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# THE EU'S COMMISSION REGULATORY SCRUTINY BOARD: BETTER REGULATION OR BIASED INFLUENCE ON LEGISLATION?

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# The EU's Commission Regulatory Scrutiny Board: Better regulation or biased influence on legislation?

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## Executive Summary

This study examines the role and impact of the European Commission's Regulatory Scrutiny Board (RSB) on the EU legislative process. The RSB was created in 2015 as an oversight body to assess the quality of draft impact assessments, fitness checks, and major evaluations within the Commission. While some studies have argued that the RSB contributes to better regulation, recent examples in EU decision-making (e.g., the Corporate Sustainability Due Diligence Directive) cast doubts over its role and potential biases towards large industries. Therefore, this report analyses the RSB's role and potential influence and has two interlinked aims. First, to shed light on the RSB's inner activities, the report provides a literature review on the better regulation agenda and the development of the RSB, as well as an analysis of the RSB's activities from 2015 to 2022. Second, to scrutinise the RSB's potential influence on EU's legislative decision-making, the report presents the main voices of critics towards the RSB in selected legislative examples. The overall aim is to shed light on the RSB's role in the EU legislative process and explore to what extent its opinions may influence decision-makers in this process.

Based on an analysis of the official RSB documents, a vast range of Commission's documents, newspaper articles, reports by interest groups and NGOs, and seven elite interviews, the study provides four concrete policy recommendations for the RSB in EU's legislative process. First, the study argues that the better regulation agenda and the RSB toolbox should be evaluated again in light of the current high ambitions in the area of sustainability of the current Commission under Ursula von der Leyen. To ensure higher social and environmental standards, smarter than less regulation is often needed. Instead of having a narrowed focus on arithmetic principles like the regulatory offsetting ('one-in, one-out' approach), impact assessments should account for long-term impacts on society. Second, the study recommends that it is unnecessary to classify between positive versus negative opinions. Specifically, the study criticises the possibility of the RSB to issue second negative opinions as this tends to politicise the EU legislative process. Third, the study argues that the RSB's de facto veto position should be abolished as second negative opinions tend to delay the legislative process, while enhancing polarisation among policy-makers. Fourth, the study recommends enhanced transparency and the facilitating access to RSB's documents.

The study suggests that the RSB promotes policy-making behind closed doors and lacks public accountability. Moreover, the structure and priorities of the RSB indeed imply that it potentially exerts a biased influence. The analysis of the RSB in this study demonstrates that external opinions are increasingly influencing the legislative process. The author calls for a rethinking of the current RSB and suggests considering alternatives to the Board.

## Zusammenfassung

Diese Studie untersucht die Rolle und Auswirkungen des Ausschusses für Regulierungskontrolle („Regulatory Scrutiny Board“, RSB) der Europäischen Kommission auf den EU-Gesetzgebungsprozess. Der RSB wurde 2015 als Überwachungsgremium geschaffen, um die Qualität von Entwürfen zu Folgenabschätzungen, Eignungsprüfungen und wichtigen Evaluierungen innerhalb der Kommission zu bewerten. Während einige Studien argumentieren, dass der RSB zu einer besseren Regulierung beiträgt, haben jüngste Beispiele in der EU-Entscheidungsfindung (z.B. die Richtlinie über die Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit) Zweifel an seiner Rolle und Bedenken hinsichtlich einer potenziellen Voreingenommenheit zugunsten von Großindustrien aufkommen lassen. Dieser Bericht analysiert daher die Rolle und den potenziellen Einfluss des RSB und verfolgt dabei zwei Ziele. Um die inneren Aktivitäten des RSB zu beleuchten, bietet der Bericht erstens eine Literaturübersicht über die Agenda für bessere Rechtsetzung und die Entwicklung des RSB sowie eine Analyse der Aktivitäten des RSB von 2015 bis 2022. Zweitens präsentiert der Bericht die wichtigsten kritischen Stimmen gegenüber dem RSB in ausgewählten gesetzgeberischen Beispielen, um den potenziellen Einfluss des RSB auf die EU-Gesetzgebungsentscheidung zu untersuchen. Das übergeordnete Ziel ist es, die Rolle des RSB im EU-Gesetzgebungsprozess zu beleuchten und zu untersuchen, inwieweit seine Stellungnahmen EntscheidungsträgerInnen in diesem Prozess beeinflussen.

Basierend auf einer Analyse der offiziell verfügbaren RSB-Dokumente, zahlreicher Dokumente der Kommission, Zeitungsartikel, Berichte von Interessengruppen und NGOs sowie von sieben Eliteinterviews, liefert die Studie vier konkrete Politikempfehlungen für den RSB. Erstens sollte die Agenda für bessere Rechtsetzung und die RSB-Toolbox erneut im Lichte der derzeit hohen Nachhaltigkeitsziele der aktuellen Kommission unter Ursula von der Leyen evaluiert werden. Um höhere Sozial- und Umweltstandards zu gewährleisten, ist oft eine „smartere“ und nicht weniger Regulierung erforderlich. Anstatt sich auf arithmetische Grundsätze wie das „One In, One Out“-Prinzip zu konzentrieren, sollten Folgenabschätzungen stärker langfristige Auswirkungen auf die Gesellschaft berücksichtigen. Zweitens empfiehlt die Studie, nicht zwischen positiven und negativen Stellungnahmen zu unterscheiden. Insbesondere kritisiert die Studie die Möglichkeit des RSB zweite negative Stellungnahmen abzugeben, da dies dazu neigt, den EU-Gesetzgebungsprozess zu politisieren. Drittens argumentiert die Studie, dass die De-facto-Vetomacht des RSB abgeschafft werden sollte, da zweite negative Stellungnahmen dazu neigen, den Gesetzgebungsprozess zu verzögern und die Polarisierung unter den politischen EntscheidungsträgerInnen zu verstärken. Viertens empfiehlt die Studie eine größere Transparenz und den erleichterten Zugang zu den Dokumenten des RSB.

Die Studie legt nahe, dass der RSB die Politikgestaltung hinter verschlossenen Türen fördert und öffentliche Rechenschaftspflicht vermissen lässt. Darüber hinaus lassen Struktur und Prioritäten des RSB vermuten, dass er möglicherweise einen parteiischen Einfluss ausübt. Die Analyse des RSB in dieser Studie zeigt, dass Meinungen von außen den Gesetzgebungsprozess

zunehmend beeinflussen. Die Autorin fordert ein Umdenken im Hinblick auf den derzeitigen RSB und hält das Inbetrachtziehen von Alternativen zu dem Gremium für überlegenswert.

## 1. Introduction

As part of the so-called ‘better regulation’ agenda, the European Commission (Commission thereafter) created the Regulatory Scrutiny Board (RSB) in 2015 as a semi-independent oversight body. Its main task is to assess the quality of draft impact assessments, fitness checks, and major evaluations within the Commission (European Commission, 2023: 3; Gaffey 2020: 166-167; Regulatory Scrutiny Board 2021a: 4). However, while research has focused on the Commission’s better regulation agenda (Dunlop & Radaelli, 2015; Golberg, 2018; Højlund, 2015), and its general consultation regime (Bunea, 2018; Bunea & Thomson, 2015; Van Bal-laert, 2017), little is known about the function and impact of the RSB. The few studies that exist are optimistic and argue that the RSB contributes to better regulation (OECD, 2018) and serves as an ‘active watchdog’ (Senninger & Blom-Hansen, 2021). Yet, recent examples from EU decision-making cast doubts over this interpretation. A range of societal actors have argued that RSB’s negative opinions on reports accompanying crucial proposed legislation (e.g., the Corporate Sustainability Due Diligence Directive) are biased in favour of large industries (e.g., BUND et al., 2022) and, thus, led to a biased influence in the decision-making. Despite these contradictory stances, we still lack systematic knowledge about how the Board functions and its potential impact on the EU legislative process.

This study addresses the above-mentioned knowledge gap and asks: ***What is the role of the RSB and to what extent does it influence the EU legislative process?*** To answer this question, the study has two interlinked aims. First, it examines the better regulation agenda and the development of the RSB to shed light on its inner activities. Second, it presents the main voices of critics towards the RSB and analyses to what extent the RSB and its opinions can affect the EU legislative process based on selected examples. Thus, the overall aim is to shed light on the RSB’s role in the EU legislative process and explore to what extent its opinions may influence decision-makers in this process. Therefore, this report enhances our understanding of how expert opinions in EU governance may influence legislative decision-making.

