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Administrative and judicial oversight of trilogues

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Abstract

The system of informal legislative negotiations between the European Parliament, the Council and the Commission now exist for about two decades. While so-called 'trilogues' aim to enhance the efficiency of the legislative process, their relative lack of transparency has led them to be criticised for undermining the possibilities of member state parliaments and citizens to meaningfully oversee, debate and participate in EU legislative decision making. We explore to which extent efforts to address these shortcomings have been successful, focussing on the oversight role of administrative and judicial actors, in particular the European Ombudsman and the Court of Justice. We argue that both the institutional structures and agendas of these actors influence the way they confront the question of trilogue transparency. Whereas the Court's focus is on safeguarding EU constitutional principles relating to democracy, the Ombudsman increasingly takes an expansive view of the concept of maladministration.

Keywords

Trilogue procedure; transparency; administrative and judicial oversight; European Ombudsman; Court of Justice of the European Union

1. Introduction

Over its two-decade career, the trilogue method of legislation has become the target of increased criticism (De Leeuw 2007; Häge and Kaeding 2007; Stie 2013; Reh 2014; Roederer-Rynning and Greenwood 2015; Curtin and Leino 2017; Brandsma 2018). The modus operandi of trilogues is particularly deemed controversial for its inability to uphold basic principles of democratic law making (De Ruiter 2013: 1210; Reh 2014: 826). Much of the criticism comes together in the trilogue method's purported lack of transparency. After all, national parliaments and the public require timely and adequate information to effectively exercise their democratic prerogatives.

We discuss the efforts of administrative and judicial watchdogs to address these shortcomings and explore the extent to which they have been successful. We focus particularly on the European Ombudsman and the Court of Justice of the European Union. The third potential oversight body, the European Commission, has the task to monitor the institutions' and Member States' compliance with obligations under the European treaties. Until now however, the Commission has not initiated such proceedings, and as the Commission's interventions in other transparency-related court cases suggest, this is unlikely to change in the future (Curtin and Leino 2017: 38). By contrast, the Commission strongly protects its own interests in the legislative process, as shown by its (successful) insistence on the right to withdraw legislative proposals until the very last moment, as part of its exclusive right of initiative. For the purpose of this article, the total absence of cases brought by the Commission in this sphere primarily means that its role as an external watchdog cannot be analysed separately.

The mandates of the Court and the Ombudsman differ: while the Court's task is to ensure that 'the law is observed' and to safeguard the EU's constitutional order through binding judgments, the European Ombudsman's mandate focuses on issuing recommendations concerning broader questions of maladministration. In legal research the jurisprudence of the Court has been carefully analysed. We analyse the two institutions alongside each other, examining how the Court and the Ombudsman have sought to align the practice of trilogue negotiations with the EU principle of legislative transparency. In this regard, we distinguish between the effectiveness of oversight procedures for individual redress, and for correcting structural gaps in the trilogue method.

The article seeks to contribute to the literature on trilogues, by offering a longitudinal analysis of the impact of administrative and judicial procedures and actors for purposes of external oversight. While political scientists have up until now focussed on interactions of actors involved in trilogue negotiations, and the manner in which they are structured by internal rules, arguably less systematic

attention has been given to the influence of *external* watchdogs in shaping the application of the principle of legislative transparency of trilogues in specific cases and over time (see however Curtin and Leino 2017; Martines 2018). Their role forms a test case of the strength of oversight institutions in ensuring the principle of openness, and thereby the formal democratic legitimacy, of legislative EU decision-making procedures for outsiders excluded from negotiation forums, at least at the level of law (Bressanelli et al. 2016; Laloux 2017: 93; Greenwood and Roederer-Rynning 2019: 126; Farrell and Héritier 2004: 1208).

Section 2 provides a short overview of the trilogue transparency problematique. It introduces the different administrative and judicial routes of redress against unfair intransparency, and formulates a number of expectations concerning the effectiveness of these routes. Section 3 discusses the study's research methodology. Sections 4 analyses experiences with respectively administrative and judicial trilogue transparency watchdogs. The findings of these analyses are discussed in section 5. We find that both watchdogs have contributed to a comprehensive understanding of the trilogue method as integral to the legislative process, encompassing all three institutions (i.e., including the Commission as a participant), and subject to the principle of legislative transparency. While the Ombudsman's efforts have increasingly focussed on selective high-profile initiatives, the Court's approach reflects a gradual, piecemeal approach of constitutionalisation.

2. Overseeing trilogues: effective administrative and judicial routes?

Informal bicameral legislative negotiations between the European Parliament and the Council first emerged in the mid-1990s (Kardasheva, 2012). Today, the use of trilogues has become a structural feature of the first reading of the legislative process employed in the vast majority of legislative proposals. The insulated negotiating style that purportedly lends the trilogue method its efficiency also creates high levels of opacity (Laloux 2017). Due to the small number of participants, limited standards of record keeping, and discretion of the negotiators, it becomes difficult for citizens and national parliaments to contribute to the decision-making process or to hold decision makers to account (Reh 2014: 826; Kardasheva 2012: 6). Compromise texts agreed in trilogues are only seldom subsequently modified.

