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***Editor's Note.***

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*Other articles in this edition are free standing.*

# Organised business interests: lessons from the EU constitutional process

by Nieves Pérez-Solórzano Borragán\*

*This paper seeks to make a contribution to the current debate on the reform of the EU by shifting the analysis away from institutional reform, and investigating the challenges and opportunities that the Convention process and the Draft Constitution offer organised interests in Europe. Organised interests participated in the Convention as observers while a Forum was set up to allow organised civil society to keep track of the proceedings and to provide input into the debate. In this context of unprecedented openness and participation, this paper examines the participation of business interest associations (BIAs) in the Convention as contributors to a more participatory model of democracy. At the same time, this paper claims that art. 46 on participatory democracy transforms the EU arena for interest intermediation. The analysis will be informed by empirical evidence offered by the contributions that EU business organisations have made to the Convention proceedings and their assessment of the final constitutional text.*

## Introduction

The 2001 Laeken Declaration recognises citizens demands for “good governance” understood as “opening up fresh opportunities, not imposing further red tape” and “for a clear, open, effective, democratically controlled Community”.<sup>1</sup> Between February 2002 and June 2003, the Convention for the Reform of the European Union (EU) drafted a constitutional text aimed at bringing citizens closer to the European design and European Institutions; organising politics and the European political area in an enlarged Union; and developing the Union into a stabilising factor and a model in the new world order. As argued by the European Round Table of Industrialists (ERT) “European business regards the Convention as a promising route towards remedying deficiencies in the current system of EU governance, thus strengthening the basis for Europe’s competitiveness”.<sup>2</sup>

Traditionally, organised business interests have been involved in history-making decisions spanning throughout the history of European integration. Historically, the business sector has dominated interest representation at the EU level and “remain the best mobilised of all ‘outside interests’”.<sup>3</sup> Business interests participated in the Convention as observers while they outlined their priorities and proposals for the future of the EU through the Forum website and their own web pages. This paper investigates the challenges and opportunities that the Convention process and the new article 46 on participatory democracy offer organised business interests in Europe. This hypothesis will be tested against the empirical evidence derived from the contributions of the main EU business associations to the Convention proceedings and their assessment of the final constitutional text.

The analysis that follows is structured into three sections:

An assessment of the key priorities and proposals outlined by the main EU business associations (BIAs), namely the American Chamber of Commerce (AmCham) ERT (European Round Table of Industrialists), EUROCHAMBRES (Association of European Chambers of Commerce and Industry), EUROCOMMERCE (European Federation of Retailing and Distribution), UEAPME (European Association of Craft, Small and Medium-Sized Enterprises) and UNICE (Union of Industrial Employers’ Confederations of Europe)<sup>4</sup> in view of the reform process undertaken by the Convention.

A selective analysis of the BIAs’ key contributions to the draft Constitution.

Some reflections on the challenges and opportunities for business interest in the post-Convention environment.

## EU business associations and the convention

The Convention process offered BIAs the possibility of expressing opinions and providing suggestions on wide-ranging issues regarding European Integration. This broad collection of issues affected the strategies undertaken by business organisations which had to depart from the ordinary approaches to lobbying and consulting with EU institution on narrowly based policy issues. This section of the paper, assesses the priorities and suggestions to the draft constitution presented by business organisations. This analysis will be informed by the extent to which the debate captured the attention of organised business interests and their ability to produce a coordinated response. As Wallace argues “the pat-

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1. European Council, Laeken Declaration on the Future of the European Union, Annex I to the Presidency Conclusions, Laeken, 14 and 15 December 2001, SN 300/1/01 REV 1  
2. ERT, European Governance for Greater Competitiveness, November 2002, p. 2.  
3. Greenwood, Justin, Inside EU Business Associations, Basingstoke: Palgrave, 2002, p. 22.  
4. UNICE is part and parcel of the consultation arrangements existing at the EU level, namely the Economic and Social Committee (ESC), the Standing Committee on Employment (SCE), Tripartite Conferences, the Social Dialogue meetings with the Troika of Presidencies and the Macroeconomic Dialogue, that allow for the participation of social partners in collective bargaining, whilst displaying a more cohesive structure. EUROCHAMBRES and EUROCOMMERCE have a secondary status and thus not always included in existing consultative procedures.

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terns of participation and attempts to influence policy are characterised more by competition among the varying interest than by successful collusion".<sup>5</sup>

Business interests were represented in the Convention proceedings by the (former) President of UNICE, George Jacobs who participated as an observer contributing to plenary sessions and working groups<sup>6</sup>. The key business priorities for the future of the EU included:

Liberty, democracy, respect for human rights, diversity, fundamental freedoms, rule of law and social cohesion should remain the basis for further European integration.

The Convention must strengthen the EU institutions while clarifying values and objectives, general competences, decision-making procedures and division of power, with the aim to create a rapid, foreseeable, transparent decision-making procedures that guarantee democratic participation. In view of the ERT, a growing lack of "unity of purpose" at EU level and slow decision-making in areas crucial to business negatively affect the competitiveness of companies operating in Europe".<sup>7</sup>

The EU should deliver a business friendly environment by furthering economic growth, social progress, high level of employment, and a balanced and sustainable development based on market economies.<sup>8</sup>

The principle of participative democracy is a keystone of European integration. Thus a targeted, systematic, structured and representative system of consultation that takes account of the new socio-economic components of Europe should be put in place. The Convention should communicate and raise the awareness of citizens and businesses of the objectives that it is pursuing, while fostering dialogue with civil society.

BIAs offered the following proposals for the implementation of the priorities outlined above:

### *Efficient and Transparent Decision-Making Process.*

To this end, the EU should develop a more reliable and flexible legal and administrative framework. UNICE advised the EU to focus on those core tasks that could be best resolved at Community level. Regarding the distribution of

competencies, BIAs called for further respect for the principles of subsidiarity and proportionality. UNICE proposed the creation of an independent body entrusted with the task of reviewing the observance of the subsidiarity principle.<sup>9</sup> Along a similar line of argument the ERT suggested the definition of an independent subsidiarity test to be applied "quickly and early in the decision-making process".<sup>10</sup> UNICE highlighted the dual nature of the subsidiarity principle. Subsidiarity has a vertical (territorial) and a horizontal (functional) dimension. Hence, it should not be assessed only in the context of the distribution of competencies amongst levels of government, but also in the context of the distribution of competencies amongst actors with specific expertise.<sup>11</sup> EUROCHAMBRES' proposal, however, focused on the vertical character of subsidiarity while highlighting the impact of policy implementation on aspects of diversity.<sup>12</sup>

BIAs supported an independent and strong Commission able to retain exclusive right of initiative for legal proposals while reinforcing its role in monitoring the implementation of EU legislation. Additionally, the Commission should implement more effective and transparent administrative procedures that ensure preservation of the rights of companies. Similarly, BIAs proposed a more efficient distribution of competencies between the European Council and the Council of Ministers and an extension of qualified majority voting (QMV) to all areas relevant to cross-border business in Europe as well as to external economic relations of the Union. Regarding the European Parliament (EP), the ERT acknowledged "the EP's own complicated decision-making procedures should be simplified and made more transparent".<sup>13</sup> Along this line of argument the ERT demanded closer links between MEPs and their constituency while opposing any institutional initiative aimed at increasing national parliaments' involvement in European economic affairs. While acknowledging the role of the European Economic and Social Committee (EESC) as the forum for civil dialogue, UNICE called for a clear distinction between civil dialogue and social dialogue. The latter being an autonomous process between the social partners and that takes place outside the EESC.<sup>14</sup>

5. Wallace, H. and Young A.R., *Participation and Policy-Making in the European Union* Oxford: Clarendon Press, 1997, p.13.

6. Mr Jacobs addressed the Convention in five occasions: 4 April 2002, 24 June 2002, 6 February 2003, 17 March 2003, and 15 May 2003.

7. ERT, *European Governance for Greater Competitiveness*, p. 2.

8. UNICE, UNICE Position on EU Convention, Brussels, 17 June 2002, p. 1.

9. UNICE, UNICE Position on EU Convention, p. 2.

10. ERT, *European Governance for Greater Competitiveness*, p. 6.

11. UNICE, UNICE Position on EU Convention, p. 3.

12. EUROCHAMBRES, *European Convention on the Future of Europe. Contribution of Eurochambres, June 2002* /final Final version ms. p. 12.

13. ERT, *European Governance for Greater Competitiveness*, p. 6.

14. UNICE, UNICE Position on EU Convention, p. 6.

*A Business Friendly Environment. BIAs proposed a lighter regulatory framework and a better use of self and co-regulation.*

In this context, UNICE's suggestions included the creation of specific mechanisms to better assess the impact of regulation, namely a independent institution that would examine "the need for EU regulation, its economic impact, and its added value to the functioning of the internal market".<sup>15</sup>

To streamline and simplify legislation EUROCOMMERCE and UNICE proposed a clarification of the hierarchy and applicability of Community instruments, (i.e. regulations, directives, decisions and recommendations). The former asked for a further extension of the open coordination method<sup>16</sup>, while the latter proposed the division of these instruments into three categories: legislative and quasi-legislative instruments, non-legislative instruments and sui-generis instruments. UNICE recommended "a greater role for other types of instruments between representative stakeholders, on specific topics [...] self-regulation and codes of conducts should also find more recognition as possible instruments to reach EU objectives, instead of systematic legislation. Business is keen to assume its responsibilities in this context. This would alleviate the legislative tasks of the EU and would democratise the rule-making exercise".<sup>17</sup>

In line with a recommendation by UNICE all business associations coincided in proposing mechanisms to test Community regulation before it comes into force. EUROCHAMBRES offered specific guidelines to be followed: "to analyse the socio-economic consequences of its application; to identify who is targeted and to what extent; to assess the effects of this proposal on national laws".<sup>18</sup>

*Increased Consultation to Bring Europe Closer to Its Citizens and Businesses. BIAs agreed that the success of European Integration requires the involvement of citizens and economic actors.*

EUROCHAMBRES maintained that citizens and businesses should be better informed about European policy objectives and the processes by

which these policies are decided. To this end EUROCHAMBRES proposed a more convincing communication policy based on information distribution networks in the form of partnerships.<sup>19</sup> To improve the quality of consultation UNICE advocated the adoption of a comprehensive code that would set out clear guidelines for the definition of core stakeholders and their representativeness, and the purpose, content, methodology and timeframe of the consultation.<sup>20</sup> Similarly, EUROCOMMERCE called for a more independent and structured social dialogue<sup>21</sup> and, an earlier and closer involvement of the social partners as concerns community initiatives in order to obtain an outcome which responds as well possible to social and economic realities.<sup>22</sup> EUROCHAMBRES raised the need for further inclusion of the chambers of commerce in the consultation process on the basis that they "are the only organisations that are able to illustrate concretely the principle of proximity as a result of their regional implantation; are the only organisations that carry out horizontal actions in support of the economic development of their region".<sup>23</sup>

The interaction between civil society and organised business interests was also part of the BIAs' strategy to improve consultation and bring the EU closer to its citizens. Both UNICE and EUROCOMMERCE supported a flexible relationship with civil society whenever possible but without jeopardizing the social dialogue. UNICE called for a distinction between the social dialogue and consultation of civil society.<sup>24</sup> EUROCOMMERCE expressed a similar view and explained the disadvantages of an arbitrary inclusion of other actors in the social dialogue.<sup>25</sup> While EUROCHAMBRES offered a more compromising approach by demanding a system of governance that explicitly establishes partnerships between the institutions and civil society.<sup>26</sup>

**BIAs' contribution to the draft constitution**

The key priorities and proposals outlined in the previous section were translated into amendments to

Article I-3, Union's objectives

Article 10, Categories of competence

15. UNICE, UNICE Position on EU Convention, p. 3

16. Promoted by the Lisbon Summit of March 2000.

17. UNICE, UNICE Position on EU Convention, p. 4.

18. EUROCHAMBRES, European Convention on the Future of Europe, p. 10.

19. EUROCHAMBRES, European Convention on the Future of Europe, p. 11.

20. UNICE, UNICE Position on EU Convention, p. 4.

21. The European Commission usually takes the lead on the agenda of social issues.

22. EUROCOMMERCE, How to Improve the Social Dialogue at the European Level in the Framework of the Convention's Works on the Adaptation of the Institutional Rules to the Future of the European Union, Brussels, April 2002, p. 2.

23. EUROCHAMBRES, European Convention on the Future of Europe, p. 3.

24. UNICE, UNICE Position on EU Convention, p. 5.

25. EUROCOMMERCE, How to Improve the Social Dialogue at the European Level, p. 5.

26. EUROCHAMBRES, European Convention on the Future of Europe, p. 4.

Article 12, Shared competences  
 Article 13, The co-ordination of economic policies  
 Article 18, The European Commission  
 Article 21, The European Central Bank  
 Article 24, International Trade  
 Article 25.1, Legislative acts  
 Article 32, Principles common to acts of the Union  
 Article 33, The principle of democratic equality  
 Article 34, The principle of participatory democracy  
 Article 34 bis, The role of social partners  
 Protocol on the Application of the principles of subsidiarity and proportionality

In terms of their success, BIAs heralded two main achievements in shaping the draft Constitution. Firstly, Article 3 makes specific reference to European competitiveness. This element was not included in the initial draft version of the article, which prompted a letter by Mr. Jacobs to the President of the Convention, Mr Giscard d'Estaing on 28 May 2003 insisting "on the importance of ensuring that such a reference is reintroduced in the Treaty". At the same time Mr Jacobs draws attention in his letter to the legitimacy of his claim on the basis of UNICE's constituency, "Companies in Europe do not understand why this reference has been taken-out of the revised draft [...] The justifications for the amended version do not evidence any request to withdraw this reference".<sup>27</sup>

Article 3 paragraph 3 now reads "The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment".

I would argue that flagging UNICE's membership base as part of the arguments put forward to the President of the Convention reflects the response of businesses to the challenges posed by the overall climate in favour greater transparency and accountability amongst organised interests in return for more participation and why not legitimacy.

Secondly, the official recognition of the nature and role of social partners and social dialogue. Hence, Article 47 reads, "The European Union

recognises and promotes the role of the social partners at Union level, taking into account the diversity of national systems; it shall facilitate dialogue between the social partners, respecting their autonomy".

Clearly, the BIAs' aim to protect the individuality of the social dialogue and limit the indiscriminate expansion of partner status with the subsequent diffusion of power has been achieved. As stated by Mr Jacobs in his address to the Convention on 4 April 2003 "the social partners have a responsibility for political decision-making which cannot be extended to other areas or other players in civil society".

Measures for further citizen participation and "good governance" are clearly outlined in Article 46 The principle of participatory democracy:

- 1 The Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
- 2 The Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
- 3 The Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
- 4 No less than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution. A European law shall determine the provisions for the specific procedures and conditions required for such a citizens' initiative.

For the first time the interaction between the EU and civil society has been clearly and openly delineated in the Treaty. Thus sending a clear message to the average citizen on the street about the EU's commitment to openness and transparency. Despite initiatives such as 'Citizen's First!' and CONNECS, the EU still lacks a targeted, systematic, structured and representative system of consultation that is relevant to the average citizen. With 55% of people having never heard of the Convention, and 52% unaware of the kind of text produced by the Convention<sup>28</sup>,

27. Jacobs, George, Letter to Mr Valéry Giscard d'Estaing, President of the Convention, Brussels, 28 May 2003

28. European Commission (Press Room), European Public Opinion still Hazy about the Convention, Brussels 25 July 2003.

the ivory tower view of Brussels institutional politics<sup>29</sup> is not likely to fade soon. Moreover, the final wording of Article 46 might help perpetuate such an image by establishing a clear separation between “representative associations” and “civil society”. Interestingly enough, UNICE tabled an amendment on those exact grounds so that the paragraph could be re-worded:

The Union Institutions shall maintain an open, transparent and regular *dialogue with civil society*

Rather, as feared by UNICE, the article reads

The Union Institutions shall maintain an open, transparent and regular dialogue with *representative associations and civil society*.

While other key priorities for business interests were also taken on board regarding the EU’s legal personality (Art. 6), the Union’s economic competences (Arts. 11, 12 and 14) and the Commission’s prerogative to initiate legislation and co-ordinate the implementation of policies (Art. 25). Yet, some of the most interesting proposals tabled by business to increase consultation have not been taken into consideration. Namely increased involvement of social partners in drawing the social agenda for Europe; extended self-regulation; the creation of an independent body entrusted with the task of reviewing the observance of the subsidiarity principle; the development of the functional dimension of subsidiarity to involve actors other than EU institutions in achieving the objectives of a proposed EU action; and the establishment of specific criteria to assess the representativeness of organisations.

## Conclusion

BIAAs made a very positive assessment of their Convention experience. The draft constitution preserves the BIAAs’ role as key contributors to the integration process. The final outcome provides “a good basis to allow further integration of Europe and for business to develop and prosper in the EU [...] The draft treaty that is on the table should allow the EU to be more transparent, more competitive and closer to its citizens”<sup>30</sup> The very participation of organised interests in the process strengthened the EU’s legitimacy for “organized interests have historically been an important means of contact for EU central insti-

tutions that are remote and lacking in democratic legitimacy”.<sup>31</sup> Yet the EU’s newly acquired participatory democracy is still to be tested, hence a number of caveats should be considered here. Firstly, the influence of BIAAs should not be exaggerated. As Greenwood argues “business now has to grapple with change agendas such as Corporate Social Responsibility, and to share the EU agenda with public interest NGOs”.<sup>32</sup> In this context, while the draft constitution identifies the exclusive nature of the social dialogue, participatory democracy as defined in the constitutional treaty, bears the danger, of opposing representative associations and civil society, perpetuating the view that BIAAs are self-appointed elites with few links to grass roots citizenry in the member state. It is no coincidence that in his address to the Convention on 24 June 2002, Mr Jacobs stated “companies are also an important part of civil society”. Moreover, UNICE regards the current Intergovernmental Conference as a “people’s affair”.<sup>33</sup> In my view, the post-constitutional scenario for interest representation while offering BIAAs the chance to contribute to a more open and accessible EU, it also challenges their role as a bridge with civil society. As stated by the EU Committee of the American Chamber of Commerce, “social partners “consumers, citizens and industry need to create a platform for the understanding of each other’s interests and concerns [...] the concept of civil society, is considered as being unhelpful in creating such platform”.<sup>34</sup>

Secondly, while the level of debate on the Convention varied from one country to another, the Eurobarometer results for June/July 2003 show that the Convention on the future of Europe remained unheard of for a majority of Europeans, both in the current EU (55%) and among the 10 accession countries (57%).<sup>35</sup> Therefore, whether the constitution-making exercise has truly met the citizens’ expectations of democracy efficiency and transparency is still to be assessed. Nicolaidis argues that this assessment should move beyond the nation-state parameters. In her view, the EU might be able to promote “new forms of participatory and deliberative democracy — including through the Web — that are more ambitious and inclusive than those found in the member states them-

29. Warleigh, Alex, “Europeanizing Civil Society: NGOs as Agents of Political Socialisation”, in *Journal of Common Market Studies*, Vol. 39, No. 4, 2001  
 30. UNICE, UNICE Reaction to Final Draft of the Convention, Brussels, 13 June 2003.  
 31. Greenwood, Justin, Interest Representation in the EU: Demos Rules OK?: Arena Research Seminar, April 8th 2003, pp. 4-5.  
 32. Greenwood, Justin, Interest Representation in the EU: Demos Rules OK?, p. 5.  
 33. UNICE, Identity, Efficiency, Governance. What European Business Expects from the Irish Presidency, 22 January 2004.  
 34. The EU Committee of the American Chamber of Commerce, Contribution by Marc Taquet-Graziani, Chair of the Institutional Affairs Subcommittee, 23 April 2003.  
 35. EUROBAROMETER, Flash EB 142 “Convention on the Future of Europe” (23.06.2003- 1.07.2003) [http://europa.eu.int/futurum/documents/other/oth250703\\_en.pdf](http://europa.eu.int/futurum/documents/other/oth250703_en.pdf)

selves, but which do not aggregate the expressions of popular will". However, she rightly suggests that the constitutional text fails to realize that "democratic question in Europe is not just about the role of citizens and civil society in EU governance but also about the role of EU governance in supporting vibrant civil societies and local democracy in Member States".<sup>36</sup> Perhaps, the degree of voter mobilization in the forthcoming elections to the European Parliament could offer an indication of citizen satisfaction.

Thirdly, the December 2003 European Council failed to build the required political consensus on the draft constitution. While the current debate over the constitutional text revolves around how many votes each country

should have in the Council of Ministers, the BIAs rhetoric favours an agreement on the constitutional text while trying to secure their participation in a mainly intergovernmental debate<sup>37</sup>. The absence of consensus means a delay in the implementation of the participation mechanisms discussed above. The Nice Treaty is sufficient to cope with the May enlargement and the prospect of ratification by 25 member states does not offer a positive outlook about the constitutional future of the EU.<sup>38</sup> While commentators have warned about the possibility of failure of ratification<sup>39</sup>, the change brought about by the Convention in outlining the method for further citizen participation and "good governance" should not be overlooked.

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38. Centre for European Reform, The CER Guide to the Brussels Summit, Briefing Note, December 2003, [http://www.cer.org.uk/pdf/briefing\\_cer\\_igc.pdf](http://www.cer.org.uk/pdf/briefing_cer_igc.pdf)

39. Walker, Neil, After the Constitutional Moment, Constitutional Online Papers No. 32/03, 2003.



# Europe and the extended impact assessment: opportunities for associations

by Alfons Westgeest \*and Rachel Barlow\*\*

*The possibilities for European associations to influence upcoming policies and legislation have been increased and widened. The Extended Impact Assessment (ExIA)<sup>1</sup> is a new mechanism that provides new opportunities for associations and non-governmental organisations. For reasons of important new policies including Transparency, Sustainable Development and Better Regulation<sup>2</sup>, the EU has launched the ExIA in a range of new mechanisms and tools to be at its disposal during different stages of the legislative or regulatory process, especially at European Commission level. It is regarded as one of the best ways to improve the quality and coherence of the policy development process. This article describes the main rationale, features and procedures of the ExIA. It also provides viewpoints of a Member State, a Member of the European Parliament and an industry representative.*

## Rationale for impact assessments

The Communication by the Commission<sup>3</sup> explains how the process of impact assessment will be implemented in gradually from 2003 for all major initiatives, i.e. those which are presented in the Annual Policy Strategy or later in the Work Programme of the Commission for a given year. The ExIA identifies the likely positive and negative impacts of proposed policy actions, enabling informed political judgments to be made about the proposal and identify trade-offs in achieving competing objectives. It also permits to complete the application of the subsidiarity and proportionality protocol annexed to the Amsterdam Treaty, and follows up on the Commission's own White Paper on Governance. The ExIA is therefore increasing occasions for associations to learn about new initiatives and influence the outcome of new EU policies and proposals early on in the process.

In addition, the ExIA offers much more information to the other EU Institutions, as the ExIA results can be used throughout the legislative process. It therefore stretches further into the European Parliament, which is increasingly powerful and is getting much more involved in the detail of law-making. In fact, the Parliament is giving the Commission a hard time on providing data and policy analyses on specific subjects in an attempt to get its hands on "Comitology" and to get more involved in co-decision. A recent example is the Thematic Paper on Waste Strategies in which case the rapporteur, Member of the European Parliament, demanded that subsequent law-making should be proposed under the co-decision procedure. The Parliament has also opened up a budget line to fund its own research of proposals, which are submitted to it by the Commission, or proposals, which are launched on its own initiative.

The Council can now spend money too, for example to investigate the costs and benefits of EU policies and law-making as the best way forward in preparation of its Summit meetings.

Besides the ExIA other information sources and consultation mechanisms that should be monitored and considered for involvement by associations include:

- Internet consultation
- Internet live chats with Commissioners
- Parliamentary investigations, hearings or special committees

Document repositories: internal EU documents that are stored electronically in databases on websites, for example the European Research Area preparing and implementing the EU's 6th Framework Programme on Research.

With the ExIA the Commission tries to bring Europe closer to citizens and strives to open up the consultation process early on. As a major attempt to bring order in the range of consultation possibilities, the ExIA proves an interesting opportunity, although it is too early to call it a "success".

## Coherence and integration

The Commission's approach to impact assessments is to see it as a mechanism to assist decision makers in the process, but not as a substitute for political judgment. The impact assessment process is an important step in the Commission's efforts to strengthen its evaluation culture. The Commission has considerable experience in single sector type impact assessments. Existing tools cover for example impact on businesses, trade, the environment, health and employment. These impact assessments are, however, often partial looking only at certain sets of impacts. This partial approach has made it difficult for policy makers to assess trade-offs

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1. Based on the presentation by Chris Allen, DG Enterprise and the relevant Commission documents  
2. COM (2002) 278  
3. COM (2002) 276 of 5 June 2002

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and compare different scenarios when deciding on a specific course of action. It is clear that the scope and methodology of impact assessment will vary according to the initiative in question. Therefore, the ExIA is intended to integrate, reinforce, streamline and gradually replace all the existing separate impact assessment mechanisms for Commission proposals.

### **Preliminary impact assessment**

At the “start” of the consultation process a *preliminary* impact assessment is made by Commission officials to evaluate a specific proposal in the context of the Commission’s Annual Policy Strategy and Working Programme. It looks at measures that have a significant impact or represent a major policy reform. The preliminary assessment gives a first overview of the problem identified, possible options and sectors affected. It will serve as a filter to help the College of Commissioners to identify the proposals that will be subject to an extended impact assessment.

This first stage assessment will result in a *short statement* focusing on the following key factors:

- Identification of the issue / objectives and desired outcome;
- Identification of the main policy options available to achieve the objective, taking into account proportionality and subsidiarity considerations, and preliminary indications on expected impact;
- Description of the preparatory steps already undertaken and foreseen; (consultations of interested parties, studies), and indication of whether an extended impact assessment is needed.

This assessment would need to be finalised in November of a certain year in order to be included in the Commission’s Working Programme for the next year.

### **Elements of the extended impact assessment**

The aim of the ExIA is to carry out a more in-depth analysis of the potential impacts on the economy, on society and on the environment, the so-called three pillars. It includes consultation with interested parties and relevant experts according to the minimum standards for consultation. It is

important for purposes of data and information gathering as well as validation. The consultation process should allow a discussion of wider considerations such as ethical and political issues.

It is important to note that the responsible Commission service should present the results of the analysis in an impact assessment report that forms part of the inter-service consultation on the proposal concerned. The Impact Assessment report should also be sent to the other institutions as a working document when the Commission would adopt the proposal. A summary of the main findings has to be included in the explanatory memorandum.

The following questions would be asked when carrying out an extended impact assessment:

- What issue is the policy/proposal expected to tackle; what would be the Community added value?
- What main objective is the policy/proposal supposed to achieve?
- What are the main policy options available to achieve the objective?
- What are the impacts – positive and negative – expected from the different options identified?
- How can the results and impacts of the policy/proposal be monitored and evaluated?

#### ***Identification***

The first question in the process relates to the identification and analysis of the issue(s) in one or more policy areas. This will be described in economic, social and environmental terms and be expressed as concretely as possible in qualitative, quantitative and where possible monetary terms. The urgency of action and any risks inherent in the initial situation should also be identified. Giving a precise and objective description of causal chains is vital, as too often analysis becomes flawed at this first stage by assuming rather than establishing links between causes and effects.

