

Replies of the European Commission on an inquiry from the European Ombudsman

- Complaint by ██████ on behalf of Corporate Europe Observatory on how the European Commission's Regulatory Scrutiny Board interacts with interest representatives and its composition, ref. 2023/439 of 04/04/2023

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 3rd of March 2023 M█████ filed a complaint on behalf of Corporate Europe Observatory against the European Commission about how the European Commission's Regulatory Scrutiny Board interacts with interest representatives and its composition.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

The complainant raised concerns about the role of the Regulatory Scrutiny Board (the Board), notably in the context of the draft EU directive on corporate sustainability due diligence (CSDD). In particular, the complainant is concerned about meetings between members of the Board, including the chair, and interest representatives. The complainant is also concerned about the composition of the Board, which it contends does not have sufficient members with environmental and social policy expertise.

III. EUROPEAN OMBUDSMAN'S INQUIRY

The Ombudsman has opened an inquiry to look into the complainant's concerns that the Commission should:

- i. Evaluate the access that corporate interest representatives (lobbyists) have to the Board and its members to ensure that there is no privileged access and to put in place more robust mechanisms to ensure that corporate lobbying does not have undue influence on the Board's work.
- ii. Ensure that the membership of the Board includes sufficient environmental and social policy expertise.

The Ombudsman requested a number of documents:

- all declarations of interest of Board members since the Board was established;
- all documents concerning disclosures of potential conflicts of interest by Board members with respect to particular reports on which the Board was working;
- documents (including emails, invitations, agendas, minutes etc.) related to all meetings of the Board with think-tanks, institutions in non-EU countries and other stakeholders from 2021 onwards;
- written contributions on individual files provided by interest representatives and the response of the Board, if it made any, from 2021 onwards;
- documents concerning the assessment of the extension of Board members' mandates;
- the CVs of all Board members since the Board was established.

Moreover, the Ombudsman requested replies to the following ten questions:

1. How does the Board handle written contributions from stakeholders in respect of individual files?
2. When organising or participating in outreach activities, how does the Board ensure that its members meet only with interest representatives who are registered on the Transparency Register? Where such meetings take place, how does the Board ensure that matters concerning individual files are not discussed?
3. The complainant is concerned that there is a significant loophole in the rules and ways of

working of the Board if lobbyists are able to express their concerns to Board members about specific files in face-to-face meetings or written submissions, whether or not Board members themselves engage in a discussion on the file. Could the Commission please comment on this concern?

4. Aside from the Board's Rules of Procedure, does the Board have additional safeguards regarding meetings with interest representatives, or guidance for the chair of the Board in relation to this issue?
5. Are meetings with the Board demand driven, or does the Board proactively seek meetings with interest representatives?
6. How does the Board ensure a balanced representation of interest groups when organising or participating in outreach activities?
7. As regards the composition of the Regulatory Scrutiny Board. How does the Commission ensure that all areas of expertise, including social policy and environment policy, are covered in the composition of the Board?
8. How many times have the three-year terms of Board members been extended by an additional year, as foreseen in the applicable rules? Where this occurred, what were the 'exceptional circumstances' justifying the extension?
9. How many times have the terms of Board members been extended beyond four years? What was the legal basis for the further extension or renewal?
10. Who assesses the extensions of the terms of Board members and how does the Commission ensure that, where terms are extended, this is consistent with the need to balance expertise within the Board?

IV. THE REPLY OF THE EUROPEAN COMMISSION

The Commission notes that the Ombudsman has informed the complainant that the aspect of their complaint which concerns the substance of the CSDD proposal falls outside the scope of your mandate and that the complainant does not have sufficient grounds to inquire into the alleged absence of an independent evaluation of the Board and the Better Regulation policy, given the stocktaking exercise that the Commission carried out in 2019 and which included consultations with academia and with stakeholders.

At the outset, the Commission notes that the concern that the Board does not have sufficient environmental and social policy expertise would seem to be based on a fundamental misconception of the Board's role and the division of responsibilities within the European Commission. These positions are reinforced by a study, commissioned by LobbyControl and the Chamber of Labour Vienna. This study was presented at an event organised in the European Parliament on the 7th of June, to which discussion the Ombudsman was invited and contributed, while the Commission did not have an opportunity to contribute and does not share the findings of this study.

For this reason, an annex is attached to this note, which provides explanations on the role and the functioning of the Board.

