



Analysis

A missed opportunity to open up secret trilogue decision-making in the EU

The “EU legislature” to continue meeting in secret

“Space to think” in secret maintained

Ombudsman: “trilogues are not expressly foreseen in the Treaties”

No legal basis under the Lisbon Treaty for trilogues

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On 26 May 2015 the EU Ombudsman opened an Inquiry into “the transparency of trilogues”.^[1] On 12 July 2016 the Ombudsman reached a decision and made proposals to the Council of the European Union, the European Parliament and the European Commission. On the face of it the proposals look like an advance in the openness of trilogues - but are they?

The main Ombudsman Recommendations are:

1. A calendar of trilogue meetings should be made public;
2. The co-legislatures – the Council and the European Parliament – should make their negotiating positions on a Commission proposal public before trilogues begin;
3. “Four column” documents” and the final compromise text to be formally adopted by the co-legislators should be made public **“after the negotiations have been concluded”**
4. “General” agendas to be public – not the actual Agenda (with document numbers etc) but only a sanitised “Summary” of it.

¹ Abolish 1st [and 2nd] reading secret deals - bring back democracy “warts and all” (2009): <http://www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf>

5. "As far as possible" lists of other documents tabled during the trilogues should be made available.
6. A list of representatives of the three institutions attending trilogue meetings should be made public.
7. An "easy-to-understand" joint database should be setup by the institutions.

Are these changes meaningful or just the minimum to meet complaints of secret decision-making and lack of legitimacy?

The Ombudsman's arguments

The Ombudsman accepts the institutions' definition of trilogues as "informal" meetings of the "co-legislators" and that their meetings are "not open to the public". The institutions consider the formal Treaty-based decision-making process is considered to be "complex and time-consuming" and the Ombudsman does not question this assertion:

"While trilogues are not expressly foreseen in the Treaties, they have proven an extremely effective and efficient means of reaching agreement between the co-legislators.... The use of several rounds of formal deliberations (or "readings") has become the exception rather than the rule." [emphasis added, para 5]

"trilogues are not expressly foreseen in the Treaties" would be better framed as "trilogues have no legal basis in the Lisbon Treaty"

In the last parliamentary session (2009-2014) 85% of all legislation was agreed in secret trilogues. When the final "compromise text" is agreed the Council Presidency sends a letter to the Chair of the relevant parliamentary Committee confirming agreement on the text. The text is effectively "set in stone" and the Committee and the plenary session are expected to rubber-stamp the text. The Ombudsman observes, diplomatically, that changes in the parliament are "uncommon" – that is to say they rarely, if ever, occur and that:

"What happens in Trilogue negotiations is therefore key for the eventual content of much legislation." [para 19]

The Ombudsman cites the view of the European Court of Justice as to:

"the ability of EU citizens to find out the considerations that underpin legislative action is a precondition for the effective exercise of their democratic rights." [para 16]

And the Ombudsman recognises that;

*"Real democratic accountability would become impossible if citizens were unable to find out about the positions taken by their representatives **during a legislative process.**"* [emphasis added, para 16]

The crucial question is, can citizens be informed of the "considerations" during the "informal" trilogue process or only after the final text has been adopted?

How open are the Council, European Parliament and the European Commission?

The Ombudsman notes that the European Parliament debates, amends and votes on developing its position in an “orientation” vote in public (though one is not adopted on every measure).

However, the Ombudsman appears to accept the position of the Council when recording that:

“the Council makes many documents produced by its working groups proactively available”

Documents on Council discussions on reaching its negotiating position are usually LIMITE and hence not publicly available. – they often contain Member States’ positions which should be publicly available [2]

The Commission’s preparation of the text of Directives and Regulation is not referred to at all. Surely citizens and civil society also need to know who influenced the drafting of the initial proposal?

