

Commission CON-sultations

Problems with public consultations, and how “Better Regulation” will make them worse

In the more than a decade since online public consultations were introduced, the Commission has fallen far short of ensuring that consultations are fully transparent, that privileged access is prevented, that all those concerned are reached and that critical input is treated seriously. A lack of reflection over examples of consultations that fell particularly far short or learning lessons of 'bad practice' has confounded this problem. A Public Consultation on the Stakeholder Consultation Guidelines carried out in 2014, followed by the introduction of new and updated guidelines in 2015, could have been an opportunity to address some of these issues. But instead the new Stakeholder Consultation Guidelines have been subsumed under the Better Regulation agenda, a big-business friendly deregulatory push that sees “consultation” as a means to allow greater, earlier and more frequent access for big business to influence policy-making.

1. Problems with Commission consultations

1.1 Background and context

In a democracy, people must have effective possibilities to influence the political process. As such, political decisions should “*be selected from a range of genuine policy alternatives; be based on transparent procedures; not be pre-structured in respect of content by any non-transparent special interests*”.¹

The European Commission introduced a system of online public consultations in the early 2000s, setting ‘minimum standards’ for consultation with civil society, intended to serve a “*dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large*”.² In other words, online consultations were supposed to contribute to better law-making and to help address the democratic deficit at EU level.

However, the Commission's system of online public consultations has been blighted by a number of serious flaws. CEO is particularly concerned about the following problems:

- leading or biased questions that steer the outcome in a pre-determined direction and fail to allow space for critical viewpoints;
- failures of transparency including responses not being published, bias in summary reports and lack of clarity over how results feed into policy-making;
- the dominance of big business interests in consultation responses.

There is an EU treaty obligation to “*carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent*”. However, along with the frequent failure of online consultations reaching a representative and inclusive audience, the official, visible public consultation process is often complemented by a far bigger, biased 'unofficial' consultation process, in the form of closed-door meetings through which corporate

Parameters of the problem?

Readers of this report might find it useful to keep in mind a couple of critical concepts to measure the actions of the Commission against. Two key parameters to consider are the appearance of:

Cherry-picking: taking greater interest in positions that confirm a particular position, while paying less attention to those which may contradict it.

Confirmation bias: interpreting results in a way that confirms the validity of particular predetermined ideas, policies or positions.

1 Is this what democracy looks like? Alternative Trade Mandate Alliance, <http://www.statewatch.org/news/2013/may/eu-atm-democracy-working-paper.pdf>

2 European Commission (EC), 2002, *Towards a reinforced culture of consultations and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, p. 5

interests receive privileged access to decision-making.³

Specific problems with the Commission's system of online consultation – both as identified by academic studies using quantitative analysis, and more recent concrete examples of specific problems we have unearthed – are detailed in sections 1.1 and 1.2 below. The second section of this critique looks at how the recent review of the Stakeholder Consultation Guidelines – as part of the 'Better Regulation' agenda – was carried out, and why it looks set to worsen the problems of skewed access and influence that we've seen so far.

1.2 Lessons from quantitative studies

Without the capacity or tools to analyse (often hundreds) of consultation responses (to hundreds of consultations) and compare how these were incorporated into summary reports, and then into policy-making, the conclusions of academic studies can be very useful. Various academic studies using quantitative data analysis of the Commission's online public consultations confirm many of the problems noted above, and explored in further detail below. One example is a quantitative analysis study published in 2011 (based on consultations up to 2008) which took the premise that *“participation (only) lives up to democratic standards when it guarantees equal representation.”*⁴ This study found that participation of EU consultations was *“characterized by the dominance of older EU member countries, the under-representation of associations from southern member countries and, most importantly, the very large share of business interest representation.”* In other words, it found a discrepancy between consultations offering *in principle* an equal chance of participation, and *in practice* participation being biased and far from equally representative of different groups and stakeholders.

The study also found that the Commission infringes its own principles of transparency in public consultations, with a weak record on publishing contributions. Moreover, the lack of transparency extends to a major lack of clarity over how and why arguments are accepted or dismissed. For a consultation to be meaningful, even if its outcome doesn't fit the expectation of the Commission the results and arguments must be taken into consideration. And, importantly, rejection needs to be based on good counter-arguments. But, the study concluded, no obvious or accessible means to tracing whether and how consultation results were taken into consideration in the process of decision-making were available. Whilst on the other hand consultation summary reports often missed out arguments and overstated the standpoint of the 'big' EU-level associations. As long as transparency around consultations is flawed, they will be eyed with scepticism, it concluded.

The study also documented the criticism – including from EU-level NGOs – that online consultations are instruments by which the Commission demands approval for its policies without offering enough space and time to give elaborated input. And, that the increasing number of consultations results in civil society's influence being less whilst industry dominates more, as civil society lacks the resources (people, time, etc) to input, whilst industry does not.

Another quantitative study, employing text analysis software to analyse Commission consultations between 2008 and 2010, found that *“at no point was it clear exactly how input from the consultation made its way into the final legislation.”*⁵ This study emphasised the enormous challenge of aggregating the data from consultations (i.e. producing fair and representative summary reports) and the integration of responses into legislation. Whatever the format of a consultation (free responses, box-ticking, a given number of questions, etc.), the resulting amount of information can be massive. These challenges are very real, but – it seems

3 For a recent example of privileged access demonstrated by the colossal number of meetings with industry, serving as near-constant 'informal' consultation, see Corporate Europe Observatory (CEO), Policy prescriptions: the firepower of the EU pharmaceutical lobby and implications for public health, September 2015, <http://corporateeurope.org/power-lobbies/2015/09/policy-prescriptions-firepower-eu-pharmaceutical-lobby-and-implications-public>

4 C. Quittkat, The European Commission's Online Consultations: A Success Story?, University of Mannheim, Journal of Common Market Studies (JCMS) May 2011, Volume 49, Number 3, pp. 653–674, http://www.researchgate.net/profile/Christine_Quittkat/publication/227374692_The_European_Commission's_Online_Consultations_A_Success_Story/links/0deec53687a002ba0f000000.pdf

5 M. Opper, C. Mahoney & H. Kluge, How to Deal Effectively With Information Overload and the Proliferation of Consultations? http://www.intereuro.eu/public/downloads/publications/InterEuro_Outreach_Paper_US_team.pdf

to CEO - the Commission's approach appears to have been to bury its head in the sand. As the study notes, the Commission neither makes clear what (if any) criteria is used in determining which policy positions to adopt and which to reject. Its legislative proposals often state that consultations were held, but *"fail to actually state what part(s) of the consultation made it into the legislation or if the consultation changed any part of the legislation"*.

The study also observes that the Commission appears to have determined the overall direction of the legislation prior to the consultation stage. So, it should be made clear which aspects of legislation the consultations actually have the ability to affect. And, legislative proposals (or other official documents) should clearly indicate what, if any, changes were made as a result of the consultation, and why. As well as if a particular actor (or group of actors) was especially influential.

