# Response to the European Ombudsman's public consultation on the transparency of trilogues

European Digital Rights (EDRi) is a not-for-profit association of over 30 digital and civil rights organisations from 19 European countries. Our objectives are to promote, protect and uphold civil rights in the field of information and communication technology.

EDRi laments that the European Commission[1], the European Parliament[2] and the Council[3] argue that this trilogues' inquiry falls outside the Ombudman's remit and we lament their reluctance to respond in detail to the Ombudsman's questions under her inquiry on transparency of trilogues.

EDRi welcomes the European Ombudsman's initiative aiming to boost transparent law making in the European Union. EDRi argues an urgent reform of trilogues is needed.[4] This document presents EDRi's response to the public consultation on the transparency of trilogues.[5]

## 1. In your opinion, is the way in which EU legislation is negotiated through the trilogue process sufficiently transparent? Please give brief reasons for your answer.

No, it is not. EDRi considers the way in which trilogue negotiations are conducted are not transparent. In most cases, transparency is almost inexistent until a deal has been reached. EDRi considers that trilogues' current practices bypass democratic good practices and prevent public participation. They represent an unacceptable democratic failure in the EU decision-making, as they are contrary to the principles of transparency, accountability and good administration. Finally and of particular concern, the trilogue process does weaken the Parliament's position in the legislative process, which is the only directly elected EU body.

The following points constitute a non-exhaustive list of factors leading to trilogues' lack of transparency:

1.1. Trilogues involve a **very limited number of participants** - selected on the basis of unclear criteria - whose names are often **not disclosed**. In the case of the European Parliament, for instance, individuals who have not been elected by EU citizens represent the position of the only directly-elected institution of the EU often represent political groups or individual MEPs (in so-called "technical meetings").

1.2. The **negotiations** between the institutions take place behind **closed doors**, with little possibility for public scrutiny of the legislative procedure. In the absence of minutes or recordings, very little is known about what occurs in these meetings or who is making what proposal(s).

1.3. Experience and evidence show **that trilogue documents are not disclosed to the public as a**

[1] http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61590/html.bookmark
[2] http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61591/html.bookmark
[3] http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61592/html.bookmark
[4] See the joint-letter on the need to reform trilogues coordinated by EDRi and co-signed by 19 civil society organisations: https://edri.org/files/Transparency_LetterTrialogues_20150930.pdf
[5] http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61589/html.bookmark



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**general rule**; only a few documents are exceptionally disclosed. In practice, the only way of accessing these documents on the proceedings is through personal contacts with negotiators or through "leaks", whose reliability can be unconfirmed. This means that only good Brussels-based lobbyists and advocates have privileged access to the documents, while the general public remains in the dark. This is almost worse than no transparency at all – transparency can be bought by paying for the right lobbyists with the right connections.

While requests can be made for **access to documents** in accordance with Regulation 1049/2001, in practice, the institutions' responses are delayed so often that this appears to be a policy decision in its own right. Access to trilogue documents are **often denied**, even if they have been leaked or accessed by a number of people outside the institutions. This is evidenced in the investigation conducted by the European Ombudsman's staff as a result of her consultation. As reported by the Ombudsman, the large majority of the documents identified were marked as "confidential", even if the this file has already been concluded.[6]

## Case study: The trilogues on the Telecommunications Single Market Regulation

While none of the institutions mentioned this trilogue in the lists provided to the European Ombudsman,[7] we would like to bring the trilogue negotiations on the Telecommunications Single Market Regulation ("TSM")[8] to the EU Ombudsman's attention as an example of the concerns referred to above.

This trilogue process formally started on 4 March 2015 and lasted until 3 July 2015,[9] finishing with the adoption of the Regulation on 27 October 2015.

