

Dear President Von der Leyen,

Corporate Sustainability Due Diligence file, ‘better regulation’, and the Regulatory Scrutiny Board

We are extremely concerned about the process within the European Commission to develop the Corporate Sustainability Due Diligence (CSDD) file, as analysed in a recent report published by Corporate Europe Observatory, Bund, and Friends of the Earth Europe.¹ Below we set out our concerns.

Background

A plan to oblige European companies to respect, prevent, and repair human rights abuses and environmental damage as a consequence of their operations abroad should have been a real step forward, and we welcomed DG Justice’s original ambition for the CSDD file.

However, when the final proposal was published, environmental groups, consumer associations, human rights groups, and trade unions were all disappointed. The number of companies covered by the draft law is very low, and the scope in terms of the value chain is very small. It talks of “established business relationships”, potentially reducing the impact of the law to direct suppliers. The original aim to push boards and directors to draw up strategies in collaboration with stakeholders has been diluted and it now seems they can rely on voluntary industry initiatives that have delivered little in the past. The climate obligations are vague and lack teeth to enforce them. Finally, the draft does not guarantee liability in European courts and leaves the burden of proof completely on victims.

As our report makes clear, we consider that the two negative opinions of the Regulatory Scrutiny Board (RSB) on the CSDD impact assessment reports had a significant impact in diluting the ambition of DG Justice for this file and led to this extremely disappointing outcome.

We would like to raise the following concerns regarding both the rules and the ways of working of the RSB and the Commission.

1 <https://corporateeurope.org/en/inside-job>

1. Direct lobbying of the RSB

The RSB is not supposed to discuss individual files or proposals with lobbyists.² However, it appears that the RSB is available to lobbyists in written form. Our report sets out how various corporate lobby groups wrote to the Board with their critique and lobby demands regarding the CSDD proposal. We were astonished to see the way in which the chairperson of the Board at the time, Veronica Gaffey, was writing back to these corporate lobbies.

In March 2021 Danish business lobby Dansk Industri (DI) wrote a detailed letter to the RSB setting out its critique of the CSDD as indicated by DG Justice's consultation. DI also included various links to 'academic' articles with a political undertone.³ DI's letter was echoed by the Confederation of Swedish Enterprise (Svenskt Näringsliv, or SN) in a similar missive.⁴ Ms Gaffey's reply is fairly bland but likely provided some reassurance to the corporate lobbies, stating that the RSB would scrutinise "all evidence underpinning the proposal, including supporting studies and stakeholders' input." When DI and SN wrote to the Board again in November 2021, Ms Gaffey wrote back even more strongly to say that she took "good note" of their correspondence and that several of DI's concerns would form an "important element of scrutiny".⁵

We believe that this kind of interaction between the RSB and corporate lobbies is not compatible with the spirit of the rules. If specific legislative files should not be discussed in RSB meetings with lobbyists, then surely the RSB should not be lobbied in writing by corporate lobbies either.

Clearly DI considers that its interventions with the RSB were significant. When the RSB issued its second negative opinion on the CSDD file, DI boasted that "we have ... specifically drawn the attention of the Regulatory Scrutiny Board to which Better Regulation principles were not respected and why".⁶

Additionally, in November 2020, Ms Gaffey met with the French corporate lobby AFEP. AFEP had approached Gaffey for a meeting specifically on the CSDD file, but the preparatory email exchanges indicate that she would instead make a "general presentation on the work of the Board in the EU regulatory process", in line with the RSB's 'no meetings on specific files' rule.⁷ We note that the presentation that Ms Gaffey supposedly gave to this meeting does not include content on CSDD.

