

In Search of Transparency for EU Law-Making: Trialogues on the Cusp of Dawn

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1. Introduction

Managing secrecy and access to official information is an important exercise of executive power that is no less crucial in the context of the EU than that of its Member States. The EU's constitutional (and ultimately legislative) response twenty five years ago in the Treaty of Maastricht placed explicit limits on EU administrative secrecy, also in innovative ways. This catapulted the EU to the global vanguard in terms of transparency and public access to documents. The logic of transparency implies that all arms of government – the executive, the entire public administration as well as parliaments – should be subject to the requirement of openness or public access.¹ The deeper democratic inspiration, as put by the Court of Justice in *Turco*, of why openness and transparency are important is that of greater citizen participation and of more sustained accountability of legislative processes. This is why the concepts of openness and of transparency were included in the political system of the EU.² Democracy reaches beyond elections, to the possibility of citizens and civil society to follow discussions in real time and to debate them in an open fashion. This presumes knowledge of the choices and compromises that are being and have been made in decision-making process and the arguments raised for and against particular options.

The apex in terms of EU transparency legislation was 2001 with the adoption of the Access to Documents Regulation 1049/2001.³ Since then it has been applied, challenged and interpreted by the courts in Luxembourg. Even if commentators have pointed to a, at times, mixed judicial record,⁴ and in some regards considerable institutional resistance (for example, regarding the

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¹ Grønbech-Jensen, "The Scandinavian Tradition of Open Government and the European Union: Problems of Compatibility?", 5 *Journal of European Public Policy* (1998), 185-199, at 187.

² See further, Curtin and Mendes, "Transparence et Participation: des Principes Démocratiques pour l'Administration de l'Union Européenne" 137-138 *Revue Française d'Administration Publique* (2011), 101-121.

³ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L145/43.

⁴ Leino and Heliskoski, "Darkness at the Break of Noon. The Case Law on Regulation 1049/2001 on Access to Documents", 43 *CML Rev.* (2006), 735-781.

Court's rulings on legal advice),⁵ the Regulation provided an accessible tool for the public to challenge secretive administrative practices of one kind or another. Over time various members of the public have used the Regulation as a means of challenging the increasingly political practices of the various institutions.⁶ The active engagement of the European Ombudsman provides an additional route both for individual and more systemic scrutiny, despite being dependent on the goodwill of the Institutions to bring about change. Considerable progress has undoubtedly been made, also in arenas that are not strictly administrative in nature, such as the negotiations of international agreements by the EU.⁷

But gaps have remained, especially when it comes to the way in which legislation is adopted at the European level. This is by no means a new problem from the perspective of democracy and democratic input from the different governance levels. Some national parliaments – especially the House of Lords⁸ – have long drawn attention to various practices that restrict access to information during the legislative process, which for them is highly problematic from the perspective of holding their own government representatives in Council to account. The paradox is that this problem seems to have intensified in recent years despite the fact that the Treaty of Lisbon aimed to make the EU more explicitly democratic and transparent and even includes a new Treaty chapter on democracy in the EU.⁹ This paper focuses on this paradox and the ways in which the three EU institutions involved in the EU legislative process – the European Parliament, the Council and the Commission – have exercised the discretion left by the current legal rules to the detriment of transparency in the legislative process.

To understand the entrenched nature of this paradox one needs to go far back to the roots of the current access to documents regime: the rules adopted in 1993 after the Treaty of Maastricht was finally ratified. At that time, the Member States “clutched at transparency as a solution without thinking through the consequences for interinstitutional relations. In advocating transparency, they inadvertently made interinstitutional reform even more pressing.”¹⁰ The nettle remains to be grasped several decades later. The Member States in particular continue to evade contentious political choices by using the mantra of efficiency in lieu of a real effort to balance genuine (and limited) needs for efficient and speedy decision-making with the democratic logic of transparency. The Member States are stuck in the previously predominant logic – that of diplomacy and of secret negotiations. The EP, which in its political statements argues for making all trilogue documents

⁵ Curtin and Leino, “Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis”, EU Working Papers RSCAS 2016/63 (2016).

⁶ Members of the European Parliament in particular have been active in defending what they perceive as their direct democratic prerogative and have liberally used the general public access provisions as a means of forcing the hand of their institutional counterparts (in particular the Council). See, in particular, Case T-14/98, *Hautala v. Council*, EU:T:1999:157 and the appeal in C-353/99 P, *Council v. Hautala*, EU:C:2001:661; Case T-84/03, *Turco v. Council*, EU:T:2004:339; Case T-529/09, *in 't Veld v. Council*, EU:T:2012:215; Case T-301/10, *in 't Veld v. Commission*, EU:T:2013:135; Case T-402/12, *Schlyter v. Commission*, EU:T:2015:209 and the appeal in C-331/15 P *France v Schlyter*, EU:C:2017:639, and most recently, *Heidi Hautala, Benedek Jávör, Michèle Rivasi and Bart Staes v. EFSA* (case pending).

⁷ See e.g. Leino, “The Principle of Transparency in EU External Relations Law – Does Diplomatic Secrecy Stand a Chance of Surviving the Age of Twitter?” in Cremona (Ed.), *Structural Principles in EU External Relations Law* (Hart Publishing, forthcoming 2018).

⁸ See, for example, House of Lords, *Codecision and national parliamentary scrutiny*, European Union Committee (2011) and House of Commons, *Transparency of decision making in the Council of the European Union*, European Scrutiny Committee, HC 128 (2016).

⁹ Title II TEU.

¹⁰ Lodge, “Transparency and Democratic Legitimacy”, 32 JCMS (1994), 343-368, at 344.

directly accessible on the internet,¹¹ seemingly allows itself in practice to be dominated by its legislative partner and to accept a restrictive disclosure policy. The concepts of transparency and of efficiency are it seems warring concepts and right now in institutional practice efficiency is winning battles if not yet the war.

The challenges are not small. Who controls the information that is part of the legislative processes and is the process as a whole under control? At its core is the manner in which supranational institutions and their respective preparatory bodies determine, in their own internal rule making processes and interinstitutional arrangements, the parameters of openness or secrecy in lieu of detailed and adopted secondary legislation, and how these arrangements comply with fundamental Treaty principles. This article explores in section 2 the legal framework and the applicability of that framework to evolving informal practices by the three key institutions involved in the EU legislative process. We present the background assumptions of the ordinary legislative procedure and the emergence of trialogues as the main format of interinstitutional negotiations. We then present the currently applied transparency arrangements. Our main frame of reference is trialogues in the ordinary legislative procedure (Article 294 TFEU), but this decision-making format is frequently used for breaking ground also in special legislative procedures. Prior to the interinstitutional stage, negotiations take place within each institution according to their own institutional rules.

The new Interinstitutional agreement (IIA) on Better Regulation addresses the organization of the ordinary legislative procedure, in general, and the transparency of trialogues, in particular.¹² The subsequent joint declaration on the EU's legislative priorities for 2017¹³ identifies items of major political importance that receive priority treatment in the legislative process. According to Commission President Juncker, these are "initiatives of major political importance that should be fast-tracked in the legislative process".¹⁴ Both transparency campaigners and corporate lobbyists seem to agree that more and more EU lawmaking is being pushed out of public view.¹⁵ It is not surprising that issues relating to legislative transparency have also surfaced in recent Court cases¹⁶ but also in enquiries by the European Ombudsman.¹⁷ Section 3 assesses some of the current challenges relating to legislative documents that are still stuck in a twilight zone, in particular given the legislative deadlock on an updated transparency regulation. These challenges relate to the opacity of Council and Member State positions, legal advice and the so-called four-column documents, which are used to map out progress in interinstitutional negotiations. Our

¹¹ European Parliament resolution of 28 April 2016 on public access to documents (Rule 116(7)) for the years 2014-2015 (2015/2287(INI)), P8_TA(2016)0202, para 27.

¹² The interinstitutional agreement on better regulation, dated 13 April 2016, is available at http://ec.europa.eu/smart-regulation/better_regulation/documents/iaa_blm_final_en.pdf, Article 32-40.

¹³ Joint Declaration on the EU's legislative priorities for 2017, 13 December 2016, available at https://ec.europa.eu/priorities/publications/joint-declaration-eus-legislative-priorities-2017_en.

¹⁴ See the Commission press Release "A Union that delivers swifter and better results: Three Institutions sign Joint Declaration on the EU's legislative priorities for 2017" dated 13 December 2016, available at https://ec.europa.eu/priorities/announcements/union-delivers-swifter-and-better-results-three-institutions-sign-joint-declaration_en.

¹⁵ See "Where European democracy goes to die" by Harry Cooper, published by Politico on 7 December 2016, available at <http://www.politico.eu/article/where-european-democracy-goes-to-die-european-parliament/>.

¹⁶ Case T-540/15, *De Capitani v. European Parliament*, O.J. 2015, C 398/57 and Case T-421/17, *Leino-Sandberg v. European Parliament*.

¹⁷ European Ombudsman's own-initiative inquiry OI/8/2015/JAS concerning transparency of trialogues closed on 12 July 2016; Strategic inquiry OI/2/2017/AB on access to documents relating to Council preparatory bodies when discussing draft EU legislative acts opened on 17 March 2017 and currently pending.

methodological approach is partly empirical.¹⁸ In order to examine how the institutions ‘think’ we have conducted a number of interviews with legal advisors and policy makers working for the EU institutions or for the Member States either in Brussels or in national capitals. In addition, we have applied and received access to the three institutions’ pleadings in the closed cases relating to legislative matters before the EU Courts. The pleadings are used to illustrate how the institutions argue about transparency in concrete cases. The institutional thinking illustrated by the pleadings is significant also for the reason that we find the influence of Court jurisprudence relating to legislative matters limited; in many cases institutional practices have continued largely unchanged despite rulings. Our interest also relates to institutional thinking and how it is reflected in the actual mundane administrative practice. In other words, we address the EU’s transparency framework in the context of its daily application, beyond the Court’s jurisprudence.

Finally, in section 4 we draw some conclusions. While we do not believe that every single part of the legislative procedure should be fully transparent, we are interested in analyzing how this balance is drawn and to suggest who should be responsible for drawing it. Who exercises these fundamental choices and the process by which these decisions are reached are of paramount salience for the the nature of democracy in the EU and its relationship with transparency and openness in the context of lawmaking. The current balancing act largely involves the institutions themselves keeping control of secrecy and adopting the relevant rules as a matter of an internal (or interinstitutional) working arrangement. When the institutions exercise legislative functions they are in fact exercising highly political functions that define the fundamental policy choices of the Union’s action. This requires not only passive transparency in the form of access to documents but also pro-active transparency by the institutions themselves.