#### ***Policy Objectives***

On the basis of the problem analysis, the policy objectives will be expressed in terms of expected results in a given timeframe (i.e. in terms of ‘ends’ not ‘means’). Where relevant, previously established objectives (e.g. in the Treaty, existing

legislation, policies, European Council requests, etc.) will be set out as well as the legal base on which such a proposal might be based.

### *Policy Options*

The “no policy change” scenario must always be included in the analysis as the point of reference against which other options are compared. The term “policy option” (for action at EU level) encompasses combinations of three closely linked elements, which will be examined simultaneously:

(a) Considering various ways to reach the objective. In many instances, there may be several ways of reaching the objectives, which should be considered when identifying the various options.

(b) Considering various policy instruments. The choice of instruments must respect relevant Treaty provisions. A combination of the different instruments might also be considered.

(c) Focusing on realistic options, including relevance, effectiveness and coherence issues.

Regarding the choice of instruments, the generic types of policy instruments that can be considered include:

- Prescriptive regulatory actions (e.g. setting air quality standards);
- Co-regulatory approaches (e.g. social dialogue);
- Market-based instruments (e.g. emission trading, taxation);
- Financial interventions (e.g. taxation, subsidies, co-financing, risk financing);
- Action aiming at Voluntary Agreements or self regulation;
- Information, networking or co-ordination activities;
- Framework Directives, as foreseen by the Action plan on Better Regulation;
- The Open Method of Co-ordination.

### *Impacts*

The economic, social and environmental impacts identified for the proposed option should be analysed and presented in a format that facilitates a better understanding of the tradeoffs between competing economic, social and environmental objectives. It is desirable to

quantify the impacts in physical and, where appropriate, monetary terms (in addition to a qualitative appraisal).

The assessment of the impacts will concentrate on the ones that are likely to be the most significant and/or will lead to important distributive effects. In an integrated assessment, it is important to avoid double counting (e.g. costs that are passed on to consumers as higher prices should not be counted as costs to businesses as well).

The time dimension (short, medium and long-term impacts) will also be examined in this context, for instance by weighing short-term negative against long-term positive impacts using a discount rate, whenever positive and negative impacts can be expressed in monetary terms.

The precautionary principle should be applied, where appropriate, including the comparison of different options will therefore be accompanied by a sensitivity analysis of the results to changes in the main internal and external variables. As a minimum the main factors that can change the direction of impacts must be highlighted.

### *Follow up*

The impact assessment should identify any possible difficulties in implementing the options assessed and describe how these will be taken into account, for example in the choice of implementation periods or the gradual phasing-in of a measure. Member States should be asked to give information about problems that they would face in implementing the proposal (e.g. implications for public administrations and enforcement authorities). Procedures to obtain monitoring data should be set out.

### **What are possible impacts?**

In the Communication of the Commission the following examples of economic, social and environmental impacts are included:

Economic impacts: both macro- and micro-economic impacts, notably in terms of economic growth and competitiveness, i.e. changes in compliance costs, including administrative burdens to businesses and implementation costs for public authorities, impacts on the potential for innovation

and technological development, changes in investment, market shares and trade patterns as well as increases or decreases in consumer prices etc.

Social impacts: impacts on human capital, impact on fundamental/human rights, compatibility with Charter of Fundamental Rights of the European Union changes in employment levels or job quality, changes affecting gender equality, social exclusion and poverty, impacts on health, safety, consumer rights, social capital, security (including crime and terrorism), education, training and culture, as well as distributional implications such as effects on the income of particular sectors, groups of consumers or workers etc.

Environmental impacts: positive and negative impacts associated with the changing status of the environment such as climate change, air, water and soil pollution, land-use change and bio-diversity loss, changes in public health, etc.

### Opinion of a member state

Several member states have looked at the new mechanism. The UK government published its approach on the internet<sup>4</sup>. It states that all Directorates within the Commission are signed up to the Action Plan. However, since this is a new initiative, it will take time to become embedded in the Commission's and Member State working practices. The support and assistance of UK policy officials will be key to promoting and delivering on this process. The same site states that UK officials should be prepared to contribute the UK data on the likely impact of the proposal if requested to do so by the Commission. They should check that consultation has been conducted (at least) according to the minimum standards established by the Commission, and that the results of the consultation are reflected in the Explanatory Memoranda accompanying the proposal. The Cabinet says to encourage other Member States and external stakeholders to influence the Commission to produce well-assessed proposals, based on effective consultation. Although the Commission's impact assessments will cover impacts across the European Union, the Cabinet advises UK officials still to produce a UK impact assessment in connection with European proposals, in order to assess UK-specific impacts in more detail. The

information produced for UK use may feed into the Commission's impact assessment.

### Opinion of an MEP

The pressure on the Parliament to rush through new legislation prior to the elections could lead to undesirable results as it poses risks for the over-regulation and does not involve the accession countries. The chair of the Environment Committee of the European Parliament, Dr. Caroline Jackson, recently underlined how the Parliament has made impact assessments work<sup>5</sup>. With reference to the US Congress policy she suggested also that Follow-up must identify the degree of neglect. She believes that the EU does not have a coherent policy for finding out how EU Legislation is applied. Dr. Jackson suggested that "sunset clauses" must be introduced in legislation that has not been universally adopted by member states within a certain timeframe.

### Views of an affected industry

Dr. Juergen Fricke<sup>6</sup> identified that in the case of the proposal for a new directive on spent batteries and accumulators, the Extended Impact Assessment was a valid approach given the more than six years it took the Commission to evaluate all aspects. The Commission's Directorates-General Enterprise and Environment jointly decided to launch the ExIA in early 2003, one of the first to be accomplished during that same year. The Commission first held an internet consultation between February and April, followed by the appointment of a consultant to perform the next phase of the ExIA between April and July. Mid July a stakeholder meeting was held, inviting all organisations interested.

Dr. Fricke stated that the advantages of the ExIA for industry were the knowledge of the policy options at an early stage, the streamlined input of relevant data, and the additional exchange of views with the consultant and the Commission representatives. He concluded it would be an excellent mechanism if properly handled and used to its full extent. However, he cautioned that the results of the ExIA do not limit the Commission to take political decisions that are not in line with the findings in the ExIA.

4. <http://www.cabinet-office.gov.uk/regulation/ria-guidance/content/eu-groundwork/index.asp>

5. EURporter, page 3, Plenary Edition 08, 12 March 2004

6. VB Autobatterie GmbH, speaker at the EuroConference

# Organisational challenges for associations: the changing European landscape

by Alfons Westgeest\* and Katrijn Otten\*\*

*The landscape for European associations has been subject to considerable change in the recent years. In many cases there are major challenges to the “founding fathers” approach of country-based associations. For business associations in Europe, the growing initiatives of the European Union, notably from the Commission and Parliament, have caused a very significant increase in EU-wide legislation and regulation. The Enlargement of the EU is another important factor this year for the association’s leadership to have a closer look at when reviewing the overall future and efficiency of their associations in Europe. This article addresses the main principles and solutions for the governance and organisational change that may be required to best serve the interests of all the members, i.e. the companies and individuals involved. While the subject of this article mostly relates to business associations of which companies are members, most of the same principles apply to professional societies and other not-for-profit organisations and NGOs in the European landscape.*

## Objectives of business associations

National, regional and European associations alike are ‘knowledge networks’ that need to deliver on three key objectives in order to be relevant for their industry sector:

- Lobbying and interest representation towards government;
- Image-building, media relations and communication to stakeholders;
- Advisory activities/technical services.

A model of preference for clarifying in a simple manner the various services which national and European associations alike offer to their members, is named the “propeller model”<sup>1</sup>:

A first important part of the associations’ activities consists of lobbying politicians, public authorities and civil society in order to enhance the interests of the industry.

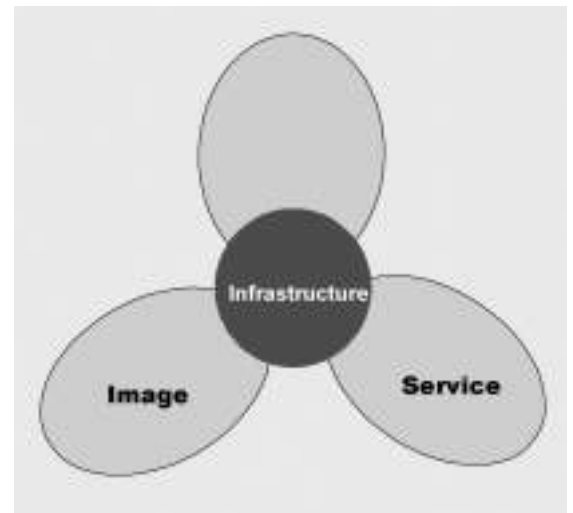
This goes hand in hand with the second activity cluster of a typical association, which is image building for the industry both positively by promoting a customer outreach program and also in case of “calamities” to be the neutral voice behind which the companies under attack can find refuge.

Finally, associations offer a whole range of services to their members, such as relationship building with trade unions, negotiation for social & labour agreements with the unions and government, publishing statistics, offering of tailor-made training programs and conferences, setting of industry standards, provision of translation and adaptation of European information for usage by local members, etc.

The model (see graphic 1) demonstrates that infrastructure is common in order to have an effective and efficient organisation to ensure

smooth running of the three “blades” of the propeller.

Graphic 1 - The Propeller Model



Whatever the perception, research<sup>2</sup> demonstrates that the model represents cross-sector common themes which are applicable to both national and European associations independent of the sector they represent. This is also recognised as such by associations carrying out an organisational and governance change program.

In reality, when applied to associations in Europe, the perception of this propeller model changes according to

Product sectors or professions the associations represent,

Political entities they deal with (European, national and local),

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1. See “Theorie en Praktijk, Professioneel Verenigingsmanagement voor besturen en directeuren van branchen beroepsverenigingen”, ed. Peter Tack, Petra Beusmans, VU Uitgeverij/VU University Press, 2001, 459 p.  
2. Tack, footnote 1; Foundation of the American Society for Association Executives, Washington DC, USA and the Union of International Associations, Brussels, Belgium

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- Historic functions the associations perform (such as the social dialogue with trade unions) and
- Dependent/independent status they have vis-à-vis other national associations (often umbrella organization).

Whatever the relevant infrastructure as such, there either is a cost savings potential, a decreasing overlap and stepped up efficiency to ensure a smooth running of the blades on each level. It requires the important players in the association landscape to align the mission of the various associations along the main three objective objectives

Therefore, in order to fulfil these objectives. European associations cannot operate in a vacuum. They need national or regional counterparts for information exchange, implementation of policy decisions and lobbying of national politicians. Multinational companies should review their membership of associations for effectiveness and cost, including the time spent by their representatives in associations. National associations should ask why they belong to a European federation and what services they should offer, especially when representing many SMEs. As EU expansion is taking place at an unprecedented scale, European business associations have an increasing workload yet often have to struggle with lack of funding and of appropriate staff skills.

### Typical European challenges

Added to this, the opening up of national markets, free movement of goods and persons have lead to a significant industry restructuring with, for example, a more centralised structure, and often aiming to control cost. At the same time niche players and SMEs are being created and new markets being built resulting in new competition, increasingly from other regions in the world.

In recent years, the companies are evaluating their association costs and therefore the economic downturn has also put pressure on costs of being member of various sector associations. It has also made them review the total costs of the European landscape, and often also the values, costs and benefits of multiple association membership. Companies are also sharply reconsidering investment in the time their people are

spending in the governance structures and programs of the associations across Europe. The shape and size of the “pool” of volunteers have changed accordingly.

There are plenty of opportunities for industry associations that have well-ordered structures and well-focused strategies to make a big impact on the laws that most affect their businesses. Many European ‘umbrella’ associations grew out of national associations and some have ended up taking on too many tasks over the years and trying to represent too many different interests. At the other end of the scale are specialist associations or single companies, whose narrow focus may make it hard to make an impact.

There are also important reasons for companies to remain involved or to even consider more investment in the association landscape. For example, the small size of the Commission, relative to its many functions, makes it dependent upon the expertise that outside interests bring for drafting workable and technically feasible policy proposals. With greater emphasis on avoiding ‘democratic deficit’, EU institutions these days are in ‘listening mode’, keen to hear what stakeholders have to say.

Generally, not-for-profit organisations need to increasingly operate in a more businesslike and focused way, while respecting those aspects that differentiate them from profit-making corporations. In short, companies and associations should take a close look at their strategies, decision-making and cost-effectiveness, using specialist advice and outside facilitators where necessary.

All these factors make up the fingerprint of each association. Because associations have a decision making which is very different from individual companies, a change process is needed to make it possible for many current associations to draw up a new landscape and streamline all into a unified pan-European structure. The use of the word process means that this cannot be achieved in one step.

### Developing strategy, governance and organisation

A restructuring process has to have a sound starting point. Strategy is the main means for

guiding the actions of the association. A new strategy for an association can be best based on the results of a review of the vision and mission. Strategy needs to be defined enough to ensure that an association can be achieving clarity in its decision-making and reach consensus on strong way forward in its operational plans.

An environmental scan or association benchmarking can be an important part of such development. The scanning requires the widest possible input including besides member companies, also the observations from potential or past members as well as association experts. In addition, viewpoints from industry observers, media or North American or Asian associations can provide very useful reference.

The involvement of consultants can be very important to provide fresh input, obtain a benchmarking from various associations' failures and successes, retain objectivity, or to facilitate the process to obtain significant results within the set timeframe.

The outcomes of any review process would include a new:

- Vision, mission and objectives
- Organisation and governance required to reach that
- Communications programmes and operational planning with resources needed
- Timelines and task forces, with a detailed implementation schedule to have the new / reformed association fully operational by a certain date, usually one or two years after the prime decision making in the annual general assemblies of the associations involved.

## **New organisation concepts**

The vision and mission will also determine the elements to find a new organisation structure best suited to reach the strategy.

In the case of European associations the structure needs to reflect the right balance between national and regional associations, all companies and the pan-European representation.

In practice, it implies the need to evaluate the new structure together with the members, the national associations and the member companies. Workshops, interviews with a representative sample, and leadership sessions are most

used tools for obtaining the best possible outcome.

Other important parts of the optimal organisational concept include:

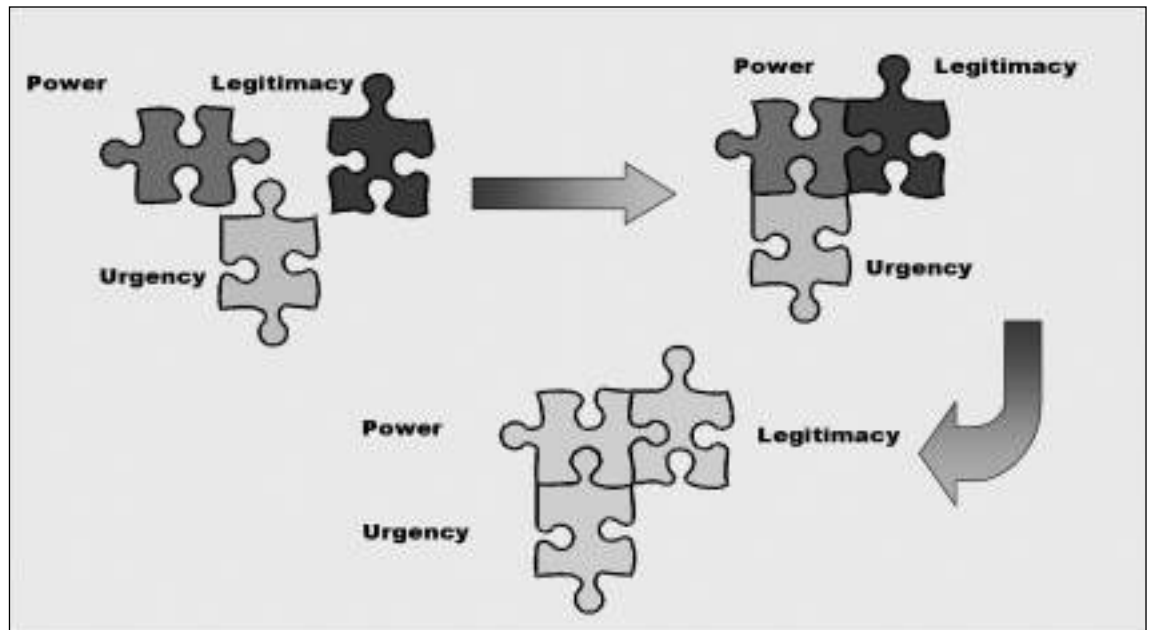
- Legal check on statutes, as to how a change can be made and new governance bodies, procedures, voting, and funding shall take place
- Strict compliance with competition law, confirming the need for training and information about rules and procedures for every meeting and key documents of the association
- Clear organigram so that every new staff person, member or stakeholder can quickly understand the main features of the organisation
- Internal reporting to compliment established responsibilities and accountability
- Finally, it is an important part of the change process to regularly report and engage with personal messages to the key stakeholders to obtain their "buy-in".

## **Power, legitimacy and urgency**

In their relationship with European associations, national associations can claim that they are the representatives of their membership base. The legitimacy that the national associations gain through their membership base is their main attribute. Companies that are members of these associations decide on the actions the associations should undertake and have the power to sanction the associations by deciding to cancel their membership. This is also true for the European umbrella associations: their rationale is that the European legislative initiatives create urgency for their industry to take collective action in order to protect or promote the industry. It is only by cooperating that the three parties have the necessary attributes to have a high-level impact when lobbying European, national and local authorities, or promoting the image of the industry.

This would mean that the national associations are positioned as the founding fathers of the European structure, and that through the pan-European nature of their membership, they would claim that their member companies create the legitimacy of national associations. However, the companies are today the drivers of the change at local, European or global levels.

*Graphic 2 - Power-Legitimacy-Urgency*



Being discontent with the current indecision and the lower than expected impact and results of the association landscape, they take up this power and request change.

The model in graphic 2 underlines the importance of common drivers to realise the vision and to implement a strategic plan to advance and adapt with time. Instead of continuing to work too independently from each other the three stakeholders should as a first step enhance cooperation to increase impact. Once the Power, Legitimacy and Urgency are aligned, and start to increasingly integrate into one strategy and structure, the industry can obtain the most effective organisation and the fastest path to success.

The association which adheres to the three main objectives will strive to have the most effective organisation and explore the best way to reach them, for example to monitor, gather intelligence and deliver communications and lobbying through work in all countries in Europe.

The following key characteristics can strongly reinforce the organisational concept chosen:

- It is driven and aligned to the main stakeholders, including decision-makers in government (politicians / legislators), industry and the public (consumers)

- Issue management: knowledge of issues and the way to focus or set priorities will drive resources needed and identify operational partnerships and alliances
- The pan-European concept for the association makes it essential to review the process on the local (Provinces, Länder, Departments, Regions), cross-border European regions and European levels. It is noted that in recent cases a restructuring of the landscape of associations resulted in the introduction of regional cooperation and competence centres, some of which with an integrated governance and management structure.
- In most cases the association belongs to a global knowledge exchange network or a global federation, so that alignment with these organisations becomes a necessity. In some cases the presence of an alliance or network of European/ multinational companies can drive that process further along.

### **Operational plan, projects and task forces**

It is crucial to agree fundamental principles or guidelines for the design of a new Association.



The operational plan must ensure a market driven and business type of approach. Besides the competent staff it will also require a commitment from and a close cooperation with the people in its member companies, reflecting the interests of those companies and the value for money. It could also provide opportunities for secondments by competent professionals from the companies, and who fit the job profile, rather than being stuck with people being “sent to Brussels” as a token of appreciation.

From an industry perspective there must be clarity about the main issues related to the efficiency of the future operation. It should reflect the ability to serve interests in terms of issues management, information, consultation and coordination.

The work plan and the establishment of Projects and Working Groups should be:

- Tailored to the needs following from the strategy
- Following consensus about which services will be offered.
- Defined with the precise scope of the work with clear objectives
- Time limited with a review that may lead to closure or new mandates

Prioritisation is also a clear tool to demonstrate to the management of the member companies what priorities prevail at any given moment and are frequently reviewed and aligned with the work programmes.

With the goals of the associations and the audiences (stakeholders) in mind, the ensuing external communications are usually grouped together along the two first objectives (lobbying and image) discussed in this article, as follows:

- Specific web, newsletter and individual communications to key groups of members and customers in order to have them aligned to the vision and strategy
- Targeted political messages to decision makers across Europe in order to improve the legislative and regulatory position for the industry
- General communication and education programs in order to reach media and form public opinion; high-visibility image campaigns
- Relationship building with other industries (up- or downstream or even horizontally related) and their business associations to become effective, proactive and respected communication and campaigners.

As part of the coherent communication strategy for the organisation, it remains important to be working with the value chain partners as it may greatly impact the association's ability to improve the advocacy and communications programmes.

## **Efficiency checklist for companies and their associations**

### **Strategy Review:**

Involve company's top management in defining objectives and the direction to take; scan the business environment for key facts, trends or scenarios.

### **Coherence and Trust**

Cooperate effectively with all companies and associations in the same field under strict guidelines; consider being inclusive and transparent for large and small companies alike to enhance trust and transparency.

### **Decision-making**

Organise effective meetings, frequent communication and timely conclusions on the various files to handle; include project task forces in decision-making; crisis management procedures.

### **Communication**

Use all available tools for timely and comprehensive information about the results of the association; tools also include web postings, personal emails and networking opportunities with (internal and external) stakeholders.

### **Optimisation**

Reduce standing committees and consider project assignments; allocate competence and responsibilities in network of national and European staff.

### **Knowledge Organisation**

Use opportunities provided by new technologies to plan ahead, exchange knowledge and introduce best practices.

### **Review of Financing**

Balance autonomy and resources; streamline revenue bases, pay structures and accountability of associations across Europe; compare costs with output.

**Measurement**

Introduce tools for the overall association landscape to measure effectiveness, responsibilities, accountability, and knowledge building.

**Governance**

Ensure competition law compliance and adherence to internal conduct guidelines; adapt corporate governance and social responsibility criteria to the association field.

# The Role of Trade Associations in EU Competition Law: Friend or Foe?

by Alan S. Reid\*

*This article is based on a paper presented at the EuroConference: The Challenge of Change in EU Business Associations, held at Scotland House Conference Centre, Brussels on Wednesday October 29th 2003 and on a book chapter, Chapter 6: EU Competition Law and Trade Associations, in The Challenge of Change in EU Business Associations, Justin Greenwood (ed.) Palgrave Macmillan, August 2003.<sup>1</sup>*

*This article discusses the role of trade associations within the European Union competition law system. National and European Trade associations are in a unique position vis a vis the European Union legal system. They possess a tremendous power to influence the development of competition law within the European Union. This influence can be positive or negative. Trade associations may legitimately represent the interests of their members, act as enforcers of competition law and collate sector specific information which evidences collusive behaviour. This constitutional power to gather and disseminate information may create anti-competitive concerns. The information may be utilised by the members of the association to facilitate anti-competitive abuses. The trade association may simply be a front for collusive activity. Trade associations must tread a fine line between adopting legitimate business practices and collaborating in collusive or abusive activity that is anti-competitive. The delimitation of the legality of trade association activity is one of degree. The factual situation appertaining to the market is vital in assessing the legality or otherwise of the activities of a trade association. The year 2004 sees radical reform of the competition law regime of the European Union. Firstly, Regulation 17/62 is repealed and replaced by Regulation 1/2003, which ushers in a new decentralised, private law enforcement competition regime. Secondly, the accession of ten new member States of the European Union requires a full-scale programme of training, education, co-operation and infrastructure-building in the field of competition law. Trade Associations are poised to play a pivotal role in this brave new competitive world.*

## The objectives of the European union and European competition law

The competition law of the European Union pursues four main objectives. Firstly, the law prevents businesses forming cartels or groupings in which prices and other conditions are fixed, to the detriment of non-members and consumers. Secondly, the law prohibits mergers, the effect of which is to create a monopolistic situation or strengthen a dominant position. Thirdly, the law prevents very powerful single companies or groups of companies from abusing a position of dominance. Fourthly, the law fetters the power of the member States to take action in the market-place, which would impair free competition. These specific rules share three objectives in common, namely the pursuit of economic efficiency, protection of both consumers and smaller firms and the establishment and continuing operation of the internal market.

Competition law is but one facet of the European Union objective of creating and subsequently ensuring the smooth operation of the internal market. Thus, competition law must be viewed in this context. The free movement of goods and services shall not be subjected to discriminatory treatment or indeed treatment that

makes the importation or export of these goods or services more difficult. If the European Union is to operate as a single market, then member States should not erect barriers to trade that impede the free flow of goods and services across national borders. Public law barriers to trade that are erected by member States must be eliminated, in the drive towards European integration. Member States, if left to their own devices, will adopt protectionist policies that favour their domestic manufacturers.

Competition law is essentially the private law counterpart to the free movement provisions of the EC Treaty. The internal market would be endangered if either member States erected barriers to trade or if private enterprises re-erected national boundaries to free trade. Internal Market coherency is integral to the European integrative project. As a result, European competition law has historically over-emphasised the negative aspects of vertical agreements when compared to other competition law regimes.<sup>2</sup>

## The substantive rules of European competition law

Trade Associations are most likely to be actively involved in the areas of the internal market regulated by articles Article 81 and 82 of the EC

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1. This article is an updated and expanded version of a paper presented at the 2003 EuroConference: *The Challenge of Change in EU Business Associations*, held at Scotland House Conference Centre, Brussels on Wednesday October 29th 2003. The author wishes to acknowledge the very useful contributions of the following Conference discussants: Georg-Klaus de Bronett, of DG Competition, European Commission, Eric Louis, of EY Law and Frederic Louis, of Wilmer, Cutler and Pickering and the assistance of Wai-Man Shek, Research Assistant at The Robert Gordon University.

2. Vertical agreements between operators at different levels in the market were viewed with suspicion by the Commission since they tended to partition the internal market along national lines. Regulation 2790/99 OJ [1999] L 336/21 has liberalised the treatment of such agreements.

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3. This article will primarily concentrate upon Article 81 of the Treaty.

4. Article 81(3) provides that collusive activity may be exempted if four criteria are satisfied, namely the col-

lusive activity 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

5. See the *Italian Flat Glass* case [1992] 5 CMLR 302.

6. See case 169/84 *COFAZ SA v. Commission* [1986] ECR 391 and case T-613/97 *Union Francaise de l'Express (UFL) v. Commission* [2000] ECR II-4055. In the UFL case, the trade association UFL had complained that the French Post Office was providing logistical and commercial assistance to its subsidiary courier company. The Court of First Instance annulled the Commission Decision which found that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI was State Aid.

7. In Case T-55/99 *Confederacion Espanola de Transporte de Mercancias v. Commission*, [2000] E.C.R. II-3207, the Spanish government adopted a scheme for subsidising the interest payment on loans granted for purchasing industrial vehicles or for leasing them with a view to purchase. The Commission had declared the system as illegal State aid. CETM brought an action to prevent the Commission from requiring the repayment of the illegal State Aid from its members. The Court held that the Commission was correct in holding that the aid was illegal aid.

8. *Roofing Felt* 86/399, OJ L 232/15.

9. Similarly, in Case 272/85

Treaty.<sup>3</sup> Article 81 of the EC Treaty prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

The most profuse violations of Article 81 are anti-competitive agreements between undertakings. Competing undertakings opt to voluntarily co-operate with one another, thus minimising their exposure to the vagaries of the market and substituting the full rigours of the free market with concertation. Such behaviour is clearly illegal and, therefore, the companies involved will employ their best endeavours to avoid detection by the Commission. As a result, the prohibition applies to informal agreements as well as concerted practices where co-ordinated action has been undertaken to align prices. Such collusive activity may be exempted, if the agreement satisfies the conditions for exemption, as outlined under Article 81(3).<sup>4</sup>

The collusion of independent companies is not the only concern of European competition law. In addition, umbrella organisations, such as trade associations, may zealously attempt to safeguard their industry sector and the member firms they represent from competition.