- **Trilogue negotiations**

EDRi had been working on this file since the very beginning.[10] When the trilogues started, EDRi published an infographic[11] to explain the trilogues process. EDRi found that this had not been sufficiently explained to the public after the adoption of the Council's mandate to start political negotiations.[12] The Council's mandate to start political negotiations was not published together

[6] http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/61594/html.bookmark

[7] There is an inconsistency in the responses made by the Institutions in this regard. First, EDRi regrets that the Council of the EU did not provide any list at all. Second, we regret that the European Parliament provided a list of negotiations ongoing on 29 September 2015. Third, and in the same vein, the European Commission only decided to disclose a list of trilogues' from 28 September 2015.
This prevents the European Ombudsman to duly assess practices carried out prior to 28/29 September 2015.

[8] Now, Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R2120

[9] See EDRi's document pool on the trilogues, which contains a detailed timeline and main documents: https://edri.org/net-neutrality-document-pool-2/

[10] See our first document pool: https://edri.org/net-neutrality-primary-document-source/

[11] https://edri.org/files/NN_process_infographics.pdf

[12] http://www.consilium.europa.eu/en/press/press-releases/2015/03/150304-roaming-and-open-internet-council-ready-for-talks-with-ep/

with the Council's press release stating that it "ready for talks with EP".[13] Since there was no place where citizens could find information about the trilogue negotiations, EDRi decided to create another document pool, where people could find *inter alia* relevant dates, information and documents published or leaked.[14] What we could not provide the public was a planned decision date around which journalists or activists could plan their activities, because none formally existed.

- **Freedom of information requests**

On 18 June 2015, EDRi made three freedom of information requests to the European Parliament, the Council of the European Union and the European Commission for access to a number of documents related to the trilogues of the TSM. In particular, EDRi asked for a list of participants; a list of categories of documents held in relation to the TSM trilogues, technical meetings and internal meetings; multi-column documents; reports; minutes and notes.

Several aspects of the way in which our requests were handled, the resultant exchanges with the three Institutions and the incomplete documents released [15] indicate multiple signs of maladministration and signal a pattern of obstructionism and a failure to be transparent.

**1) An unjustified failure to comply with prescribed time limits**

In the case of the Parliament and the Council, the initial request to access documents was not treated within the prescribed 15 working days as the deadlines were extended in both cases, and the responses were received only on 31st July 2015.

In the case of the Commission, not only was the initial request not treated within 15 working days, no letter or communication was sent to explain that the deadline would be extended, and thus no justification was given for this failure. Only two months after the initial request did EDRi receive a response by phone, on 18th August and that happened because EDRi followed-up on its request on 17th August 2015.

Similarly, our confirmatory request from 7th September 2016, which challenged a number of the disclosure decisions of the first response, was not treated promptly by the Commission. The deadline was extended twice: first for 15 working days, and again for an unspecified period as the Commission merely stated that it was doing its utmost to provide a formal reply as soon as possible. In neither case were the conditions laid down in Regulation 1049/2001 met, where the time period can be extended only if "detailed reasons are given".

Finally, the Commission responded to the confirmatory request on 27th October 2015, which was the exact day of the vote on the TSM Regulation in the European Parliament. We find the timing suspect and the overall treatment raises, yet again, clear evidence of maladministration.

[13] http://www.consilium.europa.eu/en/press/press-releases/2015/03/150304-roaming-and-open-internet-council-ready-for-talks-with-ep/

[14] https://edri.org/net-neutrality-document-pool-2/

[15] http://www.asktheeu.org/en/request/trialogues_on_the_telecommunicat_3#incoming-7499
http://www.asktheeu.org/en/request/trialogues_on_the_telecommunicat#incoming-7277
http://www.asktheeu.org/en/request/trialogues_on_the_telecommunicat_2#incoming-8199
http://www.asktheeu.org/en/request/video_tapes_trialogues_on_the_te#incoming-7346

## 2) Inconsistent disclosure practices

A closer examination of the responses of the institutions to our initial request reveals problematic inconsistencies in disclosure practices across the institutions. While an effective comparison is impossible given the absence of comprehensive lists of documents held and the discrepancy in how documents are named, several instances can be pointed to where the institutions are not consistent. Please find in the annex to our response to this consultation a comparison of the documents received in response to our initial request, dated 31st July 2015 for the Council and Parliament, and 19th August for the Commission.