However, rather curiously, for over one year subsequently, this meeting was listed publicly

2 European Commission. Decision of the President of the European Commission on an independent Regulatory Scrutiny Board. 23 January 2020. https://ec.europa.eu/info/sites/default/files/rsb_decision_23_01_2020_en.pdf

3 Letter from DI to RSB 10 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20DI%2010.3.2021.pdf>

4 Letter from Swedish Enterprise to RSB 15 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Swedish%20Enterprise%2015.3.2021.pdf>

5 Letter from RSB Gaffey to DI 22 November 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Gaffey%20RSB%20to%20DI%2022.11.2021.pdf>

6 Dansk Industri. To røde kort til Europa-Kommissionen: Nyt regelsæt for selskabsledelse er igen skudt til hjørne. 2 December 2021. <https://www.danskindustri.dk/di-business/arkiv/nyheder/2021/12/to-roede-kort-til-europa-kommissionen-nyt-regelsat-for-selskabsledelse-er-igen-skudt-til-hjorne/>

7 Exchanges between AFEP and RSB: <https://corporateeurope.org/sites/default/files/2022-05/Emails%20between%20Afeep%20and%20RSB.pdf>

on the RSB's web page as having been on the CSDD file, which would of course have been a breach of the RSB's own rules. After the nature of the meeting was queried by MEPs and CSOs, the listing was then updated to describe the subject of the meeting as: "IIA of the Commission on sustainable corporate governance and the consultation on the relevant subject. The Chair of the RSB did not discuss this proposal but provided a general presentation on the work of the Board in the EU regulatory process". However, AFEP later told *Mediapart* that several participants had raised the file during the meeting.⁸

It seems to us that there is a significant loophole in the rules and ways of working of the RSB if lobbyists are able to express their concerns to RSB members about specific pieces of legislation in face to face meetings, whether or not the RSB members themselves engage in a discussion on the file.

We consider it to be maladministration that the RSB interacted with corporate lobbies on the CSDD file in the ways outlined above.

2. Privileged access for like-minded organisations

The RSB is encouraged to undertake outreach to "raise awareness of its work outside the EU's political institutions and thereby strengthen trust in the quality of the Commission's work".⁹ The chairpersons of the RSB are required to publish a list of all meetings they hold with lobbyists and 23 such meetings have been listed since the RSB was created in 2015.¹⁰ Of these a maximum of 2 have been held with organisations which might have dissented from the 'better regulation' orthodoxy. Instead, 90 per cent plus of these meetings were held with corporate interests and think tanks supportive of 'better regulation'.

We are unclear how this is compatible with, for example the requirement that commissioners (who are also required to publish a list of their lobby meetings) "should seek to ensure an appropriate balance and representativeness in the stakeholders they meet".

Additional external meetings have been held by other members of the RSB and for the years 2020 and 2021 we have obtained a list of these via access to documents requests.¹¹ Analysis of these meetings and events reveals further events of concern. RSB members met with the pharmaceutical industry lobby and had two meetings with the controversial European Risk Forum (now re-branded as the European Regulation and Innovation Forum), a lobby platform which includes highly risky industries such as chemicals. From what we can see of the meetings with trade associations, the discussions have covered

8 *Mediapart*. A Bruxelles, le lobbying en zone grise des grandes entreprises françaises. 9 February 2022. <https://www.mediapart.fr/journal/international/090222/bruxelles-le-lobbying-en-zone-grise-des-grandes-entreprises-francaises>

9 European Commission. Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions - Better Regulation: Joining forces to make better laws. April 2021. https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf

10 <http://ec.europa.eu/transparencyinitiative/meetings/listPredecessors.do?host=242a8924-48a5-4983-b75f-fab577a950b7>

11 Check the spreadsheet for a full list of these meetings: https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing

the quality of impact assessments, political involvement, the impact of the RSB, whether Commission services take on board recommendations by the RSB, and whether proposals are delayed by negative opinions. These are all very useful insights for those looking to influence the process in some form.¹²

We consider that it is maladministration that the chairpersons of the Board have consistently only met with lobbies supportive of the Regulatory Scrutiny Board. Additionally we consider that discussions with corporate lobby groups risk aiding them to disrupt public interest law-making.