2. EU legislation and transparency

2.1. *EU law-making after Lisbon: the logic of public control*

The Lisbon Treaty assumes that EU law-making will be conducted openly.¹⁹ The Treaty establishes that the Parliament meets in public, as does the Council “when it deliberates and votes on a draft legislative act” (Article 16(8) TEU and 15(2) TFEU). The idea is that, at the very least, debate in Parliament would take place in an open and inclusive manner and on the basis of published drafts. The Treaty also places the Council and the European Parliament under an obligation to ensure the publication of the documents relating to the legislative procedures subject to Regulation No 1049/2001 “in such a way as to ensure the widest possible access to documents”.²⁰ The Court confirmed already pre-Lisbon in *Turco* that increased openness

¹⁸ On the methodological approach applied, see also Emilia Korkea-aho and Päivi Leino, ‘Interviewing Lawyers: A Critical Self-Reflection on Interviews as a Method of EU Legal Research’, forthcoming in *Journal of European Legal Studies* (2018) and Emilia Korkea-aho and Päivi Leino, ‘New legal realities’? Interviews as a normative source for EU legal research’, forthcoming in *Tiburg Law Review* (2018).

¹⁹ “The Treaty of Lisbon also improves the transparency of work within the EU, extends to the Council the principle of public conduct of proceedings, which is already applied within the European Parliament, and will result in better information for citizens about the content of legislative proceedings”. See European Union, “The strengthening of European democracy”, 5 Feb. 2014, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0021&from=EN>> (last visited 13 July 2017).

²⁰ Under Art. 12(2) of the Regulation, legislative documents – meaning “documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States” – should be made

“enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system[...]. Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize *all the information which has formed the basis of a legislative act*. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights”.²¹

Regulation 1049/2001 has not been updated following the Treaty of Lisbon – despite many years of trying.²² The interinstitutional impasse on reform has left the EU institutions a great deal of discretion since the Regulation does not give detailed guidance on how the balancing between the right of public access and the institutional need for secrecy ought to be made. The Article 4(3) “space to think” exception provides ample ground for arguments relating to the need to protect institutional efficiency.²³ In particular, the Regulation does not identify the documents in the legislative procedure that should be made available without delay, or specify the effect of the stage of decision-making – if any – on the applicable transparency requirements.²⁴ Since Regulation 1049/2001 leaves serious gaps, many of the key issues have been addressed internally by the Parliament’s and the Council’s Rules of Procedure – at their own discretion.

The Treaties stress how democracy in the EU has two varieties (Article 10 TEU). These are direct democracy, which empowers the citizens to participate in the democratic life of the Union, and representative democracy. Representative democracy builds on citizen representation in the EP and Member States representation in the Council through their governments. The national governments are democratically accountable to their own parliaments or their citizens. While our focus is more on direct democracy, legislative transparency is vital to the operation of both forms of democracy. A particularly crucial element of democracy is public control. A legislative procedure which operates across multiple procedural stages allows the different players to “repeatedly question the arguments of the others, and mobilize public attention or affected interests around different ways of concluding the legislation.”²⁵ Inclusiveness arguably requires that policy proposals are publicly contested, deliberated and justified.²⁶ As Advocate General Cruz Villalón recently put it:

“‘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,

directly accessible unless one of the exceptions under the Regulation is applicable. “Direct access” entails that making these documents publicly available should not presume specific requests but should instead take place automatically.

²¹ Joined Cases C-39/05 P and C-52/05 P, *Turco*, paras 45-46 (emphasis added).

²² Commission, “Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents”, COM(2008) 229 final; Commission, “Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents”, COM(2011) 137 final.

²³ The lead case in this regard is Case T-2/03, *Verein für Konsumenteninformation v. Commission*, EU:T:2005:125. See Leino, “Just a little sunshine in the rain: The 2010 case law of the European Court of Justice on access to documents”, 48 CML Rev. (2011), 1215–1252.

²⁴ The difficulties in drawing this distinction is also visible in court cases like Joined Cases T-424/14 and T-425/14, *ClientEarth v. Commission*, EU:T:2015:848 relating to impact assessments and C-331/15 P *France v Schlyter*, EU:C:2017:639, which involved a detailed opinion of the Commission concerning a draft Order relating to the annual declaration of nanoparticle substances,

²⁵ Lord, “The democratic legitimacy of codecision”, 20 *Journal of European Public Policy* (2013), 1056-1173 at 1063.

²⁶ Obholzer and Reh, “How to Negotiate under Co-decision in the EU. Reforming Trilogues and First-Reading Agreements”, CEPS Policy Brief No. 270, May 2012, at 4.

‘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.”²⁷

Taking these general principles as a starting point, we will now describe how the ordinary legislative procedure in general, and trilogues in particular have developed, and how public access has been realized in this context.

2.2 *The transformation of the ordinary legislative procedure: the multiplication of informal trilogues*

The codecision procedure (today known as the ordinary legislative procedure) was introduced by the Treaty of Maastricht largely to alleviate Europe’s democratic deficit.²⁸ It builds on the idea of the Council and the European Parliament co-legislating as more or less equal partners in three readings and, when necessary, in the Conciliation Committee. While the procedure was initially introduced to make EU law-making more democratic, many of the key decisions during this procedure are today made with little scope for public oversight. They are taken in a “plethora of informal and semi-formal meetings in which many of the real decisions about legislation are taken”.²⁹ In particular, the rise and rise of trilogues as the forum where legislative files are negotiated and decided upon between the three institutions entails that interinstitutional deals are, as the main rule, made in in a fast-track procedure in first reading.³⁰ During this phase, the EU democratic process is in the hands of very few: the European Parliament rapporteur(s), the representatives of the Council Presidency and Secretariat and a few Commission officials, or more recently, by Commissioners. It is not just a matter of the “invisible transformation”³¹ of the legislative procedure as such but also of substantive opacity.

The original aim of “informal trilogues” was to prepare for Conciliation Committee meetings.³² The format was found useful in many ways. A Coreper informal exchange of views in 1995 stressed the need to strengthen the dialogue, since the success of conciliation depended on the effectiveness of preparatory work; therefore the Ambassadors wondered about the possibility to “envisage a simplified procedure under which an agreement between the two institutions could swiftly be decided, in return for a few minor adjustments to the text, without recourse to the cumbersome Conciliation Committee procedure”.³³ Similar ideas were discussed on the side of the European Parliament.³⁴ A mechanism for early agreement was also linked to power relations: since

²⁷ Opinion of A.G. Cruz Villalón in Case C-280/11, *Council v. Access Info Europe*, EU:C:2013:325, para 63.

²⁸ There is a rich political science literature on codecision, which can be divided into three main categories: those on the functioning and development of the procedure; on the relative influence of the various EU institutions and finally, broader questions such as those relating to democracy and possible Treaty changes. For a review, see e.g. Rasmussen, “Early conclusion in the co-decision procedure”, EUI Working Papers MWP 2007/31 (2007), at 3-4.

²⁹ Farrell and Héritier, “The Invisible Transformation of Codecision: Problems of Democratic Legitimacy”, SIEPS Report 2003:7 (2003), at 6.

³⁰ Case T-755/14, *Herbert Smith Freehills LLP v. Commission*, EU:T:2016:482, para 56.

³¹ The term is that of Farrell and Héritier, *supra* note 29.

³² Council, “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 REV 1 LIMITE CODEC 875, 28 November 2000.

³³ Quoted in European Parliament Task Force on the Intergovernmental Conference, “Briefing No 8 on the Codecision procedure”, JF/bo/146/95, Luxembourg 20 July 1995, at 3.

³⁴ See the Bourlages/Martin report adopted by plenary on 17 May 1995.

the Parliament had proved both willing and able to use its new prerogatives and block legislation, it was in the Council's interest to initiate smooth discussions with Parliament at an early stage in the procedure.³⁵

Subsequently, the Treaty of Amsterdam introduced the option of early agreements in first reading. The new Treaty also included a declaration (No. 34) in which the Intergovernmental Conference called on the three institutions "to make every effort to ensure that the co-decision procedure operates as expeditiously as possible". Since then, trialogues have been used already during first reading, with the specific aim of adopting "fast track legislation" through early agreements. The ability to produce results fast has remained a core consideration.³⁶ Literature points to the balance between the criteria of efficiency and transparency in the legislative process, underlining the weight that has been accorded to the former and the relative lack of attention paid to the latter.³⁷ Despite the extended use of informal trialogues, the formal structure recognized by the Treaties for breaking institutional disagreement remains the Conciliation Committee. And yet, the principal mechanism for "appropriate contacts" between the Council and the European Parliament are in practice the trialogues;³⁸ an informal structure that is not recognized in the Treaties.³⁹

The wish to simplify procedures led to codecision being turned into the ordinary legislative procedure by the Treaty of Lisbon, and the use of special legislative procedures being limited. Today, the Treaties provide for 85 legal bases that refer to the use of this procedure in the adoption of EU legislation.⁴⁰ In the 7th parliamentary term (2009-2014), 89 percent of Commission proposals fell under legal bases that were adopted in the ordinary legislative procedure.⁴¹ This procedure is generally found to have succeeded beyond initial expectations,⁴² been broadly accepted and provoked little public controversy.⁴³ Since its introduction, the procedure has "developed into a well-oiled legislative procedure" where informal trialogues act as "drivers of much of the interinstitutional legislative activity".⁴⁴ Over 1,500 trialogues on approximately 350 codecision files were held under the 7th legislative term. They are an incredibly efficient format for accommodating institutional positions, and assist in closing a great majority of deals early in the legislative procedure. In 2009-2014, the number of early agreements increased to 85 percent of files decided in the ordinary legislative procedure (out of 488 files) adopted in first reading and a

³⁵ Farrell and Héritier, "Codecision and institutional change", 30 *West European Politics* (2007), 285-300, at 295.

³⁶ See e.g. Annex III of Helsinki European Council, "Presidency Conclusions", 10 and 11 December 1999, para 18, guidelines for reform and recommendations with the purpose of guaranteeing "an effective Council for an enlarged Union", which specifically instruct the Presidency to "take due account of the requirement to schedule conciliation and preparatory meetings".

³⁷ See e.g. Huber and Shackleton, "Codecision: a practitioner's view from inside the Parliament", 20 *Journal of European Public Policy* (2013), 1040-1055.

³⁸ "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 REV 1 LIMITE CODEC 875, 28 November 2000. at 20.

³⁹ However, their existence has been acknowledged in Court jurisprudence. See e.g. Case C-409/13, *Council v. Commission*, EU:C:2015:217 (Micro-financial assistance to third countries), paras 18-26.

⁴⁰ For a full list, see European Parliament, "Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th parliamentary term)", DV\1031024EN.doc, Annex I.

⁴¹ *Ibid.*, p. 3.

⁴² See e.g. Farrell and Héritier, *op. cit. supra* note 29.

⁴³ Lord, *op. cit. supra* note 25..