Trade associations are numerous in their range of types, styles and industries they represent. Trade associations pose particular difficulties for the competition authorities where the sector they represent is oligopolistic, there is a low level of product differentiation in that sector and the association (or group of associations) represents a number of actors in the sector, whether they be manufacturers, wholesalers or distributors.

In relation to Article 82, the trade association may act in a way that is abusive of its dominant position, either in an individual capacity or collectively.<sup>5</sup>

Article 87 of the EC Treaty regulates the granting of State Aid. Since State Aid will give competing undertakings in that member State an unfair competitive advantage, a trade association may take exception to the granting of State Aid by a member State.<sup>6</sup> Conversely, a trade association may also consider that the State Aid was in actual event legitimate aid which has

unlawfully been condemned by the Commission as illegal aid.<sup>7</sup>

## Trade associations as violators of competition law

Trade associations are established with a view to representing the views of their members to government, providing feedback on the views of government to their members, providing general services to their members and performing a public relation function for the relevant industry sector. As such, the trade association may be involved in promotional campaigns for the entire industry, market research campaigns, public education programmes or standard setting in terms of quality, technical requirements or customer relations. Trade associations can wield significant power over their members and may find themselves in a paradoxical situation. The vast majority of the trade association's work will be legitimate, however, their power of influence may create competitive tensions in the industry.

In the *Roofing Felt* Case,<sup>8</sup> the Belasco association represented Belgian companies involved in the asphalt industry. The co-operative agreement contained a number of innocuous and indeed legitimate objectives, *viz.*, the prohibition of bribes, collective advertising and measures designed to improve the efficiency of the manufacture and distribution of roofing felt. The agreement also included a number of ancillary objectives which were deemed to be anti-competitive. The agreement provided for minimum prices and list prices for all roofing felt sold in Belgium, the setting of quotas and the application of penalties in the event of violation of the terms of the agreement. The association's accountant enforced the quota system by levying penalties on members which exceeded their quotas. The system of collective advertising cultivated a perception of homogeneity between the members' products.<sup>9</sup>

### *The nature and objective of the rules of the trade association*

A common objective of a trade association is the desire to set prices in order to provide con-

*ANTIB v. Commission*, [1988] 4 C.M.L.R. 677  
*Antib*, a French trade association, entered into an agreement with another French trade federation. This agreement provided for a ten per cent levy on export goods. The proceeds of the levy were passed to a French co-operative and this fund was to be used for the commercial benefit of the entire trade and the running costs of the fund. The agreement was anti-competitive since foreign undertakings lost 10 per cent of their income, and were not compensated for this loss by getting new contracts. The new contracts were given to their French counterparts. The Fund appeared *prima facie*, to be an objective and non-discriminatory system designed to promote the industry, however, the main benefits were only passed to the domestic operators.

10. In the Case *Scottish Salmon Farmers' Marketing Board* [1992] OJ L246/1 over farming of salmon resulted in serious over-capacity in Europe, such that the price of salmon plummeted in the late 1980s and early 1990s. The Norwegians set a minimum price level for the price of their salmon. For such a system to work, it was vital that other salmon farmers respected the Norwegian minimum price set. Clearly, this agreement was an anti-competitive activity prohibited by Article 81.

11. Para. 300 of the NAVEG judgment. The association issued binding decisions which restricted the individual conduct of the members of the association with respect to their commercial advertising policy.

12. Case 45/85 *Verband Sachverischer v. Commission* [1988] 4 CMLR 264.

13. See the *Fenex* Decision. *Fenex* 96/438 (1996) OJ L181/28.

sistency and predictability on the market.<sup>10</sup> The Commission and the Court are particularly concerned where the trade association is acting in a public law capacity and is, in effect, acting as a substitute for the legislature of a member State, by determining the conditions under which its members may fix the prices of their products, undertake promotional business operations or advertise prices or promotions.<sup>11</sup>

The rules of the association do not need to be mandatory in order to incur the wrath of the Commission. A recommendation by an association will be classified as a 'decision by an association of undertakings' if the non-binding mandate constitutes the 'faithful reflection of the applicant's resolve to co-ordinate the conduct of its members.'<sup>12</sup> If the trade association's system of issuing recommendations is well established, the recommendations are updated annually and the circular accompanying the publication of the recommendation was couched in exhortative language, then the system will violate Article 81.<sup>13</sup> Resolutions passed at meetings of the association may also fall within Article 81(1). The system of recommendations will also violate Article 81 if the effect of those recommendations is to foreclose the national market.<sup>14</sup>

The degree of influence over the national or regional market wielded by the association and the corresponding appreciable effect on inter-Union trade is an essential criterion in assessing the legality of the trade association's actions.<sup>15</sup> In the EUDIM Case,<sup>16</sup> EUDIM was an association of wholesalers of plumbing, heating and sanitary materials. The Commission found that there had been an exchange of confidential information relating to purchases on the sanitary market but no exchange of information as regards selling prices. The exchange of information was held not to be anti-competitive since the information was general and non-confidential. In addition, the European sanitary market comprised over 3000 wholesalers, thus the market was far from oligopolistic. The highly fragmented nature of the market meant that the information exchange would not have an appreciable effect. If the trade association has the power to exclude potential members from the national or regional market, then it is likely that the activities of the association may be held to be anti-competitive.

In addition, both the written constitution of the association or the rules of the association simpliciter may violate Article 81.<sup>17</sup> For example, in Case C-37/95 *SPO v. Commission*<sup>18</sup> the SPO was set up by a number of Dutch building trade associations to 'promote and administer orderly competition, to prevent improper conduct in price tendering and to promote the formation of economically justified prices.' The Commission found that the Statutes and price regulating rules of the SPO infringed Article 81(1) and could not be justified under 81(3). The second and third objectives of SPO could easily lead to anti-competitive action *per se*.

The rules must also be proportionate to the aims of the association. If the rules go beyond what is strictly necessary in order for the association to fulfil its functions, then it is more likely that the rules will be adjudged anti-competitive.

### *Membership criteria*

In Case T-206/99 *Metropole TV SA v. Commission*,<sup>19</sup> the European Broadcasting Union was a non-profit making association of radio and television organisations. EBU represented its members' interest in the promotion of radio and television programme exchanges and other forms of co-operation. The Court of First Instance annulled the Commission's decision which rejected Metropole's allegations of anti-competitive activity by the EBU. The EBU operated a two-tier membership criteria, namely active membership and associate membership. Metropole was repeatedly rejected for membership of the EBU in either capacity. Other companies were admitted to the EBU and remained members of the EBU even when they ceased to fulfil the membership criteria set by the Union. Thus, Metropole was excluded from the benefits of membership of the EBU in a discriminatory fashion.

In Joined Cases T-5/00 and T-6/00, *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v. Commission*<sup>20</sup> the Commission was requested to investigate a complaint against three associations of undertakings in the electrotechnical fittings sector in the Netherlands. In this case, the Court of Justice

14. Case 96/82 *LAZ International Belgium NV v. Commission* [1983] ECR 3369. In that case, an association of undertakings in the water industry issued recommendations to its members to the effect that unauthorised appliances were not to be connected to the mains. Products could only gain authorisation through Belgian trade associations. This rule effectively foreclosed the Belgian market since the Belgian trade associations were minded to only certify national products.

15. In Case T-61/89 *Danish Fur Producers Association v. Commission*, [1992] ECR II-1931, the DFPA had over 5000 members. The members were subjected to a number of rules which restricted their freedom to contract. The members were prevented from organising competing auctions and from selling pelts independently in an emergency situation. Similarly, if a firm wanted to receive a subsidised loan, it had to agree to sell pelts only through the auction. The Commission considered that such rules had the effect of foreclosing the Danish market. The non-compete obligation as regards auctions, prevented the member firms from competing with the Association. Similarly, the obligation to sell pelts only through the Association in order to benefit from the insurance scheme was not indispensable to that objective. Also, Danish producers accounted for 72 per cent of fur production in the EC and turnover was over 200 million ECUs, therefore the effect on trade would be appreciable.

16. EUDIM Re 1996 OJ C111/8.

17. *National Sulphuric Acid Association* 80/917 (1980) OJ L260/24.

18. [1996] ECR I-1611.

highlighted the need for the membership criteria of an association to be applied in a coherent and consistent manner.<sup>21</sup> The membership criteria of the association was based on the rather nebulous phrase 'interest of the association.'<sup>22</sup> In essence, applicants would be admitted to the association if the members of the board of the association voted unanimously for admission. Thus, this criterion granted the board members a wide discretionary power.<sup>23</sup> In addition, clear supplementary additional membership criteria was, in fact, applied in a discriminatory fashion. One of the additional criteria for membership was a turnover requirement of 5 Million Dutch Guilders in the preceding three years. This requirement was not consistently applied, since certain wholesalers had been admitted to the association even though they had failed to reach this target figure.<sup>24</sup> The turnover requirement was also criticised since it was set at a particularly high level, which would have the effect of reinforcing the exclusionary effects of the pre-existing gentleman's agreement. Lastly, the turnover criteria assisted in the partitioning and compartmentalisation of the Dutch market since foreign undertakings were effectively prevented from joining the association given that the turnover criteria could only be satisfied in respect of turnover achieved in the Netherlands.<sup>25</sup>

Conversely, rules for terminating membership may also be anti-competitive in their effects. In the FRUBO case,<sup>26</sup> the associations possessed the power to exclude importers or wholesalers from fruit auctions, if they violated the rules of the association.

The lessons for trade associations are evident. The membership criteria of the trade association must be transparent, in order that potential applicants can adapt their behaviour in advance, proportionate in relation to their stated aim, non-discriminatory and based on objectively justified standards.<sup>27</sup>

### *Rules for Conducting Business*

In Cases T-213/95 and T-18/96<sup>28</sup> the Court of First Instance upheld the Commission's decision that an agreement between crane operators and contractors for the rental of cranes in the Netherlands contravened Article 81 and did not

qualify for exemption under 81(3). Both associations, the SCK and Federatie van Nederlandse Kraanverhuurbedrijven (FNK), were established to promote the interests of crane hirers. SCK established a certification system. Crane hirers who attained the requisite standards were permitted to join the association and in turn receive a certificate of quality. SCK members were directed to hire cranes from other SCK members only. The FNK is an umbrella organisation for crane hirers in the Netherlands. FNK members, by virtue of its constitution, are commanded to hire cranes from other FNK members and should charge acceptable rates for the rental. In effect, non-SCK certified crane hirers were prevented from hiring cranes and the rate for hire was fixed by the association, even though the rate was only a recommended rate. The Court held that the cumulative effect of the two rules was to restrict new entrants from penetrating the crane hire market. The restrictions could not be justified under Article 81(3).

SCK was subject to the competition rules since SCK was a private law body in which membership was not compulsory. SCK charged a fee for the issuance of a certificate of compliance.

SCK operated a closed system, since the association would not recognise certificates of compliance, which were issued by similar associations. If the purpose of certification was to purportedly assure quality, then SCK should have accepted equivalent certification from other institutions.

Additionally, the cost of obtaining membership of SCK for non-FNK firms was three times more expensive than for FNK members.

### *Exchanges of information*

The clearest anti-competitive role of the trade association is that of co-ordinating an information exchange network. The collection of sensitive information and the subsequent dissemination and exchange of that information between competitors is inimical to the operation of a competitive market. If sensitive price information is exchanged, the Commission will be entitled to conclude that a concerted practice is in operation.<sup>29</sup>

In Case T-16/98, *Wirtschaftsvereinigung Stahl and Others v. Commission*<sup>30</sup> a German steel

19. [2001] ECR II-3177.  
 20. The NAVEG judgment was handed down on the 16th December 2003. The judgment is available from the Curia website; <http://curia.eu.int>.  
 21. *Para.* 244 of the NAVEG judgment. 'In the contested decision, the essential point regarding membership criteria is the arbitrary character attributed to them.'  
 22. *Ibid.*  
 23. *Ibid.*  
 24. *Para.* 245 of the NAVEG judgment.  
 25. *Para.* 246 of the NAVEG judgment.  
 26. Case 71/74 FRUBO [1975] ECR 563.  
 27. See the Office of Fair Trading Guideline Booklet: *Trade Associations, Professions and Self-Regulating Bodies* OFT 408, March 1999.  
 28. *Stichting Certificatie Knaanhuisbedrijf SCK v. Commission* [1997] CEC 1324.  
 29. Cases 40-48, 50, 54-5, 111, 113-4/73 *Suiker Unie v. Commission* [1975] ECR 1663.  
 30. [2001] 5 C.M.L.R. 9.  
 31. *Ibid.*, at p. 39. 'It is apparent... that the Commission is of the opinion that the 'sensitive nature of the data is a fundamental factor in the assessment of the restrictive nature of an information exchange agreement, as is the fact that it reveals not only market position, but also the 'strategies of various individual competitors.'" See also the *UK Tractors Decision* 92/157/EEC of 17th February 1992 OJ 1992 L 68 at p.19, 'an agreement to exchange information which is both sensitive, recent and individualised in a concentrated market where there are important barriers to entry, is liable to restrict competition.'  
 32. [1994] ECR II-905.  
 33. The Agricultural Engineers Association Limited operated an infor-

industry trade association, and 16 of its members notified the Commission of its information exchange system. The parties exchanged information concerning; the market shares held for each of the products by the producers on the German market and in the Community, data on deliveries by each producer, deliveries of steel on the national market by product according to qualities and by consumer industry and deliveries of certain qualities of steel by product in each of the member States. In this case, the Court of First Instance held that the Commission's Decision had to be annulled since the Commission had erred as to the factual circumstances of the information exchange system. The information was not specific nor sensitive enough to empower the association and its members to calculate the market shares with any degree of accuracy.<sup>31</sup>

In Cases T-34/92, 35/92 *Fiatagri UK, New Holland Ford and John Deere v. Commission*,<sup>32</sup> the Court held that an information exchange system between tractor manufacturers infringed Article 81 and could not be exempted under Article 81(3).<sup>33</sup> Under British law, the Department of Transport required that a highly detailed vehicle registration form be submitted.<sup>34</sup> The association requested this information from the Department of Transport. Using this information, the association was able to produce a detailed database. This information enabled the participating members of the association to identify parallel imports more easily. This transparency and openness would be welcomed in a healthily competitive open market with a large number of tractor manufacturers, however, in a tight oligopolistic market, dominated by a small number of manufacturers, this transparency can be destructive of competition. The price and customer destination of the tractors was freely available to all the competitors in the marketplace. Thus, the manufacturers were able to substitute uncertainty with parallelism.<sup>35</sup> Indeed, the greater the accuracy and topicality of the information, the greater the risk of anti-competitive effects.<sup>36</sup>

The options for an undertaking facing the threat of an information exchange are clear.

'Either the trader concerned does not become a member of the information exchange agree-

ment and, unlike its competitor, then forgoes the information exchanged and the market knowledge; or it becomes a member of the agreement and its business strategy is then immediately revealed to all its competitors by means of the information which they receive.'<sup>37</sup>

The Commission is not against information exchange systems *per se*.<sup>38</sup> Statistical information is useful for improving a company's understanding of the market. If companies understand the market, then they are in a better position to compete effectively in that market. Historical information is unlikely to cause any competitive concerns, however, recent information about prices, deliveries and orders is likely to offend against Article 81, if the market is oligopolistic. Transparency is normally good for competition, however, in an oligopolistic market, such openness allows undertakings to co-ordinate their responses to market fluctuations to an unacceptable agree.

Most agreements that relate to individual companies will be anti-competitive since the information can be used by competitors to gauge their response to the activities of the rival. However, even information exchanges which are anonymous may violate Article 81 if the information exchange allows individual product import levels per member State to be identified. The quality of the information, the specificity of the information, the currency of the information and the current state of the market are all factors that will be used to determine whether the agreement is lawful or anti-competitive. The more that a market resembles a close oligopoly, the less detailed the information exchange will need to be to induce or promote behavioural parallelism.

## Trade associations as enforcers of competition law

Trade Associations may act as whistle-blowers in the case of anti-competitive activity. Under Regulation 17/62, the Commission is the enforcement body of European competition law.<sup>39</sup> The Commission will become aware of anti-competitive activities in one of three ways. The Commission may receive notifications from member States, interested persons or it may

mation exchange scheme in respect of tractors sold in the United Kingdom.

34. The form contained information about the type and make of tractor, the serial number, dealer, location and identity of the purchaser.

35. 'General use, as between main suppliers of exchanges of precise information at short intervals, identifying registered vehicles and the place of their registration is, on a highly oligopolistic market... likely to impair considerably the competition which exists between traders since it has the effect of periodically revealing to all the competitors the market positions and strategies of the various individual competitors.' As quoted by the Court of First Instance in the Case T-16/98,

*Wirtschaftsvereinigung Stahl and Others v. Commission* of 5th April 2001 at para. 38.

36. *Ibid.* '...the more accurate and recent the information on quantities sold and market shares, the greater its impact on undertakings' future market behaviour.'

37. *John Deere Limited v. Commission* [1998] 5

C.M.L.R. 311 at para. 93.

38. *Op. cit.* No. 19 at para.

44. 'As is apparent both from the case-law and the practice followed by the Commission in adopting decisions, information exchange agreements are not generally prohibited automatically but only if they have certain characteristics relating, in particular, to the sensitive and accurate nature of recent data exchanged at short intervals.'

39. Note however that Regulation 1/2003, which replaces Regulation 17/62, will come into force on the 1st May 2004.

40. Article 3(2)(b), Regulation 17/62. For examples of trade association complaints, see the following cases: Case T-308/94 *Cascades v. Commission*, [1995] ECR

undertake its own investigations.<sup>40</sup> In light of the increasing workload of the Commission both under competition law and its other obligations under the EC treaty, the Commission is becoming increasingly reliant upon interested persons and member States to bring potential infractions of European competition law to its attention.<sup>41</sup> This tendency will be exacerbated after May 1st, 2004.<sup>42</sup>

### *Judicial review under competition law*

Under Article 3(2)(b) of Regulation 17/62, a natural or legal person is entitled to apply to the Commission alleging that undertakings or associations are infringing competition law.<sup>43</sup> The natural or legal person is entitled to apply to the Commission where it can demonstrate a 'legitimate interest.' This test is significantly more liberal than the general requirement of standing under Article 230. Article 230 provides that a natural or legal person may only challenge a decision addressed to another person where it is of direct and individual concern to them. Individual concern has been interpreted as meaning that a measure must affect the position of the applicant by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee.<sup>44</sup> The effect of this test is that the person must demonstrate that they have been differentiated from all other objectively identified classes of person. This test has been criticised as being unduly restrictive.<sup>45</sup> In the *Metro* case, it was held that applications under article 3(2)(b) of Regulation 17/62 are to be conducted in the European Court of Justice according to the same procedure as article 230.<sup>46</sup> It is to be hoped that the general rules on standing for natural and legal persons are clarified and indeed liberalised in the near future.<sup>47</sup>

Thus, under competition law, a trade association enjoys a greater right of access to judicial review than that appertaining to article 230 generally. The Association will be entitled to bring an action for annulment if a legal measure of the Commission affects the interests of the association itself or the interests of the members of the association. In most cases, the trade association

will usually commence an action if it considers that the Commission has erred in law or in fact as to the competitive structure of the market.

Under article 232, a trade association may institute an action against an institution of the European Community for a failure to act. In contradistinction to article 230, where the association will be representing the members of the association who are allegedly acting in an anti-competitive manner, under article 232, the trade association will be representing undertakings which are negatively affected by the anti-competitive actions of other undertakings in the market.

### **The relationship between the trade association and the members of the trade association**

The relationship between a trade association and its members is symbiotic. The trade association may be held liable for the activities of its members and similarly members of the trade association may be held accountable for the trade association's actions.<sup>48</sup> Mere membership of a trade association will not impute liability to the member undertaking. However, attendance at meetings and participation in other activity conducted under the auspices of the trade association will be enough to connote responsibility on the member undertaking.<sup>49</sup>

In the *NAVEG* case, members of the association sought to extend the reach of the unlawful agreement to their relationships with third parties.<sup>50</sup> In such a case, an association will only be able to extinguish its legal liability if it brings the unlawful agreement to an end and, further, publicly distances itself from its members.<sup>51</sup>

In relation to the imposition of fines levied by the Commission, the interrelationship between the Trade Association and its members is rather complex. The level of fines that can be imposed is calculated according to the turnover of the members of the association and not that of the association.<sup>52</sup> This provision reinforces the *effet utile* of European competition law. If it were otherwise, the association could simply be organised on a not-for-profit basis, thus severely undermining the deterrent force of the competition regime. In *Cembureau*<sup>53</sup> it was held that if



II-265 where the British Printing Industries Federation BPIF lodged an informal complaint with the Commission, alleging the producers of cartonboard supplying the United Kingdom had introduced a series of simultaneous and uniform price increases and Case T-95/99 *Satellimages TV5 SA v. Commission*, [2002] 4 C.M.L.R. 35 where the trade association VPRT complained of Deutsche Telekom's methods of levying tariffs, since they appeared to discriminate between public and private satellite services.

41. See the *Proposal for a Council Regulation on the implementation of the Rules laid down in Articles 81 and 82 of the Treaty COM (2000) 582* and the *White Paper on Modernisation of the Rules Implementing Article 85 and 86 of the EC Treaty*, Programme 99/027. 42. See the discussion *infra*. 43. In the Case T-37/92, *BEUC and NCC v. Commission* [1994] ECR II-285 it was held that the *Bureau Europeen des Unions des Consommateurs (BEUC)*, the *National Consumer Council* of the United Kingdom and the *Association for Consumer Research* possessed the requisite standing to bring a complaint to the Court of First Instance against the Commission's decision not to investigate an agreement which restricted the importation of Japanese motor vehicles in to the United Kingdom.

44. Case 25/62 *Plaumann v Commission* [1963] ECR 95 at para. 107.

45. Advocate General Jacobs in the *Union* case [Case 50/00 *Union de Pequeños Agricultores v. Council* [2002] 3 C.M.L.R. 1. 25th July 2002] had suggested a new interpretation of individual concern to the effect that an individual 'should be regarded as individually con-

a trade association has been involved in a collusive agreement, the Commission is entitled to fine either the undertakings which are members of that association or the association itself. If the Commission is minded to fine the association, the Commission is entitled, when assessing the level of fine to be applied, to take into account the turnover of the members of the association. In order to fine the association, the Commission must prove that the association's rules have the power to bind the members.<sup>54</sup> If the Commission wishes to find an association jointly liable with its members, the Commission is required to establish conduct on the part of the association, which is separate from that of its members.<sup>55</sup>

Trade associations do not need to possess an independent commercial or economic activity, in order for Article 81 to apply. Article 81 applies to associations where its activities or the activities of its members are calculated to produce the results which Article 81 aims to suppress.<sup>56</sup>

With regard to Commission investigations, it has been stated that the Commission, in accordance with its central place in the enforcement regime, is entitled to question undertakings under investigation about the conduct of all the other undertakings concerned.<sup>57</sup> Regulation No. 17 provides that undertakings must cooperate actively with the Commission and that such active cooperation may result in a reduction of the eventual fine levied.<sup>58</sup> The Court has held that, by analogy, associations are under the same obligation in respect of their members, since to hold otherwise, would unduly hinder the Commission in its investigatory role.<sup>59</sup>

### *The need to maintain proper records*

In the *NAVEG* case, the Court of First Instance confirmed that associations of undertakings are under a general duty of care to maintain adequate business records.<sup>60</sup> The Court went on to emphasise that once the Commission has commenced proceedings under Regulation 17 and has requested information from the associations concerned, that duty must be observed with greater diligence.<sup>61</sup> Indeed, the association is under an obligation to

take all appropriate measures to preserve evidence that is reasonably available to it.<sup>62</sup> This requirement is observable in most domestic public law situations, such as in the field of taxation and is accepted as a necessary restraint upon undertakings.<sup>63</sup> Nevertheless, breach of this duty of care may have serious consequences for the trade association. It is a general principle of law that the burden of proof rests upon the person commencing proceedings and in competition cases it is for the Commission or the National Competition Authority to prove their case against the alleged offender(s).<sup>64</sup> The burden of proof is a rebuttable presumption that can be reversed in cases where the interests of justice so require.<sup>65</sup> An example of this reversal of the burden of proof occurred in the Cartonboard case, Case T-338/94 *Finnish Board Mills Association – Finnboard v. Commission*.<sup>66</sup> The Commission asserted that the total absence of minutes of the meetings of the Joint Marketing Committee evinced the fact that the participants of those meetings were attempting to hide the true [anti-competitive] nature of the meetings.<sup>67</sup> The Court of First Instance confirmed that the burden of proof had been reversed and that it was for the addressees of the Decision who participated in the meetings to prove that it had a lawful object.<sup>68</sup>

## **Impending changes to the competition law regime**

The competition law regime of the European Union will undergo momentous change in 2004. On the 1st May 2004, two major events take place that will have an enormous impact. Firstly, Regulation 17/62 will be replaced by Regulation 1/2003 and secondly, ten new member States will be admitted to the European club.<sup>69</sup>

### *Regulation 1/2003*

Regulation 1/2003 decentralises enforcement of the European Union competition rules. The notification procedure is abolished and replaced by a competition regime predicated upon party autonomy. The parties must 'self-assess' whether their activities are anti-competitive or pro-com-

cerned...where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests.'

46. See Case 26/76 *Metro v. Commission* [1977] ECR 1875.

47. In case T-177/01, *Jego Quere et CIA SA v.*

*Commission* of the 3rd May 2002, the Court of First Instance held, at para. 49, that 'there is no compelling reason to read into the notion of individual concern, within the meaning of the fourth paragraph of Article 230, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee.' and further, at para. 50 'In those circumstances...the strict interpretation...of the notion of a person individually concerned...must be reconsidered.' This judgment appeared to improve the legal standing of non-privileged applicants under Article 230 by reinterpreting the definition of direct and individual concern as established under the case-law of the Court. However, this liberal judgement of the Court of First Instance has recently been set aside by the European Court of Justice. See Case C-263/02 *Commission v. Jego Quere*, of the 1st April 2004. The judgement is available from the Curia website: <http://curia.eu.int>

48. Para. 355 of the NAVEG judgment.

'Admittedly, membership of a trade association cannot lead to automatic attribution to the member concerned of responsibility for various kinds of unlawful conduct on the part of the association, without any actual demonstration of the personal participation of that member or its support for the unlawful conduct complained of. However,

petitive.<sup>70</sup> It is for the undertakings or associations themselves to determine whether their activities are anti-competitive. Naturally, this test of the legality of actions of the undertakings or associations will be undertaken by legally qualified personnel, either in-house lawyers or external counsel or economists. Thus, the compliance costs for undertakings or associations will be considerably increased.<sup>71</sup> The Regulation also seeks to shift the burden of enforcement from the Commission to the National Competition Authorities and the courts of the member States.<sup>72</sup> This decentralisation carries with it a shift in emphasis from public law enforcement to private law enforcement.<sup>73</sup> The Commission envisages that the promotion of private enforcement measures promotes a competition culture generally and more specifically frees up the Commission to vigorously pursue cartels and other hard-core anti-competitive activities.<sup>74</sup> Thus, the trade association may be increasingly relied upon to act as an initiator of class actions.

