

**Better
Regulation
Task Force**

Get Connected

Effective Engagement in the EU

September 2005

Contents

Foreword by Sir David Arculus and Victoria Youngusband	3
Executive Summary	5
List of Recommendations	8
1 The Importance of Consultation	11
2 Consultation in the EU Decision-Making Process	12
2.1 Social dialogue	15
2.2 The European Economic and Social Committee (EESC)	16
2.3 The Committee of the Regions (CoR)	16
2.4 The European Parliament	17
2.5 The Council	18
2.6 Council Working Groups	18
2.7 Comitology	19
2.8 Current principles and minimum standards for consultation	21
2.9 Application of the minimum standards	22
2.10 Statutory consultation	25
2.11 External bodies	25
2.12 The Secretariat General	26
3 The Right Time	29
3.1 Transparent and systematic pre-proposal consultation	29
3.2 Expert groups and advisory committees	31
3.3 Consultation and Impact Assessment	31
3.4 The duration of written public consultations	37
4 The Right Way	39
4.1 Evaluating responses	39
4.2 Feedback to respondents	39

4.3	Evaluating the effectiveness of consultation exercises	40
4.4	Internet consultation	40
4.5	Access and accessibility	41
5	The Right People	43
5.1	The lobbying landscape of the EU	43
5.2	Lobbying and transparency	43
5.3	The CONECCS database	44
5.4	The role of representative bodies	45
5.5	Constructive engagement by business	46
5.6	A European business-led advisory group	47
5.7	European Business Test Panel	48
	Conclusions	51
Annex A	About the Better Regulation Task Force	52
Annex B	Contributors to the study	54
Annex C	Sub-group members	56

Get Connected: Effective Engagement in the EU

Foreword by Sir David Arculus and Victoria Younghusband

All regulation comes at a price and Europe's future growth, jobs and international competitiveness will depend on our ability to regulate better. Better regulation means securing for all of us, as citizens of the European Union, the protections we demand as employees, consumers and investors without imposing unnecessary or excessive regulatory costs. Better regulation is not about reducing essential regulatory protection but achieving agreed policy goals in the most effective and efficient way possible.

Consultation is at the heart of better regulation. Only when policy makers engage openly with a full range of stakeholders throughout the policy making process, considering their views and acting on the evidence they provide, can we be confident that the regulations they produce will meet their objectives at an acceptable cost to the European economy.

But the importance of good consultation goes beyond better regulation and touches on a profound debate about Europe's future. Despite successive attempts to bring the EU closer to its people, many citizens still see European integration as a remote project run from Brussels with little relevance to their daily lives. Good consultation gives businesses, the public sector, voluntary organisations, consumers and citizens a stake in the EU's decision making processes. It involves dialogue (talking *with* people not *at* them), considering different views and being ready to accept new ideas. It means consulting at the **right time**, in the **right way** and with the **right people**.

We are addressing this report primarily to the European Commission and we welcome the progress it has made on consultation. Stakeholders told us that the Commission now consults better than ever before. During our research, we have found the Commission to be open and receptive to stakeholder representations. We also support their principles and standards for consultation. But there is clearly room for improvement. For us, timing, transparency and targeting are vital to effective consultation and we uncovered weaknesses in each of these areas.

Timing is critical to good consultation, which must take place while it is still possible to exert significant influence over the direction of a policy proposal. While we found some good practice, the Commission needs to be more consistent in promoting informal engagement with stakeholders before a proposal is published for written public consultation.

Transparency is high on the political agenda and we now have the European Transparency Initiative to promote transparency as central to the integrity and credibility of political institutions. Against this background, and given the openness of so much of the Commission's work, we were surprised that the Commission does not publish information about how well individual Directorates General comply with the agreed standards for consultation. The Task Force believes that citizens have a right to know how well the Commission is performing the tasks it has set itself. This is not just about efficiency and effectiveness, but also accountability.

Targeting is about correctly identifying key groups and actively seeking the views of affected parties. We support the funding of certain non-governmental organisations by the Commission as a way of bringing people into the process who might otherwise be excluded. Similarly, we support the Commission's efforts to engage with the business community, for example through the European Business Test Panel and Commissioner Verheugen's high level group on the competitiveness of the automotive industry. The weakness here is not a failure by the Commission to target business but a failure by business always to take full advantage of the consultation opportunities available. Strategic engagement by business is crucial, as businesses have a major role to play in making sure that proposals do not unnecessarily hinder competitiveness. We welcome the Six Presidencies' ambition of giving business a clear voice at a strategic level in the EU legislative process.

In summary, the Task Force wants to see more systematic early dialogue with stakeholders, more use of different ways of consulting, more constructive engagement by business and better reporting of the Commission's compliance with its own minimum standards for consultation.

In the course of our study, we met key members of the EU institutions and explored the consultation practices of various Member States. We spoke to policy makers, business associations, trade union organisations, environmental and consumer groups, think tanks and academics. We listened to competing arguments and assessed them from the perspective of our regulatory knowledge and experience. We thank all those who contributed and trust that we have used the advice you gave to make our report practical and realistic.

We are proposing a set of recommendations that will make a real difference to the quality and legitimacy of EU legislation and will help involve civil society more closely in the development and delivery of policy. Responsibility for taking forward our recommendations rests with individual Directorates General, the Secretariat General and, just as importantly, with stakeholders. The Task Force hopes they will all rise to the challenge.



Sir David Arculus
Chair



Victoria Younghusband
Sub-Group Chair

Executive Summary

This Better Regulation Task Force report on EU consultation is the second of our studies on different aspects of EU regulation. Our first study, *'Make it Simple - Make it Better'* (December 2004)¹, set out the case for simplifying existing EU legislation. Our third study, on how the EU could make more effective use of alternatives to regulation, is due to report at the end of 2005.

Better Regulation in the European Union

Recent years have seen a growing recognition in the EU that regulatory reform is essential to enhance competitiveness, growth and employment and to promote sustainable development and a better quality of life for European citizens. In the Commission's own words, "better regulation is crucial for promoting competitiveness both at an EU level and in the Member States".

Following the work of the Mandelkern group on better regulation², in 2002 the European Commission drew up its Better Regulation Action Plan³. In 2003, the European Parliament and Council also made commitments to better lawmaking in an ambitious Inter-Institutional Agreement⁴.

In January 2004, the Finance Ministers of Ireland, the Netherlands, Luxembourg and the UK set out joint plans to place regulatory reform at the heart of their consecutive EU Presidencies during 2004 and 2005, and presented proposals for reforming the EU regulatory framework⁵. This joint initiative has been extended to include the forthcoming Austrian and Finnish Presidencies, presenting further opportunities to reform the European regulatory framework in support of the Lisbon strategy during 2005 and 2006.

Why we carried out this study

Good consultation is at the heart of better regulation. It helps to improve the quality of policy outcomes and encourages interested parties and the wider public to get more involved in policy making and the design of regulations. Conversely, inadequate consultation often leads to poor quality legislation, unresponsive to the realities of implementation or the practicalities of enforcement. Sadly, this erodes the public's appreciation of the benefits of EU law. Our study makes practical recommendations to improve stakeholder consultation that we hope will make a real difference to the quality and legitimacy of regulation.

We have produced this report as a contribution to the EU's continuing programme of better regulation. We recognise and want to build on the progress that the Commission and the other institutions have made and are keen to work in the same direction as current initiatives.

¹ <http://www.brtf.gov.uk/reports/simplifyeulaw.asp>

² Mandelkern Group on Better Regulation, Final Report, 13 November 2001
http://europa.eu.int/comm/secretariat_general/impact/docs/mandelkern.pdf

³ Communication from the Commission, Action plan 'Simplifying and improving the regulatory environment', COM(2002) 278 final
http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0278en01.pdf

⁴ Inter-Institutional Agreement on Better Law-Making, Official Journal of the European Union (31.12.2003), 2003/C 321/01
http://europa.eu.int/comm/secretariat_general/impact/docs/2003_C_321_1.pdf

⁵ Advancing regulatory reform in Europe, A joint statement of the Irish, Dutch, Luxembourg, UK, Austrian and Finnish Presidencies of the European Union, 7 December 2004
<http://www.hm-treasury.gov.uk/media/95A/52/6presidencies.pdf>

Scope of the study

This study focuses on the formal and informal consultation arrangements between the European Commission, as the initiator of legislation, and different groups of stakeholders throughout the decision making process. The Commission has a special responsibility because people's views about EU legislation are strongly influenced by how well the Commission consults and how open it is perceived to be. In addition, our study looks at the way civil society, especially business interests, organises itself to engage with the EU. As good consultation requires a dialogue, stakeholders share some of the responsibility for making it work properly.

Finally, but to a lesser extent, we also look at the roles of the European Parliament and Council of Ministers in promoting effective consultation. There is little point in the Commission having an excellent consultation process if stakeholders then feel excluded from the debate once a proposal enters the legislative decision making process. In order to keep our study manageable, we have not considered the consultation that takes place between the Commission, Parliament and Council or the Commission's internal consultation procedures.

Our working methods and approach

We started work on this study in October 2004. We have engaged with key people in the EU institutions and in the UK and have explored the consultation practices of some other Member States. We have spoken to policy makers, business associations, trade union organisations, environmental and consumer groups, think tanks and academics. We would like to thank all those who have contributed to our work. A list of those we have consulted is at Annex B.

Structure of the report

Our report is structured around the idea that **good consultation means engaging at the right time, in the right way and with the right people.**

At the **right time** means while there is still real scope for influencing a proposal, including reviewing the need for regulation in the first place. It also means allowing sufficient time for respondents to develop reasoned submissions.

Consulting in the **right way** is about the methods for reaching stakeholders and encouraging their participation. It means knowing how to uncover and understand their views and demonstrating how they have been acted upon.

The **right people** are those directly affected by a regulatory proposal and others with some legitimate interest in it. This includes those who will implement and enforce the new regulation, as well as others who may have particular knowledge or insights that would enrich the debate.

Our findings

Without exception, the people we spoke to during our study told us that the Commission had improved its consultation practices in recent years. The Commission now organises its consultations according to a set of general principles and minimum standards⁶ that we generally support. We found a promising new system of ‘Roadmaps’⁷ that set out at an early stage the likely impacts of new proposals and what consultation is planned. We found new guidelines on Impact Assessment⁸ that helpfully clarify the important relationship between Impact Assessments and the consultation process. We also found some innovative ways of engaging individual businesses in consultations, such as the European Business Test Panel.

Our main conclusion is that the system of consultation is not broken. Nor does it need a radical overhaul. Rather, there are weaknesses in the consultation process that should be addressed and good practice that could usefully be applied more systematically across the different institutions. Finally, we are concerned that some of the existing procedures are not transparent. Our recommendations are designed to improve these aspects of EU consultation.

From their inception, the Commission’s ideas and proposals for new policy and legislation benefit to a greater or lesser extent from interaction with stakeholders, lobbyists and other elements of civil society. The earlier this takes place, the greater the scope for influencing any proposal. But there is little transparency. Stakeholder engagement, prior to written public consultation, is inconsistent and opaque. This strengthens the commonly-held perception that an inner circle of well connected lobbyists and pressure groups is able to exert disproportionate influence over the Commission’s thinking during these important, early stages of the policy development process.

There is also a lack of transparency in the Commission’s failure to disclose how fully it is meeting its own standards for consultation. This appears to be at odds with the ‘European Transparency Initiative’ which was recently launched by Commissioner Kallas⁹ and which asserts that transparency is essential for the integrity and credibility of political institutions. Some of the criticism and suspicion that surrounds EU law making could be reduced by the regular publication of sound evidence of the extent and inclusiveness of Commission consultations.

The Task Force is convinced that consultation can only be fully effective when there is a dialogue between parties. Responsibility for creating an environment where this can happen is shared between the Commission and its stakeholders. The Commission wants and needs to hear the voices of business, the public sector, voluntary organisations, consumers and citizens. These interest groups also have a responsibility to engage in a constructive and timely way, something that we found is not always easy, especially for business.

The Task Force welcomes the progress that the Commission has made to improve its consultation practices. We hope that it will act upon the recommendations in this report to improve yet further the way it consults. We also hope that stakeholders, especially business, will listen to and act on our recommendations.

⁶ Communication from the Commission, Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final
http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0704en01.pdf

⁷ European Commission, Roadmaps – Commission Work Programme 2005
http://europa.eu.int/comm/off/work_programme/20050128_clwp_roadmaps.pdf

⁸ European Commission, Impact Assessment Guidelines, 15 June 2005, SEC(2005) 791
http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf

⁹ Commissioner Siim Kallas, European Transparency Initiative
http://europa.eu.int/comm/commission_barroso/kallas/transparency_en.htm

List of Recommendations

1 Consistency

The Secretariat General should revise the Commission's General Principles and Minimum Standards for Consultation so that they are consistent with the Commission's Impact Assessment Guidelines.

2 Transparency

- a) The Secretariat General should monitor, using key indicators, how well Directorates General comply with the Commission's consultation code. The results should be reported annually in the Commission's 'Better Lawmaking' report.
- b) The Secretariat General should make its guidance to officials on good consultation available to the public. Directorates General should also make this guidance easily available to their officials by publishing it on their intranets.

3 Spreading best practice

- a) Commission officials planning consultation exercises should be given specific training and support, including technical aspects such as questionnaire design.
- b) Each Directorate General should have a Better Lawmaking Unit with specific responsibility for promoting good consultation practice and for monitoring compliance with the Commission's code.

4 Early consultation

- a) Prior to written public consultation, Directorates General should have identified and consulted informally with relevant interested parties, including those directly affected by the proposal.
- b) Directorates General should ensure that the Roadmaps for which they are responsible include accessible and detailed information on the timing, type and length of planned consultation exercises and the stakeholders to be targeted.
- c) Directorates General should treat Roadmaps as living documents. They should update them, for example through internet links to supporting documents, as the proposal develops.

5 Impact Assessment

- a) Written public consultations by Directorates General should be accompanied by an Impact Assessment that sets out a range of options for achieving the policy objective.

- b) Directorates General should include in the Impact Assessment information on who was invited to submit views and who was actually consulted in drawing up the Impact Assessment, together with the key assumptions upon which it is predicated.
- c) For major proposals or where the written public consultation provides strong evidence against the favoured policy option or Impact Assessment, Directorates General should carry out a second written public consultation. This should be accompanied by an updated Impact Assessment, taking account of any new evidence provided by stakeholders.

