

Enclosing the Democratic Commons: Private Organizations and the Legislative Process

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Abstract: The freedom of association is regarded as a key civil right. It is enshrined not only in many national constitutions but also in international law. The private organizations formed under protection of this right are often regarded as positive forces that help to increase democratic participation as well as economic equality. This Paper aims to seriously question that perception by examining the considerable role that private organizations play in public decision-making both nationally and internationally. Such organizations may include humanitarian organizations, unions, corporate syndicates and professional associations.

Data on these organizations and their influence has been collected via an ongoing research project that suggests that private organizations use these lobbying mechanisms to engage in activities that often explicitly subvert democratic processes in pursuit of their own interests. The Paper will examine both results obtained as well as the methods used in influencing decision-making to quantify the impact that private associations have and how the law governing them could be modified to better serve the public interest in greater political and economic equality.

Introduction

In recent years, holistic understandings of power, such as Gramsci's cultural hegemony¹ or Masao Maruyama's 'close embrace system'² have been sidelined in favour of a narrow focus on the explicit, legally enshrined, formal instruments of state power: elections, government, referenda and the like. However, informal mechanisms of exercising power can also have a tremendous, if often overlooked, role on the democratic character of society.

Informal political participation, that is participation that is not explicitly provided for within the processes outlined by the law of state organisation, can include: participating in meetings with public stakeholders; helping to draft laws; providing information to decision-makers; or preparing position papers on aspects of public policy.

This informal participation could, in a certain sense, be described as an 'ausserparlamentarische Bewegung', as it seeks to bypass the formal decision-making structures in favour of non-regulated forms of participation.

However, unlike the original 'ausserparlamentarische Opposition',³ this new informal participation is often exercised through a group or club that has been drawn together for a

¹ Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, Quintin Hoare, Geoffrey Nowell Smith (eds) (International Publishers 1971).

² Masao Maruyama, *Thought and Behaviour in Modern Japanese Politics*, Ivan Morris (ed) (OUP 1969).

³ Originally the term 'ausserparlamentarische Opposition (APO)' was used to describe the student protest movement in Germany during the 1960s and 70s.

common purpose, and that is almost always composed of the wealthiest sectors of society. In other words, informal participation in electoral democracies is largely a private affair – privately run and privately financed. The groups and clubs with the highest level of engagement in informal decision-making are often hierarchically organized and rarely open to new members. The vast majority of these activities are directed towards consulting with a select group of decision-makers rather than with the public at large. The ability to participate informally gives these organizations a privileged position at an early stage in the decision-making process that puts them at an advantage vis-à-vis the vast majority of citizens who participate only through formal political structures, such as voting. Thus, what are ostensibly public decisions are essentially privatized; the democratic commons are effectively enclosed.

This paper will attempt to make some preliminary steps in quantifying the extent to which such groups affect decision-making in the domestic and international sphere and how this privatization of democratic decision-making could be combatted. Part I gives a brief overview of informal participation methods in domestic law-making with a particular focus on the United States. Part II examines the influence of private actors on international decision-making, in particular at the EU Commission and the United Nations. Part III seeks to understand how the enclosing of the democratic commons could be addressed. Part IV concludes.

PART 1: Informal Participation Domestic Law-making

A substantial body of work detailing how private organizations influence the domestic legislative process has been put together by academics and investigative journalists in recent years, primarily focussing on the United States. The most well-known study of this type was carried out by Page and Gilens. The study revealed that policies that were strongly supported by elites and organized groups in the United States had a legislative adoption rate of circa 56%, while “even overwhelmingly large pro-change majorities, with 80 percent of the public favoring a policy change, got that change only about 43 percent of the time.”⁴ The authors also noted that interest groups of all types did not generally represent citizen preferences, meaning that it could not be inferred that these organizations were a vehicle, or accurate substitute, for citizen engagement.⁵

Many others have reached similar conclusions, either through aggregate studies or detailed case studies on individual policy issues.⁶

At the bottom of this ability to affect political decision-making is the capacity to organize into associations or syndicates capable of efficiently pursuing goals, often via a process that has proven its success in the past and which can be easily repeated and/or scaled out as the need arises. In this manner, informal influence can be exercised in assembly-line fashion. The following briefly examines some of the ways in which this influence can be exercised.

⁴ Martin Gilens & Benjamin I. Page, “Testing Theories of American Politics: Elites, Interest Groups and Average Citizens” (2014) 12(3) *Perspectives on Politics*, 546 at 573.

⁵ *Ibid.*, at 575.

⁶ Eg. Thomas Stratmann, “Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation” (2002) *Journal of Law and Economics*, 345; Richard L. Hall and Frank W. Wayman, “Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees” (1990) *American Political Science Review*, 797; G. William Domhoff, *Who Rules America? The Triumph of the Corporate Rich* (7th ed. McGraw-Hill 2013).

Informal Participation through a Syndicate: ALEC

The American Legislative Exchange Council (ALEC) represents a good example of the concrete manner in which syndicates can seek to informally influence policy decisions. ALEC was founded in 1973 to promote specific goals: free markets, limited government, federalism and individual freedom.⁷ The organization is composed of representatives from approximately 300 groups,⁸ including private companies (representing 2/3 of all member organizations),⁹ trade groups, policy organizations and non-profits,¹⁰ as well as State legislators. ALEC’s membership has included some of the nation’s largest companies, such as: Koch Industries;¹¹ Exxon Mobil;¹² R.J. Reynolds, Philip Morris, Amoco, Chevron, Enron, and syndicates, such as the American Energy Institute and the American Petroleum Institute.¹³ It can also count a large number of State legislators among its membership – approximately 2400, or 1/3, of all State legislators¹⁴ – many of whom are speakers, presidents, and majority and minority leaders.¹⁵

As is typical for an organization that seeks to influence decision-making on an informal basis, ALEC meets its costs through private membership fees as well through special sponsorships for specific events. The membership fee for companies is approximately \$25 000, with a seat on one of ALEC’s Task Forces costing an additional \$3000-\$10 000. Special sponsorships can run at \$50 000 to \$100 000.¹⁶ These fees subsidize participation for State legislators, who are only required to pay \$100 for a two-year membership,¹⁷ and who may receive a ‘scholarship’ from ALEC to cover the costs of attending its meetings.¹⁸

Since the 1990s, ALEC has focused on drafting ‘model legislation’ for US State legislators, i.e. boilerplate laws that can be introduced as bills by US State representatives in their State Assemblies. These model bills are drafted by ALEC’s Task Forces, which are each devoted to a particular topic, namely energy; environment; civil justice; commerce; education; international relations; public safety; taxes; and telecommunications. ALEC’s model bills must be approved by the majority of legislators and the majority of private-sector task force members to be considered as passed. If a bill is approved in this manner, it is posted on ALEC’s website where it can be downloaded by State representatives and introduced into their respective Houses for debate.¹⁹

These model bills are often heavily influenced by ALEC’s corporate members and are often introduced into State Houses by legislators who did not personally participate in the drafting process. For example, in 2010, ALEC passed a bill that condemned carbon caps and called on

⁷ Alison Fitzgerald, “Koch, Exxon Mobil Among Corporations Helping Write State Laws” *Bloomberg News* (21 July 2011), <http://www.bloomberg.com/news/articles/2011-07-21/koch-exxon-mobil-among-corporations-helping-write-state-laws>.