## 3) Flawed justification for non-disclosure

We dispute the justifications invoked by the institutions for partial disclosure or refusal for some documents. Firstly, as we pointed out in our confirmatory request to the Commission, we dispute the assertion that there is not public interest at stake in disclosure of trilogue documents relating to the TSM Regulation, since access to these documents enables a wider participation to and scrutiny of the EU legislative process. Moreover, the common reference to the need to protect the inter-institutional decision-making progress from external pressure lacks consistency. In the case of the Commission's response, the Commission acknowledges that in the context of the TSM informal trilogues, some internal positions of the institutions have been disclosed to certain third parties, without any consideration of concern for the aforementioned external pressure.

The redacted parts of the five "unsolicited notes" from stakeholders identified by the Commission are a clear indication that some stakeholders have had access to certain documents, but not all of them, and most importantly, not the public. This points to a practice of selective transparency to privileged actors, to the detriment of the integrity, scrutiny and democratic accountability of the entire trilogue procedure.

Please, refer to the Annex to this consultation for a more detailed analysis of the documents requested and responses received from the three institutions.

## 2. Please explain how, in your view, greater transparency might affect the EU legislative process, for example in terms of public trust in the process, the efficiency of the process or other public interests.

According to Article 10(3) TEU, "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen." This goal is reiterated in Article 1 TEU.

Article 15(1) TFEU states that "in order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible." In addition, Article 15(3) stresses that "each institution, body, office or agency shall ensure that its proceedings are transparent". These principles are reiterated in protocols 1 and 2 to the Treaty.

EDRi is of the opinion that trilogues are not respecting the aforementioned provisions. In fact, trilogues are being used as the mechanism of choice to circumvent the principles that rule the ordinary legislative procedure.



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In light of the democratic deficit in the EU and the perceived distance between EU citizens and the legislators, the requirements for transparency should be particularly high at EU-level. (Greater) transparency on trilogue negotiations can only benefit the EU legislative process and would not undermine the efficiency of the mechanism:

2.1. Greater transparency of the trilogue process (or bringing the process to an end) stands to **increase the public involvement and participation in the EU legislative process, and by extension, increase trust in and perceived legitimacy of the EU**.

2.2. A systematic and timely release of trilogue documents would have several benefits:

- First, it would be a way to **encourage citizens' participation in the EU legislative process**. Great transparency would avoid the current opaque and privileged access to documents granted by those having personal contacts in the EU institutions.

- Second, greater transparency would **reduce the need for making freedom of information requests** and would allow that not only those requesting the documents have access to them (if the latter is granted), but **access by any person or organisation interested in the legislative file**.

- Third, it would **prevent the EU institutions from abusing the exceptions outlined in Regulation 1049/2001**.

- Fourth, it would create **greater accountability** for EU institutions by making the positions of all participants traceable and **avoid unethical lobbying practices and corruption.**

2.3. Greater transparency in trilogues would **promote and increase an environment of mutual trust between the institutions**. The current opaque situation leads to the publication of leaks, which undermine the trust between the EU institutions. The number of people involved is reduced, so a climate of distrust is created, leading to a less efficient environment.

2.4. If trilogue meetings are publicly accessible and minutes and/or recordings are available to the public, this would **introduce greater accountability, scrutiny and integrity of the EU institutions**.

2.5. Greater transparency in trilogues would **put the European Parliament at a more appropriate negotiating level in relation to the Council (and the Commission – which has a powerful but informal role) in the trilogue process**. Evidence shows that once a political agreement in trilogues is reached, the practical possibilities for adopting amendments in the European Parliament are almost impossible.

## 3. The institutions have described what they're doing about the proactive publication of trilogue documents.

In their response, the European Commission and the Council mention the Interinstitutional Agreement on Better Regulation's proposal to improve trilogues' transparency. At the time of writing, a political agreement was reached. We believe the commitment is weak and very unclear



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as to what this means in practice. In addition, this political agreement does not provide a way of ensuring the commitments would be respected.[16]

As stated elsewhere, "the Interinstitutional agreement[17] is rather unambitious concerning moves to improve transparency with regard to the controversial "trilogue" process. It states that the "three institutions will ensure the transparency of legislative procedures (...) including an *appropriate* handling of trilateral negotiations" and improve "communication to the public". In addition, the institutions committed to "facilitate traceability of the various steps in the legislative process". Would this include the publication of trilogue documents or negotiating texts? "We don't know. Would there be any way of ensuring the commitments would be respected, even if they were clear?" There is certainly no way for the public to ensure these commitments are respected.

