A captive commission - the role of the financial industry in shaping EU regulation

Alliance for Lobbying Transparency and Ethics Regulation in the European Union (ALTER-EU), October 2009. **authors:** Kenneth Haar, Christine Pohl, Andy Rowell, Yiorgos Vassalos. **editing:** Helen Burley, Tamasin Cave. **thanks to** Paul de Clerck, Olivier Hoedeman, Nina Katzemich, Susannah Ling, Richard Murphy, Daniel Pentzlin, Erik Wesselius.

The Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) is a coalition of over 160 civil society groups, trade unions, academics and public affairs firms concerned with the increasing influence exerted by corporate lobbyists on the political agenda in Europe and the resulting loss of democracy in EU decision-making. **www.alter-eu.org**

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executive summary

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The scale of the current economic crisis has taken the financial sector by surprise. However, several independent experts have warned for some time that the lack of regulation in the sector meant a crisis was inevitable. These warnings were ignored by many financial and political institutions, including the European Commission. Instead, the Commission formulated its financial policy almost exclusively on the basis of advice from the financial industry and the very people who were unable to predict the crisis.

This 'expert advice' mainly comes from so-called expert groups. These expert groups, which according to the Commission's own guidelines should represent a cross-section of views, are hugely influential in the drafting of EU legislation.

An analysis of the composition of the groups which gave or still give advice to the Commission on financial issues shows an overwhelming dominance of representatives from the financial industry. This means that **large private banks, insurance giants and a whole range of financial enterprises are staggeringly over-represented and wield significant power within the EU legislative process – from the drafting of EU strategies and laws to their implementation.**

Today, there are more than 1,000 active expert groups, with 19 groups providing ongoing policy-advice on the financial sector. Industry experts outnumber representatives from academia, consumer groups, civil society or trade unions by a ratio of four to one. The 229 industry experts even outnumber the around 150 EU civil servants in the Commission's internal market directorate-general.

A closer look at key EU policies also shows that **representatives from the financial sector were actively involved in designing the policies which contributed to the global financial crisis. The EU is now consulting the same experts on its plans to tackle the crisis.**

In the drafting of rules affecting banking, the Commission followed the advice of the banking sector and allowed the bankers themselves to assess the level of risk for their investments. The failure of banks to identify risky investments has been highlighted as one of the major causes of the current economic crisis.

Hedge funds regulation was designed with the advice of expert groups who recommended continuing the light touch regulatory approach which in their view had "served the industry, its investors and the wider market well". Even when the excessive risk-taking of hedge funds came under the spotlight as a contributing factor in the crisis, the Commission only opted for a minimal tightening of the rules. Many important issues were left unresolved, for instance market disruptions by non-EU funds or naked short-selling.

Credit rating agencies advised the Commission that rules on ratings and procedures were not needed. But the fact that many investors relied on the agencies' advice before investing heavily in toxic debts was a key factor in the crisis. On the advice of industry experts, the Commission only proposed a set of weak rules similar to the present rules in the US – which have completely failed to prevent the crisis in the first place.

When the current financial crisis broke, flaws in the **accountancy system** – essentially designed by the profession itself with little external oversight – were identified by politicians as one of the critical underlying causes of the crisis. Even though there has been much talk of the rules being re-worked, accountancy loopholes, which allow 'toxic debts' to be hidden on balance sheets, remain open.

The Commission's approach to **tax havens** has also been compromised by placing representatives of trusts – including 'off-shore' trusts – at the heart of its consultation process. Not surprisingly, the Commission's proposals to eliminate tax evasion would still make it relatively easy to circumvent the rules thanks to untaxed foundations or trusts which remain under the radar.

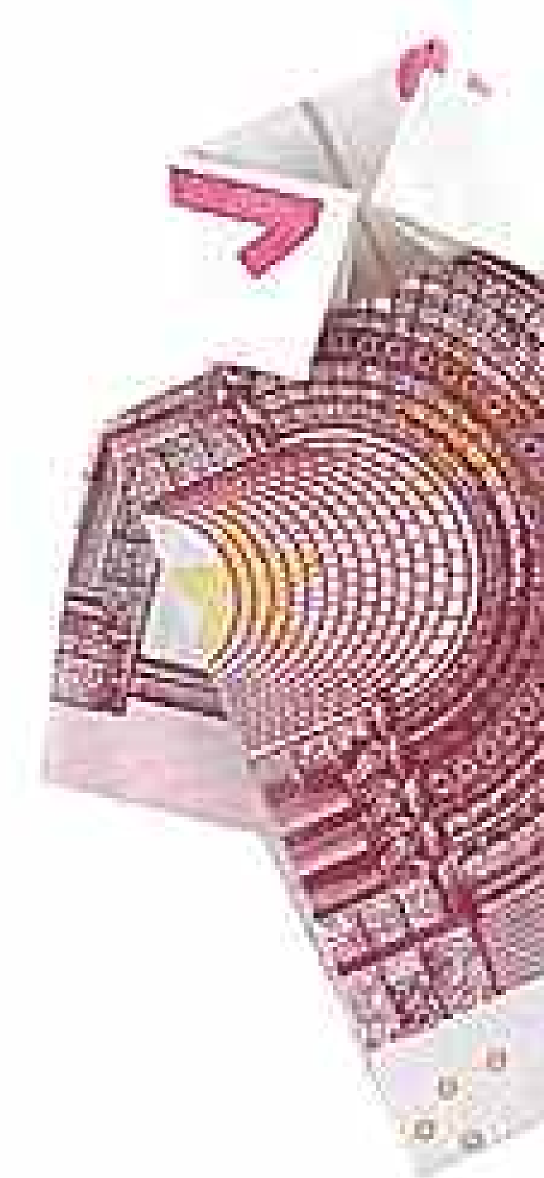
executive summary

This corporate dominance means that regulation is often shaped to protect the profits of big banks and private companies, and not the general interest of the public. **How can the Commission hope to reform the financial sector if the objective of its advisers is to maintain the status quo?**

In the interest of transparency and to achieve real change in the financial sector, the Commission should consider diverse expert advice from a range of voices. It should:

- Disclose membership (names and organisations) and documents (reports and minutes) for all groups that have been or are still advising the Commission on financial regulation since it set about creating a single market for financial services.
- Dissolve groups that are controlled by industry interests or take steps to ensure balanced representation between different interest groups.
- Only set up expert groups advising on financial issues if measures to ensure transparency and equitable consultation of all stakeholders are implemented.