European law gives expression to a constitutional principle of legislative transparency. We believe that even today, the legislative institutions are acting in contravention of this principle (Curtin and Leino 2017; Greenwood and Roederer-Rynning 2019: 126). The Amsterdam Treaty introduced a provision on

legislative transparency (TEC article 207(3)) that was later incorporated in the TFEU under article 15(3)). The right of access to all documents held by the legislative institutions, duly justified exceptions excluded, was operationalised in 2001 through Regulation 1049/2001. Article 12(2) of this act establishes that "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 directly accessible, subject to the exceptions laid down by the Regulation. Legislative documents thus constitute a 'special case' – access to them is to be provided automatically, without a prior request.

Article 4(3) of Regulation 1049/2001, known as the 'space to think' clause, provides institutions with the opportunity to refuse disclosure in order to protect the decision-making process. There is an ongoing debate about the extent to which this article can be invoked to justify non-disclosure in legislative decision making. The wording of Regulation 1049/2001, as confirmed by Court jurisprudence, makes it clear that disclosure forms the rule, and non-disclosure the rare exception. In practice, up until now, most legislative documents (including trilogue documents) have been disclosed only after the end of the legislative procedure. Disclosure after the end of the legislative procedure, while contributing to political accountability, comes too late to ensure meaningful participation (Martines 2018: 949).

Different administrative and judicial procedures exist to remedy non-conformity by the European institutions with the standards set in EU law and Court jurisprudence. These can be divided into procedures for individuals' redress and procedures to improve structural shortcomings in the institutions' handling of trilogue transparency.

Administrative procedures

When a legislative document has not been made directly accessible, individuals can make an access to documents request. The institutions have the possibility to refuse access to a document relying on a sufficiently reasoned application of one of the exceptions listed under article 4. The so-called confirmatory application, an internal appeal procedure, allows the applicant to request a revision of the original decision taken by the institution.

A confirmatory request may lead to a definitive access refusal, in which case applicants may seek redress externally, through two parallel paths (article 8(3)). The first of these is administrative, via a complaint to the European Ombudsman. The Ombudsman is elected after each election of the European Parliament by the Parliament for the duration of its term of office, and is eligible for reappointment (article 228 TFEU). The role of the Ombudsman is to promote good administration and

to identify and address instances of maladministration, which includes incorrect refusals to grant access to documents and general complaints regarding intransparency. As the filing of a complaint with the Ombudsman is free of charge it is sometimes considered a more accessible avenue for citizens than bringing a case before the General Court (Vogiatzis 2018). Although the Ombudsman does not have formal powers to sanction the European institutions, soft instruments such as the 'carrot' of a so-called friendly solution or the 'stick' of a critical remark have the potential of 'naming and shaming' them into compliance (Kostadinova 2015: 1082).

The Ombudsman also has the power to launch own-initiative inquiries. These inquiries, which are concluded with the submission of a report to the European Parliament, offer the potential of more systemic scrutiny (Curtin and Leino 2017: 2). A longitudinal impact study by Kostadinova finds an overall pattern of increased transparency due to Ombudsman intervention (2015: 1086). Nevertheless, it does not separately analyse trilogue transparency –arguably an area of decision making where institutional stakes are particularly high– and tells us little about the Ombudsman's impact on structural features of the trilogue system. Recent criticism of the current Ombudsman's manner of discharge as politicised has highlighted that the office is permanently at risk of losing credibility and having its recommendations ignored (Stein 2019).

Judicial procedures

The second avenue for redress in case of a definitive (partial) access refusal is the European Court of Justice. Judges of the Court are selected "from persons whose independence is beyond doubt" (article 19 TEU) and can, like the Ombudsman, be re-elected after completion of their six-year term. However, in contrast to the Ombudsman, they are appointed by common accord of the governments of the Member States, with replacement taking place in three-year tranches. Court cases address individual grievance. However, since rulings often clarify ambiguous elements in the law, the judgments of the Court of Justice can, and often do have wider reverberations. The legal interpretations contained in these judgments become generally applicable and must subsequently be treated as standing law by all affected parties. Nevertheless, Curtin and Leino express scepticism about the Court's ability to bring about cultural change within the institutions (Curtin and Leino 2017: 5). While the Court has a relatively wide competence to adjudicate access to documents cases, it has virtually no instruments to enforce its judgments (Rossi and Vinagre e Silva 2017). For this reason, Court interventions in this area are always at risk of being (partially) ignored in practice.