1.3 Recent examples of bad practice

The academic studies described above confirm many of the problems CEO is critical of in the Commission's approach to public consultations. In the last few years (ie since the studies' data analysis period), extensive anecdotal evidence shows that these problems continue. Recent examples of online consultations falling short of both the Commission's own rules (transparency, inclusivity, etc), and the basic requirements of democracy, include the following.

A. Individual consultation responses not published by the Commission: The Commission's own rules require it to publish individual consultation responses online – but a look through its online consultation portal “Your Voice in Europe” – reveals that many consultations *still* fail to do so. To take just a few examples, 2015's consultation on a Mid Term Review of the EU Maritime Transport Strategy,⁶ 2014's Consultation on policy options to optimise water reuse in the EU,⁷ 2013's Review of the European waste management targets consultation,⁸ and 2011's consultation in the run-up to Rio+20.⁹

B. Consultation responses published anonymously: There is no reasonable justification for *organisations* (rather than individuals) to be given the option of keeping their Commission consultation responses confidential or anonymous. Yet this practise is widespread, entirely undermining the principles of lobby transparency and accountability over who and how law-making is influenced. For example, the 2014-2015 consultation on the controversial (and much lobbied on¹⁰) issue of defining criteria for endocrine disruptors published its 22411 responses anonymously in a database. It also stated that *"142 responses where confidential treatment of the contributions was requested are not published."*¹¹ Likewise, the 2014 consultation on the future EU initiative on No Net Loss of biodiversity and ecosystem services publishes all individual answers with the proviso that the *"name and association/company/organisation of the respondents asking to be anonymous have been deleted"*.¹² [See section 2.2 C]

C. Consultancies writing consultations or compiling summaries: The lack of transparency – and accountability – around the Commission's outsourcing of elements of its consultation

6 http://ec.europa.eu/transport/modes/maritime/consultations/2015-mts-review_en.htm Despite the consultation closing on 22/04/2015, as of 23/02/16 – 10 months later – consultation responses are not available

7 http://ec.europa.eu/environment/consultations/water_reuse_en.htm Only the consultation background document and the summary report are available, as of 23/02/16. The background webpage (<http://ec.europa.eu/environment/water/reuse.htm>) states that *"The report on the public consultation includes the replies to the consultation itself and the feedback from the stakeholders meeting."* but the report in fact only summarises answers to the online consultation – without attribution or details.

8 http://ec.europa.eu/environment/consultations/waste_targets_en.htm and http://ec.europa.eu/environment/waste/target_review/consultation.htm A summary report, list of consultation questions and “detailed results” (simply a longer summary report) are available, but as of 23/02/16 individual responses are not.

9 http://ec.europa.eu/environment/consultations/un_2012.htm as of 23/02/16 only a summary report available

10 See CEO's 2014 report, A toxic affair http://corporateeurope.org/sites/default/files/toxic_lobby_edc.pdf

11 Full title is 'Public Consultation on defining criteria for identifying endocrine disruptors in the context of the implementation of the plant protection product regulation and the biocidal products regulation' http://ec.europa.eu/dgs/health_food-safety/dgs_consultations/food/consultation_20150116_endocrine-disruptors_en.htm as of 05/11/15.

12 http://ec.europa.eu/environment/consultations/nnl_en.htm and http://ec.europa.eu/environment/nature/biodiversity/nnl/results_en.htm as of 23/02/16

process to professional consultancy firms (e.g. the nature of the consultancies' role, or potential conflicts of interest that could arise from consultancies other paying clients) is another concern. For example, the Water Reuse consultation has a summary report written by professional services giant Deloitte – but given the failure to publish individual responses, as noted above, it is not even possible to see if the private firm's report is fair and representative.

In the case of the waste target review consultation (also mentioned above), all three published documents – the summary results, consultation questions, and detailed results¹³ - are authored by/ branded with 'Eunomia research & consulting'.¹⁴ But the precise nature of the relationship Eunomia had with the Commission, its role and its responsibilities, is not made clear on the consultation webpage. Some digging into DG Environment's archive of calls for tender reveals that Eunomia was awarded several contracts in 2012 under the heading “Assistance to the Commission on technological, socio-economic and cost-benefit assessments related to the implementation and further development of EU waste legislation”, for a maximum amount of nearly €700,000.¹⁵ With all this public money (for various services) going to Eunomia,¹⁶ a private consultancy whose recent industry clients include Goldman Sachs, BHP Billiton, Dong Energy, Centrica, RWE and Lloyds Bank,¹⁷ it is not reassuring that the Commission has failed to publish the consultation responses alongside Eunomia's summaries. Although the majority of consultations may not be carried out or assisted by consultancies, it is not easy to tell when or why they have been. This is problematic. Even more so when the consultation responses are not published alongside the consultancy-authored summaries, as assessment of their representativeness is made impossible.¹⁸

D. Leading or biased questions, and lack of option for dissenting views or alternatives:

Often, the structure of consultations and the nature of their questions do not enable respondents to give meaningful feedback if it is in disagreement with the Commission's underlying assumptions or policy-options. The 2013 consultation on structural options to strengthen the EU Emission Trading System (ETS) is a clear example of this.¹⁹ In it, stakeholders were requested to comment on six structural options proposed by the European Commission – but these did not include the option of replacing it with more effective regulatory climate policies. After a decade of the ETS enriching polluting companies, which have pocketed millions of euros in windfall profits from a surplus of free permits to pollute, not to mention failing to reduce domestic emissions *and* being used as an excuse to undermine other climate policies for fear of upsetting the carbon price, the ETS faces calls from ever-more civil society groups to be scrapped.²⁰ By failing to include this very rational alternative, the ETS consultation was, for what can only be political or ideological reasons incomplete.

Other examples of consultations with leading or biased questions that steer the outcome in a

13 The three documents can be downloaded from http://ec.europa.eu/environment/waste/target_review/consultation.htm

14 As well as Eunomia, the documents also have smaller logos of the Institute for Applied Ecology, Copenhagen Resource Institute, Argus and Satsuma.

15 DG Environment, List of specific contracts awarded in 2012 resulting from framework contracts,

<http://ec.europa.eu/environment/archives/funding/pdf/calls2012/Framework%20Contracts%202012.xls>

16 In the Transparency Register, Eunomia is listed as a professional consultancy, with 50 full-time equivalent lobbyists, declaring <€9,999 lobby expenditure between 04/2013 and 03/2014. It does not list any clients, stating “Own activities, no clients: n/a”, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=212121911185-07> last modified on:16/11/2015

17 Various public bodies are also named as clients. Eunomia, <http://www.eunomia.co.uk/about-us/clients/> as of 11/09/15

18 In the toolbox that accompanies the updated May 2015 Stakeholder Consultation Guidelines (see section 2 for context), it is stated that “*To the extent possible, the consultation strategy should also include information on human and financial resource planning. An external service provider or a facilitator (who must comply with the minimum standards for stakeholder consultation and follow the guidelines) might be considered for certain consultation work. It should be carefully verified that the contractors involved have no interest in the policy area subject to consultation and can operate in an independent way.*” http://ec.europa.eu/smart-regulation/guidelines/tool_50_en.htm#sdfootnote419anc If this is to make a difference, it will have to be made clear in every instance if and how this verification of independence is made. This is something to be watched out for.