⁸ *Ibid.*

⁹ Laura Sullivan, “Prison Economics Help Drive Ariz. Immigration Law” *NPR* (4 April 2012) <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>.

¹⁰ Fitzgerald, note 7.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Karen Olsson, “Ghostwriting the Law” *Mother Jones* (September/October 2002), <http://www.motherjones.com/politics/2002/09/ghostwriting-law>

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Fitzgerald, note 7.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

State Governors to withdraw from carbon cap and trade schemes.²⁰ The bill was drafted by 13 State legislators and 21 private members, including: Exxon Mobil, Koch Industries, BP, American Electric Power, the American Petroleum Institute and the American Coalition for Clean Coal Energy,²¹ meaning that corporations and corporate syndicates outnumbered politicians 2:1 in the drafting of the bill. The bill was later downloaded and introduced as legislation in dozens states.²²

Such measures are part of a formulaic process that can be repeated indefinitely, thus introducing a level of efficiency and scalability into informal participation. While it is not always successful, success rates are high enough to be significant. ALEC has drafted at least 1000 model bills.²³ According to its own estimates, in the year 2000 its legislative members introduced more than 3,100 bills based on these models, passing 450 of them (or 14%) into law.²⁴ The organization claims that on average “1000 pieces of legislation based on its bills are introduced each year” with 20 percent of those being passed into law.”²⁵

An independent study came to less optimistic, but still significant, conclusions, regarding ALEC’s success rate. The study looked at 169 model bills that ALEC had passed between 2010 and 2013, and which were seen as the organization’s ‘most significant’ pieces of draft legislation. Boolean string searches were then used to find any laws introduced during the 2011-2012 legislative session that used language that matched the model bills. The study found 132 bills with matching language,²⁶ whereby many of the bills could be traced back to the same model legislation, indicating a concerted push to have certain policies widely implemented.

Of the 132 bills introduced: 23 were variations on the ‘No Sanctuary Cities for Illegal Immigrants Act’;²⁷ 10 were variations of the ill-named Disclosure of Hydraulic Fracturing Fluid Composition Act;²⁸ 9 were forms of the Castle Doctrine or ‘Stand Your Ground’ Act;²⁹ 9 were based of the State Withdrawal from Regional Climate Change Initiative;³⁰ and 9 were forms of the Consistency of Firearm Regulations.³¹

Twelve of the 132 Bills introduced were enacted, a success rate of 9%. By comparison, in the 112th US Congress only 2% of introduced bills ‘passed’,³² while in Minnesota only 8.4% of all

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Fitzgerald, note 7.

²⁴ Olsson, note 13.

²⁵ Fitzgerald, note 7.

²⁶ Molly Jackman, “ALEC’s Influence over Lawmaking in State Legislatures” Brookings Institute (6 December 2013) <http://www.brookings.edu/research/articles/2013/12/06-american-legislative-exchange-council-jackman>

²⁷ allows private citizens to sue government for not fully enforcing a set of provisions, which include having an illegal immigrant in one’s vehicle and criminalizing “trespassing” on State land without immigration status (*Ibid.*)

²⁸ allows ‘operators not to disclose any materials that are considered a “trade secret” or present incidentally in the hydraulic fluid, and would limit the ability of individuals to challenge an operator’s claim to trade secret protection (*Ibid.*)

²⁹ “authorizes the deadly use of force against an intruder in a residence or vehicle” (*Ibid.*)

³⁰ “declares the lack of benefit to reducing carbon emissions in the state that would adopt it, and would provide that state reasonable cover to withdraw from a regional climate initiative” (*Ibid.*)

³¹ “prohibits local jurisdictions from independently enacting restrictions on the possession of firearms’ and ‘preempt[s] the right of local jurisdictions to bring certain civil actions against firearms or ammunition manufacturers, trade associations, and dealers.” (*Ibid.*)

³² *Ibid.*

bills introduced in the House were passed in 2011-2012.³³ In other States, pass rates may be higher: in Texas 18%-20% of all bills introduced into the House are passed into law,³⁴ while in Ohio the pass rate was 12% in 2011-2012.³⁵

When one considers that the study only captured ALEC’s ‘most significant’ legislation, it would appear that the success rate of ALEC bills is comparable to the success rate of bills in general. It is unlikely that bills with this content would be introduced without ALEC’s initiative. As the Page & Gilens study and others have demonstrated, the content of these laws is generally explicitly counter to the wishes of the majority, meaning that it lacks an organic basis in society. It thus seems reasonable to conclude that by acting cooperatively through ALEC corporations have managed to push the natural adoption rate of their preferred legislative content from 0 or close to 0% to a percentage that is comparable to the national average adoption rate. Working through a syndicate in this manner allows actors to use their resources more efficiently to maximize their impact on outcomes. In such a manner, corporations have adopted union tactics of solidarity to meet their own ends, namely ensuring that laws favourable to their own interests are passed, regardless of public opinion.

Informal Participation by a Single Actor: Merck

Of course, organizations may also seek to influence legislation on their own initiative rather than through a syndicate. Merck’s push for mandatory HPV vaccine in US States is a typical example. Following approval of its vaccination Gardasil, which helps to prevent cervical cancer caused by the human papillomavirus (HPV), Merck attempted to fully capture the American market ahead of its competitors, by promoting mandatory school vaccination for girls aged 11-12 and a rigorous programme of catch-up vaccination for girls and women aged 13-26. Within one year “legislation relating to the vaccine was introduced in 41 states and the District of Columbia, including bills in 24 states that would mandate HPV vaccination for 6th-grade girls.”³⁶

Merck achieved this high level of coordinated legislation by:

- contributing unrestricted educational grants to Women in Government (WIG), a national non-profit group of female state legislators, whose members later introduced many of the bills, “which, among other things, covered the expenses of dozens of legislators to attend conferences on cervical cancer at appealing destinations convened by WIG and attended by Merck representatives”³⁷
- convening “a task force to make policy recommendations”³⁸
- drafting the legislation that mandated vaccination for school-entry
- liaising with interest groups and the media to build support for the legislation.³⁹

Merck’s plan failed only when a leak revealed that Governor Rick Perry, who had ordered mandatory HPV vaccination for girls in Texas in 2007, had employed a former chief of staff

³³ “Number of Bills Introduced and Laws Passed in the Minnesota Legislature, 1849-present”, Minnesota Legislative Reference Library, <http://www.leg.state.mn.us/lrl/histleg/bills>.

³⁴ “Bill Statistics”, Legislative Reference Library of Texas, <http://www.lrl.state.tx.us/sessions/billStatistics.cfm>.

³⁵ “OH Legislation” Legiscan, <https://legiscan.com/OH/legislation/2011?page=20&type=bill>.

