

# CROOKED COUNSEL

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HOW LAW-BREAKING CORPORATIONS ARE  
ADVISING THE EUROPEAN COMMISSION



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## HOW LAW-BREAKING CORPORATIONS ARE ADVISING THE EUROPEAN COMMISSION

In shaping EU policies the European Commission often relies on external expertise and advice given by industry-dominated Expert Groups and other advisory bodies. Yet many of the corporations giving this advice have been found guilty of breaking the law. Urgent reform is needed to ensure integrity, transparency and ethics in the Commission's advisory bodies, ending the reliance on this form of 'crooked counsel'.

### EXECUTIVE SUMMARY

- » The Commission's influential advisory system — including but not limited to Expert Groups, Stakeholder Groups and European Supervisory Authorities — has been widely criticised for the degree of industry dominance and the lack of transparency.
- » This report highlights another flaw in the system: many of the corporations advising the Commission have been found guilty or are under investigation for serious ethical, financial or environmental misconduct, undermining the integrity, transparency, and credibility of the European policy-making process.
- » The ten corporations highlighted in this report are entrenched within the Commission advisory system and many are household names, advising on issues where they stand to (in)directly gain financially and which are often linked to their illegal activity. This means the Commission accepts, for instance, financial advice from corporations guilty of financial wrongdoings or defence advice from corporations using bribery to win defence contracts.
- » Advisory group reform should be a key priority for incoming Commissioners, both in fulfilling existing promises made to Parliament and ensuring law-breaking corporations are excluded from the advisory system for a minimum of five years while those under investigation are temporarily suspended.

# INTRODUCTION

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Over the last five years, numerous civil society groups have campaigned against the secrecy and industry dominance of the European Commission's various advisory bodies that shape EU policies and legislation.<sup>1</sup> Many of these bodies are formal Expert Groups, which are highly influential in shaping the Commission's policies across a range of subject areas. However, other EU advisory bodies also exist which are profiled in this report for reasons we outline.

As the Commission grapples with issues of corporate dominance and lack of transparency with current Expert Groups (see Box 1), this report highlights yet another fundamental flaw of the wider advisory group system.

There would be a public outcry if criminals were found to be advising politicians or civil servants in countries across the EU; yet this report outlines how corporations that have been found guilty of serious ethical, financial or environmental misconduct, or who are being sued for misdemeanours, are actively advising the Commission. Some may even indirectly gain financially from that advice.

Is not the credibility of the Commission called into question if it takes advice from a company while pursuing that same company for anti-competitive practices? Or if it seeks advice on financial matters from a company it has just fined millions of dollars for financial impropriety? These are very real cases — and there are many more.

The ten companies profiled in this report have been found guilty of misconduct, been involved in lengthy investigations, been heav-

ily fined by regulators and yet currently are, or have been, represented in over 30 different Expert, High Level or other groups advising the European Commission. They include multinational arms manufacturers, technology giants, banking super powers, global accountancy firms, and one of the biggest petroleum companies in the world. Many are household names.

This state of affairs cannot carry on. Advisory group reform should be one of the highest priorities for the new European Commissioners, who take office in Autumn 2014. They should act on the findings of this report and prevent any company that has broken the law or engaged in gross misconduct from serving within the advisory system for a minimum period of five years, as well as ensure the Commission implements its still-unfulfilled promises to the European Parliament to reform the Expert Group system (see Box 1).

Although we recognise the basis for international law is innocent until proven guilty, high profile investigations are not undertaken lightly and can take years of preparatory work before an official investigation is launched and then take even longer to complete, with corporations spending exorbitant sums on lawyers to drag out proceedings and uncover any feasible legal loophole to escape on a technicality. Therefore, by suspending any company actively under investigation by the Commission or EU regulators, law enforcement agencies, or regulators of member states until the case is resolved, the Commission can furthermore help protect the integrity of the advisory system.

The examples presented in this report may just be the tip of the iceberg. If this problem is to be seriously addressed and institutionalised, then a ‘blacklisting’ system is needed as

a way of formalising reform of the advisory system. How this might be achieved is outlined in the recommendations at the end of the report.

## WHO ADVISES THE COMMISSION?

Compared to many national governments, the European Commission has a relatively small administrative staff. This means it relies on outside “experts” in drafting policy proposals and legislation. One of the main routes for this advice is via the Commission’s Expert Group system, which is the Commission’s most frequently used consultation method.<sup>2</sup>

The Commission describes Expert Groups as “consultative bodies that advise the Commission on the preparation of legislative proposals and policy initiatives, the implementation of legislation, programmes and existing Union policies, and the preparation of delegated acts.”<sup>3</sup>

These groups are powerful players in the policy-making and legislation process. There are between seven and eight hundred Expert Groups, operating in over 30 policy areas, such as research and development, the environment, enterprise and industry, and financial regulation. Many of the most politically and economically significant Expert Groups have traditionally been dominated by industry.

For example, following the economic crash of 2008-09, the Commission formed an Expert Group headed up by the well-known banker Jacques De Larosi re called the “High-Level Group on Financial Supervision in the EU”, which was dominated by the very same financial institutions that had caused the crisis in the first place — Goldman Sachs, Lehman Brothers, BNP Paribas, and Citigroup.<sup>4</sup> Unsurprisingly, the group’s recommendations, which then shaped the Commission’s response to the crisis, never questioned the root causes of the financial collapse such as banking self-regulation nor contemplated

preventative measures such as breaking up banks that were ‘too-big-to-fail’.

Unfortunately, despite strong reform efforts by MEPs and promises from the Commission (see Box 1), Expert Groups continue to be dominated by industry.<sup>5</sup> For example, recent research published in November 2013 by the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU), found that in the Commission’s Directorate General (DG) for Taxation and Customs Union almost 80% of all stakeholders appointed in the preceding year (excluding government representatives), represented corporate interests.<sup>6</sup> Given how sensitive the issue of tax and tax avoidance is across Europe, this dominance is both surprising and worrying.

### BOX 1

#### THE BATTLE FOR EXPERT GROUP REFORM

Reform of the European Commission’s industry-dominated Expert Groups has been painfully slow, despite pressure from the European Parliament. This lack of progress led Members of the European Parliament (MEPs) to freeze the Commission’s Expert Group budget in November 2011, giving four conditions for it to be unfrozen:

1. An end to industry dominance;
2. No lobbyists allowed to sit in a group as an independent expert;
3. Public calls for applications;
4. Full transparency.

However, despite the Commission promising to adhere to these rules in exchange for lifting the budget freeze, research by ALTER-EU shows that many politically and economically important groups created since the budget lifting continue to be dominated by industry.<sup>10</sup> The Commission will officially review the rules in 2015.

The Expert Groups are not the only advisory bodies which are important to the Commission, however. In response to the financial crisis and following the recommendations of the de Larosière Report (the findings of the finance-industry-dominated group mentioned above), EU-level oversight of the financial industry was reformed by creating the European Supervisory Authority (ESA). Yet these new systems of financial supervision are equally problematic, being dominated by the very same financial corporations that caused the crisis and that they are supposed to be regulating; a fact that people affected by the last few years of austerity may find deeply unpalatable. Established in 2010, the ESA consists of the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA).

The three bodies provide advice to the Commission, either in response to the Commission's request or on their own initiative,<sup>7</sup> and have a close working relationship with the Commission's Directorate-General Market (DG MARKT) whose main task is to coordinate policy on the European Single Market.<sup>8</sup> The ESA also serves as an advisory body and issues opinions that can shape European Parliament and Council policy making, as well as drafting important technical implementing measures that can have a significant impact on the financial system.<sup>9</sup> Although they are not officially Expert Groups, these committees are part of the wider EU-advisory system and offer crucial advice concerning the future of regulation of the financial system, which has led to their inclusion in this report.