19 CEO, Response to Commission consultation on ETS, April 2013, <http://corporateeurope.org/news/response-commission-consultation-ets>

20 See for example. Its time to scrap the ETS! civil society statement from February 2013, https://www.tni.org/files/download/scrap_the_ets18feb.pdf, and more recently CEO's 5 reasons to scrap the ETS, <http://corporateeurope.org/environment/2015/10/eu-emissions-trading-5-reasons-scrap-ets>

pre-determined direction and fail to allow space for critical viewpoints include:

- the Transatlantic Trade and Investment Partnership (TTIP) consultation (see Box 2);
- the 2013 consultation on the EU's 2030 climate targets (led by a former BusinessEurope lobbyist employed by DG Energy), which focused on competitiveness as the key criteria (rather than planetary boundaries), pitting climate against economy, and so mirroring the narrative of polluting industry lobbies but ignoring much of the Commission's own work;
- the 2012-2013 consultation on the post-Rio+20 strategy, which presented a bigger role for the private sector as a pre-determined fact;²¹
- the 2010 consultation on the EU's Concessions Directive, which reflected that the Commission wanted a directive that would bring every sector under Single Market rules and thereby promote further liberalisation and privatisation of public services: the questions focused almost exclusively on technical aspects of how to do this, not whether these were the right objectives for EU policy.²²

E. Bias in summary reports, and beyond: The fact that that it is often unclear in summary reports why some opinions are included, or emphasised, whilst others are not, is deeply problematic. The same is true for how the overall "lessons" from a consultation's results are taken forward into policy-making. These issues have been recognised by academic studies, as well as identified in concrete cases by CEO and others. For example, David Cronin, in his book *Corporate Europe*, complains that the views expressed by a fraction of those responding to a consultation may be treated with greater respect than all the rest: "*Views that clash with those of the elite are simply disregarded.*"²³ This indictment stems from Cronin's experience of a 2011 Commission consultation concerning the future direction of its research programmes. The responses of a number of human rights organisations included complaints about how companies making weapons used against Palestinian civilians are benefiting from EU grants for scientific research. Yet, says Cronin, "*when the Commission issued an analysis of the 'consultation', it did not refer once to the concerns raised about EU support for Israel's arms industry.*"

But it goes beyond concerns about bias in summary reports, to cases where it is totally opaque as to why it is the view of the minority of responses that informs policy. Whilst the majority view expressed in a consultation's responses does not seem influence the next steps taken by the Commission. For example, in the 2011 public consultation on plastic bags, over 70% of respondents supported a ban on single use plastic bags.²⁴ Yet, the Commission did not, *at the time*, follow this up by making a proposal for such a measure, instead leaving it to member states' discretion. Similarly, the Commission seemed particularly captivated by the seven responses it received from industry to its 2011 consultation on the EU position for Rio+20, but not so interested in the 24 views submitted by NGOs. Many of the NGO responses called for binding measures to limit environmental damage, whilst industry associations questioned the need for this. The Commission's input to Rio reflected the industry view.²⁵ The TTIP consultation is another such example (see Box 2).

F. Failure to engage broader stakeholders than industry: The problem of failing to ensure inclusiveness, or equal representation for different groups of stakeholders, is ongoing. Consultations that fail to achieve input from a broad range of stakeholders, and particularly those which garner responses mainly from the industries concerned, can act as self-fulfilling prophecies. For example, the 2015 consultation on the Revision of Regulation (EU) No

21 CEO, Big business and the EU: painting the economy green, June 2012,

<http://corporateeurope.org/rio20/2012/06/big-business-and-eu-painting-economy-green>

22 CEO, The record of a Captive Commission: The 'black book' on the corporate agenda of the Barroso II Commission, May 2014, http://corporateeurope.org/sites/default/files/record_captive_commission.pdf

23 Cronin, David (2013), *Corporate Europe: How Big Business Sets Policies on Food, Climate and War*

24 European Environmental Bureau, Overwhelming public support for EU plastic bag ban, January 2012, <http://www.eeb.org/index.cfm/news-events/news/overwhelming-public-support-for-eu-plastic-bag-ban/>

25 CEO, Big business and the EU: painting the economy green, June 2012, http://corporateeurope.org/rio20/2012/06/big-business-and-eu-painting-economy-green#footnote18_ywegn07

994/2010 concerning measures to safeguard security of gas supply,²⁶ demonstrated that if you consult the fossil fuel industry on how to ensure Europe keeps getting hold of and consuming a fossil fuel, the conclusion you'll come to (or confirm) is that much more needs to be done to secure and lock in fossil fuels (see Box 1).

The security of gas supply consultation garnered 103 responses, but besides public bodies and governments, these - practically without exception - represented the fossil fuel industry.²⁷ No environmental or consumer representatives are included in the responses, though one or two (literally) district heating or energy efficiency groups are represented. Yet most of the big energy firms are: BP, E.ON, EDF, ENEL, Engie (formerly GDF Suez), PGNIG, RWE, Statoil, Total, Vattenfall, Wingas. Not to mention fossil fuel lobbies (IOGP, CEEP, Eurogas, Eurelectric) and big business or heavy industry lobby groups (Fertilizers Europe, Polish BusinessEurope member Lewiatan). It is clear this consultation failed to reach out to wider stakeholders, and therefore failed to get a wider variety of input (e.g. into alternatives to locking in gas dependence).

This failure to reach out to, engage with or make accessible to “other relevant stakeholders and citizens” - which were included in the stated target groups - can in part be explained by the often technical, specialised and one-directional questions. For example, “*Is a regional approach to N-1 needed?*” or “*As concerns exemptions from the reverse flow obligation...*”. Nor were there any questions relating to energy efficiency or renewables.²⁸ This severely limits those who could meaningfully respond, and closes down the bigger debate needed (see Box 1). Another factor in the failure to get broad input is the extremely limited sphere that would have been aware of - or alerted to – the consultation's existence. Yet despite responses being fossil fuel industry dominated, the Commission will base its consideration of “*which additional measures are needed including in the form of legislative amendments*” on the responses received.

This failure is emblematic of a wider problem with how (in)effectively broader groups of stakeholders, including citizens, are targeted and *enabled* to input into consultations. Whilst on the flip side, we see cases where the Commission does pro-active outreach to business lobby groups to be sure that as many companies as possible participate in particular public consultations, *without* doing the same for other stakeholder groups. This was evident in the Commission's consultation on trade secrets. Not only did DG MARKT consult a great deal with corporate interests *before* it made its proposal (which incorporated many business' wishes), but when it then did an online consultation (ie only *after* it had made its corporate-influenced proposal), it went out of its way to encourage business input.²⁹ This makes a mockery of the

Box 1: The self-fulfilling prophecy of the fossil fuel industry

The Commission might consider that it is ok to exclusively consult the fossil fuel industry on the security of the EU's gas supply, with the justification that Europe needs gas as a transition fuel and that many countries, especially in Eastern Europe, are dependent on unstable supplies of foreign gas to get through the winter.