Table 1: Administrative and judicial remedies in trilogue transparency cases

Remedies	*Administrative*	*Judicial*
	European Ombudsman	*European Court of Justice*
Individual	Complaint brought by applicant	Case brought by access applicant
Systemic	Own-initiative inquiry	General applicability of findings

Table 1 summarises the various administrative and judicial remedies that are available against undue transparency gaps in the trilogue method. At the level of *remedies for individuals*, action has its transaction costs for applicants. An access to documents complaint to the Ombudsman requires some familiarity with EU law. Bringing a case with the Court of Justice, in turn, requires applicants to first have brought an internal administrative appeal that was (partially) unsuccesful, and beyond that, to seek representation by a lawyer. We thus expect redress against trilogue intransparency to be sought more often via the Ombudsman than through court action. We also expect Court action to be pursued more often by specialised groups, which can pool required financial and knowledge resources.

At the level of *systemic remedies*, the default presumption is disclosure, particularly where legislative documents are concerned. We would thus expect that systemic interventions by administrative and judicial watchdogs have improved the openness of trilogues over time. Access rates however are not recorded for trilogue documents specifically by any of the institutions. Even if they were, access rates in themselves are neither an appropriate indicator of legal compliance nor of good governance as such. As detailed above, valid legal exceptions to disclosure may apply in specific cases.

We thus operationalise systemic improvement effects of external oversight to be visible along three qualitative dimensions: (1) *conceptual*: a clearer application of key notions such as 'legislative process', 'legislative actor' and 'legislative document' to the trilogue method; (2) *procedural*: clarification of precise administrative and constitutional transparency obligations during trilogue negotiations; and (3) *remedial*: widened standing for applicants and shorter handling time across procedures. Consequently, we expect external oversight to have improved the transparency regime across the (a) conceptual, (b) procedural, and (c) remedial dimensions.

In the following sections, we further explore these expectations.

3. Methods

This article aims to explore the role that administrative and judicial procedures have played in ensuring the adherence of trilogues to the principle of legislative transparency between 2001 and today.[1] We seek to answer this question by analysing various empirical materials. The number of trilogue-relevant decisions and judgements is limited. European Ombudsman's decisions following complaints brought by access to documents applicants or on his/her own initiative were searched on the register using the keywords "trilogue" and "legislative". After filtering the results, six relevant complaints were identified, as well as two relevant own-initiatives inquiries: one concerning the transparency of trilogues (European Ombudsman 2016), the other related to trilogue-related aspects of access to legislative documents (European Ombudsman 2018c, 2018d). A list of decisions and subsidiary Ombudsman documents considered can be found in Appendix 1. Transparency case law of the European Court of Justice was searched in which the contested decision related to trilogue documents, leading to the identification of three judgments and one court order. A further six cases were added based on their direct relevance to legal questions pertaining to trilogue transparency. These cases address the two most commonly invoked exceptions to disclosure, and the role of the Commission in the legislative procedure. For both bodies, the selected cases were independently confirmed as the relevant ones by practitioners from several European institutions. A list of Court cases considered can be found in Appendix 2. Finally, the Commission's official policy on trilogue transparency was not available in any publicly available document and was thus gauged through an access to information request.

The collected data were interpreted using both a legal doctrinal analysis and a qualitative law-in-context analysis. Doctrinal analysis focussed on the interpretation by administrative and judicial watchdogs of key concepts and procedures, and how this interpretation developed over time and with reference to previous precedent. The accompanying qualitative investigation analysed the watchdogs' rule interpretation as choices of oversight style that emerge under conditions of partial institutional constraint (such as competence/mandate and limited resources). The analysis was guided by the expectations formulated above. The article also comes with certain caveats. Given space constraints, it cannot offer an exhaustive analysis of contextual factors such as legislation and rules internal to the institutions pertaining to trilogue transparency or the functioning of the internal administrative appeal mechanism (the confirmatory application procedure), which frequently precedes the involvement of external watchdogs.[2] Instead, the article analyses oversight strategies developed by external

watchdogs, as well as external administrative and judicial interpretations of the trilogue method in light of the principle of legislative transparency.

4. Protecting trilogue transparency through investigation and adjudication

The Ombudsman and the Court of Justice are the two central external watchdogs, exercising respectively administrative and judicial oversight. Over time, each of these actors has developed a distinctive approach to their task. The Ombudsman's office initially set out clarifying elements of the legislative process in the context of administrative law; yet in recent years, the shift has focussed on high-profile initiatives with a more pragmatic and less legal approach (Curtin and Leino 2017). The Court of Justice, in turn, from the start steadily advanced the principle of democracy in the legislative process. This is attested bya growing body of case law (Lenaerts 2012), which includes adjudication on the trilogue method.

