

Open Government, Transparency and Financial Regulation

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Governments and transnational standard-setters emphasize the importance of open government and transparency, and use consultation exercises to take account of the views of people and firms they characterize as stakeholders. But, although the stakeholder concept is intended to be inclusive, it necessarily excludes some members of the world's population. Accountability to stakeholders is necessarily a limited form of accountability. Two characteristics of financial regulation interfere with the attainment of open government and transparency in this field. First, financial regulation is complex. Second, those who claim to, and do, understand the complexities of financial regulation are experts, rather than non-expert citizens.

The construction of the concept of the stakeholder in consultations is critical. Requests for comment and consultation documents frequently identify specific categories of stakeholder who may be affected by or interested in the questions raised by the consultation. Response forms and/or consultation documents may invite or require respondents to categorize themselves. But consultation documents and questionnaires do not explicitly address the issue of how they define, or why they do not define, the relevant stakeholders for a particular set of issues. This lack of explanation of definition constitutes a core lack of transparency in the consultation process.

1. 0 Introduction

Open Government and Transparency are pervasive concepts in domestic and transnational governance.¹ One of the first acts of the Obama Administration was to announce a commitment

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¹ See, e.g., Albert J. Meijer, Deirdre Curtin & Maarten Hillebrandt, *Open Government: Connecting Vision and Voice*, 78 International Review of Administrative Sciences 10 (2012); Christopher Hood, *Accountability and Transparency: Siamese Twins, Matching Parts or Awkward Couple?* 33 W. EUR. POL. 989, 990 (2010) (“the word transparency started to become a central doctrine of good governance for both firms and states from the 1990s, and indeed seemed to be reaching saturation coverage by the 2000s”); IMF, *Transparency is Key to Accountability* (Jan. 11, 2010) at <http://www.imf.org/external/np/exr/cs/news/2010/cs0110.htm>; Juliet Lodge, *Transparency and Democratic Legitimacy* 32 J. COMMON MKT. STUDS. 343, 353 (1994) (“Transparency, democracy and subsidiarity are seen as handmaidens.”). The analysis in this draft is based on consultation practices in the EU, UK, US and in transnational standard-setters in the field of financial regulation.

to Transparency and Open Government.² The Treaty on the Functioning of the European Union (TFEU) provides that “[i]n order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible”.³ In March 2012 the Council of the OECD adopted a Recommendation on Regulatory Policy and Governance which recommended that OECD members:

Adhere to principles of open government, including transparency and participation in the regulatory process to ensure that regulation serves the public interest and is informed by the legitimate needs of those interested in and affected by regulation. This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis.⁴

Domestic agencies responsible for financial regulation and transnational standard-setters have acknowledged that they should operate transparently and that they should consult with stakeholders in developing regulations and standards. In 2010 the Securities and Exchange Commission announced that it would implement a new rule-making process under the Dodd-Frank Act in which it would seek public comment before proposing implementing regulations.⁵

² Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009) (“Open Government Memorandum”).

³ Consolidated Version of the Treaty on the Functioning of the European Union, (TFEU) Art 15, O.J. C 83/47 at 54-5 (Mar.30, 2010).

⁴ OECD, Recommendation of the Council on Regulatory Policy and Governance, (Mar. 22, 2012) at <http://www.oecd.org/regreform/regulatorypolicy/49990817.pdf> , Recommendation 1.2 at p. 4.

⁵ Sec. & Exch. Comm’n, Press Release, SEC Chairman Schapiro Announces Open Process for Regulatory Reform Rulemaking, Jul. 27, 2010 at <http://www.sec.gov/news/press/2010/2010-135.htm> (“Under a new process, the public will be able to comment before the agency even proposes its regulatory reform rules and amendments.... The new process goes well beyond what is legally required and will provide expanded opportunity for public comment and greater transparency and accountability. The SEC also expects to hold public hearings on selected topics.”)

The EU Commission publishes consultation documents as a component of policy-making,⁶ as do the EU authorities which have delegated responsibilities for financial regulation.⁷ The Basel Committee on Banking Supervision and the International Organisation of Securities Commissions invite comments on their work.⁸

The Open Government Memorandum, the TFEU, and the OECD Recommendation on Regulatory Policy and Governance illustrate that the ideas that transparency is a component of good governance and that “the public” should be able to participate in the development of policy, as a means of improving public policy and enhancing the accountability of policy-makers, are widely accepted in public statements by national, regional and transnational policy-makers.⁹ Consultation is a component of transparency and a mechanism for incorporating public input into public policy, and policy-makers use the internet to publish consultation documents and solicit comments on policy proposals. But consultations are imperfect mechanisms for ensuring transparency, as the public has limited attention to spare and policy proposals proliferate. Making more information available about policy proposals may impede transparency by adding to problems of information overload.¹⁰

⁶ See, e.g., EU Commission, Consultation Document on the Regulation of Indices: A Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts (Sep. 5, 2012) at http://ec.europa.eu/internal_market/consultations/docs/2012/benchmarks/consultation-document_en.pdf.

⁷ See, e.g., European Securities and Markets Authority, Consultation Paper: Further Amendments to ESMA’s Recommendations for the Consistent Implementation of the Prospectus Regulation Regarding Mineral Companies (Oct. 1, 2012) at <http://www.esma.europa.eu/system/files/2012-607.pdf>.

⁸ Cf. Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INT’L L. 480 (2011).

⁹ See, e.g., Meijer et al., *supra* note 1 (describing transparency (vision) and participation (voice) as two components of open government.)

¹⁰ See, e.g., Caroline Bradley, *Transparency Is The New Opacity: Constructing Financial Regulation After The Crisis*, 1 AM. U. BUS. L REV. 7, 8 (2011-12) (arguing that “transparency in financial regulation is undermined because the information disclosed is simultaneously limited and excessive.”)

This article discusses a different issue relating to consultation: the problematic ways in which consultation documents translate the idea of the public into an idea of stakeholding. Stakeholders are a central construct in corporate and public governance. Corporate law scholars developed stakeholder models in corporate law as a way of moving beyond the director-shareholder nexus, to promote corporate social responsibility or to legitimate director conduct that might not operate in the interests of shareholders. Some writers characterize citizens as stakeholders in government,¹¹ especially since the recent global financial crisis.¹² New Public Management focuses on customer service and citizen satisfaction with public services.¹³ Public participation in policy-making is conceptualized as important for evidence-based policy-making, or as a component of democratic accountability.. In either case stakeholders are important, as those who have knowledge relevant to the policy issue, or as those who are in a position to monitor what policy-makers are doing.