This however is disingenuous for several reasons.

Firstly, investing in new gas infrastructure, like new pipelines, LNG storage or routes, etc, locks in our consumption of gas and diverts money away from renewables and energy savings.

Secondly, investing in more energy efficient buildings can save more energy than giant gas pipelines supply. The countries most effected by insecure gas supplies and cold winters, like the former Soviet countries, also have the most energy-leaking homes.

Energy insecurity, and energy poverty, are not best served by pouring more money into a polluting fuel that will only become scarcer and more expensive, whilst continuing us on a path to climate catastrophe, but by reducing our dependence on it and transforming our energy systems and social infrastructure.

Consultations which – due to failure to reach out to broader stakeholders – act as a self-fulfilling-prophecy, bely real and needed alternatives to the status quo, which powerful business elites, like the fossil fuel industry, have a vested interest in continuing and locking-in.

26 See <https://ec.europa.eu/energy/en/consultations/consultation-revision-regulation-eu-no-9942010-concerning-measures-safeguard-security>

27 EC, List of stakeholders' submissions, <https://ec.europa.eu/energy/sites/ener/files/documents/List%20of%20stakeholders%20FOR%20PUBLICATION%20-%20updated%2018%2006.pdf>

28 Consultation Paper on the Revision of Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC https://ec.europa.eu/energy/sites/ener/files/documents/DG%20ENER_Consultation%20Paper%20on%20SoS%20Revision_14.01.2015%20ddl12w.doc

29 CEO, Towards legalised corporate secrecy in the EU? April 2015, <http://corporateeurope.org/power-lobbies/2015/04/towards-legalised-corporate-secrecy-eu>

idea of an open and inclusive – not to mention transparent - consultation process.

Box 2. TTIP consultations: Lessons in how not to consult

Online public consultations have, in some very high profile cases, been used by the Commission as democratic window-dressing, to give the impression of listening to civil society and citizens' concerns. When the "real" consultation - with big business - has been going on behind the scenes for quite some time. One such example, where the stakes are high and the implications grave, is the consultation surrounding the negotiation of EU-US trade agreement TTIP.

As part of its preparation for the TTIP negotiations, the Commission held an online consultation in 2012. It attracted few respondents, mostly business. The questions were narrow and biased towards the Commission's pre-determined agenda, providing no genuine opportunity for concerns to be raised about the forthcoming TTIP talks. Civil society dialogue meetings on TTIP came much later, after the negotiations had begun, and are little more than not particularly informative information sessions. But what is worse, is that DG Trade had, in the meantime, entrenched a parallel and unofficial 'consultation' process entailing huge numbers of intimate meetings with big business lobbyists behind closed doors. These, unlike the public consultation and civil society dialogues, were not disclosed online.³⁰

These undisclosed meetings ran throughout TTIP's preparations phase, undermining the supposed purpose of the online consultation. At least 119 meetings (93% of the Commission's meetings with stakeholders during the preparations of the negotiations) were with large corporations and their lobby groups.³¹ Taking into account all lobby encounters (i.e. consultations, stakeholder debates as well as meetings) during TTIP's preparations, and 520 out of 560 encounters (92%) were with business. Only 4% were with public interest groups. Moreover, documents related to these meetings revealed that the Commission had been very actively reaching out to different industry lobby groups to seek their input. Similar efforts to engage NGOs, trade unions and other interests were absent.

This dramatically unbalanced preparatory process – the official vs 'unofficial' consultation processes – showed little sign of balancing out once the trade talks began, with business still gaining privileged access to Commission trade officials after the launch of the talks, .³² This industry-dominated access has influenced the negotiations: the Commission did not integrate civil society concerns about the inclusion of investor-to-state dispute settlement (ISDS) mechanisms in TTIP. Only after many months of negotiations, when public concern had erupted across Europe, did the Commission launch an online consultation on the topic of ISDS in TTIP.

As well as coming far too late in the day, the ISDS consultation was written in biased fashion, with questions steering participants towards the Commission's preferred conclusion of very modest reform. The possibility of excluding ISDS was not presented in the questions. The Commission's own guidelines say consultations should be "*policy shaping prior to a Commission proposal*",³³ but this consultation failed to be either policy-shaping or prior. As such, it was criticised by many NGOs "*as a mock consultation aimed at selling its pro-industry agenda, rather than an honest attempt to have a much-needed open debate on the issue*".³⁴

Presented as a 40-page legalistic text, the consultation was also difficult for members of the public to understand and engage with. It was only due to efforts of NGOs that developed tools to overcome these hurdles and enabled citizens to more easily participate and express their opposition to ISDS that the consultation attracted a record 150,000 submissions. Despite this, the Commission's response to the consultation outcome implies a certain disregard for opposition and concerns to

30 CEO, European Commission preparing for EU-US trade talks: 119 meetings with industry lobbyists, September 2013, <http://corporateeurope.org/trade/2013/09/european-commission-preparing-eu-us-trade-talks-119-meetings-industry-lobbyists>

31 *ibid.*

32 Friends of the Earth Europe, Who's driving the EU-US trade talks? 7 July 2014 <https://www.foeeurope.org/whos-driving-eu-us-trade-talks-070714>

33 European Commission, (2002), Towards a reinforced culture of consultations and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, p. 4

34 Seattle-to-Brussels network, Campaigners slam Commission's mock consultation on investor rights in EU-US trade deal, Press release, March 2014, <http://corporateeurope.org/pressreleases/2014/03/campaigners-slam-commission-mock-consultation-investor-rights-eu-us-trade-deal>

both TTIP in general, and to ISDS in particular. With regard to the former, it stated that its analysis must remain “*focused on the statements provided in relation to the specific aspects presented under each of the questions posed*”. With respect to the latter, it suggested that opposition to ISDS must be viewed in light of the Commission's ongoing efforts to reform ISDS – ignoring the fact that those rejecting ISDS were aware of the Commission's reform agenda and rejected this as inadequate as well.³⁵

As the Alternative Trade Mandate Alliance has put it, the formation of the EU's trade and investment policy suffers from “*lack of transparency, a severe democratic deficit and a rampant corporate bias.*” More specifically:

“the system of public consultations does not invite the input of individuals and groups who are not embedded in EU policy processes. Contributions to online consultations and attendees of the civil society dialogue are dominated by lobby groups, mainly from the corporate sector and with an office in Brussels... civil society inputs only come as answers to questions, which are often leading and selective in terms of what is or is not asked. Usually answers are collected in a quantitative way, which gives little opportunity for suggesting genuine policy alternatives.