4.1 European Ombudsman oversight: high-profile interventions

From the outset, the European Ombudsman has taken a keen interest in instances of maladministration related to transparency and accountability (Kostadinova 2015). At the same time, instances with a clear (indirect) bearing on trilogue transparency have been very few.[3] The limited number of complaints still allowed the Ombudsman to place certain systemic issues on the reform agenda at an early stage. In two early cases, the Ombudsman established that the Council's refusal to consider deliberating on legislative proposals fully openly constituted maladministration even when the rules did not yet oblige it to do so, and that the Presidency must be considered a part of the Council (respectively European Ombudsman 2005b: 6, and 2006: 7). Around the same time, the Ombudsman determined that the institutions have a general duty under article 12(2) of Regulation 1049/2001 to directly disclose legislative documents through their registers, but may refrain from doing so on the basis of a prima facie assessment that an exception under the same regulation applies (European Ombudsman 2005a; 2008).

It was not until recently that the Ombudsman used the own-inquiry instrument to investigate the transparency of the EU legislative process. In two much publicised, controversial inquiries, the Ombudsman respectively addressed the systemic questions of trilogue transparency (opened in May 2015, decision in July 2016) and access to Council documents in the legislative process (opened in March 2017, decision in May 2018). Both inquiries were based on a survey submitted to the

institution(s) in question, an inspection of the 'document trails' of selected legislative procedures, and a public consultation. Here we discuss them in parallel to assess not only the specific details of the interventions but also their consistency in their oversight of different legislative institutions.

The Ombudsman placed the trilogue transparency inquiry in a context of political uncertainty and legitimacy crisis (European Ombudsman 2016: para 68). In this context, she characterises trilogues as "an important informal part of the EU legislative process", which citizens and national parliaments must be able to scrutinise (ibid: 1, paras 16, 20). She includes the Commission in her inquiry on the basis of its participation in trilogue negotiations (ibid: para 41).

Given these broadly defined preliminaries, the Ombudsman's position regarding the transparency of trilogues appears underwhelming. In her view, the central utility of trilogues lies in its ability to bring the two co-legislators together to negotiate legislative drafts that each side promises to adopt unchanged (ibid: para 19). She thus subscribes to the view that a certain amount of confidentiality is required to reach the desired results. Where outsiders request access to trilogue documents while negotiations are still ongoing however, the Ombudsman merely encourages the institutions to grant access (European Ombudsman 2016: para 63). This accommodating attitude is a far cry from the Ombudsman's more principled stance in her subsequent inquiry of Council preparatory bodies, whose work takes place at an earlier stage of law making. There, she points out that the Council should provide direct, proactive, and generally full access to its legislative documents, since "[e]nsuring that citizens are able to follow the progress of legislation is not something to be desired; it is a legal requirement" (European Ombudsman 2018d: paras 2-3).

In the context of trilogues by contrast, the Ombudsman finds that "[i]t is arguable that the interest in well-functioning trilogue negotiations temporarily outweighs the interest in transparency for as long as the Trilogue negotiations are ongoing" (ibid: para 54). Consequently, she defends the possibility of disclosing trilogue agendas after the meeting and four-column documents *after* the conclusion of negotiations. This position has been described by several commentators as a strikingly 'pragmatic' capitulation of the democratic principle of legislative transparency (Martines 2018: 955; Greenwood and Roederer-Rynning 2019: 127). The approach taken is uncharacteristically a-legal. Curtin and Leino (2017: 35), for example, point out that the proposal to postpone disclosure of documents until a fixed later point in time disregards the principle of openness and the duty to demonstrate harm when deviating from this principle.[4] Moreover, she ignores the provisions on immediate proactive disclosure in article 12 of Regulation 1049/2001. This is again a different tune from the Council legislative transparency inquiry. There, the Ombudsman points out that "the EU's rules on public access to

documents […] state that '*legislative documents*' must be directly available to the public to the widest extent possible", and that "restrictions on access to legislative documents should be both exceptional and limited in duration to what is absolutely necessary" (European Ombudsman 2018d: paras 3, 36).

More idiosyncratic still is the Ombudsman's engagement with the principle of participatory democracy. In her trilogue inquiry, she connects access to documents to direct public participation, stating that a 'space to think' may in some cases be necessary to stop unwarranted interference in the legislative process, "for example, if this would lead third parties to interrupt proceedings] by seeking to intervene from a public gallery while a debate is ongoing" (European Ombudsman 2016: para 29). This analogy is evidently inappropriate to the context under investigation, since the transparency rules do not foresee in a right for citizens to be present during trilogue negotiations. Yet, whereas the Ombudsman implies that the possibility for citizens to scrutinise the draft proposal *after* conclusion of the trilogue process satisfies the requirements of participatory democracy (ibid: paras 55-6), in the case of the Council, she goes as far as to find maladministration in the Council's failure to systematically record member states' identities in legislative documents (European Ombudsman 2018c: para 15; Martines 2018: 958)). While her recommendation concerning trilogue participation contravenes the principle to justify access refusal on a case-by-case basis, that concerning Council legislative transparency goes beyond the Council's legal duties.