This article argues that although the stakeholder concept is in theory inclusive it is in fact exclusive,¹⁴ inherently and as implemented in practice. Accountability to stakeholders is necessarily a limited form of accountability. People are invited to participate in policy-making because they have a stake in the policy and not because they exist. In the context of financial regulation the complexity of the rules and the phenomenon of expertise interfere with the attainment of open government and transparency. In practice the stakeholder concept excludes many citizens from participation in policy-making. Consultation documents and questionnaires do not explicitly address issues of stakeholder definition: they do not explain the processes adopted for defining relevant stakeholders, or the choice not to define the relevant stakeholders

¹¹ See, e.g., Geraldine J. Fraser-Moleketi, *Democratic Governance at Times of Crisis: Rebuilding Our Communities and Building on Our Citizens*, 78 *International Review of Administrative Sciences*, 191, 193 (2012) (“In hollowing out the State, we hollowed out democracy, which rests on the belief that power belongs to the people and must be applied to purposes in which they have a stake.”)

¹² *Id.*

¹³ See, e.g., Ashley L. Grosso & Gregg G. Van Ryzin, *Public Management Reform and Citizen Perceptions of the UK Health System*, 78 *International Review of Administrative Sciences* 494 (2012).

¹⁴ For a contrary view, see Fraser-Moleketi, *supra* note [11](#).

for a particular set of issues. A lack of transparency about who policy-makers consider to be key stakeholders in the policy process, and how they define such key stakeholders undermines the transparency of the consultation process generally.¹⁵ The failure to describe processes of stakeholder definition and analysis in consultations is a significant transparency defect which contrasts with public commitments to open government and participation.

2.0 Stakeholder Definition and Exclusion

Consultation reflects a general expressed commitment to transparency and accountability, but governments and agencies communicate to the public about consultations in very different ways. There are differences of approach between different geographic jurisdictions and also within jurisdictions.¹⁶ One set of variations, and the one on which this paper focuses, relates to the definition or non-definition of relevant stakeholders. US notice and comment rule-making is open to all, at least as a formal matter. Agencies publish notices of proposed rule-making in the Federal Register (the notices are also available more accessibly at [regulations.gov](http://www.regulations.gov))¹⁷ and invite comments generally without specifying who they consider to be stakeholders. However, long before an agency proposes rules as a formal matter it may meet with interested parties, and such meetings can help to frame the regulatory agenda.. Even where stakeholders are not explicitly defined in consultation documents and notices of proposed rule-making, agencies responsible for the development of policy have made determinations about which groups they need to involve in the policy-development process. A failure explicitly to identify these implicit stakeholders

¹⁵ *Cf.* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 *Eur. J. Int'l L.* 187, 202 (2006) (“Here the Commission is disingenuous in pretending that decisions as to ‘which associations should be consulted and whose suggestions should be accepted, or in deciding which associational codes of conduct should pass muster, value judgments are not made’. A substantial administrative discretion with important political implications is concealed in these evaluations, which should be subjected to the controls of administrative law.”)

¹⁶ Comparing the practice of consultation in different jurisdictions is a complex exercise because the details of the rules which apply to different types of consultation vary enormously, as do the constitutional and institutional structures within which consultation is embedded.

¹⁷ See <http://www.regulations.gov>.

undermines transparency.¹⁸ Even when policy-makers do identify stakeholders in the proposals they put forward they do not explain the methods whereby they identified those stakeholders, and this failure also impedes transparency.¹⁹

The US has recently moved to increase governmental transparency. The Open Government Directive does not use the term “stakeholder” but states that “[p]articipation allows members of the public to contribute ideas and expertise so that their government can make policies with the benefit of information that is widely dispersed in society.”²⁰ Nevertheless, the implementation of the Directive involves the use of the stakeholder concept. For example, the Treasury’s Open Government Plan refers to communication with “public stakeholders.”²¹ For the Treasury this includes an “outreach effort” by FinCEN with “representatives from a variety of

¹⁸ Cf. Kimberly D. Krawiec, *Don't 'Screw Joe the Plummer': The Sausage-Making of Financial Reform* (2012), available at http://scholarship.law.duke.edu/faculty_scholarship/2445/ (noting that financial institutions invested more than other actors in influencing Volcker rule implementation, and analyzing the efficacy of the notice and comment process as a means for federal agencies to engage the general public).

¹⁹ On the distinction between transparency and effective communication, *see, e.g.*, Onora O'Neill, *Ethics for Communication?* 17 EUR. J. PHIL.167 (2009). Cf. International Association for Public Participation, IAP2 Core Values of Public Participation, (2007) at <http://www.iap2.org/associations/4748/files/CoreValues.pdf>.

²⁰ Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive (Dec. 8, 2009) http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf At 1 (Open Government Directive) Cf. OMB, Memorandum for the Heads of Executive Departments and Agencies M-11-19, Retrospective Analysis of Existing Significant Regulations (Apr. 25, 2011) at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf> (“Because members of the public are likely to have useful information and perspectives, agencies should promote public consultation about the plans. Agencies are encouraged to use the first thirty days after releasing their plans to engage in such public consultation.”); Department of the Treasury, Reducing Regulatory Burden; Retrospective Review Under E.O. 13563 76 Fed. Reg. 17572, 17572 (Mar. 30, 2011) (“How can Treasury improve public outreach and increase public participation in the rulemaking process?”)

²¹ Department of the Treasury, Open Government Plan, 7 (May 2010) (revised) at http://www.treasury.gov/open/Documents/open_government_plan.pdf.

industries that fall under BSA regulatory requirements.”²² The plan also refers to “the communication strategy for the public, open government advocacy groups, and key stakeholders.”²³ This language implies a distinction between these three groups: the public and “key stakeholders” are not identical.

After executive departments and agencies of the US Government began to develop their open government plans, the Administration initiated a broad regulatory review which required agencies to ensure public participation in the development of regulations. The Executive Order referred specifically to stakeholders.²⁴ Thus the US has adopted the language of stakeholding as a component of its regulatory process, although not so far as enthusiastically as other jurisdictions have done.²⁵

In the aftermath of the global financial crisis, legislators and regulators charged with developing new rules and regulations have sought comments from the public about the new rules. For example, in the US after the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act²⁶ the SEC announced measures to allow the public to make comments about how the agency should go about making rules, rather than merely responding to the SEC’s specific

²² *Id.* (“ FinCEN has concluded its meetings with some of the largest depository institutions and money services businesses in the United States, and is continuing its most recent outreach phase with smaller depository institutions.”)

²³ *Id.* at 8.

²⁴ Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3821 (Jan 21, 2011) (“Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.”)

²⁵ *See, e.g.*, EU Commission Communication, Smart Regulation in the European Union, 2 COM(2010) 543 (Oct. 8, 2010) (“The better regulation agenda has already led to a significant change in how the Commission makes policy and proposes to regulate. Stakeholder consultations and impact assessments are now essential parts of the policy making process. They have increased transparency and accountability, and promoted evidence-based policy making.”)