³⁶ M.M. Mello, S. Abiola & J. Colgrove, “Pharmaceutical Companies’ Role in State Vaccination Policymaking: the Case of Human Papillomavirus Vaccination” (2012) 102(5) American Journal of Public Health, 893-898.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

who had worked for years as a Merck lobbyist and that Merck had contributed \$5000 to Perry’s campaign fund.⁴⁰

Studies and surveys indicate that such practices are the rule rather than the exception.⁴¹ An examination of the Californian state legislature during the 2007-2008 legislative cycle found that 39% of the 1 883 proposed laws and 60% of those actually passed were sponsored by outside interests rather than originating with legislators themselves. Over 500 of these bills were sponsored by private industry or trade groups, who often also wrote representatives’ speeches, provided them with fact-sheets, and even sat in on legislative committees to field questions.⁴² Non-profit groups also partake in this effort to have their own laws implemented through such informal methods of participation. For example, in California the environmental group Friends of the Earth sponsored a successful bill on banning toxic flame retardants in children’s products.⁴³

While research has focused on studying the formal exercise of state power, the shift on the ground has been to participation through informal means. While these informal means of participation may not always be successful, they do show a significant success rate. More importantly, however, they move the key decision-making steps from formal, public exercises of power, for example through elections, to a non-public enclosed space where private groups use informal participation methods to their own ends.

As institutionalized as this *modus operandi* has become on a national level, it is significantly more developed in the international sphere.

PART II: Informal Participation in Supranational and International Law-making

Private organizations have long sought to influence the terms of international treaties and regulations, a practice greatly aided by two circumstances. The first is that treaties are often negotiated in secret, meaning that they present an ideal opportunity for passing unpopular measures. The second is that treaties are negotiated between countries and government negotiators have typically viewed private organizations within their own nations as entities which they have a duty to protect in the interests of aiding their own economy. There is thus a long history of private organizations and governments working together to negotiate international treaties.

For example, the pharma and film industries are largely responsible for the World Trade Organization’s TRIPs Agreement which regulates intellectual property. The original policy plan for TRIPs was drafted by industry in 1985 and implemented through coordinated action of industry and employers’ associations over a period of ten years.”⁴⁴ Similarly, the European Roundtable of Industrialists (ERT) an association of “around 50 chief executives and chairmen

⁴⁰ *Ibid.*

⁴¹ Including the study into Merck and the Gardasil vaccination which concluded that legislators viewed Merck’s activities as entirely normal and appropriate, with one legislator going as far as to say that no vaccination programme had ever been passed into law except on the initiative of pharmaceutical companies (*ibid.*).

⁴² Karen de Sa, Edwin Garcia & Sarah Yokubaitas “Sixty Percent of Laws approved during a Two-Year Period were Sponsored by Outside Interests”, *San Jose Mercury News* (10 July 2010)

<http://www.dailynews.com/20100710/sixty-percent-of-laws-approved-during-a-two-year-period-were-sponsored-by-outside-interests>.

⁴³ *Ibid.*

⁴⁴ Susan Sell and Aseem Prakash, “Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights” 2004, 48(1) *International Studies Quarterly*, 143.

of major multinational companies of European parentage” credits itself with consolidating the European Single Market and expanding the EU’s borders.⁴⁵

As on the national level, individual companies also attempt to participate informally in law-making. For example, German MEP Albert Dess recently put forward an amendment that would grant an exception from pollution rules to certain types of minibus. Dess had the misfortune to send his amendment to the European Parliament’s Environment Committee just two days before officials in the USA disclosed that Volkswagen was using sophisticated software to manipulate the results of pollution tests. When journalists took a closer look at Dess’s amendment, which had been submitted as a computer file they noted that the file source was given as ‘Volkswagen-Group’, indicating that Volkswagen was attempting to change the law to shield itself from the consequences of its manipulations being discovered. Although Dess refused to admit that the amendment originated with Volkswagen, he, like national legislators, claimed that it was standard practice for companies and special interest groups to send representatives suggestions for legislation and that he saw nothing wrong or unusual in that practice.⁴⁶ As on the national level, such tactics are also employed by non-profit organizations.⁴⁷

In order to begin to quantify the impact of these informal methods of participation, and attempt to understand the roles played by various types of organization, on supranational and international law-making, we put together a database of interactions between private organizations and the EU Commission and between private organizations and the United Nations.

Private Organizations and the Commission of the European Union

European laws originate with the Commission of the European Union, a group of individuals chosen by the European Council (i.e. the governments of the member States) and approved by the European Parliament. As the initiator of legislation, the Commission has more control over the content of that legislation than any other European body and, as such, it is a popular touchpoint for organizations seeking to influence the content of that law on an informal basis.

Our database captured meetings between outside organizations and 11 of the 28 EU Commissioners, namely:

- Andrus Ansip (responsible for the Single Digital Market)
- Valdis Dombrovskis (responsible for the Euro and Social Dialogue)
- Cecilia Malmstrom (responsible for Trade)
- Johannes Hahn (responsible for the European Neighbourhood and Enlargements Policy)
- Gunther H. Oettinger (responsible for the Digital Economy and Society)
- Jyrki Katainen (responsible for Jobs, Growth, Investment and Competitiveness)

⁴⁵ *ERT Highlights* (ERT) <http://ertdrupal.lin3.nucleus.be/system/files/uploads/2010%20October%20-%20ERT%20Highlights.pdf>

⁴⁶ Markus Becker, “Neue Abgasverordnung: VW unter Einflussnahmeverdacht in Brüssel” *Spiegel* (24 September 2015) <http://www.spiegel.de/wirtschaft/unternehmen/eu-abgas-verordnung-gesetzesidee-aus-dem-hause-vw-a-1054386.html>.

⁴⁷ See below.

- Maros Sefcovic (responsible for the Energy Union)
- Kristalina Georgieva (responsible for Budget and Human Resources)
- Federica Mogherini (responsible for Foreign Affairs)
- Frans Timmermans (responsible for Better Regulation, Interinstitutional Relations, Rule of Law and the Charter of Fundamental Rights)
- Jean-Claude Juncker (President of the Commission)

The study also captured all meetings held between organizations and members of the named Commissioners’ cabinets (i.e. the Commissioners’ assistants). All of the logged meetings took place between January 1 2015 and September 28 2015.

The total number of meetings that these 11 Commissioners held with outside organizations over this time period totalled 2091 meetings.

The meetings held by four Commissioners and their staff were selected for further analysis. These were: Ansip, Malmstrom, Mogherini, and Oettinger. Between them, these four Commissioners totalled 1015 meetings in the nine-month period of the study.

We categorized all of these meetings according to the type of organization that attended the meeting: public sector (mainly publicly-owned broadcast networks, eg. BBC); corporation (eg. Vodafone, Goldman Sachs); corporate syndicate (eg. European Express Association, American Chamber of Commerce) and associated agencies (eg. PR agencies); non-profit or grassroots association with little corporate involvement (eg. Association for the Blind, Association of Nordic Hunters); astro-turf groups (defined as organizations claiming to be independent, but in reality operating under a high level of corporate control through donations and/or board members); individual persons; trade unions; and developing country NGOs funded almost exclusively by corporations and developed country governments. There was a significant overlap between some of these organizations, especially between corporations, corporate syndicates and astro-turf groups, as many of the same corporations that met with the Commissioners were also members of corporate syndicates and sponsors of astro-turf groups that also met with the Commissioners.