More recently, the Ombudsman has introduced a fast-track procedure for access to documents complaints in order to render the remedy of the complaint procedure more effective. The Ombudsman commits to responding to access-related complaints within two months, which she achieves by omitting any new institutional dialogue with the institution to which the complaint is directed. The institution's reply to the confirmatory application is considered sufficient justification (European Ombudsman 2018b). This decision however removes the procedural right of the institutions to present their views on the merits of the complaint in question. This development fits within a pattern of increasingly strained relations with particularly the Council. In the Council legislative transparency inquiry, for example, the Ombudsman decided not to offer the Council an extension to the response deadline that she set, a decision that was protested by the Council (European Ombudsman 2018d: para 12). Overall, what stands out is the contrast between the Ombudsman's reluctance to take on trilogue intransparency that involves all three institutions and her assertive policy vis-à-vis the Council's legislative activities.

4.2 European Court of Justice oversight: piecemeal democratisation

Judicial oversight of EU law making procedures has mainly taken place through the clarification of constitutional principles relating to democratic law making. The Court has exercised this role in a careful and gradual manner, focussing its judgments on the core aspect of the dispute while steering clear of side issues in these disputes. A particularly important moment came in March 2018, when the General Court delivered its judgment in *De Capitani v Parliament* (case T-540/15). The case concerned access to the full contents of four-column documents in various trilogue negotiation procedures. In practice, the so-called 'four-column document' is the only institutionalised type of document that tracks progress made during trilogue meetings (Curtin and Leino 2017: 18).

The Court first sets out to describe the characteristics of the trilogue method. In doing so, it was able to build on earlier case law pertaining to trilogues. In *Herbert Smith Freehills v Council* (case T-710/14), the Court had already described the trilogue as "an informal tripartite meeting in which the representatives of the Parliament, the Council and the Commission take part" with the aim of reaching "a prompt agreement on a set of amendments acceptable to the Parliament and the Council", which "must subsequently be approved by each of the three institutions in accordance with their respective internal procedures" (para 56).

In *De Capitani*, the Court goes further, by finding that trilogues, even when informal, form an integral part of the legislative procedure (para 75). Based on established case law, the Court underlines the pivotal role of transparency in the legislative process. In Sweden and Turco (joined cases C-39/05 P and C-52/05 P), for example, the Court had already held found there to be a "democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act" (para 67), a point that was reiterated in *Council v Access Info Europe* (case C-280/11) in relation to legislative negotiation documents (para 33; cf. Opinion of Advocate-General in case C-280/11P: para 42). In *De Capitani*, the Court extends this conclusion when finding that "the [protection of the] effectiveness and integrity of the legislative process cannot undermine the principles of publicity and transparency which underlie that process" (paras 83-4).

The definition, *in Herbert Smith Freehills v Council*, of trilogues as a *tripartite* meeting throws up the question whether the Commission must be understood as a legislative actor. The Commission has resisted a designation of its role in trilogues as one of a legislative institution. In *ClientEarth v Commission* (case C-57/16 P), the Court nevertheless found that the Commission, without acting as a co-legislator, does indeed have a formal role in the legislative process with concomitant transparency obligations (Wyatt 2019: 831). This, the Court held, meant that the Commission could not refuse full and immediate access to impact assessment reports, since these pertained to the latter's role as

initiator of legislative proposals (para 94). The Commission's legislative powers are equally operative in trilogues, where it can withdraw its proposal up until the very end of the negotiations (case C-409/13, *Council v Commission*). From this, we believe it must follow that the special duty to fully and immediately disclose documents pertaining to trilogue negotiations applies equally to the Commission. In *De Capitani*, the Court further finds that while the duty of loyal cooperation is indeed binding on the institutions, it does not entail a duty to conceal the other institutions' legislative positions as provided in the four-column document (para 104).

While the Court in *De Capitani* finds trilogues to be part of the legislative process, it also describes them as informal (para 68). The theme of informality was already brought up in *Herbert Smith Freehills v Commission*, where the Court held that the "formal or informal context [of a document] has no effect" on the application of a specific exception to disclosure (para 47). The informality of trilogues thus cannot affect the recognition of trilogue records as legislative documents (*De Capitani*, para 74). To withhold access for the duration of trilogue negotiations, the Court holds, would deprive citizens of their right to participate at a pivotal stage of the legislative process and for a potentially very long period of time (para 107). In an interesting invocation of accountability, the Court cites the Parliament itself, which in a resolution describes trilogues as "a substantial phase of the legislative procedure, and not a separate 'space to think'" (para 105).