This suggests that the Commission seeks to fulfil its consultation obligations as a largely symbolic or proforma exercise, i.e. as cheaply as possible and in a way that allows for consultation outcomes to be easily spun in support of predetermined policy initiatives.”³⁶

The Commission's consultation on TTIP exemplifies how the Commission's official, visible consultation process is being complemented by a **far bigger, biased 'unofficial' consultation process**, in the form of closed-door meetings through which corporate interests receive privileged access to decision-making.

2. How Better Regulation will entrench and worsen the problems with stakeholder consultations

2.1 The political context: 'Better regulation for big business'

Using rhetoric around “better regulation” and cutting red tape, many big business lobbies – as well as corporate-cosy-governments, like the UK – have been the not-so-secret architects behind the EU's Better Regulation agenda, hand in glove with the European Commission.³⁷ In the context of this deregulatory business-friendly agenda (much like the “regulatory cooperation” agenda being pushed via TTIP³⁸), it is highly significant that the new and updated Stakeholder Consultation Guidelines are a chapter of the Commission's so-called Better Regulation Guidelines.³⁹ This is a clear indication that stakeholder consultation is being subsumed beneath the Better Regulation umbrella. Better Regulation is an umbrella which seeks to shelter businesses from administrative and regulatory burdens in order to improve their 'competitiveness'. How? By enabling businesses and their lobby groups to position themselves to exert even stronger influence in the decision-making process.

But Better Regulation has also been wrapped up in rhetoric about increased transparency and public participation.⁴⁰ More active 'stakeholders' will be able to enjoy more access to decision-makers; not only business groups, so the story goes, but other actors, like environmental

35 CEO, Commission consultation on investor rights in TTIP makes a mockery of democracy, January 2015, <http://corporateeurope.org/pressreleases/2015/01/commission-consultation-investor-rights-ttip-makes-mockery-democracy>

36 Alternative Trade Mandate Alliance, Is this what democracy looks like? <http://www.statewatch.org/news/2013/may/eu-atm-democracy-working-paper.pdf>

37 See CEO's 2014 report, The crusade against 'red tape': How the European Commission and big business push for deregulation, http://corporateeurope.org/sites/default/files/attachments/red_tape_crusade.pdf

38 See CEO's 2016 report Dangerous regulatory duet: How transatlantic regulatory cooperation under TTIP will allow bureaucrats and big business to attack the public interest, http://corporateeurope.org/sites/default/files/attachments/regulatoryduet_en021.pdf

39 European Commission, Guidelines on Stakeholder Consultation, Ch VII (p.63) of Better Regulation Guidelines, 19 May 2015, http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf

40 CEO, Cooperating to deregulate, http://corporateeurope.org/sites/default/files/attachments/cooperating_to_deregulate.pdf

movements and consumer groups, too. The problem however is that in the case of environmental and consumer groups, more effective or “better” regulation would in fact be of a kind that *would* impose so-called “burdens” on business. “Burdens” like the cost of emissions reductions, of developing non-hazardous chemicals, of more rigorous safety tests, of cleaning up pollution, of guaranteeing paid parental leave. It should also be noted that treating things like these as “burdens” benefits only the laggards among businesses, serving the lowest common denominator at the expense of those who have decided to invest in higher standards, better conditions, etc.

Add to this the armies of industry lobbyists in Brussels, their vast resources and the privileged access they already enjoy, especially to Commission officials. And the sum of it is that the transparency and participation-parts of the Better Regulation spiel – including the push for ever more consultations at ever more stages of the policy-making process – translates as opening the door to corporate lobbying even wider.

2.2 New Stakeholder Consultation Guidelines

The new Guidelines on Stakeholder Consultation were adopted in May 2015 as part of the overarching Better Regulation Guidelines. The Better Regulation Guidelines are “complemented” by a Better Regulation Toolbox, providing “more detailed information” - including on how to conduct a stakeholder consultation.⁴¹ According to the European Commission, the new Stakeholder Consultation Guidelines are “*the output following the Public Consultation on the Stakeholder Consultation Guidelines carried out in 2014.*”⁴² CEO gave a very critical response to this 2014 ‘consultation on consultations’,⁴³ outlining many of the problems discussed above, and the broader issue of consultations being used as a democratic window-dressing. Including CEO’s response, this meta-consultation received 120 responses.

The summary report of the Public Consultation on the Commission’s Draft Stakeholder Consultation Guidelines⁴⁴ gives a break down of these responses according to whether they’re signed up to the voluntary Transparency Register: registered organisations (76), registered companies (4), and non-registered organisations/companies (10).⁴⁵ Whilst the proportion of respondents signed-up to the lobby register is important information, this breakdown doesn’t tell us what proportion of responses represented private interests vs. the public interest. CEO’s analysis suggests respondents⁴⁶ included approximately 40 business to 23 NGOs and 7 labour organisations, a ratio of business to public interest of 4:3. Clearly, the way consultations are handled is an issue of much concern, in and beyond the business community.

A. Do not *always* exclusively consult business: The consultation summary report notes that the “*majority of replies stressed that avoiding bias to certain groups*” and that ensuring “*representativeness of stakeholders*” is very important. Yet the subsequently updated consultation guidelines only gives extremely weak guidance on this:

*“Avoid ‘regulatory capture’: The same businesses/representative organisations should **not always be exclusively consulted**, as this increases the risk of listening to a narrow range of interests.”⁴⁷*

41 Better Regulation “Toolbox”, http://ec.europa.eu/smart-regulation/guidelines/toc_tool_en.htm

TOOL #50: Stakeholder Consultation Tools, http://ec.europa.eu/smart-regulation/guidelines/tool_50_en.htm

TOOL #10: Stakeholder Consultation in the Context of an IA, http://ec.europa.eu/smart-regulation/guidelines/tool_10_en.htm

42 Email from SG STAKEHOLDER CONSULTATION, EUROPEAN COMMISSION to Rachel Tansey, 09/10/15

43 Public Consultation on the Commission’s Draft Stakeholder Consultation Guidelines, 30/06/2014 to 30/09/2014, http://ec.europa.eu/smart-regulation/guidelines/consultation_2014/stakeholder-consultation/index_en.htm

44 Results of the Public Consultation on the Commission’s Draft Stakeholder Consultation Guidelines Summary Report, http://ec.europa.eu/smart-regulation/impact/docs/contributions/summary_responses_stakeholder_consultation_guidelines_public_consultation_en.pdf

45 As well as Public authorities (15) Member States (9) Others (5) Citizens (1)

46 Excluding member states, public authorities/ regional bodies, etc

47 Guidelines on Stakeholder Consultation, Ch VII, *ibid* p. 75

You don't need a lawyer to see that such weak language – “*should not always be exclusively*” consulted - can equally imply that the same businesses *could sometimes* be exclusively consulted, or that the same organisations could always be consulted, just not *exclusively*. Despite the promising title 'Avoid regulatory capture', this guideline boils down to very little, thanks to this pitifully weak language. And despite concerns being expressed by various respondents (e.g. CEO, ETUC, Finance Watch, etc), as well as the majority of respondents stressing the need to avoid bias and ensure representativeness, this wording did not change by a single letter from the draft guidelines⁴⁸ to the final guidelines adopted in May 2015.