⁴⁴ "Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th parliamentary term)", cited *supra* note 40, at 11.

total of 93 percent either in first or early second reading.⁴⁵ The initial logic behind the codecision procedure was that the most politically sensitive dossiers would reach the conciliation stage, while more strictly technical dossiers could be adopted at first reading.⁴⁶ Today, however, the use of first reading solutions is in no way limited to technical, urgent or uncontested files.⁴⁷ Unlike in the later stages of the legislative procedure, in first reading the institutions act under no specific deadline. Currently the average total length of the ordinary legislative procedure is 19 months.⁴⁸

This kind of fast-track legislation is largely promoted through by-passing the formal machinery of law-making.⁴⁹ Instead of the three readings and conciliation stipulated in Article 294 TFEU, the general practice now is agreement in first reading. In practice, trilogues are launched before the Parliament has adopted its formal position and Council adopted its common position, with a view to reaching “a prompt agreement on a set of amendments acceptable to the Parliament and the Council”.⁵⁰ Trilogues are increasingly taking over as the main forum for making legislative deals between the three institutions.⁵¹ As the Ombudsman concludes in her recent inquiry:

“Each co-legislator will be more willing to negotiate in good faith with the other co-legislator during the Trilogue if it believes that the agreement reached will then be formally adopted unchanged. Thus, changes to the text during the subsequent formal procedure (the vote in Parliament and the consideration by Council) are uncommon. What happens in Trilogue negotiations is therefore key for the eventual content of much legislation.”⁵²

As a result, we witness an invisible transformation of the ordinary legislative procedure. The formal Treaty-based decision-making formats for interinstitutional decision making – to which transparency arrangements have more or less been linked – have been replaced by informal discussions. While the formal structures of the procedure provide for democratic potential, the informal practices established by the co-legislatures render these qualities passive.⁵³ Early agreement in first reading is fundamentally different from procedures that go through two or three readings: institutional positions in the latter stages are formal and publicly available, like those used as a basis for conciliation.⁵⁴ Therefore, the use of the ordinary legislative procedure has

⁴⁵ Only 9 files went to conciliation, and out of these all but one were adopted in third reading. *Ibid.*, p. 8. Two committees were particularly apt to use first reading deals: the REGI Committee which adopted 100 percent of its 14 files and the ECON Committee which adopted 98 percent of its 54 files at first reading.

⁴⁶ “Report by the Presidency and the General Secretariat of the Council to the European Council on making the co-decision procedure more effective”, cited *supra* note 38, para 18.

⁴⁷ See Bressanelli et al., “The Informal Politics of Codecision: Introducing a New Data Set on Early Agreements in the European Union”, *EUI Working Papers RSCAS 2014/64* (2014).

⁴⁸ However, the average length of first reading deals has increased reflecting how even most difficult files are now closed early in the process. “Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th parliamentary term)”, cited *supra* note 40, at 10.

⁴⁹ For a more detailed discussion, see Päivi Leino, “The Politics of Efficient Compromise in the Adoption of EU Legal Acts” in Marise Cremona (Ed.), *EU Legal Acts: Challenges and Transformations*, Collected Courses of the Academy of European Law (Oxford University Press, forthcoming 2017).

⁵⁰ Case T-755/14, *Herbert Smith Freehills LLP v Commission*, para 55.

⁵¹ CEPS High Level Group, “Shifting EU Institutional Reform into High Gear: Report of the CEPS High-level Group”, (2014) available at <www.ceps.eu/book/shifting-eu-institutional-reform-high-gear-report-ceps-high-level-group> (last visited 13 July 2017), at 1-24.

⁵² Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of Trilogues, 12 July 2016, para 19.

⁵³ See e.g. Stie, “Co-decision – the panacea for EU democracy?” ARENA Report Series 01/2010 (2010); Lord, *op. cit supra* note 25, at 1069-1070.

⁵⁴ Huber and Shackleton, *op. cit supra* note 25, at 1047.

also had unexpected side-effects with negative consequences for the objectives that it was specifically aimed to address: transparency and accountability.⁵⁵ The assumption is often that efficiency gains (speed) outweigh these negative consequences but the relationship between transparency and efficiency is largely untested empirically.⁵⁶

The Parliament's Rules of Procedure are the only institutional rules that recognize the existence of trialogues.⁵⁷ Their conduct relies on institutional practice, codified in a "Joint declaration on practical arrangements for the co-decision procedure" adopted in 2007, preceding the Treaty of Lisbon.⁵⁸ The declaration stresses the flexibility involved in trialogues, which "may be held at all stages of the procedure and at different levels of representation, depending on the nature of the expected discussion". There is reluctance in the Council and among many MEPs to overhaul and formalize dialogue rules. Apart from considerations relating to efficient law-making, the informal and flexible functioning of dialogue rules is believed to enhance the opportunities for the key actors to influence the dossiers.⁵⁹ The lack of formal arrangements emphasizes the lucid character of trialogues: it is not only the substance of legislation that is subject to institutional compromise, but also the manner in which compromise is reached.

2.3 *Informal trialogues as institutional working arrangements: a matter of discretion*

Institutional attitudes and practices relating to transparency in trialogues have recently been mapped in the context of an own initiative Ombudsman investigation relating to the matter.⁶⁰ In their replies, all three institutions challenged the Ombudsman's mandate to engage in the own-initiative inquiry, with reference to how trialogues and their organization are a part of their political functions and thus cannot be subject to maladministration but should instead be assessed through the political accountability mechanisms.⁶¹ The Council, for example, stressed the informal nature of trialogues as

"working arrangements that the co-legislators have put in place in exercise of their treaty prerogatives to organize the conduct of the legislative activity. Decisions on whether and how to conduct trialogues meetings – and notably decisions on when to conduct trialogues, in which composition, on whether and how to issue support documents – pertain to the political responsibility of the co-legislators [....]".⁶²

The meetings can take the form of (informal) trialogues or technical meetings. The latter are to focus on technical rather than political elements, and are conducted among civil servants and political advisers with a view to preparing for political discussions. The basis of these discussions is

⁵⁵ Farrell and Héritier, op. cit. *supra* note 29; Burns, Rasmussen and Reh, "Legislative Codecision and its impact on the political system of the European Union", 20 *Journal of European Public Policy* (2013), 941-952, at 949.

⁵⁶ Novak, "Is there a tension between transparency and efficiency in decision? The case of the Council of the European Union", EUI Working Paper MWP 2011/33 (2011).

⁵⁷ Rules 69b-69f provide for provisions on "interinstitutional negotiations during the ordinary legislative procedures".

⁵⁸ Joint declaration on practical arrangements for the Codecision procedure (article 251 of the EC Treaty), O.J. 2007, C 145/5.

⁵⁹ Stie, *Democratic Decision-making in the EU. Technocracy in disguise?* (Routledge, 2013), p. 182.

⁶⁰ European Ombudsman's own-initiative inquiry OI/8/2015/JAS concerning transparency of trialogues. All relevant opinions are available at <www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61592/html.bookmark>.

⁶¹ Opinion of the Council of the EU in the European Ombudsman's own-initiative inquiry OI/8/2015/JAS, concerning transparency of trialogues, 29 October 2015, paras 7-9

⁶² *Ibid.*, para 10.

the four-column document, which we will discuss later (Section 3.3). The distinction between “technical” and “political” is however difficult to maintain:

“Sometimes you have political dialogues which are so technical that you wonder what would be a technical triologue. But you also have very political trialogues, where it’s really a lot of politics: more political messages and all the work was shifted to the technical level and the technical trialogues lasted much longer than the political trialogues, and they would come back and say OK that’s fine go to the next topic. And I have to say this is where the deal is being made.”⁶³

Most matters are settled in technical trialogues. The function of meetings at the political level is to confirm the deal already made or agree on the proposals for solving the questions that remain formally open. Technical trialogues are to a large extent about brain-storming and the informal exchange of ideas; for example, EP officials are not expected to have a mandate for the solutions they propose.⁶⁴

“I’d like to think that there are some criteria to evaluate what is technical and what is political, but it is not always straightforward. Everything that is controversial is political. Things that seem technical can suddenly become political, and vice versa. There is an on-going discussion between the different layers of decision-makers. Important elements can still be considered technical; elements can change nature. It is a trade where closed items can be reopened, and nothing is agreed until everything is settled.”⁶⁵

The latter principle entails that, until the complete text of a proposal has been agreed by the co-legislators, changes can be made to any part, including those provisionally closed.⁶⁶ In practice, the institutions are in a more or less permanent dialogue at all levels, also outside the triologue format, making informal contacts “something very normal and natural”.⁶⁷ Efficient law-making is stressed beyond those legislative files that have a clear dead line, such as need to replace a framework that is about to expire or tackle a particularly urgent challenge:

“It is clear that some legislative files have a fixed dead line or are linked to particular political pressure to close the file. But in many cases I have felt that it is good that somebody draws a limit to negotiations since the overall solution will no longer improve no matter how long we keep on negotiating, and that more time will only help more problems to emerge.”⁶⁸

An EP official explains how “exhaustion is often the real motivation for closing a file” in addition to the “need to make results, this is what the public expects from us”.⁶⁹

One broader issue in this regard is how the Commission’s role is understood in the legislative procedure in general, and in trialogues in particular. Is it that of a technical assistant or political body? In its own view, the Commission proposal is a preparatory act that marks the initiation of an “inter-institutional process in which the Commission is closely involved, and in the course of which

⁶³ Interview with a Legal Adviser at a Member State EU Representation, 11 Feb. 2016 (Respondent 11).

⁶⁴ Interview with an Administrator at the EP JURI Committee, 9 Nov. 2016 (Respondent 33).

⁶⁵ Interview with an Administrator in the EP JURI Committee, 26 Jan. 2017 (Respondent 37).

⁶⁶ Opinion of the European Parliament in the European Ombudsman’s own-initiative inquiry OI/8/2015/JAS concerning transparency of trialogues, 22 October 2015, at 4.

⁶⁷ See the House of Lords European Union Committee, “Codecision and national parliamentary scrutiny - Report with Evidence”, HL Paper 125 (2009), at 14.

⁶⁸ Interview with a Deputy Permanent Representative, 10 Feb. 2016 (Respondent 15).

⁶⁹ Interview with an Administrator in the EP JURI Committee, 26 Jan. 2017 (Respondent 37).

it might change or even withdraw its proposal”.⁷⁰ The Court has acknowledged that, despite the Commission’s right of initiative, the legislative functions are allocated to the Parliament and the Council. Therefore, when preparing and developing a proposal for a legislative act, the Commission is not acting in a legislative capacity.⁷¹ The Commission itself defined its own role in the context of recent litigation as follows:

“Although the final decision in the legislative procedure is taken by the European Parliament and the Council, the Commission is involved in it, from the beginning to the end, through its quasi-monopoly of legislative initiative (Article 17(2) TEU) and its “ownership” of legislative proposals. [...]The Commission may also withdraw its proposals. Finally, the Commission plays an essential role in the search for a compromise between the Council and the Parliament, in light of the general interest.”⁷²

The Commission reply to the EO stresses that trialogue meetings are organized by the co-legislators (the EP and Council): “Commission assists the Trilogue negotiations, by explaining and, if it feels the need, defending the merits of its proposal. The Commission may also withdraw a proposal in exceptional circumstances.”⁷³ The latter prerogative is strong, as the Court recently confirmed in relation to a legislative file where the Commission withdrew its proposal on the very day that the Parliament and the Council were preparing to formalise their agreement.⁷⁴ The Commission objected to the decision of the co-legislators to replace the implementing power of the Commission with the ordinary legislative procedure for the purpose of the adoption of certain decisions due to the political impact those decisions were found to have. The Court examined a number of trialogue documents and confirmed – with reference to the principles of conferral of powers and institutional balance – the while Commission has no “right of veto in the conduct of the legislative process”, it does have the right of withdrawal “where an amendment planned by the Parliament and the Council distorts the proposal for a legislative act in a manner which prevents achievement of the objectives pursued by the proposal and which, therefore, deprives it of its *raison d’être*”.⁷⁵

Unlike the other bodies, the Commission has traditionally been represented in dialogues by civil servants, which has made quick political deals difficult on its part.⁷⁶ This setting is changing, noting President Juncker’s commitment to “always send political representatives to important trialogue negotiations”, the strong role of the Commission in mediating solutions in dialogues, and also the ambition of the current Commission President is to lead what he calls a “highly political” Commission, as opposed to a technocratic one.⁷⁷ We wonder if the General Court’s justification building on reserving legislative functions to the EP and the Council really holds, and the Court will

⁷⁰ Commission Defence in Case T-796/14, *Philip Morris v. Commission*, sj.f(2015)1253808, paras 58-59.