The independent Regulatory Scrutiny Board is an internal quality control mechanism that scrutinises draft impact assessments, fitness checks, and major evaluations objectively against the criteria set out in the Better Regulation Guidelines. Although Board members are senior management level and have a broad range of knowledge of EU policies, they are recruited specifically for their knowledge of Better Regulation and their analytical skills and abilities.

As is clear in the Decision establishing the Board¹, it is not designed to have deep specialist subject knowledge of any specific sectoral policy area – that is the role of the Commission services preparing the impact assessment and subsequently the draft legislative proposal. The Board’s role is solely to assess whether the draft impact assessment and evaluations submitted to it meet the required Better Regulation standards, it does not question the political or policy advisability of an initiative covered by a draft impact assessment nor call into question the sectoral knowledge of the experts preparing it. As Article 2 of the Decision establishing the Board makes clear:

*“1. The Board shall assess the **quality of draft impact assessment reports, fitness check reports and major evaluation reports** (‘reports’). It shall issue an opinion on each report that has been submitted to it. Where necessary, the Board shall **make recommendations on how the quality of a draft report should be improved**.
2. The Board may offer advice to Commission services regarding the **application and interpretation of the Better Regulation Guidelines** in particularly challenging assessments/evaluations and on methodological issues. The Board may also offer advice on **horizontal issues relating to the further development of the Commission’s policy on better regulation**.”*

Board members are selected for their broad professional experience, analytical abilities and skills, objectivity, and impartiality. In its internal operation, all Board members scrutinise all files and bear collective responsibility – there is no division of files within the Board according to different subject areas.

Concerning the specific questions asked, please find the replies directly below:

1. *How does the Board handle written contributions from stakeholders in respect of individual files?*

In accordance with the Decision setting up the Regulatory Scrutiny Board, the Board shall not discuss individual files with directly concerned stakeholders. The Board does not respond directly to stakeholders sending information. In the Commission, unit SG.A2 (acting as Secretariat of the Board) replies on behalf of the Board Chair to such unsolicited letters or messages, in a standardised way, stressing that the Regulatory Scrutiny Board does not engage with stakeholders on individual files, and clarifying the nature of its work and the timing when its opinions are made public.

2. *When organising or participating in outreach activities, how does the Board ensure that its members meet only with interest representatives who are registered on the Transparency Register?*

In accordance with the decision setting up the Regulatory Scrutiny Board, in the exercise of their functions, Board members shall not meet with organisations that are not listed in the Transparency Register. Prior to any meeting with organisations, the assistants of the Board verify that the organisations are listed in the Transparency register and only in the cases where they are, meetings can take place. However, any such meetings would be covered by the provisions set out above: namely that the Regulatory Scrutiny Board does not engage with stakeholders on individual files.

¹ P(2020) 2 of 23.11.2020 as amended by P(2022) 1 of 11.12.2023)

3. *Where such meetings take place, how does the Board ensure that matters concerning individual files are not discussed?*

The Board carries out outreach activities, limited to explaining the role of the Board, in response to requests from interested organisations. When asking for a meeting, such organisations must inform the Board of the nature and subject of the proposed meeting. From the outset, Board Members or the Chair make clear that any outreach activities concern only matters of general nature, such as the role of the Board and its operations in the Better Regulation system of the European Commission. The Board does not engage with interested organisations on individual files.

4. *The complainant is concerned that there is a significant loophole in the rules and ways of working of the Board if lobbyists are able to express their concerns to Board members about specific files in face-to-face meetings or written submissions, whether or not Board members themselves engage in a discussion on the file. Could the Commission please comment on this concern?*

The Commission considers that it is important that the Board carries out outreach activities to explain its role and operations to external stakeholders. For instance, it did so at the recent Fifth Annual Conference on Regulatory Scrutiny in the EU that took place in Brussels on the 31st of May 2023. At the event, the role of the Board and how regulatory scrutiny has functioned was discussed with stakeholders and the Board had a chance to provide clarifications to questions and misconceptions².

Such activities improve the understanding of the better regulation system and ensure transparency of the Board's work. Both the Decision setting up the Board and its rules of procedures are clear on the fact that the Board does not engage with stakeholders on individual files. In any response to requests from external stakeholders the Board makes it clear that this limitation, imposed in the decision, must be respected.

Moreover, it is the Secretariat of the Board (unit SG.A2), rather than the Board itself, that sends a standardised reply directly to any stakeholder who requests a meeting or information on an individual file or sends unsolicited written contributions, reminding them of the rules.

On this basis the Commission is convinced that there are no loopholes and that the system in place ensures maximum transparency while safeguarding Board's Members against any attempts at influencing or lobbying by external stakeholders.