6 Timescales

- a) Directorates General should consider twelve weeks as the standard period for written public consultation and eight weeks the absolute minimum. Any consultations of less than 12 weeks should include a written justification by the relevant Commissioner.
- b) Directorates General should ensure that consultation documents state clearly the opening and closing dates of the exercise. The consultation period should not start until the relevant documents are available in at least the Commission's three working languages.

7 Improving dialogue

- a) Directorates General should ensure that consultations are clear about the information being requested and how responses will be assessed.
- b) Directorates General should systematically publish feedback on the results of consultation exercises, including information on how and why proposals have been amended as a result of the consultation.

8 Evaluation

The Secretariat General should conduct a periodic evaluation of a sample of consultation exercises to gauge their effectiveness and impact on the policy process and should publish the results.

9 Access and accessibility

- a) Directorates General should ensure that stakeholders who register an interest are automatically alerted in good time to relevant consultation exercises.
- b) The Secretariat General should revise the PreLex and the European Parliament should revise the L'Oeil website so that both contain details of current and previous consultations.

10 Engaging with business

- a) Businesses should organise themselves better to take advantage of the opportunities to engage constructively with the EU and be ready to engage early to maximise their input to the policy dialogue.
- b) DG MARKT should publish clear guidance on the use of the European Business Test Panel (EBTP) as a supplementary consultation tool. All Directorates General should use the EBTP in accordance with this guidance.
- c) Member States should actively promote the EBTP to businesses and strive to fill their national quotas.

1 The Importance of Consultation

Consultation lies at the heart of better regulation. We define ‘better regulation’ as “regulation that meets its objectives without imposing unnecessary or excessive burdens and which avoids unintended consequences and commands broad public support”.

Timely and thorough consultation helps highlight potential problems and so reduce delays later in the regulatory process. Proper consultation improves the quality of legislation and ensures that proposals are technically viable, practically workable and command public support. Good consultation therefore serves a dual purpose by helping to improve the quality of the policy outcome and at the same time increasing the involvement of interested parties and the public at large.

For many citizens, the EU’s decision-making processes can seem opaque, mysterious and remote. With 25 Member States and some 456 million citizens, we should not underestimate the importance of bringing the political decision-making process closer to the people. The processes of administration and policy-making must be both visible and accessible to the outside world if they are to be understood, accepted and have credibility. This is particularly true of the consultation process, which is the primary interface with the diverse interests that make up our European society.

Better consultation has a key role to play in improving accountability and in enhancing the democratic legitimacy of the European Union. Good consultation, based on transparency and accountability, is a core component of mature participatory democracies. If stakeholders are unsure about how, when and whether to engage, the EU runs the risk of developing policy and regulatory proposals in a vacuum. As a result, when proposals emerge, they can be poorly understood and seen as unnecessary, ineffective and too costly. They may also have unintended consequences or be difficult to implement and enforce. Over time, there is a risk that the public loses confidence in the policies and in the institutions that develop them.

Too often consultation is seen by stakeholders as a battle for influence with the prize being a favourable policy outcome for a particular set of interests. The Task Force would like to see a less competitive model. We see effective consultation as a co-operative dialogue, helping to shape EU legislation in ways that maximise the benefits for all.

In terms of better regulation, consultation serves a number of different purposes, in particular:

- Consultation enables policymakers to interact with stakeholders and the public. This provides extra information and context to a policy proposal, tests assumptions, introduces new ideas and provides a broader range of views than policymakers working on their own might have.
- A well-designed and integrated consultation process encourages thorough project planning, early input by stakeholders and careful consideration of all available options.
- Consultation highlights potential problems early on so there is a chance to put them right before the policy becomes legislation.
- Consultation can also increase engagement with stakeholders, encouraging ownership of the policy and commitment to it, contributing to easier implementation and higher rates of compliance.

We firmly believe that better consultation has a vital role to play in delivering better regulation, which includes considering the option of not regulating at all and of using alternatives to conventional regulation.

2 Consultation in the EU Decision-Making Process

For the purposes of our study, we define good consultation as “**engaging at the right time, in the right way and with the right people**”.

At the **right time** means while there is still real scope for influencing a proposal, including reviewing the need for regulation in the first place. It also means allowing sufficient time for respondents to develop reasoned submissions.

Consulting in the **right way** is about the methods for reaching stakeholders and encouraging their participation. It means knowing how to uncover and understand their views and demonstrating how they have been acted upon.

The **right people** are those directly affected by a regulatory proposal and others with some legitimate interest in it. This includes those who will implement and enforce the new regulation, as well as others who may have particular knowledge or insights that would enrich the debate.

Consultation already has a role in the decision-making process of each of the EU institutions. It can sometimes be written and formal, as for example with Green and White Papers, online consultations and use of test panels. At other times, consultation can be face to face through formal and informal stakeholder meetings, working groups, expert committees and inviting interest groups to meetings. The existing opportunities for consultation that we are aware of are shown in the diagram on Page 14, which charts the likely progress of a proposal through the EU legislative machinery.

There are opportunities to influence the Commission in the earliest stages of policy formulation by making suggestions that can influence what goes into the Commission’s Annual Work Programme. The Commission sets out all its major political priorities and legislative initiatives in the Annual Work Programme, which the Commission President presents to Parliament and Council¹⁰. However, studies estimate that only about 5 to 15% of new legislative proposals originate in the Commission¹¹. Most EU legislation is concerned with updating existing rules or taking forward measures requested by the Council or Parliament. In theory then, Commission proposals should not come as a surprise to stakeholders. But the Annual Work Programme is a lengthy document and, in practice, few interest groups have the time or resources to peruse it for relevant proposals and to note their likely timescale for moving forward.

Written public consultation takes place once the Commission has adopted a legislative proposal and should allow at least eight weeks for responses. This formal process is the most widely advertised opportunity for stakeholders to contribute to the decision-making process. A formal consultation process may also be started by the publication of a Commission Green Paper. A Green Paper is a discussion document on a broad policy issue, often setting out a range of ideas. It may be followed by a White Paper containing concrete proposals for Community action, based on the results of the Green Paper consultation.

These types of formal consultation procedure can be preceded or accompanied by a number of other opportunities for dialogue, such as workshops and hearings organised by the Commission, bilateral meetings with interest groups and discussions with advisory panels. Key stakeholders who are “well connected” are often given early warning of forthcoming proposals and are invited to input during the policy-drafting stage. Effective representative organisations may try to foster relationships with the relevant desk officers or forge alliances with like-minded interest groups.

¹⁰ For reference see: http://www.europa.eu.int/comm/atwork/programmes/index_en.htm

¹¹ Neill Nugent (ed.), The European Commission, Palgrave, Basingstoke, 2001, pp. 236-237

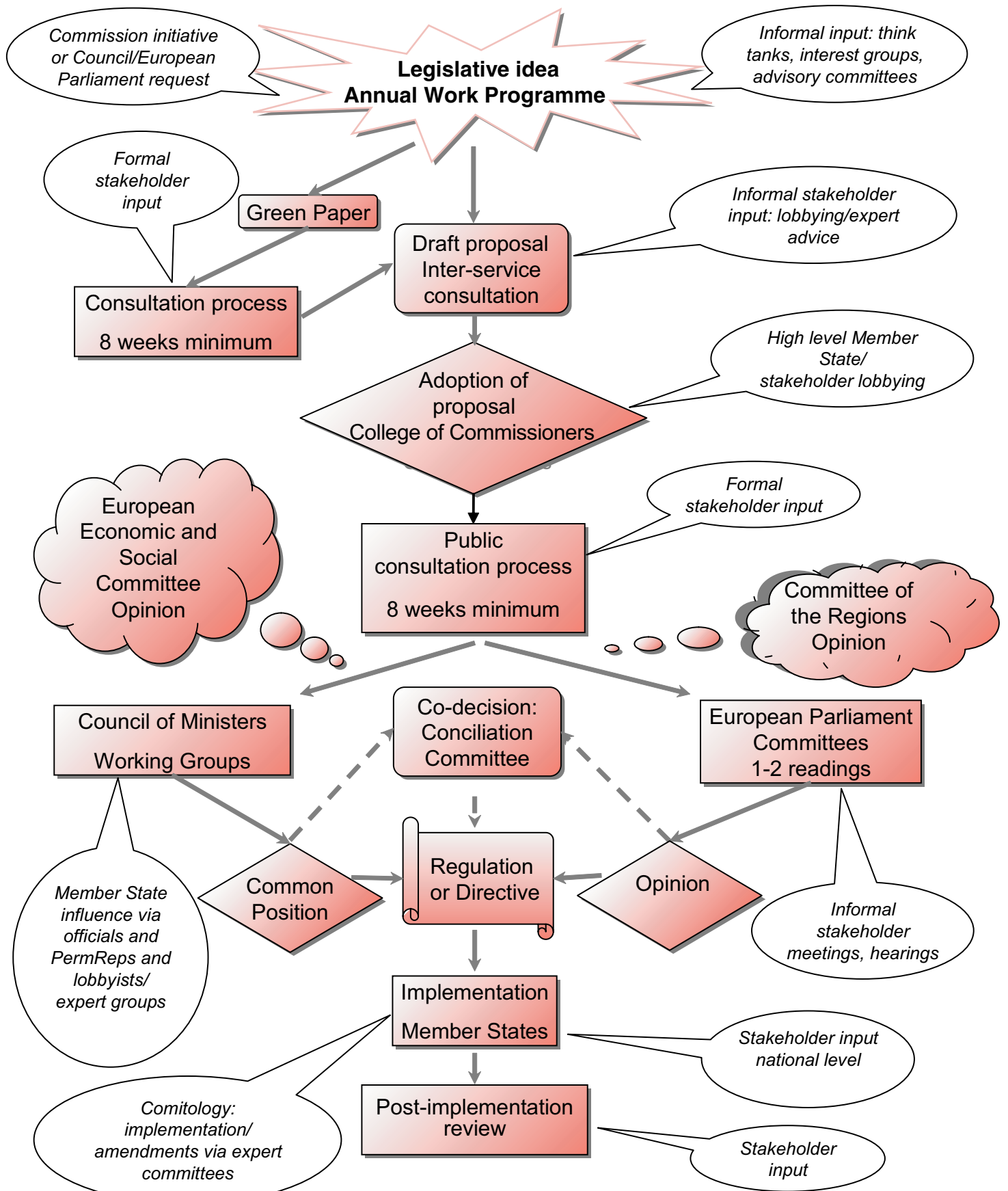
Institutional strengthening and the growing use of the co-decision process since 1992 have led special interest groups to focus increasing attention on the European Parliament. Rapporteurs and the Committee Chairs have a key role in shaping the opinion of the European Parliament. The technical nature of much of EU legislation makes many MEPs receptive to expert input, although the access granted to lobbyists varies according to the national tradition and political allegiance of parliamentarians. Professional lobbying is still unfamiliar in some Member States. Occasionally, the European Parliament organises hearings to allow for a more structured, transparent dialogue with stakeholders.

Access to the Council seems to be more restricted than to the other institutions and, considering their importance in the decision-making process, working groups are possibly 'under-lobbied'. The structure of the Council is hard to understand and its website contains less information than the Commission's or Parliament's. Interested representatives can influence the proceedings of Council working groups by making their case to national civil servants. The Member States' permanent representations and the Council Secretariat can usually be of help in identifying the relevant actors.

The Economic and Social Committee and the Committee of the Regions are institutionalised advisory bodies established to feed societal views into the decision making process. Their intermediary role does not exclude direct contact between stakeholders and the institutions.

At first sight, this short overview of the existing system reveals ample opportunities for stakeholder engagement. But there are many obstacles and, in reality, effective engagement requires stakeholders to develop a multi-channel, multi-level lobbying strategy. This requires many resources. The Commission tries to remedy the resulting problem of unequal access to the institutions in part by providing financial and logistical assistance to disadvantaged stakeholders. But many small national stakeholders remain excluded from the Brussels circuit and have to rely on bigger associations to represent their interests. There is certainly more that can be done to make the complex 'Brussels system' accessible to a wider range of stakeholders.

Existing Opportunities for Stakeholder Engagement in the EU Legislative Process



Represents an existing opportunity for stakeholder engagement.

2.1 Social dialogue

The European social dialogue is a unique component of the European social model, with a clearly defined basis in the EC Treaty¹². The social dialogue encompasses discussions, consultations, negotiations and joint actions undertaken by the Commission with specific social partner organisations on a range of issues concerning employment and social affairs. There are three bodies recognised as ‘cross-cutting industry organisations’ involved in the social dialogue, representing the management and labour sides of industry. They are UNICE (Union of Industrial and Employers’ Confederation of Europe), ETUC (European Trade Union Congress) and CEEP (European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest).

The importance of the social dialogue in the EU legislative process should not be underestimated. The EC Treaty provides for a mandatory two-stage consultation. At the first stage, the Commission consults the social partners on the possible direction of an initiative. The second stage focuses on the content of the initiative. This helps maintain a continued dialogue with the social partners throughout the policy process.

The social dialogue is a type of institutionalised consultation and some stakeholders who are excluded from the process feel that such privileged access is inherently discriminatory and based on an outdated model of industrial relations. This is not a view shared by the Commission or the social partners themselves.

Small business is one of those sectors that feels excluded by the dominant position of the three recognised social partners, UNICE, ETUC and CEEP. Small business interests are represented at a European level by UEAPME (European Association of Craft, Small and Medium-sized Enterprises). Although UEAPME is not officially categorised as a cross-cutting organisation, an agreement with UNICE does allow it to participate in the social dialogue. However, some small business organisations are concerned that the arrangement with UNICE compromises UEAPME’s independence and have proposed that the social dialogue should be supplemented by a new advisory forum on small and medium enterprises (SMEs).

Some social NGOs also feel that the current social dialogue arrangements exclude them. For example, the Social Platform, the alliance of representative European federations and NGOs in the social sector, has called for the Treaties to be amended to guarantee that civil society can participate in a more systematic and effective way. But many social NGOs are resistant to the idea of being institutionalised in this way.