Instead, the Court applies the stringent test of non-disclosure that applies to legislative documents. Here, it refers to the *Council v Access Info Europe* judgment to find that four-column documents "could [as such] not be regarded as sensitive by reference to any criterion whatsoever" (para 90). Reviewing the specific requested documents, the Court finds no sensitive contents that could reasonably be expected to lead to public pressure beyond the ordinary (para 99). Yet the Court does not go as far as to hold that no legitimate grounds could exist for protecting the legislative decision-making process from transparency under *any* circumstances; after all, the appropriate provision (article 4(3) of Regulation 1049/2001 does not omit the legislative process from its scope (para 108).

The *De Capitani* judgment is decidedly less clear on the matter of proactive disclosure. Indeed, the wording and title of article 12(2) of Regulation 1049/01 strongly suggest that a duty is incumbent on the legislative institutions to disclose legislative documents directly, even before they are requested. The Court's position in *De Capitani* however leaves remaining unclarity:

> …it is important to note that the present action does not seek to obtain direct access to ongoing trilogue work within the meaning of Article 12 of Regulation No 1049/2001. Indeed,

> the present dispute is concerned solely with access to the fourth column of the documents at issue, which may take place *only* on specific request lodged pursuant to that regulation. (para 86, italics added).

By all standards, this makes up a confounded representation of the legal facts. The Court established that trilogue documents fall within the category of legislative documents, which article 12(2) specifically deals with. The Court however then disengages from the direct access question, apparently because the applicant cannot bring a complaint concerning the lack of direct disclosure. This however turns the Court's statement into a normative fallacy: 'trilogue documents need not be proactively disclosed, because that is not what this litigation is about'.

The principle of legislative transparency would arguably be a dead letter if it could not be judicially enforced. This brings us to the question, how the court interprets the right to contest trilogue intransparency. As elsewhere, applicants must have a personal interest in the annulment of a decision, such as having a (partial) access to a requested document refusal overturned. This personal interest must remain in place until the end of the judicial proceedings. In *Leino-Sandberg v Parliament* (case T-421/17, court order issued in 2018), the Court ruled on these grounds that there was no longer a need to adjudicate. Here, the applicant had sought access to the confirmatory application decision relating to De Capitani's access request, in order to study the Parliament's refusal justification. When Mr De Capitani published the decision in somewhat modified form on his personal webpage, the Parliament argued that the applicant's interest in disclosure had been satisfied and maintained its negative decision on disclosure (para 28). An appeal in this case is currently pending.

In other cases however, the Court has upheld a personal interest in adjudication, even where the requested document had already been published. In *Access Info Europe v Council* (case T-233/09, issued in 2011) for example, a case in which the requested document had already been leaked and published on the website of Statewatch, the Court held that, "an applicant retains an interest in seeking the annulment of an act of an institution in order to prevent its alleged unlawfulness from recurring in the future". In *De Capitani*, the situation was even more clear-cut. Here, the applicant retained an interest in bringing the case even after its publication by the Parliament, because the Court deemed he had an interest in contesting the practice of strategically timing a document disclosure to bring proceedings to a halt (para 32). In the case of *ClientEarth*, attempts by the applicant to obtain a reversal of the refusal decision had led the General Court to categorically reverse the burden of proof for the specific type of legislative documents to which it the applicant had sought access. The fact that this judgment would make it significantly harder for this NGO to obtain access to comparable

Commission documents in the future was deemed a sufficiently direct interest in appealing the decision, even when the requested document had already been released.[5]

A final, separate category of jurisprudence consists of access to the court where the applicant's interest in enforcing the principle of legislative transparency is clearly private in nature (Curtin and Leino 2017: 31-2). In a string of five judgments known as the *Tobacco* cases (all issued on 15 September 2016), the Court faced this situation. All cases concerned legal advice in legislative procedures, while two pertained directly to legal advice given during trilogue negotiations. Regulation 1049/2001 does not require document requesters to state reasons for their requests, and hence such reasons should neither influence the institutions' decision to grant access, nor affect Court scrutiny. Still, based on the observations brought during these cases, the Court inferred that the applicants intended to use the disclosed documents to challenge the validity of EU legislation in ongoing court cases. Based on the principle of equality of arms, the Court thus found that the Commission and the Council were justified in denying access in order to protect the principle of equality of arms in all but one case (case T-18/15, *Philip Morris v Commission*). Interestingly, the Court thus appears to indicate that the principle of legislative transparency has greater normative force where it concerns the public, rather than a private interest.

5. Discussion

In what way have the European Ombudsman and the European Court of Justice exercised their oversight roles in order to safeguard the principle of legislative transparency in relation to trilogue documents? Both watchdogs made significant contributions to a comprehensive understanding of the trilogue method as integral to the legislative process, encompassing the Commission, and subject to the principle of legislative transparency. In the following, we take a closer look at the evidence basis of the expectations that were postulated in section 2.2.