5. *Aside from the Board's Rules of Procedure, does the Board have additional safeguards regarding meetings with interest representatives, or guidance for the chair of the Board in relation to this issue?*

As explained earlier, the Decision and Rules of Procedure are sufficiently clear as of the boundaries of outreach activities. The Board (either directly or via its Secretariat) is equally clear with stakeholders on the subjects that can be discussed (i.e. the role of the Board in the implementation of the better regulation guidelines) and what cannot (i.e. individual files).

² https://commission.europa.eu/events/fifth-annual-conference-regulatory-scrutiny-eu-2023-05-31_en

The answer to question 1 clarifies already the process of how any written input is handled, while in case any representatives from a stakeholder organisation – despite having being informed in advance about what can be discussed and what cannot – would still raise individual files in a meeting, the chair or member of the Board would remind such stakeholders that the Board cannot and will not discuss individual files and that it can only provide a general overview of the Board’s role. Therefore, the Commission cannot see the need for any additional guidance to supplement the rules.

6. Are meetings with the Board demand driven, or does the Board proactively seek meetings with interest representatives?

The Board carries out two types of outreach activities with external stakeholders:

- its annual Conference to present the Board’s annual report and discuss methodological issues of better regulation and oversight and
- meetings with organisations or external stakeholders, upon their request to explain the role of the Board in the implementation of the better regulation guidelines.

Apart from the annual conference, any other meeting with the Board is demand-driven, carefully screened, and made public³ in line with the Decision and Rules of Procedure. The Board never solicits a meeting with any external stakeholder.

7. How does the Board ensure a balanced representation of interest groups when organising or participating in outreach activities?

As explained above, aside from the annual Conference, meetings with external stakeholders are demand-driven. The Board is available to participate in meetings about general issues of its role in implementing the better regulation guidelines with all interested stakeholders who respect the provisions of the decision establishing it (such as being registered in the transparency register).

Concerning the annual Conference, the Board has made it open to all interested stakeholders, Institutions and bodies through publicity by advertising it on the Commission’s web page on events⁴.

8. How does the Commission ensure that all areas of expertise, including social policy and environmental policy, are covered in the composition of the Board?

The independent Regulatory Scrutiny Board is the Commission’s internal quality control body that scrutinises draft impact assessments, fitness checks and major evaluations, objectively, against the criteria set out in the Better Regulation Guidelines. Although Board members are senior and have a broad range of knowledge of EU policies, they are recruited specifically for their knowledge of Better Regulation and their analytical skills and abilities. The Board is not designed to, nor does it, have deep specialist subject knowledge of any particular sectoral policy area – that is the role of Commission services preparing the impact assessment and subsequently the draft legislative proposal.

³ See https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board_en and https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en#events

⁴ [Fifth Annual Conference on Regulatory Scrutiny in the EU \(europa.eu\)](https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en#events)

The Board's role is solely to assess whether the draft impact assessment meets the required Better Regulation standards, it does not question the political advisability of an initiative covered by a draft impact assessment, nor call into question the sectoral knowledge of the experts preparing it. Board members are selected for their long and broad professional experience, analytical abilities and skills, objectivity, and impartiality. In its internal operation, all Board members read all files and scrutinise them collectively – there is no division of files within the Board according to different subject areas: everybody reads everything and provides their input.

8. How many times have the three-year terms of Board members been extended by an additional year, as foreseen in the applicable rules? Where this occurred, what were the “exceptional circumstances” justifying the extension?

The three-year term of a Board member has been extended by an additional year on two occasions:

- PV(2019)2305, p. 29, decision to extend the contract of ██████████ by one year in order to ensure the quorum of four members required to take decisions.
- PV(2020)2326, p. 12-13, decision to extend the contract of ██████████ by one year as there would have been an unbalanced composition of the Board with only one external member remaining. This decision refers to Article 3 (4) of the decision of the President to amend the rules establishing the RSB (P(2020)2)

9. How many times have the terms of Board members been extended beyond four years? What was the legal basis for further extension or renewal?

The terms of Board members have never been extended beyond four years.

There was, however, one member that had served for more than four years, yet not by extension of his contract. ██████████ served initially on the Board as an Advisor from 1 February 2016 until 31/10/2019 (3 years 8 months). Following the revision of the RSB Decision in 2019 (C(2019) 5565), ██████████ applied and was successful in the selection procedure (COM/2019/1334) and was then appointed on a new contract as Principal Adviser – Member of the Board as of 01/11/2019 and remained on this post until his retirement as of 01/07/2022. (2 years 8 months).