"On 30 September 2015, EDRi and 18 co-signatories sent a letter[18] to the European Parliament President Martin Schulz, Commission President Jean-Claude Juncker and Council Secretary-General Jeppe Tranholm-Mikkelsen, asking for an urgent reform of trilogues. In the Better Regulation Interinstitutional Agreement, the institutions agreed that the Council and Parliament will be treated equally as co-legislators. Would this be respected in the context of trilogues? We don't know. What we know is that trilogues put the European Parliament, the only EU institution which is directly elected by citizens, in a far weaker position than its ostensible "co-legislator" role implies and, in practice, this process actively discriminates against citizens."[19]

At the time of writing, only the European Parliament[20] and the European Commission[21] have responded, though unsatisfactorily.

**In your opinion, would the proactive release of all documents exchanged between the institutions during trilogue negotiations, for example "four-column tables", after the trilogue process has resulted in an agreement on the compromise text, ensure greater transparency? At which stage of the process could such a release occur? Please give brief reasons.**

**All the documents** exchanged between the Institutions during trilogue negotiations **should be released**. For the sake of clarity, the wording "all the documents" implies all the negotiating texts at the different steps of the trilogue process, including, but not limited to, a list of the categories of documents held in relation to the trilogue process in question, preparatory documents of the meetings, three- and four-column documents ("multi-column tables"), lists of participants, agendas, reports, minutes, notes discussed over the course of the process and recordings.

The proactive release itself would be not sufficient if not updated on a regular basis and done before an agreement between the three institutions is reached.

[16] https://edri.org/better-regulation-interinstitutional-agreement-we-have-concerns/
[17] http://www.statewatch.org/news/2015/dec/eu-council-better-law-making-political-agreement-15007-15.pdf
[18] https://edri.org/files/Transparency_LetterTrialogues_20150930.pdf
[19] Maryant Fernández, Better Regulation Interinstitutional Agreement - we have concerns! (21.12.2015) https://edri.org/better-regulation-interinstitutional-agreement-we-have-concerns/
[20] https://edri.org/files/Transparency/Trilogues_response_Schulz.pdf
[21] https://edri.org/files/Transparency/Trilogues_response_Commission.pdf

The proactive release of trilogue documents should be conducted **systematically, at all stages of the process in a timely manner.** The publication of trilogue documents once the agreement on the compromise text is reached would not be enough to ensure meaningful transparency of the process. In addition, the latter would not provide accountability as, in general it is politically impossible to change the legislation after that time.

If we take the concrete example of the TSM, we see that the political agreement was published after the trilogues were formally finished.[22] This did not change the opaque and undue influence exerted by certain stakeholders in the process. Moreover, while the political agreement became public, it was politically impossible to influence the result of the trilogues, even if the legislative process had not formally ended.

In sum, the proactive, systematic and timely release of trilogue documents would allow respect of the transparency and values on which the EU is based, as stated in Articles 11, 12 of the TEU and Article 15 of the TFEU as well as the protocol 1 and 2 to the Treaty.

## 4. What, if any, concrete steps could the institutions take to inform the public in advance about trilogue meetings? Would it be sufficient a) to publicly announce only that such meetings will take place and when, or b) to publish further details of forthcoming meetings such as meeting agendas and a list of proposed participants?

In line with our responses to previous questions, to restrict the transparency of trilogues to the announcement of the start of the trilogues and when they will take place is not enough. Further details must be provided to the public, including, but not limited to, the agendas and proposed participants. As stated earlier, the institutions should disclose all trilogue documents. This affords the public the opportunity to for up-to-date information about the process. It is also important to underline that information has to be accessible in an easy and understandable way. The chaotic situation of there not being a defined time period for the trialogue process and arbitrary ad hoc deadlines being set for the completion (an all-night session was planned for the TSM negotiations, to give the Latvian Council Presidency a "win" for their term of office, for example), is simply not worthy of a decision-making structure for 28 democratic states.