Wholesale reform of the social dialogue is unlikely, given that it enjoys the general support of the Commission and the social partners themselves. While it is obviously important to ensure that the process captures as wide a range of views as possible, we do not agree that further institutionalisation to accommodate a new range of interests is the best way forward.

¹² Consolidated version of the Treaty Establishing the European Community, Title XI, Chapter 1 (Social Provisions), Articles 138 and 139, Official Journal of the European Communities (24.12.2002), C 325/33
http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf

2.2 The European Economic and Social Committee (EESC)

The EESC provides a formal opportunity for the Commission, Council and Parliament to improve consultation with European civil society. It describes itself as “the bridge between Europe and Civil Society.” It is a non-political body that provides a platform for representatives of Europe's civil society to express their views on EU issues. Its opinions, including those on draft legislative proposals, are forwarded to the Commission, the Council and the European Parliament, giving the committee a clear role in the Union's consultation process. Its 317 members, appointed by the Council of Member States, range from employers to trade unions and from consumers to ecologists and represent a wide range of interest groups in the EU. The EESC issues opinions on a wide variety of issues. The Task Force particularly welcomes its contribution to the debate on better regulation¹³.

2.3 The Committee of the Regions (CoR)

The CoR provides elected local and regional authorities with a voice in the European decision-making process. Its 317 members are elected members or key players in the local and regional authorities that make up the Member States. The Treaties require the Commission and the Council to consult the CoR whenever new proposals are made that could impact on local or regional matters. These include economic and social cohesion, trans-European infrastructure networks, health, education, culture, employment policy, social policy, the environment, vocational training and transport. Like the EESC, the CoR issues opinions on Commission proposals for new legislation as well as issuing own initiative reports.

Although the EESC and the CoR are European institutions formally constituted to provide specialist advice on European legislative proposals, they are not generally seen as central to the process. This may be because many stakeholders do not seem clear whose interests the Committees actually represent. Their opinions are consensual and, while this should give the Committees an importance and legitimacy based on stakeholder agreement, the reality is that the Committees do not seem to carry much weight or enjoy widespread backing on specific proposals.

The Commission's 2002 Communication on General Principles and Minimum Standards for Consultation¹⁴ proposed giving the EESC and CoR a more proactive role. However, the prospect of consultations possibly being delegated to EESC or CoR did not find much support. For example, many stakeholders do not recognise the EESC as an effective intermediary for civil society and prefer to maintain their own dialogue with the institutions responsible for the policy proposals and decisions.

However, while the Committee output may not be seen as particularly useful, the committees themselves are regarded as good fora for opinion gathering and exchanging views. Their most valuable role may lie in organising a truly cross-cutting, European policy debate and in fostering the exchange of good practice.

¹³ The European Economic and Social Committee is expected to adopt an opinion on better regulation in September 2005 (rapporteur Daniel Retureau, text reference CESE 607/2005). Another opinion on better implementation is also planned for September 2005 (rapporteur Joost van Iersel, text reference CESE 606/2005). A preliminary text version can be found at: http://eescregistry.esc.eu.int/viewdoc.aspx?doc=\\esppub1\esp_public\ces\int\int262\en\ces606-2005_fin_as_en.doc

¹⁴ Communication from the Commission, Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0704en01.pdf

2.4 The European Parliament

The European Parliament stated in its Resolution on the White Paper on Governance¹⁵ that “consultation of interested parties can only ever supplement and never replace the procedures and decisions of legislative bodies, which possess democratic legitimacy. Only the Council and Parliament, as co-legislators, can take responsible decisions in the context of legislative procedures”. The aim of consultation is therefore to give interested parties a voice but not a vote.

While it is self-evident that consultation can never replace the democratic process, some stakeholders have alleged that decisions in Council and Parliament are characterised more by political horse-trading than by evidence-based policy making. The Commission has noted that the other EU institutions need to remain aware of the risk of resorting to mere bargaining in their negotiations, as subsidiarity and proportionality could suffer in the process, undermining policy coherence, acceptance and effectiveness. In a Union of 25, deliberation based on facts and sound arguments rather than political rhetoric is more important than ever.

The Parliament usually provides a justification for the amendments it proposes but they are very succinct and give an impression of being superficial and unsupported by evidence. The Parliament does not have a research body to assess the impact of its proposed amendments to legislation. While its committees now have research budgets, MEPs themselves lack research facilities and resources, the Parliamentary library is some distance away in Luxembourg and secretariat support is limited.

Representatives of civil society are dissatisfied by practical arrangements in the Parliament. Several described their frustration at being unable to participate in committee meetings. Only MEPs and officials have the right to speak (unless specially invited) and both seats and headphones with interpretation are scarce. Some stakeholders have suggested webcasting parliamentary meetings.

MEPs and Parliamentary committees are under no obligation to disclose the content or source of evidence provided to them. Nor does the Parliament publish the attendance at or minutes of committee hearings. The Task Force would like to see greater transparency in the system. We think that Parliamentary committees should make public the representations they receive and publish the proceedings of hearings.

¹⁵ European Commission, European Governance, A White Paper, COM(2001) 428 final
http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf

2.5 The Council

There is no contradiction between wide consultation and the concept of representative democracy. While the decision-making process in the EU is clearly legitimised by the involvement of elected representatives of European citizens, we believe that Council Ministers and Working Group representatives have a clear responsibility to consult with and understand their constituents before giving their views.

The degree of consultation carried out by Member States to inform their negotiating positions in Council varies greatly and depends to an extent on their national legislative systems. The consultation procedures of Member States are outside the scope of this report. We simply note that it is important that Member States have effective mechanisms to gather the views of stakeholders before negotiating on proposals.

Case study – The Vehicle Industry Policy and European Regulation (VIPER) Group

The Vehicle Industry Policy and European Regulation (VIPER) Group is a UK government and industry stakeholder network of experts in the automotive sector. It provides a forum for government and industry to come together to discuss policy and regulation issues concerning the vehicle industry in the UK and the EU. VIPER aims to provide an ‘early warning system’ for policy and regulatory proposals, particularly those emanating from Brussels, and to allow early input of industry views on the likely impacts of these proposals.

The VIPER model is admired in the UK and often held up as an example of good practice. It is being replicated in other sectors, such as construction, chemicals and telecommunications. However, these groups are sometimes criticised for being ‘single purpose’ and not including all interested parties such as environmental and social NGOs.

2.6 Council Working Groups

Once the Commission has adopted a legislative proposal, it is sent to the European Parliament and to the Council of Ministers of Member States for consideration. The Council is assisted by the Permanent Representatives Committees (COREPER), Specialist Committees and Council Working Groups, usually composed of national civil servants. There are approximately 300 Council Working Groups. In over 80 percent of cases, COREPER reaches agreement on proposals, allowing them to be adopted by the Council without debate at the ministerial level.

Understanding this mechanism has implications for stakeholders’ lobbying strategies. More technical issues are best raised with Working Group representatives. Political lobbying at this stage is unlikely to be successful.

The extent to which Working Group minutes and agendas are published seems to vary according to the culture of the Presidency. Those that are published can be found on the Council’s public register but document reference numbers are needed for the search function. The real issue is transparency. To be of any real value to stakeholders, the register should allow users to search for documents on specific topics.

2.7 Comitology

Many legal decisions never find their way to the Council and the European Parliament but are decided by the Commission through the comitology procedure. Comitology committees assist the Commission to exercise the implementing powers conferred upon it by the Council and European Parliament. These committees include representatives from Member States and are chaired by the Commission. They deliver opinions on draft implementing measures submitted by the Commission and can therefore have an important influence on the way legislation is understood and applied in Member States.

Comitology procedures enable the Commission to establish an expert dialogue with national administrations concerning the application of Community measures. There are some 300 such committees and research suggests that, in 2002, they delivered around 3,600 opinions for implementation.

There are different types of committee, according to the subjects covered and the rules governing how they deal with Commission proposals:

- Advisory committees are generally used to discuss matters that are not politically sensitive. The committees' opinions are advisory and non-binding.
- Regulatory committees are used for measures relating to protection of the health or safety of persons, animals and plants and measures amending non-essential provisions of the basic legislative instruments. According to the rules, a qualified majority of Member State representatives in the committee must approve the Commission's proposal or it is referred back to the Council. If the Council fails to agree, the Commission can adopt the proposal.
- Management committees are most often used for measures relating to the management of the common agricultural policy, fisheries, environment and other main Community programmes. They can also approve projects and authorise Community funding. Where the measures adopted by the Commission are not consistent with the Committee's opinion, the Commission must communicate them to the Council which can take a different decision by a qualified majority.

The comitology procedure is designed to deal efficiently with secondary legislation of a technical or routine nature. However, there are complaints that policy issues are sometimes transferred to these committees as a way of avoiding more comprehensive democratic scrutiny. Indeed, the committees take important decisions such as the lifting of import bans or the fixing of quotas for substances and stipulations for the use of certain substances to be put on the market.

The main concern we have about the comitology procedure is one of transparency. The comitology database that lists the committees and their agendas is welcome, but information is often posted too late for stakeholders to influence the discussion. With participation in the committees restricted to Member State representatives and institutional actors, together with little public information, the process can seem a complete mystery to many people.

The Task Force believes that comitology procedures should be more open to public scrutiny and that contact information for the committee secretariats should be published on the Commission website alongside agendas, minutes and, where possible, the draft documents to be discussed.

Case study – The Lamfalussy arrangements

In July 2000, ECOFIN set up a 'Committee of Wise Men on the Regulation of Securities Markets', chaired by Baron Lamfalussy. It was asked to examine implementation of the regulation of the securities markets in the EU and to assess how the mechanism for regulating these markets can best respond to market developments. The Committee delivered its final report in February 2001¹⁶.

The aim of the Lamfalussy proposals is to promote greater market integration and improved competitiveness by allowing the EU to respond rapidly and flexibly to developments in financial markets. Lamfalussy proposed a four-level approach to regulatory reform and the establishment of two committees to assist the Commission. The European Securities Committee (ESC) composed of Member State Ministers and the Committee of European Securities Regulators (CESR), composed of the heads of the 25 national financial authorities and the Commission. In March 2004 the European Parliament endorsed the extension of these arrangements from the securities sector to the banking, insurance and pensions and asset management sectors.

The Lamfalussy four-level approach to regulation¹⁷

Level 1 describes the usual process whereby Directives or Regulations proposed by the Commission are adopted under the co-decision procedure by the Council of Ministers and the European Parliament. When adopting the Directive or Regulation, the Council and the Parliament agree, on the basis of a Commission proposal, the nature and extent of detailed technical implementing legislation to be decided at Level 2.

At **Level 2**, the European Banking Committee, the European Insurance and Occupational Pensions Committee and the European Securities Committee assist the Commission to draft and adopt implementing measures designed to keep technical provisions in the legislation up to date with market developments. The Commission receives advice from Level 3 Committees to assist with the drafting of this secondary legislation.

At **Level 3**, the Committee of European Banking Supervisors, the Committee of European and Occupational Pension Supervisors and the Committee of European Securities Regulators give the Commission specialist advice on preparing technical implementing measures for European Directives. They also advise on how to enhance co-operation and promote convergence of supervisory practices across the EU, for which they also issue non-binding standards and guidelines.

At **Level 4**, the Commission, Member States and financial supervisory authorities work together to ensure the effective implementation and enforcement of EU law. If necessary, the Commission may take legal action against Member States.

¹⁶ Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001 http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf

¹⁷ The Lamfalussy Process is based on a temporary agreement between the three Institutions as a result of the so-called Sunset Clause, which will be inserted into each Level 1 measure. The Sunset Clause provides the Commission with a delegation to enact Level 2 measures, but only for a limited time. The Clause is intended to preserve the European Parliament's request for a change to Article 202 of the EC Treaty. In this way, the Parliament wishes to achieve an equal role as the Council in controlling the Commission in the exercise of Comitology powers.

To address concerns that the central role given to regulators could undermine democratic accountability, there is a duty on the different committees to consult openly with interested parties when drafting legislation and to report regularly to Parliament. Accordingly, each of the committees has published guiding principles for consultation¹⁸ that include commitments to target the full range of stakeholders, to consult at an early stage, to establish panels of practitioners and consumers to act as sounding boards and to allow a three-month consultation period for significant issues. If they deviate from their principles, the committees have said that they will publish their reasons.

The Lamfalussy process is a novel way of streamlining the European legislative process and is encouraging more open consultation, greater transparency and better feedback. Stakeholders generally welcome the process but have told us that it can be undermined by cultural differences, political pressures and national interests. Further, they note that the implementation dates in the Financial Services Action Plan itself are unrealistic, placing external limits on the flexibility and responsiveness that the Lamfalussy process can provide.

It is difficult at this early stage to evaluate how well the Lamfalussy arrangements are working. While it clearly increases the opportunities for consultation and stakeholder input to Commission proposals, implementation remains largely untested. It is also important to remember that some proposals now subject to the Lamfalussy arrangements were developed before the process existed. A good process may not be able to rescue a proposal that is ill-judged in the first place.

The Lamfalussy model is being imitated in other sectors. For example, in November 2003 the European Commission established a European Regulators Group for electricity and gas. As an advisory group, it is expected to play an important role in developing the single energy market by ensuring consistent application of relevant European legislation and by providing a transparent platform for co-operation between national regulatory authorities.

We welcome these approaches to more systematic consultation between the Commission, relevant interests in the Member States and economic sectors.

2.8 Current principles and minimum standards for consultation

In 2002, the Commission set out five general principles to govern its relations with interested parties, together with a set of minimum standards for its consultation processes¹⁹. In line with good practice, these were developed following public consultation and the Commission received detailed responses from governments, trade associations, NGOs, businesses, think tanks and individuals. Respondents welcomed the Commission's aims and generally endorsed its principles.

¹⁸ For example see [http://www.ceiops.org/cgi-bin/ceiops.pl?sprache=1&verz=04a_C\\$onsultations*01a_\\$\\$statement_on_Consultation_Practices](http://www.ceiops.org/cgi-bin/ceiops.pl?sprache=1&verz=04a_C$onsultations*01a_$$statement_on_Consultation_Practices) &cm=nm

¹⁹ Communication from the Commission, Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 final http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0704en01.pdf

In essence, the minimum standards for consultation are:

- All communications relating to consultation should be clear and concise and should include all necessary information to facilitate responses.
- When defining the target group(s) in a consultation process, the Commission should ensure that all relevant parties have an opportunity to express their opinions.
- The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences.
- Without excluding other communication tools, open public consultations should be published on the internet and announced at the 'single access point'.
- The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least eight weeks for reception of responses to written public consultations and 20 working days notice for meetings.
- The receipt of contributions should be acknowledged. Results of open public consultation should be displayed on websites linked to the single access point on the internet.

