Understanding trilogue
Informal tripartite meetings to reach provisional agreement on legislative files

SUMMARY

Thanks to successive Treaty revisions, the European Parliament has acquired the status of legislator on an equal footing with the Council. Today the ordinary legislative procedure (Article 294 Treaty on the Functioning of the European Union – TFEU), previously known as co-decision, covers a vast amount of policy areas. In order to pass legislation, Parliament, representing the EU citizens, and Council, representing the governments of the EU Member States, have to agree on an identical text, which requires time and negotiations. The complexity of the EU legislative process has been sometimes criticised for being lengthy and subject to gridlock, thus the risk of not responding to societal problems in a timely manner. To overcome this criticism, the legislators have developed informal contacts to speed up the legislative process while ensuring representativeness and oversight. One of the tools commonly used today to ensure the effectiveness of the legislative process is trilogue, defined as ‘informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council and the Commission’.

These tripartite meetings have been the object of criticism for a number of reasons, including the fact that the number of participants is limited and that they take place beyond close doors. Due to the absence of any explicit reference in the Treaties, trilogues started on a very informal basis in the early 1990s and evolved over time. At the beginning, the institutions filled the legal void with informal practice that was subject to an increasing degree of formalisation over time and then resulted, inter alia, in successive modifications of Parliament Rules of Procedure (RoP). These modifications were driven by the need to ensure that trilogues efficiently support the legislative process in Parliament while remaining fully transparent and representative. Today, RoP define the key elements upon which trilogues are built, how to conduct negotiations, and how to ensure that both committees and plenary are fully informed and can exercise their oversight role. Still, some elements such as the number and frequency of meetings, the practical conduct of negotiations depend very much on the nature of the legislative file to be negotiated, and thus remain uncodified.
Introduction

Successive Treaty revisions have extended the former co-decision procedure,¹ today known as the ordinary legislative procedure (OLP) (Article 289(1) TFEU), to many EU policy areas. In the Treaty of Lisbon, around 85 legal bases provide for use of the OLP.² The detailed procedure is spelled out in Article 294 TFEU, but in essence, the OLP requires Council and Parliament to agree, on an equal footing, on a common joint text over up to three readings. Namely, Parliament and Council examine separately the Commission’s proposal. Parliament votes first by simple majority (i.e. a majority of the votes cast) on the basis of a report prepared by the relevant committee. It may adopt the Commission’s proposal, amend it or reject it altogether. The Council may then accept Parliament’s first-reading resulting in the adoption of the legislative act or it may adopt a different position that will go back to Parliament for a second reading. The co-legislators have no time limit for the conclusion of their first reading, however they only have three months each, extendible by one month, to adopt their second reading. At Parliament’s second reading, the plenary must adopt, reject or amend the Council’s first reading by an absolute majority of its Members (currently 353 out of 705 votes), rather than by simple majority. If, at second reading, Council cannot accept the Parliament’s amendments, the conciliation - third and final stage - starts. It consists of negotiations between the two co-legislators in the framework of the conciliation committee, formed by delegations of both the Council and Parliament plus the Commissioner responsible for the file. An agreement, in the form of a ‘joint text’ that then has to be confirmed by both Parliament and the Council, must be achieved in a timeframe of six weeks – extendible to eight weeks. If an agreement cannot be found, the draft is rejected and the Commission must make a new proposal.³

The empowerment of Parliament, from a consultative role to fully fledged co-legislator in most policy areas, has profoundly changed the institutional balance in the decision-making process. As a consequence, it requires more interaction and cooperation than before between the two co-legislators in order to reach a legislative agreement. After the Lisbon Treaty, only in exceptional cases may the Council legislate alone. Such cases use a special legislative procedure (Article 289(2) TFEU), in which the act is adopted by the Council with the participation of the Parliament, either through consultation (i.e. Article 89 TFEU) or consent (i.e. Article 86 TFEU).

