

18 March 2016

Attn: European Ombudsman, Emily O'Reilly

Contribution to European Ombudsman public consultation on the transparency of trilogues

This document sets out Access Info Europe's submission to the European Ombudsman's public consultation on the transparency of trilogues.

Access Info argues that greater transparency of trilogues is not only a legal obligation under the EU treaties, with their clear requirement that the legislative process be open, but also that there is a strong public interest in such transparency to ensure that decisions are not only accountable but also are taken only after consideration of a broad range of perspectives and the benefits to the wider European citizenry.

Access Info Europe is a human rights organisation dedicated to promoting and protecting the right of access to information in Europe as a tool for defending civil liberties and human rights, for facilitating public participation in decision making, and for holding governments accountable.

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 process is not sufficiently transparent; the original aim of these meetings, to increase efficiency by means of achieving early agreements on legislation, has led to them undermining accountability, transparency, and public participation and oversight of the EU legislative process.

The lack of information available at the early stages of development when trilogue negotiations occur makes it difficult for citizens to hold their public officials to account over how decisions are made, as well as to participate and engage at this early phase of the legislation process.

[Access Info has frequently criticised trilogues for violating the fundamental rights obligations of the EU treaties](#), which require that EU institutions "conduct their work as openly as possible" and "meet in public ... when considering and voting on a draft legislative act."

The European Union institutions should act immediately to comply with their legal obligations to transparency and openness of the legislative process.

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.

Since the adoption of the Lisbon Treaty, the increased use of trilogues has been defended as increasing the “efficiency” of the legislative process, and speeding it up such that [85% of EU laws are now agreed between institutions in the first reading](#) (before Lisbon, less than 30% of EU laws were agreed at the first reading).

This drive to increase efficiency has, however, led to a decrease in democratic oversight and control of the EU legislative process, a serious problem that has been raised various times by civil society organisations, EU institutions, and even the European Ombudsman herself. Introducing transparency to trilogue negotiations therefore will have a positive effect in restoring that lost democratic oversight and control that is crucial to any democratic system.

In 2013, the Advocate General in Case C280/11P Council of the European Union v Access Info Europe outlined clearly the reasons in favour of transparent legislative processes:

“Legislating’ is, by definition, a law-making activity that in a democratic society can only occur through the use of a procedure that is public in nature and, in that sense, ‘transparent’. Otherwise, it would not be possible to ascribe to ‘law’ the virtue of being the expression of the will of those that must obey it, which is the very foundation of its legitimacy as an indisputable edict. In a representative democracy, and this term must apply to the EU, it must be possible for citizens to find out about the legislative procedure, since if this were not so, citizens would be unable to hold their representatives politically accountable, as they must be by virtue of their electoral mandate.” (Paragraph 63 of the Advocate General Opinion in Case C280/11P Council of the European Union v Access Info Europe)

Greater democratic oversight and control of EU legislative processes can therefore help to increase legitimacy of the legislative process in the eyes of the public, as opposed to continued secret negotiations that reduces the capacity for EU institutions to gain the trust of citizens that they are working in the public interest.

The same Advocate General also opined about the relationship between transparency and efficiency of the legislative process:

“Inconvenient though transparency may be, when carrying out legislative as well as non-legislative functions, it must be said that it has never been claimed that democracy made legislation ‘easier’, if easy is taken to mean ‘hidden from public scrutiny’, as public scrutiny places serious constraints on those involved in legislating.”

The trilogue process, being an established feature of the EU legislative process therefore should not be treated differently to regular EU decision making, and should be held to the same levels of transparency and democratic oversight as any other part of the EU legislative process.

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.

It would greatly improve transparency for so-called "four-column table" documents to be proactively published after the trilogue process has resulted in an agreement on a compromise text. This will enable citizens to scrutinise the positions and final decision made, and enable citizens and civil society watchdogs to hold their public officials to account over the final texts before going into later stages of the legislative process.