B. Opening up Impact Assessments to consultation, and beyond! A significant ask of big business lobbies, within their 'Better Regulation' push, has been to open-up draft Impact Assessments for stakeholder consultation. In other words, to give business lobbies greater influence even earlier on. The Commission's Impact Assessments are supposed to balance the economic, social and environmental impacts of a proposed policy. In practice, they all too often favour the easy-to-calculate economic costs (read: costs to business) over the more difficult to quantify medium-to-long-term costs to society and the environment. Thus, many big business lobbies see the opening of draft Impact Assessments – which occur long before a Commission proposal goes to the Parliament and Council – as a way to increase their influence, and the hegemony of economic considerations. In other words, undemocratically entrenching the interests (and participation) of big business (which has money, resources and capacity far surpassing public interest groups) at an early stage, enabling it to rig the agenda before the more democratic institutions even get a look in.

Yet the Commission has been happy to promote what can, on paper, look good – a promise to do more public consultations must surely mean more democracy and greater transparency in the policy-making process. The reality however, is that more and more consultations, expanding to impact assessments or even Parliamentary amendments, will exacerbate the problems with existing ones (discussed above), whilst bogging down policy-making with consultations at every level ('paralysis by analysis').⁴⁹ Consultations which provide mainly industry input.

Given this context, it comes as no surprise that major and influential corporate lobby groups including BusinessEurope and AmChamEU used their responses to the Consultation Guidelines' Consultation to hammer home the importance of stakeholder consultations in the impact assessment process, *including* on Parliamentary amendments. This latter wish is something that the European Commission included in its demands for the Better Lawmaking deal with the European Parliament, but which MEPs have already rejected.

AmChamEU “*hopes that the Commission will consider sharing draft IAs with key stakeholders to review facts and methodology*”
...“*Commission should provide an additional opportunity for stakeholder consultation in cases where the proposal has been substantially changed from the original consultation*”⁵⁰

Both lobby groups actually submitted their responses to the Consultation on the Draft Stakeholder Consultation Guidelines in the same document as their submission to the contemporaneous Consultation on the Revision of the Commission's Impact Assessment Guidelines.⁵¹ The demand for the publication of/ consultation on draft impact assessments was also echoed by, for example, chemicals lobby CEFIC and the European Risk Forum (whose members include British American Tobacco, Phillip Morris, Chevron and Syngenta⁵²). All of these groups also pushed for Delegated and Implementing Acts (which the Commission may adopt in order to ensure the implementation of EU law)⁵³ to be systematically subject to public

48 The draft guidelines were included in the 2014 consultation background document: Draft Stakeholder Consultation Guidelines 2014, p.3 of Stakeholder Consultation Guidelines 2014 Public Consultation Document, http://ec.europa.eu/smart-regulation/impact/docs/scgl_pc_questionnaire_en.pdf

49 See the Dissenting Opinion of the Stoiber Group, http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/annex_12_en_hlg_ab_dissenting_opinion.pdf

50 You can access AmChamEU and all the other responses to the consultation at http://ec.europa.eu/smart-regulation/guidelines/consultation_2014/stakeholder-consultation/contributions/index_en.htm

51 IA consultation, 01/07/2014 to 30/09/2014 http://ec.europa.eu/smart-regulation/impact/consultation_2014/index_en.htm

52 ERF, Members, http://www.riskforum.eu/uploads/2/5/7/1/25710097/erf_membership_list.pdf

53 The Lisbon Treaty created a distinction between two sets of Commission acts: Delegated acts (Art.290) are defined as

consultation – another way of widening and deepening the scope of business' influence.

These lobby demands have not only been issued via this consultation and the corresponding impact assessment one. They are key asks that numerous industry groups have been pushing for years, as part of a multi-level lobbying offensive around Better Regulation, to crack-open the legislative process to industry influence in ever more places and ways. In light of this, it is no great shock that the new consultation guidelines include mandatory time-frames for stakeholder consultation or feedback on a widened scope of draft Delegated and Implementing Acts and on Inception Impact Assessments (roadmaps for initiatives with impact assessments⁵⁴).

The draft guidelines had stated that consultations would apply only to draft “*delegated acts and implementing acts with important impacts, i.e. subject to an impact assessment*”. But in the consultation, some business lobbies such as EUROCHAMBRES and CEFIC made it clear that they wanted all such acts – or a wider category of them – to be subject to consultation. And this wish is reflected in the final guidelines, which provides for Draft Delegated Acts and Implementing Acts *in general* to be subject to consultation, with only some specific exceptions.

C. Using 'personal' data protection to let companies lobby anonymously? The new consultation guidelines state that according “*to the relevant data protection rules, respondents have the following options:*

- *Publication of the contribution with personal information*
- *Anonymised publication of the contribution (without the name/ name of the organization)*
- *No publication but use of the contribution for statistical and analytical purposes.*⁵⁵

The warning bells started to ring at the option of anonymised names of *organisations*. Why? Because EU data protection legislation is about *personal* data, protecting individuals. Reg 45/2001 Art 2. para a) defines ‘personal data’ as “*any information relating to an identified or identifiable **natural person***”. In other words, it can apply to the personal details of individual citizens, or of individuals within an organisation, but not to the name of the organisation (ie. **legal person**)! If protection of personal data is used as justification for organisations (lobby groups, companies, NGOs) to keep their name secret whilst seeking to influence EU-decision-making (the definition of lobbying) then lobby transparency has been thrown out of the window.

Given that the summary report gives no mention of protection of personal data or anonymity, it is also totally opaque as to where this explicit reference to anonymising names of organisations (which does not appear in the draft guidelines) has come from.