The progressive extension of the OLP to many policy areas resulted in increased formal and informal interaction between the European Parliament and Council. If on the one hand, there was a need to increase the efficiency of the legislative procedure, on the other hand, the process had to remain transparent in full respect of the democratic principles. In fact, after a few years of the co-decision procedure, it appears that both intensive formal negotiations and informal interaction would be required for most files in order to reach agreement. It is reported that the origin of trilogues, intended as tripartite meetings, dates back to 1994 under the German Presidency and that they became standard practice under the Spanish Presidency in 1995, though such tripartite meetings had already been routine practice in the budgetary conciliation since the seventies. The need to create flexibility in order to smooth the legislative process was the main reason for introducing informal contacts. Their organisation and structure were quite different at the beginning though, for instance Richard Corbett⁴ reports that EP trilogue delegations were originally limited to the committee chair and the rapporteur, but that it was soon enlarged to include the shadow rapporteurs too. The idea behind that was to strengthen the Parliament’s position by broadening the range of actors involved in negotiations and thus ensuring greater representativeness.⁵ The scope of informal trilogues evolved too. While initially they were limited to preparing conciliation committee meetings, they later became a tool to deal with politically sensitive dossiers, while the more technical ones could easily be adopted at first reading.⁶

When the Amsterdam Treaty introduced the possibility to pass legislation as of first (rather than second) reading, trilogues progressively became the standard legislative practice regardless of the file’s complexity. Their use went well beyond the original expectations for several reasons, including efficiency gains in transaction costs of negotiating (which are considered to increase with the number of participants, increased workload and complexity of the legislative files) and gains in terms of institutional power. For instance, Shackleton argued that one of the reasons why Council was more prone to favour informal than formal negotiations was the fact that trilogues were in line
with the traditional way in which Council operates, i.e. ‘searching for agreement outside the public eye’. The progressive extension of the co-decision procedure to additional policy areas, accompanied by enhanced informal contacts between the two legislators, resulted in a reduced number of conciliation meetings and a corresponding increase in agreements at first reading. The conclusion of early agreements soon became an explicit objective of the legislative process, in the joint declaration on practical arrangements for the co-decision procedure (Paragraph 21). However, the need to maximise the effectiveness and speed of the legislative process was already spelled out in Declaration 34 attached to the Amsterdam Treaty, which called on the Commission, Council and Parliament to ‘make every effort to ensure that the co-decision procedure operates as expeditiously as possible’. Both Parliament and Council decided to take a step further and to develop outside the formal scene a plethora of informal contacts at different levels. The traditional negotiation was thus progressively taking place outside the view of the full Parliament. Questions therefore arose about how far the negotiating team could go in order to reach an agreement, the representativeness of the process and its transparency. Suffice to recall that, in principle, Parliament’s committee meetings are held in public while Rule 77(7) explicitly recognises that the deliberations of the delegation to the conciliation committee shall not be public. Moreover the Rules of Procedure explicitly dealing with interinstitutional negotiations (Rules 70 to 74) do not envisage publicity of the content of negotiations. On the Parliament side, many of these questions were addressed by successive revisions of the Rules of Procedure. For instance, originally the negotiating team did not include the shadow rapporteurs from each political group, and did not have the obligation to report back to committees, nor were committees’ decisions to enter negotiations announced in plenary.

Rapid adoption of legislative acts is often mentioned as one of the main advantages of trilogues. Trends show that first-reading agreements have become the lion’s share. During the latest legislative term, there were more first-reading agreements than ever (89 %), only four full second-reading procedures and no conciliations at all. The increase in the adoption of legislation at first reading is certainly also due to the ability of the co-legislators to reach agreement thanks to trilogue negotiations. So far in the current legislative term, Parliament has received 113 legislative proposals (21 in 2019 and 92 in 2020) and participated in 228 trilogues (75 in 2019 and 153 in 2020). The unforeseen Covid-19 crisis in 2020 impacted the work of the Commission, including its legislative planning, and consequently the legislative work in Parliament too. This resulted in delays and the need for the Commission to present an adjusted Commission work programme (CWP) for 2020.
Governing rules and established practices

Although there is no explicit reference to trilogues in the EU Treaties, Article 295 (TFEU) recalls that the Parliament, Council and Commission shall consult each other and may find arrangements for cooperation including by concluding interinstitutional agreements (IIA). The institutional practice of informal negotiations between the co-legislators has progressively been codified in joint declarations and interinstitutional agreements as well as in Parliament's Rules of Procedure. Suffice to recall the 2007 joint declaration on practical arrangements for the co-decision procedure, which called on the institutions to cooperate in good faith throughout the legislative process, to establish appropriate interinstitutional contacts and exchange information. As regards cooperation in particular, the joint declaration clarifies that it can take place in tripartite meetings, known as 'trilogues', at all stages of the legislative process. It also recognises that these meetings have proved a vital and flexible mechanism to reach agreement at an early stage in the legislative process. In 2016, the IIA on Better Law-Making called on the three institutions to ensure the transparency of the legislative process including the 'appropriate handling of trilateral negotiations' (paragraph 38).