The Task Force welcomes the Commission's initiative in setting consultation standards and supports its general principles and minimum standards. We hope that our study and its recommendations will build on these principles and standards, add some detail where necessary and, most importantly, help ensure that they are consistently and comprehensively implemented.

2.9 Application of the minimum standards

All the stakeholders we have spoken to have acknowledged that the Commission has recently improved the way it consults. We welcome this progress. However, we are concerned that the principles and standards for consultation only apply to major policy initiatives, currently defined as those requiring an extended impact assessment. This restriction does not accord with the Commission's new impact assessment guidelines²⁰, published in June 2005. These guidelines, which also define the relationship between impact assessments and consultation, are said to apply to all regulatory proposals, White Papers, expenditure programmes and most negotiating guidelines for international agreements listed in the Commission's Work Programme.

We believe that the application of the principles and standards for consultation should be extended in a way consistent with the new impact assessment guidelines. This is because what the Commission may regard as a minor initiative can still be important to specific sections of society and their right to be consulted should be respected.

However, in the longer term, the Task Force would like the Commission to go further and to apply the general principles and minimum standards not only to all regulatory proposals but also to programmes, policies and non-regulatory initiatives. For example, we would have liked the Commission to have consulted on its new impact assessment guidance as it did on the general principles and minimum standards for consultation.

²⁰ European Commission, Impact Assessment Guidelines, 15 June 2005, SEC(2005) 791
http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf

Recommendation 1 Consistency

The Secretariat General should revise the Commission's General Principles and Minimum Standards for Consultation so that they are consistent with the Commission's Impact Assessment Guidelines.

A further problem is that the consultation principles and standards do not apply to legislative proposals outside the Work Programme, even where they are likely to have significant impacts. A telling example is the Security of Electricity Supply Directive.

Case study – Security of Electricity Supply Directive

There were a number of significant electricity supply interruptions around the world during late summer 2003. Failures on high voltage transmission networks caused blackouts in the north eastern United States and eastern Canada on 14 August, in parts of London on 28 August and in eastern Denmark and southern Sweden on 23 September. Almost all of Italy was blacked out for nearly 24 hours on 28 September.

These incidents raised concerns in some quarters that investment in electricity generation and transmission networks might not be sufficient to guarantee continuity of electricity supplies in the EU.

The Commission reacted swiftly to this perceived risk and, following a certain amount of political pressure, published in December 2003 a draft Directive on promoting security of electricity supply and infrastructure investment. The goals of the proposed Directive were (a) to oblige transmission systems operators to follow rules on the safe operation of their networks (b) to provide an impetus to investment in the transmission network, especially for cross-border lines and (c) to establish a stable regulatory framework in EU Member States that gives electricity market participants appropriate incentives to enhance security of supply.

The proposal did not appear in the Commission's Annual Work Programme and consultation was very limited. The initial questions of whether Community action was necessary and whether a Directive was the best way to tackle the problem were not asked, at least in public, nor did the Commission present a range of options for protecting electricity supplies, linked to laws already in place. For example, the Electricity Liberalisation Directive of 2003 covers some aspects of security of supply.

Electricity is an essential input to virtually every modern economic activity so security of supply is vital. Each Member State has a strong incentive to protect its electricity supply against interruptions. As the single market in electricity develops and cross-border trade increases, it is clear that Member States need to co-operate to safeguard supplies. However, it does not follow automatically that new EU legislation, especially as originally presented by the Commission, is the best way to achieve this.

Although the blackouts were caused by various operational problems on transmission networks, these were not the main focus of the proposal. The scope of the proposal was further confused by the addition of a number of environmental provisions about renewables and energy efficiency which were inserted during inter-service consultation. As a result, it is arguable whether the proposed security of supply Directive, as initially drafted, would have significantly lowered the probability of a future supply interruption. According to estimates in the UK's initial regulatory impact assessment, the benefits were likely to be negligible but the costs could potentially run into billions of pounds as the proposed Directive would have required major investment in new cross-border transmission lines.

Neither the Council nor the European Parliament was content with the Commission's proposal and major amendments were introduced during the co-decision procedure. The final version will not oblige Member States to incur unnecessary costs and is consistent with competitive markets. It is our contention that much of this rearguard action from the Council and European Parliament could have been avoided had the Commission acted in less haste initially and consulted better before making its proposal.

Even where the general principles and minimum standards are applicable, they are not binding on the Commission services. While we have found good examples of thorough and extensive consultation, we have also found that many consultation exercises fail to meet the Commission's minimum standards and that compliance is patchy both between and within Directorates General.

We have found it difficult to make a reliable assessment of compliance with the minimum standards as information is not easily available and some of them are anyway qualitative. Nevertheless, in June 2005 we reviewed all the open and closed consultations on the Commission website and found that nine out of 40 consultations (or 23%) allowed less than eight weeks to respond. Two consultations were barely eight weeks long and took place over the Christmas period. Of the other standards, the Commission itself acknowledges that it needs to do better in providing reasoned feedback to respondents and in demonstrating how it has taken account of their views.

Various commentators have suggested mechanisms for enforcing the minimum standards. Some have called for them to be made legally-binding, perhaps as part of an inter-institutional agreement, which would extend their scope to the other EU institutions. Others have proposed some sort of external enforcement body. The Task Force does not favour either approach.

2.10 Statutory consultation

The problem with a legally binding requirement to consult is that it creates an opportunity and perhaps even an incentive for those dissatisfied with a particular policy outcome to challenge proposals in court on the grounds of inadequate consultation. This would prolong the legislative process and introduce considerable uncertainty over when and how any legislation enters into force. We want to find ways to help the Commission's consultation processes become more effective and efficient, not to slow down the delivery of policy or to enrich the legal profession.

The United States puts a legal duty on government agencies to consult to a minimum standard on significant proposals. There is no equivalent legal duty anywhere in the EU and we do not think it proportionate to introduce one.

2.11 External bodies

Some stakeholders believe that consultation exercises and impact assessments should be carried out by independent bodies rather than by the Commission. We do not agree. It reveals a level of suspicion about the Commission's motives and competence that is unwarranted. Further, it would take the ownership of and responsibility for consultation and impact assessments away from the officials responsible for preparing the policy and drafting the proposals. Better Regulation principles, instead of becoming part of the Commission's culture, would be seen as a set of onerous requirements imposed from outside with limited relevance to the Commission officials themselves.

A different proposal is to establish independent panels to monitor and report on the Commission's compliance with its consultation and impact assessment guidelines. The Task Force has more sympathy with this idea, as it would raise the profile of both procedures and lend them more credibility. It is also similar to the role we play in the UK. However, there are difficulties when the idea is applied at EU level. The composition of the panels would be critical. To judge whether a consultation exercise is effective and accurately targeted, any external body would need to understand the proposal and its likely impact on the stakeholders. It would be hard to achieve this level of expertise over a range of different policy areas. Similarly, the science of impact assessment and the data on which it is based are seldom uncontested and, to command widespread public credibility, an external panel would have to appear impartial. In an EU of 25 Member States and countless interest groups, it would be difficult to achieve a balanced membership without creating large or bureaucratic structures.

While we do not oppose the setting up of external validation panels, we believe that many of their objectives could be achieved more simply by increasing the transparency of the current system. In its work in the UK, the Task Force has argued against a proliferation of new committees and panels, except as a last resort and after existing structures have been shown to be beyond repair. We think this holds true for the EU as well.

Nevertheless, if the Commission is to work towards the reinforced culture of consultation and dialogue that its principles and standards set out to achieve, it is clear that someone has to take responsibility for ensuring that they are met.

2.12 The Secretariat General

The Secretariat General co-ordinates the delivery of the Commission's political priorities. Its tasks are strategic planning and programming, managing the collegiate decision-making process and co-ordinating internal policy and the Commission's position with other institutions. It is also responsible for driving forward administrative simplification, managing the follow up to the White Paper on European Governance and monitoring horizontal issues such as openness and relations with civil society.

The Secretariat General has a key role in improving the Commission's approach to consultation. It is responsible for the principles and standards of consultation and reports on their application each year in the Commission's *Better Lawmaking* report²¹. However, the Secretariat General's role is more to balance competing views than to exert quality control over individual Directorates General. Its tools for raising standards are persuasion, training and guidance rather than public benchmarking. The collegiate structure of the Commission means that the kind of explicit performance monitoring involving 'naming and shaming' or performance league tables that we find in some other administrations is quite alien. There is currently no central system of accountability or tradition of one Directorate General reporting publicly on the performance of another.

This probably explains why the Secretariat General's reporting of the way the Commission has applied the consultation standards is rather limited. The 2004 *Better Lawmaking* report cites as evidence of improving performance the fact that more consultations were carried out during 2004 than 2003. However, this is a measure of the scale of regulatory activity, not its quality. Looking back, we see that even more consultations were conducted in 2002 than 2004. Nowhere in the report do we find information on the proportion of Commission proposals that were accompanied by a full or even partial consultation, nor is there any analysis of their length or quality. The report does warn of the risk of 'consultation fatigue' and mentions the need to give better feedback to respondents, but the Directorates General that could most benefit from this advice are not identified.

The Secretariat General does monitor the Commission's performance on consultation through a high level group of the better lawmaking network and asserts that overall compliance with the minimum standards is "reasonably good". But we find no objective evidence to support this claim. The Task Force believes that citizens have a right to know how well the Commission is performing the tasks it has set itself. This is not just about efficiency and effectiveness, but also a key element of accountability.

Failure to disclose details of how well the Commission is meeting its own standards for consultation is inconsistent with the openness that characterises so much of its work and is at odds with its strategic objective in the 2005-2009 mandate to achieve higher levels of transparency. In support of this objective, Commissioner Kallas has recently launched the 'European Transparency Initiative'²², based on the assumption that greater transparency is critical to the proper functioning of the decision-making process and is necessary both to gain the trust of the public and to protect administrations against accusations of fraud. A Communication is planned for the autumn announcing specific, possibly legislative, action.

²¹ Report from the Commission, Better Law-Making 2004 pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality, COM(2005) 98 final
http://europa.eu.int/comm/secretariat_general/impact/docs/com2005_0098en01.pdf

²² Commissioner Siim Kallas, European Transparency Initiative
http://europa.eu.int/comm/commission_barroso/kallas/transparency_en.htm

We would like to see the Secretariat General collect and publish more information about how well the Commission is meeting its standards for consultation. To make this information meaningful, the Secretariat General should use key indicators to assess how the standards are being applied. These can usefully be supplemented by qualitative assessments, highlighting innovative or effective approaches to consultation, as a way of spreading good practice.

Recommendation 2 Transparency

a) The Secretariat General should monitor, using key indicators, how well Directorates General comply with the Commission's consultation code. The results should be reported annually in the Commission's 'Better Lawmaking' report.

b) The Secretariat General should make its guidance to officials on good consultation available to the public. Directorates General should also make this guidance easily available to their officials by publishing it on their intranets.

Key performance indicators, although important, can never by themselves create or sustain a culture that values talking to and engaging with stakeholders. More is needed. If we want all parts of the Commission to consult well, they need to understand the benefits of good consultation and have the skills to do it properly. That is why we support the Secretariat General in its efforts to spread good practice through persuasion, training and guidance.

For example, the Secretariat General already offers seminars on impact assessment and publishes guidance to officials on its internal website, accessible to other parts of the Commission. This guidance includes information and advice on consultation and there is also a helpdesk. The Secretariat General has also developed a computerised form as a sort of monitoring device for consultation. It requires desk officers to give details of how they are meeting some of the consultation standards and cannot be submitted if key sections are left incomplete.

These are welcome steps but are not yet sufficient. Directorates General do not routinely carry the Secretariat General's consultation guidance on their own internal websites and the helpdesk resources are constrained by competing priorities. While the Secretariat General's staffing and resources are outside the scope of our report, we believe that allocating additional resources to central monitoring and guidance would pay dividends in the longer term. However, we are also convinced that a few straightforward measures would make the current arrangements more robust and would place greater ownership of the consultation process on the Directorates General responsible for them.

For a start, given the Commission's tradition of openness, we were surprised that the Secretariat General was unwilling to disclose the contents of its intranet guidance on consultation or to say which of the Directorates General carried it on their own intranets. We believe that stakeholders should know the details of how desk officers are being advised to consult with them.

We also believe that Commission officials should have targeted training on how to carry out consultation exercises, separate from impact assessment training. While consultation and impact assessment are obviously related - a relationship we discuss later - consultation is an important topic in its own right. Consultation training should not be designed simply to enable officials to meet the minimum standards, although they are important. It should also cover

technical aspects, such as questionnaire design, and contribute to fostering a culture in which the value of consultation is understood and accepted.

Developing such a “consultation culture” should be a priority for the Secretariat General and for the individual Directorates General. This will require the setting up of effective delivery structures. We have already mentioned some of the barriers to effective central performance monitoring that the Secretariat General faces, in particular its limited resources and the collegiate nature of the Commission. Consultation is unlikely to improve significantly unless individual Directorates General take responsibility for their own consultation practices and reporting their progress.

We note that some Directorates General have a dedicated Better Lawmaking Unit. In line with the Mandelkern group’s recommendation to create a strong effective network of such units, we believe this is good practice that every Directorate General would want to follow. Each unit could then monitor the consultations taking place in their Directorate General and report regularly to the Secretariat General on how the Directorate General was performing against the consultation standards and key performance indicators. The units would also be well placed to identify good practice and lessons learned and share these more widely. As a result, the Secretariat General could report more meaningfully in *Better Lawmaking* and spread good practice.

Recommendation 3 Spreading best practice

- a) Commission officials planning consultation exercises should be given specific training and support, including technical aspects such as questionnaire design.
- b) Each Directorate General should have a Better Lawmaking Unit with specific responsibility for promoting good consultation practice and for monitoring compliance with the Commission’s code.