More generally, the Commission needs to reform the way in which it gathers expert advice by ensuring a more transparent process and a genuine commitment to seeking a diversity of views.



1 introduction

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The scale of the current financial crisis took many by surprise, yet there were those who saw it coming. Many independent financial experts from academia, politicians and activists have warned for years that the lack of regulation in the sector was a crisis waiting to happen. Their warnings were not heeded by the European Commission, which has set up an advisory system from which these voices are excluded.

Expert external advice is regularly sought by the Commission to help it fulfil its legislative and policy-making briefs. Much of this comes from advisory bodies called Expert Groups. More than 1,000 Expert Groups have now been established by the Commission[1].

Expert Groups are designed – in principle – to give broad and balanced advice to the Commission. The reality however, is that their role is often political and can be one-sided[2]. These very powerful bodies have direct access to the people who craft legislation. Expert Groups are invited to define problems and solutions, and to help frame policies. Their input often forms the backbone of the Commission's legislative proposals.

This report analyses the composition and influence of those Expert Groups which gave or still give advice to the Commission around the regulation – or deregulation – of the financial services sector. It shows that at all stages of the policy process the very same financial sector that the Commission is seeking to regulate has a near monopoly on advising the Commission on how it should do this. Alternative perspectives from different interest groups, such as independent academics, consumer organisations or other NGOs, are largely absent.

Expert Groups filled with representatives from big banks, insurance giants and a whole range of financial enterprises are involved across the whole legislative spectrum in the field of financial services. Their covert influence guides the Commission from the first conception of legislation, to the drafting of regulatory strategies to the crafting of implementation measures.

This report shows how the financial sector has been involved in designing the policies which directly contributed to recent financial instability, as well as shaping the Commission's response to the crisis. The case studies on page X highlight the undue influence of many players in the sector, from the big banks to hedge funds, credit rating agencies and the large accountancy firms.

The report also demonstrates how the Commission is breaking its own rules on Expert Groups, particularly in the way in which members are selected. The rules state that the Commission must seek a "diversity of viewpoints" to "minimise the risk of vested interests distorting the advice"[3]. As this analysis shows, this is clearly not the case. However, because details of the membership of these groups have only recently been released – and are still incomplete[4] – the Commission has felt under no pressure to adhere to its own rules.

EU governments have openly condemned the irresponsible approach of the financial sector and promised fundamental change in their relationship to banks and investment funds. But as long as the financial sector has a stranglehold advising the Commission, such changes are very unlikely to happen.

If real change is to be achieved, regulation developed in Brussels must be based on genuinely balanced and independent expert advice, rather than the opinions of the same actors and interests that triggered the current financial meltdown.

2 expert groups: a narrow coterie of advisors

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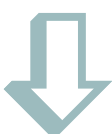
Whenever the Commission proposes new legislation, it is standard practice for it to consult with an Expert Group before the proposal is submitted to the Council and the Parliament.

Rules governing the Commission's Expert Groups are supposed to guarantee equal access to different interest groups to avoid the risk of bias, or as the Commission puts it to "reduce the risk of policymakers just listening to one side of the argument or of particular groups getting privileged access"[5].

The rules state that "[Commission] departments should aim to ensure that the different disciplines and/or sectors concerned are duly reflected in the advice provided;" and "wherever possible, a diversity of viewpoints should be assembled"[6]. To underline the point, the rules warn against underestimating "the challenge of ensuring an adequate and equitable treatment of participants"[7]. The stated aim of the rules is to "minimise the risk of vested interests distorting the advice"[8]. The "final determinant of quality" of expert advice, the Commission concludes, is "pluralism"[9].

In practice, the Commission habitually flouts its own rules. Research by transparency campaigners ALTER-EU in early 2008 found that in at least 110 Expert Groups surveyed, business representatives outnumbered any other kind of non governmental interest, whether trade unions, consumer groups, independent academics or charities. In 40 groups, there were more business representatives than governmental and non-governmental participants together[10].

ALTER-EU has repeatedly made the point that there cannot be pluralism when corporate interests dominate Expert Groups. Rather than ensuring a diversity of views, the Commission is predominantly receiving advice from corporate interests. This is also true for the advice it has received on financial sector matters.



financial sector expert groups: a decade of listening to the money men

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The current financial crisis has its roots in policy decisions stretching back years. But at the Commission, warnings about the dangers of deregulation and increasingly risky financial speculation went largely unheeded. As this study shows, both before, during and in the wake of the worst financial crisis for a generation, the Commission chose to listen almost exclusively to the finance industry, the very people who created the crisis in the first place.

3.1. creating a single market for the bankers

When the Commission set about creating a single market for financial services, 10 years ago, it published a Financial Services Action Plan (FSAP), which set out the first comprehensive strategy for developing a common set of rules for the European financial sector.

Evidence shows that financial corporations had considerable influence on the creation and development of the Action Plan. The Commission's High Level Strategy Review Group was a crucial player - their conclusions are seen as having led directly to the FSAP. All 16 members of this High Level Group came from the financial services industry, including insurers, bankers, investment fund managers, security dealers and pension fund managers[11].

The Action Plan itself announced the creation of six Expert Groups which "would assist the Commission in identifying imperfections and practical obstacles to the functioning of specific areas in the single market". Only one of these Groups has made its membership public.

Under EU transparency legislation, the Commission has released the membership details of three more Expert Groups. All four Groups show a clear industry bias:

- All 20 members of the Forum Group of the Cross-Border Use of Collateral came from the financial services industry or firms that advise them; including from Banque Paribas, ABN Amro, and Barclays[12].
- Nineteen of the 21 members of the Facilitating Cross-Border Corporate Financial Services Group, were from the financial services industry, including representatives from Barclays Bank, Lloyds TSB, ABN Amro, and Merrill Lynch, and two others from the Commission[13].
- Seventeen of the 18 members of the Forum Group of Market Experts on the ISD Green Paper, were from the financial services industry, including Morgan Stanley and Paribas[14].
- All 16 members of the Forum Group of Market Experts on Market Manipulation,were from the financial services industry (BNP, ABN Amro and Goldman Sachs)[15].

In 2004, the FSAP was reviewed with a further four Expert Groups set up to assist in the process. Again, the composition of these groups showed a clear industry bias[16]:

- 21 of the 23 members of the Banking Expert Group were from the financial industry. One was an academic and one came from a consumer organisation (see Banking case study);
- 21 of the 22 members of the Insurance and Pensions Expert Group were from the financial industry. One was an academic;
- 25 of the 26 members of the Securities Expert Group were from the financial industry. One was an academic;
- All 21 members of the Asset Management Group came from the financial industry.