Notwithstanding the absence of explicit reference to trilogue meetings in the Treaties, the Court of Justice of the European Union (CJEU) has explicitly referred to ‘triplarite meetings’, for instance in Case C-409/13 and more recently in Case T-540/15. In the latter, the Court recognised that trilogues are an ‘established practice by which most EU legislation is adopted and are therefore regarded, by the Parliament itself, as decisive phases of the legislative process’. In previous years, the Court had also made it clear that institutional practice (although not referring to trilogue in particular) may be relied upon, provided that it does not derogate from Treaty rules.

Parliament’s rules governing negotiations

Concerning Parliament, Section 3, Chapter 3, Title II of its Rules of Procedures deals with interinstitutional / trilogue negotiations under OLP. The section clarifies, when, how and under what conditions the co-legislators conduct negotiations so as to agree on a common text. Negotiations may start at any time during the legislative procedure. They usually take place within tripartite meetings known as ‘trilogue’, attended by representatives of the three institutions, i.e. the co-legislators and the Commission. Parliament has to decide whether a given committee may start negotiating and it has to adopt a mandate that will constitute the basis for conducting negotiations with the objective of reaching an agreement on a common text. The agreement is known as ‘first reading’, ‘early second reading’, ‘second reading’ or ‘joint text’ (the latter during conciliation) depending on the stage of the legislative process at which it is reached. Different rules and majorities apply depending on the stage of the legislative process.

Ahead of Parliament’s first reading, the decision can be taken either on the basis of a committee report as mandate for the negotiations or without a committee decision. In the former, the decision is announced in plenary after the adoption in committee and is submitted to a vote only if requested, by the end of the day following the announcement in Parliament, by Members, or a political group reaching at least the medium threshold (Rule 71(2)) – i.e. one-tenth of Members (Rule 179(1)(b)). The vote – simple majority applies – takes place during the same part-session. In the absence of such a request for a vote within the set deadline, or as soon as the plenary approves the committee decision, interinstitutional negotiations can start. Should the plenary reject the committee decision, the committee report is put on the agenda of the following plenary part-session and a deadline for amendments is set by the President of Parliament. In the absence of a committee decision (by an absolute majority of the committee’s Members) to open negotiations, the committee may directly table its report in plenary and Rule 59(4) may be applied (request for referral back to the committee responsible for negotiations, Rule 60). In this case, and should the plenary approve the referral, the amendments adopted in plenary will constitute the mandate for negotiations (known as a plenary mandate).
When the decision to enter interinstitutional negotiations is taken after Parliament has adopted its first-reading position, but ahead of Council’s first reading, the Parliament first-reading position will constitute the mandate. The committee’s decision to negotiate on that basis is simply announced in plenary (Rule 72). Parliament’s first-reading position also serves as the mandate when Parliament decides to enter into negotiations after the Council has adopted its position at first reading, though in this case with no announcement in plenary (Rule 73). In both cases, there is no need for a further vote in plenary as the latter has already voted on the Parliament’s first-reading position. However, the committee responsible may adopt negotiating guidelines or table amendments to the Council first-reading position if the latter contains new elements not covered by the original legislative proposal or by Parliament’s first-reading position (Rule 73, second paragraph).

Table 1 – Rules of Procedure applicable to different legislative stages

<table>
<thead>
<tr>
<th>When</th>
<th>Rule</th>
<th>Mandate</th>
<th>Committee decision to enter negotiations</th>
<th>Plenary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ahead of Parliament first reading (Committee mandate)</td>
<td>71</td>
<td>Committee report as endorsed by the plenary by simple majority or without any vote (Rule 71(1))</td>
<td>Decision taken by a majority of its members</td>
<td>Announcement in plenary. May be put to vote under certain circumstances (71(2)).</td>
</tr>
<tr>
<td>Ahead of Parliament first reading (Plenary mandate)</td>
<td>59 4 and 60</td>
<td>Committee legislative report as amended in plenary</td>
<td>No decision; or decision rejected by plenary</td>
<td>The text adopted in plenary constitutes the mandate.</td>
</tr>
<tr>
<td>Ahead of Council’s first reading</td>
<td>72</td>
<td>Parliament’s first-reading position</td>
<td>Decision taken by a majority of its members</td>
<td>Announcement only in plenary* and reference in the minutes.</td>
</tr>
<tr>
<td>Ahead of Parliament’s second reading</td>
<td>73</td>
<td>Parliament’s first-reading position</td>
<td>Committee decision by simple majority</td>
<td>No announcement in plenary.</td>
</tr>
</tbody>
</table>

Source: Author’s own elaboration.