D. Testing consultation questions with stakeholders? According to the final version of the stakeholder consultation guidelines:

*“It is **good practice to test consultation documents** (e.g. presentations, surveys or questionnaires) **with some test persons who were not involved in the drafting**. These **should be as closely as possible resembling the actual target audience** of the consultation or sub-groups of this target-audience. The purpose of this testing is to find out whether the target group will find the consultation documents easy to understand and practical to use. **Test persons can for instance be** colleagues in other units, other DGs or **stakeholder groups who can give their personal critical feedback on how to improve the documents further**, e.g. the European Enterprise Network if the consultation targets also individual SMEs.”*

It is not, in principle, necessarily a bad idea to test consultation questions with representatives

non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act – they represent a delegation of power to the Commission that is set out in the original legislative act. Implementing acts (Art.291) are to be used where uniform conditions for implementing legally binding Union acts are required – they use the procedure known as comitology. For greater analysis of the different procedures, and their implications, see Client Earth's 2014 paper <http://www.clientearth.org/reports/introduction-to-delegated-and-implementing-acts.pdf>

54 http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm

55 This is elaborated upon in the Better Regulation toolbox (tool #50), which notes that data protection rules must be respected, that if personal data is collected and processed, it must comply with Regulation (EC) 45/2001 on the protection of personal data, and that consultations must clearly state “*that contributions are going to be published on the dedicated website, **unless respondents provide a substantial justification** for their opposition to the publication of their contribution.*”

of the target audience, in order to make them as understandable and accessible as possible. However, this would only be acceptable if the test audience was diverse and representative of all relevant targets. But, in the absence of any such stipulation regarding balance or inclusiveness, plus the explicit reference to “sub-groups of this target audience” (which leaves the door open to only testing with one particular sub-group, say, industry trade associations), this guideline is worrying. It could give the Commission carte blanche to privilege particular stakeholders with access to and influence over the form of draft consultations. Offering a potentially delicious opportunity for lobby groups to pre-taste the recipe *and* give their views on the ingredients.

It is also notable that this entire section on testing consultation questions *does not* appear in the draft guidelines. Nor is there any explicit reference in the summary report to such tests, only a sentence summarising the position of some respondents that “*Key stakeholders should be involved in the **pre-consultation dialogues** that should help developing the [options] consultation*”. But the summary report lists numerous short summaries of positions that were received in response to each question, some of which contract one another (reflecting the different positions of respondents). It does not however give any indication of how prevalent particular positions were, whose positions they reflect, or why some and not others might be taken forward as a basis to be elaborated upon.

The summary report can't tell us where this suggestion for (unspecified) stakeholder groups to give critical feedback on draft consultation documents (including “*presentations, surveys or questionnaires*”) came from, or why it was included. But a look through some of the individual consultation responses⁵⁶ might help a few clues emerge:

- The response of EuroCommerce – major retail industry lobby group, whose [members include](#) Tesco, Carrefour, IKEA, M&S, Lidl, etc⁵⁷ – argues that “*in a number of cases the questions do not seem to be appropriate for all relevant sectors or are poorly formulated. ...As a remedy, stakeholders could be invited (via the stakeholder advisory groups) to comment on the set of questions prior to their finalisation.*”
- Moody's Investment Services (MIS) states in its response that “*it is important that there is pre-consultation engagement with directly affected stakeholders*” and that “*pre-consultation engagement with the likely (most) affected stakeholders will give the Commission a better perspective on the proposal and the areas of greatest impact.*”
- EUROCHAMBRES, representing chambers of commerce across Europe, “*actively encourages*” the Commission to hold “*meetings with stakeholders well before the public consultation in order to shape the initial thinking on a potential policy proposal*”
- Tobacco industry lobby group CECCM (Confederation of European Community Cigarette Manufacturers, representing British American Tobacco, Imperial Tobacco Group and Japan Tobacco International⁵⁸) suggests with regards to Eurobarometer surveys, which are one of the kinds of consultation document this guideline may refer to, that: “*relevant stakeholders should be enabled to comment on both the questions posed and the findings of the survey before it is finalized and published.*”

E. To target or not to target? Amongst other things that changed from the draft to the final guidelines, but which it is not - from the consultation summary – clear why, are several changes that seem to fit with the big business-friendly agenda behind better regulation. One of these areas concerns stakeholder mapping or the defining of consultation target groups:

- In the draft guidelines, specific consideration is given to the “*wider impacts of the initiative on other policy areas*” when identifying needs for particular stakeholder engagement. In the final guidelines, this has been deleted.

56 Not a full text search of all consultation responses, but based on searching terms including “test” “preview” “prior” “review” “critic” “question” (and then looking for similar suggestions where these terms were found) in most business groups and companies' responses.

57 EUROCOMMERCE, <http://www.eurocommerce.eu/about-us/our-members.aspx>

58 CECCM, <http://www.ceccm.eu/who-we-are/>

- Concerning the use of clear and transparent criteria for the selection of participants for targeted consultations (such as meetings, hearings, conferences, other stakeholder events) the requirement that these “*selection criteria should be announced when informing about the event, ahead of selecting the participants for full transparency*” has also been removed from the draft to the final version. Nor has this stipulation been moved into the accompanying Better Regulation Toolbox.⁵⁹

Another significant change is as follows:

Final guidelines: “*Targeted consultations allow more focused interactions or dialogue and may tap expertise more efficiently, in particular when dealing with a very specific or technical subject. Privileged access for some stakeholders should be avoided.*”

Draft guidelines: “*Targeted consultations allow more focused interactions or dialogue and may tap expertise more efficiently. However, there is the risk of privileged access for some stakeholders, which might lead to complaints at a later stage. **Using targeted consultations as the only consultation method should therefore be the exception and should be explained in the consultation strategy.***”

The point that targeted consultations being the sole consultation method should be an exception requiring justification - due to the risk of privileged access - has been removed from the final guidelines. It does not appear in the toolbox either. Instead, the non-specific and vague statement that privileged access “*should be avoided*” is all that remains. Looking for illumination in the summary report as to why this was deleted proved to be a fruitless endeavour. Diverging opinions on this matter were clearly given in the consultation responses. The summaries of different views responding to various questions included the following:

- “**no pre-selection** of audiences should take place (vulnerable to manipulation, detrimental to transparency)”
- “Prioritisation of target groups: **Selection of target audience should reflect the complexity** of the consultation topic”
- “To ensure qualitative rather than quantitative participation, the **Commission should identify the most important stakeholders and invite them individually** to answer the consultation”
- “**Only under exceptional circumstances should a targeted consultation** be the only method of consultation. If used, transparency must be increased: Who is invited when to reply to targeted consultations? What is being done with the results of the consultation?”

What is absent from the summary report however is any attribution of these views to particular stakeholder categories, or sub-categories. Nor is any hint given of how prevalent certain views were over others, or any indication if one view was predominant. In fact, it sums up that “*Positive and negative replies are split in-between the identification of the right target audience.*” So why was the reference to sole use of targeted consultation being an exception requiring justification removed? Could it have been the result of internal discussions in the Commission, or pressure from another direction, or via another medium? It is simply not clear. But what is clear is that any rationale or justification for this change, particularly if it resulted from listening to particular submissions and not others, is lacking. .