3.2. removing parliamentary oversight of the financial sector

Soon after the FSAP was adopted, the Commission set about a fundamental reform of the way in which decisions on financial services' regulation were taken in Brussels.

The Lamfalussy Process - named after the banker Alexandre Lamfalussy who headed the Advisory Group -is a remarkable approach to financial sector regulation. Instead of new rules being subject to scrutiny by the European Parliament and Council, the process relies on sector-specific committees, regulators and member-state representatives to shape them. In the Lamfalussy process technocracy has replaced democracy.

The Lamfalussy process was designed to create a more uniform set of rules across Europe so as to create a genuine single market for financial services. However the process has been widely criticised because it removed democratic oversight from the European Parliament and gave it instead to unelected technocrats. Once again the expert advisory group proposing this mechanism was corporate dominated: Lamfalussy's group of eight included four people from financial corporations, two national bankers and one from a stock exchange[17].

The Lamfalussy process has four "levels", each with a different role. At the first level, Parliament and the Council adopt a piece of legislation proposed by the Commission. The second level is where technical details of the legislation are worked out between the Commission and committees mainly made up of officials from finance ministries. The third level is where three different bodies, made up of civil servants and each with their own Expert Group, decide how to implement the law at a national level. The final level is where the Commission makes sure member states uphold the adopted rules. The European Parliament has no say on the details of the legislation or on the way in whcih they are implemented.

The Level Three bodies are the Committee of European Banking Supervisors (CEBS); the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS); and the Committee of European Securities Regulators (CESR). The expert groups advising them have a high degree of influence regarding the details of implementation measures and are dominated by financial representatives:

- Nine of CESR's 13 Expert Groups consist solely of representatives from the private financial sector; two are made up of the CESR's in-house experts; one analytical group is academics only; and one group does not disclose its membership[18].
- All the members of the six CEBS Expert Groups come from the private financial sector[19].
- Although CEIOPS's main committee is made up of representatives from financial authorities from Member States, all but three of the 17 members on its "consultative panel" are linked to the private financial sector[20].

3.3. turning to the bankers for solutions to the crisis

In October 2008, at the height of the financial crisis, the Commission once again turned to advisers with strong connections to the financial services industry for help. The key Expert Group set up to advise the Commission, the de Larosière Group, was tasked with proposing the reforms on the EU financial system as a response to the crisis. Its chairman, Jacques de Larosière, is a senior figure within the banking industry.

Four of the de Larosière Group's eight members had close links to giant financial corporations which had been deeply implicated in the crisis, including Lehman Brothers (Rainer Masera), Goldman Sachs (Otmar Issing), BNP Paribas (de Larosière himself), and CitiGroup (Onno Ruding). A fifth, Callum McCarthy, was the head of the UK Financial Services Authority, which had been described as systematically failing during the crisis. Another member, Leszek Balcerowicz, is well-known for his opposition to regulation[21].

3.4. ongoing policy advice dominated by the finance industry

The Commission's proposals on financial issues are predominantly shaped by the Directorate General (DG) Internal Market[22]. For the past five years this has been under the leadership of Charlie McCreevy, the Commissioner for Internal Market and Services.

DG Internal Market gets external advice from 19 Expert Groups, as well as three Lamfalussy Committees. Some 538 external experts participate in these Expert Groups in total[23].They advise around 150 officials from the three relevant directorates of DG Internal Market[24].

A breakdown of the Commission's external experts reveals the extent to which the advice it receives is dominated by vested corporate interests (see Annex One):

- Eight of the 19 regular Expert Groups providing external advice to the Commission are dominated by members from private financial corporations
- In only one Expert Group are non-governmental organisations (NGOs) and corporations almost equally represented.

Seven of the remaining groups are composed of member states representatives; two groups cannot be assessed as the affiliation of their members remains undisclosed; and one group appears to have input from trade unions, but not all of its members are disclosed.

Closer analysis of the Expert Groups [see table 1] reveals that:

- **There are more corporate employees helping draft Europe's financial policies than Commission civil servants: with at least 229 corporate advisors compared to 150 DG Internal Market policy-making staff.**
- The number of governmental expert group members is almost equal to the number of industry members (246 to 229 industry). This number could be even greater given that the affiliation of 18 people and the membership of one group are not disclosed (group 19 in table 1).
- 84% of the disclosed "civil society" members[25] come from the finance industry.
- Just 8% of members are from trade unions[26], 4% from consumer NGOs and 4% from academia.
- The companies with the most representatives are Deutsche Bank (five executives in four groups), BNP-Paribas and Société Générale (four groups each), and the interbank network, SWIFT (four groups).

financial sector expert groups: a decade of listening to the money men - *continued*

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active expert groups on financial policies under DG internal market[27]	**meetings (or reports) per year**	**membership**						
		government/ public banks/ ECB/EU/ OECD	**corporations/ private sector**	**academics**	**trade unions**	**NGOs (consumers)**	**'pr. experts'/ undisclosed**	**total**
Cross-border redress in financial services	?	40	-	-	-	-	-	40
European Group of Auditors' Oversight Bodies [no names]	4-5	27	-	-	-	-	-	27
Expert Group on Financial Integration Indicators [no names]	?	27	-	-	-	-	-	27
Experts Group Insurance Guarantee Schemes [no names]	0-4	31	-	-	-	-	-	31
Government Experts Group on Mortgage Credit	?	30	-	-	-	-	-	30
Government Expert Group on Retail Financial Services [no names]	4-6	30	-	-	-	-	-	30
Payment Systems Government Experts Group	?	45	-	-	-	-	-	45
Clearing and Settlement Advisory and Monitoring Expert Group 2	2	-	31	-	-	-	-	31
Clearing and Settlement Code of Conduct Monitoring Group [no person based mem/hip]	?	4	62	-	-	-	-	66
Expert Group on Credit Histories	8	8	6	-	-	5	1	20
EU Clearing and Settlement: Fiscal Compliance group	4	3	9	1	-	-	2	15
EU Clearing and Settlement: Legal Certainty group	4	6	22	7	-	-	1	36
European Securities Markets Expert Group	4	-	21	-	-	-	-	21
Financial services users' forum (FIN-USE)	6	-	3	2	-	3	5	13

active expert groups on financial policies under DG internal market	meetings (or reports) per year	membership						
		government/ public banks/ ECB/EU/ OECD	corporations/ private sector	academics	trade unions	NGOs (consumers)	'pr. experts'/ undiclosed	total
Payment Systems Market Group	?	2	35	-	-	3	-	40
Payment Systems Market Expert Group	?	2	43	1	1	3	-	50
Standards Advice Review Group	?	-	3	-	-	-	4	7
The Expert Group on Financial Education	2	6	14	-	-	-	5	25
Contacts avec les organisations syndicales communautaires (Uni - Europa) [no person based membership]	?	-	?		21	-	-	21+?
total		**261**	**249**	**11**	**22**	**14**	**18**	**575**
		-15[28]	**-20**[29]			**-2**		**-37**[30]
		246	**229**	**11**	**22**	**12**	**18**	**538**