The remainder of the study is structured as follows. The first section provides a literature review on the RSB and briefly discusses the data and methods. The second discusses the Commission’s better regulation agenda and analyses the RSB’s activities from its inception in 2015 until 2022. Thereafter, the third section scrutinizes the Board’s potential influence on EU legislative decision-making in selected examples and derives some critical shortcomings of the



RSB. Lastly, the fourth section builds on the report's findings and provides policy recommendations.

## 2. What is the Regulatory Scrutiny Board (RSB)?

According to the Commission, the RSB's main tasks are to *independently* scrutinise the quality of i) **all draft impact assessments** that accompany the Commission's legislative proposals, ii) **fitness checks**, and iii) **selected evaluations** (European Commission, 2023: 3; Gaffey 2020: 166-167; Regulatory Scrutiny Board 2021a: 4). All major policy proposals are accompanied by such draft impact assessments and the RSB **issues opinions and recommendations** on them (European Commission: 3). This means that the RSB is involved in every step of the policy process, from the policy formulation to evaluation (see Figure 1). While the Commission argues that the RSB is a *de jure* independent audit body (within the Commission), I follow previous research and maintain that it is more reasonable to classify it as *semi-independent* (see also Senninger & Blom-Hansen, 2021). This is because half of the RSB's nine members (four) and the chair come from the Commission, while the other half (four) are recruited externally (European Commission 2023). Importantly, however, the composition of the RSB has changed in January 2023 with a decision on the revised rules of procedure from formerly seven to nine members (European Commission 2023: 1).

Moreover, the position of the RSB has a **potentially wide-ranging influence**. All major proposals must be accompanied by an impact assessments report and these reports must be assessed by the RSB. If the Board issues a negative opinion on a draft report, it must be revised by the Commission's services and submitted to the Board again. If the Board issues a second negative opinion, only the Vice-President for Inter-institutional Relations and Foresight may submit the initiative to the College of Commissioners to decide whether or not to go ahead with the proposal (European Commission, 2022g). Thus, I argue that the RSB holds a **veto position** in the legislative process (see also Senninger & Blom-Hansen, 2021: 1437). It is important to stress, however, that the **RSB does not decide on initiatives or policy objectives**, which is the task of the Commission (Gaffey 2020: 167).

Figure 1 illustrates the RSB's overall role in this policy process.

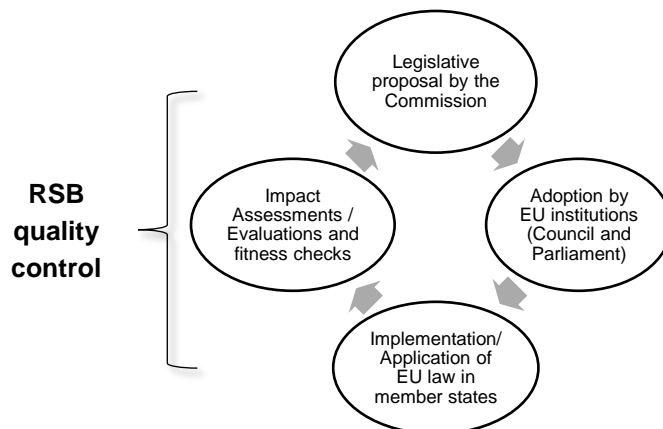


Figure 1: The role of the RSB within the EU legislative process

Despite its powers, the RSB is rather unknown outside the inner circles of EU institutions and there are only a few studies on its role and activities (Meuwese & Gomtsian, 2015; Radaelli, 2018; Senninger & Blom-Hansen, 2021), including a study from the former chair of the Board (Gaffey, 2020). These studies provide mixed findings. For example, Radaelli and Meuwese (2010) conclude that already the forerunner of the RSB – the Impact Assessment Board (IAB) – enabled policy learning and created an understanding of what impact assessments need to entail. In this vein, Meuwese and Gomtsian (2015) argue that the opinions by the IAB were crucial in developing tests and standards for subsidiarity and proportionality in decision-making. In 2015, the IAB was transformed into the RSB and the two major goals of this transformation was to also recruit independent experts from outside the EU institutions. The aim was further to professionalise the Board with members working full-time for the Board who are bound to the principle of collective responsibility (Radaelli 2018). The OECD, for example, classifies the **RSB as best practice example** in regulatory practices. This is due to the fact that the RSB involves more comprehensive assessment criteria than any other national better regulation Boards and, thus, serves as an effective quality control for EU proposed legislation (OECD, 2018). Similarly, a recent study has analysed all RSB's opinions over time in a systematic way and conclude that the RSB is an **'active and effective watchdog'** that is taken seriously by the Commission and its departments (Senninger & Blom-Hansen, 2021).

In contrast to the positive assessments of the RSB, scholars have also criticised its low degree of independence from the Commission, and argued that **trust among member states** would increase if **no officials from the Commission** participated in the Board (Radaelli, 2018). On a similar note, scholars have argued that the staffing of the Board with internal members from the Commission – like in the case of the RSB’s forerunner – does not ensure neutral assessments but, in practice, enhances the **political nature of *ex ante* evaluations** in the EU (Smismans, 2015: 22). Still, despite the divergent views on the RSB reviewed above, research on the Board’s role and impact on the legislative process is scant. This is surprising as the Board has become increasingly politicised, and critical voices claim that it even can obstruct or delay social and environmental legislation (BUND et al., 2022) that are crucial for the realisation of core EU’s initiatives, such as the European Green Deal.

### 3. The RSB between better regulation and increased politicisation

It follows from the discussion above that the RSB is an example of non-elected officials exerting power over democratic decision-making. The development towards this type of **expert driven policy-making** is a consequence of the Commission’s better regulation agenda. This agenda became one of the Commission’s top priorities for three reasons (Golberg, 2018; Radaelli & Dunlop, 2022; Senninger & Blom-Hansen, 2021). First, the so-called democratic deficit (Scharpf, 1999; Schmidt, 2020) played an important role in enhancing the perception among EU elites that the legitimacy of the EU should be strengthened by involving societal actors and citizens in EU’s decision-making (Radaelli & De Francesco, 2007; Smismans, 2019). Second, member states (especially the UK, Germany, and the Netherlands), along with various European businesses, exerted pressure on the Commission to simplify EU legislation (‘war on red tape’) and provide better *ex ante* assessments of legislation (Golberg, 2018; Radaelli & Dunlop, 2022). Third, the European Parliament and other member states aimed to improve EU legislation while the increased occurrence of non-compliance and implementation failures in the member states made the Commission increasingly more vigilant to ensure compliance and better law-making (Börzel, 2021; European Commission, 2020c; Laffan, 1997; Pircher 2022).

The developments described above were all important to the development of the Commission's better regulation agenda (Kassim & Menon, 2004; Radaelli & Meuwese, 2010). As the better regulation agenda was a top priority, the Commission sought to enhance its administrative powers (Kassim et al., 2017), and one aspect of this strategy was to delegate important tasks to the RSB, an oversight body. Thus, the **RSB is at the forefront of the call for better regulation**. Yet, its role in legislative decision-making comes with risks. On the one hand, the externalising of policy-making to non-partisan and non-elected actors can **foster de-politicisation** (Bartolini, 2005; Mair, 2013). On the other hand, non-elected expert groups like the RSB may have **agendas on their own**, which makes the RSB also **prone to lobbying**, and, thus, contributes to a de facto **politicisation** by prioritising some interests over others. When looking at the RSB's activities, there seems to be reasons to raise these concerns. For example, in 2022 the Board issued a total of four second negative opinions. Furthermore, the notion that the RSB ensures that regulations serve the public interest has raised critical questions on the RSB's role, activities, and its independence from the Commission and powerful business interests.