Contrary to our expectation, the frequency with which the two watchdogs were called upon did not differ significantly. However, this comparison has limited explanatory force, as only very few complaints and cases about trilogue transparency were brought. The expectation that individual persons would more often seek redress through Ombudsman complaints did not hold up either. Instead, external remedies against trilogue intransparency were virtually exclusively used by individuals or groups with either a specialist focus, legal expertise, financial resources or a combination of factors.

While it is difficult to quantify whether transparency of the trilogue method increased over time (e.g., in terms of delay in document disclosure), the internal guidelines pertaining to trilogue decision making gradually became somewhat better aligned with the principle of legislative transparency. In most cases it is nevertheless difficult to conclusively attribute this to the external watchdogs' interventions. This is for example the case with Rule 69f in the Parliament's rules of procedure, which requires Parliament negotiators to publicly report back to their Committee after each trilogue, but which emerged for entirely independent reasons (Brandsma 2018). Vice versa, the legislative institutions continue to disregard various of the recommendations of the Ombudsman and the rulings of the Court in their standing practice, by failing to revise their internal rules of procedure and by continuing to postpone disclosure of some four-column documents until closure of legislative negotiations (European Ombudsman 2018a; 2018d: paras 13-4; De Capitani: private communication). The external watchdogs have no other means of enforcement at their disposal than to reiterate their findings on future occasions (Rossi and Vinagre e Silva 2017). That said, there are limited signs of improvements in the disclosure practice of the European Parliament and the Council as a result of the *De Capitani* judgment (European Parliament 2019: 13; Council 2019: 7-9).

Beyond the binary more-less question, our final expectation held that a qualitative improvement of the legal interpretation of legislative transparency would be observable along three dimensions. Along the conceptual dimension, a progressive explication of key legal concepts was expected. Indeed, external oversight resulted in clear progress here. Thus, the Ombudsman, in a line that was followed by the Court, established that the trilogue method is an integral part of the legislative process and that consequently trilogue documents must, in spite of their informal nature, be recognised as 'legislative'. The Ombudsman moreover established that trilogues include the Commission. This was specified by the Court, which found that while only the Parliament and Council act in a 'legislative capacity', the Commission must still be understood as a central actor in the legislative process.

Along the procedural dimension, the two watchdogs also brought further clarity as to transparency obligations during trilogues. The Court extended the stringent test of judicial review to cases where access to trilogue documents is refused on the basis of the so-called 'space to think' exception. As legislative documents as such cannot be considered sensitive by 'any criterion whatsoever', this makes it possible in principle, but very hard in practice to justify non-disclosures of trilogue-related documents. The Ombudsman arrived at a similar, but subtly different position. While she held that legislative documents must be registered and in principle proactively, directly and fully disclosed, she wavers on this principle in relation to trilogue documents. In contrast to the Court, and without legal

substantiation, the Ombudsman finds that the effective cooperation between the institutions does, as a rule, warrant a certain amount of confidentiality to enable the building of trust.

Although these conclusions of Ombudsman and Court entail tangible progress along the procedural dimension of the principle of legislative transparency, they also leave certain pressing questions unresolved. First, as the legislator's original intent with the 'space to think' was for it to apply to discussions internal to an institution (Martines 2018: 955, cf. Lenaerts 2012: 302), it is questionable whether article 4(3) of Regulation 1049/2001 in fact applies to trilogue documents, which concern discussions *between* institutions. Neither of the two watchdogs have so far engaged with this critique. Second, both oversight actors offer only limited and inconsistent guidance on the matter of proactive disclosure. The Court, while bringing up the relevant article in Regulation 1049/2001 and finding it applicable to trilogue documents, eventually dodged the question on the ground that the case at hand was not about this question. This is problematic, as the current access rules only allow applicants to bring cases against partial refusals of *requests*, implying that the Court deems the question of proactive disclosure per definition unjusticiable. The Ombudsman, by contrast, found that direct proactive disclosure may be postponed under certain, legally unsubstantiated, circumstances. This contradicts an earlier decision, in which the Ombudsman ruled that proactive disclosure of legislative documents may only be prevented by a prima facie individual assessment that an exception under article 4, Regulation 1049/2001 applies. In spite of this lack of administrative or judicial guidance, we fail to see how the duty of proactive disclosure could not be generally applicable to trilogue documents.

