

Dear EU Ombudsman, Ms O'Reilly,

Further to our complaint to the European Commission about the work of the Regulatory Scrutiny Board (RSB), including on the Corporate Sustainability and Due Diligence (CSDD) file, which was sent on 15 July 2022, and the reply from the Commission which was received on 30 November 2022, we are writing to make a complaint of maladministration.

Against which European Union (EU) institution or body do you wish to complain?

The European Commission, specifically the RSB and the Secretariat-General which is where the RSB and its secretariat are situated.

What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

In June 2022, Corporate Europe Observatory, Bund, and Friends of the Earth Europe published a report which looked into lobbying on the CSDD file and the role played by the RSB.¹

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 was very low, and the scope in terms of the value chain was very small. It talked 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 had been diluted and they would have to rely on voluntary industry initiatives that have delivered little in the past. The climate obligations in the CSDD proposal were vague and lacked teeth to enforce them. Finally, the draft did not guarantee liability in European courts and left the burden of proof completely on victims.

As our report makes clear, we consider that the two negative opinions of the 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.

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

This complaint relates to the ways of working of the RSB including its interactions with lobbyists; the composition of the RSB including the absence of environmental and social policy expertise; and the lack of an external, independent evaluation of the work of the RSB and the 'better regulation' agenda. Additionally, we make some further remarks regarding the failure of the Commission to publish, in real time, impact assessment(s) reviewed by the RSB and the opinion(s) of the RSB on them, as well as the absence of public minutes of RSB meetings.

What do you consider that the EU institution or body has done wrong?

Below are four points plus a final comment about the Commission's approach to transparency regarding the work of the RSB.

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 several 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 Gaffney, wrote 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 Gaffney's reply was 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 Gaffney wrote back 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, and nor should the RSB respond in this way.

Clearly DI considered 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

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

Regulation principles were not respected and why”.⁶

We find the Commission’s response that “The Board acknowledged the information received from Dansk Industri without expressing views regarding the content of the letters” to be rather disingenuous.⁷

A further issue is if and how RSB members used the material that was sent in by corporate lobby groups; that is not clear to us as outsiders in the process.

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.⁸ 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 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 CSDD file during the meeting.⁹

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 RSB members themselves engage in a discussion on the file. The Commission did not address this point in its November 2022 response and simply repeated some of what we had already stated: “Mrs Gaffey clearly informed the AFEP that she would not discuss any individual files and would only present the role of the Board in the better regulation system of the Commission.”¹⁰

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

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 <https://corporateeurope.org/sites/default/files/2023-02/Reply%20to%20Com%20complaint%2030.11.22.pdf>

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

9 *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>

10 <https://corporateeurope.org/sites/default/files/2023-02/Reply%20to%20Com%20complaint%2030.11.22.pdf>

work”.¹¹ The chairpersons of the RSB are required to publish a list of all meetings they hold with lobbyists and 24 such meetings have been listed since the RSB was created in 2015.¹² 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”. We note that the rate of meetings with the chair of the RSB appears to have eased off somewhat in recent times.

Additional external meetings have been held by other members of the RSB. Originally, the list of meetings for the years 2020 and 2021 were only obtainable via access to documents requests.¹³ We now note that lists of meetings held in 2022 and 2021 have been proactively published on the RSB webpage which we welcome,¹⁴ although we regret that there is no list for 2023 (yet). This perhaps indicates that the meetings are only published retrospectively at the year end, rather than in real time, which would be much more transparent and would boost accountability. Nor are the lists provided in a user-friendly format.

Analysis of all of these meetings and events reveals further points of concern. RSB members met with, for example, the pharmaceutical industry lobby and had four meetings with the controversial European Risk Forum (now re-branded as the European Regulation and Innovation Forum), a think-tank whose membership base includes highly risky industries such as chemicals.¹⁵ From what we can see of the meetings with trade associations, the discussions have covered 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. Likely these would all be very useful insights for those looking to influence the process in some form.¹⁶ We note that in 2022 several critics of the RSB’s work (MEPs) were met, which is a welcome development.