²⁶ Pub. L. 111-203 (Jul. 21, 2010).

regulatory proposals.²⁷ The Chairman of the SEC, Mary Schapiro stated that:

"We recognize that the process of establishing regulations works best when all stakeholders are engaged and contribute their combined talents and experiences."²⁸

At the same time, the SEC solicited public comments in the context of a study of broker-dealer regulation it was mandated to carry out under the statute.²⁹ The online comment forms invited respondents to provide personal information, including information about any professional affiliations,³⁰ but did not require respondents to identify themselves as representatives of any particular interest group or type of group.³¹

The Treaty on European Union (TEU) guarantees citizens the right to participate in the democratic life of the Union,³² and to be involved in consultations about the development of policy in the EU.³³ When the Commission carries out consultations it sometimes invites

²⁷ See *supra* note 5.

²⁸ *Id.* See also the web page for Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act at <http://www.sec.gov/spotlight/regreformcomments.shtml>.

²⁹ Sec. & Exch. Comm'n, Study Regarding Obligations of Brokers, Dealers, and Investment Advisers, Request for Comment (Jul. 27, 2010) at <http://www.sec.gov/rules/other/2010/34-62577.pdf>.

³⁰ See, e.g., the form at http://www.sec.gov/cgi-bin/ruling-comments?ruling=4-606&rule_path=/comments/4-606&file_number=4-606&action=Show_Form&title=Study%20Regarding%20Obligations%20of%20Brokers%2C%20Dealers%2C%20and%20Investment%20Advisers.

³¹ The study was published in January 2011. Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers (Jan. 2011) at <http://www.sec.gov/news/studies/2011/913studyfinal.pdf> ("SEC Investment Adviser Study").

³² Art 10(3) TEU provides: "Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen." Consolidated Version of the Treaty on European Union (TEU) Art. 10, O.J. C 83/13 at 20 (Mar.30, 2010).

³³ Art 11 TEU provides: "1. 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. 2. The institutions shall maintain an open, transparent and regular

comments from stakeholders generally. For example, in March 2012 the Commission published a Green Paper on Shadow Banking,³⁴ and invited public comments. The Commission identified the “target group” for the consultation as “all interested stakeholders.”³⁵ When the Commission consulted about interest rate restrictions in the EU during 2011 the consultation document invited comments from “stakeholders.”³⁶ At other times the Commission identifies particular categories of stakeholder for consultations.³⁷ An October 2012 consultation on recovery and resolution of nonbank financial institutions³⁸ defined the target group inclusively as “Member State authorities (crisis management, supervisory, judicial), financial industry, their stakeholders (customers, creditors, shareholders, employees), trade associations, academia, citizens.”³⁹ The web page for the consultation on financial indices⁴⁰ states that the target group is “[c]ontributors to, providers

dialogue with representative associations and civil society. 3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent.” Art 11(4) provides for citizens’ initiatives. *See also* Regulation No 211/2011 on the Citizens’ Initiative, O.J. L 65/1 (Mar. 11, 2011).

³⁴ EU Commission, Green Paper: Shadow Banking, COM(2012) 102 final (Mar. 19, 2012).

³⁵ *See* http://ec.europa.eu/internal_market/consultations/2012/shadow_en.htm.

³⁶ EU Commission, *Consultation Document on the Study on Interest Rate Restrictions in the EU* (Jan. 25, 2011) at 4 (“Stakeholders are invited to send their responses to the questions raised in this document”).

³⁷ Does the approach to stakeholder definition change in an area of policy over time (does it narrow)? Hypothesis that earlier stages involve broader policy issues (consistent with e.g. ESMA and technical standards). Not clear because policy does not always evolve in tidy ways.

³⁸ EU Commission, Consultation on a Possible Recovery and Resolution Framework for Financial Institutions Other than Banks (Oct. 5, 2012) at http://ec.europa.eu/internal_market/consultations/2012/nonbanks/consultation-document_en.pdf.

³⁹ *See* http://ec.europa.eu/internal_market/consultations/2012/nonbanks_en.htm.

⁴⁰ EU Commission, Consultation Document on the Regulation of Indices: A Possible Framework for the Regulation of the Production and Use of Indices serving as Benchmarks in Financial and other Contracts (Sep. 5, 2012) at http://ec.europa.eu/internal_market/consultations/docs/2012/benchmarks/consultation-document_en.pdf.

of and users of indices and benchmarks.”⁴¹ Both of these consultations relate to areas of policy which are very technical. The recovery and resolution consultation asks for comments on a range of quite technical questions from whether existing insolvency law adequately addresses the issues,⁴² to whether the EU should enter into bilateral co-operation agreements with third countries.⁴³ And yet the “target group” includes citizens. The financial indices consultation contains a mix of questions which are designed to elicit information about market practice with respect to indices⁴⁴ and questions which seem to raise broader policy issues.⁴⁵ Given the significant media coverage of Libor over the summer of 2012 citizens would be more likely to have views about the financial indices consultation than about the non-bank resolution consultation. Yet citizens were specifically designated as stakeholders with respect to non-bank resolution and not with respect to financial indices. Failures to develop good policy in both areas would likely harm citizens. It is not clear what principles of stakeholder definition the Commission is applying here. It may be that the different definitions of the target groups in the cases are the result of different people being responsible for implementing the two consultations - either different individuals, or individuals working in different areas of the Commission with different views about what they are doing. The web page for the financial indices consultation states that the responsible service is DG Markt, Securities Markets Unit,⁴⁶ whereas the responsible service for the non-bank resolution consultation is Internal Market and Services DG,

⁴¹ See http://ec.europa.eu/internal_market/consultations/2012/benchmarks_en.htm.

⁴² Consultation on a Possible Recovery and Resolution Framework, *supra* note [38](#), at 15.

⁴³ See, e.g., *id.* at 38.

⁴⁴ Consultation Document on the Regulation of Indices, *supra* note [40](#), at 26 (“What kinds of data are used for the construction of the main indices used in your sector? Which benchmarks use actual data and which use a mixture of actual and estimated data?”)

⁴⁵ See, e.g., *id.* at 28 (“Do you consider some or all indices to be public goods? Please state your reasons... Which role do you think public institutions should play in governance and provision of benchmarks?”)

⁴⁶ http://ec.europa.eu/internal_market/consultations/2012/benchmarks_en.htm.

Unit H.4 – Financial Stability.⁴⁷

In other consultations, rather than listing or not listing citizens as stakeholders, the Commission has suggested that citizens may respond to the consultations although their views are not the ones which are likely to be very useful. The web page for the Commission’s consultation on the Green Paper on card, internet, and mobile payments,⁴⁸ states “[a]ll citizens and organisations were welcome to contribute to this consultation. Contributions were particularly sought from market participants, national governments and national competent authorities.”⁴⁹ The web page for the consultation on the recommendations of the High-level Expert Group on reforming the structure of the EU banking sector uses the same language.⁵⁰ This language draws a distinction between people who are merely allowed to respond to the consultation and those whose participation is particularly desired. There is arguably some support for the distinction in the TEU because it requires the EU institutions to “give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action” and “by appropriate means.” And the Commission is clearly stating in these consultations that citizens are welcome to make their views known. At the same time the Commission signals that the views of others are more valued.