Indeed, European Union institutions should have taken action already to increase the transparency of trilogue negotiations following the [Commission Vice-President Šefčovič's reported proposal in 2013](#) in favour of, "*the establishment of a public register of files under negotiation, which could, inter alia, include details on the composition of negotiating teams, and, once a file is concluded, make all related documentation publicly available.*"

Publishing these documents after the process, however, whilst adding to greater transparency and accountability, does little to enable equal public participation in decision making before such trilogue meetings take place.

The timing of the publication of the four-column tables should change, so that the public has the opportunity to engage at all stages of the legislative development, rather than only after the early stages of development when so much has already been agreed between institutions.

Access Info recommends that these tables be published before the trilogue negotiation begins.

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?

As explained in response to the previous question, Access Info supports proactive transparency of trilogues to the fullest possible extent, which could include not only announcing when and where trilogue meetings take place, but also the agendas, list of (proposed) participants, copies of the documents to be discussed, and any other relevant information, at the earliest opportunity before negotiations begin.

Information should also be proactively published after trilogue meetings take place. This should include minutes of trilogue meetings, the duration of the meeting, the names of the people that were present, a summary of the issues discussed, agreements reached, and next steps to be taken, as well information about the documents exchanged.

Before trilogue meetings take place, EU institutions should make an effort to publically announce and disseminate information in a variety of ways, such as via the use of various online social media platforms. All information and documents related to trilogue meetings, including those that have yet to take place, should be available and easy to access for everyone at the earliest possible moment.

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.

Estimates place the number of lobbyists in Brussels at 30,000+ individuals actively seeking to lobby European institutions and influence decision-making processes in the EU, and over 9,300 registrants appear in the EU transparency register. Those numbers mean there is almost one lobbyist per EU official in Brussels.

It would be naïve to assert that intense lobbying is not already directed towards these individuals involved in trilogues. Hence, the current lack of proactively published information is problematic because only those who are well-connected or well-resourced are able to access information they need to then influence decision makers. This undermines the democratic nature of the EU legislative process, because it stymies public debate about the proposals and positions of the different institutions before entering negotiations and limits the ability of decision makers to take the public interest into account.

Opening the trilogue process by publishing detailed advance information about these currently-secret meetings would simply permit the wider European public, outside the Brussels bubble, to be able to engage on the same basis as the lobbyists with their privileged contacts and insider 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.

Access Info supports the proactive publication of initial positions ("mandate") of all three institutions on a legislative file before trilogue negotiations commence.

The reasons are the same as those given above in favour of proactive disclosure of key trilogue documents. There is a particular interest in knowing the mandate with which each institution is negotiating, as on the basis of that mandate, the public can engage and raise concerns or speak in favour of a particular position as the case may be. It also provides European citizens and residents at the national level to know the position the Council is taking and to engage with the governments of the Member States with respect to that position.

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?

EU institutions should make a greater effort to publically announce and disseminate information in a variety of ways, such as via the use of various online social media platforms, in order to increase visibility of information and documents on trilogues. The information should also be easy to find on line and be presented in a format that enables comparability of information made available by EU institutions involved in the negotiations. The information should also be proactively available at the earliest possible moment.

The institutions could also consider the publishing of documents in a joint portal such as the Legislative Observatory (OEIL), or if this is not an option, to ensure there are clear links between

related documents across the different portals or websites of the institutions to ensure easy comparability.

Documents published by the EU institutions should always be made available in open formats. Whenever information is proactively published, it must be made available in an open format which means that it is in a machine readable format using commonly available, open source or free software tools, and can be processed, evaluated, and reused without limits.

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?

There should be no distinction in terms of transparency around "political trilogues" involving the political representatives of the institutions or technical meetings conducted by civil servants where no political decisions should be taken.

In line with the points explained throughout this submission, there should be full transparency around any kind of decision made in order to ensure public participation and engagement, and to enable holding decision makers to account.

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

No further comments.

Submission made by Access Info Europe, 18 March 2016.

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