F. Whose views are whose? The guidelines for stakeholder consultation – in both their draft and final versions – provide two options for the presentation of a consultation analysis:

1. On the basis of the different stakeholder categories, which should distinguish “*within the main stakeholder categories e.g. if similar response profiles can be identified*”.
2. On the basis of the different consultation topics, which should distinguish “*between the views of main stakeholder categories, for each of these issues and identify the nature of responses*”.⁶⁰

⁵⁹ No reference to “wider impacts” or to prior announcement of selection criteria could be found in Tool #50 or #10

⁶⁰ The guidelines also state that an overview of the profiles of respondents can provide information on the “*distribution across any other dimension (e.g. clustering by sector) that might be relevant for the specific consultation or where similar trends in replies or particular concerns can be observed*”, p. 82

Put simply, whichever option is used, the analysis should distinguish views along stakeholder categories' lines. And stakeholder categories will, it is stipulated, be identified in the profile of respondents. Despite this, the summary report of the consultation on the Draft Stakeholder Consultation Guidelines fails to effectively break down the profile of respondents (splitting them on registered and non-registered lines, so that business interests are lumped alongside public interest groups like trade unions and NGOs). Furthermore, it makes no distinction whatsoever about if and how views diverged along stakeholder category lines. Instead, it uses only phrases like “nearly all contributors”, “slightly more than half”, “a majority of respondents”.

G. Duplicate responses and weighing of responses: Another issue that seems to have become less clear from the draft to the final guidelines concerns so-called “duplicate responses”. The draft guidelines include the following section:

“Duplicate responses should be identified as otherwise the data will be skewed in favour of multiple identical responses. For example, if several replies with the same content are sent from different departments of the same company branch or subsidiary of the company, these should be considered as one reply from one company. If there are duplicate responses from individuals from the same Member State or region, it should be checked if there were campaigns encouraging citizens to reply along the same lines. In this case this should be flagged when analysing replies and also explained later on in the summary report and/or in the IA report how the duplicate replies have been treated. In some cases, particular attention may need to be paid to joint, or duplicate, responses by Member States, authorities, regions or stakeholder organisations, as these could also signal strong, organised support across various stakeholder groups for certain views or policy options.”

The final guidelines however contain *no reference whatsoever* to duplicate responses, let alone how to deal with them.⁶¹

Yet it is not clear why this section disappeared. The summary report concludes that “a majority of contributors stressed the importance of avoiding any bias in the analysis and of giving special consideration to the weighing of replies.” It also notes concerning duplications the view that “Information is missing on how to weigh the submission of identical or similar contributions from different stakeholders... Clear and mandatory rules are needed.”

The fact that there may be very different contexts of “duplicate” individual responses - and rational arguments possible for treating them or weighing-them differently - is what makes the requirement to flag and report on how duplicate replies have been treated so important. Consider, for example, the response of tobacco lobby CECCM, which argued that “duplicate responses by individuals shall not be dismissed...they should be considered at the light of what they represent: many individuals expressing their views on the issue.” Given the history of tobacco industry-led mobilisation campaigns being responsible a large portion of the 85,000+ responses to a 2010 consultation on the Tobacco Products Framework, this is not, perhaps, surprising.⁶² But compare this to the flood of citizen responses, facilitated by various NGO's online tools, determined to express dissent via the TTIP consultation, following a secretive and business-privileged process (see Box 2).⁶³ That such instances might merit different handling or weighing of “duplicate” responses (especially given the World Health Organisation restrictions on tobacco lobbying) is not inconceivable. But what is inconceivable is that if responses may be weighed differently, that there is a lack of clear and transparent criteria – or a minimum requirement for substantive justification - on how to approach this.

But instead of strengthening the requirement to report on how and why duplicate responses have been handled, the issue has been completely swept under the carpet. The neglect of this

61 The only reference to duplicate responses in the toolbox comes under 'limitations' of questionnaires: “Difficulty when analysing results – if duplicate replies are not identified, analysis of answers will be skewed in favour of these multiple identical responses – this is in particular an issue when anonymous responses are allowed” - Tool #50.

62 TobaccoTactics, TPD: Delaying the Process of Consultation, http://www.tobaccotactics.org/index.php/TPD: Delaying_the_Process_of_Consultation

63 CEO, Commission consultation on investor rights in TTIP makes a mockery of democracy, January 2015, <http://corporateeurope.org/pressreleases/2015/01/commission-consultation-investor-rights-ttip-makes-mockery-democracy>

issue in the guidelines leaves a very dangerous door open. A door left open to the Commission choosing how it treats “duplicate” responses, exercising its discretion in the interest of political expediency or desired outcomes, with no requirement even to explain how (or why). **H. Where's the feedback?** The summary report concludes that a “*great majority asked for better feedback on how the replies were taken into account and for explaining the reasons in case they were not.*” This is a view that might reasonably be considered to cross public and private interest lines, for both corporate lobby groups and public-interest groups want to know which views were listened to and why. The final guidelines state that:

“It is critical for those participating in stakeholder consultations to know how, and to what extent, their input has been taken into account and to understand why certain suggestions could not be taken up in the policy formulation.”

Given this, it is bordering on ridiculous that it is almost entirely unclear how, why and why not particular views (as set out in the summary report and individual consultation responses) were taken into account in the final guidelines. This lack of clarity leaves the Commission exposed to the very suspicions of cherry-picking and confirmation bias that these guidelines should allay.

To add to the confusion, the final Stakeholder Consultation Guidelines refer to the production of a synopsis report. But it is not clear to us if this is distinct to the hitherto referred to summary report. The synopsis report, it is said, should be drawn up at the end of the consultation work, and cover the results of each consultation activity that took place (i.e. not just online public consultations, but stakeholder meetings, hearings, surveys, etc). This synopsis report must provide feedback “*on how the results of the consultation have fed into policy making.*” In the case of the Consultation on the Draft Stakeholder Consultation Guidelines, the results of which fed in to the May 2015 Guidelines on Stakeholder Consultation (Ch VII in the Better Regulation Guidelines), either the summary report failed to come anywhere close to this standard of feedback. Or, a synopsis report (9 months after the finalisation of the new guidelines, and 1.5 years after the consultation closed) is still pending? Either way, this is not a promising start.

Finally, another notable provision in the new guidelines, one which CEO will be watching closely. When consultations pertain to legislative proposals, an “*explanatory memorandum should reflect how far the main contributions have been taken into account in the draft policy initiative and if not, substantiated why not.*” Sounds like a step in the right direction. If only there was a more promising precedent of the Commission living up to its own criteria and guidelines...

3. Conclusion

There are many and serious flaws in how online public consultations are conducted by the European Commission and things are likely to get even worse with the co-optation of public consultation by corporate interests and a complicit Commission, under the guise of 'Better Regulation'. Clearly, many of the problems highlighted in this report could be improved upon, from greater transparency over responses and how they are taken into account, to less leading questions, more room for alternatives and critical views, and efforts to enable greater and more representative engagement. However, it is clear to us that detailed recommendations of how to fix these problems would be futile without a greater sea change. What is needed, to quote ALTER-EU's book "Bursting the Brussels Bubble", is "a broader democratisation that empowers the engagement of citizens' groups in decision making" as well as "a far more active commitment by decision makers to defend public-interest concerns against the constant pressure from numerous, well-resourced commercial lobbyists". The Juncker Commission, by contrast, seems stubbornly determined to further strengthen the deregulatory tide of 'Better Regulation', making the 'competitiveness' of business the *raison d'être* of all policy. Regardless of the costs to people, planet and democracy.