From the perspective of assessing how real the possibility for the public to participate effectively in policy-making in the financial services context it would be important to know not only how policy-makers define who they see as relevant stakeholders before they begin consultations but also how they assess the comments of different contributors to consultations. In

⁴⁷ http://ec.europa.eu/internal_market/consultations/2012/nonbanks_en.htm.

⁴⁸ EU Commission, *Green Paper: Towards an Integrated European Market for Card, Internet and Mobile Payments*, COM (2011) 941 (Jan. 11, 2012).

⁴⁹ *See* http://ec.europa.eu/internal_market/consultations/2012/card_internet_mobile_payments_en.htm. The responsible service for this consultation was Internal Market and Services DG, Unit H3 – Retail financial services and consumer policy. *Id.*

⁵⁰ *See* http://ec.europa.eu/internal_market/consultations/2012/hleg-banking_en.htm (“All citizens and organisations are welcome to contribute to this consultation. Contributions are particularly sought from market participants, national governments and national competent authorities.”) The responsible service for this consultation is Internal Market and Services DG, Unit H.1 – Banks and Financial Conglomerates. *Id.*

contrast to practice in the US, when the EU Commission carries out consultations it invites respondents to specify the capacity in which they are responding. For example, the web page for the Shadow Banking consultation invited respondents to identify whether they were responding as citizens, on behalf of an organization, or on behalf of a public authority.⁵¹ The fact of distinction between these different groups may be taken to imply that the Commission weighs the contributions differently. The European Banking Authority, a “public authority,” contributed to the consultation arguing that it was “one of the main stakeholders addressing Shadow Banking issues.”⁵² But the Commission does not appear to have identified what it sees as important stakeholders with respect to this issue. Since the introduction of the (voluntary) Transparency Register⁵³ organizations which are not registered are classified with citizens.⁵⁴ But it is difficult to assess how meaningful this is. Certainly a number of organizations which are involved in lobbying in Brussels are still not registered.⁵⁵ Like the SEC the Commission does provide online access to the full text of submissions to its consultations, so it is possible for citizens to read contributions by financial market participant stakeholders to consultations.

⁵¹ See http://ec.europa.eu/internal_market/consultations/2012/shadow_en.htm.

⁵² Opinion of the European Banking Authority on the Commission’s Green Paper on Shadow Banking at <http://www.eba.europa.eu/cebs/media/Publications/Other%20Publications/Opinions/EBA-Opinion--on-the-EC-Green-Paper-on-Shadow-Banking.pdf>.

⁵³ See Agreement Between the European Parliament and the European Commission on the Establishment of a Transparency Register for Organisations and Self-employed Individuals Engaged in EU Policy- Making and Policy Implementation O.J. L 191/29 (Jul. 22, 2011).

⁵⁴ See, e.g., the list of contributors to the consultation on shadow banking at http://ec.europa.eu/internal_market/consultations/2012/shadow/index_en.htm#registered-organizations. Cf. EU Commission Communication, COM(2007) 127 (Mar. 21, 2007)(Follow-up to the Green Paper 'European Transparency Initiative') at 4 (“The Commission therefore intends to combine the voluntary register with a new standard template for internet consultations. If organisations submit their contributions in the context of such a consultation they will be systematically invited to use the register to declare whom they represent, what their mission is and how they are funded..”)

⁵⁵ See, e.g., Alliance for Lobbying Transparency and Ethics Regulation (Alter-EU), *Dodgy Data : Time to fix the EU’s Transparency Register* (Jun. 2012) at <http://www.alter-eu.org/sites/default/files/documents/Dodgy-data.pdf>.

It is important to note in this context that the Commission does not explain the processes of stakeholder analysis that lead it to identify some groups of stakeholders as being important in some contexts, but not in others. Citizens are less likely to be able to participate meaningfully in consultations about issues which are extremely technical and complex, and financial regulation is an obvious example of a policy context dominated by technical and complex practices and rules. And, in establishing authorities with responsibility for developing technical standards of financial regulation the EU institutions have recognized that although the authorities should generally carry out public consultations, sometimes such consultations may be “disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter.”⁵⁶ But technical standards of financial regulation are distinguished from measures which “imply strategic decisions or policy choices.”⁵⁷

A distinction between issues which are technical and issues which imply strategic decisions or policy choices could explain some of the differences in stakeholder definition and non-definition. But issues involving shadow banking (a consultation where the Commission asked for contributions from all interested stakeholders) are surely no less technical than those which are raised by the recommendations of the High Level Expert Group on reforming banking regulation (where the Commission wants contributions in particular from market participants, national governments and national competent authorities). Moreover, although at a surface level it may seem appropriate to distinguish between technical and strategic or policy choices, the distinction is malleable and indeterminate. A good lawyer can draft a rule which appears to be a merely technical rule, but which embeds a strategic or policy choice. For example, technical rules about capital adequacy have implications for the allocation of credit to citizen borrowers. Regulation has implications for competitive conditions in financial markets.⁵⁸ And failures of

⁵⁶ See, e.g., Regulation No 1095/2010 Establishing a European Supervisory Authority (European Securities and Markets Authority), O.J. L 331/84 (Dec. 15, 2010) Art. 10(1) (ESMA Regulation).

⁵⁷ ESMA Regulation, Art 10(1) (“Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based.”)

⁵⁸ See, e.g., Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT’L L. J. 447, 500-503 (2008) (noting that the Basel capital adequacy

regulation can impose significant costs on citizen taxpayers. Ignoring the strategic and policy implications of technical rules does not further the EU principles of transparency and public participation.

When project managers think about the stakeholders in a particular project they tend to ask which are the critical entities who can help to achieve the project. And it is likely that a policy-maker engaging in stakeholder analysis will similarly be influenced by the need to develop policies which are seen as being successful. From this perspective keeping significant market participants and their trade associations and public authorities happy by considering their views seriously makes perfect sense. Moreover, to the extent that developing good policy depends on having accurate information and benefiting from relevant expertise, such an approach may also produce better policy. However, emphasizing the importance of expertised stakeholders in consultations is problematic to the extent that legal (or at least publicly proclaimed) texts emphasize the importance of public participation rather than expertise in policy-making. In addition, stakeholders are likely to argue that their views reflect expertise, whether or not this is true.⁵⁹ Many commentators consider that the global financial crisis demonstrated the downside of relying too much on people who claimed expertise about regulation.⁶⁰

At times the news media or other organizations draw the attention of non-financial market participants to issues of financial regulation, whether or not the policy-makers seek the input of non-experts. When the SEC carried out a study of the regulation of investment advice in

accord was adopted after the US and the UK announced they would apply strict capital adequacy requirements to foreign banks doing business in their jurisdictions.)

⁵⁹ Cf. Geoffrey R. D. Underhill & Xiaoke Zhang, *Setting the Rules: Private Power, Political Underpinnings, and Legitimacy in Global Monetary and Financial Governance*, 84 INT'L AFFAIRS 535, 553 (2008) ("the influence of private actors on the input side has not only rendered public authorities dependent on the information and expertise provided by these actors but also consistently aligned public policy objectives with private sector preferences.")