We consider that it is maladministration that the chairpersons of the Board have consistently only met with lobbies supportive of the ‘better regulation’ agenda. We

11 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

12 <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=242a8924-48a5-4983-b75f-fab577a950b7> + CEO spreadsheet of all such meetings:

https://docs.google.com/spreadsheets/d/1wc3HOK2DZh0tPeDh_ugBVOspa-RiZ2JbXgUVvi025vY/edit#gid=1427934756

13 Check the spreadsheet for a full list of these meetings:

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

14 https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en#composition

15 <https://www.lobbyfacts.eu/datacard/european-risk-forum?rid=52996964558-47>

16 Topics gathered from the spreadsheet of these meetings:

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

consider there is a further risk that the external meetings of the wider RSB are too weighted towards advocates of the ‘better regulation’ agenda.

3. Membership of the RSB

A look at the online CVs of the current members of the RSB indicates that none have the social or environmental background demanded by the RSB’s original mandate which requires the members to have expertise in “macroeconomics, microeconomics, social policy and environment policy (so as to cover the three pillars of sustainable development)”.¹⁷ The current chairperson spent 10 years as head of the Commission’s translation service; other internal Commission appointments have backgrounds in migration, agriculture, and Security Union policies. The two external appointees have a background in industry and/ or economic policy.¹⁸

We consider that the absence of real environmental and social expertise is a historical problem for the RSB with only one former member, Isabelle Schömann, bringing a substantially different background and expertise.¹⁹

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.

The Commission did not address these concerns in any real way in its November 2022 response, simply responding that the Board members have “a high-level and broad expertise”. We consider this a totally inadequate response and think that the Commission should ask itself deep questions about why it has not recruited anyone with a social or environmental policy background, with the notable exception of Ms Schömann, to this controversial body. Since we wrote to the Commission in July 2022, we note that it has increased the maximum number of RSB members to nine.²⁰

Finally, in our July 2022 letter to the Commission we noted that one member of the Board had been in post since 2016 when the terms are supposed to last only three years.²¹ We note he has now left, but this issue was also not addressed in the Commission’s cursory reply.

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.

17 European Commission. Communication to the Commission: Regulatory Scrutiny Board - Mission, tasks and staff. 19 May 2015. https://commission.europa.eu/document/download/a56c4562-6ce2-477a-9caf-c2a0c7141e4a_en?filename=communication-on-the-regulatory-scrutiny-board-mission-tasks-and-staff_may2015_en.pdf

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

19 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

20 https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en#composition

21 According to information available at the time, Bernard Naudts served on the RSB 2016-22.

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".²²

We agree that the RSB has phenomenal powers, including an effective *de facto* veto on upcoming proposals which can only be overcome by a vote of the College of Commissioners, and we are very concerned that neither the Board nor the aims, scope, and implementation of 'better regulation' have undergone any independent evaluation since they were originally launched in 2015. We note the "stocktaking exercise" in 2019, but we understand that this was conducted in-house by the Commission itself. As such it was unlikely to ever question the fundamental rationale of 'better regulation', although we note that the NGOs and trade unions that contributed to the stocktake challenged 'better regulation'.²³ We maintain that an independent review is overdue.

We consider that it is maladministration that the Commission has not undertaken an independent evaluation of either 'better regulation' or the work of the RSB.

Additional remarks regarding transparency of the work of the RSB

We note that usually the Commission only publishes the final impact assessment(s) on any given legislative dossier and the RSB's final opinion on it, when the legislative proposal itself is published. This procedure is set out in the RSB's most recent Rules of Procedure dated 31 January 2023.²⁴

However, we are aware of the Judgment of the Court of Justice of the European Union of 4 September 2018 in Case C-57/16 P²⁵ in which the Court held that documents drawn up in the context of an impact assessment procedure for a legislative proposal constitute legislative documents that should be made directly accessible to the public pursuant to Article 12(2) of Regulation No 1049/2001, before the proposal, and that access should not be denied on request.