The powers of the Commission are significantly increased under Regulation 1/2003. The Regulation expressly empowers the Commission or national competition officials to seal premises, in order to allow the Commission to examine books and records.<sup>75</sup> The Commission can also take copies of books or other records in any medium, whereas under Regulation 17/62, the Commission could only take paper copies.<sup>76</sup> The Commission can now either request that information be provided to it and if this information is not forthcoming issue a decision requiring information or it can directly issue a decision requiring the information, thus bypassing the need to issue a request.<sup>77</sup>

Article 20 provides that the Commission can ask any representative or member of staff of the undertaking or an association of undertakings for explanations of the facts or documentation which relates to the subject matter.<sup>78</sup> Recital 23 provides for limited self-incrimination protection.<sup>79</sup> Article 21 provides for inspections of the homes of directors, managers and other members of staff and inspections of modes of transport and land.<sup>80</sup>

The Regulation also significantly increases the level of maximum fines that the Commission

can impose.<sup>81</sup> Article 23(1) of the Regulation 1/2003 provides that periodic fines of up to 1% of turnover in the preceding business year can be levied in five circumstances.<sup>82</sup> Firstly, where the undertaking or association supplies incorrect or misleading information when requested to do so under Article 17 or 18(2). Secondly where the undertaking or association supplies incorrect, incomplete or misleading information or fails to supply information within the time limits under Article 17 and 18(3). Thirdly, the legal entity supplies incomplete books or other records during inspections under Article 20 or indeed refuses to submit to such an inspection under subsection 4. Fourthly, in response to questions asked, the undertaking or association gives an incorrect or misleading answer, fails to rectify an incorrect or misleading answer within the time-limit set by the Commission or fails or refuses to provide a complete answer on facts relating to the subject matter of the inspection and fifthly, the undertaking or association can be fined where the seals affixed by the Commission have been broken.

Article 24 of Regulation 1/2003 provides that periodic penalty payments can be levied by the Commission in order to compel undertakings or associations to put an end to infringements of Articles 81 or 82, to comply with interim measures under Article 8, to comply with Article 9 commitments, to supply complete and correct information as required under Article 17 or 18(3) or to submit to an inspection as per Article 20(4). The maximum level of periodic penalty payments that can be levied upon undertakings and associations is 5% of daily turnover.<sup>83</sup>

The raising of the maximum level of fines mentioned above will promote compliance with the competition rules.<sup>84</sup> The financial consequences of non-compliance are significant. In tandem with the raising of the level of maximum fine imposed, the decentralisation of competition law enforcement to the national competition authorities means that the Commission can concentrate on anti-competitive activities that are of significant EU interest, whilst devolving day-to-day enforcement to the national authorities. Thus, the risk of detection is much higher and the level of fine imposed when the violation is detected is greater.

[TU] cannot contend that its personal conduct cannot be relied on as evidence of its participation in the infringements in question.’ 49. Case T-1/89 *Rhone-Poulenc v. Commission* [1991] ECR II-867, at para. 66, as quoted in the *Cartonboard* case *supra*. ‘Second, participation in meetings at which discussions with an anti-competitive object were held is sufficient to satisfy the criteria for the application of Article 85 [now 81] of the Treaty.’ See also, para. 359 of the NAVEG judgment. 50. Para. 388 of the NAVEG judgment. 51. *Ibid.*

52. ‘The upper limit of 10% of turnover must be calculated by reference to the turnover of each of the undertakings which are parties to those agreements and concerted practices or of all the undertakings which were members of the association of undertakings, at least where, by virtue of its internal rules, the association is able to bind the members. The correctness of this view is borne out by the fact that the influence which an association of undertakings has been able to exert on the market does not depend on its own turnover, which discloses neither its size nor its economic power, but rather on the turnover of its members, which constitutes an indication of its size and economic power.’ *Cartonboard*, at para. 270. See also Joined Cases T-39/92 and 40/92 *CB and Europay v. Commission* 1994 ECR II-49 and Case T-29/92 *SPO v. Commission* [1995] ECR II-289. 53. Cases T-25/95 to 87/95 *Cimenteries v. Commission* [2000] 5 CMLR 204. In this case, the Commission found that there was an agreement between national cement trade associations and individual cement producers, to share the

One issue of concern for trade associations is where the trade association is found guilty of breaching European competition law and becomes insolvent in the interim: Regulation 1/2003 provides a solution.<sup>85</sup> In respect of the fines applicable for breach of Article 81 and 82, the new Regulation retains the maximum ceiling of 10% of turnover in the preceding business year. The fine imposed on the trade association is calculated on the basis of the turnover of each member of the association active on the market concerned. The maximum level of the fine imposed is 10% of the turnover of each member active on the market. If the trade association is unable to pay the fine, the Commission is entitled to recover the fine from any of the members of the association which had a decision making capacity in the association, subject to the proviso that the members must have been active on the market. Thus, there is no incentive for the constituent members of the trade association to dissolve the trade association or cause the trade association to go bankrupt since the financial penalty still subsists.<sup>86</sup>

Interim measures can be ordered under the new Regulation, in urgent cases where there is a risk of serious and irreparable damage to competition.<sup>87</sup>

### *The new member states*

The competition authorities in the new member States are relatively inexperienced in competition economics and legal principles.<sup>88</sup> It is a practical concern which may have serious implications for the role of the trade association in a decentralised competition culture.<sup>89</sup> The role of the trade association as highlighter of anti-competitive activity may be imperilled in the new member States if the trade associations themselves do not have faith in the competence of the National Competition Authority. If they do not perceive the relevant NCA as a competent and efficient enforcer of EU competition law, then they will be disinclined to have recourse to this enforcement mechanism. This problem may be exacerbated by national procedural rules on standing. It is not inconceivable that a trade association may fail to be sufficiently affected by the anti-competitive activity to instigate an action in a national court.

Conversely, in the situation of the trade association as instigator of anti-competitive behaviour, the National Competition Authority may be insufficiently financed, resourced or educated to fully appreciate the anti-competitive potential of collusive action undertaken by or within a trade association.<sup>90</sup> Indeed, new member States may be over-protective of their own national or regional trade associations, viewing them as an important bulwark against more powerful trade associations and undertakings from the established member States. Trade associations from the accession countries may also share this perception. Thus, there is a real danger that trade associations from the West and the East may distrust each other to such an extent that they adopt anti-competitive behaviour, in an attempt to protect their position on the greatly expanded internal market. The enlarged internal market may become the battleground in the fight for trade association supremacy, with membership criteria, technical standards and the rules for conducting business and information exchanges being the weapons of choice.

## Conclusion

Trade associations play a crucial role in the European internal market. The trade association's co-ordination and facilitation may be detrimental to healthy competition or it may promote competition. A trade association essentially promotes the economic sector it represents. The attitude of the trade association to this objective is of central importance. The trade association may adopt a short-term protectionist perspective. This approach may bring short-term relief from full competition, however long term reform and rationalisation of European industry is in the best interests of the industry and thus of the trade association. If the trade association is committed to a positive long-term strategy, the association may act as a pro-competitive guardian of the industry.

Regulation 1/2003 and the enlargement of the European Union to the East brings both tremendous challenges and opportunities to trade associations. Decreased legal certainty and increased compliance costs may be encountered, however, more effective central monitoring by the Commission

European market and to control the transshipment of cement between member States. 'Circulation of price lists and other price information reinforced the general agreement on non-transshipment to home markets. Exchanges of information on production capacity, output, sales and prices on home and export markets were an autonomous infringement, because they created a system of solidarity and reciprocal influences designed to achieve co-ordination of economic activities.'

54. *Ibid.*, at p. 485.

55. *Ibid.*, at pp. 1325 and 2622. In *Cembureau*, the Court held that the Commission had breached the requirements of procedural fairness in so far as the Commission's statement of objections did not set out the Commission's intention to fine nine associations of undertaking separately to their members.

56. *Ibid.*, at p. 1320.

57. Joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00 *Aalborg Portland v. Commission*, 7 January 2004 at paras. 207-208.

58. Case T-13/89 *ICI v Commission* [1992] ECR II-1021, at para. 393.

59. Joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00 *Aalborg Portland v. Commission*, 7 January 2004 at para. 209.

60. At para. 87 of the judgment.

61. *Ibid.*

62. *Ibid.*

63. For example, in the United Kingdom the fifth data protection principle of the Data Protection Act 1998 provides that data shall not be kept longer than necessary. In the specific context of tax, it would be advisable for the undertaking to keep records for 6 years. See *Data Retention Policies - Data Protection*

and devolved enforcement will ensure a more efficient competition regime. Trade associations must adapt to this new environment. They will be subjected to greater scrutiny than hitherto and will also be expected to be more pro-active in undertaking, or assisting with, private law enforcement. The conflict between the Western European trade associations and East European trade associations is also a potential concern. These two tribes may be

*Considerations*, Rowan Middleton, 2003 C.L.S.R. Vol. 18, No. 5 216-221.

64. In this respect, see *Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, available at OJ [2003] L1/1. Article 2 of the Regulation confirms that, 'the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement' and that, 'The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.' See also Joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00 *Aalborg Portland v. Commission*, 7 January 2004 at paras. 78-79. The judgment is available from the Curia website; <http://curia.eu.int>.

65. In the context of English law, see *Murphy on Evidence*, 7th. ed., 2000, Blackstone Press, London, at p. 105.

66. [1998] ECR II-1617.

67. Para. 164 of the judgment. The meeting was deemed to be evidence of a concerted practice.

68. *Ibid.*

69. The applicant States are Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

70. See for example, *Devolution and Convergence in Competition Enforcement*, Terry Calvani, 2003 ECLR 24(9), 415 at p. 421.

71. *Representing Clients After the Modernisation of EC Competition Law*, Vincent Power, 2003 ICCLR 14(11) 335-342 at p. 336.

72. *Op.cit.*, No 70.

73. 'Increasing public awareness of the law can prevent more undertakings from violating the antitrust rules and make private enforcement more effective.'

*Estonia's Competition Policy: A Critical Evaluation Towards EU Accession*, Julia Thielert and Maarten Pieter Schinkel, 2003 ECLR 24(4), 165-175 at p. 175.

74. See paragraph 3 of the Preamble to Regulation 1/2003. See also, *Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK*, 2004 ECLR 25(1) 25-36, at pp. 27 and 35.

75. Article 20(2)(d). See, *Reform of EC Competition Law - Implementation of Reforms in the UK*, 2003 Comp. Law Mon. 3(4).

76. *The Investigative Powers of the European Commission*,

fearful of each other and hence may adopt defensive and offensive policies which threaten competition on the market. This threat may prove to be less imagined than real.

Undoubtedly, in the 21st Century trade associations look set to continue playing an important role in the competition law system of the European Union, itself a key component of the European Union integration project.

Anna Tissot-Favre, 2003 ICCLR 14(10) 319-325, at p. 322.

77. *EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You! Part 1: Between the Idea and the Reality: Decentralisation under Regulation 1*, Alan Riley 2003 ECLR 24(11) 604-615, at p. 607.

78. *Ibid.*, p. 609.

79. *Ibid.*

80. *Ibid.*

81. *Major Events and Policy Issues in EC Competition Law, 2002-2003: Part 1*, John Ratcliff 2004 ICCLR 15(2) 19-41 at p. 21.

82. Under Article 15 of Regulation 17/62, the Commission was only entitled to impose fines of between 100 and 5,000 units of account.

83. Article 16 of Regulation 17/62 only provided for a maximum figure of 50 to 1000 units of account.

84. *Op.cit.*, No 76, at p.319.

85. Article 23(4).

86. See, *Reform of EC Competition Law - Implementation of Reforms in the UK*, 2003 Comp. Law Mon. 3(4).

87. Article 8. See, *Reform of EC Competition Law - Implementation of Reforms in the UK*, 2003 Comp. Law Mon 3(4) and *EC Antitrust Modernisation: The*

*Commission Does Very Nicely - Thank You! Part 1: Between the Idea and the Reality: Decentralisation under Regulation 1*, Alan Riley 2003 ECLR 24(11) 604-615, at p. 607.

88. 'The market economy is unlikely to deliver the advantages it promises and the formerly centrally planned economies will be unable to survive the competitive pressures and market forces of the internal market.'

Mario Monti, as quoted in; *Estonia's Competition Policy: A Critical Evaluation Towards EU Accession*, Julia Thielert and Maarten Pieter Schinkel, 2003 ECLR 24(4), 165-175 at p. 165.

89. 'First there is a stream of hostility to notions of competition in European culture which may legitimise the activities of competition infringers and deter litigation.'

*EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You! Part 2: Between the Idea and the Reality: Decentralisation under Regulation 1*, Alan Riley 2003 ECLR 24(12) 657- 672, at p. 670.

90. *Representing Clients After the Modernisation of EC Competition Law*, Vincent Power, 2003 ICCLR 14(11) 335-342 at p. 339.

# The search for input legitimacy through organised civil society in the EU

by Justin Greenwood\*

*Aspirations to enhance input (participative) legitimacy at the EU level have long focused upon outlets of civil society, particularly those organised at the EU level, culminating in a draft constitutional Treaty article embracing them within the scope of participatory democracy. Recent research has identified the limitations of organised citizen interest groups in acting as a bridge between the EU and citizens in member states, and the extent to which the search for input legitimacy jeopardises output (effectiveness) legitimacy. To these may be added a number of key factors: the way in which the supply of opportunities for participation influences demand; the willingness of EU institutions to reach 'outsider' groups; the recent consolidation of citizen interests into cognate families and the 'pooling' of dialogue with EU institutions; the role of EU funding for civil society interests in input legitimacy; and the national level of interest organisation as a means of EU legitimacy.*

## Introduction: the problem

Political systems need legitimacy from their subjects in order to undertake a full range of governance functions. Legitimacy arises from two sources: inputs (the ability to participate in political decision making); and effectiveness (results). The limited nature of the EU as a political regime can partly be explained through its lack of input legitimacy. Some authors believe that it never can achieve input legitimacy (Majone, 1996; Scharpf, 1999; Moravcsik, 2002). The core, structural problems are the absence of mechanisms of 'majoritarian' politics which bring 'politics to the people' and which can be found in most member state settings, and the associated lack of a 'European public debating space'. These structural problems include the absence of:

- the agenda setting power of adversarial debate;
- the absence of mass membership political parties organised on a European wide basis;
- competing parties forming government and opposition;
- voting to change a government;
- a territorially based (i.e. EU wide) media;
- a decision making system which is readily intelligible to citizens.

To some observers, the best that can be done for legitimacy is therefore to concentrate upon outputs, acquiring consent through Pareto efficient solutions that are in the collective interest (Majone, 1996; Scharpf, 1999). Examples of these include environmental and consumer protection policies, and Extended Regulatory Impact Assessments. This latter measure explicitly equips the European Commission to act as public interest arbiter through broadening assessments of impact beyond those active in lobbying on them to other, dormant or latent, stakeholders potentially affected.

The European Commission's 2001 EU White Paper on Governance included an explicit, centre-stage search for enhancing citizen input to EU policy making, with a substantial focus upon the role of organised civil society, particularly those at the EU level. It reflected that

'belonging to an association provides an opportunity for citizens to participate actively in new ways other than or in addition to involvement in political parties....organised civil society represents the views of specific groups of citizens to the European institutions...and contributes to the formation of a European public opinion...promoting European integration in a practical way and often at grass roots level' (European Commission, 2001a, p.4).

The White Paper built on a number of initiatives and cognate communications on the subject from both the European Commission and the European Economic and Social Committee (Commission of the European Communities, 1992; 1997; European Commission, 2000; 2002; European Economic and Social Committee, 1999; 2000). This focus was funnelled into the 2003 Convention preparing a draft constitutional Treaty, maintaining a central focus on the potential contribution of organised civil society to enhancing EU input legitimacy, and resulting in a dedicated draft Treaty Article (46) involving explicit use of the term participatory democracy. To what extent can organised civil society provide a solution to the shortfall of EU input legitimacy?

## The EU system of organised interests

The structural problems of input legitimacy for the EU have resulted in a special place for interests organised at the EU level since the cre-

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ation of the first institutions of the EEC. Because it lacks the legitimacy to engage in redistribute policies, much of what the EU does is based on regulatory activities, which distribute costs and benefits narrowly upon selective constituencies. For this reason, the EU is an ideal venue for interest groups. They bring much needed resources to policy making, implementation, and monitoring. In some accounts of how European integration develops, they help the EU to acquire more policy competencies by bringing irresistible demands to member state doorsteps, and assist in the popular identification with the European Union. In these senses, interest groups are the 'natural constituency' of the European Commission, and it has done all it can to welcome all comers, and to stimulate and nurture the formation of EU level groups.

There are around 1500 formal EU interest groups organised at the EU level embracing every imaginable specialism (Greenwood, 2003). They are almost exclusively associations of organisations (either of national associations, or/and companies), rather than of individuals<sup>1</sup>, and are geared at tasks of political representation by engaging with EU institutions. My own head count indicates that around 20% are citizen groups, of which the vast majority receive EU funding. Some of these organisations are part of wider international movements, and a few have obtained sufficient resource levels for Brussels offices which can exceed 20 staff<sup>2</sup>. Some are almost completely dependent upon EU funding, and justify this as a source of independence in the same way as state funding of political parties avoids the need to court donations from sources which could otherwise compromise their agendas. Others take the view that even EU funding brings with it obligations and possible compromises to their independence. Nonetheless, even the most notable refusenik of EU funding, Greenpeace, has a Brussels policy office which is geared to engaging EU political institutions rather than to engaging in mass activism, reflecting both the difficulties of organising transnational protest activities, and the institutionalised nature of EU interest group activities.

There is a very high degree of embeddedness of some citizen and trade union interests within the Commission services responsible for the Employment and Social Affairs (DG EMP), and

DG Environment<sup>3</sup>, in particular. This high degree of institutionalisation may have influenced the agendas and styles of some groups. While providing political access for the interests they represent, institutionalisation may also channel energies into permanent relationships which distance them from their core member constituencies. Many have been created, funded and nurtured by the Commission's own hand in the hope that they will one day be strong enough to carry demands for more integration through their members to the doorsteps of national governments. Some have become extensions of the European Commission, and bring to the Commission little more than a reflection of its own thinking. This is not true of all such groups, but is not uncommon, and where such circumstances arise organised interest groups become detached from civil society and part of the political system in which they operate. Ironically, the Commission's need for such groups to act as bridges to citizens in the member states is hampered by the institutionalised nature of these relationships, a factor which, viewed from a distance, helps explain the restlessness of Commission initiatives aimed at them.

## Representative and participatory models of democracy in the EU and the role of organised civil society

One of the first explicit and systematic reflections of the Commission/group relationship at institutional level was the European Commission's landmark 1992 paper on 'An Open and Structured Dialogue between the Commission and Special Interest Groups.' This paper emphasised the importance of broadening participation in the preparation of Commission proposals, the systematic basis of Commission consultation, the wider availability of Commission documents and open access for all with no accreditation system.

These general principles formed a limited foundation from which to pursue the trail for input legitimacy. Each of these agendas continued with a series of initiatives throughout the 1990s and beyond, including an Treaty principles and Council declarations linking openness

1. There are very rare exceptions, such as Eurofora with around 200 citizen members, but such organisations tend to be largely based around a national (Italian, in this case) membership base. See

media.supereva.it/eurofora/index.html

2. The European Women's Lobby, the European Youth Forum, and the World Wide Fund for Nature (WWF), each have in excess of 20 staff. WWF, with 26 staff, enjoys the highest level of resources.

3. Examples of these include the 'revolving door' between the European Women's Lobby and DG EMP (Helfferich and Kolb, 2001; Mazey, 2000); the 'training ground' provided by the *stagiaire* scheme operated by DG Environment from which the Brussels environmental groups draw substantial benefit; and the over dependence of the European Trade Union Confederation upon DG EMP to achieve its goals (Martin and Ross, 2001).

to broader democratic principles of participation, accountability and legitimacy (Harlow, 2002; Dyrberg, 2003). There have been substantial attempts to bring transparency to the work of the European Commission and Parliament, based around a 2001 Regulation on Access to Documents coupled with activism from the European Ombudsman, accompanied by mechanisms such as web based document and correspondence registers. These include the possibility of access to Third Party documents, and access to input from those responding to consultation exercises. Transparency has also been used as a two-way street, with demands placed upon civil society organised interests for public disclosure of the nature of the interest and constituency they represent. The early basis of input legitimacy find echoes also in the European Parliament debates on regulating lobbying, where a 'level playing field' between business and other types of interests became an issue. But the full extension of the debate to issues of participatory democracy only become apparent where it came to settle upon organised citizen interests.

All of these debates are easily traced to the post Maastricht agenda of 'addressing democratic deficit,' and much of the energy of the EU since has been absorbed by this task. Some of this energy has very recently gone into attempts to engage with citizens directly, but much of it has been directed at the relationship between the EU institutions and organised civil society in the hope that these will be the best way to reach with citizens. Much of this has effort has been invested in institutionalised relationships in the social policy arena. An annex to the Treaty, Declaration 23, has been described within the Commission as the first formal expression of Commission/NGO relations in identifying the importance of dialogue between the EU and 'charitable associations and foundations... responsible for social welfare establishments and foundations' (Commission of the European Communities, 1997, pp6-7) (see also Geyer, 2001; Kendall and Anheier, 1999). Social Policy Commissioner (1993-1999) Flynn noted in a 1999 review that 'since 1993 there has been a real blossoming of the relationship between DGV and the social NGOs' (European

Commission, 1999, p.50). Flynn's 'landmarks' were the 1993 White Paper for Growth, Competitiveness and Employment, the 1994 White Paper on European Social Policy (European Commission, 1999), and the search for European civil dialogue.

Flynn and the Chair of the European Parliament Social Policy Committee, Stephen Hughes, did much to help create (1995) an umbrella structure of civil society interests which was later to develop into one of the principal structures of organised civil society, the European Platform of Social NGOs<sup>4</sup> ('Social Platform'). Flynn's 'home' Commission service, DG V (subsequently Employment and Social Affairs, DG EMP), long the key Commission directorate in seeking to advance the frontiers of European integration in social fields, provided the institutional patronage for this group. In the early days, a key task of the Platform was to prepare for the first European Social Policy Forum in 1996, which attracted 2000 delegates (Geyer, 2001). A second event, of around 1300 delegates, was held in 1998 (Smismans, 2003). This latter event became 'hijacked' by the controversy caused by a European Court of Justice ruling which brought into question the legal basis of Commission funding of NGOs, a situation which was resolved some months later.

The Commission channels around 1 billion euro of funding through NGOs, often for projects designed by NGOs itself within broader frameworks (European Commission, 2000). These funds create cross-border networks of grateful recipients which have the effect of deepening European integration at grass roots level, with the formal agendas proposed through funding bids sometimes of secondary importance. Indeed, with their ability to reach through to local communities, the structural funds are one of the best instruments for EU institutions to engage directly with citizens and with their representative organisations at the national level. Article 6 of the Regulation establishing the European Social Fund explicitly refers to local social capital, and a recent pilot project (1999-2002) funded 30 projects aimed at building local social capital (European Foundation, 2003). Initiatives such as URBAN, LEADER+ and EQUAL are based around part-

4. The Platform today represents 39 European NGOs and, through them, 1700 national organisations (www.socialplatform.org)

nerships with civil society designed to intervene in local labour markets. Variation in EU popularity may be linked to the extent to which a territory is in receipt of the structural funds.

The Social Policy Forums were designed to agitate and prepare the way for a 'Civil Dialogue', which, using as inspiration the Social Dialogue allowing EU employer and trade union organisations to draft labour market legislation between them, sought a legal, institutionalised basis for NGO participation in EU policy making. Despite its support from DG EMP, the specific demand for a mechanism comparable to social dialogue has never quite been fulfilled. This is partly because of lack of support elsewhere within EU institutions, with no support at all among member states for its inclusion in the Treaty of Amsterdam. The nature of the demand for civil dialogue has now shifted from a mimeo of social dialogue, in that there is consensus among civil society organisations that the more generalised concept of 'civil dialogue' has now been achieved through the insertion of an article into the 2003 draft Constitutional Treaty on 'participatory democracy.' This latter process removed a further obstacle to 'civil dialogue' in the shape of objections that institutionalised social dialogue type processes 'by-pass' the European Parliament. This is because the draft Treaty 'ranks' participatory democracy as firmly secondary to that of representative democracy, ensuring that the two principles complement each other in the search for input legitimacy rather than clash. Ahead of these were several landmarks in the development of participatory concepts of democracy.

Two Communications from the Commission, one in 1997 and one in 2000, took the agenda for organised civil society participation forward. The 1997 Communication reflected that groups foster a sense of citizenship and solidarity, while the 2000 Communication, issued in the name of President Prodi and Vice President Kinnock, explicitly reflected that

'NGOs can make a contribution fostering a more participatory democracy both within the EU & beyond' (European Commission, 2000, p. 4).

In between and following these Communications, the European Economic and

Social Committee (EESC) sought to re-invigorate its own marginal position in EU policy making by re-positioning itself as an outlet for all of organised civil society through a series of activities aimed at reaching out to citizen interest organisations. The latest of these involves the establishment of a 'Liaison group with European organisations and networks' in February 2004 (European Economic and Social Committee, 2004). The ability of the EESC to embrace the spectrum of citizen interests is limited by its own difficulties of internal reform to move beyond its principal constituency of producer interests. Civil society groups are also wary of marginalisation by being 'parked' at the EESC, and of diluting their message through the need to achieve consensus positions in the EESC<sup>5</sup> (European Economic and Social Committee, 2003). Nonetheless, the EESC has been able to feed the debate with definitions of<sup>6</sup> and criterion referenced standards for,<sup>7</sup> organised civil society, both of which have been taken up for policy purposes by the European Commission. Because its members are appointed by national governments, the EESC also implicitly draws attention to the potential role of interests organised at the national level in EU democratic legitimacy.

The contribution of national interest groups to EU legitimacy is a wider issue which achieved relatively little analytical or policy making attention until the arrival of the 'Lisbon Process' in 2000. This gives national interest groups a role in the delivery of the EU strategic goal to become the most knowledge based and dynamic economy in the world by 2010. For the most part, this involves social policy groups in the delivery of strategies to assist with labour market inclusion (Armstrong, 2002). The principle of subsidiarity seems to guarantee the possibility of national interest groups in EU policy making, difficult though this is to operationalise. In practical terms, national interest groups have long been involved in the management of EU public affairs, particularly among business interest associations, and a source of potential legitimacy among their constituency of members. Through vertical, or horizontal, coverage of EU issues at the national level, and through dedicated EU offices, national associations of business<sup>8</sup> and the

5. Civil society organisations are now seeking a 'privilege pass' to the new EESC premises, basing such demands on arrangements in force at the European Parliament – and providing a minor example of a point developed later in the paper about how standards in place generate new demands.

6. 'organisational structures whose members serve the public interest through discussion and function as mediators between the public authorities and the citizens' (European Economic and Social Committee, 2000, p.107).

7. These are outlined later in this paper under the discussion on the White Paper on Governance

8. 170 national associations are listed in the 2004 edition of the European Public Affairs Directory (Landmarks, 2004)



professions devote substantial staff and member resources to the management of EU affairs, and in doing so provide a potential avenue for input legitimacy.