#### 4. Data and Methods

The RSB's role in EU legislative process has been largely neglected in the research. Specifically, while the RSB aims to be transparent, its functions are still opaque and not well understood. This report sheds light on these neglected aspects. However, the main aim is to focus on the role and activities of the RSB in the EU legislative process and to explore if the RSB and its opinions can have negative effects on the legislative process. Importantly, this study does not provide a systematic assessment of all RSB's opinions and its effects on the quality of the impact assessments within the Commission, since this type of research has already been conducted (see Senninger & Blom-Hansen, 2021). Therefore, this study does not investigate whether the RSB fulfils its overall tasks and performance as outlined by the Commission. In contrast, this report aims to provide an overview of the RSB's role and activities and utilizes selected examples to scrutinize the main criticism of the Board from other EU institutions and societal actors.

This study analyses all official available documents published by the RSB. This includes the RSB's annual reports<sup>1</sup>, the RSB's opinions<sup>2</sup>, and its rules of procedure. Moreover, the study examines reports, press releases, staff working documents, decisions, and communications by the Commission as well as documents from the European Parliament and reports by interest groups and other organisations. Additionally, the analyses build on newspaper articles from Agence Europe – an international newspaper on EU institutions. Furthermore, I conducted seven elite interviews<sup>3</sup> between September 2022 and January 2023 with members and former members of the RSB, members of the European Parliament (MEPs), and officials from various interest groups and NGOs. Based on a semi-structure interview guide, I asked all interviewees about their views on the better regulation agenda and the role of the RSB in EU's legislative decision-making. The interview guide also included questions on the structure of the RSB and its independence. Each interview lasted around 40 minutes and was recorded, transcribed, anonymised, and analysed qualitatively. Moreover, I included discussions with four scholarly experts that are familiar with the better regulation agenda and the RSB to gain additional insights based on their research and findings. The different data sources allowed for data triangulation.

#### 4.1. Interviews

Since the RSB and its role are highly politicised, I aimed to include organisations and institutions with as many different political affiliations as possible in my interviews. Yet, in the selection of interviewees it was important that these individuals had knowledge on the better regulation agenda and the RSB, which reduced the number of potential interviewees. Between August 2022 and January 2023, a total of 39 requests for interviews have been sent out to i) officials from the Commission, ii) officials from the RSB, iii) former officials from the RSB, iv) MEPs, v) other EU institutions, and vi) various interest groups with diverse interests, including different NGOs. Out of these requests, it was only possible to gain a total of seven

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<sup>1</sup> Available under: [https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board\\_en#annual-reports](https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en#annual-reports)

<sup>2</sup> Available under: <https://ec.europa.eu/transparency/documents-register/>

<sup>3</sup> Please find a list with all interviews in the Appendix.

interviews. The reasons why specific organisations or individuals were not willing to be interviewed were multifaceted. Those who declined, for example, mentioned: too high workload, insufficient knowledge on the RSB, conflict of interests, or a general unwillingness to comment on the RSB. Moreover, three additional interviews were already planned and the interview guide sent out, but I never received any answers thereafter and all attempts to schedule a meeting were unsuccessful.

#### *4.2. Case selection*

For this study, I selected legislative cases where the Board issued negative and second negative opinions. Since the study aims to explore potential negative influences by the RSB on the legislative process, I selected cases where the RSB's impacts on the legislative process have been publicly discussed or criticised by political actors. Four concrete case studies were selected: the Work-Life Balance Directive, the Directive on Minimum Wages, the Corporate Sustainable Due Diligence Directive (CSDD), and the recently debated consumers' right to repair. I selected these cases based on three considerations. First, the RSB issued negative opinions in all cases; only once in two cases, twice in one case, while the fourth case is still in the legislative process. This case selection provides some variation with regard to the RSB's opinions on draft impact assessments. Second, the cases cover a longer time period from 2017, when the RSB issued a negative opinion on the report of the proposed Work-Life Balance Directive, until the most current example in 2022. Third, the different cases were selected as they cover different policy areas within sustainability legislation and thus, have significant impacts on the social and environmental domains. The cases further all aim to pursue sustainability goals with a focus on labour market policies, environmental policies, and consumers' rights. However, since most criticism towards the RSB thus far emerged in the case of the CSDD, this case will be more thoroughly discussed as it stands out as most likely case where the RSB's opinions impact the legislative process.

## 5. The EU's 'better regulation' agenda: A deregulation agenda?

The EU's 'better regulation' agenda is the foundation of the RSB's work. According to the Commission, the aims of this agenda are to ensure that EU legislation is cost-efficient, based on evidence, and transparent. This purpose is reflected in the following official declaration by the Commission:

*"Better regulation" means designing EU policies and laws so that they achieve their objectives at minimum cost. Better regulation is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. (European Commission, 2017a: 4).*

In the declaration, the Commission emphasises that the goal of better regulation is not about deregulation. Yet, when examining the historical development of the agenda, it becomes evident that it has been **influenced by actors advocating deregulation**. For example, the first impact assessments were primarily concerned about business impacts and some countries, such as the UK or the US, saw better regulation as part of a broader deregulation agenda (Interview 1, 2022). The UK, which already had relatively liberalised markets, aimed to create a well-functioning internal market without any barriers for businesses and companies (Interview 4, 2022). Yet, in contrast to the origins of a better regulation strategy in the US and UK (see Baldwin et al. 2010), the Commission pursued an **integrated approach** to impact assessments by looking at possible environmental, economic, and social impacts early on and in parallel (European Commission, 2002; Interview 1: 2022).

However, different interest groups argued that the **ideas of conducting impact assessments largely came from the industry**. For example, Corporate Europe Observatory (CEO) argues that the tobacco industry wanted to place its interests in a wider context, and sought to bring down its own costs in relation to the labour market and its wider societal impact (Corporate Europe Observatory, 2020; Interview 4, 2022). Accordingly, CEO has always claimed that the better regulation agenda serves the interests of the industry and enhances deregulation. One of my interviewee expressed this in the following way: 'The setup of the better regulation agenda is more sympathetic to the industry side' and 'even though the Commission has put

on board more social and environmental aspects, they could not get away from the initial take of deregulation’ (Interview 4, 2022). Thus, in contrast to the Commission’s official claims, critical voices contend that the better regulation agenda – that is, the basis for the RSB – was **politically biased from the onset**.

### *5.1. The inception of the better regulation agenda*

Several member states also made calls for increased quality of EU legislation already in the early 1990s (Council of the EU, 1992). They sought to achieve an administrative reform of the Commission (Stevens & Stevens, 2001) and a simplification of EU legislation (Council of the EU, 1992: 33). As a response to these demands, the Commission established the SLIM (Simpler Legislation for the Internal Market) initiative (European Commission, 1996a) to ensure improved effectiveness of EU regulations (European Commission, 1996b: 86). Alongside the UK, other countries such as Germany and the Netherlands also supported this initiative and called for increased transparency in EU policy-making. Against this background, **demands for an independent review body** that would serve as a guardian of the rules emerged already in 1997 (Radaelli & Dunlop, 2022). The Commission adhered to these demands (Radaelli & Dunlop, 2022: 4), and constructed a task force in 1998 - the Business Environment Simplification Task Force (BEST) (European Commission, 1998: 7). The Commission’s stated aim was to reduce the administrative burden, especially for small and medium-sized enterprises (SMEs). However, clear standards for involving SMEs were lacking (Radaelli & Dunlop, 2022: 5). This is one example indicating that even though the agenda itself emerged due to some member states’ demands to improve law-making, the practical realisation of such aims often missed these important points. Nowadays, the general objectives of the **better regulation agenda** are prone to criticism by civil society organisations, such as the European Consumer Organisation BEUC, who argues that these objectives **focus unilaterally on regulation as a burden and as a cost factor for businesses** that shall be alleviated. Instead, these general goals should be to improve legislation by e.g., providing for better protection, better governance, and enforcement structure (BEUC, 2022). As one MEP that I interviewed pointed out: ‘What needs to be said is that particularly with the better regulation agenda many high goals have been announced which then did not materialise at the end of the day’ (Interview 7, 2023).



