

Reply by the European Commission to a suggestion for improvement 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. 439/2023/KR

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 3 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) 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 BY THE EUROPEAN COMMISSION

The Commission noted 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 did 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 noted 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 7 June 2023, to which discussion the Ombudsman was invited and contributed, while the Commission did not have a chance to contribute. The Commission does not share the findings of this study.

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 at 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 clarified in the Decision establishing the Board¹, the latter is not designed to have deep specialist subject knowledge of any specific sectoral policy area – that is the role of

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

Commission departments preparing the impact assessment and subsequently the draft legislative proposal. The Board's role is solely to assess whether the submitted draft impact assessment and evaluations meet the required Better Regulation standards. The Board 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 by the Ombudsman, the Commission replied as follows:

- 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.A.2 (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 which 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.

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.

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?*

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 31 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 misconceptions.²

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.A.2), 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.

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?*

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).

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 stakeholder that the Board cannot and will not discuss individual files and that it can only

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

provide a general overview of the Board's role. Therefore, the Commission cannot see the need for any additional guidance to supplement the rules.

5. 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.

6. 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 to 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

7. 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.

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,

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)

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. THE INSPECTION MEETING OF THE EUROPEAN OMBUDSMAN INQUIRY TEAM WITH REPRESENTATIVES OF THE EUROPEAN COMMISSION

The Ombudsman inquiry team asked for an inspection meeting to get a better understanding of how the Commission assesses conflicts of interest, how it ensures a balanced composition of the Regulatory Scrutiny Board (RSB) in terms of the expertise and experience required and

how the RSB interacts with interest representatives. The meeting was organised on 12 March 2024 to clarify questions that arose when inspecting the documents that the Commission had identified as falling within the scope of the Ombudsman's request.

The Commission made available the following documents for inspection:

- six completed and signed declarations of conflict of interests (DOI) of external RSB members;
- fourteen written contributions on individual files provided by interest representatives and the response of the RSB;
- two examples of standardised replies to interest representatives sent by the RSB secretariat;
- four Commission Decisions concerning the extension of RSB members' mandates;
- the CVs of all RSB members.

Moreover, the Ombudsman requested the Commission to discuss the following eleven issues, grouped in four themes:

I. Declarations of conflict of interests

1. In relation to the declaration of interests that has 2020 in its file name, did the Commission assess the personal interests that were declared in this case that could lead to any actual or potential conflict of interest relevant to the position offered? If so, how?
2. Did the Commission assess the proposed mitigating measures put forward by the member? If so, how?
3. The declaration of interests form sets out that, in case potential conflicts of interest are identified, copies of the declaration must be transmitted to the responsible team in the Commission's department for Human Resources and to the Business Correspondent of the Secretary-General. Was this procedure followed in this case? If so, what was the reply of the relevant services of the Commission?
4. Did the Commission monitor compliance with the proposed mitigation measures in this case? If so, how?
5. In five out of six signed declarations of interests, the candidate RSB candidate member declared no potential or actual conflicts of interest. The form used for the declaration of interests provides that, where no interests are declared by the candidate member, the Commission is still obliged to confirm the absence of conflicting interests based on the declaration and the updated CV of the candidate. Did the Commission conduct its own assessment in these cases to confirm the candidates' self-declared absence of conflicting personal interests and, if so, how?

II. Meetings of the RSB with interest representatives

6. The complainant said that a meeting that took place in 2020 between the RSB and an interest representative for French businesses was listed by the RSB as having concerned an individual file. Could the Commission please submit for inspection the documents it holds in relation to the meeting in November 2020

between the then RSB Chair and the French corporate lobby referred to above, including minutes if available?

7. In its comments, the complainant pointed to a recent request for public access to documents which included correspondence from 2023 between the RSB Chair and a Brussels-based think tank interested in regulation and innovation. In its reply of 8 September 2023, the Commission informed the Ombudsman that the RSB Secretariat has sent standardised replies on behalf of the RSB since December 2021. Could the Commission please comment on the above-mentioned correspondence between the RSB Chair and the think-tank?
8. Have there been any other cases in which the RSB Chair or members corresponded directly with interest representatives after December 2021?

III. Extensions of RSB members' periods of appointment

9. RSB members serve a three year-period that is non-renewable, save for an extension of one year in exceptional circumstances. In its reply to the Ombudsman of 8 September 2023, the Commission indicated that one RSB member served for more than six years, albeit on different contracts. What is the purpose of the non-renewable three year appointment of RSB members (which may exceptionally be extended by up to one year)?
10. Does the Commission consider the case of the RSB member who served for more than six years contradictory to its rules that include a limit of four years?