Finally, along the remedial dimension, remarkably few trilogue-related complaints have been brought before either the Ombudsman or the Court. In the case of the Ombudsman, this is particularly striking considering that a complaint is not dependent on a previous negative decision by an institution. The low complaint rate may be related to the relative length of administrative and judicial oversight procedures (roughly 2 years), which (particularly in the trilogue negotiation phase) removes much of the utility for individuals seeking access. The Ombudsman's newly instituted fast-track procedure recognises this problem, but does so at risk of undermining due process, and thereby, the legitimacy of the Ombudsman's decisions. In the case of the Court, the picture is more muddled. The Court has made efforts to interpret such a direct disadvantage broadly, to include situations after a requested document is disclosed, so as to prevent future breaches of the law and to hold the legislative institutions from timing disclosure strategically in the middle of judicial proceedings. That said, litigation may have been held back by the requirement that applicants need to demonstrate a direct disadvantage deriving from an access refusal, which excludes the reliance on a general, societal interest in improving trilogue transparency. Moreover, in a potentially troubling new development,

the Court recently ordered an NGO that lost a case to pay the legal costs not only of the defendant (the Commission), but also of intervening private parties (case T-545/11 RENV, *Stichting Greenpeace Nederland v Commission*). If orders of this nature become generalised practice, they are likely to have a considerable chilling effect on access to judicial remedies for NGOs and citizens alike.

6. Conclusion

Our analysis shows that external watchdogs can play a positive role in providing an effective form of administrative and judicial oversight that brings both publicity to and clarification of the application of the principle of legislative transparency in relation to trilogue decision making. Their interventions are increasingly demanding that the three institutions involved in trilogues own up to their obligations and accept the conconmittant transparency standards. Over the years, various improvements were noted in the conceptual, produral, and remedial clarity of these obligations. Given that all participants in the legislative process, particularly the Parliament, are at least rhetorically strongly committed to transparency, the findings of external watchdogs form a potential source of embarrassment that may serve as a driver of reform (Martines 2018: 958). Recent evidence indeed suggests that the external watchdogs' oversight has led to greater rule-adherence, although improvements appear limited and are not systemic.

Our analysis also suggests that the relation between the watchdog and the institutions they oversee can influence the focus and effectiveness of their oversight work. Blind spots may emerge that are due to the the watchdog's *own* principal or client relation. In the case of the Commission, its position as initiator of draft legislation gives it a pivotal role in trilogue negotiations: clearly, it 'takes three to trilogue'. Having a stake in maintaining a productive working relation with the Parliament and the Council, the Commission has thus never invoked its prerogatives as guardian of the treaties to act on perceived transparency gaps in the trilogue method. Quite to the contrary, it defended them by intervening in the central *De Capitani* case.

The Ombudsman, herself an appointee, has an equally complex accountability relation with the appointing body, the Parliament. Materially, the Ombudsman's treaty mandate of investigating maladministration covers all Union institutions, bodies, and agencies. However, reporting directly to the Parliament and requiring its assent for re-appointment, the possibility arises that the Ombudsman refrains from drawing conclusions that antagonise her principal, or in some cases, might take the latter's side in inter-institutional politics through an unbalanced investigatory approach. The associated risk is that the Ombudsman's investigations lose prestige and may be dismissed by the

affected institutions as partial. Our analysis provides some (albeit limited) evidence that aligns with the described dynamic.

The Court of Justice, finally, seems least affected by external relations. Judges are selected consensually by the member state governments based on their outstanding judicial competence, which places them at a greater distance from interinstitutional relations. Yet here, there are also limits to effective oversight. Unremarkable yet povital is the fact that the Court of Justice's role is largely reactive. The quality of judicial review thus depends at least in part on the hand that it is dealt. More subtly, being to a considerable extent bound by previous case law, the Court functions as *its own* principal. These factors conspire to the circumspect, piecemeal oversight style that characterises the Court's case law.

The above-described relational risks should not be exaggerated. Administrative and judicial oversight has clearly played an important role in providing checks on discretion where trilogue transparency is concerned. Yet they each point at a typical limit to external oversight. External watchdogs become less mindful when they associate too much with the institutions they oversee; less effective when they antagonise these institutions to the point of partisanship, and more indeterminate when opportunities for intervention are few a far between. As in other cases of oversight, there is no silver bullet for trilogue transparency. External oversight must therefore continue to calibrate between different actors, methods, and styles.

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Notes

(1) The cut-off point for data searches is 1 December 2019.
(2) See however Curtin and Leino (2017), Brandsma (2018) and Greenwood and Roederer-Rynning (2019).
(3) In 2018, the issue of access to information or documents came up in 134 or 24.6 per cent of cases. This figure remains close to that of 2001, when 84 or 29 per cent of cases dealt with alleged information of transparency deficits (European Ombudsman 2002: 271 and 2019c: section 4.3).
(4) That the Ombudsman considers the exceptions under Regulation 1049/2001 to be potentially applicable to legislative documents is shown by two recent decisions in which she respectively approved of the application of an exception to one such a document, and called for a revision of an applied exception in relation to another (respectively European Ombudsman 2019b and 2019a). In these cases, against the respectively the Commission and the Council, the Ombudsman again applies a strictly legal interpretation of the principle of legislative transparency.
(5) The Court subsequently went on to retract the reversed burden of proof.

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