3 The Right Time

3.1 Transparent and systematic pre-proposal consultation

To be effective, consultation should start as early as possible. Interested parties should be involved in the development of a policy at a stage where they can still influence its aims and the options for delivery. This approach to consultation is among the Commission's general principles but what it means in practice is not explained.

Policies are not developed in a vacuum. They are informed to a greater or lesser degree by interaction with elements of civil society. By international standards, the Commission is a relatively small organisation and does not always have the specialist skills or knowledge to develop policy without outside help. It is therefore particularly receptive and open to external influence, far more so than most Member State governments. But the nature and extent of engagement with stakeholders in the early stages of policy development varies both between and within Directorates General. In some cases, it seems to depend on the individual desk officer and much informal consultation tends to rely on personal contacts.

A key concern of stakeholders is that pre-proposal consultation should not only take place but should also be transparent and systematic. The aim should be to establish a continuous dialogue with stakeholders so that ideas are tested before they are formally published and consultation exercises do not come as a surprise.

In line with its right of initiative, the Commission contends that the need for consultation should be assessed on a case-by-case basis and that consultation can never be an open-ended or permanent process. In short, there is a time to consult and there is a time for the Commission to make a final decision on a proposal. This is self-evident and it is not an argument against early consultation. Thorough pre-proposal consultation could help the Commission by reducing delays and disputes later in the legislative process.

Most of the people we spoke to stressed the paramount importance of engaging with the Commission during the early phase of the legislative process. However, we have also heard that businesses in particular are reluctant to invest time and resources in what may turn out to be little more than a gleam in a policymaker's eye and which may not have an impact for several years. The timing of pre-proposal consultation is therefore critical. Stakeholders may be reluctant to consult on a blank sheet of paper but, equally, may believe that, once a proposal is set down in writing, it is too late to influence its general direction.

Case study – Directorate General Health and Consumer Protection (SANCO) Scoping Paper

On 1 July 2005, DG SANCO introduced new guidelines on developing policy proposals²³. The guidelines require desk officers to produce a Scoping Paper - a single document that sets out all the information necessary to discuss, launch and develop an initiative from its inception to the time it is submitted to the Commissioner for a decision. With certain exceptions, a Scoping Paper is required for all new legislative proposals and non-legislative proposals leading to a Commission decision.

There are two stages to the DG SANCO policy development process. The first stage is an initial appraisal of policy options with estimates of likely impacts, based on early consultation with stakeholders. If approved by a high level panel chaired by the Director General, the proposal enters the second stage. This involves further informal consultation and preparation

²³ European Commission, Health and Consumer Protection Directorate-General, Guidelines for the preparation of a DG SANCO scoping paper, internal working document, 2005

of a delivery plan to accompany the proposal, including detailed plans for further engagement with stakeholders. This must be approved by the Commissioner.

Under this new system, by integrating stakeholder engagement into the policy process from the very beginning, DG SANCO estimates that the first informal consultations could take place as much as two and a half years before an approved proposal is published in the Commission's Work Programme.

The Task Force welcomes this systematic approach to preliminary consultation. If successful, we would like to see it adopted by the other Directorates General.

Effective consultation is a two way process – a dialogue. The Commission has a responsibility to identify and consult informally with interested parties when shaping its proposals. Equally, stakeholders have a responsibility to respond positively to Commission requests for views and supporting evidence. In the interests of transparency and accountability, those involved should disclose details of the consultation to the public. The public has a right to know from the Commission who was consulted. Similarly, consumers, shareholders and businesses, especially small firms that cannot engage directly in the process, have a right to know how effectively their representative organisations are representing their interests. There should be no room for to use the excuse that “I was not consulted” as a legitimate argument against a final proposal.

Case study – European Regulation on Fluorinated Greenhouse Gases

The Commission's consultation on Fluorinated Greenhouse Gases is a good example of proactively identifying and maintaining a dialogue with stakeholders.

In June 2000, the Fluorinated Greenhouse Gases Working Group was established as part of the European Climate Change Programme (ECCP) to find cost-effective ways of reducing emissions of these gases as a contribution to Europe's Kyoto Protocol target. The Working Group included representatives from all the relevant industrial sectors, environmental NGOs and Member States. The notes of meetings and reports of the group were made available to a wider audience.

Following publication of the working group's report, DG Environment took on the responsibility of developing and drafting the proposed legislation. This required further research to strengthen the evidence base on emission trends and on the cost-effectiveness of the options for reducing emissions.

The desk officer responsible ensured that stakeholders had the opportunity to stay involved in the development of the legislation by extending the mandate of the working group so it could act as a stakeholder forum to consider and comment on the draft technical studies on emissions trends and policy options.

The desk officer also maintained regular contact with all the key stakeholders so that there was balanced dialogue throughout the process. This involved site visits to primary production facilities, equipment manufacturers, servicing and technical centres and workshops in the EU and US where stakeholders were consulted on the key elements of the proposed regulation. DG Environment encouraged visits from stakeholders and received delegations from US, Brazil and Japan as well as Europe. It was made clear that the views of all stakeholders would be taken into account in determining the final proposal.

The Commission published a draft proposal for a Regulation on fluorinated gases in August 2003, which secured political agreement in October 2004. The Council adopted its opinion in July 2005 and the dossier is now awaiting the European Parliament's second reading decision, which is expected at the end of September 2005.

3.2 Expert groups and advisory committees

Expert groups and advisory committees can be important to pre-legislative consultation. They are not the same as comitology committees, which are concerned with the implementation of legislation. Early in the drafting phase, their members can considerably influence the Commission's decision-making by non-binding opinions or advice on future proposals. The Commission regularly uses such groups to test the technical accuracy and political acceptability of early ideas and drafts.

There are three types of groups and committees:

- Advisory committees are consultative and include representatives from industry, consumer organisations and NGOs.
- Expert groups include Member State and professional experts and provide technical information and assistance to the Commission.
- Scientific committees comprise independent scientific experts who give scientific advice on the drafting and changing of Community rules.

It is estimated that about 700 committees and groups assist the Commission in the drafting phase.

Stakeholders expressed concerns about the size, effectiveness, composition and transparency of expert groups and advisory committees. For example, there can be more than a hundred people (four from each Member State plus the Commission) on advisory committees and stakeholders say that this makes them unwieldy and little more than talking shops. Unfortunately, this creates an impression that the Commission is more interested in displaying its willingness to listen than really taking notice of what is said. While it is obvious that groups should be kept to a manageable size, we find it difficult to judge the legitimacy of more general complaints because the whole process lacks transparency.

Semi-institutionalised stakeholder groups are by their nature exclusive but this should not mean that the wider public is excluded entirely from their work. The Task Force believes that information about advisory and expert groups should be made public, including their composition, selection criteria of members and how to contact the committee. Agendas for meetings and minutes should be publicised and external stakeholders should be given an opportunity to input their views and concerns ahead of the meetings.

3.3 Consultation and Impact Assessment

The detailed methodology of Impact Assessment is beyond the scope of this report. Nevertheless, the timing and nature of consultations during the preparation of impact assessments and the use of Impact Assessments during consultation on a proposal are central to our study.

In June 2005 the Commission published new guidelines on Impact Assessment²⁴. They advise that a formal Impact Assessment is prepared for all regulatory proposals, White Papers, expenditure programmes and most negotiating guidelines for international agreements listed in the Commission's Work Programme. The Task Force welcomes these guidelines.

The new guidelines recommend that Commission services publish 'Roadmaps' alongside the Commission's Annual Policy Strategy and Work Programme. Roadmaps replaced Preliminary Impact Assessments in January 2005. They set out briefly the problem, policy options, impacts and the timing of consultations to be undertaken. Their aim is to inform other Commission services and the public of the expected impacts of different policy options and to provide the basis for assessing the level of analysis that will subsequently be needed.

We fully support the idea of Roadmaps and expect them to make the policy-making process more accessible, transparent and consistent. However, the early examples we have seen contain only sketchy information about who has been consulted and who will be consulted in assessing the probable impacts of the proposal. Further, Roadmaps are not currently updated as a proposal moves forward and their presentation on the Commission's website as a single 204 page pdf file²⁵ makes them difficult to navigate.

Recommendation 4 Early consultation

- a) Prior to written public consultation, Directorates General should have identified and consulted informally with relevant interested parties, including those directly affected by the proposal.
- b) Directorates General should ensure that the Roadmaps for which they are responsible include accessible and detailed information on the timing, type and length of planned consultation exercises and the stakeholders to be targeted.
- c) Directorates General should treat Roadmaps as living documents. They should update them, for example through internet links to supporting documents, as the proposal develops

The new Impact Assessment guidelines state that consultation should not be a one-off event and that a series of consultations may be appropriate. The guidelines give the example of a three-stage consultation: the initial one to gauge stakeholder perceptions about the nature and seriousness of the problem; the second to explore views on a range of options for intervention; the third to invite detailed reactions to the preferred option. The Task Force endorses this approach to consultation, which offers stakeholders a continuing dialogue as the regulatory process proceeds. We also welcome the Commission's greater use of Green and White Papers as part of encouraging stakeholder engagement.

The scale of any consultation exercise should be proportionate to the significance of the proposal and the guidelines rightly say that repeated consultations should be kept to a minimum to avoid the risk of consultation fatigue among stakeholders. We understand that information to Commission officials on when it might be appropriate to have fewer consultations is on the Commission's intranet site. However, as the site is not accessible by the public, we are unable to judge the basis for this advice.

²⁴ European Commission, Impact Assessment Guidelines, 15 June 2005, SEC(2005) 791

http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf

²⁵ European Commission, Roadmaps, Work Programme 2005

http://europa.eu.int/comm/off/work_programme/20050128_clwp_roadmaps.pdf

We firmly believe that early engagement with stakeholders, followed by a written public consultation accompanied by an Impact Assessment, represents the minimum level of consultation necessary for any proposal. The Commission should develop its proposals and their Impact Assessments through a process of early, informal consultation with the full range of potential stakeholders, including those identified in the Roadmap and any other interested parties who volunteer information. It is important that stakeholders engage constructively at this early stage.

Following these early exchanges, a written public consultation should then set out the need for action at European level and a range of options for achieving the objectives, including, where possible, non-regulatory options. The Impact Assessment should set out the estimated costs, benefits and risks of each option, including the option of not intervening at all. It should state who was invited to consult in preparing the Impact Assessment and with whom consultation actually took place, together with any assumptions upon which it is predicated. In the interests of transparency, live links to stakeholder submissions should be incorporated into the proposal's Roadmap. Where consultants have been engaged to draw up the Impact Assessment, they too should disclose the sources of their data.

For a major proposal with wide-ranging impacts, we believe that a second round of written public consultation focusing on the preferred option is a worthwhile investment of time and effort. This is particularly the case if, during the first round, strong evidence was provided that challenges either the Commission's favoured policy option or the Impact Assessment. Where a second round of written public consultation is held, the Impact Assessment should be revised to take account of evidence provided by stakeholders during the first round.

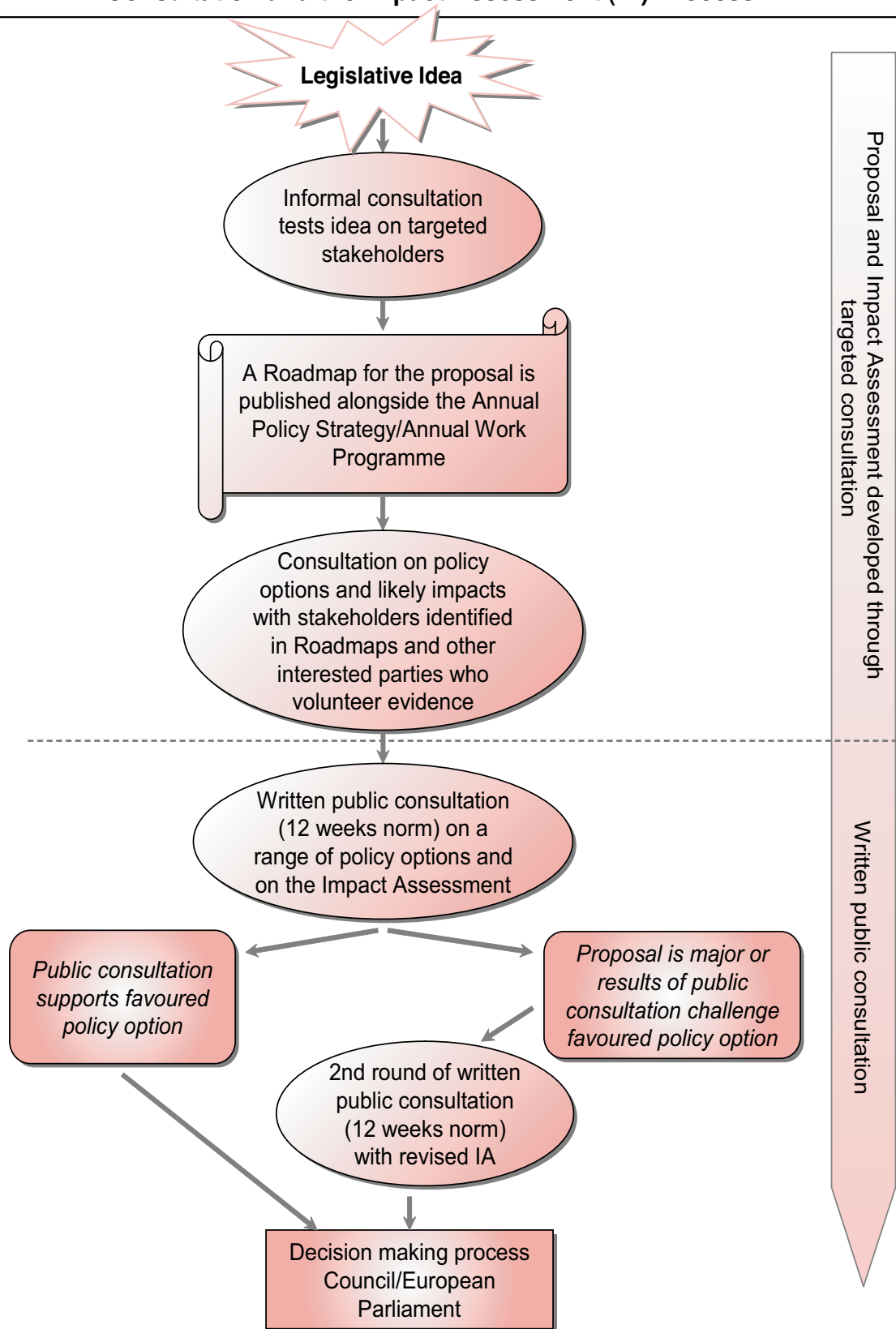
In proposing additional consultation, the Task Force is not trying to delay the legislative process but to speed it up. Inadequate consultation in the planning stages leads inevitably to prolonged disputes later in the process, for example over the validity of Impact Assessments. Such disputes encourage disaffected interest groups to throw a spanner in the legislative machine. Although in many ways an example of open and extensive consultation, the REACH proposal has been stalled by the production of some 50 rival Impact Assessments by different factions. Arguably, better consultation in developing the Commission's first Impact Assessment might have prevented some of these later problems. We take a more detailed look at consultation on the REACH Regulation on page 35.