⁶⁰ See, e.g., Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis*, 22 (Mar. 2009) at http://www.fsa.gov.uk/pubs/other/turner_review.pdf ("Mathematical sophistication ended up not containing risk, but providing false assurance that other prima facie indicators of increasing risk (e.g. rapid credit extension and balance sheet growth) could be safely ignored.")

2010,⁶¹ as it was mandated to do by the Dodd-Frank Act,⁶² its request for comments generated 3500 responses.⁶³ In some cases the individual commenters' responses seem to have been prompted by news articles,⁶⁴ suggesting that they were not actively engaged in looking for opportunities to express their views on financial regulation. In preparing the study staff of the SEC "met with interested parties representing investors, broker-dealers, investment advisers, other representatives of the financial services industry, academics, state securities regulators, the North American Securities Administrator Association ("NASAA"), and the Financial Industry Regulatory Authority ("FINRA"), which serves as a self-regulatory organization ("SRO") for broker-dealers."⁶⁵ The Investment Adviser Study states that:

Many retail investors and investor advocates submitted comments stating that retail investors do not understand the differences between investment advisers and broker-dealers or the standards of care applicable to broker-dealers and investment advisers. Many find the standards of care confusing, and are uncertain about the meaning of the various titles and designations used by investment advisers and broker-dealers. Many expect that both investment advisers and broker-dealers are obligated to act in the investors' best interests.⁶⁶

⁶¹ SEC Investment Adviser Study *supra* note [31](#).

⁶² *Id.* at i-ii.

⁶³ *Id.* at ii.

⁶⁴ *See, e.g.*, Comments of Elizabeth Marion, (Aug. 31, 2010) cited in the SEC Investment Adviser Study, *supra* note [31](#) at footnote 448 on page 94. The letter is also available at <http://www.sec.gov/comments/4-606/4606-2672.htm> (the online comments file describes this respondent's name as Elizabeth Manion). *See also, e.g.*, Comments of Barbara Roper, Director of Investor Protection, Consumer Federation of America (Aug. 30, 2010) at <http://www.sec.gov/comments/4-606/4606-2448.pdf> (CFA Submission) ("In an effort to encourage more investor response, CFA issued a news release to personal finance writers in mid-August designed to prompt them to write columns and articles encouraging investors to make their voices heard.")

⁶⁵ SEC Investment Adviser Study *supra* note [31](#) at ii.

⁶⁶ *Id.* at v. Comments are available at <http://www.sec.gov/comments/4-606/4-606.shtml> .

The Study cites comment letters from sixteen investors and two investor advocates.⁶⁷ Emphasizing these comments in the Study shows that the SEC staff treated the views of these investors and investor advocates seriously, not surprisingly given the SEC's mandate under the statute. The conclusions expressed in the Study do address the issue raised by the individual comments that some consumers of financial services do not appreciate that different providers of advice are subject to different regulatory requirements. But the conclusion the Study draws, that the investment adviser standard should apply to all providers of personalized investment advice to retail customers, is not compelled by the investors' comments, and others have criticized the Study, arguing that the SEC did not research thoroughly enough the implications of the proposed rule change.⁶⁸

The content of consumers' responses to the SEC's request for comments tends to underline the idea that some consumers of financial services are relatively uninformed and vulnerable to being abused by their advisers. These characteristics do not make consumers credible generally as commentators on proposals for rules of financial regulation.⁶⁹ Thus even where consumers are most clearly among the relevant stakeholders with respect to regulatory proposals the ways in which they participate in the regulatory process undermine their ability to influence the way in which the rules are developed. The style, form, and content of the

⁶⁷ See Comments of David Certner, Legislative Counsel and Legislative Policy Director, American Association of Retired Persons (Aug. 30, 2010) at <http://www.sec.gov/comments/4-606/4606-2549.htm> ; CFA Submission, *supra* note [64](#).

⁶⁸ *See, e.g.*, Commissioners Kathleen L. Casey and Troy A. Paredes, Statement Regarding Study On Investment Advisers And Broker-Dealers (Jan. 21, 2011) at <http://www.sec.gov/news/speech/2011/spch012211klctap.htm> (“the Study does not identify whether retail investors are systematically being harmed or disadvantaged under one regulatory regime as compared to the other and, therefore, the Study lacks a basis to reasonably conclude that a uniform standard or harmonization would enhance investor protection. A stronger analytical and empirical foundation than provided by the Study is required before regulatory steps are taken that would revamp how broker-dealers and investment advisers are regulated.”)

⁶⁹ Contrasting with this image of the uninformed, vulnerable consumer is the recognition that communities have put enormous efforts into resolving the foreclosure crisis. *See, e.g.*, Governor Elizabeth A. Duke, Community Voices: Promising Practices for Neighborhood Stabilization, Speech at the 2011 Federal Reserve Community Affairs Research Conference, Arlington, Virginia (Apr. 28, 2011) at <http://www.federalreserve.gov/newsevents/speech/duke20110428a.htm> .

submissions of the AARP and of the Consumers' Federation of America⁷⁰ are dramatically different from those of the individual commenters, and comparable to those written by other responding organizations.

The example of the preparation of this study suggests that if the SEC wants the reality to match up to its rhetoric of public consultation it needs to develop a more sophisticated approach to incorporating the information investors have about how its rules operate in developing effective regulation. The CFA's submission suggests that the SEC could have done more to reach out to individual investors in preparing for the Study.⁷¹ The CFA suggests using different techniques to generate public input, such as holding town meetings, and that the SEC could try to focus on where investors would be able to have the most relevant input:

Another option would be for the Commission to release an appeal for comments from Chairman Schapiro, sent to newspapers throughout the country. Such an appeal could and should hone in on the issues where investors are most likely to have relevant input: whether they understand the differences between different types of investment professionals, what they expect from a financial adviser, what protections they believe would be beneficial, and what their experience has been in shopping for and working with investment professionals. Investors need to understand that, even if they lack technical expertise in the issues covered by the study, they have a view that deserves consideration.⁷²

It is particularly striking to note the CFA's critique of the SEC's approach to obtaining input from the public in a context where Congress specifically instructed the SEC to study "[w]hether retail customers understand or are confused by the differences in the standards of care

⁷⁰ See *supra* note [67](#).

⁷¹ CFA Submission, *supra* note [64](#) ("A preliminary review of comment letters submitted through the beginning of last week suggests that virtually all letters submitted at that time had come from members of the industry. While the comment period had one week remaining when this review was conducted, the results suggest that more needs to be done to encourage greater input from investors. We therefore urge the Commission to take additional steps to reach out to average investors.")

⁷² *Id.*

that apply to broker-dealers and investment advisers.”⁷³ In other contexts the SEC is even less likely to work to obtain useful input from investors.