Among the other landmarks in the development of participatory democracy channels, De Schutter (2002) draws attention to formulation of the Charter of Fundamental Rights, annexed to the 2000 Treaty of Nice. This involved a highly transparent process facilitating input from organised civil society (particularly citizen) interests, with the social platform seeking to involve citizens directly by organising a series of parallel Citizen Assemblies designed to achieve the inclusion of the Charter in the EU Treaties. The Platform's aspiration to repeat the idea during subsequent Treaty preparation processes was partly subsumed by its institutionalisation through the 2002/3 Convention process, described later. The Charter drafting experience agenda set a new model of formulating international Treaty agreements, a cause taken up by the governments of the Benelux countries, and which found echoes in the design and procedures of the Convention on the Future of Europe, charged with drafting the new EU Constitutional Treaty. Now that these practices have been adopted, it has probably changed forever the way in which intergovernmental Treaties are created, and illustrates the way in which the supply of opportunities for participation influences their demand. That is, once a demand is conceded and a standard set, stakeholders seek to institutionalise it, make it a norm within a short period of time, and build and extend upon it. Put another way, providing opportunities for civil society participation generates standards, expectations, and demands for further opportunities for input.

Another standard for participation has been set by the relationship between DG Trade of the European Commission and world trade/development oriented interest groups. This is one of the oldest dialogues, dating from 1974, involving around 1200 such groups participating under the (Commission financed) umbrella of CONCORD (Liaison Committee of Development NGOs<sup>9</sup>) to comment on Commission trade and development assistance (Seebohm, 2003). A more focused dialogue has

involved the establishment by the Commission of 'Contact Groups' to facilitate dialogue on Commission input to WTO policy. In its exchanges, involving 580 groups (European Economic and Social Committee, 2003). Goehring detects traces of deliberative democracy in this dialogue, creating new policy instruments for the Commission (Goehring, 2002; see also Eriksen and Fossum, 2000) in fields such as access to medicine, and agriculture, where the expertise of groups has attracted favourable comment from both the responsible Commissioner, Pascal Lamy, and from Jacques Delors (European Economic and Social Committee, 2003). Lamy has developed participative practices which delight institutional NGOs and which ensures the transmission of views of the counter-globalisation movement, but of particular note are the efforts the Commission has gone to undertake dialogue with interest groups who resist institutionalisation and refuse to participate in the CONCORD forum. In these cases, the Commission has established bilateral dialogue, and in doing so has reached out to a constituency of 'outside left', anti globalisation/anti capitalism groups who have recently engaged EU policy making. In doing so, the Commission has done more than most political systems to reach out to the far corners of civil society.

These individual efforts apart, both the Social Platform and CONCORD umbrella structures represent an attempt and preference among the Commission to 'pool' its dialogue with 'families' of NGOs which has emerged. Among other 'families' are the 'G8' group of environmental NGOs, which has for some time purposefully but loosely co-ordinated environmental action, and the Human Rights Group, an even more informal network based around Amnesty International. These four structures form part of the Civil Society Contact Group, a co-ordination outlet which has outlasted its initial brief to input into the work on the Convention on the Future of Europe (Alhadeff, 2003). Despite a rather unhappy start (European Economic and Social Committee, 2003), this group has now spawned a permanent secretariat, and adds value to institutionalised dialogue through its confederative nature, resembling producer organisa-

9. Formerly with the acronym CLONG

tions. Of these 'families', environmental interests have most to be pleased about from the outputs to EU policy making. The 1998 Aarhus Convention gives such groups the best position with inputs also, giving them a legal right to information and participation in environmental decision making which is enforceable in the European Court of Justice.

From these groups an amendment was fed through a sympathetic Convention (on the Future of Europe) member, seeking (unsuccessfully) a Treaty clause that would

'*guarantee* a regular dialogue with civil society in *every* stage of the decision making process' (Peeters, 2003; my emphasis).

Meeting such demands would clearly interfere with decision making efficiency, and we may indeed be approaching the point where the search for participation interferes with the ability of an already overloaded political system to work efficiently (Menon and Weatherill, 2002; Skogstad, 2003). The propensity for 'nuisance' and 'value' appears to vary according to the characteristics of policy networks, features which are essentially concerned with their degree of institutionalisation (Skogstad, 2003. Börzel, 1998). The 2003 Chemicals REACH<sup>10</sup> Directive from the Commission attracted some 6,500 responses to its initial consultation. The volume and intensity of these responses attracted demands that the Commission establish bureaucratic machinery to identify how it had responded to the detailed input it had received. The Commission has indeed pledged itself to provide an explanation of how the results of consultations were taken into account in formulating the final proposal, and in doing so has voluntarily extended its accountability. This voluntary move is one that has been taken ahead of the incorporation into the Treaty of the Charter of Fundamental Rights, which includes the right to justification of administrative decisions. Once again, the incremental expansion of citizens rights, based on an expectation created by the establishment of earlier rights, is apparent from this process.

A series of consultation standards for dialogue with outside interests were adopted by the Commission for use across the entire Commission at the end of 2002, and were

themselves the subject of an extensive consultative process (European Commission, 2002). They seek to deliver an evenness of approach, and to balance legitimacy with effectiveness by resisting demands for extended periods of consultation and fixing the period in which to respond at eight weeks. Where Commission guidelines require impact assessment, use of the guidelines for consultation is obligatory (ECAS, 2004); in other cases, groups such as the European Citizen Action Service have raised the prospect of taking deficiency in practice to the European Ombudsman. A legal basis of dialogue is resisted in the standards, as were demands for the softer 'Compact' version between governments and voluntary organisations, a device originating in the UK and now exported to other member state environments. Whilst the standards cover less ground than the proposed Compact, they promise to deliver similar de facto outcomes by providing breadth and ease of access to the preparation of Commission policy initiatives through the EU web portal Europa. An idea floated in the White Paper on Governance of going beyond consultation standards to partnership agreements with a selective number of civil society organisations was not taken forward following resistance from both the European Parliament and some citizen groups (European Economic and Social Committee, 2003). The production of the consultation standards have effectively completed the task the Commission commenced in 1992 of broadening the basis of Commission consultation. This work also delivers on the promise of 'better law making' from the White Paper on Governance, but also forms part of a wider package on the table for organised civil society groups: the promise of more participation in return for more transparency and accountability.

### **The capacities of EU civil society organisations**

A number of initiatives originating from the White Paper on Governance are aimed at enhancing the capacity of EU level organised interest groups. The Paper recorded that:

civil society organisations need to tighten up their internal structures, furnish guarantees of

10. Registration, Authorisation and Evaluation of Chemicals. The Commission adopted the Directive on 29.10.03.

openness and representativity, and to prove their capacity to relay information or lead debates in their member states (European Commission, 2001b, p.17).

This statement reflects an exasperation with civil society groups at a lack of capacity to perform a bridging role between the Commission and with citizens in the member states. Recent research conducted among selective constituencies of citizen interest groups organised at the EU level has concluded that, on the whole, they do not act as agents of political socialisation in the member states, and that those who work for them have little interest in undertaking this role. On the basis of his empirical research among them, Warleigh concludes that

‘Although it would be misleading to argue that all NGOs fail to demonstrate any such capacity, necessary structures to allow NGOs an EU socialisation function, such as the existence of methods of internal decision making which allow supporter input into NGO EU strategy, are in general conspicuous by their absence. So too are mechanisms by which NGO supporters or members can hold these organisations to account, or make an input into their decision-making’ (Warleigh, 2003, p.118),

and that

‘NGOs will be unable to act as agents of civil society Europeanisation unless they are internally democratic and willing and able to act as agents of political socialisation, with particular reference to EU decision making and policy...NGOs are as yet simply not ready to play this role, and...it cannot be assumed that their capacity to act in this way will be improved....their internal governance is far too elitist to allow supporters a role in shaping policies, campaigns and strategies....Moreover, most NGO supporters do not actually want to undertake such a role...NGOs are no ‘magic bullet’ which will automatically hit the target of political socialisation’ (Warleigh, 2001, p.635).

Warleigh’s research, findings and conclusions were replicated by Sudbery, who conducted interviews with the Liaison Committee of Development NGOs, the European Environmental Bureau (EEB), the Platform of European Social NGOs, and Amnesty International. A typical comment was that of a

respondent from the European Platform of Social NGOs that ‘we do not have direct contact with supporters, but rely on member organisations to bring the issues to their attention’ (p.89). The respondent from the EEB commented that

‘while ideally it would be good to get people involved, time pressures mean that the most effective use of my time is to get on with advocacy. In the end my role is not to encourage the most participatory governance, but to ensure the best results for the environment’ (Sudbery, 2003, p.90).

Another of Sudbery’s respondents stated that it was difficult to persuade colleagues in the Member States to take an interest in the work of the Brussels office because the EU is seen as ‘far away and fuzzy’, and even having ‘negative overtones’ (ibid.).

These concerns have led to Commission initiatives, originating from the White Paper on Governance, aimed at upgrading the internal capacities of groups so as to achieve more transparency and accountability from them. The CONECCS<sup>11</sup> initiative includes a new database of interest groups on Europa in which inclusion is contingent upon confirming that the interest group is formally constituted, EU wide, active, with expertise, and prepared to provide information about itself. There are further compulsory questions about group establishment, objectives, and post-holders, and for those involved in EU consultative bodies, about sources of finance and details of members ([http://www.europa.eu.int/comm/civil\\_society/coneccs/start.cfm?CL=en](http://www.europa.eu.int/comm/civil_society/coneccs/start.cfm?CL=en)). Whilst the site makes clear that inclusion on the database confers no special privileges, and there are at present no facilities – and little capacity – within the Commission to evaluate the information being presented by groups, an open question is whether it in fact represents the start of a de facto system of accreditation. The Economic and Social Committee might be well placed to perform such a role.

The Economic and Social Committee has become the lead institution in putting forward criteria for EU interest groups through its Opinion on the White Paper on Governance (European Economic and Social Committee, 2002). Interaction between its members in the

11. Consultation, the European Commission, and Civil Society

different sections produced the recommendations that a European organisation must, in order to be eligible for institutional dialogue,

- exist permanently at Community level;
- provide direct access to its members' expertise, and hence to rapid and constructive consultation;
- represent general concerns that tally with the interest of European society
- comprise bodies that are recognised at member state level as representatives of particular interests;
- have member organisations in most of the EU member states;
- provide for accountability for its members;
- have authority to represent and act at European level;
- be independent and mandatory, not bound by instructions from outside bodies;
- be transparent, especially financially, and in its decision making structures.

These criteria are emerging as de facto standards for civil society groups to meet. Some citizen interest groups have vigorously contested them agenda set for them by arguing that they are organisations for a particular cause, rather than of it (European Economic and Social Committee, 2003; Halpin, 2001). Such reasoning implicitly concedes the point that citizen interest groups can often be factional. They use wider agendas such as 'democratic deficit' to demand attention to their own cause, but which in reality carries no guarantee that talking to spokespeople of factional interests who themselves lack a wider democratic mandate will resolve the problem. But in a Madisonian sense, they hope that the constituency of them together provide for both wider legitimacy and a series of checks and balances in the democratic process.

Nonetheless, the Commission agenda for groups may constitute an unrealistic agenda. On the one hand, groups have become highly institutionalised by the EU institutions for their own purpose, yet on the other the Commission expects them to be close to their grass roots derivative constituency. The two are not Pareto efficient concepts.

## The draft constitution

The draft Constitutional Treaty of the European Union was prepared using a highly

transparent, broadly inclusive, partly deliberative process through the work of the 2002-3 Convention on the Future of Europe. Article 45 of the draft Treaty stipulates that the EU shall be founded on the principle of representative democracy. It is under this Article that the right to citizen participation is included. This constitutional right was switched from another Article (46) on Participatory Democracy during the drafting process, reflecting a clear choice as to where the place of participation in the new EU constitutional Treaty lies (Smismans, 2003). This priority order ensures no clash between the two principles, and that measures for participatory democracy can continue to develop without offending the mainstay principle of representative democracy. The absence of anything equivalent to the voting mechanism in representative democracy with which to quantify input will ensure the secondary place of participatory democracy for the foreseeable future.

Article 46 states that 'EU institutions shall give citizens and representative associations opportunities for input, and maintain an open, transparent & regular dialogue with both (for unclear reasons there is a separate Article, 51, which repeats the obligation in application to churches & non confessional organisations). Article 46 also includes provision for a petition with 1 million signatures to invite the Commission to submit a policy proposal, a later insertion into the Treaty for which some citizen groups have claimed responsibility, and upon which a good many invest substantial hope (ECAS, 2003). Thus, Article 46 includes scope for forms of participatory democracy beyond that of organised civil society, despite citizen participation being included under the title on representative democracy.

Opinion is divided about the value of the 1 million signature trigger, a late entry into the draft constitution in which the European Citizen Action Service (ECAS) claims to have played a part (ECAS, 2003). In its most optimistic interpretation, it demonstrates the wider responsiveness of the system to demands originating from organisations wearing the badge of civil society, and of the wishes of the system to reach out beyond organised interests directly to citizens as surrogate mechanisms for other struc-

tural limitations on input legitimacy. In this respect, the draft Constitutional Treaty and the Convention process has gone beyond the scope of the White Paper on Governance. Sudbery records comment from members of the Commission team working on the Governance White Paper which reveal their core doubts about the feasibility of moving beyond output legitimacy to search for input legitimacy. One member of the team told her

‘perhaps the most effective way to link with the citizen is by more effective results’ (Sudbery, 2003, p.92),

and, more startlingly, that

‘the issue about bringing in the citizen is for speeches, for the rhetoric. This organisation will never touch the citizen directly’ (ibid.).

The draft constitutional treaty is unique among European constitutions<sup>12</sup> in including an Article on participatory democracy, one in which the role of organised civil society interests are central. While the structural problems for input legitimacy identified at the outset of this article seem insurmountable, the extent to which the EU has sought to achieve it cannot fail to impress all but the more hardened sceptic.

## Conclusion

Elite interest groups only have a limited capacity to endow the EU with input legitimacy. Ironically, it is their degree of institutionalisation by the Commission which makes it diffi-

cult for citizen groups to act as two-way conduits between their members and the EU institutions. Within its own terms, however, the elite model of civic participation shows some signs of development, influenced by: the ways in which the supply of opportunities for participation influences demand; the willingness of EU institutions to reach ‘outsider’ groups; the recent consolidation of citizen interests into cognate families and the ‘pooling’ of dialogue with EU institutions; the role of EU funding in creating grass roots cross border networks; and the involvement of national interest organisations in core EU objectives. Aspects of such attempts to find input legitimacy may, however, be at the point of interfering with output legitimacy. Where groups become a hindrance to output legitimacy and appear to add little value to input legitimacy, so the development of a regulatory agenda aimed at regulating dialogue and standard setting their internal governance seems inevitable. While the Commission continues to resist accreditation (O’Sullivan, 2003) on the grounds of the prospective losses of policy and democratic inputs, the CONECCS database may yet be such a regulatory system in the making – and ironically one which could itself be a barrier to input legitimacy by creating the impression of a two tier access system. The unrelenting search for input legitimacy may, as Jacques Delors recently observed<sup>13</sup>, be its own enemy, but it does reveal some new dynamics in its development en route.

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12. A debateable exception is that of Portugal, among the most recent of European constitutions (European Economic and Social Committee, 2003)

13. The remark was made in his concluding comments to a conference on ‘Participatory Democracy and the European Constitution’ held by the European Economic and Social Committee on March 8/9 2004.

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# The EU's relationship with NGOs and the issue of "participatory democracy"

by Tony Venables\*

The inclusion of article 46 "the principle of participatory democracy" in the draft treaty establishing a contribution for Europe is a victory for NGOs. Discussions are beginning, particularly at the initiative of the EU Economic and Social Committee, which held a conference on this theme on 8-9 March 2004. The European Citizen Action Service (ECAS) is doing its own analysis of what this principle should mean and how it should be put in practice up-dating its earlier work on "listening to civil society – the Commission's relations with NGOs" The policy research by Andrew Crook ([www.ecas.org](http://www.ecas.org)) was the result of conferences and input to the Commission's white paper on European governance in 2001. This had an influence on the follow-up to the White Paper, and in particular the Commission's standards of consultation of December 2002. We now need to consider the much broader framework of participatory democracy.

The main conclusion of the conference of the economic and social committee is that "participatory democracy" is a slogan which everyone assumes they understand, but which in reality has not been properly analysed and debated. Findings have been collected across Europe about how participatory democracy should be put in practice (c.f. final report on governance of the European research area: the role of civil society 20 October 2003, which is a useful compilation of techniques of communication, consultation and citizen participation)<sup>1</sup>. However why it is needed and what the aims are is not so clear. Probably the best model is the Aarhus Convention, but that is applied to the citizens' right to information, to be heard and to have access to justice in the environmental area; and is to be implemented by the Union. Should the convention be restricted to the environmental area or could it be a model for more general application?

At the conference on 8 and 9 March one of the most frequent answers to the question of why we need participatory democracy, relates to the perceived limitations of representative democracy and the decline in voter participation in elections and membership of political parties. Pursuing this approach could lead to a straight clash between protagonists of participatory and representative democracy in which NGOs and civil society more generally would be the losers. This

already happened when the European Parliament was highly critical of the Commission's proposal in the white paper on European governance to have special partnership arrangements with certain NGOs. Jacques Delors was right at the end of the March conference to remind participants of the primary role of the political and institutional decision-making process and that unless Europe has clear objectives on which it can deliver, citizens and their associations will not have the time to participate. Where the representative democratic system does not work well, participatory systems cannot work well either.

It is important therefore to define what participatory democracy is and what its objectives are specifically for the European Union, and not just in relation to representative democracy. For some the principle may not go much further than improving how the Institutions communicate and consult. For others it may be much more – a way of mobilizing citizens and NGOs to participate at different geographical levels in the social cohesion and economic reforms pursued by the Union. For a third group it may be connected to active European citizenship.

There is time for such a debate. Although the intergovernmental conference is now in a better position to make a fresh attempt to overcome the disagreements on the draft constitution, the text would still have to pass referenda and ratification processes in 25 countries, which is hardly a foregone conclusion. There is also the process of enlarging the EU Institutions and extending them to 25 Member States. This means that the discussions started round the white paper and continued round the convention have to be taken up by civil society with the new Institutions, which should have the opportunity to develop a consensus. The new Commission should propose a full scale debate, hearings and consultation process in agreement with NGOs on Article 46 and a timetable for the contributions to adopt implementing measures.

In some quarters it is claimed that this type of full-scale debate is not needed because it already took place round the Convention on the Future of Europe and led to the inclusion of Article 46. This assumes however that civil society was really involved and engaged with the Convention, and unfortunately that was only partially achieved.

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1. published by Institute for Organisational communications (IFOKGmbH) found in the website of the DG Research: [http://www.europa.eu.int/comm/research/science-society/pdf/final\\_report\\_study.pdf](http://www.europa.eu.int/comm/research/science-society/pdf/final_report_study.pdf)



The Convention was a real step forward by comparison with the intergovernmental conference: documents and debates were public<sup>2</sup>, there were contact groups and hearings with civil society, as well as a forum and a special meeting of young people. However, it is difficult to conclude that what was done for a special body like the highly political convention is really applicable to much of the day-to-day technical decision-making. Although the Convention fulfilled its mandate when it came to relations with civil society, a number of deficiencies were apparent:

- the process, as revealed by the minutes, was decided by the Convention itself and in a way which left its Praesidium very much in control of the outcome: i.e. a member was to preside over the contact groups and help choose spokesmen from NGOs and other interests. Convention members chose members of the youth Convention etc. All this resulted in useful, technically competent input to the Convention, but not the creativity and more radical ideas they were looking for had participation been less organized and more open.
- the attempt to reach a wider civil society through the internet was only partially successful – too few interventions essentially from European umbrella bodies – and it was not interactive: i.e. submissions were made but fell into a black hole; there was no response. The virtual civil society forum created by the Convention was an example of how the internet can become a kind of alibi – giving the appearance of participation whilst in reality being nothing of the kind.

The Convention's civil society contact groups, hearings and website made a start, but the processes need to reach out far more. Indeed the way that Article 46 is drafted, suggests that that should become the case. One point is worth making: when the issues of: what is participatory democracy; and how should Article 46 be applied are addressed, this has to be done in relation to the Constitutional Treaty as a whole and two other processes:

- the social partners and autonomous social dialogue (Article 47)
- the status of churches and non-confessional organizations with which the Union should also have regular dialogue (Article 51)

Article 46 contains four quite distinct proposals and they do indicate something, even if a lot more discussion and analysis is needed to put flesh on the bones.

The first proposition is that “the Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.”

ECAS made proposals which were not taken up by the Convention but which did become official policy of the Commission and the European Parliament that to be able to participate meaningfully, citizens should have a prior right to be informed. The battle for a “right to be informed” is not lost. A number of speakers at the March seminar, including the representative of the Irish Presidency, placed emphasis on the need to overcome ignorance about the EU and to communicate better. The important point about this proposition is that the EU is trying to go further than other international organizations such as the Council of Europe or the UN family and address not only associations, but also citizens. How to achieve this? Is it enough through the Europa site to invite comments from individuals as well as organizations? How to involve citizens in the debate on European issues, and on which kind of issues, and at what geographical levels? There are some positive examples: the Europa site is attempting to become more a site for the citizen rather than just stakeholders and there are examples of massive input on draft legislation (i.e. the chemicals package, REACH<sup>3</sup>, or on GMOs). The draft constitution should spread the practice more broadly.

The second proposition is for open dialogue with “representative associations and civil society.” It is important that the way this is interpreted should not contradict the first proposition that the citizen needs to be included. The issue of representativity has to be not handled very carefully in order not to restrict participation by NGOs or individuals. The value of more input from associations and civil society depends on what they have to say and therefore the ideas and evidence they bring to the debate. Obviously if they have members in all or most of the EU countries and beyond, it will give greater weight

2. Minutes and agendas of the meetings of the Praesidium were however secret. Thanks to an ECAS Complaint to the European Ombudsman, they were however published after the convention had completed its work.  
3. Registration, Evaluation, and Authorisation of Chemicals

to their position and argument. On many issues however, valuable input has to be sought from single issue NGOs which do not always exist Europe-wide, advocacy groups or think tanks which do not have members or representative structures. It is more important that the process of dialogue and its inclusiveness should be representative rather than from each of the participants.

The third proposition says that “the Commission shall carry out broad consultations”. Unless this is done with the Institution which has the right of initiative and is at the start of the legislation or policymaking, it is impossible to have any meaningful process of consultation let alone participation at a later stage. The Commission has adopted binding minimum standards of consultation across the board in all policy areas in December 2002. This decision now needs to be properly enforced so that consultation becomes more systematic. For example ECAS has taken up with the Commission that consultation on the future of the EU’s structural funds after 2006 has led to extensive debates with regional authorities, but hardly at all with NGOs and civil society more generally. It has to be stressed however that whilst Article 46 makes special mention of the Commission, it in fact applies as a whole to the “Institutions” but apparently unlike the rule on access to documents, also to agencies and other bodies of the Union. ECAS believes that there should be some kind of European compact or inter-institutional agreement, therefore, to apply after extensive dialogue, the aims and

methods of participatory democracy not only to the Commission but also to the other Institutions and any other bodies of the Union. Ways should be found for proposals for such a European compact to come from civil society in the first instance, rather than top down, from the Institutions.

The fourth proposition is for citizens’ initiatives – i.e. that “not less than one million citizens” can invite the Commission to take an initiative within its competence. This was a welcome last-minute addition to the draft Constitution by the Convention. It is similar to the proposal ECAS made in its proposals to the Convention for a series of draft articles to strengthen European citizenship. It will be important to ensure that the way this is implemented does not make citizens initiatives too restricted and that a clear obligation is placed on the Commission to make proposals. Signatories should come from a “significant number of member states” – apparently the authors of the proposal had in mind 8 out of 25 which seems reasonable since few issues affect citizens equally right across the Union. It is important to recognize that collecting one million signatures is more difficult than it appears: the issues have to be precise and clear, in the public eye, relate directly to peoples’ lives, and be capable of solutions through European-wide action. By no means all issues lend themselves to this treatment. In any case, there is time. Before NGOs start to use this procedure and collect signatures a European law has to be in place.

# Balancing political participation with decision making effectiveness: lessons from the EU governance agenda for groups

by Hans-Werner Müller \*

When we talk about the representation of small businesses' interests at European level, we talk about how to realise the concerns of them. In most of the European countries this takes place through the representative democracy, the so called "social midfield", the stratified democracy. Between the governments, which are always intrinsically showing a risk of bureaucracy and exaggerated desire to legislate, on the one hand, and the individual entrepreneur who is standing with his two feet in the reality on the other hand, intermediary organisations and intermediary institutions are necessary where all involved parties can debate and discuss about the challenges in our society and propose solutions for them. UEAPME is an exponent of this model, as it is more than an ordinary lobby organisation, more than a pressure group: UEAPME, as most of its member organisations, is a social partner.

Apparently, the European Institutions are also in favour of this model. In a Council Resolution of 22 November 1993, the Council, in particular, called for a strengthening of the partnership between the European Institutions, the Member States and the organisations representing SMEs with a view to consolidating growth and employment. The European Charter for Small Enterprises, adopted by all Member States in June 2000, calls on, in its 10th action line, to "develop stronger, more effective representation of small enterprises' interests at Union and national level". What is the situation nowadays, what are the latest developments?

## Let me start first with the social dialogue.

European Social Policy has become of a tremendous importance as 80 % of national legislation in this field follow from European directives. At the same time, the European social partners have become real legislators in the social field, at the same level as the Parliament and the Council.

The European Social Dialogue has its origin in a meeting in 1985 between the social partners of the day (UNICE-industry, CEEP-public services,

CES-trade unions) and Jacques Delors in Val Duchesse. No representative of SME was present as there was not yet a strong and representative SME organisation, as there is today. The role of the three social partners has been reinforced through the Social Protocol annex to the Treaty of Maastricht in 1991. In this Protocol, the Social partners were allowed to conclude negotiated agreements, which once transformed in a directive by the European Commission and accepted by the Council, are applicable towards everybody, without the possibility for the European Parliament to intervene. Also the Council can only accept or reject the agreement in its entirety, it cannot amend it. Through this protocol the social partners have become real legislators. Another step was taken with the Treaty of Amsterdam, whereby the Protocol was integrated in the Treaty (article 138).

The first agreement of this type has been concluded between the social partners in 1996 on parental leave, without the participation of a specific representative of SME, in casu UEAPME. It is clear that one can question the representativity of the social partners involved in this agreement and about the legitimacy of this agreement.

In December 1998 UEAPME finally concluded an agreement of co-operation and mutual recognition with UNICE, which gave UEAPME access to the European social dialogue and to the negotiations as part of the UNICE delegation.

In 2001 UEAPME and CES concluded a first bilateral joint declaration. The first signature of a negotiated European agreement by UEAPME took place in 2002 on telework.

Although UEAPME has been recognised now as an European social partner, it is still not at the same level as UNICE, CEEP and CES. In the opinion of a lot of European interlocutors UEAPME is only a part of UNICE, as for example the seats UEAPME receives in the Social Dialogue Committee, the negotiations and the European summits are still UNICE seats. Due to the fact that UEAPME is not fully recognised as a horizontal organisation, SMEs and especially small and micro enterprises are not independently represented in the Social Dialogue.

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Also the European Institutions and the Member States have an ambiguous attitude: UEAPME is only invited or taken into account when they have a specific interest to do so and UEAPME has to serve as an alibi. Our presence is still insufficient at high political level or during so called “informal” consultations, but which are politically decisive and crucial.