The Court made clear that transparency in EU decision-making processes contributes "to increasing those citizens' confidence in those institutions" and recognised that the disclosure of information in good time is crucial to allow citizens to make their views known in an ongoing decision-making procedure. Specifically regarding draft and final impact assessment reports and RSB opinions, the Court held that, "such a disclosure, at a time when the Commission's decision-making process is still ongoing, enables citizens to understand the options envisaged and the choices made by that institution and, thus, to be aware of the considerations underlying the legislative action of the European Union. In addition, that disclosure puts those citizens in a position effectively to make their views known regarding those choices before those choices have been definitively adopted, so far

22 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

23 https://commission.europa.eu/publications/better-regulation-taking-stock-and-sustaining-our-commitment_en

24 https://commission.europa.eu/document/download/6f90ad20-4eb9-4888-ac72-ac7e9ff49223_en?filename=2%20RSB%20Rules%20of%20procedure-%20revision%202023%20signed.pdf

25 Case C-57/16P, ClientEarth v. EU Commission, ECLI:EU:C:2018:660

as both the Commission's decision to submit a legislative proposal and the content of that proposal, on which the legislative action of the European Union depends, are concerned."

Please note that we have two access to document requests (currently at confirmatory application stage) to seek access to the impact assessment and RSB opinion on two specific chemical policy files: the REACH revision and the Mercury regulation, as we do not consider that the Commission is currently compliant with the above case law. In the former case we have only received a heavily-redacted impact assessment and opinion; in the second case, we did not receive anything.

We will keep you updated on these matters but we urge the Ombudsman to investigate whether it is appropriate for impact assessments and RSB opinions to only be published with the final legislative proposal, especially in the light of Case C-57/16 P.

We further urge the Ombudsman to consider whether it is appropriate that the Commission does not make public the minutes of Board meetings.

Finally we support the work of the EU Ombudsman to investigate why the Commission does not publish full declarations of interest for the members of the RSB.²⁶

What, in your view, should the institution or body do to put things right?

We consider that the Commission should:

- Evaluate the access that corporate lobbies have to the RSB and its members and ensure that there is no privileged access.
- Evaluate the role that corporate lobbying played in influencing the RSB's decision-making on the CSDD file. Unfortunately, it is too late to remedy any damage wrought by corporate influence as the file is now mid-way through the legislative process, but lessons should be learnt.
- Put in place more robust mechanisms to ensure that no corporate lobbying influences future RSB decision-making.
- Proactively publish a user-friendly list of lobby meetings with the RSB, in real time, which is linked to the EU lobby register in order to ensure that only those in the register are met.
- Ensure that the membership of the RSB includes sufficient environmental and social policy expertise.
- Undertake an independent evaluation of both the RSB and the 'better regulation' agenda.
- Open up the work of the RSB by, for example, publishing impact assessments and RSB opinions, and the minutes of RSB meetings, in real time.
- Publish the declarations of interest of RSB members.

Ultimately, Corporate Europe Observatory agrees with the European Environmental Bureau and NEF who have argued that there should be a rethink about regulation, no longer seeing it as a 'burden' as the 'better regulation agenda tends to do, but instead

²⁶ <https://www.ombudsman.europa.eu/en/case/en/63133>

viewing it as a vital tool to achieve social, environmental, and equality objectives. These CSOs advocate for a “think sustainability first” principle to guide EU law-making to ensure we re-protect Europe for the challenges we face.²⁷ The evidence from our investigation into the CSDD reinforces our view that there needs to be a totally different approach. Our wider critique of the ‘better regulation’ agenda is available on our website.²⁸

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes. Our complaint to the Commission about the work of the RSB was sent on 15 July 2022²⁹ and the reply from the Commission was received on 30 November 2022.³⁰

If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Not applicable.

Has the object of your complaint already been settled by a court or is it pending before a court?

For points 1-4 above, no. However, please see our comments above about the Judgment of the Court of Justice of the European Union of 4 September 2018 in Case C-57/16 P as it relates to the publication of impacts assessments and RSB opinions.

Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he or she is not entitled to deal with it?

Yes.

Do you agree to participate in a short survey (about one minute in length), once your case has been closed, to help us improve the service we provide to complainants?

Yes.

27 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>

28 <https://corporateeurope.org/en/better-regulation-corporate-friendly-deregulation-disguise>

29 <https://corporateeurope.org/sites/default/files/2022-11/Commission%20complaint%20CSDD%2015.7.2022%20FINAL.pdf>

30 <https://corporateeurope.org/sites/default/files/2023-02/Reply%20to%20Com%20complaint%2030.11.22.pdf>

We look forward to hearing from you in response to these concerns. Please let us know if you require any additional information. Thank you in advance for your interest.

Yours sincerely,



Vicky Cann

vicky@corporateeurope.org