4

conclusions: near total capture by the finance industry

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The findings of this report raise serious concerns over the democratic nature of decision-making within the European Commission. For a functioning democracy, it is a prerequisite that all concerned views are taken into account. The regulation of financial markets undoubtedly is an issue which concerns not only the financial industry but each and every citizen of the European Union.

The European Commission recognises that when developing and implementing EU policies, it needs to consult as widely as possible and has established rules designed to "minimise the risk of vested interests distorting the advice" (described in Chapter 2). Analysis of the Expert Groups on financial services clearly shows that these fundamental principles have not been followed.

Out of the 10 Expert Groups that helped the Commission draft and review the Financial Services Action Plan (FSAP; described in Chapter 3.1) eight revealed their membership. Out of a total of 167 experts in those groups, 160 were from the financial industry. The group that designed the Lamfalussy process (described in Chapter 3.2) was corporate dominated. The same goes for all the key expert groups advising the supervisors and regulators bodies in the implementation phase of the Lamfalussy process. 84% of the disclosed "civil society" members providing on-going policy advice on financial issues to DG Internal Market (described in Chapter 3.4) come from the finance industry. And the de Larosière Group, tasked with proposing an EU reaction to the crisis (described in Chapter 3.3) has been dominated by financial industry insiders implicated in the current crisis.

According to the Commission, it was the intention in creating a single market to include a diversity of opinion, from independent experts to smaller investors and consumers. Yet representatives of these groups have been almost wholly absent in the Commission's Expert Group process[31].

The near total capture of the legislative process by the finance industry has been pointed out by many critics over the years.

In a European Parliament report in 2005, Dutch Member of European Parliament Ieke van den Burg of the Committee on Economic and Monetary Affairs noted the "lack of input from consumers and users with regard to financial services legislation"[32].

The President of the European Socialists (PES) Poul Nyrup Rasmussen goes even further. Commenting on the latest proposals to regulate hedge funds, he accuses Commission President Barroso of fulfilling the demands of industry: "Barroso pretends to be the candidate for all parties but he has caved in to the demands of industry and their friends in the Commission"[33].

Even the Commission itself has acknowledged the risks associated with excessive corporate influence. In February 2009, Commissioner Charlie McCreevy warned against the Commission becoming "captive" to "those with the biggest lobby budgets or the most persuasive lobbyists. We need to remember that it was many of those same lobbyists who in the past managed to convince legislators to insert clauses and provisions that contributed so much to the lax standards and mass excesses that have created the systemic risks,"[34].

Yet, despite this, the financial services industry has retained a near monopoly on advising the Commission. This corporate capture means that regulation is shaped in the interests of big banks and all too often against the interests of society at large. The Commission seeks legitimacy through consulting with Expert Groups. However, it is not seeking legitimacy in society at large but solely within the business community.

recommendations:

If real change is to be achieved in the financial sector, the Commission must receive well-balanced expert advice from a range of voices. The Commission should:

- Disclose membership (names and organisations) and documents (reports and minutes) of all groups that have been or still are advising the Commission on financial regulation since the Financial Action Plan was published.
- Dissolve groups that are controlled by industry interests or take steps to ensure balanced representation.
- Not set up any new Expert Groups advising on financial issues unless transparent and fair mechanisms that guarantee equitable consultation of all stakeholders are implemented.

More generally, the Commission needs to reform the way in which it gathers expert advice. Therefore, the Commission should:

- Ensure that the mechanisms by which it accesses expertise are both transparent and equitable.
- Seek impartial scientific advice
- Seek advice from different sections of society.

Finally, the European Parliament should not approve the budgets of expert groups in the financial sectors as long as they are not balanced and do not represent all relevant stakeholders.

5

Expert Groups in practice: how one-sided advice impacts Europe

These case studies reveal the impact that the one-sided advice of Expert Groups on the financial services sector can have on EU decision-making. It should be remembered that these Expert Groups represent only a proportion of the corporate-dominated financial groups whose advice is sought. Many more advise other parts of the Commission[35]. Although a similar pattern exists within other policy areas, it is nowhere near as common as within the financial sector.

5.1 banks act as poacher and game keeper

The current financial crisis has led many to conclude that self-regulation by banks increased financial instability. For example, one senior analyst at the OECD concluded: "For capital regulation – please – keep the poachers out of the woods with their game warden hats on"[36].

This self-regulatory regime allowed banks to systematically lend far too much money relative to their capital resources, a factor that is seen as largely contributing to the crisis[37]. Many commentators have said that weak international rules – as outlined in these case studies - that were supposed to ensure that banks kept adequate amounts of capital were at fault.

One such rule, called Basel II, allowed banks to assess the risks of their investments themselves, enabling those with toxic assets to appear more solid than they actually were. This situation was considerably aided by the credit rating agencies (see Case Study 4.3).

Basel II is not an EU financial instrument, but was agreed by the Basel Committee on Banking Supervision (BCBS). Members of the BCBS are not elected politicians, but representatives from central banks and supervisory authorities from the G-10 countries[38]. Their proposals, after "intense industry consultation"[39], are supposedly non-binding recommendations for banks internationally, not obligatory rules.

Conferring with the bankers on their own rules. The Commission chose to incorporate the Basel II accord into the EU law – in something called the Capital Requirements Directive[40] – with surprisingly little controversy. The Commission made sure that the European financial industry was consulted thoroughly during the negotiations and several Expert Groups directly addressed the Basel recommendations:

- The Banking Expert Group consisted of 23 people, who all except two (one an academic, the other from a consumer organisation) were from the private financial sector (BNP-Paribas, Deutsche Bank, Société Générale, Banco Bilbao etc)[41]. The group said they saw no reason to query the Basel II accord in their final report[42].
- One Expert Group, that represents the "users" of financial services - FIN-USE, criticised the Banking Expert Group report. It warned against listening to "a one-sided 'closed shop' of suppliers and technical finance experts", and argued that "other stakeholders should have equal access"[43]. They appear to have been ignored.