The Task Force does not accept that engaging stakeholders throughout the development of a proposal will encourage consultation fatigue. Most of the stakeholders we spoke to wanted more consultation, not less, provided their views were listened to, considered and answered.

Recommendation 5 Impact Assessment

- a) Written public consultations by Directorates General should be accompanied by an Impact Assessment that sets out a range of options for achieving the policy objective.
- b) Directorates General should include in the Impact Assessment information on who was invited to submit views and who was actually consulted in drawing up the Impact Assessment, together with the key assumptions upon which it is predicated.
- c) For major proposals or where the written public consultation provides strong evidence against the favoured policy option or Impact Assessment, Directorates General should carry out a second written public consultation. This should be accompanied by an updated Impact Assessment, taking account of any new evidence provided by stakeholders.

Consultation and the Impact Assessment (IA) Process



Case study – REACH (Registration, Evaluation and Authorisation of Chemicals)

The proposed new EU regulatory framework for chemicals (REACH)²⁶ was cited by many of the people we spoke to as one of the most open consultation processes that the Commission has ever run. Consultation started early in the pre-legislative stage and there was extensive stakeholder engagement using a variety of tools, such as hearings, seminars, conferences and bilateral meetings. The internet-based public consultation made a real difference to the legislative proposal; improving its practicality, reducing unnecessary burdens on business and raising awareness among stakeholders.

Despite this praise, some believe that much of the controversy that has beset the REACH proposal could have been avoided if the consultation process had been more transparent and less hasty. Certainly the large response to the internet consultation might have been more manageable had the proposal been in better shape before it was published. It seems that the outgoing Commission was anxious to get the legislative process well established so that the policy could not easily be derailed.

The reluctant release of Impact Assessments made stakeholders suspicious of the rationale for REACH and, once the Commission had entered the final drafting stage, no further communication with stakeholders was considered necessary. This approach has been criticised as being aloof, old-fashioned and unhelpful.

The development of the REACH proposal also illustrates the difficulty in preparing a credible Impact Assessment when the issue is so complex and highly controversial.

In February 2001, the Commission published a White Paper²⁷ aimed at revising chemicals legislation. Even before the White Paper was adopted, an initial brainstorming meeting in February 1999 allowed more than 150 stakeholders (regulators, scientists, industry, environmental and consumer NGOs) to provide the Commission with an overview of the problems with the current system and potential solutions.

One of the key proposals is to convert the current dual system, which deals with ‘existing’ substances placed on the market before 1981 separately from ‘new’ substances marketed after 1981, into a single comprehensive system called REACH. The Commission is concerned that the full risks of a number of ‘existing’ chemicals is unknown because they are not currently subject to the same testing requirements as ‘new’ chemicals. It also wants to encourage the replacement of dangerous chemicals with less harmful alternatives.

The REACH proposals are also aimed at putting the responsibility for the testing and risk assessment of chemicals on manufacturers rather than national public authorities. Chemicals manufacturers are very concerned about the additional costs of testing and registering and many SMEs, particularly in the fine and speciality chemicals sectors, fear that they would be disproportionately affected.

A stakeholders’ conference was held in April 2001 to discuss the White Paper and from October 2001 to February 2002 the Commission convened several technical expert groups. Minutes of these meetings can be found on the internet but there is no description of the

²⁶ Proposal for a Regulation of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency and amending Directive 1999/45/EC and Regulation (EC), COM(2003) 644 final
http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0644en.html

²⁷ European Commission White Paper, Strategy for a Future Chemicals Policy, COM(2001) 88 final
http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2001/com2001_0088en01.pdf

experts' backgrounds or qualifications, nor an explanation of how they were selected. Only the name and sometimes the nationality are published. There appears to have been a significant presence of Scandinavian experts.

In May 2003, Margot Wallström, Commissioner responsible for the environment, and Erkki Liikanen, Commissioner responsible for enterprise, jointly presented an outline of the scope of the new package. At the same time, a public internet consultation on the Commission's draft legislative proposal was launched to invite views on the proposed new approach.

Initially the public consultation was scheduled to last just seven weeks but, following pressure from stakeholders, this was extended to ten weeks. The consultation alerted stakeholders to the magnitude of the proposal and flagged many potential implementation problems of the initial draft.

Such was the concern about the impact of REACH on business that the French President, the German Chancellor and the British Prime Minister, wrote to the Commission urging it to consider the effect on European competitiveness.

The public consultation exercise generated more than 7,000 responses, sorely testing the capacity of the Commission to consider them all, let alone provide reasoned feedback. Following the consultation and to the satisfaction of business stakeholders, the draft Regulation was significantly amended. In particular, polymers were exempted from registration, a light touch approach to intermediates was chosen and registration requirements for substances manufactured or imported in volumes of between one and ten tonnes were relaxed. However, this did not please some NGOs, who felt that these changes were at the expense of environmental and public protection.

In June 2003, the Commission asked a consultancy to carry out an Impact Assessment. This demonstrated the anticipated public health benefits of the system. However, industry was deeply suspicious about the objectivity of the study and subsequently produced its own impact estimates which greatly polarised and confused the debate. To date there are some 50 rival Impact Assessments in existence, which have not helped to rationalise the decision-making process.

To end the wrangling over the expected consequences of REACH, the Commission agreed to two additional Impact Assessments, one by consultants KPMG on competitiveness and innovation (this study was led and entirely funded by industry) and another by the Commission's Joint Research Centre (JRC) and Institute for Prospective Technological Studies (IPTS) on the impact of REACH on the new Member States. A high level stakeholders' group of representatives of the three European institutions, NGOs and industry was appointed to oversee both studies. The new Impact Assessments were released in April 2005.

The Commission presented draft legislative proposals in October 2003. The proposal is now being discussed by the European Parliament and the Council of Ministers under the co-decision procedure.

REACH continues to excite great interest. In January 2005, a European parliamentary hearing, organised by the Environment, Industry and Internal Market Committees, was reportedly attended by a thousand stakeholders. The Committees' final report is expected in October 2005.

The extensive consultation on REACH has certainly been effective in engaging stakeholders and in influencing the proposal. While a proposal of the size and scope of REACH was always bound to be contentious, more systematic and transparent engagement with a range of stakeholders, prior to written public consultation, might have avoided some of the later difficulties.

3.4 The duration of written public consultations

Some commentators regard the debate on minimum periods for written public consultation as a uniquely British preoccupation and a distraction from the real issue of how to engage stakeholders more effectively. Most stakeholders we spoke to said they valued early dialogue at the pre-proposal stage and a predictable timetable for consultation exercises over extending the duration of written public consultation. With a predictable timetable, stakeholders know when to expect consultations and can prepare their evidence and arguments in time.

Despite this, when asked about the optimal length for written consultations, most stakeholders said that the Commission's eight-week minimum period was too short in many cases. The Commission's view is that eight weeks represents a reasonable balance between the time needed for proper consultation and the need for timely decision-making. It also notes that the eight-week standard is a floor and not a ceiling and that many consultations are, in fact, for longer periods.

The Commission's Corporate Governance and Company Law Action Plan shows the variability of compliance with the minimum standards within one Directorate General.

Case study – Directive on Shareholder Rights

An example of a good consultation (so far) is the Commission's proposal for a Directive on shareholder rights. The Commission issued a detailed discussion document for initial consultation in September 2004, a full year before it expected to adopt a formal proposal, and allowed 12 weeks for responses. In the light of the responses received, a second consultation was published May 2005 on proposed minimum standards that should apply to shareholders' rights.

Case Study – Directive on an Annual Corporate Governance Statement and Other Disclosure

However, consultation on the Commission's proposal for a Directive on an Annual Corporate Governance Statement and Other Disclosure failed to meet the minimum standards. The Commission issued its consultation in April 2004, just six months before it adopted the formal proposal in October. The tight timetable meant the Commission allowed only six weeks for responses. The consultation was described by stakeholders as rushed and slapdash.

The Mandelkern group on better regulation proposed a 16-week period for written consultation²⁸. The UK standard is 12 weeks and the US allows just over eight weeks (60 days) for significant proposals. Many Member States do not specify any minimum period. In Denmark, for example, written public consultations often last for just a few days. However, the Danish tradition of open

²⁸ Mandelkern Group on Better Regulation, Final Report, 13 November 2001
http://europa.eu.int/comm/secretariat_general/impact/docs/mandelkern.pdf

and ongoing engagement with civil society as proposals are developed means that the written consultation is usually a formality, as the competing arguments have already been heard. In the European context, membership-based organisations invited to submit views need time to assess the relevance of a consultation to their members, draw up a commentary, distribute it across often widely dispersed groups, collect their member's views, analyse them and write their response. They may also have to translate documents into different languages for their members. A common complaint is that the eight-week consultation period usually starts with the release of the first working language version and this puts those speaking other languages at a disadvantage.

Given that the European legislative process can last several years, we feel it is short-sighted to set a time limit for consultation that could deny key stakeholders the opportunity to comment meaningfully on proposals that affect them. Time spent on consultation is an investment in a proposal's future quality and legitimacy. If the voices of, for example, small business and social organisations are not heard properly because they do not have enough time to consult with their constituents, the final proposal is unlikely to command widespread support and risks being more difficult to enforce.

Of course, public consultation cannot last indefinitely and any time limit is bound to be somewhat arbitrary. An eight-week consultation period may well be appropriate for proposals with limited scope or when the Commission has to act quickly in response to events. However, we believe that public consultations lasting only eight weeks should be the exception rather than the rule.

Having spoken to stakeholders, we believe that some organisations, especially those that represent a range of interests, need more than eight weeks to formulate their response to written consultations. The Task Force would like 12-week consultations to be the norm and the Commission to justify at the beginning of the consultation document any decision to consult for a shorter period. Eight weeks should remain the absolute minimum.

Recommendation 6

Timescales

- a) Directorates General should consider twelve weeks as the standard period for written public consultation and eight weeks the absolute minimum. Any consultations of less than 12 weeks should include a written justification by the relevant Commissioner.
- b) Directorates General should ensure that consultation documents state clearly the opening and closing dates of the exercise. The consultation period should not start until the relevant documents are available in at least the Commission's three working languages.

4 The Right Way

4.1 Evaluating responses

The reasons for consultation can vary and it is important for both the Commission and stakeholders to be clear about the purpose of the exercise. For example, consultation can be used to gather facts and evidence or to test the strength of public opinion on the acceptability of a proposal or policy option. The problems of evaluating responses and providing feedback would be reduced if the Commission stated at the outset what information it was seeking, what was up for discussion and what was non-negotiable, either because a decision had already been taken or because of treaty obligations. This would reduce the number of irrelevant responses and help those being consulted to frame their views in the most useful way.

One considered response is often more useful than hundreds of identical submissions and the Commission needs to communicate this. Some stakeholders seem to think that the Commission is more interested in the volume of responses than their quality and relevance, as though consultation responses were like votes. For example, the Commission received many similar replies to the REACH consultation and we have heard of business organisations encouraging their members to submit standard responses to Commission consultations. This wastes everyone's time and is unlikely to advance the debate.

A key factor in evaluating responses can be the degree of 'representativeness' of the respondent, with greater weight being given to European organisations. UNICE has proposed qualitative criteria for 'representativeness' against which the responses from European organisations should be assessed. The Task Force does not favour this sort of formulaic evaluation.

Any weight given to the views submitted by pan-European organisations should not mean that national or regional organisations, those without EU-level representation or third country stakeholders are treated less seriously. Neither should these groups feel deterred from responding directly to EU consultations. National and regional stakeholders can shed light on the local dimension to an issue, particularly where proposals affect only a few sectors or a few Member States. Further, involving a wide range of national and local organisations and stakeholders is critical to avoiding the impression that European consultation is a cosy process of "Brussels talking to Brussels". By making clear that responses to consultation will be evaluated on their quality rather than their origin, the Commission can help ensure that individuals and local groups do not feel disenfranchised. The Commission should actively seek out local views.

4.2 Feedback to respondents

The Commission's minimum standards say that the Commission should set out the results of consultation in the explanatory memoranda that accompany legislative proposals. An explanatory memorandum typically runs to about eight pages and is available in all languages. It should explain how the consultation was conducted, its results and how the results were taken into account in the proposal.

The Commission's 2004 *Better Lawmaking* report²⁹ found that, in two thirds of the explanatory memoranda reviewed, too little was said about how responses to consultation were taken into account in the proposal or why they were discounted. The report also highlighted the problem of 'consultation fatigue'.

The Task Force believes that the two problems are related. Consultation exercises that are

²⁹ Report from the Commission, *Better Law-Making 2004* pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality, COM(2005) 98 final
http://europa.eu.int/comm/secretariat_general/impact/docs/com2005_0098en01.pdf

irrelevant to their target group, disingenuous about their aims or excessively complex in their presentation give rise to consultation fatigue and stakeholder dissatisfaction. Conversely, stakeholders are less likely to become fatigued or disenchanted with the consultation process if they receive feedback on how their responses have been evaluated and what difference they have made.

We agree with the Commission that it is often not practical to give respondents individual feedback. However, we believe that the Commission should always publish collective feedback for respondents and the wider public on the results of consultation exercises and indicate how proposals have been amended as a consequence.

Recommendation 7 Improving dialogue

a) Directorates General should ensure that consultations are clear about the information being requested and how responses will be assessed.

b) Directorates General should systematically publish feedback on the results of consultation exercises, including information on how and why proposals have been amended as a result of the consultation.