Below we list ten examples of corporations that have played key roles in advisory groups to the European Commission that have been found guilty of illegal activities, misconduct, or are being investigated for misdemeanours. Their continuing privileged role in helping to shape European Commission policy is a cause for deep concern for all those that value integrity, transparency, and credibility within the policy-making process.

# I. DEFENCE COMPANIES

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Over recent years, as large swathes of Europe have struggled with the crippling effects of austerity, some industries have continued to receive significant state financial backing, no more so than the defence industry. In 2010, the combined EU military expenditure across the 27 EU Member States was just short of €200 billion, equivalent to the annual deficits of Greece, Italy and Spain combined.<sup>11</sup>

Despite this level of spending, industry advocates persistently argue that increased spending is necessary for a secure Europe.<sup>12</sup> No surprise then that the EU's extensive security research programme — shaped in large part by

the Commission's expert groups — has been described as a dream come true for arms industry lobbyists. The companies portrayed in this report such as BAE Systems, Finmeccanica and EADS/Airbus have been among the main recipients of the research grants from this security research programme,<sup>13</sup> including via the Commission's lucrative FP7 Research and Development budget, which amounted to €1.4 billion from 2007 to 2013.<sup>14</sup> However, these companies have been advising the Commission on security research and other issues via Expert Groups at the same time as being under investigation themselves for highly illegal or improper activities.

## I. I. BAE SYSTEMS

BAE Systems is Britain's largest defence company and the third largest aerospace and security company in the world, employing nearly 90,000 people.<sup>15</sup> Like other defence companies profiled in this report, BAE has a symbiotic relationship with the European Commission, being a prominent member of at least seven Expert Groups over the last few years (See Appendix).

BAE (along with Finmeccanica) was a member of the Intelligent Manufacturing Systems Industrial Advisory Group which closed in 2011.<sup>16</sup> This influential group, whose remit was to increase the influence of European industries in the global research agenda (see Appendix), had eight members all of which were corporations; because of this total corporate dominance it featured in a complaint to the European Ombudsman.<sup>17</sup> The defence

giant is also a member of two currently active Expert Groups: along with Finmeccanica, the Public-Private Platform on Network and Information Security,<sup>18</sup> and with Shell, the Joint Transfer Pricing Forum (JTPF).

The JTPF is a highly influential group whose remit is to “discuss transfer pricing problems which constitute obstacles to cross-border business activities” within the EU.<sup>19</sup> Transfer pricing refers to multinational companies over- or under-charging their subsidiaries between different countries for their goods and services in order to channel profits into low-tax regimes. One of the world's top experts in international tax even goes as far as arguing that the mechanism allows multinationals to “pay tax nowhere”.<sup>20</sup> Via transfer pricing, for example, an estimated \$800 billion per year flows out of developing countries untaxed.<sup>21</sup>



Offshore tax havens are often used as the places to route or hide the money. But the very multinationals and accountancy firms advising the Commission via the Expert Group on this subject are complicit in engaging in transfer pricing.<sup>22</sup>

#### ILLEGAL ACTIVITIES AND CORRUPTION ALLEGATIONS

BAE Systems has been embroiled in corruption allegations since the early 2000s, when British and American authorities started investigating its activities, including the defence giant's use of tax havens to pay covert and corrupt payments. So we have a company that has been consistently accused of abusing international tax rules, advising the Commission on tax-related issues.

By far the largest probe into BAE focused on the £43 billion al-Yamamah contract, Britain's largest-ever arms agreement, signed in the mid-1980s, to supply over 100 fighter jets to Saudi Arabia. It was secured by a lucrative secretive "slush fund" which was used to "bribe" officials to win the contracts.<sup>23</sup>

In February 2010, after an investigation which lasted eight years, BAE paid almost £300 million in criminal fines and pleaded guilty to charges of false accounting and making misleading statements over defence contracts, in simultaneous settlement deals with the British

and American governments. Washington had accused BAE of "wilfully misleading" it over defence payments.<sup>24</sup>

The US authorities described a web of secret shell offshore companies BAE used to make the covert payments, as well as the use of tax havens such as Switzerland, to pay Saudi intermediaries.<sup>25</sup> The settlements also covered sales to the Czech Republic, Romania, South Africa and Tanzania.<sup>26</sup> The defence giant's auditor at the time of the offences was KPMG (see below on how this accountancy and consultancy firm has also been investigated for law-breaking and settled cases but continues to advise the Commission).

BAE also reached an agreement with the British Serious Fraud Office to plead guilty to a breach of duty to keep accounting records relating to a \$39.5 million contract to supply a radar system to Tanzania in 2002.<sup>27</sup> Some eight years later, in 2010, the company was fined £500,000 for concealing payments in connection with the sale of the Tanzanian air traffic control system. Passing sentence, the judge declared he was "astonished" at claims that BAE had not acted corruptly. At the time, the former Labour minister Clare Short argued: "It was always obvious that this useless project was corrupt."<sup>28</sup> Once again, the company used secretive offshore accounts in the British Virgin Islands to pay people involved in the deal.<sup>29</sup> In March 2012, the defence company finally paid £29.5 million to the Government of Tanzania.<sup>30</sup>

#### » SHOULD A COMPANY INVOLVED IN NUMEROUS CORRUPTION CHARGES INVOLVING ARMS DEALING, AS WELL AS USING ELABORATE OFFSHORE TAX HAVENS, BE ADVISING THE COMMISSION ON BOTH DEFENCE ISSUES AND TACKLING TAX EVASION?

### I. 2. FINMECCANICA

Finmeccanica is Italy's biggest high tech company and one of the top ten largest aerospace, defence and security companies in the world.<sup>31</sup> The defence giant has been an influential

member of at least eight Commission Expert Groups for the last decade (see Appendix). Some of these groups have been instrumental in paving the way for policies and programmes



which financially benefit the defence industry, including the EU's lucrative security research programme.<sup>32</sup>

Finmeccanica was a member of two Expert Groups beginning in the early 2000s, which were particularly important in steering Commission defence spending: the Group of Personalities in the Field of Security Research, which defined the basic structures of the security research programme and the European Security Research Advisory Board, which advised the Commission on research direction (See Appendix). Despite ongoing corruption and bribery scandals concerning the company, it has remained an integral member of the Commission's Expert Group process.

#### CORRUPTION ALLEGATIONS:

In January 2014, the Indian Government cancelled a €560 million contract to supply twelve AgustaWestland helicopters after bribery allegations or what was deemed officially as "integrity-related issues".<sup>33</sup> The Indian Government was so outraged that it threatened to blacklist AgustaWestland from future Indian contracts.<sup>34</sup>

The allegations, which have also led to a number of ongoing complex court cases, date back to when the contract was signed in 2010. They centre on Giuseppe Orsi, the Chief Executive of AgustaWestland's Italian owner, Finmeccanica and the alleged payments of millions of pounds-worth of bribes to Indian officials and politicians.<sup>35</sup> Bruno Spagnolini, the Chief Executive of AgustaWestland, has also been arrested on the same charges.<sup>36</sup>

When Orsi and Spagnolini went on trial in June 2013, the Italian Prosecutor alleged that two men presided over a system of bribery and corruption that was part "of the company philosophy".<sup>37</sup> They were accused of channelling

funds through consultants to three cousins of the head of the Indian Air Force from 2005 to 2007.<sup>38</sup> One of the middlemen allegedly involved was named in the arrest warrant as a British businessman who was reported to have received €30 million, "partly designed to support the corrupt activity meant to win the order and partly to implement the contract".<sup>39</sup> At the time of going to press, the trial continues.