While the Treaty in article 137 recognises the specificity of SME, and I quote: *“such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized enterprises.”*, the Commission is not so consequent that she draws conclusions concerning the representativity of the negotiators.

When you are recognised as a European social partner, you have access to a lot of other structures and consultative committees, even if there is no direct link with the social dialogue. This is due to the fact that European policy is highly influenced by social issues. So, a recognised social partner has an optimal position in the consultative bodies.

Employment and Social Affairs policy have become a major part of the integrated strategy as defined at the Lisbon Summit. Efforts of co-ordination and synergy used to strengthen the co-ordination of economic policies, to improve the functioning of the labour market, and to achieve the implementation of the necessary structural reforms, should also aim at a greater involvement of the social partners at all levels, and particularly the representative organisations of handicrafts and small and medium sized enterprises.

Nowadays, the social dialogue in its entirety, forms part of the “acquis communautaire” and constitutes an essential factor for the representatives of handicrafts and SMEs in the follow-up of the Charter. UEAPME regards the social dialogue as one of the instruments with which to address the economic and social challenges which face small enterprises. The social dialogue can generate solutions which are adapted to small enterprises, only on the condition that it takes account of the specificity of small enterprises and handicrafts for their economic and social development.

While in nearly all European countries, the governments decide who has to participate or

who is allowed to participate in the social dialogue, at European level there is the absolute autonomy of the partners. By refusing to draw up efficient eligibility criteria and by keeping on to repeat that the mutual and reciprocal recognition by the partners is sufficient, the Commission allows the big players to solve their problems as big boys between themselves and get rid of the specific SME-partner. This kind of autonomy for the social partners is exactly the same as introducing the law of the jungle. In the long term this will undermine the reason for existence, the “raison d’être”, of the social dialogue. Wasn’t the social dialogue not created just for reducing the democratic deficit, to realise some subsidiarity and to make the decision making process in the social field at European level more efficient? If the Commission and the Member States do not change their attitude, then the added value of the social dialogue will never be realised, as there is: flexibility, rapidity and the possibility that the measures fulfil the needs, interests objectives and values of the people and enterprises. And hasn’t the Commission not the task, as formulated in article 138 of the Treaty, to promote the consultation and to take any relevant measure to facilitate the dialogue by ensuring balanced support for the parties? Without representativity, there is no legitimacy.

This is why a series of proposals for action are necessary:

- The direct and automatic participation of the representative structures of handicrafts and small enterprises should be guaranteed in all consultation and decision-making procedures at European level., as well as at all high-level political meetings, in order to be able to present the specific needs of small enterprises. That is why UEAPME asked that the Convention on the future of Europe should propose an independent representation of SMEs in the Social Dialogue at horizontal level.
- a greater involvement of the representative organisations of handicraft and small enterprise structures in the social dialogue at all levels (European, national, sectorial, branch, enterprise level) should be promoted, especially in the candidate countries, in order to guarantee a better follow-up of the implementa-

tion of agreements negotiated between the social partners.

- Support the real and effective involvement of the representative organisations of handicrafts and small enterprises at national level in all the current European processes.

The interests of the small businesses at European level have to be represented not only in the Social Dialogue, but of course in all Community policies. And even if the label of social partner gives access to a lot of other structures and consultative committees, the question of the representation of small businesses' interests at European level is broader than this. It is also about the consultation process concerning other policies, it is also about how and who the Commission consults. And also this is very problematic.

Although the Commission is of the opinion that, and I quote the Charter Implementation Report 2001, "*providing small business with the opportunity to voice their interests, preferably in a systematic matter, is of crucial importance*", the reality is quite different. In the Charter the Commission announced that she would complete a review of how the interests of small businesses are represented at EU and national level, including through the social dialogue. After more than two years, nothing has happened in this field, except the announcement of a Best-project concerning the consultation of SMEs at national level. The same Charter implementation report considers that within the context of the 10th recommendation of the Charter, the interests of small businesses are sufficiently taken into account by means of the direct consultation of enterprises via internet and also through the Enterprise Policy group. For those who are not familiar with this Group:

- This Group, a so called high level consultative body advising the European Commission on Enterprise Policy gathers a sample of thirty five members, active in industry, services and... trade unions or in promoting growth in innovation. No comment...

Nonetheless, a legally binding Protocol to the Amsterdam Treaty, on the application by the European institutions of the principles of subsidiarity and proportionality to lawmaking, includes a formal requirement for the

Commission to "*consult widely before proposing legislation and, where appropriate, publish consultation documents.*"

In the opinion of UEAPME good consultation helps to improve the quality of the policy outcome and enhances the involvement of the parties concerned.

However, the actual Commission's approach, as proposed in the action plan on better regulation, to have broad open consultation of all interested parties and individuals, mainly through the Internet, is, in UEAPME's opinion, not the best means for good consultation.

Good and efficient consultation requires in the first place consultation of the groups directly concerned and affected, and this should be done through their representative European organisations. Therefore criteria should be developed by the Commission to consult in a first phase the European representative parties and organisations involved.

Attention should be paid to the important role which representative horizontal and sectorial business organisations play as intermediaries between enterprises and the European institutions. Indeed, their role is not simply to register or collect the opinion of their members, but also to find a common position that reflects the opinion of the different countries or economic sectors. As such, their opinions are more than a simple sum of all the opinions from single enterprises. They are the result of a democratic consultation and decision-making process, and not as some civil servants think the "opinion of a majority, neglecting the minority point of view". In our opinion, regulations based on collectively agreed positions will also be more easily respected. It means also the application of the subsidiarity principle.

A culture of consultation and dialogue requires not only a consultation without engagement on specific proposals, but constitutes a compulsory part of the whole decision-making process as well as the consultation and involvement of the parties concerned during the whole preparatory process. The European Charter for Small Enterprises, as well as the European Parliament<sup>1</sup> and the ECOSOC<sup>2</sup> called on the Commission to initiate and increase consultation with the representative organisations, par-

1. European Parliament resolution on the Commission communication - sustaining the commitments, increasing the pace (COM(2001) 641). P5\_TAPROV(2002)0324 (A5-0192/2002 - Rapporteur: Dominique Vlasto). See also the Report of Bushill-Matthews  
2. Rapport Girond, CES 1471/2001

ticularly those representing small businesses.

Direct consultation of businesses through the Internet can only be an additional way of consultation as the results lack representativity and are frequently biased. Small business owners do not have the time to answer complex executive questionnaires on e.g. planned new legislation and here, representative organisations play the role of intermediary.

Moreover, many SMEs, especially micro-enterprises, do not use the internet yet, and it will still take time, investment and training, before most SMEs use it and become familiar with it. To avoid the exclusion of whole SME sectors, consultation should not be solely organised on an electronic basis. There will still be a need for contacts "on a paper-basis". Otherwise, a lot of SMEs and especially small enterprises, will be excluded from consultation.

So far, the results of direct consultation of businesses were also biased by the fact that the EC Website and documents are not available (or not at the same time) in the different official E.U. languages and are not written in everyday language. So, we are not convinced that the "Increased use of the Internet and the possible development of the Business Test Panel structure will ensure improved transparency from the policy maker and more feedback from business" (see Charter Implementation report 2001).

Conclusion: consultation of the representative European business organisations should have the absolute preference over direct consultation.

Another problem is the consultation time the Commission usually applies for its consultations: this time is simply too short. For the moment it is 8 weeks, but most of the time only the English version of the consultation text is available in the beginning of the consultation period. The other language versions are often published 3 or even more weeks later. As the European organisations have to consult their members who have at their turn to consult their members or sectorial organisations, and as the European organisations have to consolidate the opinions received (and once again: they do more than just "collecting" opinions), a consultation time of at least 10 weeks is a minimum.

Otherwise consultation is just an alibi... (The "Code of practice on written consultation" used by the U.K. Government indicates that 12 weeks should be the standard minimum period for a consultation.).

Documents should also be available in time, especially for meetings. Meetings and hearings should also be announced well in advance. In this context, UEAPME would like to stress that some recent "consultations" launched during the last week of July by some DGs, in full holiday period, are an absolute mockery of the consultation principles.

Small enterprises can only put through their interests in the policy making process, if they have a powerful representation. That is true for regional, national and also European levels. On the other side, it is much more difficult to organise a large group of small businesses, than a small group of large ones. Thus, the representative organisations of big industry are normally much stronger than small enterprises representatives. To compensate for this imbalance, many countries have created special regulations (privileged access to information, public support etc.).

To become an accepted partner in the policy-making process, it is also essential that an organisation can speak for the whole economy or important parts of it (encompassing organisation) and not only for specific interests (lobby group).

## Conclusion.

The representative European SME-organisations should be fully recognised on the level of consultation. In this context UEAPME asks that the Commission makes a clear distinction between European representative organisations and the others. Therefore criteria should be developed by the Commission to consult in a first phase the European representative parties and organisations involved. Without any doubt, this shall contribute to a better involvement of interested parties, especially small businesses, through a more transparent consultation process, which will foster the Commission's accountability.

# Connecting Citizens to the EU: Information and civil society

by Angelina Hermanns\*

## The informed citizen

The White Paper of the EC on European Government, adopted in July 2001, is an ambitious project with the aim of establishing more democratic forms of governance at all levels-global, European, national, regional and local. The White Paper forwards a set of proposals focussing on better involvement and participation of all citizens in the EU's decision-making process.

There are great hopes as to what participation can achieve:

- To respond to the expectations of EU citizens,
- To enhance the efficiency and legitimacy of European governance,
- To connect Europe with its citizens,
- And even generate a sense of belonging to Europe,

However, before participation and before benefiting from transparency and openness comes information. Eurobarometer polls show that a large part of EU citizens do not feel informed about European issues, that they do not understand the basic rules of the Brussels game: who decides when, and what with which type of legitimacy. They just feel and know that these decisions are crucial for their daily life. Nevertheless, a growing majority just turns away from „Brussels“, the low turnout in EP elections is one indication for this process.

Part of the problem is the fact that we do not have European media and a European „audience“. People watch their national TV news and read their local newspapers. Satellite and cable TV have not changed our old habits. We use them to watch international music videos or sports, but we still get our information about politics from our national media. A Spanish MEP's speech in the European Parliament will never make it to prime time news in the UK. Europe's cultural diversity and its many languages are part of our rich heritage. But they are not always a blessing in terms of a European information network. Therefore, European politics are often seen from a national perspective and are rarely „translated“ for the national audience.

What are the conclusions?

Information about „Europe“ and „Brussels“ is crucial for the involvement of civil society in EU

affairs. Media polls show that people are interested in getting this information as long as it corresponds to their daily life and their own experience. They are not interested in the usual „family-photo“ from yet another European Council. But they want to know, if their health insurance pays for a treatment in another EU country and if their university degree will be accepted all over Europe.

The concept of European governance alone does not generate their interest. The European citizenship needs moderators.

## The role of NGO's

Can NGOs bridge the gap between society, civil society, and the concept of trans-national governance as represented by the EU?

Yes, they can for various reasons:

they include the diverse structures of national civil society concepts, of the multi cultural diversity also in terms of participation,

they include regional and local actors and represent them.

They are far better than institutions and political parties in encouraging other citizens to participate.

But isn't there a danger that organized NGO EU actors, firmly based in EU circles alienate the regional actors? Not, if they consider themselves as the „EU experts“ that are necessary to monitor the complex and difficult legislation process in Brussels. They are indispensable because they know what issues are at stake and what are the choices and what can make a difference. They can communicate this back to their „constituencies“.

A good case study of how to bring together regional, national and EU actors is the decision-making process about the EU financing of the Spanish National Hydrological Plan SNHP. The Spanish National Hydrological Plan involves the hundreds of engineering projects including dams and pipelines to transfer water from the river Ebro in north east Spain for agriculture and tourism in the south. Spanish environmentalists were concerned that the plan's 118 dams and associated infrastructure will destroy the Ebro Delta and many of Spain's richest wetlands. They found out as well, that the Spanish

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Government had applied for EU-funding of a third of the total cost of the SNHP, up to 8 billion Euro. Now, they needed the support of their EU-experts. In a joint effort, lobbyists from WWF, EEB (European Environmental Bureau) and Birdlife International started to examine the decision-making process and found the loopholes.

A summary of an independent legal opinion commissioned by WWF showed that a decision to use EU structural funding for the huge water transfer scheme would contravene European environmental legislation as well as the EC Regulation governing the regional funds (EC No.1260/1999). It warned that any Community funding for the SNHP must conform with the provisions of the EU Treaty and all relevant EU laws. In the case of a major project like the damming and diversion of the River Ebro, the legal opinion stated that a number of studies must be undertaken by the promoters to show that environmental laws are being respected and that the benefits of the scheme outweigh the costs.

Back in Spain, experts examined the effects of the proposed dams in the National Hydrological Plan on Natura2000 sites to illustrate the lack of compatibility of the SNHP with EU environmental legislation. They published a report that conclusively showed that at least 46 Natura2000 sites will be negatively affected by the plan, including areas with populations of the Iberian lynx — the most endangered feline species in the world. In Brussels, further material against the SNHP had been gathered: The massive water transfers envisaged by the plan run counter to key principles enshrined in the EU Water Framework Directive and parts of the SNHP had been submitted for funding without Spain undertaking any global EIA (Environment Impact Assessment).

The work paid off. The European Commission sent a letter to the Spanish Government expressing doubts about the SNHP's economic feasibility and long-term viability, and thus requesting further information about it. The European Parliament's Petition's Committee debated on the SNHP and MEP's from across Europe expressed their concern at the environmental impacts and the planning behind the scheme. In Barcelona, hundreds of

thousands demonstrated against the SNHP. Spanish environmentalists dressed as pink flamingoes flocked to Brussels at the Commission traditional Green Week and were able to present their concerns to many people attending Green Week, including Prince Laurent of Belgium, European Environment Commissioner Margot Wallstrom, and the Head of the UN Environment Programme Klaus Topfer. As of today, the Spanish water plan is on hold. Officially, the Commission has yet not taken any decision on co-funding the SNHP, but behind the Brussels scene nobody believes that any European taxpayers money will go to this project, unless it will be revised and the environmental dimension will be fully implemented.

This success would have been impossible without the work of Brussels based NGO's. They know why and how the Directive on Cogeneration should be Improved or how to turn the proposed "Eco-design" Directive into a truly effective initiative for EU and global climate change policy. They are the moderators that European citizens need.

NGO's in Brussels are indispensable for the implementation of the concept of trans-national governance and the participation of civil society as represented by the EU. Of course, regulations and principles for NGO's have to be established to guarantee democratic control and transparency, according to those that we expect of public institutions and especially from EU institutions. The Commission requirements are a good starting point:

- To tighten up internal structures,
- To furnish guarantees of openness and representativity
- Capacity to relay information and lead debates in their member states,

## **The internet as a tool in the transparency process**

But do we really need any moderators when anything you want to know is to be found on the internet? A simple exercise can answer this question. Go to Google, write EU transparency and push the search button. In 0.27 seconds you get 503.000 results.



The first four hits are:

- A position paper by London Stock Exchange on EU transparency in investments,
- The Third World Network TWN calling for EU transparency in trade talks on services.,
- an EP hearing about access to documents,
- and statewatch news on EU transparency

Indeed, I can get all information that I want about EU transparency in less than a second. But I get as well all information I never wanted to know about. The internet is no miracle cure to heal the democratic deficit nor does it create transparency per se. On the contrary, it bombards you with all kind of information and leaves you frustrated.

The White Paper on European Governance includes the internet in its proposals for communication with the European citizens. The Commission has put up several websites to support citizens on how to get information. Virtually all documents, produced in Brussels,

can be read on the internet. Policy initiatives and drafts are placed on the internet for comments. After years of campaigning for access to documents especially in the EU Council, this is good news.

But do I create transparency by simply putting a document on the web? And is an uncommented document, e.g. of 300 pages plus 400 amendments, a valid source of information or just raw material? By the way, this is not a new question and not restricted to the internet. Sending the Maastricht Treaty to each household, as happened in France in the run-up to the Maastricht referendum, did not really improve the EU knowledge of French citizens.

Again, moderators are needed to bridge the gap. Moderators from civil society, moderators from NGOs using their networks to inform citizens about European policies. In this perspective the White Paper on European Governance is right to stress their role.

# L'urgence d'un encadrement juridique des STN au niveau international

par Melik Özden\*

La nécessité d'un contrôle des activités des Sociétés transnationales (STN) au niveau international se fait de plus en plus pressant. En effet, malgré la multiplication au cours de ces derniers mois de déclarations d'intention de la part de dirigeants des STN en faveur de la bonne gouvernance et de règles éthiques dans la gestion des entreprises<sup>1</sup>, on constate que leur pratique néfaste n'a guère changé. A titre d'exemples, l'entreprise *Worldcom*, dont l'ex-patron avait été inculpé l'an dernier pour des malversations comptables d'un montant d'environ 15,6 milliards de Francs suisses, est à nouveau accusée de fraude<sup>2</sup>. Il est établi aujourd'hui qu'« un large cercle de dirigeants d'*Enron* manipulaient des informations<sup>3</sup> ». D'ailleurs, selon M. Paul Volcker, ex-Président de la Réserve fédérale américaine, « après le scandale *Enron*, les associations professionnelles de sociétés d'audit n'ont toujours pas modifié leur fonctionnement<sup>4</sup> ». Quant au Président français M. Jacques Chirac, il déclara à l'occasion de la réunion du G8 à Evian que « le rôle de l'entreprise est de produire, mais pas dans n'importe quelles conditions. Nous ne pouvons accepter que prospèrent des pirates de la mondialisation<sup>5</sup> ».

Faut-il rappeler que, lorsqu'une entreprise est au bord du gouffre, on appelle toujours l'Etat à réparer les « pots cassés » alors que l'argent public se fait de plus en plus rare en raison des cadeaux fiscaux faits aux STN au détriment des dépenses sociales ? A titre d'exemples, le gouvernement français a débloqué cette année 16 milliards d'Euro pour sauver *Alstom* et *France Télécom*. Le gouvernement britannique a dû investir 37,5 milliards d'Euro depuis 1993 pour soutenir son entreprise de chemins de fer (*Railtrack*, devenu *Network Rail*), pourtant privatisée depuis plus de dix ans ! L'administration américaine a injecté, entre septembre 2001 et mai 2003, près de 35 milliards de dollars pour sauver son secteur aérien (constructeur et agences de voyages), sans parler du gouvernement suisse qui a payé 2 milliards de Francs suisses pour secourir sa compagnie nationale *Swissair*<sup>6</sup>.

Bien entendu les désastres causés par les STN ne concernent pas uniquement les services publics privatisés (eau, électricité, transports, etc.), mais touchent pratiquement tous les

domaines de la vie. Les secteurs très sensibles tels que la santé et la défense n'échappent pas à cette règle. En effet, les entreprises pharmaceutiques ne font pas de cadeaux aux sidéens ou aux malades « négligés » (tuberculeux et paludéens par exemple). Bien que le discours officiel vante les mérites de l'accord sur l'accès aux médicaments des pays du Sud négocié au sein de l'OMC à Doha (novembre 2001) et à Cancun (août 2003), les épidémies continuent à se propager, les malades continuent à mourir pour la plupart sans aucune assistance, le prix des médicaments reste très élevé et certains pays, qui ont la capacité de produire des génériques, sont menacés de procès et de sanctions.

Quant à la « défense » des pays (ne faudrait-il pas plutôt parler d'« attaque » ?), elle est en voie d'être privatisée. En effet, depuis une dizaine d'année, des entreprises de mercenaires, principalement basées légalement aux Etats-Unis, en Angleterre et en Afrique du Sud, offrent leurs services aux gouvernements. Elles ont la capacité d'intervenir n'importe où dans le monde et ont déjà pris part à de nombreux conflits en Afrique, Amérique Latine et en Asie<sup>7</sup>. Le dernier exemple est l'Irak où « l'armée américaine sous-traite les tâches de logistique et de soutien aux entreprises de mercenaires *Kellog* et *Brown and Root* »<sup>8</sup>. Certes, ces dernières années la plupart des pays occidentaux ont passé de l'armée de recrues à celle de professionnels, mais de là à autoriser la création des entreprises de mercenaires qui sont, de surcroît, côtées en bourse... et utilisées dans des conflits armés, pose de graves problèmes, à commencer par l'exercice de la démocratie et de la souveraineté des Etats, sans parler des graves violations des droits humains commises par ces « nouveaux acteurs ». A titre d'exemple, des mercenaires de *Dyncorp* sont « accusés de proxénétisme sur des mineurs en Bosnie »<sup>9</sup>.

## Groupe de travail sur les STN

Dans ce contexte, le contrôle des activités des Sociétés transnationales au niveau international est non seulement une nécessité absolue, mais également une urgence. Dans un article précédent, nous avons déjà exposé les enjeux de ce débat et les travaux entamés dans ce sens dans le

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1. Cf. entre autres à l'article intitulé « l'intégrité est désormais la chose plus importante pour Pricewaterhouses Coopers », publié dans *Le Temps* du 26 août 2003.

2. Cf. *Tribune de Genève* du 27 août 2003.

3. Cf. *Le Temps* du 2 mai 2003.

4. Idem.

5. Cf. *Le Temps* du 2 juin 2003.

6. Cf. *Le Temps* du 18 août 2003.

7. Cf. *Bilan*, septembre 2003.

8. Cf. *Le Courrier* du 29 octobre 2003.

9. Cf. *Bilan*, septembre 2003.

10. Voir « Associations transnationales » N° 4/2002, Octobre-Novembre 2002.

11. Ce Groupe de travail a été créé suite à l'adoption de la résolution intitulée « Rapport entre la jouissance des droits économiques, sociaux et culturels et du droit au développement et les méthodes de travail et activités des STN » (cf. E/CN.4/Sub.2/RES/1998/8) dont le mandat consiste entre autres à : i) identifier et examiner les effets des méthodes de travail et des activités des sociétés transnationales sur la jouissance des droits économiques, sociaux et culturels et du droit au développement, ainsi que des droits civils et politiques ; ii) examiner, recevoir et rassembler des informations, y compris tout document de travail établi par un membre de la Sous-Commission, sur les effets des méthodes de travail et des activités des sociétés transnationales sur la jouissance des droits économiques, sociaux et culturels et du droit au développement, ainsi que des droits civils et politiques ; iii) Formuler des recommandations et des propositions ayant trait aux méthodes de travail et aux activités des sociétés transnationales, afin d'assurer que ces méthodes et activités correspondent aux objectifs économiques et sociaux des pays dans lesquels elles opèrent, et de promouvoir la jouissance des droits économiques, sociaux et culturels, du droit au développement et des droits civils et politiques ; iv) examiner l'étendue de l'obligation des États en ce qui concerne la réglementation des activités des sociétés transnationales lorsque leurs activités ont ou sont susceptibles d'avoir des répercussions importantes sur l'exercice des

cadre du Groupe de travail sur les STN de la Sous-Commission de la promotion et de la protection des droits de l'homme (SCDH) de l'ONU<sup>10</sup>.

Constitué en 1998<sup>11</sup>, ce Groupe de travail avait élaboré un premier « Projet de normes sur la responsabilité des STN et autres entreprises commerciales en matière de droits de l'homme ». Ce projet n'assurant pas un contrôle effectif des STN quant à l'impact de leurs activités sur les droits humains, l'Association Américaine de Juristes (AAJ) et le Centre Europe-Tiers Monde (CETIM) ont organisé au Palais Wilson à Genève du 6 au 7 mars 2003 un séminaire de travail, avec la participation de tous les membres du Groupe de travail<sup>12</sup>, afin de proposer des amendements à ce texte.

A fin avril, durant un meeting informel le Groupe de travail en a produit une nouvelle version<sup>13</sup> qui a été soumise officiellement au Groupe de travail de la SCDH, réuni au Palais des Nations à Genève les 29 et 31 juillet 2003.

Étant donné que la plupart de nos préoccupations n'avaient pas été prises en compte par le Groupe de travail, nous avons à nouveau exprimé notre point de vue sur le projet de normes, en proposant des amendements, dans une brochure<sup>14</sup> présentée à la 55ème session de la Sous-Commission.

À l'issue de ses délibérations, le Groupe de travail a soumis le Projet de normes précité, avec des modifications et un « Commentaire » y afférant. La SCDH les a entérinés par l'adoption d'un projet de résolution (voir ci-après).

### **Projet de normes sur la responsabilité des STN et autres entreprises commerciales en matière de droits de l'homme**

Le Projet de normes adopté<sup>15</sup> reconnaît la responsabilité des STN pour leurs activités dommageables en matière de droits de l'homme et leur impose des conditions générales pour le respect des droits de l'homme. Il exige entre autres que les STN « reconnaissent et respectent les normes applicables du droit international, les dispositions législatives et réglementaires ainsi que les pratiques administratives nationales, l'état de droit, l'intérêt public, les objectifs de développement, les poli-

tiques sociale, économique et culturelle, y compris la transparence, la responsabilité et l'interdiction de la corruption, et l'autorité des pays dans lesquels elles opèrent » (art. 10).

Si nous sommes passés d'un projet de code de conduite volontaire adressé aux STN à un « Projet de normes sur la responsabilité des STN et autres entreprises commerciales en matière de droits de l'homme » adressé aux États – afin qu'ils fassent respecter par les STN les droits humains – et à caractère contraignant, le Projet de normes adopté comporte encore des lacunes.

En effet, le terme « autres entreprises » est maintenu dans le projet alors que le CETIM et l'AAJ avaient demandé que le Projet de normes se limite aux seules STN et ne concerne les « autres entreprises » que dans la mesure où ces dernières sont des filiales, de fait ou de droit, d'une STN ou ses fournisseurs, sous-traitants et preneurs de licence. Bien qu'amendé, la définition du terme « autres entreprises » reste insatisfaisante.

Le projet n'est pas explicite sur la responsabilité solidaire des sociétés transnationales avec leurs filiales, sous-traitants, preneurs de licence, etc. Il ne vise pas explicitement comme première la responsabilité civile et pénale des dirigeants des STN et maintient par contre celle des travailleurs et des cadres quant aux activités des STN alors que nous avons demandé son exclusion au motif que les travailleurs ne prennent pas part aux prises de décisions. Ce sont en effet les dirigeants (gérants, membres du directoire ou du Conseil d'administration) qui ont le pouvoir décisionnel dans l'entreprise. À noter toutefois que la responsabilité des dirigeants y figure désormais, mais au même titre hélas que celle des travailleurs<sup>16</sup>.

En outre, si le Projet de normes parle de mécanisme de mise en œuvre, sa conceptualisation n'est pas formalisée. Pourtant, ce point est capital si l'on veut que le Projet de normes soit opérationnel.

### **Commentaire au Projet de normes**

Bien que le Commentaire<sup>17</sup> au Projet de normes ait été adopté en même temps que le Projet de normes, sa valeur juridique n'a pas été précisée.

droits économiques, sociaux et culturels, du droit au développement et des droits civils et politiques de toutes les personnes relevant de leur juridiction.

12. Il s'agit de MM El-Hadji Guissé (Sénégal), Vladimir Kartashkin (Fédération de Russie), Miguel Alphonso Martinez (Cuba), Soo Gil Park (Corée du Sud) et David Weissbrodt (Etats-Unis d'Amérique). A noter que, outre les représentants de nos organisations respectives, Mme Laurence André, chercheuse de l'Université Catholique de Louvain et le Professeur Eric David de l'Université Libre de Bruxelles y ont également participé.

