



accessnow

ACCESS NOW'S SUBMISSION TO THE EUROPEAN OMBUDSMAN CONSULTATION ON TRILOGUES PROCESSES

The Ombudsman invites you to give your views on the following points:

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 trilogue negotiation process is often labeled as the 'black box' of European decision-making by media and academics alike due to its lack of transparency and non-existent democratic accountability. The process itself is not established by the treaties or rules of procedures and yet the trilogue remains an overwhelmingly dominant feature of legislative process; allowing decision-makers to negotiate European legislation behind closed doors. This is in contradiction to the relative transparency and accountability taking place in the legislative process up to the start of the trilogue. Early on, from the Commission's consultation to the launch of the trilogue, the institutions publish impact assessments, proposals, revisions, reports, amendments, and organise relevant workshops and debates. While further efforts should be made to improve the transparency on compromise amendments, civil society groups and other stakeholders find themselves utterly in the dark once the trilogue processes initiate.

There are no minutes of meeting nor any recordings of the proceedings and the public is completely blocked out without access to any substantial documents. Data protection is often touted as the reason for extensive non-disclosure not just of the texts, but also of the participants and agenda. This is clearly a broad misuse of that right. In an electoral democracy, this kind of gated negotiation is beyond necessity and it does very little for the EU's reputation amongst its constituents.

Negotiation documents are kept away from the public which can only have ex post access to the multicolumn documents guiding the trilogue discussions, if and when they are deemed shareable by the Commission's General Secretariat and at the discretion of the negotiators, with no oversight. The multicolumn documents serve as a replacement for the codecision procedure as outlined in the Treaty of the European Union (TEU), which inherently takes away a severe amount of the Parliament's as well as the Council's negotiation power. The reasoning behind this black box negotiation table is that it speeds up the legislative process, but

efficiency cannot come at the cost of transparency, accountability and respect for fundamental democratic values. However, data provided by Europe's legislation database known as EUR-lex indicates that there is no upward trend in the amount of passed legislation that would correlate to the trilogues' increasing usage. A European Parliament Report however indicated that the use of trilogues skyrocketed in the post-Lisbon Treaty era. The report suggests that whereas about 4% of EU legislation used to find compromise through trilogue proceedings before 2009, in the post-Lisbon era the number of legislation agreed upon under trilogues is near 80%.

Taking those numbers into consideration, there is no tangible proof that the trilogue process does anything to expedite the lifecycle of legislation. The productivity therefore has not changed; what has changed is *how* we now arrive at legislative compromise. Trilogue negotiations have no clear benefits and bring the discussion 'off the record', which is an unacceptable trespass against the rights of the EU's public.

In light of these problems, there is an obvious need for major reform in order to address the democratic deficit in the decision-making process. All documents, memos, notes and outcomes of negotiations must be under requirement of publication in a timely and systematic manner. The public should also have access to most meetings, in line with the procedures for regular Parliament committee meetings. The disproportional access creates a discrepancy where some processes are more open than others; opening this to all interested parties will increase trust in the institutions at a time when the EU legitimacy deficit is growing. There is a public interest in the timely and systematic disclosure of these documents in order to enable proper public scrutiny and accountability of EU decision-making.

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.

Greater transparency within the trilogue will inherently increase public trust as well as lead to a deeper engagement of the public and civil society representatives, all of which supports the principle of democratic accountability which is currently absent from this process. The status quo hinders transparency specifically in respect to digital disclosure and open government abilities which the Internet can otherwise offer. This undermines citizen trust in EU institutions and raises significant national-level discussions about EU's transparency and responsiveness. Greater transparency for the trilogue should be approached in several steps:

First, the political meetings should be publically available. This can be achieved by either by opening a registered attendance or through video-streaming as has been effectively adopted in the European Parliament.

Second, adequate minutes of meeting need to be kept and there should be a transparent register of all who attended and contributed to the negotiation in question. This documentation should then be made openly available over the internet to uphold stakeholder accountability.

Third, pre-negotiation texts should be released beyond a select few stakeholders; these need to be available not simply for the sake of transparency, but for the sake of the public's and

academia's understanding of the European Union and the internal dialogue that institutions lead.

Fourth, there must be an independent cross-institutional committee to evaluate any challenge the public may have against the trilogue process, whether that is questioning the attendance roster for a certain meeting or challenging the non-disclosure of what should be publicly available texts.

Such improved practices will put all stakeholders on an equal footing. This is no secret that a number of Brussels-based lobbyists get privileged access to documents. This allows them to influence the negotiations behind-closed doors, putting all other interested stakeholders at an unfair - and undemocratic - disadvantage.

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.

There is an urgent need to move beyond the sole discretion of negotiators when it comes to publication of trilogue documents. The public good cannot rely on good practices of a handful of members providing minimum insights into few trialogues, there needs to be strict regulation for this process. The institution's publications clearly indicate that without stricter rules, nothing will change;

Paragraph 17 of the Council's response to this inquiry exemplifies the troublesome nature of their approach to document transparency. In that single paragraph they indicate that they deliberately restrict public access to materials all the while retaining full discretion over the content and information which is released. There is no existing oversight for this self-determined system; an entirely undemocratic and unaccountable characteristic. The proactive publication of trilogue documents should be required of the negotiators, however, as outlined above, this must stretch well beyond the multicolumn documents which are in question here.