The Indian deal was not an isolated case: For a number of years, prosecutors in various Italian cities have been investigating Finmeccanica on suspicion it engaged in corrupt activities to win contracts in Latin America, Asia, and also in Italy.<sup>40</sup> Pier Francesco Guarguaglini, who was Orsi's predecessor as Finmeccanica Chairman, was also under investigation for a separate case of suspected corruption.<sup>41</sup> Under Guarguaglini's tenure, Finmeccanica endured years of scandal related to allegations of kickbacks, management impropriety and other problems linking him with Italy's highly controversial former Prime Minister, Silvio Berlusconi.<sup>42</sup>

Berlusconi even criticised Italian prosecutors for arresting Orsi, arguing bribes were a "necessary" part of doing business in some countries. "These are not crimes. We're talking about paying a commission to someone in that country," said the now-disgraced politician.<sup>43</sup>

In 2011, Lorenzo Borgogni, the company's then Director for External Relations, was also investigated by Rome magistrates for suspected payments of bribes to politicians and political parties. Mr Borgogni denied acting illegally.<sup>44</sup> Other Finmeccanica officials also announced that year they were stepping down after the publication of Italian court documents claiming the group used bribery to win contracts. Although the men denied wrongdoing,<sup>45</sup> the allegations fit a pattern of unethical behaviour by the defence giant stretching back years.

#### » WHY IS A COMPANY ACCUSED OF CORRUPTION ON ARMS DEALS ADVISING ON HOW THE EU SPENDS ITS DEFENCE RESEARCH BUDGET?

### I. 3. EADS / AIRBUS

EADS is a French/German defence company which was rebranded Airbus in 2013, a year after the German Government blocked a €35 billion merger between EADS and BAE Systems.<sup>46</sup>

Like the other defence companies, EADS has been a key advisor to the European Commission at the same time that it has been under investigation by a number of countries for serious allegations including bribery and insider trading. EADS used to be a member of four important Groups, now-closed, which have helped influence the security agenda in the decade after the millennium, including the FP7 Security Advisory Group; European Security Research Advisory Board; Group of Personalities in the Field of Security Research and Strategic Aerospace Review for the 21st Century (STAR 21). (See Appendix).

The one active Expert Group the company is a member of concerns Key Enabling Technologies (KETs). These are technologies the Commission believes will be highly influential in the forthcoming decades, such as nanotechnology, nanoelectronics including semiconductors, advanced materials, biotechnology, and photonics.<sup>47</sup> Some of these like biotechnology and nanotechnology are seen as highly controversial by many environmental and consumer groups.

The European Commission announced its strategy to boost the industrial production of KETs-based products in mid-2012. The KET Expert Group was set up in January 2013 with the participation of EADS, just two months after the company's offices were raided in Germany and six months after Britain's Serious Fraud Office launched an official criminal investigation.<sup>48</sup>

#### ALLEGATIONS OF ILLEGAL ACTIVITIES

Starting in 2008, there was a long-running investigation by the French police and the

financial markets regulator into alleged insider dealing by senior executives at EADS — the practice whereby a company or an employee trades confidential financial information before it is made public, often considered a criminal offence. The investigation was dismissed by the head of Airbus, Tom Enders, as a “show trial and a piece of bad theatre”.<sup>49</sup> In December 2013 it was announced that seven current and former Airbus and EADS executives were to stand trial in France for alleged insider trading.<sup>50</sup>

Meanwhile in August 2012, Britain's Serious Fraud Office (SFO) had launched a criminal investigation into GPT Special Project Management, a British-based subsidiary of EADS and its £2 billion contract to provide communications and intranet services for the Saudi National Guard, which protects the Kingdom's royal family.<sup>51</sup> The SFO's investigation, which is still ongoing, is exploring allegations by a former employee of GPT who alleged that millions of pounds of bribes had been given by GPT to Saudi officials, along with gifts of jewellery and luxury cars worth tens of thousands of pounds.<sup>52</sup>

In the ongoing GPT investigation, the SFO is examining documents that apparently revealed that between 2007 and 2010, GPT paid £11.3 million into an account in the Cayman Islands, as well as money to Switzerland to bank accounts linked to the Saudi Royal family.<sup>53</sup> In total, it was alleged that over £72 million in “sweeteners” and bribes were paid by GPT to a Saudi prince who is a close relative of the ruler, King Abdullah.<sup>54</sup> It also transpired that the project's financial controller in Saudi Arabia had for years tried to raise his concerns about unexplained payments, but his concerns had been ignored by the company.<sup>55</sup> In one email, the controller warned that payments to an offshore account in the tax haven of the Cayman Islands were “illegal”.<sup>56</sup>

EADS has faced trouble elsewhere too. In November 2012, the company's offices in

Germany were raided by state prosecutors and police as part of an investigation into alleged bribes paid to facilitate the sale of Eurofighter Typhoon fighter jets to Austria five years previously. EADS was already under investigation in Austria for the possible payment of bribes to officials relating back to 2007 when the Austria Defence Ministry signed a contract to buy 15 Eurofighters for a reduced price of about €1.63 billion. At the time, the deal had been hotly debated by the country's political parties with allegations of bribery arising quickly. Investigators said the probe focused

on whether advisory contracts had been used to disguise bribes.<sup>57</sup>

In August 2013, a joint business venture between EADS and fellow arms manufacturer ThyssenKrupp was raided in Germany on suspicion of paying millions of Euros of bribes related to an order of submarine equipment from Greece, at a time when Greek spending on public services was forcefully slashed as a condition for an economic bailout package, but military spending was encouraged.<sup>58</sup>

**» SHOULD THE COMMISSION BE TAKING ADVICE ON DEFENCE FROM A  
COMPANY EMBROILED IN NUMEROUS INVESTIGATIONS FOR ALLEGATIONS  
OF BRIBERY AND INSIDER TRADING REGARDING ARMS DEALS; OR  
ON KEY TECHNOLOGIES THAT IT STANDS TO BENEFIT FROM?**

## 2. DIGITAL COMPANIES

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The EU and the technology companies currently have a close relationship. Since March 2013, the Commission has partnered with dozens of technology companies, including Microsoft and Telefónica, with the purpose of creating new technology jobs.<sup>59</sup>

Moreover, the technology sector is set to be one of the biggest winners of the EU's new programme for research and innovation entitled Horizon 2020, which has a budget of around €80 billion and which lasts from

2014 until 2020.<sup>60</sup> With a particular focus on technological innovation, global tech companies could reap huge benefits. Investment in information and communication technology companies is due to increase by about 25% under Horizon 2020 compared to the previous research programme, called FP7, although many of the advisory groups are still being announced.<sup>61</sup> And at the same time, some of these companies have been locked in battle with the European Commission for violating anti-trust rules.

### 2. I. MICROSOFT

Microsoft needs no introduction. The software giant is one of the largest technology companies in the world. It is precisely Microsoft's dominance of the computer software market that has caused the company so many problems with the EU. Since the late nineties, the Commission has launched one anti-trust investigation after another against the company. It has been a long, drawn-out and bruising legal process, leading to the *Financial Times* to call Microsoft an "anti-trust delinquent",<sup>62</sup> which "once revelled in its reputation as antagonist-in-chief of the Commission"<sup>63</sup> arguing that "no other company has so consistently flouted Commission's antitrust decisions". In the previous eight years to 2012, Microsoft had paid close to €1.6 billion in fines, largely for non-compliance to anti-trust rules.<sup>64</sup>

Yet at the same time as being embroiled with the European Commission in this bitter legal dispute, Microsoft has also advised the

Commission in at least two Expert Groups, one on the Security and Resilience of Communication Networks and Information Systems for Smart Grids,<sup>65</sup> which is now closed, and the High Level Group on Modernisation of Higher Education, which is still active.<sup>66</sup>

Microsoft's involvement with these groups also raises conflict of interest issues. In September 2012 the European Commission launched the High Level Group on Modernisation of Higher Education, which will undertake a three year review on how best to achieve quality and excellence in teaching and learning in higher education. In some countries in Europe, notably, the UK, there is a growing concern about the increasing involvement and influence of technology companies, such as Microsoft, in education and higher education. Microsoft, for example, has its own exportable, model high-tech school teacher-training programme, and has invested heavily in online courses and virtual

schools.<sup>67</sup> Having Microsoft represented on this Group could give the company undue influence over the direction of EU Higher Education policy. What happens, for example, if the Group proposes policies, including software recommendations, which Microsoft would directly financially benefit from?