* In this case, the decision taken at committee level cannot be contested or put to a vote in plenary, thus negotiations can start as soon as the committee has taken a decision.

**Parliamentary committees’ role**

Originally, one of the perceived risks was the fact that trilateral meetings could progressively erode the role of committees as ‘legislative engine’ of the Parliament. However, successive modifications of Parliament’s RoP, in 2007, 2012 and 2016, have streamlined the process across committees and ensure that they remain at the centre of the legislative process. Today, it is for the committees in the first instance to decide whether to enter into negotiations or not, to adopt the mandate for negotiations and to decide how to conduct them. They remain the principal interlocutor of the Parliament’s negotiating teams, which have to regularly (i.e. after each trilogue meeting) report back to committees on progress in the negotiations as well as share the relevant documents. Moreover, committee secretariats not only ensure the smooth functioning of trilogues but may also play a key role in maintaining the institutional memory. In fact, trilogues remain partly uncodified, thus committee secretariats, in addition to advising, may provide the ‘substantive as well as procedure memory’.

Roederer-Rynning and Greenwood, in their extensive research on trilogues, identified two main patterns in the common culture of trilogue amongst committees, namely the central role...
of the chair and the organisation of work between technical and political layers. These authors noted that the role of the chair may vary according to the circumstances, namely the chair can perform the role of key negotiator, problem-solver, or may delegate most of the negotiating task to a vice chair or to the rapporteur for the file. Albeit interesting, this categorisation has to be followed with caution as other factors may impact the role of the chair too, for instance they may have a less active role in trilogues due to the heavy legislative workload in certain committees.

The conduct of negotiations

Negotiations are conducted on the basis of the Code of Conduct for negotiating in the context of the OLP, laid down by the Conference of Presidents (Rule 70). It is worth recalling that each institution designates its participants to trilogue in accordance with its own rules of procedure. For Parliament, the rapporteur for the file leads Parliament’s negotiating team, which should at least include the shadow rapporteurs from each political group willing to participate (Rule 74) and the chair of the responsible committee or a vice-chair designated by the chair. The Code of Conduct requires respect for Parliament’s political balance throughout all negotiations and envisages that the negotiating team be assisted by an ‘administrative project team’. The latter will be coordinated by the secretariat of the committee responsible and is composed of individuals from the Parliament’s Secretariat, including inter alia, from the Legal Service of the Parliament.

In practice, trilogues are ‘usually conducted in an informal framework', at 'different levels of representation' (General principles of the 2007 joint declaration), and alternately chaired by the Parliament or the Council, depending on where the meeting is hosted. The number and conduct of meetings remain largely uncodified and thus left to the practice developed by committees and in particular by their chairs. For instance, Roederer-Rynning and Greenwood12 in their research (See Figure 2) identified some recurrent patterns in relation to the Committee on Economic and Monetary Affairs (ECON)13 during the sixth and seventh legislative terms. These include no bilateral talks until Parliament and Council have adopted their mandates, strict distinction in roles between individuals involved in technical and political trilogues, the committee chair leads the Parliament negotiating team and the other Members do not negotiate with the Council Presidency in the chair’s absence.

Content-wise, Parliament and Council exchange information on the progress of the file being negotiated on a regular basis. The discussions may touch upon both political and technical issues. Much is left to the practice of individual committees and their Council counterparts, however, and, at the risk of over-simplifying, one could say that the staff of the three institutions usually handle the more technical issues in view of the political-level meetings where the ‘real negotiations take place'.14 The distinction between political and technical elements is not always clear-cut. For instance, according
to Roederer-Rynning and Greenwood, thirteen different layers of trilogue practices could be identified: political trilogues, technical trilogues and a third layer of bilateral meetings 'between the political and the technical staff of the EP and the Council'. The three layers take place in parallel, sometimes simultaneously and they are characterised by constant interaction. Many rounds might be necessary for complex or controversial files. In fact, the OLP activity report for 2014-2019 shows that the number of trilogues required per legislative file 'ranged from one (for over 50 files) to 27, with 10 or more trilogues needed on 20 files or packages of files'.