Grassroots organizations were differentiated from corporate syndicates based on their membership and donation profile. Even if an organization pursued profit-making activities, it was still deemed to be a ‘grassroots organization’ if it was ultimately composed primarily of individual contributors, for example, the European Federation of Origin Wines, European Visual Artists, etc. Grassroots organizations were also differentiated from astro-turf groups primarily on the basis of their donation profile and their membership base. If an organization received a large proportion of its funding from large multinationals it was deemed to be an astro-turf group. For example, the European Policy Centre describes itself as an independent thinktank, but its members include nearly every Fortune 500 company, eg. BT, Johnson & Johnson, Statoil, Bain & Company, BASF, Boeing, Chevron, Dow, DuPont, ExxonMobil, GE, IKEA, Mitsubishi, Nestlé, Nokia, Philip Morris International, Sanofi, Vodafone, Weber Shandwick, as well as syndicates, such as the American Chamber of Commerce to the European Union, the Confederation of British Industry, the Confederation of Businessmen and Industrialists of Turkey, the Confederation of Danish Industry, the Confederation of European Community Cigarette Manufacturers, and the European Round Table of Industrialists (ERT).⁴⁸ Similarly, Bruegel describes itself as “a European thinktank [that is] independent and non-doctrinal [and that has the mission] to “improve the quality of economic policy with open and

⁴⁸ “List of Members”, European Policy Centre, http://www.epc.eu/members_list.php.

fact-based research, analysis and debate”, adding, “[W]e are committed to impartiality, openness and excellence”.⁴⁹ Bruegel’s members include: BBVA, Blackrock, Deutsche Bank, T-Mobile, E-bay, EDF, Enel, Euronext, Generali, Goldman Sachs, Google, HSBC, Huawei, Iberdrola, ING, MetLife, Microsoft, Moody’s, Morgan Stanley, Novartis, Pfizer, Prudential, Qualcomm, Shell, Societe Generale, Standard’s and Poor’s, Standard Chartered, Telefonica, Toyota, Tudor Funds, Unicredit Group, as well as the central banks of Luxembourg, France, England, Italy, Denmark, Poland and Sweden, and the European Bank for Reconstruction and Development and the European Investment Bank.⁵⁰ The story is similar at the Centre for Strategic and International Studies which received large donations from: Aramco, Bank of America, Chevron, ExxonMobil, Northrop Grunman, PhRMA, Statoil, Bechtel, Citigroup, ConocoPhillips, GE, Lockheed Martin, McAfee, Boeing, Airbus, Coca-Cola, Nikkei, Raytheon, Shell, Samsung, Merroll Lynch, Symantec, BAE Systems, BP, Canon, Deloitte, Mitsubishi, ebay, Halliburton, Occidental Petroleum, Proctor & Gamble, Alcoa, Barclays, Eli Lilly Honeywell and Honda to name but a few. Such membership profiles were typical of what were deemed to be astro-turf groups.

A small number of meetings were impossible to categorize, due to insufficient available information.

In total, the meetings of each Commissioner were categorized as follows:

Table 1

Meeting	Ansip	Mogherini	Malmstrom	Oettinger	Total Direct Meetings	Meeting Distribution
Astro-Turf	1	0	8	0	9	4.39%
Genuine Non-Profit / Grassroots	2	2	9	6	19	9.27%
Trade Unions	0	0	1	3	4	1.95%
Public Sector	2	0	3	6	11	5.37%
Corporations	23	1	8	62	94	45.85%
Corporate Syndicate	19	1	18	25	63	30.73%
Uncategorized	0	0	3	2	5	2.44%
Sum	47	4	50	104	205	100.00%

Direct Meetings with EU Commissioners by Category

⁴⁹ “Bruegel at a Glance”, Bruegel, www.bruegel.org/about/.

⁵⁰ “About Bruegel: Membership”, Bruegel, <http://bruegel.org/about/membership/>.

Table 2

Meeting	Ansip Cabinet	Mogherini Cabinet	Malmstrom Cabinet	Oettinger Cabinet	Total Cabinet Meetings	Meeting Distribution
Astro-Turf	7	7	8	2	24	2.96%
Genuine Non-Profit / Grassroots	4	19	13	6	42	5.19%
Trade Unions	2	0	4	2	8	0.99%
Public Sector	12	12	3	14	41	5.06%
Corporations	139	16	59	128	342	42.22%
Corporate Syndicate	96	17	111	112	336	41.48%
Individual	1	0	0	0	1	0.12%
Uncategorized	2	2	4	8	16	1.98%
Sum	263	73	202	272	810	100.00%

Meetings with the Cabinets of EU Commissioners by Category

In total there were 436 meetings with corporations and 299 meetings with corporate syndicates, accounting for 72% of all meetings. Adding in the 33 astro-turf meetings, these three categories together account for 75.6% of all meetings. Trade unions accounted for just 12 meetings and genuine grassroots movements, whether profit or non-profit, for 61 meetings, totalling 7% of all meetings. Even the meetings of Mogherini (the outlier here), show 55% of meetings with corporate interests and only 26% with grassroots movements.

Despite these negative findings, there are indications of a slightly more balanced approach on the part of the Commissioners than on the part of their cabinet members, as three out of the four Commissioners studied met with a greater proportion of grassroots organizations and a smaller proportion of astro-turf groups than did their cabinets.

Nevertheless, the overwhelming number of meetings were held with corporations or corporate syndicates and the question very much arose as to the impact these meetings were having on legislation. Although descriptions of the meetings between EU Commissioners and private organizations are extremely laconic, usually comprising only one or two words, there is reason to believe they have.

Net Neutrality

One of the most significant pieces of legislation passed at the European level in 2015 was the Telecoms Single Market Regulation (EU) 2015/2120 on net neutrality. Although it was only adopted by the EU Parliament in October 2015, agreement on this legislation was reached in June 2015 – at the same time meetings on the topic between EU Commissioners and private organizations rapidly dwindled.