#### A FIFTEEN YEAR ANTI-TRUST BATTLE

In 1998 the Commission started investigating Microsoft for anti-competitive activities and abusing its market dominance. In March 2004 the EU fined the technology giant just under €500 million and ordered it to release key data code to rival software developers. Microsoft was found guilty of freezing out rivals with regard to Media Players, whilst unfairly linking Internet Explorer to its own Windows operating system, again at the expense of its rivals.<sup>68</sup>

After a lengthy legal battle, in February 2008 the Commission fined the company a record €900 million after Microsoft failed to comply with the earlier ruling from 2004. In doing so, Microsoft became the first company in 50 years of EU competition policy that the Commission had to fine for failure to comply with an anti-trust decision. The record fine came after the Commission had launched

two new anti-competition investigations against Microsoft into similar issues.<sup>69</sup>

By 2011, the company was also under investigation by the Spanish anti-trust authorities in both Ireland and Spain for allegedly blocking the sale by third parties of personal computer software licenses.<sup>70</sup> A year later, on the eve of the company's Windows 8 launch in 2012, the Commission ordered Microsoft to change how it featured its Internet Explorer in the operating system, once again threatening the company with legal action. Joaquin Almunia, the EU's new Competition Commissioner, called the breach "serious" and likely to incur a "severe" fine.<sup>71</sup> Once again, Microsoft failed to act. In March 2013, the Commission fined Microsoft a further €561 million over its failure to offer Windows users a choice of internet browser.

The latest fine came as Microsoft was also in dispute with the Danish tax authorities over a claim of up to \$1 billion, including penalties for late payment of taxes, which stretched back nearly a decade.<sup>72</sup> The unpaid money stems from the \$1.88 billion takeover by Microsoft of the Danish software company Navision in 2002. The Danish tax authorities claim Microsoft sold the rights to Navision's successful business planning software at below market value to a subsidiary in Ireland.<sup>73</sup>

#### **» SHOULD THE COMMISSION BE TAKING ADVICE ON THE DIRECTION OF EDUCATION POLICY FROM A SERIAL OFFENDER AGAINST RULES TO PREVENT MONOPOLIES; AND WHO COULD STAND TO BENEFIT FROM THE TECHNOLOGY DECISIONS TAKEN IN THE EDUCATIONAL FIELD?**

## 2. 2. TELEFÓNICA

Microsoft is not the only technology company which has been fined by the Commission for anti-competitive practices, whilst at the same time as acting as an advisor to the Commission. Telefónica is the largest telecoms operators in Spain, recently accounting for almost half of all revenue generated by

the Spanish telecoms sector.<sup>74</sup> The company also owns O2, the UK's second largest mobile phone operator.<sup>75</sup>

The company is represented on one standing committee of the European Securities and Markets Authority (see below), and on two

Expert Groups, including the Data Retention Expert Group,<sup>76</sup> and the newly formed High Level Group on the future use of the UHF band.<sup>77</sup> This latter industry-dominated Group is headed by Pascal Lamy, the ex-head of the World Trade Organisation.<sup>78</sup>

Telefónica represents the European Telecommunications Network Operators Association in the highly controversial Data Retention Expert Group. Dominated by the telecommunications industry and with no civil society representation,<sup>79</sup> the group relates to the controversial Data Retention Directive, which requires telecommunications companies to store emails and phone calls for up to two years in the name of tackling serious crime.<sup>80</sup> In April 2014, the European Court of Justice ruled that the Directive was “invalid”. It argued that the “Directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data.”<sup>81</sup> There is a precedent which illustrates the potential conflict of interest here: many telephone companies in the Netherlands have been found to be illegally using private data for commercial purposes.<sup>82</sup> Despite this, a company who has

already been repeatedly fined for illegal activities is still asked to advise the Commission on such a sensitive — and potentially commercially profitable — issue.

#### ANTI-COMPETITIVE ACTIVITY

In 2007, the European Commission fined Telefónica €152 million for charging competitors too much for access to its broadband network in Spain between 2001 and 2006.<sup>83</sup> Four years later, in January 2011, the Commission served Telefónica and Portugal Telecom with formal charges for anti-competitive practices in the Iberian telecommunications market. In January 2013, the Commission imposed a massive €67 million fine on Telefónica, coupled with a smaller fine of €12 million for Portugal Telecom, for agreeing not to compete with each other in the region’s markets.<sup>84</sup> Telefónica appealed the decision to the European Court of Justice, arguing it had not breached the law. The appeal is ongoing.<sup>85</sup> That same month, the technology giant was in trouble in Brazil, where the country’s competition watchdog ordered Telefónica to reduce its influence over the country’s market.<sup>86</sup>

#### » HOW DOES IT ENHANCE THE INTEGRITY OF EU POLICY IF A COMPANY REPEATEDLY INVOLVED IN MARKET-FIXING IS ALSO ADVISING IT ON FINANCIAL MARKETS AS WELL AS THE EXPANSION OF NEW MARKETS?



# 3. FINANCE COMPANIES

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The fall-out from the financial crisis has dominated in Europe in recent years, from turmoil within the Eurozone, to multiple bailouts and austerity for hundreds of millions of people. In the years following the financial crisis, the reputation of some of Europe's largest banks has been shredded. Public trust in the banking sector continues to plummet. Even five years after the crisis started, trust in the banks is said to be at an all-time low, due to a series of financial scandals and allegations of corruption.

Nearly three quarters of the population in one European country, the UK, believe that the banks have not learnt the lessons from the crash.<sup>87</sup> Despite this, these bruised, battered, and much-maligned banks still have the ear

of the European Commission via the advisory system, whether they are Expert Groups or on three new finance supervisory groups, of which two are profiled in this report. The first is the European Banking Authority (EBA), which works to ensure there is effective regulation and supervision of the European banking sector, and assesses risks and vulnerabilities within the sector.<sup>88</sup> The second is the European Securities and Markets Authority's (ESMA) whose remit is to enhance the protection of investors and reinforce stable financial markets within the EU.<sup>89</sup> These authorities are equally important channels of influence for the financial companies as Expert Groups themselves, and therefore are included in this report.

## 3. I. BARCLAYS

Barclays is one of Europe's largest banks, employing 140,000 people worldwide. Like other banks profiled in the report, it has acted as an adviser to the Commission at the same time as being embroiled in one financial scandal after the other. The bank is a member of one current Expert Group, the Public-Private Platform on Network and Information Security, and two that are now closed, the Derivatives Expert Group and the Group of Experts on Banking Issues<sup>90</sup> (see Appendix).