After the Directive was adopted in October 2005, the rules on banking supervision still needed to be defined. Although this could have led to greater oversight of the banks, the task of developing the guidelines on supervision was assigned to the Committee on European Banking Supervision (CEBS). It asked its own Consultative Panel for advice – a panel dominated by representatives from the big banks, including Credit Suisse, BNP Paribas, Deutsche Bank, the Dunbar Bank, the Royal Bank of Scotland, Skandinaviska Enskilda Banken as well as the European Banking Industry Commission, the Portuguese and Polish Banking Associations, the Spanish Federation of Savings Banks, and the Danish Bankers Association[44]. Their advice did not call for greater external oversight.

Following the outbreak of the recent financial crisis, the spotlight once again fell on Basel II and its inherent self-regulatory regime. Although regulators were under both political and public pressure to act, no fundamental debate about self-assessment took place[45].

The question remains as to why the EU has not pushed for fundamental reform of Basel II. Part of the answer lies in the recommendations of the corporate-dominated de Larosière Group, the Expert Group the Commission set up to advise on proposals for international banking reform.

In February 2009, the Larosière report concluded that Basel II had "underestimated some important risks and over-estimated banks' ability to handle them". However, its recommendations were limited in scope, proposing only to "tighten norms on liquidity management" and "strengthen the rules for bank's internal control and risk management"[46]. The focus was on improving internal management, while the appropriateness of self-regulation per se was never critically addressed[47].

This did not go unnoticed among academics. Colm McCarthy, from University College Dublin wrote that although de Larosiere report "recommends revisions to Basel II" it was "without much in the way of specifics"[48]. ***"For all its wisdom and sometimes far-reaching suggestions, the de Larosière Report fails us. Europe deserves better solutions",*** added Laurens Jan Brinkhorst, a Professor from the University of Leiden, Jean-Victor Louis a Professor emeritus from the Université Libre, Brussels and René Smits, a Professor at the University of Amsterdam[49].

5.2 hedge fund regulation has more holes than Swiss cheese

Although defining a hedge fund can be difficult, it is a so-called "alternative investment fund"[50] which is more flexible in terms of investment options and strategies than traditional collective investments. For years, many influential political voices have called for tighter regulation of hedge funds – their excessive risk-taking, lack of transparency, and short-selling have all been cited as causes for concern[51]. But the Commission's response to hedge funds has been heavily influenced by the industry.

In January 2006, the Commission appointed two 'working groups' to look at regulation relating to hedge funds and private equity. Both groups were made up exclusively of industry representatives[52]. Staff from the Commission performed a secretariat function.

The group on hedge funds concluded that there was no need for "additional specific or targeted legislation of hedge fund participants or investment strategies at a European level." The existing light-touch regulatory approach had, in the group's view, "served the industry, its investors and the wider market well." It warned that attempts to further regulate the evolving industry would" drive the business and its investors offshore"[53]. They singularly failed to analyse the risks associated with the hedge fund industry.

Another expert group established in January 2006 to look at market efficiency under the Undertakings for Collective Investments in Transferable Securities (UCITS) directive (current EU legislation for traditional collective investment) could also have looked at the hedge fund industry. The UCITS directive does not cover the alternative funds industry, but as hedge funds in practice function more or less like traditional investment funds, enlargement of the UCITS directive has been suggested[54].

The composition of the group followed the same principles as the Expert Groups on hedge funds and private equity: every single one of the 23 members came from the European investment fund industry, with the European Commission once again providing secretariat services[55]. The Expert Group did not consider regulating the hedge fund industry.

Democratic pressure yields few results. It was only after the current financial crisis hit that the Commission undertook a public consultation on policy issues arising from the activities of the hedge fund industry in late 2008[56]. However, the consultation was extremely short, lasting just six weeks over the Christmas holidays, from 18 December 2008 to 31 January 2009.

In September 2008, however, a large cross-party majority of MEPs passed a resolution requesting that the Commission come up with proposed legislation covering hedge funds[57]. France's Nicolas Sarkozy and Germany's Angela Merkel also demanded action by Brussels.

Finally, on 29 April 2009 the European Commission put forward a proposal to regulate the activities of hedge funds[58]. However, these have been heavily criticised, including by the European Socialists, who pointed out that the proposal only covers EU-based fund managers, and that registration is a formality with no real requirements. The proposals do not address for example market disruptions by non-EU funds, naked short-selling, protection of institutional investors or tax evasion[59]. **The Party President of the European Socialists (PES) Poul Nyrup Rasmussen described the Directive as having *"more holes than a Swiss cheese"*[60].**

The European People's Party (EPP) has also criticised the proposals, with Jean-Paul Gauzès, the recently-appointed rapporteur on the Alternative Investment Fund Directive, stating that he intends to regulate funds as well as fund managers covered in the draft text of the directive[61].

Some 60 years after hedge funds were first invented[62], the EU still has no comprehensive framework for the regulation and supervision of the alternative fund industry in which the cash of many Europeans is invested, directly or indirectly through pension funds. The Commission has so far favoured self-regulation and weak oversight over risk control.

According to the European Socialists, Commission President Barroso and Commissioner McCreevy have simply fulfilled the demands of industry: "It seems, 'consensus' is only what private equity and hedge funds want, not what is in the interests of the real companies and working people"[63].

5.3 credit rating agencies: modelling ineffectiveness

Credit Rating Agencies (CRAs) are private institutions that analyse and classify the risk involved in various financial instruments. They played an important role in the financial crisis. Many investors relied on the agencies' advice before investing heavily in what often turned out to be toxic debts. Not only did CRAs give the highest possible rating - triple A - to securities based on sub-prime loans, they were among the last to react to the downturn in the US real estate market.

Concern about CRAs existed before the current crisis because of their role in the dot.com crisis of 2000 and with Enron's collapse. On both occasions, the assessments of the agencies turned out to be wrong. After the Enron scandal, US legislation was introduced to try and prevent the same mistakes from happening again[64].

The new US law obliged agencies to provide the authorities with a description of their procedures and their methodology for determining credit ratings. However, rules on ratings, procedures and the methods involved were not introduced. This area stayed in the hands of the agencies themselves. As the current crisis shows, the legislation has proven too weak to prevent CRAs in the United States from repeating the mistakes of the past.