⁷¹ Joined Cases T-424/14 and T-425/14, *ClientEarth v. Commission*, paras 102-103.

⁷² Commission Defence in Case T-755/14, *Herbert Smith Freehills LLP v. Commission*, sj.f(2015)643751, para 22.

⁷³ Opinion of the European Commission in the European Ombudsman's own-initiative inquiry OI/8/2015/JAS concerning transparency of trilogues.

⁷⁴ Case C-409/13, *Council v the Commission*.

⁷⁵ *Ibid.*, para 83.

⁷⁶ Fuglsang and Olsen, “Staying in the Loop. The Commission’s role in first reading agreements”, EPIN Working Paper No. 25/September 2009 (2009).

⁷⁷ Juncker, “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission Opening Statement in the European Parliament Plenary Session”, Strasbourg, 15 July 2014, available at <https://ec.europa.eu/priorities/sites/beta-political/files/juncker-political-guidelines_en.pdf> (last visited 13 July 2017) .

have a second chance to address this issue since an appeal is pending.⁷⁸ In the trialogue context, it is obvious that the Commission also produces compromise texts – something that is built into its role as a mediator. Since EP and Council proposals would be subject to a higher standard of transparency, it would be odd to consider the role of the Commission as that of an administrator, to which a lower standard applies.⁷⁹ More generally we would stress that it is not easy to distinguish the purely technical from the political – either as a matter of substance or over time.⁸⁰ It is striking that many of the institutional solutions are defended on the basis of the idea that technical decisions can be delegated and negotiated in secret, as long as they are subject to political control. However, we doubt both that this is possible as well as the effectiveness of public control in this regard.

2.4 Access to trialogue documents: the logic of communication

The public access legal framework does not address the question of trialogue documents specifically. The 2007 joint declaration on practical arrangements quoted above stipulates that trialogues “shall be announced, where practicable”, and “when conclusion of a dossier at first reading is imminent, information on the intention to conclude an agreement should be made readily available as soon as possible”.⁸¹ There is no mention of access to information while the process is in the substantive phase. Under the new IIA on Better Regulation, the three institutions commit to ensuring “the transparency of legislative procedures, on the basis of relevant legislation and case-law, including an appropriate handling of trilateral negotiations”.⁸² Today each institution has its own systems for access, and primarily settles questions relating to access to documents produced by itself (when necessary, following a consultation, if the request concerns a document produced by another institution). For the Parliament’s part, documents can be found in the Legislative Observatory, which is currently the most comprehensive institutional register.⁸³ The Council also maintains a register, but finding documents in it requires knowledge of either its number, title or a time period for its creation. The Commission has no comprehensive public register. Its register contains “a number of documents, with a focus on legislative documents, as well as agendas and minutes of Commission meetings”, and official Commission documents⁸⁴ (such as COM or SEC documents that can be sought by number), but many documents it has in its possession can only be accessed by submitting a request. Therefore, following legislative procedures requires a serious amount of detective work. Ideas about a joint and comprehensive interinstitutional register have been presented for years,⁸⁵ and been subject to discussions under

⁷⁸ Case C-57/16 P, *ClientEarth v Commission*, O.J. 2016, C 191/5.

⁷⁹ Interview with a Member of the Council Legal Service, 9 Nov. 2016 (Respondent 31).

⁸⁰ On the traditional justification for delegating technical issues to bodies that are subject to political accountability, see further, Majone, ‘The rise of the regulatory state in Europe’ 17:3 *West European Politics* (1994)77-101.

⁸¹ Joint declaration on practical arrangements for the Codecision procedure, cited *supra* note 58.

⁸² The interinstitutional agreement on better regulation, dated 13 April 2016, is available at http://ec.europa.eu/smart-regulation/better_regulation/documents/iaa_blm_final_en.pdf, (last visited 13 July 2017), para 28.

⁸³ See <<http://www.europarl.europa.eu/oeil/>>.

⁸⁴ See <https://ec.europa.eu/info/about-european-union/principles-and-values/transparency/access-documents/how-access-commission-documents_en#publicaccesstodocuments> (last visited 13 July 2017).

⁸⁵ See e.g. “Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th parliamentary term)”, cited *supra* note 40

, at 46, where reference is made to a “public register on trilogues, which could make available to the public, inter alia, information on files under negotiation and the composition of negotiating teams, and, once agreement on a given file is reached, all relevant documentation.”

the interinstitutional committee created under Regulation 1049/2001,⁸⁶ but so far produced no concrete results. The new IIA includes a commitment to “improve communication to the public during the whole legislative cycle” and “undertake to identify, by 31 December 2016, ways of further developing platforms and tools to this end, with a view to establishing a dedicated joint database on the state of play of legislative files”. Work on a joint database between the three institutions is ongoing, and there is an initiative to present all documents relating to interinstitutional legislative procedures at a single point on EUR-LEX.⁸⁷

There are no joint or agreed minutes or reports of trilogue meetings. Instead, reporting takes place within each institution according to its own practices.⁸⁸ As far as interinstitutional discussions are concerned, in principle any kind of document that is seen by the parties as facilitating the negotiations is admitted.⁸⁹ In practice, the four-column document is the only jointly drafted report of discussions that tracks progress: “It is in effect the full ‘map’ of the informal, but decisive, Trilogue negotiation process”.⁹⁰ It is a shared document between the institutions, which usually contains the initial Commission position, the Parliament’s position as adopted in Committee and the Council position. In addition, the document includes a fourth column, which shows the compromises suggested by any of the three institutions or considered agreed to between the negotiators.⁹¹

The practices relating to the creation of these documents are highly informal. The only institutional provision referring to four-column documents used to be found in an Annex to the Parliament’s Rules of Procedure, which specified that

“[n]egotiations in trilogues shall be based on one joint document, indicating the position of the respective institution with regard to each individual amendment, and also including any compromise texts distributed at trilogue meetings (e.g. established practice of a four-column document)”.⁹²

In the Parliament’s new Rules of Procedure from January 2017, this point has been deleted, thus turning four-column documents into documents that exist as a matter of practice, but not as a matter of law. It is difficult to avoid the feeling that the change deleting explicit mention has been triggered by the fact that these documents are under a sustained accountability spotlight, both by the Ombudsman and by the Court as a result of challenges brought before it.

In practice, four-column documents are drawn up in collaboration between the Secretariats of the three institutions, which also fill them in as negotiations progress.⁹³ Only the fourth column with comments and compromise solutions changes during the negotiations.⁹⁴ In the fourth column, “any institution may table additional written contributions on specific issues for consideration in trilogue meetings”.⁹⁵ The order and the number of columns may also vary according to the

⁸⁶ See Art. 15(2) of Regulation 1049/2001.

⁸⁷ See the Opinion of the Council of the European Union to the own-initiative inquiry OI/2/2017 AB on access to documents relating to documents relating to Council preparatory bodies when discussing draft EU legislative acts, available on the European Ombudsman’s website, para 14-15.

⁸⁸ Opinion of the European Commission, cited *supra* note 73.

⁸⁹ Opinion of the European Parliament, cited *supra* note 66.

⁹⁰ Decision of the European Ombudsman, cited *supra* note 39, para 49.

⁹¹ Opinion of the European Commission, cited *supra* note 73.

⁹² See Annex XX, which laid down a ‘Code of conduct for negotiating in the context of the ordinary legislative procedures’, point 5.

⁹³ Opinion of the European Commission, cited *supra* note 73.

⁹⁴ Opinion of the European Parliament, cited *supra* note 66.

⁹⁵ Opinion of the European Commission, cited *supra* note 73.

political and negotiating circumstances.⁹⁶ Multi-column documents are atypical since they are living documents, and there is no specific point in time when they are formally completed or registered. Instead, amendments and compromise proposals are added to the same Word file, which is subject to new discussions in varying formats and frequently amended.⁹⁷ Four-column documents are not documents that are tabled in a formal setting, “it is just an exchange”.⁹⁸ They are a means to control and keep track of the negotiation process where agendas for meetings have little practical relevance:

“at the trialogue stage everything changes, agenda items are frequently postponed and matters outside the agenda are taken up. ... Matters that were provisionally closed are opened up again. [...] nothing is definitely agreed. But of course we also make progress in trialogues. But informing about what actually happens would be confusing. I find it confusing, I often do not know what was decided.”⁹⁹

However, while done on the technical level, the process of drafting these documents is highly influential for the outcome, since solutions build largely on discussions between the Presidency, the Commission and the Council Secretariat when preparing the four-column-documents.¹⁰⁰

All three institutions define the four-column document in technical terms. For the Commission: it is a “working-tool”.¹⁰¹ For the Council, it “is a shared document belonging to an informal process”.¹⁰² For the Parliament, it is a “pragmatic working tool [which] ensures that negotiations progress in an orderly fashion.” The only institution stressing the importance of these documents is the EP, which recognizes their emergence as the main working tool for legislative negotiations. The Parliament also points out how the jointly prepared four-column documents have been seen to promote transparency in trialogues but mainly within the Parliament itself.¹⁰³

In the Council, four-column documents are prepared as standard Council documents and registered in the public register when they are circulated to the Member States. Following distribution, therefore, their existence is visible in the register, but the documents cannot usually be downloaded. Only selected versions of the document are distributed to the Member States and subsequently registered, depending on when the Presidency wishes to place the matter on the agenda. The registered versions of the four-column documents are made publicly available after the final adoption of the legislative act. Before that, these documents can be made available based on individual requests under Regulation 1049/2001.¹⁰⁴ The Council policy has been to grant partial access only to disclose the European Parliament and Commission positions (that are public anyway). The Council mandate is disclosed if it has been disclosed earlier if disclosure is possible at time of request, but usually access to the Council part is refused.¹⁰⁵

Also for the Parliament, documents relating to trialogue negotiations are generally disclosed once agreement on the file has been reached; this is linked to how the “final outcome of the

⁹⁶ Opinion of the Council, cited *supra* note 61, para 16.

⁹⁷ Interview with a Member of the Council Legal Service, 9 Nov. 2016 (Respondent 31).

⁹⁸ *Ibid.*

⁹⁹ Interview with an Administrator in the EP JURI Committee, 26 Jan. 2017 (Respondent 37).

¹⁰⁰ Interview with a Deputy Permanent Representative, 10 Feb. 2016 (Respondent 15).