IV. Expertise of RSB members

11. According to the Commission's Better Regulation guidelines, impact assessments are required for Commission initiatives that are likely to have significant economic, environmental or social impacts or which entail significant spending, and where the Commission has a choice of policy options. The Commission replied to the Ombudsman that RSB members are "recruited specifically for their knowledge of Better Regulation and their analytical skills and abilities". The standards under the Better Regulation guidelines include matters of macroeconomics, microeconomics, social policy and environment policy. The complainant implies that there is a risk of bias when (most) RSB members have a background in economics, and not in social or environmental policy. Could the Commission please comment on this concern?

The Commission provided extensive answers to the questions posed by the European Ombudsman's inspection team. In particular, the Commission explained that the RSB – in line with its mandate – refused to discuss an individual file with the specific French interest representative and proposed instead a general presentation of the role of the RSB in the EU's regulatory framework. Hence the individual file was never discussed with them. As regards the case of the RSB member who served for more than six years, the Commission clarified that that member of the Board had been reappointed after a selection procedure on a different post following the change in the RSB Decision. The Ombudsman assessed that the Commission has not fully explained how it ensured the diversity of expertise among the RSB members. In addition, the Ombudsman was not convinced by the Commission's explanation of the impact the outreach activities with individual stakeholders may have on public perception of the independence of the Board. These unclarities were, however, insufficient for the Ombudsman to continue the inquiry.

VI. THE OMBUDSMAN DECISION AND ITS SUGGESTION FOR IMPROVEMENT

On 13 September 2024, the Ombudsman informed the Commission of the decision to close the complaint concluding that no further inquiries are justified.

In addition, the Ombudsman suggested to the Commission should ensure that:

- 1) when choosing their outreach activities, RSB members consider not only the actual risk of undue influence but also the public perception of their independence. In this context, RSB members should avoid holding meetings with individual interest representatives;
- 2) the composition of the RSB clearly corresponds to the diversity of the expertise required in its Communication on the RSB, that is, the three pillars of sustainable development, namely macro- and microeconomics, social policy and environment policy. The Commission should clearly describe the criteria it applies for selecting RSB members to this end.

VII. THE EUROPEAN COMMISSION REPLY TO THE OMBUDSMAN ADDITIONAL SUGGESTION

The Commission welcomes the suggestions for improvement by the European Ombudsman on further safeguarding the transparency of the Regulatory Scrutiny Board's outreach activities and preserving its balanced composition.

As regards the first suggestion (RSB members to avoid holding meetings with individual interest representatives), the Commission considers that – in line with its establishing decision – the RSB already applies a strict rule in such meetings of never discussing individual files, therefore minimising the real or perceived risk of policy bias in its proceedings. Instead, the RSB presents its role, responsibilities, tasks, and position of the Board within the Commission's better regulation framework. In this way, the knowledge is spread among all stakeholders which are not always fully aware of the role and functions of the RSB.

Article 12 of the Board's current Rules of Procedure provide that it "shall not discuss individual files with directly concerned stakeholders". To further increase transparency, the Commission may make these provisions even more explicit in their next revision specifying that the Board members shall not discuss individual files with any stakeholders, not only those directly concerned ones. This language will confirm beyond any reasonable doubts that any meeting of the Board with stakeholders will only concern matters of general interest related to its role, responsibilities, takes and position within the Commission.

Concerning the second suggestion about clearly describing the selection criteria the Commission applies for selecting RSB members, the Commission will make sure that the text of the future vacancy notices contain sufficient information on how the selection criteria are applied in the recruitment process. Furthermore, the Commission will stress in the in the vacancy notice that the recruitment of RSB members will aim at ensuring a sufficiently diverse expertise in the Board. The vacancy notices will also specify the weights of each main criterion (personal qualities, technical skills and expertise, and management / high-level

advisory skills) in the assessment of candidates by the selection panel. In this way, a diverse and balanced composition of the RSB will be spelled out even more clearly.

VIII. 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 within the boundaries set out in the Decision establishing the Board. These rules will be further emphasized in the Board's Rules of Procedure, stressing the general nature of the RSB outreach activities.

The Commission established the Regulatory Scrutiny Board with a view to assess the quality of impact assessments, fitness checks and evaluations against the better regulation guidelines and the better regulation toolbox, which both reflect the Commission's stance on its better regulation policy. One of the principles of that policy is a comprehensive approach to assessing the impacts across the policy cycle, considering economic, social, and environmental impacts of EU policies at the same time. To further stress this, the vacancy notice will make it clearer that the recruitment of RSB members will aim at ensuring a sufficiently diverse expertise on the three main categories of analysis.

For the Commission
Ursula VON DER LEYEN
The President