Barclays is also represented on the standing committees of one of the three supervisory bodies set up to oversee the financial sector after the recent crisis: the European Securities and Markets Authority (ESMA). Barclays is directly represented on two of ESMA's Committees along with Deutsche Bank: the Secondary Markets Standing Committee,

whose work relates to the structure, transparency and efficiency of secondary markets for financial instruments, including "Over the Counter" markets,<sup>91</sup> and ESMA's Commodity Derivatives Task Force. The later group monitors and analyses all regulatory and industry developments relevant for commodity financial markets, such as energy markets, emission allowances and agricultural commodities.<sup>92</sup> Barclay's participation seems particularly ironic given its recent financial misconduct, including being under investigation for manipulating the US energy markets (see below).<sup>93</sup>

### FINANCIAL MISCONDUCT

Barclays has been one of the worst offenders for mis-selling and manipulating various key financial rates and policies.<sup>94</sup> In June 2012, US

and UK authorities fined the bank over \$450 million for manipulating the London-based interest rate, known as Libor, which is a benchmark interest rate used by banks globally to set the price of everything from credit card fees to corporate loans. The bank admitted to “misconduct” spanning back five years and over three continents not only with Libor but also Euribor, the corresponding Brussels rate.<sup>95</sup> The attitude at the bank is summed up by one email from an employee asking a derivatives trader to illegally submit a lower Libor rate: “Dude. I owe you big time! Come over one day after work and I’m opening a bottle of Bollinger.”<sup>96</sup>

In December 2013, in a settlement with the Commission, Barclays also admitted to participating in a cartel that aimed to manipulate Euribor. The bank only escaped a €690 million fine via an immunity deal in which it provided the Commission with essential information.<sup>97</sup> The rate-rigging scandal eventually led to the departure of Barclay’s boss Bob Diamond. In the words of the *Financial Times*: “Barclays... faces an uphill battle in 2014 to convince customers and other stakeholders it can be trusted.”<sup>98</sup> Indeed, new boss Anthony Jenkins has said it could take between five and ten years to rebuild trust in the bank.<sup>99</sup>

Meanwhile the first British legal action over the manipulation of Libor will start later this year, when a client of the bank sues it for mis-selling them certain financial products which were then pegged to the rigged Libor rate.<sup>100</sup> In February 2014, the Serious Fraud Office also announced that three former employees at Barclays would face criminal charges emanating from their investigation into manipulation of the Libor rates.<sup>101</sup>

The bank is also being investigated for potential manipulation of foreign exchange rates in an investigation by UK authorities which goes

back two years.<sup>102</sup> In November 2013, the bank suspended six traders as part of its internal inquiry into alleged rigging of the foreign exchange market, including its chief currency trader in London.<sup>103</sup> Five months later, in April 2014, Switzerland’s competition watchdog said it had launched an investigation into eight banks, including Barclays, for potentially rigging the foreign exchange rates. “There are indications that these banks went into anti-competitive agreements to manipulate price rates in foreign exchange trading,” said the Swiss regulator.<sup>104</sup>

The bank has also been hit by the mis-selling of Payment Protection Insurance (PPI), announcing in 2012, that it had set aside £2 billion to pay victims of PPI mis-selling, where people who were sold mortgages or loans were also unwittingly or misleadingly sold expensive insurance to cover them in the event of unforeseen problems, for example if they became ill or lost their job.<sup>105</sup> Barclays was also one of a number of banks that agreed to pay up to £1.3 billion to customers who were mis-sold credit card insurance. The bank was expected to face the largest fine, in the region of £300 million, as it has a dominant share of the credit card market.<sup>106</sup>

Barclays is also one of four banks which together set aside some £700 million for compensation for mis-selling complex derivative products to small businesses — some analysts believe the final amount of money the industry will have to pay for this will be an additional £2 billion.<sup>107</sup> Meanwhile the bank is still under investigation for manipulating US energy prices. The US electricity markets regulator, US Federal Energy Regulatory Commission, filed a lawsuit in 2013 to try to force the banking giant to pay a \$470 million fine.<sup>108</sup> It alleges that Barclays engaged in a scheme to manipulate energy prices in California between 2006 and 2008.<sup>109</sup>

**» HOW IS A BANK THAT HAS BEEN FOUND GUILTY OF MANIPULATING  
VARIOUS FINANCIAL AND COMMODITY MARKETS NOW ADVISING  
THE COMMISSION ON COMMODITY MARKETS OR ON THE  
REGULATION OF THE EUROPEAN FINANCIAL SYSTEM?**

### 3. 2. DEUTSCHE BANK

The Frankfurt-based bank is the Eurozone's largest bank by assets.<sup>110</sup> It is a long-standing advisor to the European Commission, being a member of two active Expert Groups: The World and Europe up to 2050, and EU Policies and Research Priorities and the Expert Group on Cross-Border Insolvency. It was also a member of four that are now closed, including the Group of Experts on Banking Issues and Derivatives Expert Group, which monitored compliance with the Derivatives industry (see table). The Bank is also represented directly on ESMA's and EBA's advisory committees. Deutsche Bank sits on five of ESMA's Committees, which amongst other things, are responsible for giving advice to the Commission on the regulation of derivatives (see Appendix).<sup>111 112 113 114 115</sup>

#### FINANCIAL MISCONDUCT

During the last two years, the bank has been embroiled in one scandal after another. In July 2012, it was reported that Deutsche Bank was one of four banks being investigated for the attempted manipulation of the region's benchmark interest rate, Euribor.<sup>116</sup>

In 2013, Deutsche Bank was one of four top European financial institutions which were collectively fined a record €1.7 billion by the Commission. The settlement was the first implicit admission by the banks that they had been manipulating the Japan-focused Yen Libor as well as the Euribor rate. Joaquín Almunia, the EU Competition Commissioner, said the bank cartels were "appalling examples of the misconduct" in the financial sector. Deutsche Bank accepted it had been involved in both cartels and paid the largest fine of €725 million. At the time Joaquín Almunia

said the fines were "not the end of the story", as various investigations against different banks continued.<sup>117</sup>

Indeed the fines continued. In December 2013, the bank agreed to pay \$1.9 billion to settle allegations in the US that it mis-sold mortgage-backed securities,<sup>118</sup> and a former Deutsche Bank Managing Director in Hong Kong was sentenced to seven years in prison for accepting illegal bribes in return for investment tips.<sup>119</sup>

2014 could be far worse for the bank, as it has still not faced any fines over involvement in the Libor scandal. The German regulator, BaFin, recently criticised the bank's handling of the affair and its failure to take firmer disciplinary action against certain members of staff.<sup>120</sup> Sometime this year, Deutsche Bank is expected to settle with the US, UK, and German authorities over Libor, with some financial analysts estimating that the bank will have to add a further €1.5 billion to its litigation reserves this year.<sup>121</sup> So far, it has only set aside an estimated €500 million to cover possible Libor manipulation fines.<sup>122</sup>

In September 2012, Deutsche Bank was one of a number of banks under investigation by the Commission for blocking rivals from establishing derivatives trading platforms.<sup>123</sup> Deutsche Bank's troubles intensified in December that year, when the German police raided the bank's headquarters as part of a probe into tax evasion, money laundering and obstruction of justice involving carbon trading, as part of an ongoing investigation.<sup>124</sup> The bank also faced claims from its own staff that it had failed to report \$12 billion in losses during the financial crisis.<sup>125</sup>

**» SHOULD THE COMMISSION LOOK FOR FINANCIAL ADVICE FROM A BANK THAT IS STILL BEING INVESTIGATED FOR NUMEROUS ILLEGAL FINANCIAL ACTIVITIES FROM BOTH BEFORE AND AFTER THE FINANCIAL CRISIS?**

### 3.3. SANTANDER

Santander is the Eurozone's largest bank by market value.<sup>126</sup> Like other banks profiled in this report, it too has been hit by various scandals in recent years at the same time as acting as an advisor to the Commission. Until 2010, the bank was a member of the Commission's Derivatives Expert Group, which monitored the compliance of the industry with derivatives called credit default swaps.<sup>127</sup> The failure of the industry to regulate the derivatives market is seen as one of the main reasons for the financial crisis.<sup>128</sup>