¹⁰¹ Opinion of the European Commission, cited *supra* note 73.

¹⁰² Opinion of the Council, cited *supra* note 61, Para 16.

¹⁰³ Opinion of the European Parliament, cited *supra* note 66.

¹⁰⁴ Opinion of the Council, cited *supra* note 61.

¹⁰⁵ Interview with Members of Council Secretariat, 20 Jun. 2016 (Respondents 35 and 36).

negotiating process always becomes a public document”.¹⁰⁶ Disclosure of documents related to conciliation and third reading, in the rare cases when these stages are used, are systematically published in the Parliament’s public register, following signature of the final act by the co-legislators. The register also includes joint texts approved by the Conciliation Committee as well as other documents of general character concerning this part of the procedure

National parliaments often cannot follow how negotiations advance in trialogues. They depend on information provided by their national governments, who might be constitutionally required to provide such information but themselves have difficulty in gaining access to information. This makes it virtually impossible for them to engage in a dialogue with their own parliament while trialogue negotiations are ongoing. The positions of national parliaments are usually based on the initial Commission proposal, which is often significantly altered during the legislative process, which moves fast, something that hinders effective scrutiny.¹⁰⁷ While Member States may have other general channels of information concerning trialogues, for example by interaction with MEPs of their own nationals¹⁰⁸ their knowledge of actual amendments made during trialogues may be limited. A topical example of a trialogue deal can be found in the Regulation (EU) No 909/2014, which exceptionally includes a national derogation applicable to Finland.¹⁰⁹ What makes the file interesting is that neither the Finnish Government nor the Parliament ever asked for the derogation, nor was it included in the Council mandate. There are no public documents from the trialogue stage to verify its origin, but most likely the derogation originated in the financial lobby, and was inserted by a trialogue representative of the EP.¹¹⁰ This is an example of highly selective transparency- to the lobbyists but not the affected national public interest. The unclearly drafted derogation in the Finnish case caused significant delay in national implementation, not least because there was no national position clarifying the objectives of this derogation. A legal advisor working for another national parliament explains trialogues is :

“a sore point for us, in the sense that it is so lacking in transparency, so it’s very difficult to know what’s going on, and from a scrutiny point of view we only really manage to, on many occasions, get engaged when the whole thing’s all done and dusted and it’s all too late.[...] what we end up with in the worst cases, or at the worst end of the spectrum, is here’s a Commission proposal, it’s been discussed in Council, it’s had a mandate in COREPER, none of which is being made to the public, it’s had all these trialogues and here’s the finished product, like it or lump it.”¹¹¹

National parliaments can only hold their own governments to account for positions taken in the EU legislative procedure if they have access to core information about the actual decision-making. In the following section, we address three issues that have been particularly contentious in this regard: Member State positions, legal advice by the institutions’ legal services and four-column documents.

¹⁰⁶ Opinion of the European Parliament, cited *supra* note 66.

¹⁰⁷ “Codecision and national parliamentary scrutiny - Report with Evidence”, cited *supra* note 54, at 15-16.

¹⁰⁸ Interview with a Legal Adviser at a Member State EU Representation, 11 Feb. 2016 (Respondent 11), pointing out how in more political files the bigger Member States tend to be well represented among the rapporteurs.

¹⁰⁹ Art. 38(5) Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, O.J. 2014, L 257/1.

¹¹⁰ The Finnish Government’s proposal HE 28/2016 vp, Hallituksen esitys eduskunnalle laiksi arvo-osuusjärjestelmästä ja selvitystoiminnasta sekä eräiksi siihen liittyviksi laeiksi, at 23.

¹¹¹ Interview with a Legal Advisor working for a National Parliament, 7 Sep. 2016 (Respondent 26).

3. Stepping into the twilight zone

3.1 Council and Member State input

The provisions on open Council deliberations found in the Treaty are significant as a matter of principle, but in practice often irrelevant for legislative matters that are closed in first reading. In the large majority of files, legislative work is undertaken by Council preparatory bodies (committees and working parties) convening under Coreper, which leads the work and closes most of the deals¹¹² before they reach a formal Council configuration at ministerial level. Coreper and working party discussions are not open to the public. Coreper documents, such as Council mandates for the trialogues, are not made public on distribution. When they are made publicly available depends on the file.¹¹³ Legislative documents are usually prepared as ST documents (standard) and marked in the Council register when circulated to delegations.¹¹⁴ Since 2016 this has increasingly also applied to room documents and working papers: the Council's new system of recording documents also covers 'informal documents', which are now registered and thus easily retrievable.¹¹⁵ However, the great majority of them are made public only upon request, after a case-by-case assessment, while the discussions on the legislative file are on-going. In this assessment, the existence of the risk that disclosure may seriously undermine the on-going decision process is particularly considered.¹¹⁶ There are no statistics on how many documents are disclosed in full or in part and at what stage of the procedure.

In the Council, legislative documents are systematically disclosed via the public register only once a file has been closed, in practice after a delay of a year or two.¹¹⁷ However, even at the stage when documents are generally released there are certain documents that merit particular treatment. Such documents include in particular Legal Service opinions (see Section 3.2 below) and contributions by Member States. The Council Rules of Procedure further make it possible for a Member State to request that documents that reflect its individual position in the Council are not to be made available to the public.¹¹⁸

¹¹² Art. 19 allocates the task of preparing the Council work on Coreper, which is to examine the items all items placed on Council agenda with the view of endeavouring to reach agreement prior to submission to the Council. Coreper also decides on the "adequate presentation of the dossiers to the Council and, where appropriate, shall present guidelines, options or suggested solutions".

¹¹³ However, there are examples of legislative files, in particular the recent data protection package, where there have been several requests to documents upon issue both at EU and national levels by civil society and consultancy representatives. In those cases documents have been made universally available upon request, after the working group or trilogue for which they had been prepared. Since many of these documents were also leaked, a decision was taken to prefer official disclosure. Trilogue documents were however not always disclosed in full. Interview with Members of Council Secretariat, 20 Jun. 2016 (Respondents 35 and 36).

¹¹⁴ Some are prepared as DS documents (room documents) in which case they are not marked in the register, but on a separate list which is upheld and published once a month by the responsible DG. If there is a request for all documents belonging to a certain file, these documents are considered as well. Interview with Members of Council Secretariat, 20 Jun. 2016 (Respondents 34 and 35).

¹¹⁵ Opinion of the Council of the European Union to the own-initiative inquiry OI/2/2017 AB on access to documents relating to documents relating to Council preparatory bodies when discussing draft EU legislative acts, available on the European Ombudsman's website, at 10.

¹¹⁶ Opinion of the Council, cited *supra* note 61, para 17.

¹¹⁷ Under Art. 11(6) of Annex II to the Council Rules of Procedure, "any documents" relating to legislative acts will be made available after the adoption of the act, including "information notes, reports, progress reports and reports on the state of discussions in the Council or in one of its preparatory bodies (outcomes of proceedings)"; Interview with Members of Council Secretariat (Respondents 35 and 36).

¹¹⁸ See Art. 11 of Annex II to the Council Rules of Procedure on "Specific provisions regarding public access to Council documents".

In the trialogues, the Council is represented by its Presidency, assisted by staff from the Secretariat and the Council Legal Service. In principle, feedback from trialogues is given to the delegations either through working parties or Coreper:

“Trialogues are usually reported from in detail in working parties and for Coreper on a slightly more general level. The Presidency also rather clearly articulates that this is the mandate you have given me but it will not be enough and I will need more flexibility. We also discuss tactical issues in detail.”¹¹⁹

Coreper as the forum for confidential deals has been emphasized in particular after the decision to turn formal Council discussions public:

“At some stage of the negotiating process we need a stage for making compromises, and currently it is Coreper. And in Coreper I we seldom take matters to the ministers that would include open questions. This is necessary because of the technical nature of questions but also for reasons of scheduling, since many of our Councils only convene less seldom than once a month. There is the question of efficiency, but also political credibility. And this smoke screen is needed at some stage where you can move without losing face and for Member States it is better that this takes place in an organized structure than that the forum for deal-making simply disappears.”¹²⁰

Discussions in Coreper are closed:

“In a Union of twenty-eight Member States you need to have some system where you can just present something to the Member States to say could you agree or not and then go back because otherwise the whole process will be slowed down so completely.”¹²¹

In this setting, the objective of ensuring transparency in EU policymaking, characterized by the ideal of consensus among sovereign States as main stakeholders, is genuinely challenging.¹²²

Fears of slowing down the process have largely guided Council policy, in particular when its decision-making is in its early stages. As far as Member State positions are concerned, the Council’s traditional policy line has been to black out delegation symbols from documents, with reference to how their identification “could considerably reduce the flexibility of delegations to reconsider their position or lead to a re-opening of the debate and thereby seriously undermine the Council’s decision-making process”.¹²³ Denials to grant access have been justified by reference to how the requested contributions related to “particularly sensitive issues in the context of preliminary discussions within the Council [...] where thorough discussions have not yet taken place [...] and a clear approach has not yet emerged [...]”.¹²⁴ The Council has maintained that democratic debate does not presume identifying delegations. Its “legislative process is very fluid and requires a high level of flexibility”, enabling Member States to modify their positions and thereby maximising the chances of reaching an agreement. Maximum room for manoeuvre is needed for ensuring a “negotiating space”, which is necessary for preserving the effectiveness of the legislative process. If national positions were disclosed, this would trigger pressure from public opinion, and hamper the effectiveness of the Council’s decision-making process.¹²⁵ This would, in

¹¹⁹ Interview with a Deputy Permanent Representative, 10 Feb. 2016 (Respondent 15).

¹²⁰ Ibid.

¹²¹ Interview with a legal advisor at a Member State Permanent representation, 11 Feb. 2016 (Respondent 12).

¹²² Harlow and Rawlings, *Process and Procedure in EU Administration* (Hart Publishing 2014) 119.

¹²³ Council letter of 19 December 2002 quoted in Case T-84/03, *Turco v. Council*, para 7.

¹²⁴ Decision of the Council of 26 February 2009, quoted in Case T-233/09 *Access Info Europe v. Council*, para 10.