According to the new rules, net neutrality, that is, the idea that internet service providers should treat all online content equally, neither slowing down specific content nor allowing users to

pay for preferential treatment⁵¹ is generally guaranteed, but there are a number of exceptions to this rule that were desired by the telecommunications industry. In particular, providers can offer ‘special services’ with a higher quality of internet speed. It is generally agreed that the exceptions are vaguely formulated⁵² to the point where there seems to be severe disagreement on what they actually comprise. While European Union officials claim that ‘special services’ may only consist of emergency calls, health services and traffic directing measures,⁵³ telecoms companies see things differently. Deutsche Telekom CEO Timotheus Hottges claims that the exceptions for special services will allow his company to develop ‘innovative internet services’ that have a higher level of quality than current services, including around: video-conferencing, online-gaming and Tele-medicine that will be charged at higher rates, while services like delivering e-mail may be slowed down.⁵⁴ Vodafone Deutschland has voiced its agreement with Hottges, adding that in their view Voice Over IP and Internet TV also qualify as special services where extra fees for connectivity can be imposed.⁵⁵ Under the new rules, service providers are also explicitly allowed to “predict periods of peak demand and introduce “reasonable traffic management measures”, and to group some services into traffic “classes”, which can be sped up or slowed down at will”⁵⁶. This means that service providers will need to be able to distinguish to what end someone is using the internet.⁵⁷

This regulation was presented as a “compromise between the interests of business and society” by Oettinger, one of the Commissioners in charge.⁵⁸ Hottges of Deutsche Telekom also opined on the theme of balancing various interests. According to Hottges:

“politics has a difficult job in our society, because it has to balance various interests. In regards to net neutrality it had to balance the interests of ‘net activists’ who see the internet as a public good against telecommunications companies who have to recoup the billions of investment that they have made into broadband infrastructure.”

Hottges claimed that the politicians heard lobbyists from both sides, over petitions, traditional media and social media.⁵⁹

However, he failed to mention that his own organization’s ability to detail which services it would prioritize the day after the law was passed,⁶⁰ may have had something to do with the nine private meetings it held on the topic with Commissioners Ansip and Oettinger and their cabinets. And while Deutsche Telekom may have been unusually active, it was not alone.

Net neutrality and related laws were primarily the responsibility of Commissioners Ansip and Oettinger. In descriptions of Ansip’s cabinet meetings topics related to net neutrality were

⁵¹ Alex Hern, “EU Net Neutrality Laws Fatally Undermined by Loopholes, Critics Say”, *Guardian* (27 October 2015), <http://www.theguardian.com/technology/2015/oct/27/eu-net-neutrality-laws-fatally-undermined-by-loopholes-critics-say>.

⁵² “Netzneutralität: Europaparlament beschließt umstrittene Internet-Regeln”, *Spiegel* (27 October 2015) (<http://www.spiegel.de/netzwelt/netzpolitik/netzneutralitaet-europaparlament-beschliesst-gesetz-a-1059768.html>); Fabien Reinbold, “Netzneutralität: Telekom plant Internet-Maut”, *Spiegel* (29 October 2015) (<http://www.spiegel.de/netzwelt/netzpolitik/netzneutralitaet-telekom-kuendigt-internet-maut-an-a-1060196.html>).

⁵³ *Ibid.*

⁵⁴ Timotheus Hottges, “Netzneutralität: Konsensfindung im Minenfeld”, Deutsche Telekom (28 October 2015) (<http://www.telekom.com/medien/managementzursache/291708>).

⁵⁵ Reinbold, note 52.

⁵⁶ Hern, note 51; Telecoms Single Market Regulation (EU) 2015/2120, para. 9.

⁵⁷ “Netzneutralität: Europaparlament beschließt umstrittene Internet-Regeln”, note 52.

⁵⁸ *Ibid.*

⁵⁹ Hottges, note 54.

⁶⁰ Reinbold, note 52.

discussed with 31 organizations in total.⁶¹ The records for seven mention ‘net neutrality’; 8 mention ‘telecom regulation’; 11 mention ‘data roaming’ or ‘TSM (Telecom Single Market)’; 5 mention ‘broadband investment’; others mention related matters, such as ‘innovative digital TV services’. At times, a meeting covered more than one topic, eg. a meeting with Elisa Oyj (a Finnish telecoms company) covered net neutrality, roaming and telecom rules. These meetings were held exclusively with corporations (23 meetings) or corporate syndicates (8 meetings).⁶² Ansip held personal meetings with 10 organizations on these topics, 9 with corporations and 1 with a corporate syndicate. Oettinger’s cabinet held meetings with 21 organizations on these topics, four of which were with Deutsche Telekom (which also met with Ansip’s cabinet). Ten of these meetings were with corporations, and 11 with corporate syndicates.⁶³ Oettinger himself met with 16 organizations, 15 of which were corporations and 1 which was a corporate syndicate. This included two meetings each with Deutsche Telekom, Telefonica, Orange and Vodafone Belgium.

The few meetings that each Commissioner held with grassroots organizations over this time period covered topics that were completely unrelated to the issue of net neutrality,⁶⁴ making the claim that all sides were heard and that different interests were taken into account difficult to comprehend. Even if the Commissioners were aware of other views, by learning of them from newspapers or social media, the persons and organizations who held such views were not given the opportunity to express those views personally. In the ‘balance’ between business and society, the Commissioners agreed to 78 meetings with corporations and corporate syndicates, but to 0 meetings with grassroots groups. It is difficult to see how this could have failed to have some affect their decision-making, especially when the corporations involved prove themselves capable of taking immediate action to capture new markets based on the laws passed.

This is even more the case, when one considers that the efforts to pass EU Regulation 2015/2120 started in earnest after some of the corporations involved in meetings were punished for behaviours (blocking Voice-Over IP and zero-rating content), that have now been legalized under the new rules. Other brushes with the law include long-standing accusations that many internet service providers intentionally degrade Skype conversations,⁶⁵ as well as accusations that BT’s ‘Content Connect’ programme violated net neutrality.⁶⁶ These punishments were vigorously protested by several of the corporations that met with the Commissioners in the run-up to net neutrality reform, stating “it is not technologically efficient or beneficial for consumers if all traffic is treated equally”.⁶⁷ The syndicates also warned that unless they were allowed to engage in ‘positive price discrimination’ that they would be unable to ‘innovate’,

⁶¹ Each meeting with an organization is counted as one meeting. Thus, if three organisations met with the Commissioner during the same meeting this was counted as 3 meetings.

⁶² Meetings were held with: AT&T; Cisco Systems; Fédération Française des Télécoms; Rewheel; Elisa Oyj; Ericsson; Allegro Group HU Kft.;Tele 2AB; Fastweb Spa; Nokia; MVNO Europe; Orange; Telefonica, S.A.; Deutsche Telekom, among others.

⁶³ Including: Liberty Global; FFFH Council Europe, BT, Deutsche Telekom; European Competitive Telecommunications Association, Orange, Nokia, etc.

⁶⁴ E.g. VAT collection.

⁶⁵ “EU Regulators say Telecoms Block Skype” (16 March 2012) Euractiv,

<http://www.euractiv.com/infosociety/eu-regulators-telecoms-block-sky-news-511541>.

⁶⁶ Duncan Geere, “BT Rejects Accusations of Net Neutrality Breach. Sort Of”, *Wired* (4 January 2011), <http://www.wired.com/2011/01/bt-rejects-accusations-of-net-neutrality-breach-sort-of/>.

⁶⁷ “Dutch Regulator Fines KPN, Vodafone over Net Neutrality Breaches” Mobile World Live (27 January 2015) <http://www.mobileworldlive.com/featured-content/home-banner/dutch-regulator-fines-kpn-vodafone-net-neutrality-breaches/>.

language frequently used by the Commission and other EU bodies in defending the regulation.⁶⁸

The case is thus very similar to Volkswagen’s efforts to have emissions laws changed discussed earlier, the only difference lying in the success of the telecoms industry to legalize their own behaviour in a timely fashion, as opposed to Volkswagen’s failure.