### 5.2. *The Commission's white paper*

Another push for the better regulation agenda was made in the early 2000s (Mandelkern Group on Better Regulation, 2001), a time that marked a shift in EU governance from a previous permissive consensus to a constraining dissensus (Hooghe & Marks, 2009). Around this time, mainstream parties in most European countries were increasingly challenged by right-wing and Eurosceptic parties that gained increased support (de Vries & Hobolt, 2020). Consequently, due to the increased popularity of Eurosceptic parties, the popularity of the EU and its policies decreased among citizens, while EU's legitimacy was questioned (Hobolt & de Vries, 2016). Additionally, events such as the resignation of the Jacques Santer Commission, due to financial mismanagement in 1999, and the Irish 'no' to the Treaty of Nice in June 2001 made it even more evident that the question of democracy was not only about the role of the parliament but also about 'good governance' (Smismans, 2019).

As a response to the proclaimed democratic deficit, the Commission published a white paper in 2001 (European Commission, 2001) aiming to increase transparency and public involvement in EU decision-making (European Commission, 2001). This led to the creation of the 2002 action plan (European Commission, 2002). Since the implementation of this action plan, **impact assessments** have been a crucial tool for the Commission to review legislation before enacting it, particularly for initiatives that have a significant economic, social, and environmental impact (European Commission, 2022e). Yet, critics argue that the balance between the three parts mentioned in the impact assessments (economic, social, and environmental) was not equal, and that **economic issues were de facto prioritised** (Interview 2, 2022).

### 5.3. *The war on the red tape and the 'Stoiber group'*

In the coming years, EU member states, particularly the UK and the Netherlands, intensified their efforts to reduce bureaucratic 'red tape'. This resulted in the high-level group in 2007 (European Commission, 2012), known as the 'Stoiber Group', which advised the Commission to develop an EU regulatory fitness and performance programme (REFIT). The self-proclaimed goal of this programme was to make EU laws lighter, simpler, and less costly – especially for SMEs (High-Level Group on Administrative Burdens, 2014). Another stated aim by the group was that REFIT should serve as a key initiative in addressing economic challenges related to

smart regulation. Therefore, REFIT should be based on input from citizens and stakeholders through the 'Fit for Future Platform' and the 'Have Your Say' portal (European Commission, 2022b).

While member states and societal actors demanded a greater involvement through consultation, the Stoiber group and its final report received **sharp critique from civil society**. As outlined by a report by BEUC, the main criticism was that the consultation process still remains limited and that these initiatives focus far too little on the crucial question of whether EU legislation sufficiently takes long-term societal challenges into account (BEUC, 2022). Another line of criticism was that the true function of REFIT and its platforms is to further **enhance deregulation and open up for greater lobbying**. This line of critique builds on the observation that EU decision-making was further concentrated within small expert groups in the Commission and that the role of the European Parliament thereby was undermined (LobbyControl, 2015). Moreover, another outcome of the Stoiber group was that **SMEs often were exempted** from a considerable number of rules, allowing for increased deregulation in practice (Agence Europe, 2014).

In summary, while the Commission's main aim of the better regulation agenda was to 'relieve the burden of legislation', critics argue that this phrasing was quite biased as it gave the impression that EU legislation is only a burden for private players (Interview 5, 2022). Like one of my interviewees put it: 'the concession that regulation by its very nature must involve certain duties for businesses and companies has been miscommunicated in the process' (Interview 5, 2022). Since the better regulation agenda includes issues of public interests, it also needs public actions: 'In Brussels, there still is the belief that one gets somewhere with abstract goals and private actors, but if we leave the better regulation agenda to private actors, it won't function' (Interview 6, 2022).

#### 5.4. *The establishment of the RSB*

Eventually, calls from the member states and EU institutions to hold the Commission accountable for better law-making, led to the establishment of an independent oversight body in 2006 (Radaelli & Dunlop, 2022: 7-8). The **Impact Assessment Board (IAB)** was the forerunner to the RSB and it **only consisted of Commission officials**, which, consequently, created doubts about its independence (Radaelli, 2018). It took several years (until 2015) before the IAB was transformed into the RSB. Officially, the Commission's reasons for this transformation was to ensure independence of the Board, through the inclusion of external members (Agence Europe, 2015). Moreover, the goal was to expand its tasks to evaluations and fitness checks of existing policies (European Commission, 2015a, 2015b). The introduction of the RSB was further enabled as president Barroso's and Juncker's ambitions were to centralise the decision-making authority inside the Commission (Kassim et al., 2017). Additionally, Juncker considerably pushed forward with the better regulation agenda (Agence Europe, 2017), arguing that it was needed to **restore citizens' confidence** in the EU's ability to deliver (European Commission, 2015a: 3). This priority became urgent to the Commission, as citizens' trust in the EU had been significantly eroded following the 2008 economic crisis and the imposition of austerity measures by the EU (Scharpf, 2015; Schmidt, 2021). Thus, the Commission sought to counteract these tendencies by achieving greater participation from the public in the decision-making process (European Commission, 2017b).

#### 5.5. *A new approach by Ursula von der Leyen: All about costs?*

By the end of 2019, Ursula von der Leyen took office and announced that the Commission's goal was to **further reduce unnecessary burdens for citizens and businesses**. To achieve this ambition, the Commission strongly emphasised the **'one-in, one-out' principle** (i.e., any newly introduced rules are offset by removing equivalent rules in the same policy area), the principle of proportionality (Regulatory Scrutiny Board, 2019: 34)<sup>4</sup>, and other new measures. As a result, the better regulation guidelines and toolbox – which serve as guidance for the RSB to review the quality of draft impact assessments – were revised to include these as well as other

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<sup>4</sup> Please note that all documents by the RSB are published by the Commission. However, in order to better differentiate or highlight the documents issued by the RSB, I decided to include them in this study with the RSB as author.

new elements, such as strategic foresight or mainstreaming the **United Nations Sustainable Development Goals** (European Commission, 2021a). Therefore, one of the RSB's tasks next to many other quality elements mentioned in the guidelines and toolbox is to scrutinise the 'one-in and one-out' estimates presented in a dedicated annex of the draft impact assessments (Interview 1, 2022). According to the Commission the 'one-in and one-out' approach shall not be applied mechanically (European Commission, 2021a)

Yet, criticism has been raised against these general measures of better regulation. Especially the focus on the 'one-in, one-out' principle received sharp critique arguing that it would nowadays be more about quantity than about quality (Interview 2, 2022). While this principle has been shown to reduce the costs of regulation and administration in many countries (CEPS, 2019), one main critique is that it has a **too strong focus on economics and reliefs for businesses**, and too little on citizens or a macroeconomic perspective (Leidenmühler et al. 2020). Consequently, this approach has been heavily criticised by four out of seven interviewees (Interview 4, 2022; Interview 5, 2022; Interview 6, 2022; Interview 7, 2023) arguing that legislation should not be assessed based on quantitative metrics but instead based on an assessment of whether it benefits society (see also European Parliament, 2022a: 22). Indeed, the better regulation agenda has a **strong focus on the costs for (large) businesses** (BEUC, 2022). One of my interviewees voiced the following concerns about this focus: 'I do fear that we move towards regulation not as an investment for society but that it is all about the costs, the costs for businesses' (Interview 2, 2022). Consequently, several actors call for a critical evaluation and revision of the better regulation agenda (Interview 2, 2022; Interview 4, 2022; Interview 5, 2022).

## 6. The work of the RSB in EU's legislative process

The RSB **assesses the quality of draft impact assessments, fitness checks, and selected evaluations** within the Commission (European Commission, 2023). After the Commission sets the political priorities, it is up to the different Directorate Generals (DGs) to evaluate existing law, consult stakeholders, and draft an impact assessment. However, the preparation of an impact assessment is a long process that, in exceptional cases, can take up to two years (Interview 1, 2022), and it is also very costly (at around half of a million Euros) (Interview 2, 2022). Yet, in crisis situations, when swift decisions are needed (e.g., during the Covid-19 pandemic or the war in the Ukraine), there is the possibility to adopt legislation without a comprehensive impact assessment. In such cases, it is possible to evaluate the legislation afterwards (Interview 1, 2022; Interview 2; 2022).