4.3 Evaluating the effectiveness of consultation exercises

It is important to evaluate the effectiveness of consultations and for the information gained and lessons learned to inform future consultation planning. Evaluation should not be limited to the length of the exercise and whether minimum standards were met, but should review whether the right people were engaged and whether the proposal was improved as a result. Over time, the regular evaluation of a sample of consultations and the broadcasting of good practice will help policymakers to understand how to make the best use of consultation in their particular circumstances.

It is obviously vital to distinguish between satisfaction with the consultation process and satisfaction with the policy outcome. We have found a tendency among some stakeholders to rate a consultation exercise on whether or not their views prevail rather than on its thoroughness or timeliness. The success of a consultation should not be judged on the basis of the outcomes achieved but on whether there was a fair chance to make one's case and feedback to show what account had been taken of the views submitted.

Recommendation 8 Evaluation

The Secretariat General should conduct a periodic evaluation of a sample of consultation exercises to gauge their effectiveness and impact on the policy process and should publish the results.

4.4 Internet consultation

There are many ways to consult with stakeholders, including open and guided internet consultations, test panels, advisory groups, workshops, hearings, seminars and conferences. All have their place and no single method will be sufficient on its own. Engaging stakeholders effectively requires a mix of techniques and the appropriate combination will depend on the purpose of the consultation and the scale of the proposal.

The Commission has made clear that consultation should not be a one-off exercise and must sit within a wider framework of stakeholder dialogue. Nevertheless, we found concern among many of the people we spoke to about the dominant role given to public internet consultations.

The internet is a vital tool for bringing EU decision-making closer to the people and for making it more comprehensible. Many people find that the internet makes access to consultations easier, quicker and more convenient. However, we should not forget that over-reliance on internet consultation can still exclude some sections of society.

Internet consultation also raises other issues. Both small business and social organisations have expressed concern that the internet can hide the representativeness of respondents such that all submissions are treated equally. Small business organisations worry that individual SMEs are prone to send responses that promote their own narrow interests and risk undermining agreed positions that may have been laboriously negotiated.

The volume of responses to EU internet consultation has increased in recent years, making it more challenging for the Commission to review and make sense of them all within the time available. Language barriers add to the difficulties, although the Commission's multilingual staff and online translation tools can help and some documents, such as Green Papers, are translated into all official languages. One approach to this problem is to use more questionnaires for consultation. They are usually easier to answer and then to analyse than free text and this reduces translation costs. The Commission sees questionnaire consultations as a good way to address consultation fatigue, but their design can cause problems.

We have already recommended that officials should have better training on questionnaire design and we welcome the guidance annexed to the Commission's new Impact Assessment guidelines. Questionnaire design is a rather specialised skill. Many of the questionnaires we reviewed were of poor quality, featuring leading or double questions and guiding respondents in a particular direction. In some cases, the questions were impossible to answer. A basic rule when designing a questionnaire is to pre-test it on users. On the evidence we have seen, this rarely happens.

Questionnaire consultation can certainly benefit both stakeholders and the Commission. However, poor questionnaire design means that the information received is likely to be inaccurate and can cause stakeholders to become frustrated. It also adds to the perception that the Commission is only interested in hearing views that support its proposals rather than new arguments and fresh perspectives.

4.5 Access and accessibility

Access is about being able to find a consultation document and accessibility is about making sense of it. The Commission's Communication on general principles and minimum standards for consultation proposed a single point of access to the Commission's public consultation documents³⁰. This was an excellent idea and the site now exists. But it does not contain all open consultations and needs to be better signposted from the Commission's homepage.

This is a missed opportunity. For a comprehensive picture of all open consultation, stakeholders still have to visit the websites of individual Directorates General.

PreLex³¹ is the database on inter-institutional procedures. It includes details of all Commission Communications and proposals (legislative and budgetary, conclusions of international agreements) that have been transmitted to the Council or the European Parliament. However, it does not contain details of consultations, making it awkward to track the development of a proposal.

³⁰ European Commission, Your Voice in Europe, Single Access Point to Consultations http://europa.eu.int/yourvoice/consultations/index_en.htm

³¹ European Commission, PreLex <http://europa.eu.int/prelex/apcnet.cfm?CL=en>

L'Oeil is the 'Legislative Observatory'³². It monitors and analyses the activities of the various institutions involved in the legislative procedure and the role of the European Parliament in shaping European legislation. It also monitors the proposals put forward by each new Presidency of the Council and the outcome of Council meetings. It enables users to monitor the work of the European Parliament and to look ahead to future stages, involving both parliamentary committees and plenary sessions. However, like PreLex it does not have details of consultations.

Some Directorates General have set up systems so that stakeholders who register an interest can be automatically alerted to relevant consultation exercises. We tested these services and found them generally unreliable. Unfortunately, DG newsletters do not routinely contain details of new consultations, although there are examples of good practice. Directorate General Taxation and Customs Union (DG TAXUD) produces very useful newsletters that include up to date information about consultations. Directorate General Information Society and Media (DG Infosoc) helpfully advertises relevant hearings at the European Parliament in its newsletters.

Recommendation 9 Access and accessibility

a) Directorates General should ensure that stakeholders who register an interest are automatically alerted in good time to relevant consultation exercises.

b) The Secretariat General should revise the PreLex and the European Parliament should revise the L'Oeil website so that both contain details of current and previous consultations.

Small Business Europe provides a valuable service to SMEs by summarising complex proposals and publishing on its website a 'regulation tracker'³³, which allows users to follow the progress of legislation through the key stages of the decision-making process. Small Business Europe also advises SMEs on how to engage most effectively with the EU. Other business organisations could usefully follow this example of good practice.

Once stakeholders have solved the access problem and found a relevant consultation document, they need to understand it. We found that, all too often, the language is unnecessarily complicated and technical.

The Commission's minimum standards state that all consultations should be clear and concise. In our view, that means that all documents should be written in plain language and contain a straightforward, easy to understand description of the issues at stake and the policy options proposed. We have already made the point that responses to consultation exercises are likely to be more useful if respondents are given clear information about what the Commission wants from them. Simple things like numbering paragraphs for ease of reference and highlighting the questions where the Commission would particularly welcome a response could make consultation documents more useful and user friendly.

We also suggest that, before publishing a consultation, the Commission should seek the views of disability organisations on whether they are likely to be of particular interest to groups that might require special formats. Official documents need to be written in plain language and published routinely in the approved W3C standard (X)HTML format, which has also been endorsed by the EU institutions.³⁴ This makes them suitable for use by people dependant on assistive technologies such as screen readers, screen magnifiers and refreshable Braille displays.

³² European Parliament, The Legislative Observatory
<http://www2.europarl.eu.int/oeil/index.jsp>

³³ <http://www.smallbusinesseurope.org/Issues/>

³⁴ http://europe.eu.int/information_society/policy/accessibility/index_en.htm

5 The Right People

5.1 The lobbying landscape of the EU

To understand the consultation process, it is important to appreciate the distinctive lobbying landscape of the EU. The multilevel system of EU governance is unique and complex and a growing array of stakeholders is competing for the attention of officials. As the EU institutions interact at national and regional level with 25 Member States and with third parties, managing consultation with different interest groups is a huge challenge. Further, as the institutions have proportionately fewer staff than most national administrations, they frequently rely on stakeholders to supply information to inform proposals.

The plurality of stakeholders presents the Commission with a problem in balancing interest group representation. However, it also provides a good system of checks and balances, making it difficult for any single interest group to secure exclusive access to Commission officials or politicians. The fragmentation of power in EU decision-making ensures that no one interest group can routinely dominate and every dossier has to find its own majority.

Stakeholders come in all shapes and sizes, from well-staffed, powerful trade associations to single person operations or the occasional visitor to Brussels. There are also the professional lobbyists. It is estimated that there are some 15,000 lobbyists in Brussels, together generating revenues of between €60 and €90 million a year³⁵. Some people assert that an inner circle of well connected lobbyists and pressure groups exerts a disproportionate influence over the Commission's thinking at the expense of newer or smaller groups.

Certainly their perceived access to the Commission's centres of power is viewed with considerable suspicion by those whose dialogue is limited to formal public consultation procedures and feedback via an anonymous mailbox.

5.2 Lobbying and transparency

The Commission has recently started a review of its relationship with lobbyists and non-governmental organisations to promote greater transparency and stamp out conflicts of interest. There is pressure for mandatory registration of lobbying activities, as voluntary registers are not considered comprehensive or to provide sufficient information on the interests represented and how they are financed.

The lobbyists' own codes of conduct have few signatories and so far lack serious sanctions. However, the lobbyists themselves deny that their present system of self-regulation is ineffective.

We support greater transparency in the Commission's dealings with civil society, including professional lobbyists and NGOs. However, we believe that a new regulation, as the Commission proposes, is unlikely to be justified without more compelling evidence that there is a serious problem and that legislation is the best way of dealing with it.

Different criteria must apply when a lobbying organisation receives funding from the Commission for its lobbying and representational activities. In these circumstances, it is reasonable to ask for details of membership and financial support as a condition of Commission funding. Some NGO's receive as much as 90 percent of their funding from the Commission. For this, they are obliged to show which interests they represent, how inclusive

³⁵ Siim Kallas, Vice-President of the European Commission and Commissioner for Administrative Affairs, Audit and Anti-Fraud, The need for a European transparency initiative, speech held at The European Foundation for Management, Nottingham Business School, Nottingham, 3 March 2005.
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/130&format=HTML&aged=1&language=EN&guiLanguage=en>

their representation is and how accurately they reflect those interests. They are not obliged to support certain views.

At first sight, the idea of the Commission paying lobbyists in order to be lobbied sounds paradoxical. Promoting a level playing field so that all civil society can become involved in the EU decision making process is obviously worthwhile. But why fund lobbyists when their objective is to gain dominant political influence and thereby make the playing field less level? In fact, a competitive free market would soon be dominated by big business, pushing out the poorer interest groups. It is against this background that the Commission funds some social and environmental NGOs as an essential market correction mechanism. Such support does not extend to small business, another specialist interest group potentially disadvantaged by a competitive market in influence.

It can be argued that the Commission needs a well-structured, capable civil society and that funding improves the quality of input it receives. But it is a question of balance. Some business organisations complain that the market in influence is now skewed unfairly in favour of social and environmental NGOs and consumer groups, which have no real mandate or legitimacy. NGOs counter this by saying that commercial pressure groups do not have a mandate for their views from their employees and customers.

Our impression is that the NGO voice may well be in the ascendant and a recent study³⁶ confirmed that the EU institutions now view industry and NGOs as equally competent at lobbying. But the reasons for this are complex and not necessarily linked to financial support from the Commission. Certainly there is increasing co-ordination and professionalism among the NGOs but equally business has not always been good at presenting a co-ordinated case to the Commission. We consider later what business might do to engage more successfully with the Commission.

We recognise that interference in the market causes distortions and can create problems. However, Commission funding brings citizens into the process that would otherwise be excluded, countering the perception of democratic deficit. For that reason we support the Commission's funding of NGOs, subject to the existing safeguards.

5.3 The CONECCS database

The Commission has collected information on consultative bodies in a database named CONECCS (Consultation, the European Commission and Civil Society)³⁷. The database also has information on the committees and other structures that the Commission uses to consult civil society organisations in a formal or structured way. The directory of organisations is a voluntary scheme, intended only as a source of information not as a means of accreditation. It does not try to include details of informal contacts with the Commission.

Although potentially a useful tool for policy makers and stakeholders alike, the database is of limited value at the moment. Stakeholders feel that it is under-used by the Commission (although exact hit rates are not available) and consequently see little reason to update their details. The data it contains are also rather limited, giving no indication of a group's membership and therefore the extent to which it could claim to be representative. Properly maintained, the database could be a valuable resource to help policy makers identify relevant stakeholders and to allow stakeholders to identify potential allies.

³⁶ Buson Marsteller, *The Definite Guide to Lobbying the Institutions*, Spring 2005
[http://www.euractiv.com/29/images/The%20Definitive%20Guide%20to%20Lobbying%20the%20European%20Institutions%20\(Spring%202005\)_tcm29-140977.pdf](http://www.euractiv.com/29/images/The%20Definitive%20Guide%20to%20Lobbying%20the%20European%20Institutions%20(Spring%202005)_tcm29-140977.pdf)

³⁷ Database for Consultation, the European Commission and Civil Society (CONECCS)
http://www.europa.eu.int/comm/civil_society/coneccs/index_en.htm

The Secretariat General lacks resources to maintain the database, check entries and promote its wider use across the Commission. Nevertheless, we believe that significant improvements could be made at a comparatively modest cost. For instance, the database could be made more accessible by providing links from the EU institutions, national trade associations and other relevant websites. The search facility could also be enhanced to allow searches by sector and key word as well as by name and an email could be sent periodically to each organisation on CONECCS asking it to confirm its data.

5.4 The role of representative bodies

The question of when to consult with representative bodies and when to consult directly with individual stakeholders is one of proportionality and pragmatism. We therefore support the Commission's decision not to place any restrictions in its minimum standards on eligibility to take part in consultation. We have already said that, as part of pre-legislative consultation, officials should engage directly with affected parties before publishing a draft proposal. However, we also recognise that, for reasons of economy and ease, much of the dialogue that takes place before written public consultation will be with representative bodies.

The recognised social partners and other major organisations are a natural first point of contact for the Commission. These bodies are easily accessible and have experience of collecting and presenting data. UNICE and UEAPME stress the important role that representative business organisations play. They do not simply register or collect the views of their members, but also find a common position that reflects the opinion of different countries and economic sectors. Thus, the argument goes, their opinions are more than a simple sum of all the opinions from single businesses. They are the result of an intra-organisational democratic consultation and decision-making process.

However, some see the relationship between the Commission and its social partners as being too cosy. Further, both Commission officials and members of the European business associations argue that the agreed positions that such bodies produce do not reflect the realities for individual firms and are of limited value. The process of achieving consensus among a diverse membership may mean that representative bodies lose the richness of data that individual stakeholders can provide. Therefore, the consensual positions of European associations may actually be less than the sum of their parts.