TTIP and TiSA

Another common theme in the EU Commission meetings were the TTIP (Transatlantic Trade and Investment Partnership) and TiSA (Trade in Services Agreement) negotiations, between the EU and the US.⁶⁹ Like many international treaties, these negotiations have been conducted in secret. The analysis of the effects of informal participation on these negotiations must therefore be conducted on the basis of leaked drafts.

What is known is that a large number of meetings between EU Commissioners and private organizations have been held on these topics, primarily with Commissioner Malmstrom, who is responsible for trade. In Malmstrom’s cabinet meetings, TTIP was mentioned 56 times, and TiSA 3 times. These meetings covered a total of 77 organizations, 9 of which were corporations, 39 of which were corporate syndicates, 3 of which were genuine grassroots associations, 4 of which were astro-turf groups and 2 of which were unions.⁷⁰ The term ‘trade negotiations’ was mentioned 11 times, 8 times in meetings with corporate syndicates, once with a corporation and once with a grassroots organization. In Malmstrom’s personal meetings, the term ‘TTIP’ was mentioned 27 times, 5 times with corporations, 11 times with corporate syndicates, 4 times with grassroots groups, 5 times with astro-turf groups, once with a trade union and once with an uncategorizable group.⁷¹ Of the 94 meetings held in total, 87% were held with corporations, corporate syndicates, and astro-turf groups and 11.7% were held with grassroots groups and trade unions. There was, in other words, a heavy bias towards meeting with corporate groups, a bias that is reflected in what we know of the TTIP and TiSA texts.

TiSA, for example, covers much the same ground as the EU’s new rules on net neutrality, and reduces the ability of States to prevent foreign intelligence agencies from accessing their citizens’ data, e.g. through laws that demand local data hosting.⁷²

TTIP, like similar trade deals including NAFTA and the WTO covered agreements, essentially ensures that internationally active companies will not be tied to or affected by certain provisions of national law.

Art. 4 (d) of the draft prohibits maximum limits on the level of foreign investment or foreign shareholding in an enterprise, while Art. 4 (e) prohibits ‘measures which restrict or require’ that foreign investment be funnelled through ‘specific types of legal entity or joint ventures through which an investor of the other Party may perform an economic activity’.⁷³

⁶⁸ *Ibid.*

⁶⁹ And in the case of TiSA, several other countries.

⁷⁰ Meetings included: Chamber of Commerce of the United States of America, Microsoft, BMW, Daimler, TheCityUK, Bruegel, the European Policy Centre, The European Federation of Pharmaceutical Industries and Associations and (multiple times) the European Roundtable of Industrialists.

⁷¹ Meetings included: European Roundtable of Industrialists, Bruegel, Friends of Europe, Goldman Sachs and Commerzbank.

⁷² Jeremy Malcolm, “TISA: Yet Another Leaked Treaty You’ve Never Heard of makes Secret Rules for the Internet” (27 May 2015) Electronic Frontier Foundation, <https://www.eff.org/deeplinks/2015/05/tisa-yet-another-leaked-treaty-youve-never-heard-makes-secret-rules-internet>

⁷³ Available at: <http://keionline.org/sites/default/files/eu-kommission-position-in-den.pdf>.

Art. 13 (1) stipulates that foreign investors should receive national treatment in regards to compensation for losses suffered as a result of “war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot” while (2) obliges States to provide compensation in the event of an investment being requisitioned by the armed forces of a territory or destroyed in the course of one of the situations mentioned above, provided said destruction proves to have been unnecessary, with the losses of the investment accruing from the date of destruction or requisitioning to the date that payment is made.

Regarding expropriation, Art. 14 enshrines the Hull formula in regards to the amount of compensation to be paid by a State to an investor, thus closing off a long-running dispute between two legal theories (the Hull formula and the Calvo Doctrine) on the level of compensation to be paid in such situations and the place of foreign investors vis-à-vis naturalized investors. This is significant, as it provides loopholes whereby naturalized investors can also assume the benefits of a foreign investor. For example, in the Yukos case before the Permanent Court of Arbitration, the plaintiffs were only able to access certain protective provisions because they had funnelled their business through offshore organizations outside of Russia.⁷⁴

Arts. 24-28 allow the free movement of senior employees of corporations and graduate trainees for temporary work purposes among all countries party to the agreement, while not permitting free movement for anyone else, thus privileging movement in the interests of corporations above any other interests.

Art. 51 of TTIP mandates increased liberalization of the financial sector, while Art. 52 mandates that parties may regulate for “(a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; (b) ensuring the integrity and stability of a Party's financial system”, while explicitly stating in para. 2 that “[t]hese measures shall not be more burdensome than necessary to achieve their aim.” While other protective measures are not specifically banned, they are also not provided for in the text of the treaty. Para. 3 essentially closes off the possibility of cracking down on tax evasion, reading: “[N]othing in this Agreement shall be construed to require a Party to disclose information relating to the affairs and accounts of individual consumers or any confidential or proprietary information in the possession of public entities”.⁷⁵

The benefit of these provisions, or any other provisions contained in the TTIP draft, for anyone except corporations or the extremely wealthy is non-existent. Considering that 87% of consultations on the topic were held with corporations and corporate syndicates, it should not be surprising that their interests have been reflected so faithfully in the final text. This is especially the case, as no other parties were permitted to gain knowledge of the provisions under debate, thus impinging on their abilities to develop a position vis-à-vis those provisions. Indeed, it is concerning that much of the official justification for the secrecy of the TTIP negotiations is the desire not to give away the negotiating strategy to the other State parties, but that many of the corporations and syndicates attending meetings with the EU Commissioners, are, in fact, incorporated in those foreign parties. The informal participation in these matters is thus effectively encircled by a narrow group of interests that disproportionately participate via these channels.

⁷⁴ See eg. PCA Case No. AA 227, *Yukos Universal Ltd. (Isle of Man) and the Russian Federation*, Final Award (18 July 2014).

⁷⁵ Draft text available at: <http://keionline.org/sites/default/files/eu-kommission-position-in-den.pdf>.

Private Organizations and the United Nations

The study into private organizations and the work of the United Nations revealed a slightly different but still significant pattern. Organizations wishing to work with the United Nations agencies must be accredited to ECOSOC, the UN’s Economic and Social Council, where they are divided into three categories: general, special and roster. This study looked at general organizations, as these organizations have the greatest participation rights and therefore the best chances of influencing UN agencies. There are 144 organizations accredited as general organizations through ECOSOC. Fifty of those organizations were investigated more closely in an attempt to categorize them according to their area of interest. The results were as follows:

Table 3

Organization Type	# in Sample	Distribution
Genuine non-profit or grassroots organizations	23	46%
Public organizations	4	8%
Corporate syndicate	1	2%
Astroturf groups	4	8%
Organizations working in the developing world but sponsored completely by first world governments	2	4%
Organizations that were combination of developed country governments and astro-turf groups working in tandem	7	14%
Uncategorizable	9	18%

Sample distribution of ECOSOC members

Discounting the uncategorizable groups, genuine non-profits and grassroots groups account for 56% of all organizations accredited to ECOSOC. However, corporate syndicates, astro-turf, and astro-turf/developed country government combination groups account for 29% of all accredited organizations.