Standards in Europe are even lower than in the US. In 2004, at the behest of the Parliament, the Commission asked its Committee of European Securities Regulators (CESR) to offer advice on future regulation of CRAs. An Expert Group was set up consisting of representatives from member states' financial authorities.

Following the industry's failed approach. From the outset, the majority view of the Group was that there was no need for mandatory regulation of CRAs. In March 2005, it delivered its advice, which was "not to regulate the Credit Rating Agencies industry at an EU level for the time being".

Their advice was based on "extensive dialogue" with the CRA industry and one of CESR's Expert Groups – a group dominated by bankers and investors[65], including the Banco Comercial Português, Centrobanca, Deutsche Bank, AXA Investment Managers, Euroclear Bank, BNP Paribas, Spanish Association of Investment and Pension Funds (INVERCO), and the OTP Bank RT, Hungary, among others. They considered "the prescriptive regulation of the rating process as inappropriate"[66]. In January 2006, the Commission confirmed that it was sticking to a voluntary approach[67].

Two years later, during the financial crisis, another Expert Group published a report on the role of CRAs. The European Securities Markets Experts Group (ESME) is made up of 21 people from financial companies, most of which are involved in securities trading[68]. Their report left no doubt that, while there was consensus that CRAs were to blame for a large part of the crisis, regulation of the ratings process should not be regarded an option: "The resolution of the current crisis of confidence in the ratings industry rests primarily with the CRAs themselves," it said, adding: "There is no regulatory panacea in isolation". It even went so far as to argue that "in fact, full formal regulation may be counter-productive"[69].

After consulting with the CESR and with ESME and having had "discussions with credit rating agencies, and sought comments from other interested parties including industry associations from the insurance, securities and banking sector and information providers"[70], the Commission tabled its final proposal for the regulation on CRAs in November 2008[71].

Although the Commission has conceded that its proposal is a necessary reaction to "massive failures" in the existing rules exposed by the financial crisis[72], its proposal was similar to the present rules in the US. In other words, it effectively mirrored the very same failed law that had proved unable to prevent the financial crisis.

There are those who believe that the Commission's proposals will just make things worse. Giving evidence before a House of Lords committee on EU regulation, Professor Goodhart from the LSE, an ex-member of the Monetary Policy Committee of the Bank of England, argued that the Commission should not rely on CRAs, because the assumptions that go into their credit models are flawed. "I think the need is much more to say that you should not rely on credit rating agencies for anything, rather than to take a line, "What we are going to do is regulate you", because you will just actually make the whole thing worse ... ***I think the European Union in this respect is going rapidly down exactly the wrong road".***

5.4 credit rating agencies: unaccountable standards

When the current financial crisis broke, flaws in the accountancy system, such as the way in which companies can hide toxic assets in their accounts, were identified by politicians as critical underlying causes of the crisis.

There has been a process to try and standardise international accounting standards for nearly a decade. While the profession has made much of the rules being re-worked in the wake of the financial meltdown, critics argue that this amounts to little more than tinkering. The actual system of self-regulation, as well as the undue influence the sector has on the EU regulatory process, has been left untouched.

International accountancy standards are set by a self-regulatory body called the International Accounting Standards Board (IASB). The IASB's Standards Advisory Committee includes KPMG, PriceWaterhouse Coopers, Deloitte, Ernst & Young and the lobby group European Round Table of Industrialists (ERT)[73]. Essentially, accountancy firms make up their own rules. The IASB has been heavily criticised for being "untransparent and outside democratic control"[74].

When it comes to regulating accountancy practices in Europe, the Commission reviews the IASB standards before deciding whether or not they should be adopted. This is a complex procedure. Initially, the Commission takes advice from its Committee of European Securities Regulators (CESR), which develops a common approach towards the standards; technical input and advice is then given by the European Financial Reporting Advisors Group (EFRAG); and finally, draft regulation is submitted to the Commission's Accounting Regulation Committee for approval. If rejected, it goes back to EFRAG for review.

EFRAG is made up of accounting experts from the private sector. Like the IASB, it is privately financed and managed and represents the main private sector groups closely involved in financial reporting, namely the large accountancy firms and the accounting profession[75]. As one financial insider puts it, EFRAG represents an "absolute lack of objectivity". The undue influence within EFRAG of the largest four accountancy firms – PricewaterhouseCoopers, Deloitte Touche, Ernst & Young, KPMG - has also been called into question[76].

The body within EFRAG tasked with offering advice is its Technical Expert Group (TEG). When it was first formed TEG's chairman was Johan van Helleman, a partner in KPMG. Other members of the committee included a partner at the international audit company, Mazars & Guerard, a partner at the international accountancy firm Deloitte & Touche, two financial experts from oil giants Shell and Petrofina, an Italian accountant, two bankers, two experts from the UK and German accounting standards boards and a Spanish professor of accounting[77].

TEG's current membership still reads like a "who's who" of the accountancy industry and influential large companies. It includes members from KPMG, Deloitte, Ernst and Young, Mazars, UniCredit Banca Mobiliare, Société Générale and BP[78].

So, the Commission has charged a private sector body with a vested interest to act as a de facto referee on a set of standards drawn up by another unaccountable body dominated by the accountancy profession, the IASB.

Keeping accountancy loopholes open. In 2002 the EU passed a key piece of legislation that adopted international financial reporting standards (IFRS), as promoted by the IASB, into EU law. In the run up to the Directive being adopted, EFRAG was asked for its endorsement of all the standards. EFRAG approved them all except one: IAS 39, a controversial standard that looks at financial derivatives and instruments. IAS 39 has been so controversial that EFRAG subjected it to a separate review. After this was completed the committee was effectively split, and so EFRAG did "not issue any advice whether to endorse IAS 39 or not,"[79].

However another standard - IAS 27 on Consolidated and Separate Financial Statements – has also raised real concerns. IAS 27 demands that a parent company is required to present consolidated or single accounts[80]. This means that subsidiary accounts do not have to be declared and that if a bank had set up a company or "Special Purpose Entity (SPEs)" to try and keep certain risky assets off the balance sheet, these would not be declared either.

SPEs, which have been under growing scrutiny since their first use in the late '80s[81], have emerged as a key component in the financial crisis. As Wall Street Watch explains, the practice "allows companies to exclude "toxic" or money-losing assets from financial disclosures to investors in order to make the company appear more valuable than it is"[82].