¹²⁵ C-280/11 P, *Council v. Access Info Europe*, para 24.

the Council's view, reveal itself especially in the reluctance of delegations to provide their views in writing, which would "cause significant damage to the effectiveness of the Council's internal decision-making process by impeding complex internal discussions on the proposed act, and would also be seriously prejudicial to the overall transparency of the Council's decision-making".¹²⁶ The secrecy surrounding Council decision-making also has interinstitutional implications for the Parliament, which enjoys limited access to information about discussions within the Council and individual Member States' positions. Its lack of access to information concerning Council negotiations is a frequently voiced concern.¹²⁷

The question relating to publicity of Member State positions was raised when Access Info Europe, an NGO promoting freedom of information in the EU, requested access to a working party document relating to a legislative matter, which included footnotes indicating the positions of individual delegations. Negotiations on the file were on-going at the time of the request, and no common position by the Council had yet been adopted. The central question was whether the disclosure of Member State positions detracts from the effectiveness of decision-making and, if yes, whether effectiveness or openness should take priority. Another salient issue was what turns a document into one that is "of a particularly sensitive nature" within the meaning of *Turco* – for the Parliament, which intervened on the applicant's side, this nature could not arise from media interest or the existence of divergences in the views of the parties.¹²⁸

In its appeal to the Court of Justice,¹²⁹ the Council argued that the balance established by EU law between transparency and effectiveness would be excessively balanced in favour of the former if Member State positions needed to be disclosed. The CJEU rejected this with reference to how full access to a document can be limited only if there is a genuine risk that the protected interests might be undermined. The high standard of proof required to establish that level of harm makes it almost impossible to rely on the need to protect the institutions' decision-making process (Article 4(3) of Regulation 1049/2001) in this context. This is a strong and generally worded statement by the Court, also keeping in mind that the requested documents related to the early stages of Council decision-making. In particular, according to the Court,

"the various proposals for amendment or re-drafting made by the four Member State delegations which are described in the requested document are part of the normal legislative process, from which it follows that the requested documents could not be regarded as sensitive – not solely by reference to the criterion concerning the involvement of a fundamental interest of the European Union or of the Member States, but by reference to any criterion whatsoever".¹³⁰

Following the ruling, the Council General Secretariat prepared a paper of options for the Member States to consider.¹³¹ The Secretariat pointed out that there is, in fact, no legal obligation on the Council to draw up documents which identify Member States' positions, but such documents – when drafted systematically in all legislative files – assist in providing a detailed overview of the state of play of on-going negotiations. However, situations exist where the automatic recording and subsequent public release of the names of individual Member States might be deemed

¹²⁶ Ibid.

¹²⁷ Rule 43. See also "Activity Report on Codecision and Conciliation 14 July 2009 – 30 June 2014 (7th parliamentary term)", cited *supra* note 40, at 45.

¹²⁸ Parliament Statement in Intervention in C-280/11 P, *Council v. Access Info Europe*, para 33.

¹²⁹ C-280/11 P, *Council v. Access Info Europe*.

¹³⁰ Ibid., para 63.

¹³¹ See Council, "Drafting of documents relating to legislative activities", 8622/1/14 REV 1 LIMITE, 13 May 2014.

inappropriate. Alternatively, the practice of recording individual delegations in all documents relating to on-going legislative procedures could be ceased. This would address the specific concern that publicity could reduce Member States' negotiating flexibility, but also render the preparatory documents less useful for delegations. Coreper opted for a middle position: to continue recording Member State symbols in documents relating to on-going legislative procedures where it is deemed appropriate with reference to coherence, the impact on the efficiency of the Council's decision-making and the Member States' negotiating flexibility; the need to keep track of the evolution of the negotiations and other considerations linked to the specific nature of the file or subject-matter, notably its sensitive character.¹³² However, there is reluctance to enforce the ruling. A legal advisor working for a national parliament sees this reluctance as hindering national scrutiny as well:

“I don't think the Council has been really following the spirit of the jurisprudence anyway on the disclosure of legislative documents. I mean they still whack a *limité* stamp on things that have Member State positions when it's by no means accepted by the Court.”¹³³

The European Ombudsman recently launched a strategic inquiry relating to the disclosure of documents on discussions on draft EU legislative acts in Council preparatory bodies in order to to examine how the *Access Info* ruling is implemented in practice and to scrutinise the extent to which the present arrangements adequately facilitate public scrutiny of ongoing legislative discussions.¹³⁴ The Council now feels that the ruling does not require the adaptation of its Rules of Procedure,¹³⁵ and that Regulation 1049/2001 is applied so that access to delegation symbols is given in ongoing legislative procedures 'save in duly justified and exceptional cases'.¹³⁶ The Council's latest Annual Report on the application of the Regulation indicates that at the initial stage, the need to protect the Council's internal decision-making was the most used exception (555 times, or in 36% of applications). This was also the most used exception invoked to justify partial access (23 times, or 42%) at the stage of confirmatory applications (90 times, or 87%).¹³⁷

These discussions raise a key issue relating to legislative transparency: what is an acceptable efficiency cost in a law-making procedure that claims democratic foundations? The underlying assumption seems to be that an increase in transparency (potentially) exposes the debates of law-makers to a general public composed of outsiders, and that this may lead to a loss of decisional efficiency measured either in time or the attainment of particular pre-set policy goals by the insiders.¹³⁸ By inverse logic, it is believed that a decrease in transparency leads to gains in terms of decisional efficiency.¹³⁹ In our view the delay that may take place does not, without more,

¹³² See Council, “Outcome of the proceedings of the 2479th meeting of the Permanent Representatives Committee held on 15 May 2014”, 10078/14 LIMITE, 22 May 2014.

¹³³ Interview with a Legal Advisor working for a National Parliament, 7 Sep. 2016 (Respondent 26).

¹³⁴ Letter opening strategic inquiry OI/2/2017/AB on access to documents relating to Council preparatory bodies when discussing draft EU legislative acts, 10 March 2017.

¹³⁵ Opinion of the Council of the European Union to the own-initiative inquiry OI/2/2017 AB on access to documents relating to documents relating to Council preparatory bodies when discussing draft EU legislative acts, available on the European Ombudsman's website, para 9.

¹³⁶ *Ibid.*, para 8.

¹³⁷ Council, “Fifteenth annual report of the Council on the implementation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents”, Council doc. 7903/17.

¹³⁸ Maarten Hillebrandt & Stéphanie Novak, ‘Integration without transparency’? Reliance on the space to think in the European Council and Council, 38:5 *Journal of European Integration* (2016), 527-540, at 529.

¹³⁹ *Ibid.*

preempt the value of more substantive democratic engagement which might also result in qualitatively better outcomes.

3.2. *Legal Advice*

Regulation 1049/2001 includes an exception to public disclosure relating to court proceedings and legal advice, which requires the institution to balance the harm from disclosure with the public interest in disclosure. The applicability of the exception to legal service opinions given in the context of legislative procedures has been repeatedly subject to disagreement. For the Council, their disclosure should be limited, since these opinions are

“an important instrument which enables the Council to be sure of the compatibility of its acts with Community law and to move forward the discussion of the legal aspects at issue. Secondly, disclosure of the legal service’s opinions could create uncertainty regarding the legality of legislative acts adopted further to those opinions and, therefore jeopardise the legal certainty and stability of the Community legal order.”¹⁴⁰

The Council has not been convinced about the relevance of the legislative context for its analysis: in its view,

“an overriding public interest is not constituted by the mere fact that the release of those documents containing the legal service’s advice on legal questions arising in the debate on legislative initiatives would be in the general interest of increasing transparency and openness of the institution’s decision-making process.”¹⁴¹

Like the Council, the Commission has been defensive of legal advice. In its view,

“Only clear and independent legal advice can play an effective role in influencing their internal decision-making process. Such advice permits the institutions to be informed realistically as to their margin of manoeuvre and, in particular, it permits them to exercise their discretion whether or not to follow such advice.”¹⁴²

If such advice were to be made public, the Commission argues, “[l]egal services would be obliged to exercise self-restraint and to draft their legal advice in very cautious terms”. Therefore, “[p]ublic legal advice, drawn up in cautious terms, cannot be as influential or effective in guiding the institution to a legally sound result and hence contribute to legal certainty and the rule of law”.¹⁴³

The role of legal services in assisting in the context of dialogues has also recently been on the judicial agenda. For the Commission,

“If the Commission Legal Service cannot freely advise on a particular drafting of a text when it is known that the text will be contested, its role will inevitably be limited to oral comments in order not to put at risk the work of the Commission and, in trilogues, of the legislators. In such circumstances [...] the drafting of a specific provision requires, almost by definition, written action, in the form of a first draft and then amendments to that draft, accompanied, as the case may be, by the reasons behind a particular drafting.”¹⁴⁴

¹⁴⁰ Council Decision concerning Mr Turco’s confirmatory application of 22 November 2002, quoted in Joined Cases C-39/05 P and C-52/05, *Turco*, para 13.

¹⁴¹ *Ibid.*

¹⁴² Response of the Commission in Joined Cases C-39/05 P and C-52/05 P, *Turco*, JURM(2005) 6028, para 13.

¹⁴³ *Ibid.*, para 14, 16.

¹⁴⁴ Commission Defence in Case T-755/14, *Herbert Smith Freehills LLP v. Commission*, sj.f(2015)643751, para 57.

The Commission assessed the matter in particular from the perspective of prospective litigation. Disclosure of documents that are of relevance for future litigation would “place the debate in the public square, while at the same time being discussed before the courts”, which would “seriously also undermine the serenity and integrity of the legal debates before the Union courts”.¹⁴⁵ Consequently,

“on balance, the value-added of the disclosure of those documents for the democratic life of the Union is negligible or even negative, and that the need to protect ‘court proceedings and legal advice’ weighs much more.”¹⁴⁶

The Commission has also stressed how the documents drafted by its legal services in the dialogue context do not reflect the positions defended by the Commission in the legislative process but instead concern “legal advice in the preparation of positions to be taken. There is no overriding public interest to know how the position taken has been prepared”.¹⁴⁷ For the public, it is sufficient to read the relevant Article

“as it has been adopted by the legislature. It can draw conclusions from the text itself and from other documents available, and does not need to dispose of the legal advice of the Council legal service to know ‘how the legislature applies this principle’.”¹⁴⁸

The institution that seems to have the least issues with the publicity of its legal advice is the legal service of the European Parliament. Legal matters are handled by its Legal Affairs Committee, a political body, and its legal service, which gives much of its advice to and in committees whose work is public in any case, so there is no presumption that its advice should or could be confidential:

“I have no particular problems about giving legal advice to the public, as I say, it has a very sanitary effect on the members on the Legal Service, they really have to try and get it right immediately, from the beginning. And if this means a little more caution, fine.”¹⁴⁹

The *Turco* ruling quoted above is not only influential because of the general principles of legislative transparency it expresses, but also for laying out the interpretation of the exception relating to the protection of legal advice in the legislative context. The Court established that “Regulation No 1049/2001 imposes, in principle, an obligation to disclose the opinions of the Council’s legal service relating to a legislative process”.¹⁵⁰ However, access can be denied temporarily and in exceptional cases if the advice is “of a particularly sensitive nature or having a particularly wide scope that goes beyond the context of the legislative process in question”.¹⁵¹

The implementation of the general principle of access was debated again in the *Miettinen* case,¹⁵² when the Court had the opportunity to clarify that “particularly sensitive character” relates to the substance of the document, not the policy area (in this case, criminal law and fundamental rights) to which the document belongs. The General Court recalled that the application of Article 4(3) of

¹⁴⁵ Ibid., para 59.

¹⁴⁶ Ibid., para 66.

¹⁴⁷ Ibid.

¹⁴⁸ Commission Statement in Intervention in Case T-710/14, *Herbert Smith Freehills LLP v. the Council*, sj.f(2015), paras 8-9.

¹⁴⁹ Interview with a Former Member of the Legal Service of the European Parliament (Respondent 19).

¹⁵⁰ Joined Cases C-39/05 P and C-52/05 P, *Turco*, para 68.

¹⁵¹ Ibid., para 69.