During the early preparatory phase, the Commission's services can ask for so-called '**upstream meetings**' with the RSB's members to discuss the main problems and expected impacts of legislation (Gaffey, 2020; Regulatory Scrutiny Board, 2021a: 7-8). While these meetings take place at an early stage and the RSB argues that these meetings are important to ensure the quality of the reports (Regulatory Scrutiny Board 2021), the content discussed in these meetings are largely **unknown to the public**, which can undermine the credibility of the RSB (Interview 4, 2022; Interview 7, 2023).

### 6.1. *Assessment criteria: Focus on economic impacts?*

After the DGs finalised a draft impact assessment, they formally submit it to the RSB<sup>5</sup>, where all members read the report (Interview 1, 2022; Interview 2, 2022). The RSB then scrutinises the draft impact assessment and **issues an opinion with recommendations** (Gaffey, 2020). In doing so, the RSB uses the criteria in the better regulation agenda and a specific toolbox (European Commission, 2021a). This **toolbox** is a 608 pages long report that includes economic, social, and environmental impacts as well as the sustainable development goals (European Commission, 2021a). Until the toolbox was revised in 2021, it included 15 types of economic impacts, 9 types of social impacts, 8 types of environmental impacts, and 6 types of impacts

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<sup>5</sup> This is normally done four weeks before the RSB's meeting.

involving human rights (Gaffey, 2020: 175). Accordingly, the former RSB's toolbox **predominantly highlighted economic impacts**.

Indeed, impact assessments always involve a cost benefit analysis where the economic dimension is often more easy to assess (Interview 1, 2022). Yet, one main idea of the RSB was to also thoroughly take societal and environmental impacts into account (Interview 2, 2022). However, assessing these dimensions are more difficult with the current better regulation agenda, which seems to be tailored for evaluating economic impacts – that is, criteria stressing that impact assessment should be evidence-based, that cost/benefit analyses should be accurate, and that the indicators on how to measure the success of a policy should be appropriate (European Commission, 2021a). While social and environmental aspects have been taken into account during the last years (European Commission, 2021a), the primary focus often remains on the economic impacts and the costs (see also 5.5.).

## *6.2. Meetings of the Board and its opinions*

The Board meets 2-3 times per month but has the option to call for additional meetings (Gaffey, 2020; Regulatory Scrutiny Board, 2021a). Moreover, the RSB may treat a file via a written procedure, which often applies to more straightforward cases or in the case of resubmissions. The RSB's meetings last about one hour per file. Yet, according to an internal survey by the Commission, where 900 staff members responded, the RSB's one-hour meetings seem too short (Regulatory Scrutiny Board, 2018: 21).

The RSB's meetings are followed by a discussion among all RSB's members to **collectively determine an opinion** on the case at hand (Interview 1, 2022; Interview 2, 2022). Such opinions are quite technical in nature and are 2-3 pages long. They entail five main sections, laying out the context of the impact assessment, the overall opinion with possible changes requested, examples on how to improve the impact assessment, and comments on the procedure and information (see also Gaffey, 2020; Senninger & Blom-Hansen, 2021). The same formal procedure applies in the case of evaluations. Moreover, during this entire process, the RSB works closely with the Secretariat General of the Commission. One former member of the RSB criticised that the Secretariat General would have been 'too present' in the RSB's work (Interview 2, 2022).

Subsequently, the opinions by the Board are **published online**, but only *after* the Commission has finalised the proposal. This procedure creates controversy because the legislators lack access to these opinions when a legislative proposal is discussed and drafted within the Commission. For example, MEPs asked the RSB to **get access** to its negative opinion on the consumers’ right to repair in autumn 2022 (see section 8.2.). These **requests were denied**. According to critics, this type of lacking transparency **obstructs the work of elected officials**, who need access to crucial documents in the decision-making process (Interview 6, 2022; Interview 7, 2023).

In brief, the Board carries out its opinions at an early stage in the legislative process and before the Commission adopts a proposal (see Figure 2). Importantly, however, the RSB **does not decide on initiatives or policy objectives**, which is the task of the Commission (Gaffey 2020: 167).



Figure 2: The role of the RSB in proposing EU legislation

### 6.3. *Impact assessments and the RSB’s work*

In general, impact assessments are carried out if the Commission’s initiatives are expected to have a *significant* economic, social or environmental impact. The decision whether to make impact assessments in the first place is made by the General Secretariat of the Commission. When the RSB scrutinises such draft impact assessments, the RSB can issue a **‘positive’**, **‘positive with reservations’**<sup>6</sup> or **‘negative’ opinion**. If an opinion is negative, the report needs to be revised substantially and re-submitted to the Board for a second review and opinion. The **second opinion** is then also the final one and is only issued in cases where the Board detected

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<sup>6</sup> The Board introduced this possibility of a ‘positive opinion with reservations’ in 2017 (Regulatory Scrutiny Board, 2018: 14).

severe shortcomings. In these cases, only the Vice-President for Inter-institutional Relations and Foresight may submit the initiative to the College of Commissioners to decide whether or not to go ahead with the proposal (European Commission, 2022g). Consequently, the RSB has a *de facto veto position* in the early stages of EU’s legislative process (see also Senninger & Blom-Hansen, 2021). While some argue that a negative opinion provides incentives for the Commission’s services to improve the quality of the draft impact assessment (Interview 1, 2022), others argue that a negative opinion by the Board can complicate the legislative process by preventing services from moving onwards (Interview 2, 2022).

When looking at all opinions by the RSB that are published by the Commission, the RSB has **reviewed 314** draft impact assessments **between 2016 and 2021**. Yet, the number has varied significantly between the years (see Figure 3). The most productive years were 2018 and 2021.<sup>7</sup> While the RSB issued 76 opinions in 2018, the highest number so far was in 2021 with a total of 83 cases. This was also the year where the RSB issued the most negative opinions (31 in total) as well as the most frequent second negative opinions (four in total).

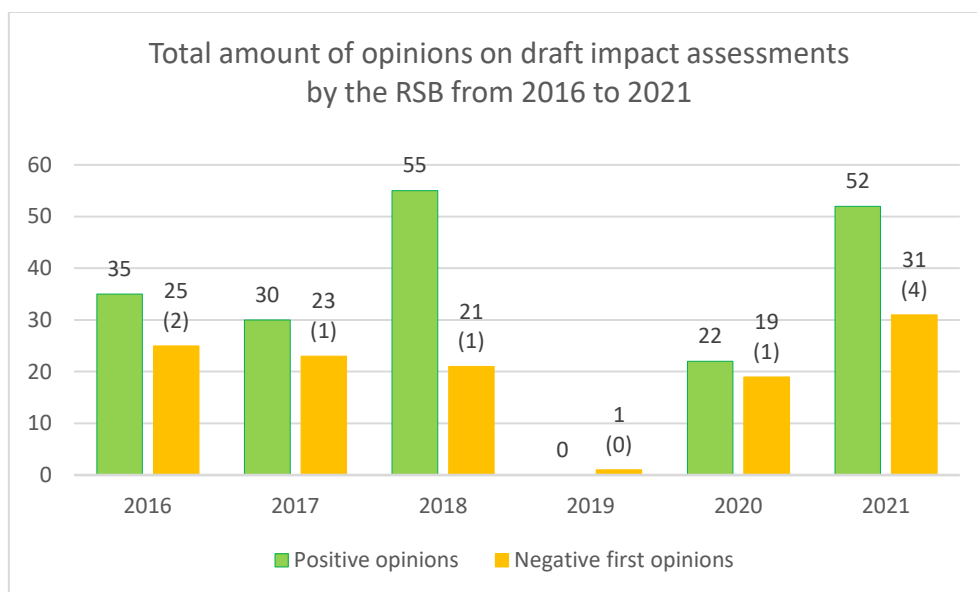


Figure 3: Total amount of positive and negative first opinions by the RSB on impact assessments from 2016 to 2021. Please note that the number in brackets included in the negative first opinions reflect the total amount of negative second opinions. Source: author’s own compilation based on the annual reports by the RSB.

<sup>7</sup> In 2019, the RSB only reviewed one single case due to the parliamentary elections and the new Commission under Ursula von der Leyen taking office by the end of 2019.



