

European Ombudsman
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29 March 2016

Dear Sirs

Disclosure, by the European Parliament, Council of the EU and European Commission, of documents relating to trilogues and transparency of trilogues in general - European Ombudsman Case: OI/8/2015/JAS

The City of London Law Society (“CLLS”) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

This letter has been prepared by the CLLS Regulatory Law Committee (the “Committee”). The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

We welcome the European Ombudsman's public consultation on the transparency of trilogues, and are grateful for the opportunity to provide feedback on the questions raised.

1. Is the way in which EU legislation is negotiated through the trilogue process sufficiently transparent?

We do not consider that the way in which legislation is negotiated throughout the trilogue process is sufficiently transparent.

We would like to stress that both the industry and its advisers very much value the publication of Presidency compromise texts, which they consider to be an important and useful element of transparency.

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.

As the European Ombudsman's paper recognises, the amount of information available, and its accessibility, varies as between the institutions.

We recognise that there is a balance to be struck between transparency and efficiency. We acknowledge that, particularly in relation to trilogues within the conciliation phase, there may be some force in the European Parliament's expressed concern regarding undue formalisation of the trilogue process, and the risk that this might lead to the real negotiations taking place at other occasions, without having all political groups in the room and without text proposals being exchanged in an orderly way between the Institutions.

We nevertheless consider that some degree of greater transparency could serve to enhance public trust in the process, potentially enhance the quality of the final legislative output, and assist those seeking to interpret the final legislative text in achieving a better understanding of the policy underpinning of compromises made during the trilogue process.

In this regard, we refer to the comments made by Verena Ross of ESMA to the House of Lords EU Sub-Committee on Economic and Financial Affairs on 28 October 2014 to the effect that even ESMA would find it helpful to be a bit more closely associated with some of the debates in terms of understanding what the drivers were for coming up with certain legal texts. We also note comments by Sharon Bowles to the same effect: "It is only during trilogue processes at some times when the Parliament has been arguing for one thing that the Commission representative, who has been at the Basel Committee, has actually elaborated on who wanted what and where."

In particular, we would like to stress that when flash reports of the outcomes of trilogues have been made available shortly after completion of the relevant trilogue, these have proved invaluable in understanding the policy rationale underpinning conclusions reached in trilogue.

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.

We welcome the proposals for proactive publication of trilogue documents, and for making public the different stages of inter-institutional negotiations on individual files. We consider that these will assist in enhancing transparency and facilitate a better understanding of the policy drivers underpinning legislation.

It seems to us that the position of trilogues in the conciliation phase may differ somewhat from trilogues which take place earlier in the proceedings, in advance of preparation for the work of the Conciliation Committee. Nevertheless, we acknowledge that, even at the earlier stage, the trilogue meetings which deal with political elements may have greater sensitivity, and that proactive disclosure of certain documents relating to purely political elements prior to agreement on the compromise text might in certain cases serve to undermine the institution's decision-making process.

We do not consider the same is true of the multi-column document, which effectively sets out each institution's preferred case prior to trilogue discussions in the three columns completed prior to commencement of trilogue. It would also be helpful for the document with the completed fourth column to be accessible shortly after trilogues complete (recognising that it remains subject to approval by the institutions and subject to review by legal linguists).

We firmly believe that there is real merit in making available at an earlier stage documents pertaining to "technical meetings" (on technical rather than political elements). The importance of this is illustrated by concerns expressed by the supervisory authorities – they note that although they work hard in trying to bring their technical expertise to bear to make sure that legislation that was decided on is actually made workable, they are constrained by their mandate which is limited to what has been decided at level 1, with the result that they are sometimes unable to deliver the right quality technical input in the level 2 drafting that they would like.

We believe that that there would be significant benefits for both the ESAs, and other stakeholders with technical expertise to offer, in being able to access the documents ("non-papers" and the like) prepared in respect of technical elements of the level 1 process at an earlier stage, ideally at or about the point when they are circulated to proposed participants in advance of the trilogues taking place (the orderly exchange referred to by the European Parliament). We also believe that any flash reports produced in respect of a trilogue should be made available at or about the time they are circulated.

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?

We believe it would be helpful if the institutions informed the public in advance that trilogue meetings will take place and when (recognising that the dates may change at short notice), and publishing links to meeting agendas, and in respect of technical trilogues, relevant non-papers.

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.

Publication of a list of named proposed participants, meeting agendas and supporting documents might result to more focussed lobbying on those involved in the negotiations – we don't necessarily believe that the amount of, or pressure from, lobbying would necessarily increase overall.

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.

As we understand it, the "multi-column document" in fact contains the three positions (including the public Commission proposal and the public Parliament mandate) so there would appear to be no significant reason why publication of this document at the time it is circulated internally would undermine the institution's decision-making process.

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?

We believe that the institutions should maintain and update a complete register of documents. The availability of the register is critical to the ability of the public to exercise their right of access in a precise and targeted manner. It would be helpful if those registers were capable of being searched by relevant legislative initiative and by date.

The European Parliament's procedure files are a good resource, although there can be delays in updating them, but they currently only link to the primary documents. The ECON committee's website is also quite user-accessible in terms of particular meetings, although identifying all relevant materials relating to a particular legislative file is more difficult.

We recognise that it may not be feasible - in the short term, or in terms of resource - to produce a single register per legislative file combining the documents already published by all three institutions, although we believe that this would considerably increase both the visibility and user accessibility of documents and information.

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?

Yes – see 3 and 4 above. We believe that the drafting of technical elements could benefit from expert input and, where appropriate, evidential input at an earlier stage.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Karen Anderson', followed by a period.

Karen Anderson
Chair, CLLS Regulatory Law Committee

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