The Code of Conduct refers to a joint document as a basis to conduct negotiations, often referred to as the 'four-column' document because it indicates the positions of the three institutions involved and any provisionally agreed compromise text. The document includes the original legislative proposal from the Commission (first column), the position of the Parliament (second column), that of the Council (third column) and the compromise text (fourth column). It is therefore a document subject to constant revision – its fourth column at least – and has recently been at the centre of an ECJ case (see below the section on the scrutiny of trilogues). On Parliament’s side, after each trilogue, either the rapporteur or the chair of the negotiating team reports back to the committee responsible or, if the committee cannot meet in a timely manner, to the committee coordinators. Though, in Case T-540/15, the Court referred to the duty to report back to committee, it also underlined that ‘the absence of detailed and uniform minutes, and the variable disclosure thereof, do not therefore mitigate the lack of transparency of ongoing trilogue’.

When the co-legislators reach a provisional agreement, this should be confirmed by an exchange of letters between the co-chairs (paragraph 35 of the 2007 Joint Declaration) and then formally approved by the Council and the Parliament in plenary. On the Parliament side, should a provisional agreement be approved by the committee responsible with a single vote by a majority of the votes cast, it is then considered by the plenary (Rule 74). Although in principle, Members of Parliament are able to table amendments, this would put at risk the provisional agreement and any amendment adopted would require the text to be renegotiated with the Council. In Case T-540/15, the Court underlined that most of the agreements reached in trilogue meetings ‘are subsequently adopted, mostly without substantial amendment, by the co-legislator’ (paragraph 72). Bressanelli et al. argue that there are many reasons for that, including the fact that the negotiating teams usually benefit from strong mandates, the reputational costs for the Parliament of failing to approve a provisional agreement in plenary, and the subsequent political costs that would make reaching future agreements with the Council more difficult for Parliament. The final legislative act being the result of a joint effort by the co-legislators, Parliament and Council announce the successful negotiation results in a joint press conference, and their presidents sign the final text at a joint ceremony (paragraphs 45 and 47 of the 2007 Joint Declaration).

### Trilogue facts and figures

**eighth legislative term, 2014-2019**

- **1 185 trilogue meetings** took place on 346 legislative proposals.
- The top four committees involved in trilogues were the Committees on Civil Liberties, Justice and Home Affairs (232), on Economic and Monetary Affairs (136), on Environment, Public Health and Food Safety (120), and on Industry, Research and Energy (93).
- The average number of trilogue meetings per file is 4.
- The average number of trilogue meetings per file under the joint committee procedure (Rule 58) is 8.
- 90 OLP were adopted with no negotiations.
- Out of 227 mandates for negotiations at first reading, 177 were committee mandates.
- Out of these 177 committee mandates, 21 were contested and only 4 rejected.


* From February 2017; prior to that there was no systematic conformation of mandates by plenary.
The Commission’s role

The 2007 Joint Declaration calls on the Commission, in light of its right to initiate legislation (Article 17 TEU), to facilitate contacts between the two co-legislators in a constructive manner with a view to reconciling different positions while having regard to their respective roles as laid down in the Treaties. In Case T-424/14, the Court considers that when preparing a legislative act, ‘the Commission does not itself act in a legislative capacity’ because this precedes the actual legislative procedure. Moreover, the Court added that ‘it is the Parliament and the Council who exercise legislative functions’. However, pundits argue that the Commission’s behaviour is often not totally neutral, but instead it tends to act like a committed negotiator and going beyond the ‘honest broker’ role. While an honest broker would look for a compromise between the co-legislators and assist them, they claim that the Commission would actively defend its original draft proposal – a role that could lead to the withdrawal of the proposal, though in exceptional circumstances. Other note that to overcome gridlock in negotiations, the Commission is more and more asked to amend its original proposal and to come forward with proposals ‘in line’ with the co-legislators’ requests, which might be seen as an attempt to impinge on the Commission’s right of initiative.