See our response to question 7 for more details.

## 5. Concerns have been expressed that detailed advance information about trilogue meetings could lead to greater pressure on the legislators and officials involved in the negotiations from lobbyists. Please give a brief opinion on this.

This justification for secrecy is indeed frequently voiced. For example, the Council stated in its response to the European Ombudsman's own-inquiry on trilogues' transparency that when dealing with Freedom of Information Requests under Regulation 1049/2001, "particular attention will be paid to the existence of the risk that disclosure may seriously undermine the on-going decision-making process. In such case, access will be refused unless an overriding public interest can be identified".

[22] www.consilium.europa.eu/en/press/press-releases/2015/07/pdf/st10409-re01_en15_pdf/

This excuse has also been invoked in exchanges between civil society and the EU institutions in response to freedom of information requests for documents relating to files subject to trilogues negotiations.

The idea that transparency could place the inter-institutional process at risk by exerting pressure on the institutions lacks consistency, not least because it is nonetheless acknowledged that certain lobbyists and stakeholders (and not all EU citizens and civil society groups) do gain access to the positions of the institutions over the course of trilogue meetings "with no transparency, no procedure and no public justification, without any consideration of concern for the aforementioned external pressure".[23] Such selective "transparency" actively undermines public trust in the decision-making process. As stated above, EDRi disputes the assumption that there is no overriding public interest at stake to publish trilogue documents, "as access to these documents enables a wider participation to the EU legislative process." If the assumption of demonstrating that an overriding public interest must be demonstrated in each case were correct, trilogues "would be a way to circumvent the transparency and values under which the EU is based, as stated in Articles 11, 12 of the TEU and Article 15 of the TFEU as well as the protocol 1 and 2 to the Treaty."[24]

While efficiency is a worthwhile objective, trilogues cannot be used as a way of circumventing Treaty obligations and parts of the ordinary legislative procedure, as the prevalence of first-reading agreements in recent years would suggest.

### 6. In your opinion, should the initial position ("mandate") of all three institutions on a legislative file be made publicly available before trilogue negotiations commence? Briefly explain your reasons.

EDRi believes that the mandate of all three institutions on a legislative file should be publicly available as this renders all the EU decision-making process somewhat clearer and allows somewhat better scrutiny and accountability not only from citizens, but also from the other EU institutions, bodies and EU agencies.

EDRi notes that this is already the case for the "mandates" of the European Commission. In the case of the European Parliament, this is often the case as well, except in cases where the European Parliament has not even adopted a first-reading position. As regards the Council, EDRi's experience shows it is the least transparent institution.

As explained throughout our response, however, the sole release of the mandate would be vastly insufficient to guarantee trilogues' transparency.

[23] Cf. http://www.asktheeu.org/en/request/trialogues_on_the_telecommunicat_2#incoming-8199
[24] *Ibid.*



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## 7. What, if any, concrete measures could the institutions put in place to increase the visibility and user-accessibility of documents and information that they already make public?

In trilogues, most of the documents are NOT public. In the case of the TSM regulation, it is clear that the EU user-accessibility and visibility of documents and information of the trilogues were neither satisfactory nor sufficient, as documents and information are far for being accessible.

Within this context, there are **several and considerable concrete measures** that the EU institutions could put in place to increase the visibility and user-accessibility of documents and information related to trilogues:

7.1. The EU institutions should publish **press releases, blog posts and social media posts** about trilogues in general and legislative dossiers subject to trilogue negotiations in particular.

7.2. Provide **a list of trilogue documents and a list of meetings** that will take place in the context of trilogue negotiations and keep them **up-to-date**. For consistency among the Council, Parliament and the Commission, the Institutions should agree on **common denomination** of documents and meetings.