The UK Government’s consultation on a New Approach to Financial Regulation⁷⁴ was a broader consultation about financial regulation than the SEC’s work on its Investment Adviser Study, and the Government suggested that it would engage with “relevant stakeholders,” although it also invited responses generally.⁷⁵ In describing the results of the consultation, the Government stated that it had received “[a]round 220 formal written responses ... from a diverse range of stakeholder groups.”⁷⁶ The Summary of Responses ascribes responses to groups of commenters described in rather vague terms, such as “a number of respondents,” “the majority of respondents,” or “the overwhelming majority of respondents,” and “near-universal consensus.”⁷⁷ At times views are ascribed to groups with particular characteristics. For example:

The majority of respondents, including almost all financial services sector respondents, stressed the importance of accountability and transparency for the

⁷³ SEC Investment Adviser Study *supra* note [31](#) at i.

⁷⁴ See *supra* note [75](#). The UK Government also established an Independent Commission on Banking which published its Final Report in September 2011. Independent Commission on Banking, Final Report : Recommendations (Sep. 2011)

⁷⁵ See, e.g., HM Treasury, a New Approach to Financial Regulation: Judgement, Focus and Stability, 59 Cm. 7874 (Jul. 2010) at 59 (“Responses are requested by 18 October 2010. The Government will also engage directly with relevant stakeholders ahead of this date.”) The Government published a summary of responses to the consultation in November 2010, noting that Government representatives had met with a range of stakeholders. HM Treasury, A New Approach to Financial Regulation: Summary of Consultation Responses, 3 (Nov. 2010) (“During the consultation period, Treasury Ministers and their officials met a wide range of interested parties to discuss the proposals, including a number of bilateral meetings and workshops with stakeholders. Discussions with international counterparts were also held.”).

⁷⁶ A New Approach to Financial Regulation: Summary of Consultation Responses, *supra* note [75](#), at 4. The respondents (whose responses are public) are listed at pages 19-24 of the Summary of Responses. The responses are also available at http://www.hm-treasury.gov.uk/consult_financial_regulation.htm . The web page provides links to seven separate pdf files representing comments by respondents organized alphabetically. While it is possible to navigate around each document this method of organizing responses does not seem to be designed to maximize transparency.

⁷⁷ *Id.* at 5.

PRA, the CPMA and the FPC, including through appropriate engagement with regulated firms.⁷⁸

Although the Summary states that it is important to protect consumers, consumer protection is not the primary objective,⁷⁹ and the Summary is drafted to reassure the regulated population that their interests will be considered:

The Government also notes that the PRA and CPMA will operate under the usual obligation placed on public bodies to behave reasonably and in the public interest; this obligation should provide industry and other stakeholders with comfort that the new authorities will consider the impact of their actions on those they regulate.⁸⁰

The Summary document notes some concern that “the governance structure proposed could lead to a concentration of power within the Bank of England.”⁸¹ The document does specifically note some comments of consumer groups.⁸² But reading the Summary document does not give much of a hint of which specific groups of stakeholders held which views, and, although the individual responses are available on the Treasury’s website, they are not organized to be easy to

⁷⁸ *Id.*

⁷⁹ See, e.g., A New Approach to Financial Regulation: Summary of Consultation Responses, *supra* note 75, at 7 (“The description of the CPMA as a consumer champion was welcomed by many respondents, though many also noted that this should not compromise the regulator’s independence or lead to consumer protection taking precedence over other factors.”)

⁸⁰ *Id.* at 8.

⁸¹ *Id.* at 14. This presumably involves a recognition that there was a time when people said that the City of London was regulated by the Governor of the Bank of England’s eyebrows. See, e.g., Adam Tickell, *Creative Finance and the Local State: the Hammersmith and Fulham Swaps Affair*, 17 *Political Geography* 865, 876 (1998) (“Until the 1970s, the London financial markets operated on a largely informal basis where, with very few exceptions, verbal agreements were cast in stone and the probity of the markets was guaranteed by the fabled power of the Governor of the Bank of England’s eyebrow.”)

⁸² See, e.g., A New Approach to Financial Regulation: Summary of Consultation Responses, *supra* note 75, at 15 (“Some consumer representatives argued for greater transparency, specifically in the context of the CPMA’s decision-making and maintaining an open dialogue with consumer groups.”)

review.⁸³ The Government's grand claims to be committed to transparency in the development of the new rules⁸⁴ are not borne out by the details of its work.

The UK Treasury's initial consultation on the New Approach to Financial Regulation was followed in early 2011 by a more detailed report and consultation,⁸⁵ and in 2012 by a White Paper.⁸⁶ The 2011 consultation document explicitly links to the earlier consultation and to the Summary document, presenting the new document as the product of the earlier consultation, and of the Government's work in response to the results of that consultation.⁸⁷ But in the 2011 document the Government explained its views on transparency and financial regulation in a new way:

... consistent with its wider agenda on the reform of public institutions, the Government is fully committed to the accountability and transparency of the new regulatory institutions. The location of responsibilities within independent, expert institutions is a model of public administration which is well suited to technical issues – such as financial regulation – for which certainty, long-term focus and a degree of insulation from political influence is important. However, the model also depends on there being clear accountability for performance, supported by transparency and, where appropriate, engagement with affected segments of

⁸³ See, e.g., *supra* note [76](#).

⁸⁴ See, e.g., A New Approach to Financial Regulation: Summary of Consultation Responses, *supra* note [75](#), at 4 (“The Government remains fully committed to an open and transparent policy-making process.”)

⁸⁵ HM Treasury, A New Approach to Financial Regulation: Building a Stronger System, Cm. 8012 (Feb. 2011).

⁸⁶ HM Treasury, Banking Reform: Delivering Stability and Supporting a Sustainable Economy Cm 8356 (Jun. 2012).

⁸⁷ See, e.g., Building a Stronger System, *supra* note [85](#) at 6 (“The November summary response set out the Government's emerging thinking on each of these themes. Based on the work carried out by the Treasury, Bank and FSA over the last seven months, the Government is now able to provide far more detailed and specific policy responses in each of these areas. The remainder of this introduction highlights some of the main developments since the July document was published.”)

society.⁸⁸

The 2011 version of the new approach contains a particular vision of the role of the consumer of financial services: consumers are responsible for their own decisions,⁸⁹ consumers benefit from competition between financial services providers,⁹⁰ but sometimes consumers need redress and compensation.⁹¹ These assumptions about consumer responsibility and the connection between competition in markets and consumer benefit are not uncontroversial;⁹²

⁸⁸ *Id.* at 9. The reference to the insulation of financial regulation from politics is somewhat ironic as the impetus to reform financial regulation is largely political. *See, e.g., id.* at 3 (“The Government recognises that steps must also be taken to ensure that financial firms are never again allowed to take on risks that are so significant and so poorly understood, resulting in such severe economic consequences for businesses, households and individuals. That is why the Coalition Government made the reform of UK financial regulation, and the replacement of the flawed system introduced by the previous administration, one of its key priorities on taking office in May 2010.”)