There is reason to believe that such groups seek to influence the United Nations in their own interests. One of the organizations studied was CIFA, the Convention of Independent Financial Advisors. CIFA’s board members are drawn almost exclusively from investment and private banking backgrounds and the organization focuses its activities at the UN on the “excessive regulation and taxation for investors”. According to CIFA’s UN policy:

“Our objective is to define social responsibility in a way that has meaning and relevance for those who are managing financial, and hence social, institutions. In no way do we attempt to dispute accepted business objectives...it is a significant part of our responsibility to promote a responsibility within our clients to be able to contemplate and achieve a lifestyle independent from the support offered by social institutions... This is partly due to our requirement that our members find means to assist their clients in achieving financial security, and partly from the recognition that it is not necessarily the duty of governments to provide for its citizens in every aspect of financial well being.”⁷⁶

CIFA’s activities include “promoting the acceptance of the role of business” in developing countries; and seconding “skilled people” to national and international organisations. They aim to combat “attacks on free enterprise” by providing books and teaching materials for schools

⁷⁶ “UN Activities: Principles”, CIFA <http://cifango.org/humanitarian.php>.

and universities and by top management speeches and articles on free enterprise, profits and social responsibility. They also aim to provide part-time teachers, to assist in teacher training, to conduct seminars and to “fund development of teaching material to be used in conjunction with the development of technology.”⁷⁷

CIFA was able to obtain a partnership with UNITAR (the UN Institute for Training and Research) to run its courses on ethics and finance in 2011. In the official UNITAR press release CIFA is described as a foundation “created at the initiative of a group of financial entrepreneurs to face the increasing number of regulations and the growing complexity of markets. Its mission is to strengthen the role of independent financial advisors (IFAs) at the international level in order to better defend the interests of investors.”⁷⁸ This explicit bias of CIFA, however, seems to have been no bar to involving the organization in educational activities.

CIFA is also pursuing the adoption of a Charter of Investor Rights, which it has already drafted and which is hoped to have adopted by the UN General Assembly, a hope perhaps not entirely in vain, as the General Assembly awarded CIFA’s chair Jean-Pierre Deserens a certificate honouring his work for the rights of investors at its 66th session.⁷⁹

The Charter covers similar ground to TTIP. Among other things, it is dedicated to the ‘fundamental and inalienable rights of the investor’ and the preservation of private property, and states somewhat disconcertingly, that it “*attempts* to respect the legislation, traditions and customs of all the countries which ratify it.”⁸⁰

It absolutely forbids the expropriation or confiscation of private property⁸¹ and guarantees that investors should be able to dispose of their assets without any restrictions whatsoever.⁸² The Charter also guarantees protection for the investor’s private sphere.⁸³

Activities such as these which are aimed not at protecting the most vulnerable members of society who may be excluded or marginalized by formal decision-making structures, but rather serve to protect those already advantaged by these societal structures, have been enabled by instituting the informal methods of participation at international organizations.

The UN Guiding Principles Reporting Framework presents another example of this informal participation at play. The Reporting Framework was developed through the Human Rights Reporting and Assurance Frameworks Initiative (RAFI) under the auspices of John Ruggie. It is described on the RAFI webpage as having been drafted through “an open, global, consultative process involving representatives from over 200 companies, investor groups, civil society organizations, governments, assurance providers, lawyers and other expert organizations from all regions of the world.”⁸⁴

Despite this allegedly open and consultative process, the Reporting Framework is particularly toothless even by UN standards. It consists entirely of 3 pages of open-ended questions, which companies agree to answer, the most demanding of which is: “How does the company enable effective remedy if people are harmed by its actions or decisions in relation to a salient human

⁷⁷ “UN Activities: Areas of Concern”, CIFA <http://cifango.org/humanitarian.php?id=22>.

⁷⁸ “Ground-Breaking Collaboration on ‘Ethics and Finance’ Launched by UNITAR and CIFA”, UNITAR, <https://www.unitar.org/ground-breaking-collaboration-ethics-and-finance-launched-unitar-and-cifa>.

⁷⁹ The Certificate is available at: <http://cifango.org/images/uploads/UN.pdf>.

⁸⁰ Art. 1, CIFA, Charter of Investor’s Rights, available at: <http://cifango.org/page.php?id=1> (emphasis added).

⁸¹ Art.4, CIFA, Charter of Investor’s Rights.

⁸² Art. 5, CIFA, Charter of Investor’s Rights.

⁸³ Art. 6, CIFA, Charter of Investor’s Rights.

⁸⁴ “About Us” UN Guiding Principles Reporting Framework, <http://www.ungpreporting.org/about-us/#sthash.3Nt0JTqm.dpuf>.

rights issue?” whereby the company is given the opportunity to define its own salient human rights issues.⁸⁵ The entire process marginalizes the existence of courts and legal regimes that are more appropriate fora for dealing with human rights violations than internal company processes.

Once again, the consultative process itself seems to deliver indications for why the Guidelines took the ultimate form that they did.

Table 4

Organisation Type	New York	London
Public representatives / organisations	1	2
Corporations	10	10
Corporate syndicates	2	2
Genuine non-profit	1	4
Astroturf groups	4	-
Individual	1	1
Trade union	1	-
Uncategorizable Organizations	-	1

Consultation meetings for the UN Guiding Principles Reporting Framework⁸⁶

Corporate interests outnumbered non-corporate interests by a factor of more than 2:1, even at these consultations which were supposed to serve as ‘multistakeholder’ meetings. Although RIFA also held a meeting focused more on civil society in Indonesia, which was more difficult to quantify, that meeting also included some astro-turf groups and businesses among participants.⁸⁷

In other words, the UN Guiding Principles Reporting Framework was at least partially drafted by the very companies whom it proposes to regulate. It is no great surprise that its rules are thus far from onerous.

Influencing legislation via informal participation methods is a wasteful and resource-intensive project. In fact, organizations may over-estimate their own ability to impact legislation this way.⁸⁸ However, the very fact that informal participation is so resource-intensive automatically privileges those groups who are in possession of the most resources: corporations, corporate syndicates and corporate-run think tanks. As we have seen, these organizations can afford to continually re-engage with decision-makers and to provide them with ready-made laws, position papers and ‘studies’ which they have financed in their own interests. Thus, when informal consultation processes exist, these interests tend to dominate and drown out all other

⁸⁵ UN Guiding Principles Reporting Framework, http://www.ungpreporting.org/wp-content/uploads/2015/03/UNGPRReportingFramework_Feb2015.pdf.