Publication of Initial positions

Following the Commission publication of a legislative proposal the Council and the parliament meet to adopt their initial positions prior to entering trilogues:

*“The Parliament’s position is already always made public while **publication by the Council happens occasionally**. The publication—even if intermittent on the part of the Council—implicitly recognises that this does not undermine the capacity to negotiate. What remains to be done is the **systematic publication** of the initial positions on every legislative proposal.”* [emphasis added, para 44]

The Ombudsman proposes that the Council should always make public its initial position. However, there is no reference to making public the often lengthy process in the Council prior to this. The process of reaching an initial position in the parliament is carried out in public while most of the Council discussions are in LIMITE documents which are not public. Hence citizens and civil society have denied access to the ideas debate and accepted or rejected and often the positions of their governments. **Why are these documents not also public?**

Trilogue Agendas

Instead of arguing that surely the Agendas can be public the Ombudsman settles for a fudge:

*“These agendas usually outline which specific part of the legislative proposal will be discussed at the respective meeting. It should therefore be possible for the institutions to provide the public with a more **general summary version** of this agenda, focusing on the main points for discussion at the Trilogue. Information would be provided to the public **without revealing individual strategies, or compromising negotiations.**”* [para 47]

The documents on the Agenda will usually simply state, for example, that Chapter XI is to be discussed and the documents to be considered. It is very hard to see how this could compromise negotiations.

² Access Info judgment, see Footnote 3

Agenda should be published in full and in advance of the meetings.

“Four-column” documents

Four column documents contain the Commission proposal, the positions of the Council and European Parliament and in the 4th column the agreed “compromise” text”. A new version is prepared before each trilogue meeting. The Ombudsman notes:

“The evolving four-column document therefore tracks a Trilogue’s progress. It is in effect the full “map” of the informal, but decisive, Trilogue negotiation process.” [para 49]

Why does the Ombudsman propose that all four column documents should only be made public after a measure is adopted?

The answer is that:

*“When the negotiations have been concluded, public scrutiny cannot have a direct impact **on the negotiations**”* [para 55]

as:

“disclosure could potentially damage the negotiation process.” [para.54]

Why is this? This is because a compromise early in the process might later change and the:

“public, which might not be aware of the delicate negotiating strategies of the co-legislators regarding such concessions, could be seriously misled.” [para 54]

In the Access-Info case the CJEU was dismissive of the idea that people might be confused by changes during Council Working Party meetings:

“Public opinion is perfectly capable of understanding that aspect of proposals made in the legislative process [that changes to the text may be made]” [3]

Four-column documents should be made public as they are produced.

Trilogue Notes

No Minutes are made of trilogue meetings. Notes made by Council or parliament negotiators are not proactively released but people could apply for them. Where records such a parliament Committee Minutes or videos are produced for publication they should be included on legislative databases.

In addition institutions should “as far as possible” make available lists of documents tabled during trilogue meetings and thus people could apply for access under Regulation 1049/2001.

All documents produced for trilogue meetings should be made public.

³ Text of judgment: <http://www.statewatch.org/news/2013/oct/ecj-access-info-iudgment.pdf>

The “space to think”

The Ombudsman accepts the needs for the “space to think” in trilogues:

“elected representatives must have some privileged space to negotiate. It would be contrary to the very essence of representative democracy, if third parties, wishing to participate directly in a parliamentary debate, were to interrupt a debate amongst democratically elected representatives (for example, by seeking to intervene from a public gallery while a debate is ongoing). [para 29]

The Ombudsman’s rationale is that:

“It is therefore necessary to balance the interest in having a transparent process with the legitimate need to ensure a privileged negotiating space. While the right of the public to participate in the legislative process must be protected and fostered, the precise mechanisms by which this right is exercised may need to be circumscribed in some situations. In such cases, however, it is even more important that the public is provided afterwards with all the information necessary to understand and scrutinise the process that has occurred.... [para 30]

“Ultimately, a process in which participants are given no opportunity to deliberate for a period in private, will serve little purpose if it is incapable of producing results. However, the extent of such private deliberations must be proportionate to the actual sensitivity of the issues.” [para 31]

These seem very strange arguments. The Council and the Commission have defended for years for the “space to think” in secret. All parliaments have to cope with the possibility of interventions from the gallery. While specialist inquiries may take place behind closed doors (eg: on security issues) this does not hold for discussions on legislative decision-making. So why is the EU so different?