⁸⁹ The Consultation document proposes that one of the basic principles of the new regulatory regime is to be “the principle that consumers of financial services are ultimately responsible for their own decisions.” *Id.* at 8.

⁹⁰ *Id.* at 8 (“Competition will be an important new feature of the regulatory remit, incorporated in a way that goes significantly beyond the current FSMA framework. This will provide a significant step forward in terms of recognising the importance of competition in delivering good outcomes for consumers of financial services.”) The UK Government has also recently proposed changes to competition law. *See, e.g.,* Department for Business, Innovation and Skills, A Competition Regime for Growth: A Consultation on Options for Reform (Mar. 2011) at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf>. *See also, e.g.,* Department for Business, Innovation and Skills & Cabinet Office, Better Choices, Better Deals: Consumers Powering Growth, (Apr. 2011) at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/better-choices-better-deals.pdf>.

⁹¹ Building a Stronger System, *supra* note [85](#) at 9 (“Finally, the Government also recognises that redress and compensation have a part to play in the regulatory system, to provide consumers – particularly retail customers – with appropriate mechanisms to protect them if things go wrong.”)

⁹² *See, e.g.,* OFT, Consumer Behavioural Biases in Competition, A Report by Steffen Huck, Jidong Zhou, and London Economics Charlotte Duke, 6 (May 2011) at http://www.of.gov.uk/shared_of/research/OFT1324.pdf (“Perhaps the most striking result of the literature so far is that increasing competition through fostering entry of more firms may not

indeed the Government's own Better Choices, Better Deals document published in March 2011 noted that too much choice may not benefit consumers.⁹³ It is unclear from the 2011 New Approach document to what extent the Government planned to solicit the views of consumers and consumer groups in the consultation. In order to move ahead with the legislative process the consultation period was only eight weeks long, although the document emphasized that this is not an issue as there would be future opportunities for stakeholders to comment on the proposals.⁹⁴ The document also stated that the Government would

proactively seek the views of respondents in a structured way, and .. engage in dialogue and discussion so that policy proposals continue to develop through the consultation period and beyond.⁹⁵

The 2010 New Approach Consultation did not identify the relevant stakeholders, but the 2011 consultation did state that:

the Government will ensure that the momentum behind this crucial reform programme is maintained, while maximising the opportunities for industry, consumer groups, and other interested parties, to engage constructively with the process.⁹⁶

The 2011 consultation document also described the general public as “the ultimate stakeholder in

always make consumers better off and in specific circumstances may even make consumers worse off.”)

⁹³ Better Choices, Better Deals, *supra* note [90](#), at 15-16.

⁹⁴ Building a Stronger System, *supra* note [85](#) at 13 (“the Government will consult on the proposals contained in this document for eight weeks, before publishing a draft Bill in the spring. This draft Bill will then be subject to full, formal pre-legislative scrutiny....The Government recognises that the consultation period for this policy document is shorter than normal. This expedited process is necessary to enable formal pre-legislative scrutiny to be conducted, without significantly extending the timetable for reform. Pre-legislative scrutiny will, in any case, provide a significant additional opportunity for stakeholders to provide input into the development of the legislative framework.”)

⁹⁵ *Id.*

⁹⁶ *Id.* at 14.

the regulatory system.”⁹⁷ The document as a whole makes a number of quite vague and indefinite references to different stakeholders without any indication of what precise steps the Government proposed to take to include the views of the different groups in the process for development of draft legislation. It is not a model of transparency in this respect. But the consultation document suggests that the Government sees input from consumers as relevant only to the evidently consumer aspects of regulation. For example, the Government did not propose that the new PRA should have a consumer panel.⁹⁸ The public would have the right to be consulted annually on the work of the PRA but there would be no consumer panel to focus on its work on an ongoing basis.⁹⁹ Readers of the document had to wade through to page 58 of the document to discover this fact. The drafters of the consultation document assume, rather than explain, that it is appropriate to limit consultation of consumers to the areas where their interventions are deemed appropriate by those in charge. But the ability of market participants to express their opinions on the activities of the PRA and the FCA was not to be limited in the same way.¹⁰⁰ And in some cases of conflict between the two bodies the Government proposed that the PRA should prevail.¹⁰¹

⁹⁷ *Id.* at 55.

⁹⁸ *Id.* at 57-8 (“A number of respondents to the July consultation suggested that the PRA should be required to maintain a standing consumer panel, for the purposes of seeking views from consumers about the effectiveness of its regulation. While consumer issues will be integral to the new regulatory structure – particularly with the creation of a dedicated new consumer protection regulator – on reflection the Government does not think that it will be necessary to retain the consumer panel for the PRA. The PRA will be focused exclusively on prudential issues. Where the PRA believes that its decisions will have a material impact on consumers, it will be required to consult the FCA to take advantage of its expertise... the FCA will be required to maintain a consumer panel, consistent with its consumer protection role.”)

⁹⁹ *Id.* at 58.

¹⁰⁰ *Id.* at 66-7 (“The Government will therefore legislate for Practitioner, Smaller Business Practitioner, Markets and Consumer Panels for the FCA.”)

¹⁰¹ *Id.* at 85 (“However, where the PRA and FCA cannot agree an appropriate course of action, the Government considers that it is necessary to enable the PRA to prevent the FCA from taking actions where it considers that they are likely to lead to the disorderly failure of a firm or wider financial instability (on which the PRA may consult the FPC). This recognises the fact that the PRA will be best placed to make this assessment and thereby avoid outcomes that would be harmful to both regulators’ objectives.”)

The examples of the SEC’s development of its Investment Adviser Study and the UK Government’s work on its new approach to financial regulation both illustrate that policy-makers who focus on financial regulation tend to distinguish between areas of financial regulation which relate to consumer protection and other areas. They are more likely to seek comments from consumers on issues of consumer protection than on other issues of financial regulation. But they do not always make as much effort as they might to ensure consumer feedback even with respect to issues of consumer protection.

That policy-makers who focus on financial regulation treat financial institutions and other market participants as the important stakeholders in the development of financial regulation is not new. However, the SEC’s and the UK Government’s limited efforts to engage consumers described above are inconsistent with their own broad, general, and very visible, statements about the importance of transparency and public consultation. It may be unrealistic to imagine general participation in discussions of how that regulation should be constructed and implemented, but that is what policy-makers seem to promise. And it is sometimes difficult to reconcile the grand public rhetoric about transparency and the importance of public participation in governance with specific examples of consultations and requests for comments.

3.0 Some Conclusions: Stakeholder Analysis for Open and Transparent Government

The examples of consultation in this article reveal that when policy-makers translate public participation in policy-making into taking account of the views of stakeholders policy-makers are adopting very different approaches to their task. Even within the EU Commission different actors or groups seem to adopt different approaches to stakeholder analysis.