7.3. The Commission and Council should follow the example of the Parliament's **Legislative Observatory**[25] in compiling a list of all available documents as part of an online register to allow for access in accordance with Regulation 1049/2001. The Parliament's Legislative Observatory should be improved, by *inter alia* including trilogue documents (at least a reference to their existence) and improving the search of trilogue negotiations and documents (including, but not limited to, the list of categories of documents held in relation to trilogue negotiations, the agendas, the list of participants, multi-column documents, reports, minutes, notes, recordings, press conferences, etc.).

7.4. **Up-to-date document pools** per dossier under trilogue negotiations. The EU institutions can take EDRi's document pool on the General Data Protection Regulation (GDPR)[26], whose trilogue was mentioned in the European Commission's and the European Parliament's response to the European Ombudsman's own-inquiry on trilogues' transparency; or EDRi's document pool on the TSM Regulation,[27] as per the case study mentioned in our response to this consultation.

## 8. Do you consider that, in relation to transparency, a distinction should be made between "political trilogues" involving the political representatives of the institutions and technical meetings conducted by civil servants where no political decisions should be taken?

The answer to this question can be argued in two ways:

On the one hand, EDRi believes **no distinction** should be taken between "political trilogues" and "technical meetings" in relation to the right to access to documents. Technical meetings are part

[25] http://www.europarl.europa.eu/oeil/home/home.do
[26] https://edri.org/gdpr-document-pool/
[27] https://edri.org/net-neutrality-document-pool-2/



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of the EU legislative process as well as the trilogues. The full transparency on technical meetings contributes to define the political pattern of a given legislative process. Moreover, attention should be paid also on the membership qualification of civil servants. All the documents regarding the technical meetings should be public, included reports and agendas.

On the other hand, however, EDRi believes **a distinction** should be made especially in the case of the European Parliament. The Parliament is the only directly-elected EU institution. In EDRi's experience, the text of trilogues progress more in technical meetings. In these meetings, MEPs are often absent. This means that in the key moments of the EU decision-making, the people directly elected by people to represent them are not in the room. Technical staff is not elected by citizens. They are, however, empowered with an important task. Where is their accountability if no relevant document is published, no minutes are produced, no video is recorded, etc.?

The European Parliament's rapporteur reports back to the responsible committee from time to time. However, these "reports" are usually very general and do not enter into the specifics of the text being negotiated. This means that in practice, the reporting mechanism has become a mere formality the Parliament conducts without real accountability or transparency of the process. EDRi recommends that good practices of Parliament's committee meetings are mirrored within the trilogue process.

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

### In general

Although trilogues are not explicitly mentioned in the EU Treaties, trilogues have become the rule rather than the exception in EU law making. While this process was created to bring efficiency to EU's decision-making processes, EDRi is of the opinion that the way in which EU legislation is negotiated through the trilogue process is not sufficiently transparent and undemocratic on a number of levels. Evidence shows that trilogues are being used a mechanism of choice for EU institutions to circumvent their commitments to transparency and good administration, undermining the accountability and transparency of the EU legislative process.

### Communication to the public

In EDRi's long experience working on EU policy-making, trilogue meetings are generally not publicly announced in advance and the visibility of documents and information published is very poor, as explained throughout our response to this public consultation. Taking the TSM file as an example again, the decision to finalise the file in one evening/night for no obvious reason beyond the political preference of the Council presidency was neither announced or publicly explained.

### Publication of trilogue documents

Trilogue documents are not proactively published by the EU institutions. The public does not even have access to a list of legislative files which are being negotiated under the trilogue process.



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EDRi reaffirms that all documents used in trilogues should be published, and that trilogues should not take place behind closed doors. In addition, the institutions should promote the visibility and user-accessibility of the information available (see previous responses for more details).

### Access to trilogue documents

The institutions should adopt a publication-by-default approach and thus only deny access or allow partial access in very limited circumstances. In practice, this means that the institutions should avoid any type of obstruction to public access to documents, including unjustified delays, the use of template responses to deny access to public documents without real reasoning, etc.

### Trilogue meetings

They should be held in public, and not behind closed doors. We suggest similar rules as those adopted for normal Parliament's committee meetings should be adopted. To the very least, detailed reports of the trilogue meetings should be publicly available.