- The origin of - the "space to think"?

Under the “Code of Access to EU documents” (in force between 1993-2001) the list of exceptions (similar to those on Articles 4.1 and 4.2 of the current Regulation) were the **only** grounds for refusing access to documents. It did **not** contain the concept of the “space to think”, whereby documents under discussion in the *legislature* could be kept secret, hidden from public view.[4]

The first to put forward this idea was the Commission in April 1999 as part of the consultation on implementing the commitment in the Amsterdam Treaty which said:

“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”

In a paper produced for the consultation in 1999 the Commission said that access “would **not** extend to working documents in the form of a contribution to internal proceeding” and access should be delayed:

⁴ See: <http://www.statewatch.org/COUNCODE.html>

"to certain documents to avoid interference in the decision-making process and to prevent premature publication of a document from giving rise to "misunderstandings" or jeopardising the interest of the institution (eg: granting access to preparatory documents only after the formal adoption of the decision)." [emphasis added] [5]

When the formal discussions on the new Regulation got underway the Commission argued for a new "exception" to allow institutions to refuse documents which would undermine "the effective functioning of the institutions") and the Council also decided that it wanted the power to refuse access where no decision on a document has been made where it "could seriously undermine the institution's decision-making process". Thus was the "space to think conceived.

The first EU Ombudsman, Jacob Soderman, addressing a Conference in Brussels on 26 April 1999, said the "dinosaurs" were back - trying, under the cloak of implementing the Amsterdam Treaty, to turn the clock back so that the institutions could control what documents were to be released, to whom they will be released and when they will be released. In 2001 the new Regulation embraced the "space to think" in law.

Regulation 1049/2001 states in Article 4.3 that:

"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

The Council widely uses Article 4.3 to refuse access to documents. Its draft Annual Report for 2015 shows that 45% of refusals for initial requests for access are under this Article and 28% at the confirmatory application stage. In addition it is used to censor documents where "partial access" is given on 27% of requests at the stage of an initial request.

It is also interesting to note that the most popular policy area for document requests is Justice and Home Affairs (27%).

- There is no legal basis under the Lisbon Treaty for "the space to think"

The legitimacy of the "space to think" in Article 4.3 of the Regulation was questioned in 2011 in a Working Document prepared by Heidi Hautala MEP who was the Rapporteur on the Annual Report on public access to documents. [6]

⁵ Proposed Commission changes to Regulation on access to documents fail to meet Lisbon Treaty commitments:

<http://www.statewatch.org/news/2011/mar/05eu-access-regulation-com-amend-mar-11.htm>

⁶ <http://www.statewatch.org/news/2011/jan/ep-access-reg-ann-report-working-doc-no-1.pdf>

The Working Document said that the exception "*disclosure of the document would seriously undermine the institution's decision-making process*" was inserted into Regulation 1049/2001 to:

"mirror the spirit of a specific former [Amsterdam] Treaty provision (Article 207(3) TEC) which required transparency of Council legislative preparatory works, "while at the same time preserving the effectiveness of its decision-making process." (Working document No 1, p4)

But in the Lisbon Treaty there is:

"no reference to the concept of protection of the decision-making process in the new Treaties, and the current "survival" of this concept is based only on Article 4(3) of Regulation (EC) 1049/2001." [emphasis added].[7]

The "space to think" should be abolished by repealing Article 4.3 of Regulation 1049/2001

Conclusion

One of the fundamental principles of a democracy is that its legislatures should carry out their proceedings in public. When the Council and the European Parliament meet to decide on legislative matters the trilogues are in effect the "EU legislature".

Trilogue meetings must be open and access to all the documents under discussion be made available to the public and civil society as they are produced. It is these principles that define a democracy worthy of the name.

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⁷ <http://www.statewatch.org/analyses/no-130-access-docs-com-new.pdf>