Transparency challenges

The principle of transparency is one of the main foundations of a democratic system based on the rule of law. Without it, citizens are not able to participate effectively in the decision-making process and to scrutinise political choices made on their behalf. In the successive Treaty revisions, the European Union addressed the transparency deficit of its administration and policy-making process. Suffice to recall that since the Treaty of Maastricht, efforts have been made to promote a more transparent, open and inclusive decision-making process. In fact, the institutions are to conduct their work as openly as possible (Article 15(1) TFEU), with the Parliament (Article 15(2) TFEU) and Council (Article 16(8) TEU) meeting in public, the latter specifically ‘when it deliberates and votes on a draft legislative act’. In addition, institutions must ensure the publication of documents relating to legislative procedures, and allow citizens and EU residents to access the types of documents as enshrined in Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the EU. This fundamental right is also reflected in secondary law adopted in 2001 – Regulation (EC) No 1049/2001 on public access to European Parliament, Council and Commission documents. It lays down that legislative documents are in principle public, with some limited exceptions detailed in Article 4. This latter allows, inter alia, EU institutions to refuse access to a document for reasons of public security or when disclosure would undermine an ongoing court proceeding. Moreover, the institutions shall refuse access to documents that are for the internal use of the institution or documents relating to matters for which decisions have not been taken yet by the institution, if their disclosure ‘would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure’. The existence of a serious risk of undermining the decision-making process authorises the institution to refuse access, even when a decision has been taken, when documents contain ‘opinions for internal use as part of deliberations and preliminary consultations within the institution concerned’.

In this context, questions have been raised about the transparency of trilogues because the co-legislators meet outside formal decision-making channels and behind closed doors, thus limiting the possibility for scrutinising the conduct of negotiations. While transparency tools should be in place, it is also recognised that the institutions should be granted the necessary flexibility to negotiate.

European Ombudsman’s inquiry on transparency

The European Ombudsman is the institution in place to protect EU citizens against cases of maladministration in the EU institutions. In view of the concerns over the democratic deficit of trilogues, the Ombudsman initiated a strategic inquiry on the issue in 2015 (OI/8/2015/JAS). The Ombudsman, Emily O’Reilly, concluded that there was no case of maladministration. Nevertheless, she
identified issues that would need to be addressed to enable informed public participation in the law-making process. She recommended the institutions proactively promote the transparency of trilogues by means, inter alia, of publishing their documents so as to allow citizens to have all the necessary information to understand the political considerations at stake during negotiations. More precisely, she proposed the publication of calendars of forthcoming trilogues, initial positions of the three institutions and meeting agendas, before or shortly after the beginning of negotiations. Moreover, she invited the institutions to provide in a user-friendly joint database – as information is scattered across different online platforms – a list of the decision-makers involved, and other documents tabled during the negotiations to facilitate requests for disclosure. The Ombudsman recognised the co-legislators’ need for space to deliberate, therefore, the disclosure of some documents, such as the four-column documents and final agreed text, could take place as soon as possible after the conclusion of the file.

The Ombudsman conducted a separate inquiry into the transparency of the legislative process of the Council (OI/2/2017/TE) in March 2017. In that case, the report concluded that the institution’s practices constituted maladministration. The report stated that the Council failed to systematically record identities of Member States expressing positions in legislative files in preparatory level bodies. Moreover, the Council automatically assigned ‘LIMITE’ status to files of ongoing deliberations – meaning for internal use only – in violation of the principle of widest possible public access to documents established by the CJEU’s case law. Thus, in the context of trilogues, the Ombudsman recommended that the Council review the ‘LIMITE’ status of documents setting out its position – the third column – to make it publicly available before trilogues take place.

The Court sheds light on transparency issues

The jurisprudence of the CJEU, prior to and since the entry into force of the Lisbon Treaty, played a crucial role in strengthening legislative transparency. The CJEU has interpreted narrowly the exceptions under Regulation (EC) 1049/2001 by enforcing the principle of the widest possible access to legislative documents; suffice to recall the joined cases Sweden and Turco v Council and the Council v Access Info Europe case. More recently, in March 2018, in the case De Capitani v European Parliament (Case T-540/15), the Court touched upon the balance between transparency and efficiency in the context of ongoing trilogue negotiations. In 2015, the applicant requested Parliament to grant him access to the multi-column documents of ongoing trilogues having their legal basis in Title V TFEU and Article 16 TFEU. Parliament granted full access to five multi-column tables and partial access to two others based on Article 4(3) of Regulation (EC) 1049/2001, a decision that was challenged by the applicant. In its judgment, the Court recalled the need to demonstrate that the risk of undermining, specifically and actually, the decision-making process needs to be reasonably foreseeable and not purely hypothetical, in line with the principle that derogations are to be interpreted strictly. The Court further stated that institutions must evaluate document requests of ongoing negotiations on a case-by-case basis and access may be refused only when duly justified. The decision of the Court followed the logic of previous rulings (Case T-84/03, Sweden and Turco v Council), which affirmed the importance of citizens’ awareness of political considerations during the decision-making process in order to fully exercise their democratic rights. According to the Court’s ruling in Case T-540/15, this should not be different for trilogues as they are an integral part of the legislative procedure, hence they must comply with the principles of transparency and publicity.

