitiated, the Eur-Lex and legislative observatory entries of first reading agreements look like the EP's first reading amendments were fully accepted by the Council without changes, although these 'EP' amendments constitute in fact a compromise between the two institutions reached through informal trilogues.

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.**

More transparency during negotiations may impede decision-making efficiency, because it may lead to negotiators' room for compromise being curtailed. I also do not think that there is a convincing normative argument to be made that such transparency is required to improve the democratic legitimacy of the EU. However, for reasons of accountability, it should be clear with what positions the institutions entered the negotiations and what the reasons for those positions were.

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 Council releases these documents already once an agreement has been reached, but one has to be familiar with the Council's register of documents to be able to find them, and one has to know that these types of documents exist in the first place. The average citizen has neither the knowledge nor the skills to identify these documents. And of course, they are not included in the register of the Council in those cases were they were maintained by Parliament. To have any effect, these documents need to be posted on Eur-Lex and the legislative observatory. If no other documents exist that detail the institutions' positions at the start of negotiations, I think the initial version of the four-column document should be published at that point in time. I do not think that information on the progress of negotiations needs to be published in real-time (see reasons given in comment to previous point), but the relevant documents should be made available once negotiations are over. The public needs to be able to understand how policy outcomes were arrived at to be able to hold policy-makers to account.

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?**

I do not think that the public needs to know in advance when trilogue meetings take place and who takes part in them. However, to hold policy-makers to account, the public needs to be able to see at least after the fact when meetings have been taken place, what topics were discussed, what general conclusions have been reached, and who participated in those meetings. Identifying the particular people involved in the negotiations is of particular importance for the EP delegation (because MEPs are personally and directly accountable to citizens, while the Council is represented by government representatives, who are often civil servants). The publication of abbreviated minutes, similar to EP committee minutes, after negotiations have been concluded would go a long way in making the process more transparent.

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.**

That might be possible. Greater transparency introduced in one decision-making arena often leads to a relocation of 'real' decision-making to less transparent settings. The net-result is no gain or even a further loss of transparency.

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. Presumably, the Commission's position is outlined in its initial proposal already. However, documents outlining the positions of the Council and the EP are not available in all or even most cases. Without the publication of such documents, it is impossible to attribute responsibility for policy outcomes to a particular institution, which is a precondition for allowing citizens to hold policy-makers in those institutions to account. To ensure the functioning of a democratic system, it is essential that citizens have the possibility to learn what policy positions their legislators advocate.

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?

Eur-Lex and the legislative observatory should explicitly state when an early agreement has been reached through informal trilogues and indicate the dates of meetings, links to agendas and four-column documents (especially to the first one; to others once negotiations have been concluded), as well as abridged minutes (indicating general topics for discussion and outcomes, as well as attendance - similar to EP committee minutes).

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, it is impossible to make a general, abstract distinction between technical and political decisions. What is considered to be technical or political is mainly a result of the degree of conflict in positions of legislators. It has little to do with inherent characteristics of the subject matter under negotiation.

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

An increasingly serious problem with access to documents is not that documents are not released, but that they are not produced at all, or that they are not produced in a form that makes them easily identifiable for the public by requiring their automatic inclusion in the register of an institution. For example, a large number of 'working documents', 'DS'-coded documents, 'Presidency Flashes', 'non-papers', emails, or

indeed any other document without an 'ST'- or 'CM'-code, that the Ombudsman was able to inspect for two files as part of this inquiry are not, as a matter of course, included in the Council's register. In my experience with requesting access to Council documents, these types of documents are often only supplied if specifically asked for (i.e. if other ST-coded documents mention them and the requester learns in that way about their existence). If general requests are made for access to all documents relating to a certain file, these types of documents are usually not produced. My (admittedly subjective) impression from various requests to documents and extensive experience in using the Council's register for my own research is that transparency requirements are being increasingly circumvented in that way. I have less experience with requesting documents from the EP, but I would not be surprised if many of those documents are not readily supplied either in response to generally worded requests for access to documents (e.g. agendas of shadow meetings, background documents, feedback notes, etc.).