### 6.3.1. RSB's second negative opinions: Delaying gender rights?

When looking at all of the nine second negative opinions issued by the RSB between 2016 and 2021, the majority of them (six in total) concern environmental or social legislation.<sup>8</sup> Two of these legislative proposals sought to enhance gender rights across Europe, with the initiative on **equal pay between men and women** and the initiative on **preventing gender-based violence**. In case of the Equal Pay Directive, the RSB mainly argued that the draft impact assessment lacked evidence, that the proportionality of the preferred policy option would not sufficiently be laid out, and that the impact assessment lacked an overview of the global costs and benefits (European Commission, 2021b: 95-102). The lack of evidence and an underdeveloped benefit-to-cost ratio analysis were also reasons why the RSB issued a negative opinion on the draft proposal for preventing gender-based violence. Moreover, the RSB criticised the unclear scope of the directive as well as the lack of incorporating case law and assessing the member states' implementation efforts (European Commission, 2022d: 69-74). However, one might argue that economic criteria are often unsuitable for evaluating social and environmental policy aspects, thereby complicating legislation in these areas. Accordingly, since the initiative in such cases is submitted to the College of Commissioners to decide whether or not to go ahead with the proposal (European Commission, 2022g), this can potentially delay the proposal of crucial legislation, such as the proposals on gender rights. As the RSB is primarily staffed with male members (see section 7), this reflects critically on the RSB.

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<sup>8</sup> Second negative opinions were issued on draft impact assessments on the 'Directive on the promotion of the use of energy from renewable sources' (2016) (Regulatory Scrutiny Board 2016: 33), on the 'Legislative proposal on a framework for the free flow of data in the EU' and the 'Prudential treatment and supervision of investment firms' (2017) (Regulatory Scrutiny Board 2017a: 21), the 'Sustainable Finance Initiative – fiduciary duty' (2018) (Regulatory Scrutiny Board 2018), on the 'principle of equal pay between men and women through pay transparency' (2020) (Regulatory Scrutiny Board 2020: 12), on 'Sustainable corporate governance', 'Energy Performance of Buildings Directive', 'Preventing and combatting gender-based violence', and on 'EU Space-based secure connectivity' (2021) (Regulatory Scrutiny Board 2021: 31-25).

### 6.3.2. Share of and reasons for negative opinions

When looking at the share of positive and negative opinions by the RSB on draft impact assessments in Figure 4, there is **no clear time trend**. However, considering the whole period, the RSB issued negative opinions in 39% of all cases<sup>9</sup>. What we can see is a variation between the different years with the highest share of negative opinions (46%) in 2020 and the highest share of second negative opinions in 2021, where 13% out of all negative opinions have also been negative a second time.

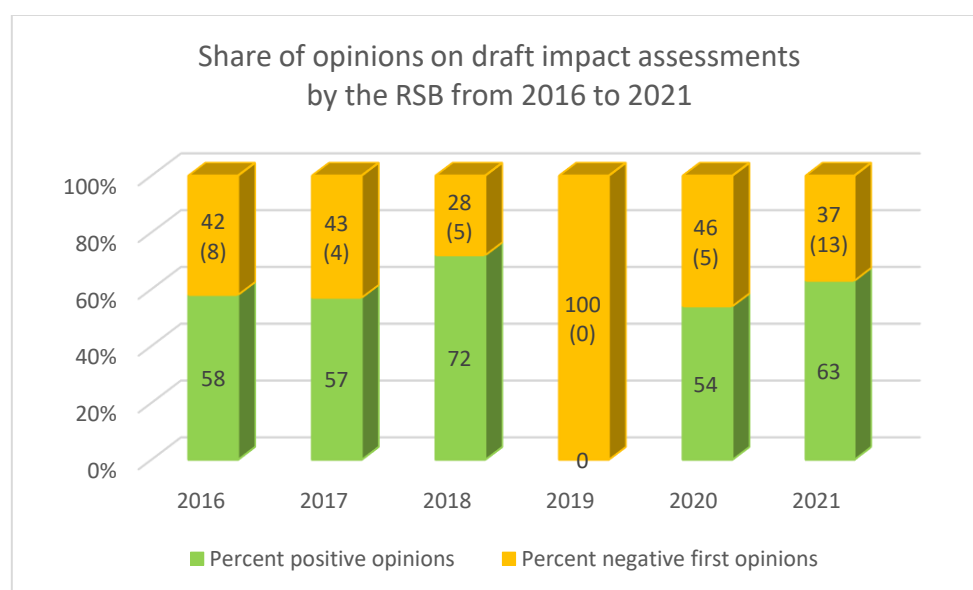


Figure 4: Share of positive and negative first opinions by the RSB on impact assessments from 2016 to 2021. Please note that the number in brackets included in the negative first opinions reflects the share of negative second opinions. Source: author's own compilation based on the annual reports by the RSB.

When studying these negative opinions, the results reveal that the RSB mainly **rejected the draft impact assessments** due to weaknesses in the definition of the exact problem. Principal reasons also concerned the scope and context of the draft impact assessment, and the development and definition of different options. Additionally, negative opinions were issued due to shortcomings in the design of baseline scenarios and due to unclear linkages between various objectives. Furthermore, the negative opinions stated problems with the rationale of policy actions, unclear objectives, and a lack of coherence. In some cases, the RSB questioned

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<sup>9</sup> Please note that this number does not include the year 2019 since there has only been one single case.

the need for EU actions based on the principle of subsidiarity, as well as a lack of a sufficient analysis of impacts for SMEs (see Regulatory Scrutiny Board, 2016: 13-14; Regulatory Scrutiny Board, 2017a: 19-20; 2018: 12-14; 2020; 2021a: 17-18).

### 6.3.3. Economic impacts and current challenges

According to the RSB's annual reports, the **majority of the discussed impacts were economic ones**, followed by impacts on administrative burden, and impacts on SMEs (Regulatory Scrutiny Board 2016; 2017a; 2018; 2019). Yet, in the last two years there has been an increase in assessments of environmental and social impacts (Regulatory Scrutiny Board, 2020, 2021a). From the beginning, most impact assessments mainly provided a quantification on the costs and focused less on the benefits (Regulatory Scrutiny Board, 2016: 21). While this trend has improved in some years (e.g., Regulatory Scrutiny Board 2017a), the overall trend lies on the quantification of costs (Regulatory Scrutiny Board, 2021: 26).

It is important to highlight that the year **2020 brought two challenges**. First, the Commission faced **time constraints** to propose the ambitious priorities in the area of sustainable legislation. These draft impact assessments, thus, suffered from **low quality** and were sometimes **rejected** automatically by the RSB, which highlighted that key elements were lacking. Second, the draft impact assessments needed to include the **Covid-19 pandemic and its impacts** as well as the new economic situation (Regulatory Scrutiny Board, 2020: 17-18).

In every annual report, the RSB made the assessment that the Commission largely took its opinions and concerns into account when finalising the impact assessments (Regulatory Scrutiny Board, 2016, 2017a, 2018, 2019, 2020, 2021a). This conclusion is also supported in research on this specific question (Senninger & Blom-Hansen, 2021). Yet, the RSB laid out **shortcomings in the quality of the consultation process**. More precisely, the Board criticised the collection of data and, in some cases, the insufficient public consultations. The RSB further stressed that the different stakeholders' groups should be equally represented and that their feedback should be presented in a more transparent way (Regulatory Scrutiny Board, 2019: 28). Additionally, it needs to be ensured that commissioned studies underlying the impact assessments are not considered to be biased (Interview 1, 2022).

Importantly, we observe a shift in the RSB's work since Ursula von der Leyen took office. The new Commission put a greater emphasis on the political agenda of the European Green Deal and the Digital Agenda. Specifically, the new Commission pursued the 'one-in, one-out' approach as a core principle of assessing the impacts (Regulatory Scrutiny Board, 2020, 2021a). Moreover, the new Commission clearly states that EU legislation should be proportionate, and, thus, be achieved through the 'lowest possible costs' (Regulatory Scrutiny Board, 2021a: 15). Yet, as already outlined in section 5.5, these principles are criticised by a wide range of EU and societal actors.