Remaining challenges

The Parliament, Council and Commission have addressed the European Ombudsman’s recommendations. As far as Parliament is concerned, the negotiating mandates as well as the names of members of negotiating teams are publicly available. Moreover, Parliament has addressed the transparency issues through successive modifications of the Rules of Procedure, in order also to reinforce political oversight of trilogues. However, Brandsma argues that these rules are not always
complied with in practice. For instance, in his study, the author argues that negotiating teams do not systematically report back to committee meetings or sometimes that report lacks substance.

On its side, the Commission agreed that the responsibility for trilogues could be made clearer by identifying the responsible Commissioner and directorate-general, in response to the European Ombudsman. However, it also stated that such information could be provided in the context of the future Joint Legislative Database. Some authors point out that the persistent difficulties in tracing documents – four-column or meeting documents – remain, as they are scattered across different databases and are still not proactively published at an early, or even later, stage according to different sources. Finally, the Council has taken slow steps to improve the transparency of trilogues, which led Parliament to adopt a resolution in 2019 endorsing the Ombudsman’s proposals and calling on the Council to comply with it. In early 2020, a group of Member States made commitments to improve transparency in the Council by ensuring proactive publication of legislative documents and greater openness of trilogue negotiations. Moreover, they committed to record the main political lines of discussion and national statements in the note accompanying the mandate as well as systematic publication of important legislative documents of the Council. A few months later, the Council itself committed to proactively publish progress reports on trilogues as well as the mandate for negotiations.

MAIN REFERENCES


Kulger Dionigi M. and Koop C., Investigation of informal trilogue negotiations since the Lisbon Treaty – Added value, lack of transparency and possible democratic deficit, Study for the European Economic and Social Committee, July 2017.


Understanding trilogue

ENDNOTES

1. **Art. 251** of the Treaty establishing the European Community (TEC), introduced by the Maastricht Treaty.

2. The Treaty also provides for the possibility to adopt legislative acts through a special legislative procedure (**Art. 289(2) TFEU**), i.e. the act is adopted by the Council with the participation of the Parliament, via either consultation or consent, or the act is adopted by the Parliament with the participation of the Council.


6. Report by the Presidency and the General Secretariat of the Council to the European Council on making the co-decision procedure more effective, 13316/1/00 REV1, 28 November 2000.


8. Ibid.


13. According to Roederer-Rynning and Greenwood, many of the trilogue practices originated in the ECON committee during the sixth and seventh legislative terms. During the seventh term, ECON took part in ‘more than twice as many trilogues as any other committee’.

14. The distinction between technical and political level negotiations also affects the level of institutional representation. For instance, in technical trilogues, the Commission will usually be represented at Head of Unit level accompanied by the official dealing with the file and the legal service, while political trilogues will more often be attended by directors, directors general, or even Commissioners when an agreement is in sight. For more information see: M. Kulger Dionigi and C. Koop, *Investigation of informal trilogue negotiations since the Lisbon Treaty – Added value, lack of transparency and possible democratic deficit*, Study for the European Economic and Social Committee, July 2017.


17. See also Case **C-409/13**, which states that the Commission does not have the right of veto but has the right to withdraw the proposal when amendments distort it in such way that it is deprived of its raison d’être (paragraph 83).

18. **Handling of documents internal to the Council**, 2018: ‘LIMITE’ are deemed covered by the obligation of professional secrecy in accordance with Article 339 TFEU and Article 6(1) of the Council’s rules of procedure.


22. Belgium, Denmark, Estonia, Finland, Ireland, Latvia, Luxembourg, the Netherlands, Slovenia, Sweden.
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