The bank was also a member of the Clearing and Settlement Advisory and Monitoring Expert Group 2 that closed at the end of 2010.<sup>129</sup> The Expert Group worked to make clearing and settlement of securities transactions easier. During its tenure on both Expert Groups, subsidiaries of the bank were under criminal investigation. From March 2011 until September 2013, Santander was a member of the Banking Stakeholder Group of the European Banking Authority.<sup>130</sup> It is currently a member of ESMA's Corporate Finance Standing Committee (see Appendix).<sup>131</sup>

#### FINANCIAL MISCONDUCT

In December 2008, the US broker Bernard Madoff was arrested for running one of the biggest financial rackets of modern times, "basically, a giant Ponzi scheme" with a fraud estimated at \$65 billion. He was sentenced to 150 years in jail for wrecking the lives of thousands of investors.<sup>132</sup>

Optimal, Santander's Geneva-based hedge fund investment arm, was forced to admit to clients losses of up to €2.3 billion via the

Madoff fund. In November 2009, Manuel Echeverria, the ex-head of Optimal was charged with criminal mismanagement of client funds which had been invested with Madoff. At the time, he was one of the most senior wealth managers said to be facing criminal charges connected to the scandal.<sup>133</sup>

One of the lawyers taking the legal case argued that essentially Santander had been negligent: "It's one thing for a small money manager in Geneva to be misled by Mr. Madoff, but we're talking here about one of the largest banking groups in the world, which could easily have found out what happened had it taken some precautions."<sup>134</sup>

Like other large European banks, Santander has also been hit by the scandal of mis-selling Payment Protection Insurance (PPI). In July 2011, Santander set aside €620 million to cover PPI mis-selling in the UK. Under pressure from the UK authorities, the bank opted to settle with customers rather than face lengthy legal action.<sup>135</sup>

In February 2013, the bank faced further regulatory action by British authorities after the regulator uncovered serious failings in the investment advice given by Santander, which had led to the bank suspending its investment advice service in the UK.<sup>136</sup> Two months later, in April 2013, the Portuguese Government launched legal action against Santander for selling "toxic" derivatives to public sector companies. Once described as "financial weapons of mass destruction" by the financier Warren Buffett<sup>137</sup>, the banks' extensive use of derivatives, a complex financial product which few understood, is seen as one of the major reasons behind the financial crisis.<sup>138</sup>

#### » WHY WAS A BANK FACING LEGAL ACTION FROM NATIONAL GOVERNMENTS OVER ITS DERIVATIVES TRADING ALLOWED TO ADVISE THE COMMISSION ON DERIVATIVES?

The Portuguese Government only decided to take legal action after trying to reach an agreement with Santander's Portuguese subsidiary. Santander was estimated to have sold derivatives that could result in potential losses for the Portuguese Government of

about €1.3 billion. Santander argued that its derivatives contracts were “not of a speculative nature”,<sup>139</sup> a statement that would be seen by many as a contradiction in terms, given the risky nature of derivatives.

### 3. 4. KPMG

KPMG is one of the “Big Four” accountancy firms, alongside PricewaterhouseCoopers (PwC), Deloitte and Ernst & Young. Over the last few years KPMG has acted as an advisor to the Commission on audit issues while being fined and investigated by the US and UK authorities respectively, for failures in its audit provisions.

KPMG has been advising the Commission as a member of the European Securities and Markets’ (ESMA) Corporate Reporting Standing Committee, which conducts all ESMA’s work on issues related to accounting and audit. The Committee pro-actively monitors and influences regulatory developments in the area of accounting and auditing.<sup>140</sup> KPMG is also widely represented in other advisory committees, such as ESMA’s Investment Management Standing Committee and its Investor Protection and Intermediaries Standing Committee.<sup>141</sup> The company is also a member of the Joint Transfer Pricing Forum Expert Group and VAT Expert Group,<sup>142</sup> and from March 2011 until September 2013, it was a member of the Banking Stakeholder Group of the European Banking Authority (see Appendix).<sup>143</sup>

#### FINANCIAL MISCONDUCT

The UK authorities have launched a number of investigations against this accountancy firm. In 2010 the British financial regulator launched an investigation into KPMG’s auditing of BAE Systems after the defence giant settled corruption investigations by paying a fine of nearly £300m (see the case study on BAE Systems).<sup>144</sup> The obvious question is

how much did KPMG know of the corrupt payments. The following year, Britain’s Competition Commission began an investigation into the UK’s audit industry, which was then described by the *Financial Times*, as “dysfunctional”.<sup>145</sup> When it reported its findings in 2013, the Competition Commission initiated changes that would lead to greater competition and ensure that audits “better serve the needs of shareholders”.<sup>146</sup>

In 2013, KPMG and other members of the Big Four were heavily criticised by an influential British parliamentary committee, the Public Accounts Committee, for continuing to offer clients tax avoidance schemes,<sup>147</sup> even after the issue of tax avoidance had become politically contentious. By that year, KPMG was also under scrutiny from the British regulator as to how it had examined the accounts of failed bank HBOS, which collapsed in 2008, bankrupting many shareholders, costing thousands of jobs and forcing a £20.5bn taxpayer bailout.<sup>148</sup>

In May 2013 the British regulator launched an investigation into whether KPMG was properly independent when it audited the accounts of Pendragon, the car dealer.<sup>149</sup> The investigation, which is still ongoing, centres on a former partner of KPMG who became a non-Executive Director at Pendragon only months later.<sup>150</sup> In 2014, the British began a further investigation into KPMG’s auditing of the Co-op Bank, which had nearly collapsed with a capital shortfall of £1.5 billion.<sup>151</sup>

Also in January 2014, KPMG agreed to pay \$8.2 million to settle charges with the American Securities and Exchange Commission (SEC)

that the accountancy giant had compromised its independence by providing non-audit consultancy services to companies whose books it audited, leading to a conflict of interest, as there are rules on audit companies both advising and auditing clients.<sup>152</sup>

This was not the first time North American authorities had charged the accountancy firm.

The firm faced another scandal and lost two clients after one of its executives admitted insider trading by leaking financial information to a “golfing” friend for money and gifts such as a Rolex watch. Once again the audit firm was said to be under investigation by the SEC and criminal charges were laid against the employee.<sup>153</sup>

**» SHOULD A CORPORATE ACCOUNTANCY FIRM WHOSE PRACTICES HAVE HIDDEN HUGE LOSSES AND ENCOURAGED THE USE OF TAX HAVENS, AS WELL AS BEING FINED FOR SERIOUS CONFLICTS OF INTEREST, BE ADVISING THE COMMISSION ON TAX EVASION?**



# 4. OIL COMPANIES

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## 4. I. SHELL

For a company the size of Royal Dutch Shell, you might expect it to be in a considerable number of Expert Groups. Surprisingly the oil giant directly sits on only one, which is not related to energy but taxation. Alan McLean, the Company's Executive Vice President of Taxation and Corporate Structure is a member of the Joint Transfer Pricing Forum Expert Group,<sup>154</sup> which is supposed to stop corporations channelling profits into low tax regimes by trading internally. (For more on transfer pricing see BAE Systems.)