#### *6.4. Evaluations and fitness checks and the RSB's work*

The Commission conducts evaluations to assess if specific legislation or policies have delivered – at minimum cost – the goals and changes European business and citizens asked for. These evaluations help the Commission to assess whether legislation should be kept or changed (European Commission, 2022h). Thereby, the Commission focuses on specific criteria that include a cost/benefit analysis, the stakeholders' needs, and the creation of an added-value through EU legislation. In these regards, a fitness check is a certain type of evaluation as it assesses how the different laws are linked to each other (European Commission, 2022h). In terms of evaluations, the **RSB's opinions** can only be '**positive**' or '**negative**'. However, in the case of a negative opinion, the Commission's department can still finalise and publish the fitness checks or evaluations, even though they are expected to change and improve the reports in accordance with the RSB's advice. While only a number of evaluations are selected for scrutiny each year, fitness checks are always reviewed by the RSB (European Commission, 2022g).

Figure 5 shows the total numbers of evaluations scrutinised by the RSB. Most cases in 2016 – the first year were the RSB was active in evaluations – concerned the Multiannual Financial Framework (Regulatory Scrutiny Board, 2016). When looking at Figure 5, we see that the RSB issued a total of 35 cases until 2018. In the following years, between 2019 and 2021, the RSB issued 17, 13, and 15 opinions respectively (a total of 45 cases), which is a slight increase. Yet, compared to the opinions on draft impact assessments, the numbers are still rather low.

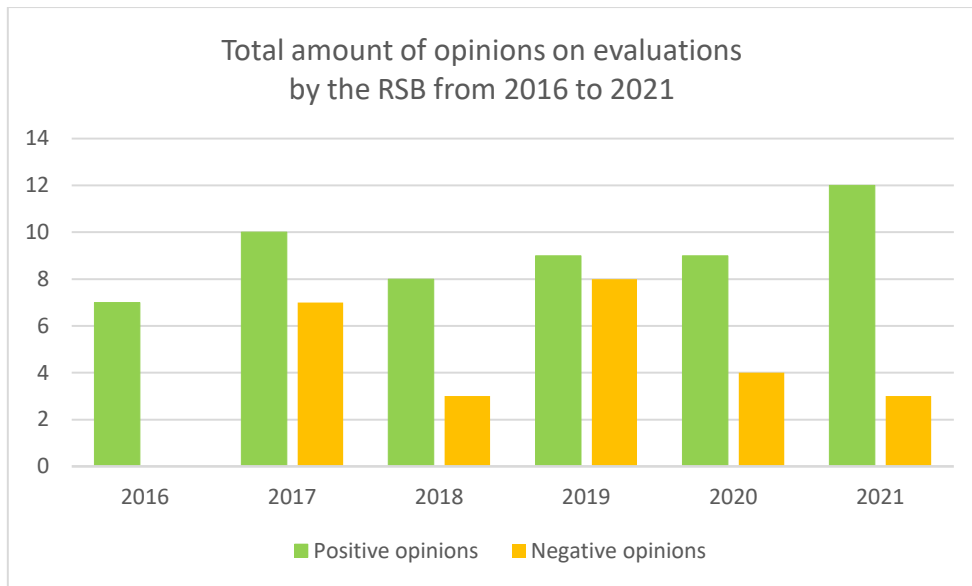


Figure 5: Total amount of positive and negative opinions by the RSB on evaluations from 2016 to 2021. Please note that in case of evaluations, a second negative opinion is not possible. Source: author's own compilation based on the annual reports by the RSB.

Looking at Figure 6, we see that between 0 and 47% of the opinions were negative, which is a rather substantial variation. When looking at the last available data from 2021, only 20% of the opinions were negative. As with opinions on the draft impact assessments, **no clear time trend is visible.**

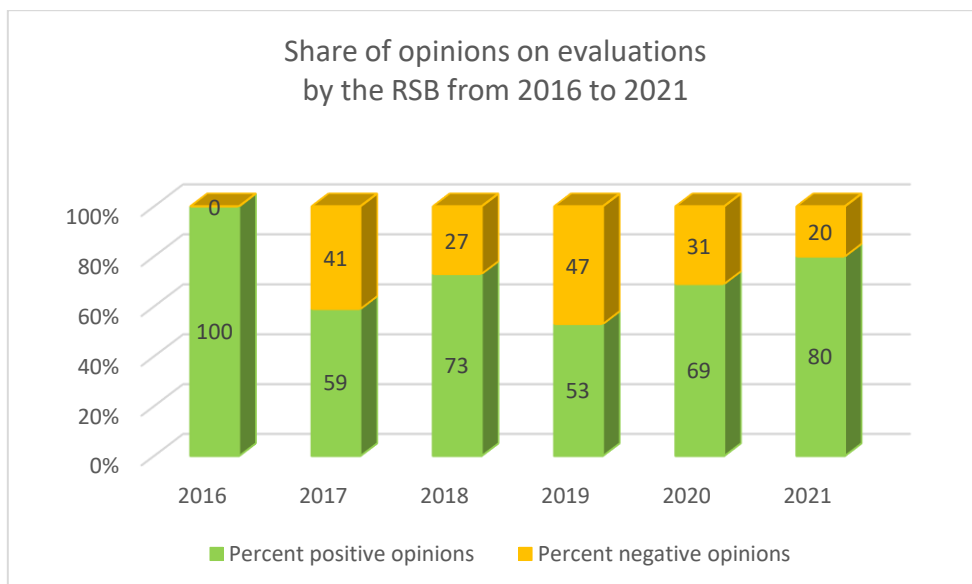


Figure 6: Share of positive and negative opinions by the RSB on evaluations from 2016 to 2021. Please note that in case of evaluations, a second negative opinion is not possible. Source: author's own compilation based on the annual reports by the RSB.

When we analyse the RSB's **negative opinions on evaluations**, one of its major concerns has been that conclusions were not backed up by data. Moreover, the RSB often argued that the policy context was insufficiently described or that the evaluations failed to sufficiently develop benchmarks for the policy success (see also Regulatory Scrutiny Board, 2019, 2020, 2021a). Additionally, the opinions assessed that the full quantification of the 'evaluate first' principle was largely lacking and the RSB criticised the lack of reporting on the consultation processes (see also Regulatory Scrutiny Board, 2019: 11; 2021a: 26). According to these opinions, the RSB often found that it was unclear if the policy objectives met current societal challenges (Regulatory Scrutiny Board, 2020: 26).

#### *6.5. Other activities by the RSB*

The annual reports of the RSB provide further information on the **upstream meetings** and the **RSB's outreach**. Between 2017 and 2021, the RSB held a total of 214 upstream meetings. Figure 7 shows the number of upstream meetings in this time frame; we see a clear **increase** after 2019, with a peak of 67 meetings in 2021. The RSB describes such a meeting as an 'informal back and forth discussion where the Board learns about the file, and the services receive early feedback on what Board members expect and consider to be important' (Regulatory Scrutiny Board, 2018: 23). Yet, the RSB also argued that these meetings are often held too late and that they are not sufficient for addressing problems surrounding data and design in a proper way (Regulatory Scrutiny Board, 2018: 13). More importantly, there is **no public information** available on these meetings and their contents, therefore, remain unclear.<sup>10</sup> The agendas as well as the minutes are informal and, thus, not publicly available.

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<sup>10</sup> Only in the 2020 annual report, it is stated that the content of these meetings would align with the new Commission's priorities (Regulatory Scrutiny Board, 2020)

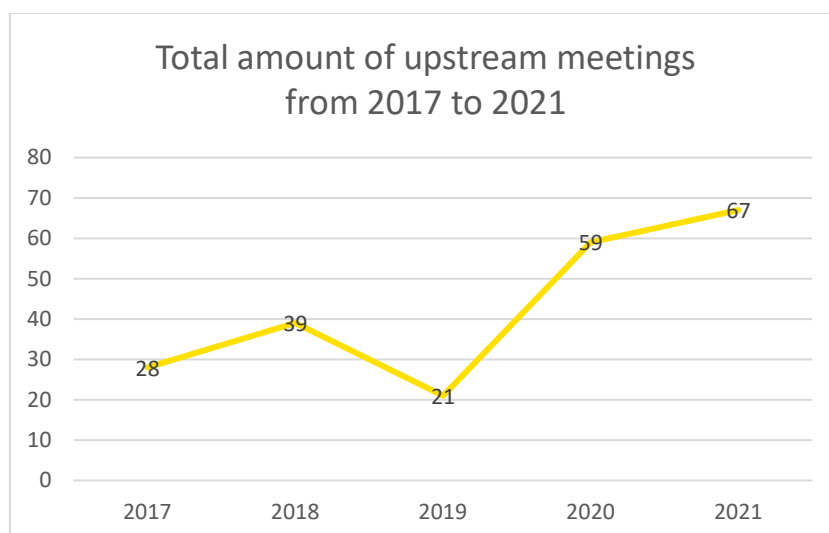


Figure 7: Total amount of upstream meetings by the RSB between 2017 and 2021. Source: author's own compilation based on the annual reports by the RSB.