The "Financial Stability Forum" (FSF) - a group tasked by the G8 to analyse the causes and weaknesses that have led to the financial meltdown – has also criticised SPEs for leading "market participants to underestimate firms' risk exposures". Two of the FSF's recommendations were to "Improve and converge financial reporting standards" for off-balance sheet assets and that "the IASB should improve the accounting and disclosure standards for off-balance sheet vehicles on an accelerated basis"[83].

In November 2008, G20 leaders called on those who set accounting standards to "significantly advance their work to address weaknesses in accounting and disclosure standards for off-balance sheet vehicles". They demanded action by March 2009[84].

By March, EFRAG's Chairman, Stig Enevoldsen, wrote to the IASB noting that the issues around IAS 27 had been "given a much higher priority than hitherto because it is considered to be a financial crisis-related project"[85].

There is no doubt that IAS 27's flaws could have been picked up a decade earlier if EFRAG had a more balanced membership. Enevoldsen might have criticised IAS 27, but he was a member of the EFRAG committee that originally passed it. As EFRAG and the IASB continued their deliberations, in April 2009 the G20 once again called for action on off-balance sheet vehicles[86].

The issue remains unsolved and the IASB is moving at a snail's pace to deal with this supposed priority of reform which will not to be finalised until 2012[87]. The Commission is allowing these industry dominated groups to control the process and determine the timescale.

5.5 tax havens: a STEP in the wrong direction

In 2005, the Commission brought in new rules intended to tackle tax evasion. The EU Savings Tax Directive called on EU governments to tax the savings income of citizens who put funds outside their home countries in tax havens, thus avoiding paying tax.

The Commission reviews the Directive every three years and in 2007 it set up an Expert Group, called the Expert Group on Taxation of Savings or EUSD Group.

Instead of inviting a cross section of society from industry, NGOs and unions, EUSD was established "to examine the operation of the Directive from the point of view of market operators", who were asked to "obtain advice on the possible need for amendments to the legislation and on the foreseeable impact of any such amendments"[88].

EUSD's membership included the Alternative Investment Management Association, which represents hedge funds; the European Banking Federation (FBE) representing Europe's largest banks; the International Capital Market Association that represents global investment banks; the International Swaps and Derivatives Association, which represents the derivatives industry and the Society of Trust and Estate Practitioners (STEP)[89]. STEP is the main organisation representing the interests of trusts and their trustees, many of which are based in tax havens. Its largest branch outside the UK is in the tax-haven of Jersey.

Many of the groups in the EUSD are naturally hostile to the Directive. For example, in 2003, the FBE called for it to be delayed[90]. Two years later in 2005, it expressed "deep concerns" about the "urgent need for clarity and certainty" on the implementation process of the Directiveiv. The ISDA warned that the "proposed obligations (...) have the potential to create havoc among European financial institutions"[92].

Undermining and advising at the same time. The ways that trusts are impacted by the Directive is extremely complicated[93], but STEP has been highly vocal in its opposition. It has run a campaign trying to make sure that trusts do not face further regulation: they have argued that trusts are not the problem, they cannot be legally defined, any action on trusts has to be on a level playing field with other financial instruments, and there will be a financial burden with any revision[94].

John Christensen from the Tax Justice Network (TJN) does not believe that a lobby organisation for trusts and tax havens should be involved in advising the Commission on legislation that clearly adversely affects its clients. "They have a huge conflict of interest" he argues, adding: "They don't distinguish between serving their clients' interests and the public interest"[95].

Other experts agree. Richard Murphy, an accountant from Tax Research UK has studied the recent activities of STEP and is worried that it is advising the Commission. "STEP is always trying to stay ahead of legislation by creating new structures which undermine that legislation," he argues. ***"Some of these organisations are blatantly trying to undermine the effectiveness of the EUSD. And yet here they are advising on the EUSD. I find that amazing"***[96]. Murphy also noted that when he was asked to submit evidence to the Expert Group there was substantial protest raised by the industry that his comments amounted to 'political' interference[97].

Through the EUSD, STEP and the other financial lobby organisations have had an undue influence on the Commission revision process. Internal Commission documents show that STEP was shown a "preliminary draft of the mandate" of the EUSD, at the group's first meeting. The draft mandate of the group included examining "the operation of the Directive and giving advice on the possible amendments to the legislation". One of the main issues to be decided was the "treatment of payments made to and from trusts"[98].

In the minutes of EUSD meetings, there are instances where STEP steered the debate away from further regulation of trusts. In one, "an expert from the trust industry indicated that any extension of the Directive to arrangements described in general terms as "discretionary trusts" or "trusts" would not be a solution". Any provisions relating solely to trusts "would be likely to introduce distortions of competition with other equivalent structures".

Having raised these concerns, the experts from STEP "were invited by the Commission services to provide their help in exploring alternative ways to address the issue of trusts and equivalent structures, for the sake of ensuring a level playing field"[99].

In the fourth meeting, STEP even suggested that the Commission should review the Mutual Assistance Directive rather than the Savings Directive[100]. As the Mutual Assistance Directive is primarily associated with tax fraud and money laundering rather than tax avoidance through tax havens, this would suit STEP's political and economic agenda perfectly.

In its official response to the Commission's consultation on the Directive, STEP has tried to undermine it in two additional ways. It has tried to get discretionary trusts, probably the most common private trust, exempted from any legislation, arguing it is "impossible" to define them[101], and STEP has also been scaremongering that it would be difficult to draft trust-related amendments in the Directive which would be "litigation proof"[102].

When the Commission announced its revised proposals in November 2008 it promised to eliminate tax evasion, but conceded that "at present, it is relatively easy for individuals to circumvent the rules by using interposed legal persons or arrangements (like certain foundations or trusts) which are not taxed on their income"[103]. In response the Tax Justice Network argued that although the Commission's proposals had gone "some way towards addressing the problem ... there's still far to go,"[104].