13. Cf. E/CN.4/Sub.2/2003/12.

14. Cf. *Brochure intitulée « Propositions d'amendements au projet de normes sur les responsabilités des sociétés transnationales et autres entreprises commerciales en matière de droits de l'homme », élaborée par le CETIM et l'AAJ, édition du CETIM, Genève, juillet 2003 (disponible en français, espagnol et en anglais et accessible sur le site [www.cetim.ch](http://www.cetim.ch)).*

15. Cf. E/CN.4/Sub.2/2003/12/Rev.2.

16. Cf. *Paragraphe 14 du préambule du « Projet de normes sur la responsabilité en matière de droits de l'homme des sociétés transnationales et autres entreprises » (E/CN.4/Sub.2/2003/12/Rev.2).* 17. Cf. E/CN.4/Sub.2/2003/38/Rev.2.

18. Cf. *Projet de résolution intitulée « La responsabilité en matière de droits de l'homme des sociétés transnationales et autres entreprises » (E/CN.4/Sub.2/2003/L.8).*

19. Cf. Entre autres « Building on Quicksand: The Global Compact,

Ce Commentaire présente certains avantages, mais aussi des inconvénients. Il est vrai qu'il précise davantage la portée du Projet de normes sur certains points.

L'inconvénient principal du Commentaire, c'est de faire la part trop belle aux STN dans la mise en œuvre du Projet de normes. En effet, il y a un décalage trop important en faveur de la mise en œuvre volontaire par les sociétés transnationales, alors que tout est à construire pour un mécanisme de contrôle contraignant et indépendant. C'est ce qui explique l'insistance de la quasi-totalité des ONG pour la création d'un mécanisme de mise en œuvre effectif.

## Résolution de la SCDH sur les STN

Aux termes de cette résolution adoptée à l'unanimité<sup>18</sup>, la SCDH :

transmet à la Commission des droits de l'homme (CDH) le Projet de normes pour examen et adoption ;

recommande à la CDH d'envisager la création d'un groupe de travail à composition non limitée pour examiner le Projet de normes, après avoir recueilli les observations des Etats, des organes de l'ONU, des institutions spécialisées et des ONG ;

recommande au Groupe de travail de la SCDH de poursuivre ses délibérations selon son mandat et, en particulier, de rechercher les mécanismes qui permettraient de mettre éventuellement en œuvre les normes.

Comme indiqué ci-dessus, au départ, le Groupe de travail, sous l'impulsion de M. Weissbrodt, expert et membre de ce groupe, voulait adopter un code de conduite volontaire sur les STN. Suite à la mobilisation du CETIM et de l'AAJ, appuyés par de nombreux autres ONG et mouvements sociaux, ce Groupe a été amené à changer sa position. En effet, à ce jour, toutes les ONG sans exception revendiquent le caractère contraignant du Projet de normes adopté.

Toutefois, beaucoup reste à faire. Nous devons poursuivre nos efforts pour que toutes nos préoccupations soient prises en compte pendant les travaux de la CDH et pour la création effective d'un mécanisme de contrôle des STN.

Aussi critiques que nous soyons sur le contenu de ce projet de normes, il faut souligner que cette démarche a l'avantage décisif de s'inscrire dans un cadre légal et d'envisager des sanctions à l'égard des STN violatrices des droits humains. Dans ce cadre, il est incompréhensible que M. Kofi Annan, secrétaire général de l'ONU, multiplie ses démarches pour un « partenariat » entre les STN et l'ONU. En effet, après son fameux *Global Compact*, que nous avons déjà critiqué car il ne sert en fait que de label flatteur attribué à des STN violatrices des droits humains<sup>19</sup>, M. Annan a annoncé en juillet dernier la création, dans le cadre du PNUD, d'une commission de haut niveau centrée sur le secteur privé et le développement et placée sous la coprésidence de MM Ernesto Zedillo, ex-Président mexicain et Paul Martin, ex-Ministre des finances canadien. Présentée comme l'« illustration de développement du partenariat entre le secteur privé et l'ONU », elle vise à « atteindre les objectifs du développement, proclamés lors du sommet du millénaire<sup>20</sup> ».

Faut-il le rappeler et insister que ce genre d'initiative ne sert qu'à dédouaner les STN de leurs responsabilités légales et constitue à un court-circuitage des démarches entreprises dans le cadre légal par les instances onusiennes en matière des droits humains.

En effet, le Comité des droits économiques, sociaux et culturels (CODESC) a, à maintes reprises, rappelé aux Etats de prendre des mesures « par tous les moyens appropriés » afin de prévenir les violations des droits, économiques, sociaux et culturels<sup>21</sup>. Dans ce cadre, « les Etats devraient élaborer un ensemble de mesures législatives pour criminaliser toutes les activités des STN qui violent les droits économiques, sociaux et culturels<sup>22</sup> ». Plus concrètement, s'agissant du droit à l'alimentation, le CODESC a souligné dans son « Observation générale N° 12 » que « l'obligation de protéger ce droit impose aux Etats de veiller à ce que des entreprises ou des particuliers ne privent pas les individus de l'accès à une nourriture suffisante<sup>23</sup> ». Il en a fait de même s'agissant du droit à l'eau : « les Etats parties sont tenus de prendre les mesures législatives et autres nécessaires et effectives pour empêcher, par exemple, des tiers de refuser l'accès en toute égalité à un approvision-

nement en eau adéquat, et de polluer ou de capter de manière injuste les ressources en eau, y compris les sources naturelles, les puits et les systèmes de distribution d'eau<sup>24</sup> ». En outre, le CODESC met en garde les Etats afin qu'ils prennent des « mesures pour empêcher leurs propres ressortissants ou des compagnies qui relèvent de leur juridiction, de violer le droit à l'eau de particuliers et de communautés dans d'autres pays. Les Etats parties doivent agir de manière compatible avec la Charte des Nations Unies et le droit international applicable lorsqu'ils sont à même d'inciter des tiers à respecter ce droit [à l'eau] en usant de moyens juridiques ou politiques<sup>25</sup> ».

Quant au rapporteur spécial de la Commission des droits de l'homme sur le droit à l'alimentation, il constate, dans son rapport présenté récemment à l'Assemblée générale de l'ONU, qu'à « ... une époque où les STN sont désormais plus puissantes que les gouvernements, il devient impératif d'étendre le champ d'application des normes relatives aux droits de l'homme pour garantir que ces sociétés [STN] n'abusent pas de ce nouveau pouvoir dont elles disposent<sup>26</sup> ». Partant de l'obligation des Etats en vertu du Pacte international relatif aux droits économiques, sociaux et culturels, le rapporteur spécial souligne que « les gouvernements doivent contrôler et réglementer ces sociétés [STN] sur le plan interne et au-delà des frontières<sup>27</sup> ». A ce propos, le rapporteur cite des affaires de « responsabilité directe à l'étranger » (dans le cadre de la responsabilité civile), jugées dans plusieurs pays (Angleterre, Australie, Canada et Etats-Unis notamment), dans lesquelles des STN ont eu à répondre de violations des droits humains commises à l'étranger devant une juridiction du pays d'origine<sup>28</sup>.

Bien que le Conseil de sécurité ait décidé d'enterrer le rapport d'un groupe d'experts sur le pillage de la République démocratique du Congo (ex-Zaire) par « souci du processus de paix au Congo<sup>29</sup> », le Procureur de la Cour pénale internationale, M. Luis Moreno Ocampo, a affirmé que ses services pourraient aussi « enquêter sur la façon dont des transactions commerciales ont

contribué à la poursuite des crimes de guerre et crimes contre l'humanité en République démocratique du Congo. Le Conseil de sécurité devrait veiller à ce que les informations rassemblées par le Panel [groupe d'experts] soient accessibles au Procureur pour l'aider dans ses investigations<sup>30</sup> ».

Sur le plan juridique, les organisations régionales sont en voie d'harmoniser leur législation. En effet, avec l'entrée en vigueur le 1er juillet 1998 du Protocole additionnel à la Charte européenne des droits de l'homme, il est possible de déposer une plainte devant les juges de Strasbourg sur des questions relatives aux conditions de travail et à la protection sociale. La Cour interaméricaine des droits de l'homme prévoit des procédures similaires depuis l'entrée en vigueur du « Protocole de San Salvador » le 16 novembre 1999.

S'agissant de la Commission africaine des droits de l'homme, saisie d'une plainte au sujet des pratiques d'un consortium pétrolier entre la société pétrolière nationale et la société *Shell* au Nigeria, la Commission a conclu dans son arrêt rendu en 2001 que : « la Charte africaine et le droit international font obligation au Nigeria de protéger et d'améliorer les ressources alimentaires existantes et de garantir l'accès à une alimentation suffisante pour tous les citoyens. En dehors de l'obligation d'améliorer la production alimentaire et d'en garantir l'accès, le droit à l'alimentation exige au minimum que le gouvernement nigérian s'abstienne de détruire ou de contaminer des ressources alimentaires. Il ne devrait pas permettre que des acteurs privés détruisent ou polluent des ressources alimentaires et empêchent la population de pourvoir à ses besoins alimentaires<sup>31</sup> ».

Tenant compte de tout ce qui précède, il est important que les Etats adoptent le Projet de normes, transmis à présent à la CDH, en le renforçant avec des modifications pertinentes précitées, afin que les STN cessent de violer les droits humains en toute impunité. Les ONG, les mouvements sociaux et les académiciens devront maintenir leurs pressions sur leur gouvernement respectif dans ce sens.

Genève, novembre 2003

democratic governance and Nestlé », coédité par le CETIM, IBFAN-GIFA et la Déclaration de Berne, octobre 2003.

20. Cf. Communiqué de presse du PNUD du 25 juillet 2003.

21. Cf. entre autres « Observation générale N° 3 », adoptée le 14 décembre 1990.

22. Cf. *Document de travail relatif aux effets des activités des STN sur la mise en oeuvre des droits économiques, sociaux et culturels*, élaboré par M. El Hadji Guissé (E/CN.4/Sub.2/1998/6).

23. Cf. E/C.12/1999/5 (paragraphe 15), adoptée le 12 mai 1999.

24. Cf. Paragraphe 23 de l'« Observation générale N° 15 », E/C.12/2002/11, adoptée le 26 novembre 2002.

25. Cf. Paragraphe 33 de l'« Observation générale N° 15 », E/C.12/2002/11, adoptée le 26 novembre 2002.

26. Cf. A/58/330.

27. Idem.

28. Idem.

29. Cf. Article intitulé « Le pillage du Congo-Kinshasa n'est pas sanctionné par l'ONU », publié dans *Le Monde* du 1er novembre 2003.

30. Cf. Communiqué de presse de *Human Rights Watch* du 28 octobre 2003.

31. Cité dans le rapport du Rapporteur spécial sur le droit à l'alimentation (cf. A/58/330).

# Bonne gouvernance en bonne intelligence

par Erik Rydberg\*

Il est difficile, aujourd'hui, de fermer yeux et oreilles devant le bourdonnement que la notion de bonne gouvernance introduit dans toute réflexion sur la chose publique. Qui s'intéresse au programme des Nations unies pour le Développement sera tombé, ces mois, sur un rapport intitulé "Renforcer la gouvernance démocratique pour réduire la pauvreté", fruit des travaux du Centre d'Oslo sur la gouvernance<sup>1</sup>. Qui se préoccupe de activités du Forum social mondial aura découvert qu'un de ses ateliers, à Porto Alegre en janvier 2003, avait pour thème "Gouvernance mondiale et institutions internationales"<sup>2</sup>. Qui observe l'évolution des centres d'intérêts de la Fédération des entreprises de Belgique aura appris, en novembre 2003, que celle-ci a lancé une vaste enquête interne visant, notamment, à préparer le secteur privé à l'obligation que l'Europe fera sans doute prochainement à chaque pays de désigner "un Code de *corporate governance* auquel les sociétés cotées nationales devront se référer". Qui cherche à rester informé de l'actualité politique belge aura lu, peut-être, l'été dernier, la déclaration gouvernementale de l'équipe Verhofstadt II et, ainsi, noté que cette dernière se propose de moderniser les entreprises publiques "selon les règles de la *corporate governance*". On peut multiplier les exemples. Chasser de l'esprit la bonne gouvernance, c'est s'exposer à la voir revenir au grand galop.

Est-il possible d'avoir sur le sujet un regard ingénu? La question n'est pas gratuite. Dès lors qu'on se trouve devant un nouveau concept, on a tout intérêt, avant de s'en servir, de s'interroger sur les raisons qui ont fait apparaître cette "boîte à outils". Pourquoi celle-ci plutôt qu'une autre?

Lorsqu'on cherche à analyser les discours sur la gouvernance, et c'est ce à quoi nous nous limiterons dans le cadre de ce bref survol de la question, on sera rapidement amené à séparer, d'une part, distinct des systèmes de gestion d'entreprise qui s'en revendiquent (gouvernance d'entreprise, en anglais « *corporate governance* »), le contexte géopolitique qui justifie aujourd'hui de traiter celui-ci en termes de gouvernance et, d'autre part, les discours sur la gouvernance proprement dits, les grandes tendances qui les habitent et les étayent.

## Du côté de la Cité mondiale

Le contexte géopolitique, pour faire court, tient en un mot. Mondialisation. L'internationalisation des relations économiques et commerciales, le poids gigantesque pris par les organes qui encadrent ces relations, tels le Fonds monétaire international, la Banque mondiale et l'Organisation mondiale du commerce, ont conduit les Etats et tous les pouvoirs précédemment organisés dans ce cadre – désormais donné comme étrié – à pallier, par divers moyens, leur marginalisation et impuissance.

On n'explique pas autrement la revendication, notamment portée par les grandes organisations syndicales et divers mouvements sociaux, d'une « gouvernance mondiale ». C'est l'idée que, puisque le monde économique est désormais organisé à l'échelle planétaire, le monde politique n'a d'autre choix, sous peine de perdre toute influence sur le cours des événements, que de suivre l'exemple.

La volonté, exprimée ci et là, de réformer l'Organisation mondiale du commerce s'inscrit dans ce mouvement : redonner au politique la présence sur la décision économique. C'est vrai également de la nébuleuse que d'aucuns ont convenu d'appeler les « altermondialistes », où l'on veut une « autre » mondialisation, régie non plus par les forces et lois du marché, mais par les suffrages d'une Cité mondiale... qui reste à inventer ?

Ce qui est, en quelque sorte, visé ici – et senti comme une nécessité – est la création d'un gouvernement mondial. Pourquoi dès lors est-ce le terme, bien plus obscur, de gouvernance mondiale qui s'est imposé ? L'analyse<sup>3</sup> que Jean-Pierre Robin a faite du livre que vient de publier le commissaire européen Pascal Lamy sous le titre « La Démocratie-monde, pour une autre gouvernance globale » est à cet égard éclairante. Robin note ainsi l'embarras de Lamy à définir son propos, qui juge indispensable d'instaurer un cadre politique international, une « *démocratie-monde* » qui serait le pendant naturel de « *l'économie-monde* » et, conscient de ce que la notion d'un gouvernement supranational a d'utopique, voire de peu souhaitable, lui préfère le « *concept mou de 'gouvernance'* » que Lamy appelle ici, par un « *affreux barbarisme* », la

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1. Programme des Nations Unies pour le Développement, 2003.

2. Les Cahiers de la solidarité du CRID, juillet 2003.

3. Le Figaro, 5 avril 2004.

Associations transnationales 2/2004, 170-175

« *démocratie alternationale* ». Ainsi que l'observe Robin, « *les néologismes trahissent toujours un certain embarras de leurs auteurs, tout comme ils suscitent l'agacement des lecteurs.* » Pourquoi, s'interroge Robin, Lamy impose-t-il à la pensée autant de détours inutiles et abscons, alors que, en réalité, sa définition de la gouvernance « *devient moins abstraite dès que l'on a compris qu'elle s'applique à la construction européenne. Qu'on le regrette ou qu'on s'en félicite, cette dernière offre en effet un mode de gouvernance sans précédent.* »

Faut-il y insister ? On voit ici, condensé et contrasté en quelques lignes, un va-et-vient entre, d'une part, l'aspiration à un gouvernement mondial, avec tout ce que celui-ci comporterait d'utopiques mécanismes de légitimation démocratiques et, d'autre part, jouant sur l'attrait populaire de cette idée vertueuse (d'où les contorsions embarrassées de Lamy), la volonté politique de faire contrepoids à l'intégration économique mondiale en lui opposant une « *gouvernance mondiale* » qui, elle, que ce soit sous le nom de « *construction européenne* » ou de « *méthode communautaire* », n'a qu'un lointain rapport avec l'idéal démocratique d'un gouvernement qui exécuterait la volonté d'une assemblée élue et de pouvoirs constitués qui, tous, « *émaneraient de la nation* ».

## Pratiques et procédures

Tel est le fossé qui sépare les notions de gouvernement et de « *gouvernance* », cette dernière représentant un concept fourre-tout censé rationaliser, justifier et formaliser un ensemble de procédures et de pratiques, pragmatiques plutôt que démocratiques, emportant la décision politique : pour reprendre le mot de Jean-Frédéric Schaub qui, dans une mise en garde contre le risque de « *brader la politique au profit de la gouvernance* », définit celle-ci comme une « *notion (qui) sert à légitimer la décision politique lorsqu'elle est prise en dehors des institutions qui incarnent la démocratie.* »<sup>4</sup>

Ces procédures et pratiques étant caractéristiques du fonctionnement des institutions européennes, on ne s'étonnera donc pas des faveurs dont jouit le concept de gouvernance dans cette sphère-là. On n'en voudra pour preuve – exemple symptomatique – que ce texte consacré

à « *La coordination des politiques économiques dans la zone euro* »<sup>5</sup> signé de Pierre Jacquet et Jean Pisani-Ferry. S'y voient opposés une coopération économique européenne forgée « *à travers un processus de construction pragmatique, en repoussant toujours le débat préalable sur la finalité* » et des Etats, « *à la fois désireux et rétifs à de nouveaux transferts de souveraineté* », situation qui indique, selon les auteurs, que « *la méthode communautaire atteint ses limites* » et, partant, qu'il convient de « *réfléchir à la gouvernance de l'Europe* ». Envisagée sous l'angle économique, cette gouvernance doit, disent-ils, être préférée à l'expression de gouvernement économique due à Pierre Bérégoovoy, car la notion de gouvernance « *souligne la pluralité des acteurs et la nécessité de définir et d'adopter des 'bonnes pratiques' dans un certain nombre de domaines économiques.* » Réfléchir à la gouvernance de l'Europe consiste, en d'autres termes, non seulement à renforcer et consolider de « *bonnes* » procédures et pratiques, mais, ceux-ci étant appelés à se substituer aux mécanismes démocratiques classiques de la décision politique, à en faire dépendre l'élaboration d'une « *pluralité d'acteurs* », devant lesquels doit s'effacer le législateur. Il s'ensuit tout naturellement que, les auteurs estimant qu'il manque à cette coordination européenne une charte de politique économique, ils en confieraient volontiers l'élaboration, « *suivant une méthode déjà utilisée, à un groupe d'experts et de personnalités européennes incontestables.* » Aux conseillers du Prince, si on veut...

La démarche n'est pas propre aux clercs qui gravitent autour de la sphère européenne. Commentant et reprenant à son compte les conclusions du rapport de la « *Commission mondiale sur la dimension sociale de la mondialisation* » commandité par l'Organisation internationale du travail, l'International Centre for Trade Union Rights en appelle ainsi à l'organisation d'une série de « *multi-stakeholder Policy Development Dialogues, designed to bring all relevant actors together to work towards agreement on key issues such as building a multilateral framework (...)* »<sup>6</sup>, un « *jargon* » où chacun aura reconnu le thème cher aux systèmes de gouvernance consistant à privilégier un processus de décision politique qui s'appuie sur une « *pluralité d'ac-*

4. Nouvel Observateur, 14 août 2003.

5. in Questions européennes, Conseil d'analyse économique

6. International Union Rights, vol. 11, issue 1, 2004.

teurs ». En d'autres termes, et à supposer que la gouvernance pourrait prendre la forme d'un gouvernement, sa composition, sans cesse variable, compterait des syndicats, des fédérations et lobbys patronaux, des organisations non gouvernementales, des groupes d'intérêts de toutes sortes, chacune de ses entités "ministérielles" autoproclamées usant de l'autorité que lui confère le rapport de forces du moment.

### Pour et contre

Les discours sur la gouvernance, quant à eux, peuvent être, pour la commodité de l'exposé, répartis en trois grandes catégories. La première, qu'on qualifiera volontiers de dominante, n'offre guère, en ce qu'elle constitue un plaidoyer (mais rarement déclaré comme tel) en faveur des systèmes de gouvernance, de prise sur la théorie et la filiation idéologiques qui sous-tendent l'argument : la gouvernance y apparaît comme une sorte d'axiome divin, venu de nulle part, dont il ne s'agirait que d'expliquer la machinerie et les ressorts, présentés comme a priori avantageux. La seconde tient du « retournement », le discours, de nature tactique, consistant cette fois à vider le contenu de la gouvernance, perçu et rejeté comme négatif, afin de lui substituer – sous la même appellation... – un autre contenu, un autre projet politique, ce qui ne manque pas de vicier quelque peu la démarche par l'ambiguïté du procédé. La troisième, enfin, est représentée par la critique, parfois radicale, de la gouvernance, d'un point de vue tantôt académique, tantôt politique.

La catégorie dominante, on l'a vu, est celle qui épouse et adopte – prend pour siennes, pour d'emblée données – les valeurs de la gouvernance comme système d'organisation politique de la Cité. Le discours, par essence politique (il cherche à convaincre plutôt qu'à informer), fait ici écran à la compréhension de son contenu. Le phénomène n'est pas propre au discours sur la gouvernance tant la pensée convenue, aujourd'hui, impose à quiconque veut en appréhender les enjeux de la soumettre à un travail de « stratigraphie » critique : d'où vient telle et telle idée, qui l'a promue en premier et qui l'a ensuite relayée dans quels cercles idéologiques successifs, quand et dans quel but ?

Cette démarche s'inspirera avec fruit de la critique de l'idéalisme que Karl Marx a exposée dans « L'idéologie allemande ». Marx y note en effet que le propre du discours idéaliste déconnecté de son terrain historique tient en ce « tour de force » qui consiste « à démontrer que l'esprit est souverain dans l'histoire ». Il s'ensuit, pour l'idéaliste, que les idées sont séparées de ceux qui, « pour des raisons empiriques, dominent entant qu'individus matériels » et séparées, donc, « dans des conditions empiriques de ces hommes eux-mêmes » : par ce petit tour de magie, on parviendra à répandre la croyance que « ce sont les idées ou les illusions qui dominent l'histoire ». On achèvera ainsi d'établir un « lien mystique entre les idées dominantes successives » en concevant ces dernières « comme des 'autodéterminations du concept' ». Comme le fait ensuite observer avec acuité Marx, « pour dépouiller de son aspect mystique ce 'concept qui se détermine lui-même', on le transforme en une personne – 'la conscience de soi' – ou, pour paraître tout à fait matérialiste, on en fait une série de personnes qui représentent 'le concept' dans l'histoire, à savoir les 'penseurs', les 'philosophes', les idéologues qui sont considérés à leur tour comme les fabricants de l'histoire, comme le comité des gardiens, comme les dominateurs. Du même coup, on a éliminé tous les éléments matériels de l'histoire et l'on part tranquillement lâcher la bride à son destrier spéculatif. »<sup>7</sup> Le résultat en sera, conclut-il, que, « chaque époque croit sur parole ce que l'époque en question dit d'elle-même et les illusions qu'elle se fait sur soi. »

Le discours sur la gouvernance de la première catégorie est de ce type. La gouvernance y est un concept qui s'autodétermine, le résultat éthéré de penseurs en chambre, une idée détachée des « conditions empiriques » qui l'ont vu naître. Et il faut, pour y voir clair, procéder à une stratigraphie critique, qui rétablit le qui, le comment et le pourquoi de ce discours.

C'est entre autres pour concrétiser cette démarche de stratigraphie critique que le Groupe de recherche pour une stratégie économique alternative (Gresea) organise depuis l'an dernier un cycle de formation-débat baptisé l'Université des alternatives. Pour tenter de faire la clarté, collectivement, sur des sujets d'actualité portant tant à la controverse qu'aux batailles de slogans, les deux ne sont pas antinomiques,

7. MARX, Karl, L'idéologie allemande, 1845-46, Editions sociales, 1970, page 80-81.



elles vont de pair. Sur la gouvernance, ainsi, le Gresea a publié un numéro thématique de son trimestriel<sup>8</sup> pour, ensuite, susciter là-dessus, dans le cadre des Universités des alternatives, en octobre 2003, une réflexion collective critique à laquelle ont notamment contribué, par l'éclairage qu'ils ont apporté aux multiples facettes de la bonne gouvernance, François Martou, président du Mouvement ouvrier chrétien, Ghazi Hidouci, ancien ministre algérien de l'Économie, et Frédéric Debuyst, professeur émérite de l'UCL, et ce afin non pas de faire le tri parmi les nombreuses interprétations qui sont faites de la gouvernance ni de voir, chacun selon ses penchants, laquelle serait politiquement correcte, mais pour tenter d'acquiescer, sur la bonne gouvernance, une bonne intelligence.

C'est, donc, d'autant plus nécessaire lorsque le discours sur la gouvernance prend la forme du plaidoyer idéaliste. Un exemple illustrera le propos. Apparue voici une dizaine d'années sur la scène politique européenne, la notion de bonne gouvernance conduira la Commission européenne à lui donner un contenu à usage communautaire dans un Livre blanc en 2001 et, la même année, sous le titre "La gouvernance dans l'Union européenne"<sup>9</sup>, à en publier en quelque sorte les prémices intellectuelles, puisqu'il s'agit ici de réflexions académiques initiées en 1995 par la Cellule de prospective de la Commission européenne, sur lesquelles cette dernière entend bâtir, ex nihilo, le substrat idéologique d'une bonne gouvernance européenne.

Ex nihilo, en effet, car il s'agit d'une construction artificielle et c'est ce qui rend l'ouvrage remarquable. On n'y trouvera aucune référence à ce qui forme le point de départ du discours sur la bonne gouvernance<sup>10</sup>, à savoir les théories de l'économiste américain Ronald Coase<sup>11</sup> qui, en 1937, visaient une meilleure gestion de l'entreprise privée, ni à la résurgence de ces idées dans les années septante, date à laquelle elles déborderont dans la sphère publique. Aucune référence, non plus, aux programmes d'ajustements structurels qui, faute de produire dans le Tiers-monde les résultats escomptés par la Banque mondiale dans les années quatre-vingts, ont conduit cette dernière, à partir de 1992<sup>12</sup>, à introduire le concept pour y porter remède en conditionnant ses aides à l'adoption de règles de

bonne gouvernance. Le raisonnement, pour caricaturer, était très simple: pour venir à bout de l'obstacle principal aux politiques de développement que sont, aux yeux de la Banque mondiale, les États des pays du Sud, il convient, bonne gouvernance oblige, de leur imposer des règles de responsabilisation, de décentralisation et de transparence, trois normes que la Banque mondiale enrichira, en 1994<sup>13</sup>, des concepts de participation et de société civile.

Voilà le cheminement et les dates-clés - dont cet ouvrage ne dit mot - au sujet desquels quiconque doit s'interroger s'il veut comprendre pourquoi une théorie américaine de «management» d'entreprise a été érigé en un modèle à vocation universelle de l'art de gouverner par les grandes institutions intergouvernementales internationales.