¹⁵² Case T-395/13, *Miettinen v. Council*, EU:T:2015:648.

Regulation 1049/2001 presumes that the decision-making process is *seriously* undermined through disclosure having a substantial impact. While the legislative procedure was on-going at the time of Miettinen's request, the contested decision failed to contain any tangible element demonstrating a risk that would be reasonably foreseeable and not purely hypothetical. Contrary to the Council's arguments, the Court stressed that

"full public access to the contents of Council documents constitutes the principle, above all in the context of a procedure in which the institutions act in a legislative capacity, and that the exceptions must be interpreted strictly. First, [...] it should be noted that the requested document examines whether the proposed legal basis for the proposal for a directive is appropriate. It is sufficient to note [...] that the question of the legal basis is an essential question in the legislative process and does not shift the focus of debates, but is an essential part thereof. Secondly, as regards the risk invoked by the Council that disclosure of the requested document would impede its negotiating capacities and the chances of reaching an agreement with the Parliament, [...] a proposal is designed to be debated, in particular as regards the choice of legal basis. Moreover, as the applicant states, in the light of the importance of the choice of legal basis of a legislative act, the transparency of the choice does not weaken the decision-making process, but strengthens it."¹⁵³

The scope of the legal advice exception in the legislative context has recently been examined in a number of cases relating to the negotiations of the new directive concerning the manufacture, presentation and sale of tobacco (TPD) and related products.¹⁵⁴ In these cases a number of affected tobacco companies who were challenging the validity of the new legislation in national courts had applied for access to documents relating to the trialogue phase. The requested documents included a number of e-mail messages sent between the different legal advisers of institutions and Member States. The Council refused to grant access to these documents, emphasizing that the messages contained "informal exchanges regarding the preliminary legal positions" on particularly controversial, complex and debated provision, arguing that informal documents of this kind "should enjoy specific protection, precisely because they were informal and intermediate".¹⁵⁵ The Commission refusal was primarily based on the connection of these documents with pending litigation, some of which involved the applicants, whose interest in gaining access was thus more private and privileged than public.¹⁵⁶ The Court accepted that

"Although the legislative discussions conducted during a triologue often concern political issues, they may also sometimes concern technical legal issues. In the latter case, on occasion, the legal services of the three institutions must discuss and agree on a position, an agreement that must subsequently be approved by each of the three institutions in accordance with their respective procedures."¹⁵⁷

¹⁵³ Ibid., paras 67-70.

¹⁵⁴ See Case T-18/15, *Philip Morris v. Commission*, EU:T:2016:487; Case T-796/14, *Philip Morris v. Commission*, EU:T:2016:483; Case T-800/14, *Philip Morris v. Commission*, EU:T:2016:486; Case T-710/14, *Herbert Smith Freehills LLP v. Council*, EU:T:2016:494; Case T-755/14, *Herbert Smith Freehills LLP v. Commission*, EU:T:2016:482. Case T-520/13, *Philip Morris Benelux v. Commission* closed with an order of the Court since the Commission disclosed the requested impact assessment after commencement of the action and there was no longer a need to adjudicate on the action.

¹⁵⁵ Case T-710/14, *Herbert Smith Freehills LLP v. Council*, paras 7 and 9.

¹⁵⁶ Case T-755/14, *Herbert Smith Freehills LLP v. Commission*; Case T-800/14, *Philip Morris v. Commission*.

¹⁵⁷ Case T-755/14, *Herbert Smith Freehills LLP v. Commission*, para 55.

The Court also accepted that the exchanging of views between the Legal Services of the three institutions in order to reach a compromise regarding a legislative text in the context of a trilogue could be described and subsequently protected as legal advice.¹⁵⁸

A significant difference with the *Turco* situation was that, at the time of requesting the documents, the chosen legal basis was already subject to legal challenge.¹⁵⁹ The applicants had a private interest in the outcome, unlike in the *Turco* case, which was brought by a Member of the European Parliament. In the Tobacco cases, the Court accepted that the relevant documents had a relevant link with a dispute pending before the EU Courts and that disclosure would “compromise the principle of equality of arms and, potentially, the ability of the institution concerned to defend itself in those proceedings”.¹⁶⁰ For the Court, the ability of an institution to defend itself would be seriously compromised if it needed to consider internal positions concerning the legality of the various options envisaged in the context of the drawing up of the act in question, including assessments by its own staff which may have ultimately been disregarded.¹⁶¹ Disclosure of such documents would

“seriously compromise its decision-making process, as it would deter staff from making such remarks independently and without being unduly influenced by the prospect of wide disclosure exposing the institution of which they are part. The possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process.”¹⁶²

It would seem that these rulings, from the General Court, expand the scope of the relevant exception as compared to previous case law. In *Turco*, the CJEU was not convinced by arguments relating to external pressure.¹⁶³ The institutional thinking in the legal services points to an understanding ranging from categorical protection of their advice to a need to protect advice beyond the closure of the relevant legislative procedure every time institutions act contrary to the advice of their legal services.¹⁶⁴

Due to the predominant institutional mindset, the *Turco* ruling never had any more than a marginal effect on institutional behavior.¹⁶⁵ Indeed, a pertinent example of this is the Council Rules of Procedure, which were never updated to reflect the jurisprudence. Several appeals are also pending before the European Ombudsman. The fact that very few legal service opinions are actively made public is a point observed also at national level when the justification for amendments made during Council discussions have remained difficult to trace in public documents.¹⁶⁶ Legal advice is, however, routinely used for the purpose of solving deadlocks

¹⁵⁸ Ibid., paras 58-59.

¹⁵⁹ Case T-800/14, *Philip Morris v. Commission*, paras 70-71.

¹⁶⁰ Case T-796/14, *Philip Morris v. Commission*, para 88.

¹⁶¹ Case T-18/15. *Philip Morris v. Commission*, para 73.

¹⁶² Ibid., para 87.

¹⁶³ Joined Cases C-39/05 P and C-52/05 P, *Turco*, para 64.

¹⁶⁴ Interview with a former Legal Advisor at a Member State EU delegation, 3 Feb. 2016 (Respondent 1).

¹⁶⁵ This is also reflected in jurisprudence, see e.g. Case T-452/10, *ClientEarth v. Council*, EU:T:2011:420; Case T-303/13, *Miettinen v. Council*, EU:T:2014:48; Case T-395/13, *Miettinen v. Council*.

¹⁶⁶ See the recent statements of the Constitutional Law Committee of the Finnish Parliaments PeVL 61/2016 vp concerning the establishment of the European Public Prosecutor’s Office, and PeVL 50/2016 vp, which concerned the legislation concerning elections to the European Parliament. In both cases significant amendments had been made following an opinion of the Council Legal Service, which however was not made publicly available to more than an extremely limited extent; a practice that the Committee found unsatisfactory with reference to democratic principles.

because it is seen as the common, objective and therefore “neutral” ground – irrespective of how objective it in fact is. Indeed, the notes from the legal services often largely describe the state of the law, often with reference to case law or EU legislation, rather than concrete suggestions on the choices to be made or what should be done. Recent rulings demonstrate that there are however instances where legal advisers in the dialogue context not only give advice on legal matters. Rather they can and also do act as mandated with the task of reaching an agreement.¹⁶⁷ This may lead to the drafting of compromise texts. The legal advice then becomes part of the actual EU law making process. The lines between what is “legal” and what is “political” are thus notoriously difficult to draw.

3.3. *Interinstitutional (four-column) documents*

A case concerning access to the core dialogue documents, the four-column documents, is currently pending before the General Court.¹⁶⁸ Their publicity has so far only been addressed by the European Ombudsman in the context of her recent investigation. The Ombudsman recognizes a general difficulty with tracing and locating existing public information relating to legislative procedures and recommends the establishment of a joint database. She urges the institutions to provide information on dialogue dates and the institutions’ initial positions on the Commission proposal, regardless of the level at which the position has been adopted internally. As noted above, this is a highly relevant recommendation for the Council in particular. The Ombudsman also asks for general summary agendas before or shortly after the dialogue meetings but is satisfied with information that does not reveal individual strategies or compromise negotiations. She acknowledges that access to the evolving versions of the four-column document would allow the public to follow how a final text has emerged from the institutions’ different starting positions. However, the EO proves sensitive to institutional concerns relating to efficiency: “It is arguable that the interest in well-functioning dialogue negotiations temporarily outweighs the interest in transparency for as long as the dialogue negotiations are ongoing.” Four-column documents should, however, proactively be made available as soon as possible after the negotiations have been concluded. In addition, she argues for making lists of dialogue documents, including a list of the politically responsible representatives present. In case negotiations are delegated to civil servants, their names should be accessible.

The Ombudsman recommendations appear very restrained considering that her approach resembles that already enunciated by the Council itself in a report adopted in 2000. In that report, legislative transparency is mainly treated as a matter falling under a common communications strategy:

“A paradoxical situation exists. The co-decision innovation has become a point of reference among legislative procedures, but is still little known. Its results, even when they relate to areas of direct concern to Europe's citizens, are given only very little publicity. Efforts must be made to rectify this situation by setting up a communications strategy which will ensure transparency and the flow of information to citizens, while safeguarding the effectiveness of proceedings and the confidentiality of the negotiations and guaranteeing the freedom of each institution.”¹⁶⁹

¹⁶⁷ Case T-755/14, *Herbert Smith Freehills LLP v. Commission*, paras 58-59.

¹⁶⁸ Case T-540/15, *De Capitani v. European Parliament*.

¹⁶⁹ “Report by the Presidency and the General Secretariat of the Council to the European Council on making the co-decision procedure more effective”, cited *supra* note 38, at 23.

This was seen to require in particular the publication of updated information on the progress of co-decision dossiers, informing of the results of negotiations within the Conciliation Committee, and informing the press about the progress of legislative co-decision procedures. Apart from requiring the establishment of a joint database, the Ombudsman report adds little to the position adopted by the Council itself almost 20 years ago, long before the new Treaty framework into force.

One of the predominant reasons for institutions to prefer a logic of transparency that privileges communication is the ability for the (executive) institution to enjoy almost unlimited discretion to autonomously decide what, and what not, to intentionally reveal and with what slant to communicate it. It also allows the institutional actor to assess the necessity for communication in view of the overall needs of efficiency and the ability to reach decisions. It is the classic argument of negotiations of any kind – that only decisions behind closed doors will enable actual compromises to be reached. While “[c]losed settings could be legitimate in situations where actors search for common ground and where a shielded setting is a means to reaching goals that can otherwise not be achieved [...] when the purpose of a setting is the adoption of public policy, secretly reached agreements must at some point be tested and justified in a publicly accessible manner.”¹⁷⁰ If that is applied more concretely to the legislative setting then in order to produce good legislation, “legislators have to be able to use their discretion and judgment to negotiate compromises that improve on the status quo, but they also have to be responsive to their constituents as a matter not only of political survival but also of democratic duty.”¹⁷¹

In addition, we find that the Ombudsman’s conclusion disregards some of the key principles of the Access Regulation: the presumption of openness, and the consideration of harm, as interpreted in particular in the *Access Info* ruling quoted above, where the Court required a high standard of proof to establish a genuine risk of serious harm. The presumption of openness requires, that documents are made available, unless this criterion is fulfilled, based on individual examination of documents. We see no reason why these general principles would not apply also to four-column documents. What the European Ombudsman seems to suggest is a general presumption of secrecy in the legislative context, which would free the institutions from the duty of examining each requested document individually. While the General Court has acknowledged in *ClientEarth*¹⁷² that general presumptions of secrecy can be established in the legislative context,¹⁷³ we seriously doubt that they would be suitable in the context of a negotiating stage forming the core of legislative activity. The judgment by the General Court in *Client Earth* has been appealed and the case is now before the Grand Chamber of the Court of Justice. General presumptions can, as a matter of principle, be held not to apply if the applicant manages to demonstrate that the presumption does not apply or that there exists a “higher public interest” justifying disclosure.¹⁷⁴ So far no applicant has managed to cross this threshold, illustrating just how irrebuttable in

¹⁷⁰ Stie, op. cit. *supra* note 59, p. 189.