10. Who assesses the extensions of the terms of Board members and how does the Commission ensure that, where terms are extended, this is consistent with the need to balance expertise within the Board.

Decisions on extensions of term for Board members are taken by the College. As the answers to questions 8 and 9 show, such decisions are taken in “exceptional circumstances” in the interests of the continued functioning of the Board and to ensure an appropriate balance between internal and external members. For the reasons set out in the answer to question 7, the expertise of all Board members is equally valid given the role of the Board is confined to scrutinising draft impact assessments against the objective criteria set out in the Better Regulation toolbox.

V. CONCLUSION

The Commission considers that the Regulatory Scrutiny Board carries out its function of assessing the quality of impact assessments, fitness checks and selected evaluations independently from any pressure from external stakeholders. Current rules are clear on the scope of its outreach activities: the Board cannot engage with external stakeholders on individual files. The Board has therefore never had any meeting on individual files with interest representatives, nor has it engaged in any oral or written correspondence with them. Outreach activities are necessary to increase understanding about the Board's role and activities and ensure transparency of its work. They are carried out in the boundaries set out in the Decision establishing the Board.

For the Commission

Věra JOUROVÁ

Vice-President

Annex

Additional explanation on the role and functioning of the Regulatory Scrutiny Board.

- **Role of the Board**

The role and operations of the Board are clearly outlined in the decision providing its mandate and its rule of procedure.⁵ They are also comprehensively explained in a dedicated Tool #3 of the Better Regulation Toolbox.⁶ By its mandate and function, the Board is an **independent body within the Commission**. Its main task is **to provide independent quality control of draft impact assessments, fitness checks and selected evaluations** within the Commission. It is not involved and takes no view on the political decision. This is taken by the College, as informed by an evidence-based impact assessment and without being bound by it. Therefore, a negative assessment of a draft impact assessment is not a negative assessment of a (draft) legislative proposal as **the Board does not look at legislative proposals** as it has no role in the EU legislative process and EU decision making.

The Commission has established its internal quality control system for impact assessments and evaluations and set up the Board for this purpose. **The Board is not an interinstitutional body**. If other EU institutions, see such need regarding their own activities (e.g. independent quality scrutiny of their impact assessments on significant amendments they may want to introduce to a legislative proposal of the Commission), it is up to them to do so in line with the spirit of the Interinstitutional Agreement on Better Law Making. Currently, there is no specific formulised review process by the co-legislators of assessments as to whether amendments are significant and what their impact would be.

Finally, it should be recalled that **the Board's set-up is fully in line with the OECD's 'best regulatory practice'**, which calls for a regulatory oversight body to be established close to the centre of government with an independent mandate. The Court of Auditors has also recognised the Board's increasing impact on the quality control and noted that the Board's mandate compared to that of its predecessor, the Impact Assessment Board, is a positive development which puts the Commission's regulatory quality oversight body ahead of many of its peers in the EU and beyond.

- **"Veto power" of the Board and delay of decisions**

The Board has no "veto power", neither in the internal Commission nor in the "EU's decision-making process". If the Board finds that a scrutinised draft impact assessment does not meet the Commission's better regulation standards (as provided in the Better Regulation Guidelines and Toolbox), it issues a negative opinion and asks for a resubmission. This occurs roughly in one third of the cases at first submissions and is part of the normal process of improving the quality of the evidence base.

Once resubmitted, the Board issues a second opinion on the revised draft report. **Only in very rare cases, the Board issued a second negative opinion**, where the resubmitted draft report still contained fundamental deficiencies. Out of the 314 impact assessments scrutinised by the Board between 2016 and 2021 this happened in nine cases (less than 3%). However, this does not mean that the legislative initiative cannot go ahead in the College. In line with the working procedures of the

⁵ Available at https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en

⁶ https://commission.europa.eu/system/files/2023-02/br_toolbox-nov_2021_en.pdf

Commission, the Vice-President for Inter-institutional Relations and Foresight can decide whether and in what form to proceed. In practice all the initiatives, where the accompanying impact assessment received a second negative opinion in 2021 or 2022 proceeded and were adopted by the Commission, while ensuring that the proposal's scope is sufficiently backed by the available evidence. The political decision is taken by the College, as informed by an evidence-based impact assessment and without being bound by it. In these rare cases, the explanatory memorandum of the Commission's proposal explains why the decision was made to still proceed. In all cases, the Commission explains how the opinion(s) were taken into account.