La deuxième catégorie de discours sur la gouvernance, qui «retourne» le concept pour lui donner un autre contenu ne sera abordé ici, à titre d'illustration exemplative, qu'au travers de la présentation qu'en fera François Martou lors des Universités des Alternatives. Martou rattache la gouvernance à ses origines manageriales et à la croyance illusoire, dans ces milieux, de traiter l'économie comme un «sujet» rationnel, soumis à des lois prévisibles, notamment d'équilibre général. Ce qui l'intéresse, cependant, étant homme politique, ce sont les valeurs de transparence, d'obligation de rendre des comptes, de conditionnalité démocratique, de lutte contre la corruption et de bonne gestion des administrations publiques que la théorie politique de la gouvernance juge aujourd'hui centrales. Ce sont tous, dit-il, des valeurs qui, dépouillées du mauvais usage qu'en font les grandes institutions internationales, peuvent être considérées comme positives et progressistes.

Pour Martou, ainsi, il y a une «mauvaise gouvernance» et une «bonne gouvernance». La «bonne» s'oppose à la «mauvaise» en déniaut au marché son statut hégémonique et en imposant à ce dernier des règles de fonctionnement qui ménagent une place aux biens publics et à des services publics performants. On l'a déjà dit, cette démarche ne manque pas d'être ambiguë, en ce qu'elle établit, à l'intérieur du concept de gouvernance, une rivalité de contenus idéolo-

8. «La gouvernance, stade suprême du colonialisme?», GRESEA Achos n° 39, juillet 2003.

9. Les cahiers de la Cellule de Prospective, Communauté européennes, 2001.

10. Pareille présentation anhistorique n'a rien d'exceptionnel. Dans un hors-série publié au 1er trimestre 2001 sous le titre «Qui gouverne l'économie mondiale», la revue Alternatives économiques dressera le tableau des «Quatre écoles de la gouvernance mondiale» dans un article de quatre pages dans lequel on ne trouve en tout et pour tout que trois références historiques datées.

11. COASE, Ronald, "The Nature of the Firm", *Economica*, 1937

12. "Governance and development", World Bank, 1992.

13. World Bank Governance, World Bank publications, 1994.

giques. Elle est cependant représentative d'un courant politique important.

## Une démocratie des notables?

La dernière catégorie, enfin, qui se concentre sur une critique, parfois radicale, de la gouvernance est d'ordre tantôt académique, tantôt politique. De la première, citons Isabelle Darmon, qui relève que le concept de gouvernance est « *inséparable du retrait de la régulation, d'un recul des instruments législatifs contraignants et, symétriquement, de la promotion de la 'corégulation' et de la 'contrainte volontaire', puisque une plus large place doit être faite aux interactions entre 'partenaires', dans les phases préalables à la prise de décision.* ». De manière plus fondamentale, dit-elle, « *les tendances actuelles, via la gouvernance (ou le dialogue civil, qui en l'une des composantes), à institutionnaliser la société civile, en niant l'autonomie d'un espace d'expression citoyenne, en niant la possibilité de contestation et de conflit, puisque tout est supposé se résoudre par le dialogue, peuvent aboutir à la marginalisation de cet espace autonome, et à sa 'criminalisation', notamment en le forçant à radicaliser ses actions* »<sup>14</sup>.

Citons encore Corinne Gobin qui, dénonçant la dérive technocrate que la gouvernance impose au modèle démocratique européen, note qu'on assiste ici, gouvernance oblige, à une construction politique où « *la multitude d'associations (est) mise sur un pied d'égalité (les différences basées sur la puissance financière ou la nature des liens représentants et représentés y sont gommées car l'important, c'est la multitude) prend la place du peuple. (...) La souveraineté du peuple et la représentation électorale basée sur le mandat et la représentation politique ne sont plus reconnues comme la fondation de l'édifice démocratique. L'utilisation de la référence à la 'société civile' permet de légitimer l'action politique de groupes représentants des intérêts de pouvoirs privés divers, qu'ils soient marchands, corporatistes ou religieux. La démocratie de représentation du peuple devient une démocratie de participation des notables.* »<sup>15</sup>

Cette « démocratie des notables », sujet d'inquiétude pour quiconque s'intéresse à la chose publique en nos contrées relativement privilégiées, suscite dans les pays du Sud qui la subissent, une analyse qui n'est pas moins acérée. Là,

on constate, avec Rémy Herrera, que les institutions tels que le Fonds monétaire international et la Banque mondiale imposent depuis les années nonante des règles de bonne gouvernance qui minent et sapent les services publics, dérèglent les systèmes d'échanges, de commerce et de fixation des prix et ôtent aux Etats toute capacité d'encore élaborer de manière autonome des politiques économiques et sociales. Dans quel but, en réalité ? Herrera : « *In spite of the vagueness of the concept and of the normative judgement criteria involved, the goals formulated by these organizations are quite clear and convergent : what is at stake is the shaping of states' policies to create those institutional environments most favourable to the opening up of the countries of the South to globalized financial markets.* »<sup>16</sup>

Au Nord, la gouvernance impose une modification radicale du droit public et des régimes dits de démocratie parlementaire ; au Sud, elle enserme les Etats dans un labyrinthe de règles incapacitantes qui les place sous tutelle. Autant de raisons pour s'intéresser à la gouvernance, malgré ou à cause du flou qui entoure le concept.

Car il s'agit bien d'un art de gouverner et un art de gouverner qui entend se substituer aux fondements de la démocratie parlementaire qui, depuis Montesquieu, garantissent la légitimité des décisions des pouvoirs constitués. Tel paraît en effet l'enjeu et, partant, l'importance d'une bonne intelligence du concept. La gouvernance, on aurait pu commencer par là, s'appuie en effet sur une série d'idées qui, jamais neutres ni innocentes, invitent chacune à la circonspection. C'est l'idée que les Etats doivent se conformer à de bonnes pratiques, notamment de transparence, de responsabilisation et de lutte contre la corruption, ce qui peut paraître souhaitable s'il n'étaient les moyens pour y parvenir, qui consistent, principalement à l'égard des pays du Sud, à une mise sous tutelle qui n'est pas sans évoquer les procédés colonialistes. Et c'est l'idée, ô combien sympathique, de la participation de la société dite civile à la chose publique qui, sous des allures de démocratie directe, risque de remplacer les électeurs par des groupes de pression<sup>17</sup>, et que gagne le meilleur, le plus persuasif, le plus puissant d'entre eux...

Ce n'est pas un des moindres paradoxes que, au nom d'une démocratie accrue, la gouvernan-

14. DERMONT, Isabelle, « Dialogue civil, gouvernance et société civile », La Revue Nouvelle, mars-avril 2002.

15. GOBIN, Corinne, « De l'Union européenne à... l'euphorisation des mouvements sociaux », Revue internationale de politique comparée, Louvain-la-Neuve, mai 2002.

16. HERRERA, Rémy, « Good governance against good government ? », Third World Economics, 1-15 March 2004.

17. Voir encore, notamment, CASSEN, Bernard, « Le piège de la gouvernance », Monde Diplomatique, juin 2002, BROWN, John, « De la gouvernance ou la constitution politique du néo-libéralisme », ATTAC, mai 2001 et de SELYS, Gérard, « Livre blanc sur la gouvernance : coup d'Etat de velours ? », RTBF, 8 août 2001.

ce tend à en saper progressivement les assises. réflexion critique et citoyenne par le Gresea,  
C'est une évolution qui, jugée digne d'une nous touche tous.

*World Social Forum. Challenging Empires.* Edited by Jai Sen, Anita Anand, Arturo Escobar & Peter Waterman, The Viveka Foundation: New Delhi, 2004. 402 pages. Index.

Published on the eve of the 2004 World Social Forum (WSF) held in Mumbai, India, this book is an anthology of articles, interviews, and documents about the WSF. Although most of the writings had already been published or disseminated on the internet, the collection is as new and current as any multi-authored volume could hope to be. The book contains 57 writings written by 39 individual contributors plus several formulated by organizations.

The WSF began in January 2001 in Porto Alegre, Brazil, and was held there for two additional years before journeying to India. The next Forum will be back in Porto Alegre. The initiation of the WSF was an innovative idea, and the early meetings succeeded in garnering media attention. As someone who perceived the WSF as important and yet has not attended it, this reviewer was eager to read the volume to see what the Forum has accomplished and how it is confronting the usual challenges of any international association. Getting started is often easier than maintaining momentum.

As Jai Sen, one of the four co-editors, explains in the first of several "Proems" that undergird the volume, the book is an attempt to contribute to a better understanding of the WSF. In my view, the book succeeds in achieving that purpose. The book provides a valuable window into the WSF annual events, and to the phenomenon of a Forum within a broader global politics. The reader will see the rich diversity of perspectives, the creativity, the complexity, the anger, the optimism, the internal contradictions, and the disorganization that all play a part of the WSF story.

The subtitle of the book is "Challenging Empires," and the authors see the Forum doing that on several levels. The Empire is revealed to be "neoliberal globalization" which is pointed to by many of the authors as the problem and target underlying the Forum. The term "neoliberal globalization" is not precisely defined, but one gets the basic idea in the WSF Charter of Principles (June 2001) which states opposition to "a process of globalisation commanded by large multinational corporations and by govern-

ments and international institutions at the service of those corporations' interests with the complicity of national governments." Much criticism is leveled at the World Trade Organization and at the United States by many of the authors in the volume.

The book is divided into five sections, each beginning with a thoughtful short Proem by Anita Anand. (Anand was one of the co-editors of the excellent 1999 volume, *Whose World Is It Anyway? Civil Society, the United Nations and the Multilateral Future.*) The five sections are: Antecedents, Diaries of WSF participants, Critical commentaries, the Forum in India, and Looking Beyond to Possible Futures and Worlds. Each section also contains a set of short documents about the WSF and related fora.

The two themes that seem to unify the book are (1) opposition to neoliberal globalization and (2) the WSF as an Open Space, rather than a movement or organization. The notion that something as threatening and powerful as neoliberal globalization should be addressed in the WSF by sponsoring a global forum, rather than through transnational organized advocacy, is a novel idea in the evolution of international associations. I am unaware of any precise historical precedent for a continuous broad international forum outside of the academic context. The much older World Economic Forum (WEF), typically held in Davos, may be a precedent to some extent (and certainly gave the inspiration to the WSF organizers), but one guesses that the WSF organizers think that they are doing something different than what they perceive the WEF to be doing. One gap in the volume is a comparative analysis of the two Forums.

The idea of an open space is contested within the WSF on two (or more) dimensions. One is whether the WSF should remain just a neutral space for knowledge sharing and dialogue, or whether it should solidify into a movement or organization. Chico Whitaker's essay discusses this conundrum in a clear and cogent way. He views the WSF as an open space that can be visited voluntarily and that serves to incubate

ideas. Such a space has no leaders. This lack of hierarchy is seen as valuable in inducing and facilitating movements, rather than seeking to command them. Another dimension of contestation is how open the WSF space should be. As Jai Sen points out in one of his essays, the Forum is not actually open to groups of all views. One has to be “opposed to neoliberalism and to domination of the world by capital and any form of imperialism.” Surely this is a self-contradictory stance for a forum that should be eager to listen to and argue with the neoliberals.

Many other issues regarding the WSF are addressed in the essays. One is the challenge of spatial geography. The WSF began in Porto Alegre and for quite predictable reasons, holding it in other locations has proved difficult. Even a Space has to be located somewhere and this presents a challenge for the WSF that has defined itself as operating in a “decentralised fashion.” In his essay, Michael Albert suggests emphasizing local Forums as the foundation of the WSF and turning the annual global forum into a delegate event. In another essay, P.J. James takes note of some offshoots of the WSF such as the European Social Forum and the Asian Social Forum.

Other essays address theoretical questions. Arturo Escobar examines cyberspace and complexity theory for insights into the development of social movements. Michal Osterweil, borrowing from Boaventura de Sousa Santos, ponders whether we need a new epistemology to assess experiences such as the WSF since they will always be found wanting when gauged with established criteria. Nikhil Anand suggests that by coming to the WSF, participants are com-

pelled to give up singular discourses of marginalisation and to come to terms with more complex and multivalent relationships.

Still other essays seek to present a useful historical perspective on the WSF processes. Peter Waterman provides a very useful background. Michael Löwy compares the WSF to the four Internationals which began in 1864. Johanna Brenner looks at a few decades of transnational feminist organizing. Andrej Grubacic considers the Anarchist roots of the Forum.

One omission struck me as I finished reading the book: I could not recall much being said about law. I checked the index and saw three references to “law,” and yet when I thumbed back to those pages, nothing was there about law or the rule of law. Could it be that in this entire volume from 39 contributors, there was no discussion about the role of law in social processes? And if so, was that a blind spot of the editors, or does the inattention to law reflect its non-importance at the WSF? I don’t know the answer.

Within the inattention to law, there is even a larger gap, which is the omission of any discussion of international law. Given the theme of the WSF that “Another World is Possible,” this reviewer would have expected that better world to be one in which international legal norms play a stronger role than they do in the existing world. I would hope that the WSF vision does not understand international law as simply a top-down tool used by the Empire.

Steve Charnovitz  
Washington, D.C.  
April 14, 2004

## Civil Society sidelined from highest United Nations Human Rights body

*Open Letter to the Director-General of the United Nations Office at Geneva, Mr. Sergei Ordzhonikidze, the United Nations Acting High Commissioner for Human Rights, Mr Bertrand Ramcharan, and the President of the Commission on Human Rights, Mr. Ambassador Mike Smith*

The undersigning organisations are deeply concerned that, for the first time in the history of the UN Commission on Human Rights, which opened yesterday in Geneva, NGOs are prevented from accessing the floor of the plenary.

By doing so civil society is prevented from interacting with governmental delegates, which is crucial to the advocacy role. Furthermore this is a distressing departure from the long established practice of interaction between the functional commission of ECOSOC and non governmental organizations in consultative status.

We do understand and share the security concerns, however once we have being through the various security checks, NGOs should be allowed into the plenary.

Effective participation of NGOs is key to the working and credibility of the commission as highlighted by most of the speakers, including Minister of Foreign Affairs from Ireland, Germany and Paraguay.

We urge you respectfully to reconsider such unfortunate decision.

Yours sincerely,  
Human Rights Watch  
International Commission of Jurists  
International Federation for Human Rights

*source: latest WFUNA newsletter*

## Conference on disarmament welcomes enhanced participation of Civil Society in its work

On 12 February, the UN Conference on Disarmament decided to enhance the engagement of civil society in its work. Among other things, the decision concerning civil society states that non-governmental organizations are entitled to make written material available to the members of

the Conference outside the Council Chamber twice per annual session. After the Conference adopts a program of work, it will allocate one informal plenary meeting per annual session to NGOs to address the Conference. Only NGOs whose activities relate to the work of the

Conference will be able to address it, and a formal selection process will be put in place to consider requests from NGOs to participate.

Source:  
<http://www.un.org/News/Press/docs/2004/dcf435.doc.htm>

# Civil Society Observer

In its efforts to build relationships that matter between the UN system and civil society, UN-NGLS is introducing a new electronic bulletin: *Civil Society Observer*. *Civil Society Observer* is a package of selected articles, reports and other documents to keep you connected to what's going on in global civil society and the debate surrounding its role in the world.

Over the last ten years, civil society organizations have developed a keen understanding of how the UN system works and have developed innovative strategies to engage it. The work and activities of civil society continue to develop and adapt to changing realities at a tremendous pace, eliciting both supportive as well as confused and questioning responses.

When it decided to develop Civil Society Observer, NGLS did so on the understanding that the UN System and the myriad of organizations that comprise global civil society need new and trusted sources of information, analysis and opinion on the evolution and dynamics of civil society's role in global governance. It is intended to provide this by taking the pulse of how civil society is being portrayed in the media around the world, by presenting articles that reflect the state of the debate on civil society, as well as highlighting some analytical and political contributions from civil society organizations themselves.

Here are some of the publications reported by *Civil Society Observer*:

*"An Enabling Environment for Civil Society: What Does it Mean*

*and How Does Law Fit In?"*

Published by the Centre for Civil Society Research (University of Natal), this paper explores the notion of an 'enabling environment' for civil society. After examining the limitations involved, it adopts a broad, practical view of the legal dimensions that co-determine the operational context for civil society by, first, asking the question: 'an enabling environment for what?' Answers are found in terms of civic existence, expression and engagement and address five critical outcome domains- Association, Resources, Voice, Information and Negotiation (ARVIN)- that are significantly affected by legislation. For each domain, a set of ideal legal conditions is described and sample questions are posed that would help assess the degree of legal conformity with what is needed for a vibrant and effective civil society. *Source:*

<http://www.un-ngls.org/csolfowler.doc>

*"Civil Societies and Peacebuilding - The New Fifth Estate?"*. The author traces how and why, in the context of global conflict, new orders of NGO's have evolved into significant political actors and have increasingly made their presence felt at the local, national and international level. <http://www.un-ngls.org/cso/FifthEstate.pdf>

**Mutual Misgivings: Civil Society Inclusion in the**

**Americas:** Published as part of a larger research project exploring the evolving relationship between civil society organizations and the multilateral system, this paper presents a series of case studies

that examines civil society participation in three multilateral processes and organizations in the Americas: the Organization of American States (OAS), Free Trade Area of the Americas (FTAA), and the Summit of the Americas. It seeks to understand the why, what, who and how of government engagement with CSOs and to raise issues for further debate and consideration. [http://www.un-ngls.org/cso/mutual\\_misgivings.pdf](http://www.un-ngls.org/cso/mutual_misgivings.pdf)

**Do NGO's have a problem of legitimacy?** Authored by the Swiss Coalition of Development Organizations, this paper problematizes the issue of NGO accountability by contextualizing it within a broader debate of what the authors call a "democracy deficit" in international politics. The paper concludes that while setting legal guidelines for the governance and management of NGO's may be acceptable, guidelines that attempt to prescribe the "legitimate" political behavior of NGOs are problematic and unacceptable, with the potential of reinforcing rather than mitigating "democracy deficits" where they exist. <http://www.un-ngls.org/NGO-Legitimait-eng.doc>

**From 'Donorship' to Ownership: Moving Towards PRSP Round Two (Oxfam):** If poor countries are to reach the Millennium Development Goals, it is vital to critically evaluate the lessons learned from both the consultation process and the policy content generated by the first round of Poverty Reduction Strategy Papers (PRSP's), argues a newly released Oxfam Briefing

paper. <http://www.un-ngls.org/cso/OxfamV1.pdf>

**From OAU to AU and NEPAD: Strategies for African Women:** Excerpt from a Report on a Regional Strategy Meeting on Women's political participation and gender mainstreaming in the African Union and its Specialized Mechanisms. <http://www.pambazuka.org/index.php?id=20443>

**Risky Development: Export Concentration, Foreign Investment and Policy Conditionality (World Vision):** Risky Development uses data from 84 developing countries from 1981 to 2000 to examine the links between trade, growth and poverty. The report concludes that a country's development strategy should not be externally imposed, but rather should be based on a careful appraisal of its capacities and the costs, benefits and risks of different strategies. <http://www.un-ngls.org/cso/RiskyDevelopment.pdf>

**The Future of Multilateralism after Monterrey and Johannesburg (FES):** The key ingredients for a strengthened and democratized multilateral system have been sketched out in numerous reform reports, expert bodies, NGO demands, and official resolutions adopted by governments in New York, Monterrey and Johannesburg argues a paper published by Friedrich Ebert Stiftung (FES). However, the realization of this vision depends on the initiative of individual governments to overcome, in the framework of coalitions, political blockades at the global level, without losing sight of the need to strengthen the hand of the UN and its General Assembly as the center of multilateral cooperation. <http://www.un-ngls.org/cso/MultilateralismV1.pdf>

**The Pros and Cons of Private Provision of Water and Electricity Service (Citizen's Network on Essential Services):** This booklet

seeks to describe the main rationales for using the private sector to deliver water, sanitation and electricity services, and attempts to evaluate them in theory and practice. It also identifies policy trends and the major policy instruments used by multilateral organizations to promote private provision in these sectors. It concludes with recommendations for assessing the feasibility of private provision.

<http://www.un-ngls.org/cso/CNESV1.htm>

Source: Tony Hill, Coordinator, NGLS

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## African Civil Society Organizations Seek Greater Roles in Governance

Civil Society organizations have in recent times sought and fought for increasing relevance concerning governance and development issues around the globe.

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## A free trade area in the Balkans

At a meeting of the Stability Pact for South Eastern Europe in Brussels on 27-28 June, seven South Eastern European countries had signed a Memorandum of Understanding (MOU) which aims to establish a network of free trade agreements (FTAs). These countries signed a series of deals in Rome, last November, establishing a free trade area covering 55 million people and seen as a step to eventual European Union membership. Moldova - which was scheduled to enter the WTO - also expressed interest in joining the trade bloc.

According to the MOU on Liberalisation and Facilitation of Trade, Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Macedonia, Romania and Serbia-Montenegro committed themselves to implementing a harmonised system of tariffs within six years. To this end, the seven countries, with an aggregate population of 55 million people, are to set up a network of bilateral FTAs which will allow for at least 90 percent of goods to be exchanged free of tariffs. The FTAs will feature WTO-consistent provisions for applying antidumping, countervailing and safeguard measures; transparent and non-discriminatory measures on public procurement, state aid and state monopolies; and a clause for the future liberalisation of services.

The MOU further states the signatories' intention to harmonise their legislation with that of the EU, in particular regarding company law, company accounts

and taxes, banking law and competition law as well as customs procedures and methodologies for the collection of trade statistics. The EU, under whose guidance the agreements will be worked out, welcomed the MOU as an important step towards the goal of stabilising South Eastern Europe and promoting its economic integration with the EU.

*Source: AFP (via ClariNet)*

## Caraïbes

L'Union européenne a ouvert des négociations relatives à la conclusion d'un accord de partenariat économique (APE) avec les 16 États des Caraïbes. Les commissaires européens chargés du commerce et du développement et leurs homologues des Caraïbes ont lancé officiellement des négociations qui visent à promouvoir le commerce et le développement grâce à la conclusion d'un accord de région à région.

*Source : La Lettre de la Fondation Schuman, lundi 19 avril 2004*

## United Local Cities and Governments: A new global organisation

*United Local Cities and Governments* is a new organisation that will start operations in January 2004 and will have its headquarters in Barcelona, Spain. *United Local Cities and Governments* is an organisation that originated in the unification of the World Federation of United Cities (WFUC) and the International Union of Local Authorities (IULA), the two most

important global organisations for local governments. It will represent the cities and organisations of local governments in different countries. *United Cities and Local Governments* will be a truly global organisation with a decentralised structure, operating in seven areas of the world: Africa, Asia and the Pacific, Europe, Russia and the Newly Independent States (NIS), Middle East and western Asia, Latin America and North America.

*United Cities and Local Governments* will be the main interlocutor between local governments and the United Nations. The organisation will support international cooperation between local governments and their associations, basing itself on the pioneer work of the WFUC and IULA in city-to-city cooperation, reinforcing the capacities of local governments, local democracy and the participation of women in local decision-making. It will be a worldwide source of key information on local governments. The creation of *United Cities and Local Governments* heralds a new era for local governments and for the reinforcement of the local voice at the international level.

Paris has been selected to host the founding congress of the global organisation *United Local Cities and Governments* from 2nd to 5th May 2004. 2,500 to 3,000 participants representing over 80 countries are expected to attend this meeting. In uniting with one another, the World Federation of United Cities (WFUC) and the International Union of Local Authorities (IULA) are founding an organisation in which local powers will try, together, to find responses to the challenges of

globalisation. In this congress, the debate shall centre on the role of cities and local governments in the future of development, including decentralization and local democracy, sustainable development and cooperation for development and peace. It shall also be an opportunity to define the initial political and strategic direction of “United Cities and Local Governments”, and to elect its executive bodies.

### *Missions and objectives*

The Paris Congress will constitute the Founding Congress of the new world organisation, United Cities and Local Governments. The mission of this new global organisation is to be the united voice of democratic local self-government, promoting its values, objectives and interests to the international community, through cooperation among local governments.

United Cities and Local Governments has been created through the unification of the World Federation of United Cities (FMCU) and the International Union of Local Authorities (IULA), bringing together the two largest global local government associations.

United Cities and Local Governments is a truly global organisation with a decentralised structure, operating in seven world regions:

- Africa
- Asia and the Pacific
- Europe
- Russia and the Newly Independent States (NIS)
- Middle East and Western Asia
- Latin America
- North America

United Cities and Local Governments will be the key interlocutor between local governments and the United Nations. It

will support the activities of its members in the fields of city-to-city cooperation, local government capacity building, local democracy and the participation of women in local decision-making. It will be a worldwide source of key information on local governments and their associations.

Membership of United Cities and Local Governments is open to individual cities and national associations of local governments, international local government organisations and international organisations concerned with local government matters.

The local and regional elected representatives present in Paris will adopt the organisation’s constitution and elect its governing bodies.

United Cities and Local Governments will have its headquarters in Barcelona, from January 2004.

**Some items in recent issues:**

*Parmi les thèmes traités récemment :*

**Issue number:**

*Numéros :*

Transnational actors in the international system <i>Les acteurs transnationaux dans le système international</i>	6/1999, 2/2000, 3/2001, 4/2002.
The recognition of the legal personality of INGOs <i>La reconnaissance de la personnalité juridique des OING</i>	3/1986, 3/1990, 5/1990, 3/1995.
Cooperation between INGOs and IGOs <i>La coopération entre les OING et les OIG</i>	6/1999, 6/2000, 3/2003, 4/2003
Sociology of international relations <i>Sociologie des relations internationales</i>	3/2001, 4/2002, 1-2/2003, 3/2003.
Social movements, trade unions and cooperatives <i>Mouvements sociaux, syndicats et coopératives</i>	6/1996, 3/1997 5/1999, 1/2001.
Economic and trade issues <i>Questopms économiques et commerciales</i>	4/1998, 5/1999, 3/2002, 4/2003.
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Humanitarian aid and humanitarian law <i>L'aide et le droit humanitaires</i>	2/1996, 2/1999, 2/2001, 4/2002.
Language, communication, education and gender <i>Langage, communication, éducation et égalité des sexes</i>	2/1998, 1/1999, 6/1999, 2/2000.
Civil Society and the State <i>La société civile et l'Etat</i>	4/1998, 1/1999, 4/2000, 2/2001.
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Arab Associations <i>Associations arabes</i>	1/1998, 6/1999 2/2001
Asian Associations <i>Associations asiatiques</i>	2/1997, 6/1999 3/2003

**Some authors / ont publié dans nos colonnes :**

Sami A. Aldeeb, Chadwick Alger, Benjamin R. Barber, Chérif Bassiouni, Mohammed Bedjaoui, Jan Berting, Maurice Bertrand, Elise Boulding, Boutros Boutros-Ghali, Cynthia Cockburn, Jacques Delors, Adama Dieng, Francis Fukuyama, Johan Galtung, Susan George, André Gorz, Group of Lisbon, Robin Guthrie, Robert Harris, Jürgen Höffner, Bill Jordan, Alexandre Kiss, Alain Labrousse, Ronnie D. Lipschutz, Marc Luyckx, Federico Mayor, Elikia M'Bokolo, Marcel Merle, Morton Mitchnik, Edgar Morin, Basarab Nicolescu, Ignacio Ramonet, François Rigaux, Nigel Rodley, John G. Ruggie, Wolfgang Sachs, Pierre de Senarclens, Jan Aart Scholte, Vaudana Shiva, Rodolfo Stavenhagen, Rajesh Tandon, Charles Taylor, Fernand Vincent, Peter Waterman.