Members of the EU Parliament (MEP) have long advocated for a more transparent approach. MEP Sven Giegold stated in an interview, "*documents should be published during the process. What we have is unacceptable because they are public, but only to some... if you make the trialogues transparent, the accountability and integrity problem is solved.*" MEP Giegold went on to describe how there is an internal discrepancy even between the negotiator's access to background position documents and how he was often surprised to hear about their existence from industry lobbyists rather than the Commission or Council. The clear lack of professional integrity and institutional accountability described here can be fully accredited to the fact that there is no formal requirement for these documents to be released in due time and in their full extent.

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?

In addition to the four concrete suggestions outlined in question two of this consultation, announcements regarding the date, place and subject matter of the trilogues should be published in an organised, reliable and systematic manner on the Commission website. This should extend to include a detailed planned meeting agenda alongside a list of both proposed and invited participants. The same procedure should be observed for any follow-up meetings, although this announcement (including an agenda and participant list) should be accompanied by detailed minutes of meeting from the previous session.

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.

No evidence has ever been given to support this claim. In fact, awareness of the trilogues can lead to a more diverse dialogue between the MEPs and their constituents as well as other stakeholders. Limiting transparency for this reason only damages democratic principles and erodes public trust in the negotiation process; it does not alleviate or restrain lobbyist pressures. In fact, a lack of transparency can actually benefit ‘institutionalized lobbying.’ It creates an advantage for full time lobbyists in Brussels who can potentially get a copy of the discussed documents from friendly contacts. The lack of transparency in trilogue negotiations feeds into a culture of closed door negotiations, in stark contradiction to core EU values.

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.

Article 2 of the Interinstitutional agreement on better law-making establishes; “democratic legitimacy, subsidiarity and proportionality, and legal certainty.” It goes on to outline that the three institutions “agree to promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process.” It is time to hold our representatives to the very words they have drafted for themselves; institutional mandates as well as all other trilogue related documents must be made publically accessible. The fact that a vote is taking place on the opening of such an inter-institutional discussion without any public scrutiny shows the need for the creation of a regulated process. More accountable legislators are inherently better legislators.

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 primary issue is that not nearly enough materials are made public to comply with EU's own requirements for public accessibility as established in the Treaties. However, for the documents which are currently being publicised, it would be helpful to have a simplified approach to accessibility. The Commission's website could benefit from a keyword search; not always is the general public aware of who the representatives driving a negotiation are, this can make searches in the database rather difficult. The multicolumn documents themselves could benefit from being more accessible in terms of presentation. Summaries of what each negotiator came to the table with and what they ended up negotiating would be helpful and it would foster understanding, thereby increasing transparency.

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

Political trilogue negotiations should always be made public as that is where most of the final text is agreed upon, similarly to council ministry meetings which are broadcasted. The public has a right to see into this decision-making procedure.

As for technical meetings, while it can be understood why lawyers, assistants and the secretariat need to have lengthy detailed meetings which might not need to be broadcasted, documents reflecting their respective and agreed positions before the meeting and the positions after the meeting should be made available, as well as a list of participants.

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

The most significant progress to be made regarding the trilogues is regulate their development either in the the institutions rules of procedures or in law. As it stands, they are a haphazard ad hoc mechanism with little transparency, no accountability and no democratic integrity. Without anchoring strict rules for the trilogue negotiations in legislation, we cannot hope to make any meaningful or long term strides in securing transparency and responsibility into the framework.

A significant step in this process should be to establish an adequate oversight committee through which individual negotiators can address their concerns. This would be ideally situated within the office of the EU Ombudsman; this would ensure the neutrality and independence of oversight.

Sources:

Augustyn, Maja. *Transparency and Access to Documents in the EU: Ten Years on from the Adoption of Regulation 1049/2001*. EIPA. Available at:

http://www.eipa.eu/files/repository/eipascope/20110912103927_EipascopeSpecialIssue_Art2.pdf

Berthier, Anais. *Trade Secrets Trialogue Underlines the EU's Democratic Deficit*. Euractiv, 17 September 2015. Available at:

<http://www.euractiv.com/section/science-policymaking/opinion/trade-secrets-trialogue-underlines-the-eu-s-democratic-deficit/>

Boronska-Hryniewiecka, Karolina. *The Black Box of European Legislation: The Motivation (or Lack of It) behind Transparency in EU Policy Making*. The Polish Institute of International Affairs, Policy Paper no 4 (106), March 2015.

Bunyan, Tony. *Statewatch Viewpoint: Secret Trialogues and the Democratic Deficit*. Statewatch bulletin vol 16 no 5/6. September 2007. Available at:

<http://www.statewatch.org/analyses/no-64-secret-trilogues.pdf>

EU-LEX, Legal statistics. Available at:

<http://eur-lex.europa.eu/statistics/legislative-acts-statistics.html>

European Barometer 83. Available at:

http://ec.europa.eu/public_opinion/archives/eb/eb83/eb83_publ_en.pdf

Fox, Benjamin. *Secret EU Lawmaking; the Triumph of the Trialogue*. EUObserver, 4 April 2014. Available at: <https://euobserver.com/investigations/123555>

Giedold, Sven. *I've no problem with livestreaming secret talks on EU law*. Interview with Euractiv, 12 October 2015. Transcript available at:

<http://www.sven-giegold.de/2015/interview-with-euractiv-ive-no-problem-with-livestreaming-secret-talks-on-eu-law/>