### Language

To the best of EDRi's knowledge, trilogue negotiations are generally conducted in English. If, for instance, a shadow MEP is not fluent in English, this prevents the understanding of the discussions and effective decision-making. The same reasoning applies to trilogue documents, which, to EDRi's experience, are only drafted in English.

Whereas interpretation is possible upon request, the European Parliament itself recognises that this "might not always be possible in case of last minute changes or where it is necessary to convene trilogues at short notice". In our experience, this has happened in several instances. If one examines trilogues calendars, meetings and exchange of text proposals often (but not always) happen in a very short time-frame. As the European Parliament acknowledges in its response to the European Ombudsman's own-inquiry, "trilogue dates may change at rather short notice". In addition, legislators do not always have translation services available, since some of the meetings happen at late hours at night. This might explain – at least in part – the huge textual differences between the trilogue agreement and the legally corrected text of the TSM Regulation.

### Citizens' representation

In its response to the European Ombudsman's own-inquiry on trilogues' transparency, the European Parliament's President Mr. Schulz, warned against "an undue formalisation of the trilogue process", "as the real negotiations might then take place at other occasions, without having all political groups in the room and without text proposals being exchanged in an orderly way between the institutions." In EDRi's experience, we are aware of the fact that not all political groups are present at all times during the trilogue process, not even during the "political meetings". How can EU citizens be represented at meetings which are held behind closed doors and whose representatives are not even present? If more transparency is put in place, all political groups and Institutions' representatives will likely change their behaviour and attend trilogues' meetings.

## The European Parliament's position

The European Parliament is the only EU institution that is directly elected by EU citizens. Trilogue negotiations put the European Parliament's position at risk.

One of the most vicious effects of trilogues lies in the weakening of Parliament's position in the legislative procedure. This a non-negligible argument, inasmuch the number of legislative files where the Parliament adopts an independent line and pushed the proposal through the full legislative procedure dropped from 21% to 5% in the 2004-2009 legislature and dropped from 5% to 2% in the 2009-2014 legislature. At the same time, the number of files completed in First Reading has gone up to 85%.[28]

[28] See http://ec.europa.eu/codecision/statistics/docs/report_statistics_public_draft_en.pdf

# ANNEX. INTERINSTITUTIONAL COMPARISON OF THE DOCUMENTS RELEASED IN RESPONSE TO EDRi'S FREEDOM OF INFORMATION REQUESTS ON THE TSM REGULATION[29]

A Access granted
P Partial access granted
D Access denied
- Not identified as relevant to request

NB: Due to inconsistency in names used for documents across the institutions, effective comparison of disclosure practices is practically impossible.

| | European Commission | Council of the European Union | European Parliament |
|---|---|---|---|
| Number of documents identified as relevant to FOI request | 34 | 35 | 32 |
| Meeting document, 1st informal trilogue, 23 March 2015 | P | P | P |
| Meeting document, 2nd informal trilogue, 21 April 201 | P | P | P |
| Meeting document, 3rd informal trilogue, 2 June 2015 | P | P | P |
| Draft agenda, 1st informal trilogue, 23 March 2015 | - | - | A |
| Draft agenda, 2nd informal trilogue, 21 April 2015 | - | A | A |
| Draft agenda, 3rd informal trilogue, 2 June 2015 | - | A | A |
| Draft agenda, Shadows' meeting, 13 May 2015 | - | - | A |
| Draft agenda, Shadow's meeting, 26 May 2015 | - | - | A |
| List of participants 1st informal trilogue | P | P | P |
| List of participants 2nd informal trilogue | P | P | P |
| List of participants 3rd informal trilogue | P | P | P |
| Fair use concept, comparative overview | - | - | D |
| Briefing note Meeting 18 March | - | - | D |
| Briefing note 14 April | - | - | D |
| State of Play 22 May 2015 | - | - | D |
| State of Play 1 June 2015 | - | - | D |