There is no doubt that the Commission's process was compromised by placing representatives of trusts at the heart of its consultation process looking after the interests of trusts and tax havens. But it now faces stiff opposition from independent experts and campaign groups like the TJN, who are challenging the stranglehold of the financial services on the Commission. They, like others, argue that after the financial crisis, we can no longer have a captive Commission.

appendix – index of groups referred in this report

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expert group's name	status	description	referred in chapter
Alternative Investment Expert Group – subgroup on hedge funds	Dissolved	Corporate dominated Expert Group advising the Commission on a regulatory approach for hedge funds (drafting phase)	4.2
Alternative Investment Expert Group – subgroup on private equity	Dissolved	Corporate dominated Expert Group advising the Commission on a regulatory approach for hedge funds (drafting phase)	4.2
Asset Management Group	Dissolved	Corporate dominated group that assisted the Commission in the review of the FSAP (drafting phase)	3.1
Banking Expert Group	Dissolved	Corporate dominated group that assisted the Commission in the review of the FSAP (drafting phase)	3.1, 4.1
CEBS: 6 expert groups	Active	6 corporate dominated expert groups advise the Committee of European Banking Supervisors (CEBS) in the Lamfalussy process (implementation phase)	3.2
CEIOPS: consultative panel	Active	A corporate dominated consultative panel advises the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) in the Lamfalussy process (implementation phase)	3.2
CESR: 13 expert groups	Active	9 of 13 expert groups advising the Committee of European Securities Regulators (CESR) are coprorate dominated – Lamfalussy process (implementation phase)	3.2
Clearing and Settlement Advisory and Monitoring Expert Group 2	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4
Clearing and Settlement Code of Conduct Monitoring Group	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4
Contacts avec les organisations syndicales communautaires (Uni-Europa)	Active	Expert group giving the Commission ongoing policy advice with its composition not fully known (most probably Union controlled)	3.4
Cross-border redress in financial services	Active	Government-only Expert group giving the Commission ongoing policy advice (drafting phase)	3.4
EU Clearing and Settlement: Fiscal Compliance group	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4
EU Clearing and Settlement: Legal Certainty group	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4
European Financial Reporting Advisors Group (EFRAG)	Active	One of the 9 corporate dominated groups advising the Committee of European Securities Regulators (CESR) – Lamfalussy process (implementation phase)	4.4
European Group of Auditors' Oversight Bodies	Active	Government-only Expert group giving the Commission ongoing policy advice (drafting phase)	3.4
European Securities Markets Expert Group (ESME)	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4

expert group's name	status	description	referred in chapter
Expert Group on Credit Histories	Active	Expert group giving the Commission ongoing policy advice with balanced composition (drafting phase)	3.4
Expert Group on Financial Integration Indicators	Active	Government-only Expert group giving the Commission ongoing policy advice (drafting phase)	3.4
Experts Group Insurance Guarantee Schemes	Active	Government-only Expert group giving the Commission ongoing policy advice (drafting phase)	3.1, 3.4, 4.3
Expert Group on Taxation of Savings (EUSD)	Dissolved	Corporate dominated Expert Group set to examine the EU Savings Tax Directive from the point of view of market operators (drafting phase)	4.5
Facilitating Cross-Border Corporate Financial Services	Dissolved	Corporate dominated Expert Group assisting the Commission to improve the functioning of the single market (drafting phase)	3.1
Financial services users' forum (FIN-USE)	Active	Users Forum giving the Commission ongoing policy advice with unclear but likely balanced composition (drafting phase)	3.4
Forum Group of the Cross-Border Use of Collateral	Dissolved	Corporate dominated Expert Group giving DG Internal Market ongoing policy advice (drafting phase)	3.4
Government Experts Group on Mortgage Credit	Active	Government-only Expert group giving the Commission ongoing policy advice (drafting phase)	3.4, 4.1
Government Expert Group on Retail Financial Services	Active	Government-only Expert group giving the Commission ongoing policy advice (drafting phase)	3.4
High Level Group on Financial Regulation (de Larosiere)	Dissolved	Corporate dominated group that advised the Commission on how to reform financial markets (drafting phase)	3.1
High Level Strategy Review Group	Dissolved	Corporate dominated Expert Group that assisted the Commission in designing the FSAP (drafting phase)	3.1
Insurance and Pensions Expert Group	Dissolved	Corporate dominated group that assisted the Commission in the review of the FSAP (drafting phase)	3.4
Payment Systems Government Experts Group	Active	Government-only Expert group giving the Commission ongoing policy advice (drafting phase)	3.1
Payment Systems Market Group	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4
Payment Systems Market Expert Group	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4
Expert Group on Investment Fund Market Efficiency	Dissolved	Corporate dominated Expert Group that advised the Commission how to improve market efficiency under the UCITS directive (drafting phase)	4.2
Standards Advice Review Group	Active	Expert group giving the Commission ongoing policy advice with unclear composition (drafting phase)	3.4
Expert Group on Financial Education	Active	Corporate dominated Expert Group giving the Commission ongoing policy advice (drafting phase)	3.4

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6 Commission's guidelines on the use of expert advice, COM (2002) 713, p. 5 and 11

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9 Commission's guidelines on the use of expert advice, COM (2002) 713, p. 9

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21 CEO, FoEE, LobbyControl and SpinWatch; "Would you bank on them? Why we shouldn't trust the EU's wise men", February 2009, http://www.corporateeurope.org/system/files/files/resource/WouldYouBankOnThem.pdf

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23 Around 35 persons (both from governments and from industry) participate in two or even three Expert Groups, so technically the total number of physical persons participating is lower.

24 In the European Commission's Staff Directory, we have counted 216 total staff in Directorates F, G and H of DG Internal Market. Of those, around 150 have a role in policy making (heads of unit, directors, policy and legal officers). Most of the rest are human resources, budget and administrative assistants, and secretaries. There are also nine seconded 'national experts'. According to the Commission's staff figures [http://ec.europa.eu/civil_service/docs/bs_dg_category_en.pdf] in DG Internal Market there are 276 high ranking officials ('Administrators'according to the internal terminology - grade AD). This would mean an average of around 35 officials per Directorate and so 105 officials for the three Directorates that deal with financial policies. This could mean that Commission staff with real policy drafting powers on financial policies may be even less than 150 and apparently somewhere between 105 and 150.

25 In the report we are using the term "civil society" as the European Commission defines it, which includes business, unions, NGOs and academia

26 21 out of 22 trade unionists are in 1 specific group, that is supposed to link with the unions.

27 Information according to the Commission's Expert Groups register (visited in July 2009).

28 13 government representatives participate in two groups each and 2 representatives participate in three groups each.

29 There are 20 business representatives with double membership. 19 of them are members both of the 'Payment Systems Market Group' and the 'Payment Systems Market Expert Group'.

30 There are 20 business representatives with double membership. 19 of them are members both of the 'Payment Systems Market Group' and the 'Payment Systems Market Expert Group'.

31 The same for workers of the sector and various NGOs working on financial issues.

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This Report has been produced with the financial assistance of Sigrid Rausing Trust and the Dutch government. The content of this Report are the sole responsibility of the authors of the report.

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