The company was involved in a number of Expert Groups that are now closed or their term has finished (see Appendix). Of particular interest is the High Level Group for Key Enabling Technologies. This Expert Group promoted technologies such as the expensive and unproven Carbon, Capture and Storage,<sup>155</sup> which Shell is trying to commercialise, especially in Canada where it is exploiting the dirty tar sands.<sup>156</sup> Shell admits that the commercialisation of CCS will not be possible without the help from governments,<sup>157</sup> which is where the EU's influence could have been crucial in arguing that state finance was important. There could have been a potential conflict of interest in Shell advising the Commission on a technology which it hopes to commercialise. It was also a member of the Expert Group on Alternative Fuels, advising the Commission on highly controversial agrofuels (made from using food crops).<sup>158</sup> Both technologies (CCS and agrofuels) are being championed by Shell as a way to avoid moving away from fossil fuels as climate change science demands.

Another route of influence for all the companies profiled in this report is via membership of business associations. By way of an example, although we have not included indirect membership of Expert Groups for the other companies, for Shell this influence lever is important. For example, the company is a member of three lobby organisations, all of whom are members of the Expert Group on Climate Policy for International Maritime Transport to Reduce Greenhouse Gas Emissions from Ships under the European Climate Change Programme.<sup>159</sup> Via its membership of four lobby group associations Shell is a member of the Stakeholder Expert Group on the Review of EU Air Policy, an industry-dominated Expert Group.<sup>160</sup> It is also an indirect member of two other Expert Groups<sup>161,162</sup> as well as being a member of the corporate lobby group BusinessEurope, which sits on over 50 Expert Groups.<sup>163</sup>

## POLLUTION AND CORRUPTION

For decades the company has been accused of complicity in human rights abuses and rampant pollution by academics, environmental, human rights and church organisations, amongst others.<sup>164</sup> In January 2013, a landmark case, a Dutch court ruled that Shell Nigeria was responsible for polluting Nigerian farmland.<sup>165</sup>

This is not the only court case the company faces. The Bodo Community from the Niger Delta is also claiming compensation from Shell following the impact on their commu-

nity of two massive oil spills in 2008, which Shell has admitted liability for. In March 2012, the British law firm Leigh Day filed papers at the High Court in London after negotiations with Shell over the payment of compensation for the two huge spills broke down. The legal action, on behalf of 15,000 members of the Bodo community, represented the first time Shell had faced claims in the UK from a community from the global South for environmental damage caused by its oil extraction operations.<sup>166</sup> In September 2013, members of the community unanimously rejected an offer of compensation from Shell, calling the amount “derisory and insulting,”<sup>167</sup> and Shell will now have to face court proceedings throughout 2015 in the UK courts.<sup>168</sup>

The company has faced regulatory action concerning pollution in Nigeria. In 2012, Shell was fined by Nigeria’s oil regulator, the National Oil Spill Detection and Response Agency (NOSDRA), for a spill off the country’s southern coast in the Bonga field. Although Shell said it believed there no “basis in law for such a fine”, in February 2014 NOSDRA enforced the \$5 billion fine on the company. According to press reports in Nigeria, the company also faces a further \$6.5 billion fine from a second Nigerian regulator, the Nigerian Maritime Administration and Safety Agency over the same spill.<sup>169</sup>

Shell’s complicity in human rights abuses has led to a settlement in legal action in the US. In 2009, the company paid \$15.5 million in an

out-of-court settlement, after facing charges it was complicit in the execution of the Nigerian playwright and activist Ken Saro-Wiwa and eight other Ogoni. The company had fought the allegations for over a decade.<sup>170</sup>

For years Shell has also been criticised by transparency campaigners for its opaque tax operations, especially in countries such as Nigeria, where it does not publish the amount of profit it makes, making it easy to relocate profits out of the country via tactics such as transfer pricing, on which it advises the Commission. This kind of tax avoidance has been labelled “resource colonialism” by environmental groups such as Platform London. Shell is believed to have over 500 subsidiaries in offshore tax havens, as designated by the Financial Secrecy Index.<sup>171</sup>

Nor is tax avoidance the only issue dogging Shell’s Nigerian operations. The company has also been hit by corruption allegations having been previously ordered to pay \$48 million in civil and criminal fines over its contractor’s involvement in bribing Nigerian customs officials.<sup>172</sup>

Elsewhere the company’s operations have also come under scrutiny. In September 2013, Shell was fined \$1.1 million dollars by the US Environmental Protection Agency for violations of their Clean Air Act permits for Arctic oil and gas exploration drilling in the Chukchi and Beaufort Seas, off the North Slope of Alaska.<sup>173</sup>

**» WHY HAS AN OIL COMPANY CONTINUOUSLY FINED AND TAKEN TO COURT FOR ENVIRONMENTAL AND HUMAN RIGHTS ABUSES, CORRUPTION CHARGES AND TAX AVOIDANCE BEEN ASKED TO ADVISE ON LOWERING EMISSIONS AND TAX AVOIDANCE?**

# 5. RECOMMENDATIONS

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This report highlights that further reform to the Commission's advisory system is urgently needed. The presence of corporations such as those we have highlighted in the advisory bodies of the European Commission is a serious challenge to the integrity, transparency, and credibility of the policy-making process.

One way to formalise the needed reform is via a blacklisting system which could be developed separately by the Commission specifically for Expert Groups and other advisory bodies and be publicly available. Those barred from Expert Groups and other advisory bodies should also be placed on the Central Exclusion Database (CED). The confidential CED is currently designed to prevent companies from accessing EU funds for reasons such as corruption, final court judgement for fraud, grave professional misconduct, or conflict of interests. However it is said to be "toothless" and not working adequately.<sup>174</sup>

If the procedures behind the CED were reformed and made transparent, it could provide a blueprint for deciding whether a company should be barred from accessing funds as well as prevented from advising the Commission on policy and legislation. In April 2014, the Plenary of the Parliament called on the Commission to make the CED public.<sup>175</sup>

In conclusion, we argue that the following should happen:

- » Companies that have been fined by the Commission or EU regulators, law enforcement agencies, or regulators of nation states, or proven guilty by them or settled cases with them, should not act as advisors for a minimum of five years; during this time the companies or any of their employees should be barred from any Expert Groups and advisory bodies. The list of these companies should be publicly available;
- » Companies that are actively under investigation by the Commission or EU regulators, law enforcement agencies, or regulators of nation states should be suspended from advising the Commission until the end of any investigation;
- » Companies who have been proven guilty, fined by the EU authorities or EU governments or settled cases with them should be placed on the Central Exclusion Database and thus have no access to funds from the EU budget for a period of at least five years; The Central Exclusion Database should be made public as requested by the Plenary of the European Parliament in March 2014;
- » In order to ensure that Expert Groups serve the public interest, incoming Commissioners should implement the four conditions agreed with the Parliament to end industry dominance of Expert Groups and other advisory bodies, as well as ensuring they are formalised in 2015 when the 'horizontal rules' are reviewed;

- » The European Parliament should freeze the 2015 Expert Groups budget to ensure the conditions are met and the rule changes are adequate.

If incoming Commissioners are serious about protecting the integrity, transparency, and credibility of the policy-making process, they need to oversee urgent reform of the Commission's advisory system, ensuring that corporations found guilty of or under investigation for serious ethical, financial or environmental misconduct are not allowed to play a role, while ongoing demands from the Parliament are implemented in full.