⁸⁶ “Third Round of Expert Multistakeholder Consultations”, Human Rights Reporting and Assurance Frameworks Initiative, (19 November 2014) http://business-humanrights.org/sites/default/files/GPRF_LondonconsultationNov2014report.pdf

⁸⁷ “Consultation with Civil Society Organizations”, Human Rights Reporting and Assurance Frameworks Initiative, (5 November 2014) http://business-humanrights.org/sites/default/files/GPRF_JakartaCSOconsultationNov2014.pdf.

⁸⁸ See ALEC’s estimate of a 20% success rate in having legislation passed compared to conclusions of a 9% success rate by an independent study, above.

considerations. Thus, informal participation methods, which were designed to benefit marginalized and vulnerable groups have been nearly completely co-opted in the interest of the most powerful members of society.

The question is thus how this can possibly be combatted.

PART III: Stopping the Democratic Enclosure

One of the key issues that emerged in studying informal participation was that law-makers did not perceive themselves as having the time or expertise to research issues on their own and sought to close this gap by relying on the services of private organizations.⁸⁹ This perception persisted even when information was available through public bodies.⁹⁰

This held true on the European level as well, where each Commissioner’s assistants were devoted to meeting with private organizations instead of conducting their own research. These assistants rarely met with universities or other publicly-funded research groups, choosing to rely on privately-funded think-tanks instead to provide them with information. When European bodies commission their own studies, they tend to be carried out by organizations that have obvious conflicts of interest with the point at hand. For example, the European Union tasked the Centre for Economic Policy Research with investigating the probable effects of TTIP on the European economy. Its final report, issued in March 2013⁹¹ predicts glowing rewards to the European economy from TTIP, perhaps not surprising from an organization which “relies on corporate donors for critical institutional support”⁹² and whose members include: Alfa Bank; Citigroup; Commonwealth Opportunity Capital; Credit Suisse; Grupo Santander; Intesa San Paolo; Itau Unibanco S.A.; JP Morgan; La Caixa; Lloyds Banking Group; Moore Europe Capital Management; Sparebank 1; UBS; UniCredit and Wadhvani Asset Management.⁹³ TTIP, of course, foresees, significant further liberalization of the financial sector as well as robust protection for investors. Yet, for some reason, the EU Commission considered that an organization run by the corporations that stand to benefit most from these provisions would be the ideal venue for an impartial study on the treaty’s impact. Similarly, the EU’s BEREC study on net neutrality, conducted by telecoms regulators, limited itself to analyzing the impact of various internet offers on consumer behaviour, without, at any point, considering the political or social implications of net neutrality.⁹⁴

In order to combat these practices, at the very least, law-makers need to stop accepting ‘studies’ conducted by entities that exhibit obvious conflicts of interest and replace these with

⁸⁹ Mello, Abiola and Colgrove, note 36; Ailsa Chang, “When Lobbyists Literally Write the Bill” *NPR* (11 November 2013) <http://www.npr.org/sections/itsallpolitics/2013/11/11/243973620/when-lobbyists-literally-write-the-bill>; de Sa, Garcia & Yokubaitas, note 42; Anthony Madonna & Ian Ostrander, “If Congress Keeps Cutting its Staff, Who is Writing Your Laws? You Won’t Like the Answer” *Washington Post* (20 August 2015), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/08/20/if-congress-keeps-cutting-its-staff-who-is-writing-your-laws-you-wont-like-the-answer/>

⁹⁰ *Ibid.*

⁹¹ “Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment”, Centre for Economic Policy Research (March 2013), http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf.

⁹² “Corporate Membership”, Centre for Economic Policy Research, <http://cepr.org/content/corporate-membership>.

⁹³ “Supporters of CEPR”, Centre for Economic Policy Research, <http://cepr.org/content/supporters-cepr>.

⁹⁴ “How do Consumers Value Net Neutrality in an Evolving Internet Marketplace? A Report into Ecosystem Dynamics and Demand-Side Forces”, Body of European Regulators for Electronic Communication, BoR 15(65) (June 2015), file:///C:/Users/rfwor_000/Downloads/5024-berec-report-on-how-consumers-value-net_0.pdf.

independently verified studies, preferably from multiple sources. While preventing review of such documents in private would, of course, be impossible to prohibit, it should be possible to introduce regulations whereby studies and facts provided by parties with a conflict of interest cannot be used in official policy justifications.

It is difficult to prevent meetings between private organizations and law-makers under the current system, as most legal systems protect the right to form associations, as well as the right to petition law-makers. However, transparency regulations could be enhanced by requiring all transcripts of meetings between private organizations and public representatives to be published in full online, so that the position of such private organizations and the extent of cooperation between them and representatives is clear to all. While this does not preclude the possibility of off-the-record meetings, it does make the process of attempting to alter the law in one’s own interests a more burdensome task.

A final possibility would be to strengthen the requirements on the participation of private organizations as they currently exist at the UN and apply these to other decision-making bodies. Organizations accredited to the UN must submit a report on their activities every four years.⁹⁵ The main purpose of the report is to ensure that NGOs are carrying out activities “to support the development aims of the Economic and Social Council (ECOSOC) and the United Nations at large.” In particular, the report must detail every contribution it has made to “meetings and outcome documents or reports; oral and written statements; proposal of agenda items; and organization of parallel NGO meetings or side events”. The purpose is to determine whether the organization’s contribution has been sufficient for it to retain its status. In applying for accreditation organizations are also required to provide details on their members, as well as income (including sources) and expenditure. There are also restrictions on the manner in which organizations can participate at the UN with limits on the length and number of papers that an organization may circulate.

It would be possible to strengthen these requirements by setting thresholds on the type of funding that an accredited organization may acquire. For example, one could stipulate that an accredited organization may not receive more than 30% of its funding from for-profit enterprise or that an accredited organization may not receive donations above a certain threshold. Applying such regulations would quickly level the playing field between grassroots organizations and corporate interests. It would be possible to extend these regulations as well as the need for accreditation to national legislatures and the European Union, alongside a judicial review mechanism.

PART IV: Conclusions

Possibilities for informal participation in decision-making were designed to give citizens, particularly under-represented and marginalized citizens, an opportunity to affect policy between elections. Unfortunately, the system of informal participation now serves only to cement the interests of those best able to dominate the playing-field, as law-givers have come to rely on private organizations to provide them with draft laws and policy information. This automatically privileges those organizations with the necessary resources to devote to such tasks. In particular, it privileges private profit-oriented organizations who are able to form robust, sophisticated co-operative alliances for the sake of pushing through their preferred legislation. Allowing these organizations to participate on an informal basis essentially alters the forum in which political decisions are made, moving them to a private arena in which

⁹⁵ The requirement only applies to special and general NGOs.

decisions are made by few actors and then pushed through via a highly coordinated expenditure of resources. The legislative process of entire nations and even international bodies can be essentially hijacked through these means provided that the available resources and coordination are sufficient. This means that a few very large corporations have a disproportionate effect on legislative activity that persists at the international level. Revitalizing democracy and bringing power back to the majority of people, will require strong regulation on these informal methods of influence that pushes debate and decision-making back to a public forum.