Transparency would be enhanced if policy-makers articulated the principles of stakeholder analysis they use. If we take public commitments to open government, participation and transparency seriously we should re-evaluate stakeholder analysis.¹⁰² The stakeholder construct is

¹⁰² Cf. Fraser-Moleketi, *supra* note [11](#), at 193 (“The concepts of community and citizen participation are those that give vitality to democratic governance. Without a sense of sharing, neither participation nor trust in the basic objectives of governance may be expected. These are the very concepts which have been undermined by the business model of governance. The market or business model has rested, in effect, on technocratic assumptions, which would entrust the functions of government to experts and leave it to expert managers to carry out these tasks efficiently and effectively. Nothing else appeared to matter. This assumption went in tandem

malleable, even manipulable, so the principle of transparency demands that policy-makers clarify their analyses of who the relevant stakeholders are with respect to particular policy issues. But beyond merely identifying their processes of stakeholder analysis in the interests of transparency, policy-makers should try to develop principles for stakeholder analysis which are consistent with a broad commitment to open government, including citizen participation in policy-making.

In the examples presented in this paper the policy-makers involved did not make significant efforts to be transparent about how they planned to engage with stakeholders. They did not specify clearly which stakeholders they planned to consult about which issues, nor precisely how they planned to do so. They did not explain what tools of stakeholder analysis they employed in developing their consultations. And they did not describe the results of their consultations in ways which made it clear who said what and how much attention the policy-makers had paid to the details of what they said.

This is not to suggest that the issue of how to defining the stakeholders with respect to any policy initiative is anything other than a complex problem.¹⁰³ Different stakeholders likely have different views about what constitutes effective participation.¹⁰⁴ The policy-maker may have a number of different objectives in mind in making the definitional decision. Some consultations are not really consultations at all, but are designed to persuade the public.¹⁰⁵ One objective may

with an idea that citizens are clients or consumers. It prevailed in the 1980s and 1990s, with adverse effects on democracy.”)

¹⁰³ Cf. Paul Dragos Aligica, *Institutional and Stakeholder Mapping: Frameworks for Policy Analysis and Institutional Change*, 6 PUBLIC ORGANIZ. REV. 79 (2006)

¹⁰⁴ Cf. Maureen M. Berner, Justin M. Amos & Ricardo S. Morse, *What Constitutes Effective Citizen Participation in Local Government? Views from City Stakeholders*, 35 Public Admin Quarterly 128, 129 (2011) (“Arguments in favor of citizen participation are rooted in normative theory, and as a result, discussions of what constitutes “effective” participation are likewise normatively-based. Yet we should be equally (if not more) concerned with how the stakeholders of participation— practitioners, elected officials, and citizens — understand effective citizen participation.”)

¹⁰⁵ Cf. Resignation of Professor Brian Wynne from the Steering Group of the Food Standards Agency’s public dialogue ‘Food: the use of GM’ (Jun. 2, 2010) at http://www.lancs.ac.uk/fass/doc_library/cesagen/FSAResignationpressreleaseBW.pdf (Quoting Professor Wynne as saying that the UK’s Food Standards Agency “appears not to understand the socio-political as well as scientific fabric of such issues, and is thus unable to recognise its own

be to ensure that the consultation process is as open and transparent as possible; another may be to ensure that those whose interests are affected by a policy proposal are included in the consultation, another may be to ensure that those who have relevant expertise are encouraged to share that expertise with the policy-maker, and yet another may be to ensure that those whose involvement is critical to the success of the initiative are involved and encouraged to make it succeed.

These objectives could be characterized as prioritizing good government, good policy,¹⁰⁶ or successful policy.¹⁰⁷ But although any or all of these objectives could be justifiable in some circumstances, they may also have problems. A policy-maker focused on achieving a particular result may approach consultation from the perspective of defining the issues, and the relevant stakeholders, in order to achieve the desired result. A policy-maker focused on producing good, evidence-based policy, may define the issues and the relevant stakeholders in a way that is not conducive to identifying the best policy options because of her own biases. A policy-maker focused on good government may focus so intensely on the issues of managing and processing responses that she loses sight of the real issues. And this may be a particular problem if the management and processing of the consultation is treated as an issue for technical experts in programming rather than those who have knowledge of the issue area.

In the context of financial regulation it is tempting to think that consultations are primarily about using the expertise of market participants and ensuring that market participants will work to make new policies effective. Finance and financial regulation are complicated. Clearly market participants do have their own perspective on issues of financial regulation, and they may sometimes have valuable knowledge about how markets work that is inaccessible to outsiders. But financial market participants do not have the only expertise that may be relevant to the development of policy, and sometimes they may prefer regulatory solutions which could

social and political biases and confusions when doing what it calls public dialogue, and yet misrepresenting itself as following only “sound science.”“)

¹⁰⁶ A policy-maker could be trying to develop good policy even if the policy-maker has an excessively limited view of what evidence is relevant to the policy question.

¹⁰⁷ A policy could be successful for these purposes if it is implemented effectively whether or not the policy is a good one.

privilege their own interests at the expense of consumers, taxpayers, and other groups.

Finance and financial regulation are very complex and it can be difficult for non-market-participants to express views about financial regulation that seem significant and relevant (even if they do notice the consultations are occurring and take the time to participate). Building the capacity of consumer groups to participate in the development of policy is one possible response, and one that the EU Commission has adopted.¹⁰⁸ But developing more, and more expert, consumer representatives is not the only way to address the issues. Policy-makers could take much more care than they now do to try to articulate the implications of different policy proposals, including different aspects of proposals, for different groups. In particular those who develop financial regulation should think of the implications of their proposals for citizens, and not just for consumers of financial services. As to the issue of complexity, some policy-makers have begun to argue that the rules of financial regulation are excessively complex. Andrew Haldane has argued that simple rules may be more appropriate for complex systems, such as financial systems, than complex rules.¹⁰⁹ Robert Jenkins has written that “global regulators would have less to argue about if there were fewer rules to coordinate and fewer regulations to enforce.”¹¹⁰

¹⁰⁸ Eurofin-use.

¹⁰⁹ Andrew Haldane, Executive Director, Financial Stability, Bank of England, Capital Discipline, based on a speech at the American Economic Association, Denver (Jan. 9, 2011) at <http://www.bankofengland.co.uk/publications/speeches/2011/speech484.pdf> ("As a thought experiment, imagine instead we were designing a regulatory framework from scratch. Finance is a classic complex, adaptive system. What properties would a complex, adaptive system such as finance ideally exhibit to best insure about future crises? Simplicity is one. There is a key lesson, here, from the literature on complex systems. Faced with complexity, the temptation is to seek complex control devices. In fact, complex systems typically call for simple control rules. To do otherwise simply compounds system complexity with control complexity.")

¹¹⁰ Robert Jenkins, Member of the Financial Policy Committee, Bank of England, a Debate Framed by Fallacies, Speech at the International Centre for Financial Regulation’s 3rd Annual Regulatory Summit, London (Sep. 25, 2012) at <http://www.bankofengland.co.uk/publications/Documents/speeches/2012/speech603.pdf>