# APPENDIX

EXPERT GROUP	ACTIVE/ CLOSED	PURPOSE /OBSERVATIONS	MEMBERSHIP: (COMPANIES FEATURED IN THIS REPORT)
Public-Private Platform on Network and Information Security	Active	The groups' remit is to assist the Commission in preparation of legislation or policy in relation to cyber-security. <sup>1</sup>	Finmeccanica; BAE Systems; Microsoft; Telefónica; Barclays
Information Society Technology Advisory Group (ISTAG)	Closed	Its remit was to advise the Commission on the overall strategy for ICT (Information and Communication Technology) research and development. <sup>2</sup>	Finmeccanica
FP7 Security Advisory Group	Closed	Its remit was to provide advice on the content of the FP7 Security Work Programme. <sup>3</sup>	Finmeccanica; EADS / Airbus
Intelligent Manufacturing Systems Industrial Advisory Group.	Closed	The Group's aim was "to strengthen Europe's voice within this industry-driven international community of collaborative research, development and innovation." <sup>4</sup>	Finmeccanica; BAE Systems
European Security Research Advisory Board (ESRAB)	Closed	An influential Expert Group which examined the security research agenda in the early 2000s, especially as it related to the FP7 research agenda. <sup>5</sup>	Finmeccanica; BAE Systems; EADS / Airbus
European Security Research and Innovation Forum (ESRIF)	Closed	Tasked with defining the European Research and Innovation needs for the mid- to long term. <sup>6</sup>	Finmeccanica; BAE Systems
Group of Personalities in the Field of Security Research.	Closed	The primary mission was to set priorities for a European Security Research Programme in line with the EU's foreign, security and defence policy objectives. <sup>7</sup>	Finmeccanica; BAE Systems; EADS / Airbus
Strategic Aerospace Review for the 21st Century (STAR 21)	Closed	The European Advisory Group on Aerospace was set up in 2001 to analyse the adequacy of the existing political and regulatory framework for aerospace in Europe. <sup>8</sup>	Finmeccanica; BAE Systems; EADS / Airbus
Joint Transfer Pricing Forum	Active	A platform where experts "can discuss transfer pricing issues which constitute obstacles to cross-border business activities within the EU". <sup>9</sup> For more on what transfer pricing is, see the main text, p. 4.	BAE Systems; KPMG; Shell
Key Emerging Technologies (KETs) High Level Commission Expert Group	Active	The aim of the Expert Group is to discuss and advise the Commission on Key Emerging Technologies (KETs), their related policy issues; and to promote KETs policies by the Member States. <sup>10</sup> KETs are technologies such as nanotechnology, nanoelectronics and biotechnology.	EADS / Airbus
High Level Group for Key Enabling Technologies	Closed	The mandate of this High Level Group was to propose a longer-term strategy and concrete actions to improve deployment of KETs in the EU. <sup>11</sup>	Shell
High Level Group on Modernisation of Higher Education <sup>12</sup>	Active	The remit of this High Level group is to make "succinct proposals" on how to implement new higher education initiatives or reforms.	Microsoft

EXPERT GROUP	ACTIVE/ CLOSED	PURPOSE /OBSERVATIONS	MEMBERSHIP: (COMPANIES FEATURED IN THIS REPORT)
Expert Group on the security and resilience of communication networks and information systems for Smart Grids <sup>13</sup>	Closed	This Expert Group discussed how to strengthen the security and resilience of communication networks and information systems for Smart Grids at the EU level. <sup>14</sup>	Microsoft
High Level Group on the future use of the UHF band	Active	High Level Group is to deliver strategic advice to the Commission for the development of a political strategy on the future use of the Ultra High Frequency (UHF) band. <sup>15</sup>	A senior executive from Telefónica
Data Retention Expert Group	Active	To aim of this Expert Group is to exchange information about changes in technologies relating to the provision of publicly available electronic communications as well as to help Member States ensure that the Data Retention Directive “continues to fulfil its intended aims”. <sup>16</sup>	A senior executive from Telefónica
The World and Europe up to 2050: EU policies and research priorities	Active	Conducts research on visions and options for action on different policies in the years to come. Explores the main drivers that may affect or impact the world and Europe by 2030/2050. <sup>17</sup>	Deutsche Bank think tank
Expert group on cross-border insolvency	Active	Assists the Commission with the revision of regulations on insolvency proceedings.	Deutsche Bank
EU Clearing and Settlement: Fiscal Compliance group	Closed	Analysed problems related to taxes in the context of the integration of EU securities clearing and settlement systems. <sup>18</sup>	Deutsche Bank
Clearing and Settlement Advisory and Monitoring Expert Group 2	Closed	Worked on achieving a barrier-free Single European market for clearing and settlement of securities transactions. <sup>19</sup>	Deutsche Bank; Santander
Group of Experts on Banking Issues	Closed	Gave advice and opinions on the policies and possible legislative measures of the Commission in the field of banking. <sup>20</sup>	Barclays; Deutsche Bank
Derivatives Expert Group	Closed	Monitored compliance with the industry commitment on Central Counterparty (CCP) clearing of European credit default swaps (CDS) and forum for the industry to discuss specification of technical standards facilitating the compliance with the commitment. <sup>21</sup>	Deutsche Bank (ISDA International Swaps and Derivatives Association) Barclays Capital (ISDA International Swaps and Derivatives Association) Santander (EBF European Banking Federation)
VAT Expert Group	Active	Advises on the preparation of legislation and other policy initiatives in the field of VAT.	KPMG
Expert group on alternative fuels	Closed	Advised the Commission on issues relating to alternative fuels. <sup>22</sup>	Shell
Expert group on Environment & Health Action Plan - Human Biomonitoring	Closed	Assisted the Commission in the development of a coordinated approach to Human Biomonitoring in Europe. <sup>23</sup>	Shell



EUROPEAN SUPERVISORY AUTHORITIES ( ESA)	ACTIVE/ CLOSED	PURPOSE /OBSERVATIONS	MEMBERSHIP: COMPANIES FEATURED IN THIS REPORT
European Banking Authority's (EBA) Banking Stakeholder Group	ACTIVE	The Group's role is to help facilitate consultation with stakeholders in areas relevant to the tasks of the EBA. <sup>24</sup> For more on the EBA, see the main report, p.10.	Deutsche Bank; KPMG and Santander from 2011-2013
European Securities and Markets Authority's (ESMA) Corporate Reporting Standing Committee	ACTIVE	Conducts all ESMA's work on issues related to accounting, audit, periodic reporting and storage of regulated information. <sup>25</sup>	Telefónica
ESMA's Post-Trading Standing Committee	ACTIVE	Responsible for giving advice to the Commission on technical standards and guidelines relating to the regulation of Over-The-Counter Derivatives. <sup>26</sup>	Deutsche Bank
ESMA's Commodity and Derivatives Task Force	ACTIVE	Monitors and analyses all regulatory and industry developments relevant for commodity financial markets. <sup>27</sup>	Deutsche Bank; Barclays
ESMA's Financial Innovation and Standing Committee	ACTIVE	Coordinates the national supervisory authorities' treatment and response to new or innovative financial activities. <sup>28</sup>	Deutsche Bank
ESMA's Secondary Markets Standing Committee	ACTIVE	Undertakes ESMA's work relating to the structure, transparency and efficiency of secondary markets for financial instruments, including trading platforms and Over the Counter (OTC) markets. <sup>29</sup>	Deutsche Bank; Barclays
ESMA's Corporate Finance Standing Committee	ACTIVE	Is responsible for developing all of ESMA's work relating to the Prospectus Directive and Corporate Governance. Additionally, it carries out ESMA's work with regard to major shareholding disclosures under the Transparency Directive. <sup>30</sup>	Deutsche Bank; Santander
ESMA's Corporate Reporting Standing Committee	ACTIVE	Conducts all ESMA's work on issues related to accounting and auditing. Monitors and influences regulatory developments in the area of accounting and auditing. <sup>31</sup>	KPMG
ESMA's Investment Management Standing Committee	ACTIVE	Undertakes ESMA's work on issues relating to collective investment management. <sup>32</sup>	KPMG
ESMA's Investor Protection & Intermediaries Standing Committee	ACTIVE	Undertakes ESMA's work on issues relating to the provision of investment services and activities by investment firms and credit institutions. Particular regard is made to investor protection. <sup>33</sup>	KPMG

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