A further concern expressed by national business organisations is that, when the Commission claims to have "consulted industry", the reality is that it has held a formal consultation with UNICE. This can reduce consultation with industry to more of a tick box procedure. Many business organisations stress the need to reach down to national level to unearth details on potential impacts of proposals.

This is not to deny the importance of UNICE and UEAPME, given the difficulties of engaging directly with the business community, especially small firms. The long time lag between the inception of a proposal and its coming into force is a major barrier to sustained SME involvement. SMEs are naturally more worried about short term profit and loss than long term horizon scanning. They do not have the time, the resources or the inclination to monitor the Commission's website for relevant consultations. There is certainly more the Commission could do to reach out to small businesses. We discussed earlier, for example, the accessibility of consultation documents. But, the fact remains, that for most SMEs the most efficient way to engage, albeit indirectly, with the EU is through business associations.

Direct engagement with larger companies presents its own challenges. We have already noted a degree of reluctance by some companies to commit management resources in the early stages of consultation. But this is not the only obstacle. We have also found that companies are sometimes unwilling to disclose information that could help improve a proposal because their primary motive in responding to a consultation is to seek competitive advantage.

5.5 Constructive engagement by business

As far as possible, the Commission would like businesses to work together to present an agreed response to its proposals. This is understandable, given the growing number of separate interests represented at EU level and the challenge this presents to a relatively small Commission administration. A joint sectoral position is usually more useful to the Commission than the disparate views of single companies, especially if they are mainly interested in stealing a march on the competition.

The NGO sector has developed thematically grouped consortia to help address problems around the increasing fragmentation of interests and limited access to officials. Examples include the 'Green 8' (eight of Europe's largest environmental NGOs), the European Public Health Alliance, the European Social Platform, the European Youth Forum and CONCORD, a network of relief and development NGOs.

We recognise that businesses need to compete and to make profits and that forming formal alliances with their competitors may be incompatible with commercial realities. Nonetheless, some examples exist that show how businesses can benefit from ad hoc coalitions.

Case study – The Electronics Coalition

The Electronics Coalition was formed in 1998 to work on the proposed Waste Electrical and Electronic Equipment (WEEE) and Restriction of Hazardous Substances (RoHS) Directives. It is a coalition of companies with interests in sectors targeted by the proposed Directives, including American and Japanese firms with operations in Europe. The aim of the Electronics Coalition was to share information and to develop and promote common messages about the proposals in a different but complementary manner to trade associations.

The Coalition played a pivotal role in reaching consensus amongst the different industry associations on the key issues of the WEEE and RoHS Directives and in finding a common approach to responding to stakeholder concerns. The Coalition also actively drove the development of strategic alliances with other key stakeholders, for example the European Environmental Bureau (EEB) and the European Consumer Organisation (BEUC).

The Coalition's proactive lobbying work led to a range of amendments to the Directives being introduced in the European Parliament and Council of Ministers and influenced the final shape of the proposals. The Coalition secretariat estimates that of the 29 proposals made by the Coalition, 21 (72%) were adopted in the final Council text.

So what can businesses do better? They must start by deciding whether and to what extent it is in their interests to try to influence the EU agenda. If they decide that it is, they should take a

commercial decision to commit the resources necessary for effective engagement. From this position, there are a number of possible tactics businesses can use:

1. **Know what is going on:** Search the Commission's Roadmaps³⁸ for relevant proposals. Track their progress through the institutions. Register for email alerts to relevant consultations. Small firms might find joining a trade association the most efficient way of keeping abreast of developments.
2. **Engage early and proactively:** In our experience, the Commission is more receptive to representations from stakeholders and there is more chance of influencing policy at its early stages. It is not necessary to wait for the formal public consultation. Business should submit views on the outline proposal and the preliminary impacts set out in its roadmap.
3. **Provide factual evidence:** Businesses often have access to up to date and accurate information about the proposal and its implications. The views they submit should be supported by reliable data to help promote evidence-based policy-making.
4. **Think European:** Defending purely national positions in Brussels is always difficult and usually counter productive. The most effective messages describe company and national interests in the wider European context of the issue that the Commission is seeking to address.
5. **Build alliances:** Those lobbying most successfully work with allies and build coalitions. Ad hoc issue-specific coalitions can sometimes be more responsive and innovative than traditional trade associations.
6. **Communicate:** Always take advantage of opportunities to engage throughout the legislative process, not only with the Commission but also the Parliament and Council.
7. **Compromise:** Consultation should be a dialogue not a battle. A willingness to listen and to compromise is more likely to succeed than an approach based on self-justified confrontation.

5.6 A European business-led advisory group

The Six Presidencies' Initiative on Advancing Regulatory Reform in Europe³⁹ proposed the establishment of a business-led advisory group to help the EU institutions assess progress on better regulation initiatives and to identify areas for further reform. An advisory group could help support the drive for better regulation in Europe and assist the EU institutions to deliver their policy objectives in the most efficient and effective way. Business's first hand experience of regulation should play a central role in making sure that EU proposals encourage jobs and growth.

The Task Force welcomes the aim of giving business a clearer strategic voice in the EU legislative process, although not of course at the expense of other legitimate interests. The

³⁸ European Commission, Roadmaps, Work Programme 2005
http://europa.eu.int/comm/off/work_programme/20050128_clwp_roadmaps.pdf

³⁹ Advancing regulatory reform in Europe, A joint statement of the Irish, Dutch, Luxembourg, UK, Austrian and Finnish Presidencies of the European Union, 7 December 2004
<http://www.hm-treasury.gov.uk/media/95A/52/6presidencies.pdf>

Commission's Communication on Better Regulation⁴⁰ proposed setting up an advisory network of experts in better regulation to provide strategic advice on regulatory reform. This might prove to be an appropriate vehicle for business to get its views across but we think there should be further work with the business community itself before deciding on an exact mechanism.

Case study – Competitive Automotive Regulatory System for the 21st Century (CARS 21)

The Cars 21 High Level Group was formed in January 2005 at the initiative of the European Commission. It comprises Member State ministers, Members of the European Parliament, industry and trade representatives, trade unions, NGOs and the European Commission. Commissioner Verheugen chairs the group. The group aims to make recommendations to improve the worldwide competitiveness of the European automotive industry by December 2005. It is also producing a 'roadmap' of the likely timing of policies and legislation over the next 10 years.

CARS 21 is a good example of how stakeholders can be involved in the development of policy and regulation. It gives them an opportunity to examine the existing regulatory framework in their sector, anticipate future developments and consider the impacts of proposals on competitiveness. However, the composition and representation on such groups is contentious.

There is a tension between demands for wide representation and demands for strategic decision-making. Stringent selection criteria are required to keep groups such as CARS 21 to a manageable size. Conversely, as the group has a key role in and privileged access to the EU decision making process, it must operate transparently and give wider interests the opportunity to provide input to its work.

5.7 European Business Test Panel

Business and trade associations often try to arrive at a common position among their members in response to consultations. As we have noted, this can often help the Commission to understand the key points among what can often be a complex range of views across a sector. However, individual companies sometimes criticise these common positions for being anodyne and representing the lowest common denominator among their membership. Consensual positions cannot show the diversity of business opinion within a sector, identify leading companies and ideas or reveal internal disagreements. Sometimes the Commission needs to hear the unfiltered views of individual companies on policy options. The European Business Test Panel (EBTP) is an innovative approach to help Commission services consult directly with individual businesses.

The EBTP is a Directorate General Internal Market and Services (DG MARKT) initiative that allows the Commission to contact and hear the views of more than 3,600 European businesses on major proposals or policy initiatives.

⁴⁰ Communication from the Commission, Better Regulation for Growth and Jobs in the European Union, COM(2005) 97 final http://www.europa.eu.int/comm/secretariat_general/impact/docs/com2005_0097en01.pdf

Each Member State is responsible for filling a quota of businesses to make the sample statistically representative. The EBTP is entirely internet based and is an addition to, not a substitute for, other consultation methods.

It works by the Commission sending businesses on the EBTP a short explanatory note about a new initiative and asking them to complete a short questionnaire (10-15 questions). The questionnaire and supporting material are available in all EU official languages. Although there is an agreed minimum of two weeks for businesses to submit their replies, in practice at least six weeks is normally allowed for responses.

Case study – EBTP consultation on tax barriers

DG TAXUD was the first Directorate General other than DG MARKT to use the EBTP. Its consultation on tax barriers relating to VAT uncovered problems that were previously unknown to DG TAXUD, for example, that it was impractical to reclaim VAT in cross-border transactions. DG TAXUD is now working on amendments to the Directive to address this problem.

Based on this success, more consultations are planned for the next 12 months. These include, in the shorter term, surveys on regulatory quality (how much time and money is spent on administrative burdens), on workplace diversity (the second non-DG MARKT proposal) and on the administrative costs of producing statistics on intra-EU trade in goods.

The EBTP provides the Commission with a means of quick and targeted consultation, direct interaction with regulated businesses and an efficient way to request relevant, practical data. While a few Member States originally greeted the EBTP with scepticism, most have now filled their quotas. This is welcome but the results may still be skewed since our own limited research suggests that response rates vary considerably from one Member State to another.

The EBTP is based on the well-established Danish model of a business test panel, whose main purpose is to generate useful statistical data. Some EBTP members complain that the use of questionnaires guides their responses in a certain direction and they would like more opportunity to express their views in free text. While this would increase the range and detail of responses, it would make analysis more difficult and time consuming. Another suspicion is that the Commission uses the EBTP selectively when it wants to demonstrate external support for its proposals. Perhaps this view arises because the criteria for using the EBTP to supplement the normal consultation process are not well understood. In fact, the EBTP is suitable for most horizontal policy issues with an impact on business and the programme of consultations is agreed by Member States, which are encouraged to seek the views of business organisations.

The EBTP is potentially an important part of the Commission's consultation toolkit and represents a practical solution to the problem of securing direct input to the policy process from individual businesses. It is unfortunate that it lacks credibility among some business stakeholders, who regard it as a tick-box exercise to justify, rather than significantly amend, proposals. We suspect, however, that this criticism may, in part, reflect the desire of business organisations to control their members' voices.

Recommendation 10 Engaging with business

- a) Businesses should organise themselves better to take advantage of the opportunities to engage constructively with the EU and be ready to engage early to maximise their input to the policy dialogue.
- b) DG MARKT should publish clear guidance on the use of the European Business Test Panel (EBTP) as a supplementary consultation tool. All Directorates General should use the EBTP in accordance with this guidance.
- c) Member States should actively promote the EBTP to businesses and strive to fill their national quotas.

6 Conclusions

The Task Force embarked on this study in the firm belief that good consultation is essential for both legislators and the public. Effective consultation provides expert input to improve the quality and hence the ultimate effectiveness of legislation. It also helps build bridges between the European institutions and the citizens, encouraging different interest groups to make their voices heard and to engage in the future development of the European Union.

We wanted to find out how consultation is organised and to uncover people's views on what works and what could work better. We wanted to hear that the European institutions welcome input from stakeholders on their work and that different interest groups, business and NGOs, are making the most of the consultation opportunities available. We also wanted reassurance that consultation is not seen as a formulaic box ticking exercise but is properly understood and accepted as a vital part of better regulation.

We found the Commission to be open and receptive to the views of its stakeholders and to have developed a set of principles and minimum standards for consultation that we support.

We found many examples of good consultation but we also found that compliance with the Commission's minimum standards was patchy. This did not always result in poor legislation and we note that there is no simple relationship between the quality of formal consultation and the acceptability to stakeholders of the resulting legislation. Even where there is inadequate formal consultation, the informal system of checks and balances provided by lobbyists and pressure groups usually means that the worst excesses of bad regulation are avoided. However, citizens would rightly have more faith in an EU regulatory system based on systematic and transparent consultation than on the chance interventions of proactive stakeholders.

Good consultation cannot be guaranteed by extending consultation periods or consulting with more people. Good consultation is targeted and proportionate. There is a risk that setting more stringent rules for consultation would make the process burdensome both for the institutions doing the consultation and for those being consulted. This would lead to inefficient use of resources and could be seen as undermining the democratic process without significantly improving regulatory outcomes.

We spoke to many people in preparing this study. They challenged us to make our recommendations practical and to avoid empty rhetoric. We hope we have achieved this and made recommendations, which, if implemented, will make a real difference to the quality and legitimacy of regulation.

In true dialogue, both sides are willing to change.

Annex A

About the Better Regulation Task Force

Membership

The Better Regulation Task Force was set up in 1997 to give the UK government independent advice on how to regulate better. We aim to improve legislative outcomes and, at the same time, to reduce unnecessary burdens on citizens, business and the public sector. The Task Force is non-political. Our members are appointed by the Minister for the Cabinet Office for their individual skills and qualities and for their knowledge of the regulatory environment. They do not represent any particular interest group or constituency. Members come from a wide variety of backgrounds - small and large business, the charitable and voluntary sectors, trade unions, consumer groups, enforcement bodies and the professions. The Chair of the Task Force is Sir David Arculus.

Principles of good regulation

The Task Force has developed five principles of good regulation. They underpin our recommendations to improve the EU consultation system.

Proportionality – Subject to certain minimum standards, the scale of a consultation exercise should be proportionate to the potential impact of the proposal.

Accountability – The accountability for effective consultation is shared between the Commission and its stakeholders. All have a responsibility to engage in a timely, open and constructive way. To achieve widespread compliance, legislation needs to command the support of affected stakeholders.

Consistency – Consultation should be carried out to a consistent standard and to predictable timetables.

Transparency – It should be clear who has been consulted, what responses were received and how they have been acted upon.

Targeting – Consultation should identify key groups and actively seek the views of affected parties.

Members of the Task Force

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A register of members' interests has been drawn up and is available on the Task Force website: www.brta.gov.uk or on request to the BRTF Secretariat, 22 Whitehall, London SW1A 2WH.

Annex B

Contributors to the study

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BEUC (The European Consumers' Organisation)
British Bankers' Association (BBA)
British Chamber of Commerce (BCC)
Bundesministerium für Wirtschaft und Arbeit (German Federal Ministry of Economics and Labour)
Bundesministerium des Inneren (German Federal Ministry of the Interior)
Bundesverband der Deutschen Industrie e.V. (BDI, Federation of German Industries)

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 Directorate General Health and Consumer Protection (DG SANCO)
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Annex C

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