A negative opinion should normally also not lead to a delay in the adoption decision as services need to pencil in time for adaptations or resubmissions in their adoption planning. The toolbox #3 is clear in its timing guidance in this respect and explains that the usual practice of the Board is that it needs **four weeks to provide its opinion**. In fact, there is no correlation between initiatives implemented under the Commission Work Programme for 2022 that received a negative submission at first submission and delays. Finally, it should be recalled that the internal organisation of the Commission is up to the Commission (TEU Art 17.6), and it has the administrative autonomy in matters relating to its operations, and so do the co-legislators.

- **Meeting with stakeholders**

Members of the Board do not and did not discuss individual cases with any external stakeholders. In line with the Decision setting up the Board, the Board can carry out outreach activities such as consultations and exchanges of views on horizontal, sectoral, or methodological issues in the context of better regulation. However, the Board Members shall not discuss individual files with stakeholders.

- **Access to the Board's opinions before the Commission adopts an initiative**

Making the Board's opinions available earlier than the proposal would reveal preliminary views and policy options, which are still under consideration. The release of the Board's opinion(s) prior to the publication of legislative proposal would not address the public interest of ensuring impartiality and credibility of the process, as it would expose the Board and the Commission to significant lobbying and would give a wrong impressions and unnecessary attention to when views on insufficient drafts are revealed before having the chance to address identified shortcomings in the scrutiny control process.

Besides, it is worth flagging that **the Commission has an extensive and top-notch stakeholders' consultation system**, ranked as Nr. 1 by the 2021 OECD Regulatory Outlook⁷ compared to 34 OECD countries. It consults at the start of the policy-making process through a 'call for evidence' document accompanied by a public consultation questionnaire translated in all EU languages that is published on the 'Have your Say' portal and that is open for 12 weeks and when the legislative act is adopted by the Commission for 8 weeks and on delegated and implementing acts for 4 weeks. When an initiative is adopted by the Commission, the impact assessment and the opinion(s) of the Board are all made available. In this way, there is maximum transparency of the process.

⁷ <https://www.oecd.org/gov/regulatory-policy/oecd-regulatory-policy-outlook-2021-38b0fdb1-en.htm>

- **Transparency on upstream support meetings**

Upstream support meetings between the Board and services preparing analytical documents are **part of the Commission's internal preparation process**. They take place at an early stage of the analytical policy development process where still all possible issues and policy options are explored and investigated and where usually intense evidence collection and consultation activities are still on-going, allowing all stakeholders to express their views via dedicated consultation instruments. These meetings are highly technical, explorative and do not involve any external participants.

- **Integrated and balanced assessment of impacts**

The revised Better Regulation Toolbox of 2021 in Tool #18 identifies **35 impact categories** which all can have economic, social or environmental impacts. 27 out of these denote an indicative dominant economic category, 18 a dominant environmental and 16 a dominant social category of impact. It underlines that **social, environmental, and economic impacts cannot be seen in isolation** requiring an integrated assessment approach. Indeed, for most of the presented 35 impact categories it is clearly identified upfront that at least two of the three generic impact categories should be considered as dominant. Moreover, even where there is only one dominant impact category identified, such as the functioning of the internal market and competition, it is obvious and follows from the guidance, that this impact category always needs to be looked also from an employment and consumer perspective. Finally, the Commission's Better Regulation Toolbox provides ample guidance on how to assess environmental and social impacts, including methods to assess costs and benefits, be it quantitatively and/or qualitatively.

The Board scrutinises whether all relevant social, economic, and environmental impacts have been adequately assessed in submitted draft impact assessments. It publishes corresponding statistics in this regard.

- **Sustainable development and long-term impacts on society and environment**

The Commission already in 2002 presented its integrated approach and guidelines to impact assessment, including the requirement to consider a wide range of possible economic, environmental, and social impacts. In its latest update of its Better Regulation Strategy (COM(2021)219) the Commission announced that it **mainstreams the UN sustainable development goals** to ensure that every legislative proposal contributes to the 2030 sustainable development agenda. The assessment of the impacts on the relevant sustainable development goals is a **mandatory requirement of the Commission's Better Regulation Guidelines**, and the Better Regulation Toolbox provides a dedicated Tool #19 in this respect. The **Commission has further strengthened the assessment of environmental impacts via its emphasis on the 'do no significant harm' principle**, together with the focus on the 'digital by default' principle. The better regulation guidelines and toolbox have correspondingly be updated in November 2021 and **the Board is tasked to scrutinise that all these requirements are fulfilled** in the draft impact assessments submitted to it. In this respect Commission impact assessments do already need to account for long-term impacts on society and environment.