3. Membership of the RSB

A look at the online CVs of the current members of the RSB indicates that almost all have economics or business administration backgrounds.¹³ The current chairperson spent 10 years as head of the Commission's translation service. However RSB members' expertise is supposed to cover "macroeconomics, microeconomics, social policy and environment policy (so as to cover the three pillars of sustainable development)".¹⁴ Where is the required social and environmental expertise?

We consider that this is also a historical problem with only one former member, Isabelle Schömann, bringing a substantially different background and expertise to other members.¹⁵

This adds further weight to concerns that 'better regulation' prioritises corporate concerns and economic arguments over public interest, social, and environmental arguments for regulation. This is a particular worry considering the Von der Leyen Commission's focus on the European Green Deal, which is generating numerous legislative files with an environmental theme.

We further note that one member of the Board has been in post since 2016 when the terms are supposed to last only three years.¹⁶

We consider that it is maladministration that the RSB is not following its own membership rules. It is extremely concerning that the RSB does not include experts on social policy and environment policy.

12 Topics gathered from the spreadsheet of these meetings:

https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit?usp=sharing

13 See https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0_en

14 European Commission. Communication to the Commission: Regulatory Scrutiny Board - Mission, tasks and staff. 19 May 2015. https://ec.europa.eu/info/sites/default/files/communication-on-the-regulatory-scrutiny-board-mission-tasks-and-staff_may2015_en.pdf

15 This information is available in Regulatory Scrutiny Board annual reports: https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board_en#annual-reports

16 According to https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0_en Bernard Naudts has served on the RSB since 2016.

4. Absence of evaluation of the 'better regulation' agenda

The Commission itself has said of the RSB: "No regulatory oversight body in the Member States is given this degree of influence".¹⁷

We agree that the RSB has phenomenal powers and we are very concerned that neither the Board nor the aims, scope, and implementation of 'better regulation' have undergone any rigorous evaluation since they were originally launched in 2015.

Such a review is urgent and long overdue as there are significant concerns within civil society that the 'better regulation' agenda, including the RSB, are being used by corporate lobbies to undermine progressive proposals. We endorse the view of the European Environmental Bureau and NEF who have argued that we need to rethink regulation, no longer seeing it as a 'burden' but instead as a vital tool to achieve social, environmental, and equality objectives. They advocate for a "think sustainability first" principle to guide EU law-making to help us to re-protect Europe for the challenges we face.¹⁸ The evidence from our investigation into the CSDD reinforces the need for a new approach.

And we are not just concerned about the influence of 'better regulation' and the Board on the final CSDD legislative proposal. The RSB's opinions are being subsequently used by corporate lobbies to add weight to their own lobby demands. For example, the BusinessEurope critique of the CSDD proposal, published May 2022, includes 12 positive references to the RSB's two negative opinions.¹⁹

We consider that there is a significant risk that corporate lobbies will look at the experience of the CSDD file and will in the future consider that some well-timed interventions towards the RSB could help trigger processes to delay and dilute other pieces of upcoming regulation.

We consider that it is maladministration that the Commission has not evaluated either 'better regulation' or the work of the RSB. Such an evaluation should look at how they enable corporate lobby arguments and undermine public interest regulation.

I look forward to hearing from you in response to these concerns.

Yours sincerely,



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17 European Commission. Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions - Better Regulation: Joining forces to make better laws. April 2021.

https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en_0.pdf

18 David Powell, Patrick ten Brink, Francesca Carlsson, Emily Scurrah, Frank van Lerven, Adrian Bua. Reprotecting Europe: The European Green Deal vs the war on regulations. 23 January 2020.

<https://neweconomics.org/2020/01/reprotecting-europe>

19 <https://www.besnesseurope.eu/publications/proposal-directive-corporate-sustainability-due-diligence-csdd-besnesseurope-comments>