[29] See http://www.asktheeu.org/en/request/trialogues_on_the_telecommunicat_3#incoming-7499
http://www.asktheeu.org/en/request/trialogues_on_the_telecommunicat#incoming-7277
http://www.asktheeu.org/en/request/trialogues_on_the_telecommunicat_2#incoming-8199
http://www.asktheeu.org/en/request/video_tapes_trialogues_on_the_te#incoming-7346
Some of the documents were received by post and/or in person. Should the European Ombudsman want to have access to these documents, EDRi will collaborate to provide them and/or further information.

| | | | |
|---|---|---|---|
| EP draft compromise text on net neutrality | D | D | D |
| EP draft compromise text on roaming | D | D | D |
| EP draft compromise text on end-users rights | D | - | - |
| Draft agenda 27 March 2015 (1st Technical Meeting) | - | A | A |
| Draft agenda 20 April 2015 (4th Technical Meeting) | - | A | A |
| Unofficial consolidated text (Universal Service Directive) | A | A | A |
| Unofficial consolidated text Roaming III | P | D | D |
| 4-column document on Net neutrality provisions 24 March 2015 | - | P | P |
| 4-column document on Net neutrality provisions (including recitals) 30 March 2015 | - | P | P |
| 4-column document on Net neutrality provisions (including recitals) 21 April 2015 | - | D | - |
| Technical analysis paper on Net neutrality and roaming-related to end-user provisions | - | D | D |
| Technical paper on roaming | - | - | D |
| Technical paper on neutrality | - | - | D |
| Technical paper on congestion | - | - | D |
| Technical non-paper on congestion management | - | D | |
| Technical non-paper on roaming | - | D | |
| Technical non-paper on open internet provisions and related end-users rights | - | D | |
| Technical non-paper on end-users' rights related to open internet access provisions | - | D | |
| Technical analysis paper on Possible issues to be addressed in the wholesale roaming review | - | D | |
| IMCO proposal on roaming related to end users' rights | - | D | D |
| Technical paper on roaming | D | - | D |
| Technical paper on open internet | D | - | D |
| Technical paper on end-users rights | D | - | D |
| Presentation "Connected Continent" proposal, Latvian presidency | A | A | - |
| Presidency draft text 22 May 2015[30] | - | A | - |
| Presidency draft text 27 May 2015 | - | A | - |
| Presidency non-paper 08 May 2015 | - | D | - |
| Presidency non-paper 17 May 2015 | - | D | - |

[30] Text previously made public: http://data.consilium.europa.eu/doc/document/ST-9165-2015-INIT/en/pdf

| | | | |
|---|---|---|---|
| Presidency non-paper 20 May 2015 | - | D | - |
| Council standard document (5) | - | A | - |
| Commission Internal Flash report (3) | P | - | - |
| Commission Briefing notes for three informal trilogues (3) | D | - | - |
| Commission Inter-institutional Relations Group (GRI) Fiche | D | - | - |
| Commission informal non-papers (7) | D | | |
| CDT position paper on proposed amendments to Open Internet | A[31] | - | - |
| BEUC's key demands | A | - | - |
| GSMA Position paper on Open Internet | A | - | - |
| GSMA Position paper on Roaming | A[32] | - | - |
| ETNO position paper | A[33] | - | - |

[31] On 27 October 2015 (the day of the 2nd reading's vote in the European Parliament), the Commission decided to grant full access and reveal the redacted part.
[32] *Ibid.*
[33] *Ibid.*

## Inconsistencies in Content

Example: List of Participants in Informal Trilogues

| | European Commission | Council of the European Union | European Parliament |
|---|---|---|---|
| 1st informal trilogue | Omitted:<br>- Latvian Presidency Director Edmunds Belskis | Same as Parliament | Same as Council |
| 2nd informal trilogue | Omitted:<br>- Latvian Presidency Director Edmunds Belskis<br>- Latvian Presidency Director (Lux) Pierre Goerens | Same as Parliament | Same as Council |
| 3rd informal trilogue | Omitted:<br>- Director of Latvian Presidency Edmunds Belskis<br>- Latvian Presidency Director (Lux) Pierre Goerens | Same as Parliament | Same as Council |

**For more information or clarification, please contact**

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