¹⁷¹ Gutmann and Thompson, *The Spirit of Compromise. Why Governing Demands It and Campaigning Undermines It* (Princeton University Press, 2012), p. 159.

¹⁷² Joined Cases T-424/14 and T-425/14, *ClientEarth v. Commission*.

¹⁷³ In its earlier case law the Court has contrasted the framework of administrative functions with cases in which the EU institutions acted in the capacity of a legislature, identifying the latter cases as those where wider access to documents should be authorized, and seen this difference as a reason to justify presumptions of secrecy in the administrative context. Case C-139/07 P, *Technische Glaswerke Ilmenau*, EU:C:2010:376, para 60.

¹⁷⁴ *Ibid.*, para 62.

practice these general presumptions may be.¹⁷⁵ The presumption of non-disclosure is intrinsically rather abstract and with no access to the actual document it may be very difficult, if not impossible, to refute the presumption. This may require some rethinking of general presumptions of non-disclosure.

The Ombudsman's conclusion also contradicts an emerging feature in Court jurisprudence on legislative transparency which suggests that closed stages in decision-making can be justified if they are followed by open ones where it is possible to influence the outcome. For example, in *ClientEarth* the General Court accepted that the citizens' right to know the underpinnings of legislative action in real-time is less relevant at the preparatory stage of a legislative proposal than later on. This is because there will be a chance to influence the procedure after the legislative procedure has been initiated.¹⁷⁶ This logic is familiar from the Court's earlier case law relating to transparency at the stage of Conciliation Committee. In the *IATA* case, the claimants contended that the principles of representative democracy were undermined since the meetings of the Conciliation Committee were not public in nature. The Court pointed out that the joint text adopted by the Conciliation Committee must still be examined by the Parliament itself with a view to its approval; an examination that takes place in the conditions of transparency under the Parliament's normal transparency provisions, thus ensuring "in any event the genuine participation of the Parliament in the legislative process in compliance with the principles of representative democracy".¹⁷⁷ The extent to which a similar principle can be extended to legislative initiatives is however questionable, as is its application in the trialogue context, where the stages following the closing of trialogues tend to be a mere formality.

Exceptions applying to types of documents (such as four-column documents) during entire phases of the legislative procedure (like trialogues) create block exceptions that run contrary to the logic of the Regulation in guaranteeing the "widest possible openness" that is based on the consideration of concrete harm in individual cases. Limiting access during the entire stage of trialogue negotiations is not a minor temporary limitation as is exceptionally permitted under Article 4(7) of the Regulation. Since the Treaties set no time limit for negotiations in first reading, they can be on-going for months or even years, during which the initial legislative proposal may change fundamentally, and is usually approved without any further changes apart from technical modifications proposed by lawyer-linguists. If these documents remain confidential, there are limited ways in which civil society or citizens to engage in a timely and informed debate about matters that are on the legislative agenda, beyond the use of communication policy tools, which we find unsatisfactory as an avenue for ensuring public access as a part of ensuring accountability. The logic of discretionary communication should not automatically pre-empt the very different logic of public access, in particular access to legislative documents. This does not mean in our view that confidential negotiations cannot at a certain stage be acceptable if followed by a public arena enabling public involvement. How this could work in practice in the specific context of trialogues is not evident when the subsequent public stages are currently a mere formality, without genuine possibilities for political contestation.

¹⁷⁵ This is linked to the broader question of whether the existence of an overriding interest justifying the disclosure of documents could always be presumed to exist in legislative matters, which the Council and the Commission specifically challenged in *Herbert Smith*. Case T-710/14, *Herbert Smith Freehills LLP v. Council*. The Court did not rule on this question.

¹⁷⁶ Joined Cases T-424/14 and T-425/14, *ClientEarth v. Commission*.

¹⁷⁷ Case C-344/04, *International Air Transport Association v. Department for Transport*, EU:C:2006:10, paras 60-61.

The time may well be ripe for efficiency to beat a chequered retreat. EU normative provisions point to a logic of transparency, in the sense of openness and of public access that is privileged in the Treaty of Lisbon. This logic does not patronize the citizen but rather values the role that the public and the informed citizen can play in a wider democratic perspective. From this perspective, transparency is seen as a fundamental citizens' right and as a means of securing public accountability. Democracy is after all not only about the adoption of pre set policy goals but also debating those goals in a genuine and open manner. The institutions do not need protection from civil society input or diverging opinions; in any event, it is not an acceptable reason for secrecy in a democratic procedure. Nor is it appropriate for European civil servants who apply the public access rules within the institutions to use their intrinsic discretion so as to 'protect' the legislative agenda and pre-legislative policy choices within the Commission or another institution. This is all the more so when one takes into account the selective transparency through access that many lobbyists enjoy in practice within the legislative process.¹⁷⁸ The reality of selective transparency for the privileged few brings with it the need to balance in the broader public interest and ensuring more possibilities for broader public scrutiny. Transparency to a highly selective audience can never be a substitute for general transparency –the precursor of accountability.

4. On the cusp of dawn

Regulation 1049/2001 is chronically and structurally outdated. It is not just a matter of muscle fatigue but also of an altered institutional environment. The clear and stated ambition of the Lisbon Treaty is to ensure legislative transparency. The outdated Regulation leaves far too much scope for institutional discretion. Amending the Regulation in line with Lisbon Treaty is and remains desirable for many reasons. But –quite aside from the seeming political deadlock on this and the risk of retrogression - the crucial issue is how the legislative procedure itself is regulated and how it operates de facto, as merely one reading instead of the three indicated in the legal framework.

Limited issues of legislative transparency such as access to legal opinions and Member State input are arguably now already quite clear irrespective of legislative revision. Existing case law stresses the democratic objectives of the Treaties. The main challenge is to ensure that the institutions actively apply that case law in practice. What happens at the moment is that in iterative cases the institutions effectively challenge the Court's rulings again and again. There is moreover no way to get repeated institutional resistance into the Court as the Commission as guardian of the Treaties is unlikely to bring a case against itself or one of the other institutions for failure to comply with the Court's own judgments. This means that the role of the Ombudsman in this area is particularly crucial and remains very topical. The nettle remains to be grasped.

The most imperative part of legislative transparency relates to the search for transparency at the stage of interinstitutional negotiations, in particular trialogues. This is the arena where compromises are being made on the legislative package as a whole, resulting in the final text of the act being approved unamended in formal procedures. In this arena, the Ombudsman's conclusion relying on the logic of communication instead of the logic of public access is

¹⁷⁸ See Korkea-aho, 'EU Lobbyists: Rulemakers 'in the shadows'? in Fahey (Ed.), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge 2015) 207–230.

unsatisfactory from the perspective of guaranteeing transparency of the crucial stage in EU law-making. Communication is fundamentally about control by the institution holding the information while in a democratic procedure, control should by definition be with the citizens. The creation of secluded spaces for entire, decisive procedural parts such as trialogues in the manner suggested by the Ombudsman is taking the logic of secrecy too far. Secrecy should in our view not dominate decisive stages of decision-making where everything is on the table and compromises are reached which then become the final text of the EU legislation and the rest of the procedure –the actual votes in Council and in the European Parliament - is in reality a mere formality.

Consequently, we do not agree with the Ombudsman on four-column documents, which runs contrary to the democratic underpinnings of the Regulation and some of the Court's most established case law. In our view four-column documents should, as the general rule, be made available proactively and in real time, following the presumption of openness built into the Treaties and the Regulation. At the very least and as an interim arrangement –not quite dawn but only the first hints of it- four-column documents should be made publicly available when the public access provisions are activated (passive access to documents). Disclosure should be, as with any disclosure under the Regulation and in line with existing case law, subject to concrete evaluation of harm in individual cases. When possible harm to the interests protected by the Regulation is being assessed, the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical. Such harm is difficult to justify in the legislative context, but we do not exclude the possibility entirely in the non-ordinary legislative procedure or in the conciliation procedure when that procedure is used. In current institutional thinking it would seem that much of the efficiency cost claimed is far from being foreseeable and highly hypothetical in nature, as the institutional thinking quoted above demonstrates. The evaluation of harm must primordially reflect the democratic underpinnings of the Regulation. It should not be used as an excuse to avoid political responsibility before citizens or national parliaments for choices made. It is hard to see why the general public interest in the adoption of EU wide legislation would not outweigh the institutions own interests in completing a law-making procedure as quickly as possible. This is not to say that we see no room whatsoever for secluded spaces. But the bottom line is that if secluded pockets exist they are limited in time and subject matter and are followed by opportunities for political debate and contestation. This is not currently the case given the manner in which the ordinary legislative operates.

The new normalization of the “first reading” (only) trialogues should be replaced by a much more widespread and full use of all three readings. Since the subsequent readings come with time limits it is not evident that the use of the full legislative procedure would automatically contribute to its length, but would instead bring more openness, more accountability and often also better quality legislation.¹⁷⁹ The conciliation committee process has many positive aspects: a clearer outcome; not every detail is discussed but the focus can be kept on politically relevant questions; matters are not closed and re-opened several times; and the focus is on a feasible number of issues that can be grasped, presented to the public and national parliaments, and brought to an appropriate conclusion.¹⁸⁰

The commitment to create a joint database could contribute moreover to not only making more documents available earlier in the process, as well as making their identification easier, but also to shedding light on the vast number of legislative documents that are currently not made public

¹⁷⁹ Interview with an Administrator at the EP JURI Committee, 9 Nov. 2016 (Respondent 33).

¹⁸⁰ Ibid.

while the process is ongoing. The time has come for less obfuscation and for the adoption by the Member States and by the European Parliament, with the facilitation of the Commission, of incremental steps towards genuine interinstitutional reform in the legislative sphere. The challenge of getting the EU legislative procedure under control demands no less – a visible and accountable legislative handshake that no longer takes place hiding in the shadows of the twilight zone but in the special and emerging light of dawn. Transparency is a necessary but insufficient condition in and of itself of accountability. Citizens, civil society groups, the media and other stakeholders can use transparency to trigger fire-alarms that in turn can publicly engage parliamentary participation (both European and national) in a timely and constructive fashion. The task of building a European wide democracy calls for no less.