Over time, the RSB invested more efforts to increase its visibility, transparency, and outreach – inter alia by organising workshops and conferences (Regulatory Scrutiny Board, 2017a: 17; 2018). For example, the RSB held a total of 46 outreach activities in 2019 to present its work and activities. These meetings/events were held internally in the Commission (11 meetings) and in other EU institutions - including the European Parliamentary Research Service and the Committee of the Regions (6 meetings). Moreover, meetings/events took place in the different member states including Better Regulation Network and RegWatch Europe (total of 11 meetings). However, most meetings (18 in total) took place with stakeholders, interest groups, and the general public such as College of Europe and United Nations Economic Commission for Europe (UNECE) (Regulatory Scrutiny Board, 2019: 14). Also, in 2020 and in 2021 the RSB held 32 and 33 outreach meetings respectively with other EU institutions, member states institutions, and stakeholders (Regulatory Scrutiny Board, 2020: 38; 2021a: 11). The annual report of 2020 reveals that seven meetings took place EU inter-institutional with e.g., Council Working Party, European Parliamentary Research Service, and advisory bodies. Moreover, 12 meetings took place with member states institutions such as the Better Regulation Network and RegWatch Europe and 12 meetings with other stakeholders including interest groups, think tanks, and international representatives (Regulatory Scrutiny Board 2020: 38).

For 2022, we see a similar trend in an online list of all meetings<sup>11</sup>. Yet, except for the years 2019 and 2020, actual examples of meetings are not included in the annual reports even though this practice would increase transparency.

## 7. The RSB and its structure: Rules of procedure, members, and (semi-)independence

The RSB is a team of elite experts that shall assess the quality of draft impact assessments, fitness checks, and selected evaluations (European Commission, 2023: 3). Since January 2023, it consists of **nine members**: the **chair, four Commission officials** ('internal members') and **four temporary agents** ('external members') which are all **appointed by the Commission** (European Commission, 2023: 1). From its inception in 2015 until January 2023, the RSB consisted of six members (three internal and three external) and a chair (European Commission, 2020a). Since half of its members and the chair come from the Commission, the formal structure favours the Commission.

The Commission communication on mission, tasks, and staff of the RSB states that all members of the RSB have to be experts in macroeconomics, microeconomics, social or environment policy (European Commission, 2015b). Furthermore, they should work full-time for the Board, appointed for a non-renewable period of three years, but with the possibility of an extension for an additional year (European Commission, 2020a). The purpose of allowing extensions is – according to the Commission – to guarantee the continuity, balance, and full capacity of the Board, even in times of exceptional workload (European Commission, 2020a: 3). The Board is further assisted by three assistants who are selected by the chair.

The members must adhere to a **code of ethics, confidentiality, and rules regarding conflicts of interest** (European Commission, 2015b: 3-4). For example, members are instructed to act independently, form their own opinions, and avoid to 'seek or take instructions' (European Commission, 2023: 2). Since such a Board with elite experts and wide-ranging competencies

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<sup>11</sup> Please find the list under: <https://commission.europa.eu/system/files/2022-12/RSB%20-%20Meetings%20of%20Board%20Members%202022%20-Version%20published%20on%20Europa%20December%202022.pdf>



within the Commission is prone to be influenced or lobbied by various actors, members are sworn to uphold the highest standards of ethics and conduct. In the event of a potential conflict of interest regarding a specific report, members are expected to bring this to the attention of the chair (and in case of the chair to the Commission's president), who may decide if the member (or chair) should not participate in the scrutiny of the specific report (European Commission, 2023). Yet, this procedure was never initiated in the RSB according to an answer from the Commission. Furthermore, Board members must be vigilant in avoiding meetings with organisations or individuals not listed in the Transparency Register and they must refrain from discussing individual files with any interested parties or concerned stakeholders (European Commission, 2023).

Importantly, the RSB's decisions and opinions are based on the principle of collective responsibility. Each member is well-versed in the issues at hand, having read all relevant dossiers, and discussions are held collectively to ensure the best possible outcome (Interview 1, 2022; Interview 2, 2022). Even though the RSB strives for consensus, decisions can be reached by simple majority<sup>12</sup>. The principle of collective responsibility further implies that members of the Board should refrain from questioning any decisions adopted by the Board (European Commission, 2023).

The Board is committed to transparency and accountability and its opinions are made publicly available on the Commission's website but only after the proposal is finalised (European Commission, 2023: 5). Additionally, the RSB must publish annual reports. Still, the RSB's meetings are not open to the public, and only designated representatives from the Commission may attend (European Commission, 2023).

### *7.1. Composition and educational background of the current Board*

The current Board, as of January 2023, consists of a chair (Rytis Martikonis) and five members (James Morrison, Dorota Denning, Michael Gremminger, Philippe Mengal, Elisabetta Siracusa) – the last two joined in September 2022 and in December 2022. Four of the six people currently working for the RSB, come from the Commission (the chair and three members)

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<sup>12</sup> Abstentions do not count for votes.

while **two members are external**. Before one of the last members (Philippe Mengal) joined in September 2022, there was only one external member (Dorota Denning). Moreover, for a long time she was also the only woman in the RSB. Thus, the constellation of the Board is **not gender-balanced**, which is another source of criticism against the RSB even though the last member who joined in December 2022 is also female (Elisabetta Siracusa).

Except for one member with a background in engineering, **five members have their educational backgrounds in business or economics**, while the chair has a background in law and international relations. Still, none of the members has an educational background in social or environmental policy, which can be a potential source of bias<sup>13</sup>. Summarised, the members of the RSB are primarily male with an educational background in business and economics and most are recruited internally from the Commission. Thus, the composition of the Board **cannot be considered well-balanced**.

Furthermore, it is crucial to stress that the Board has severe **difficulties in having sustained activities that include all members**. There are two reasons for this. First, the rather short working period of three years makes it very difficult to ensure consistency in the Board. In 2019, this implied that members were lacking for the quorum to adopt decisions, leading to delays in the Board's work. The lack of active members was traced back to the fact that many members ended their work due to the maximum 3-years period, while it took the RSB long time to recruit new ones (Regulatory Scrutiny Board, 2019: 11). Yet, problems in acting in full capacity also occurred in 2020, 2021 (Regulatory Scrutiny Board, 2021a: 28) and in 2022. Second, the requirements for the candidates are very high. Candidates must have proven knowledge and competence in regulatory policy, impact assessments and *ex-post* evaluations processes as well as skills in appropriate methodologies evidenced through academic merits. Moreover, on top of having very good knowledge about EU decision-making, candidates must be specialised in one core field (macroeconomics; microeconomics; social policy; and environment policy). Besides these requirements, candidates must also have at least 15 years of

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<sup>13</sup> Please note, however, that the published CVs under [https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board\\_en](https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board_en) entail different forms and are sometimes reduced to the absolute minimum. Thus, additional work experiences are often not mentioned which makes it difficult to derive clear conclusions.

professional experience and 5 years of advisory experience (Secretariat-General, 2020). Additionally, the work load of the Board is exceptionally high. In sum, the rather comprehensive work load and the difficulties in guaranteeing the presence of all members in the Board causes more or less severe challenges as full capacity of the RSB would better allow to deal with the work load (Interview 1, 2022; Interview 2, 2022). Moreover, these difficulties can further enhance the imbalance of the RSB towards the Commission since internal members are easier to recruit. Thus, one demand from critics, who worry about the bias of the RSB, is that it should be entirely independent from the Commission (Interview 7, 2023).

## 8. ‘Voices of the critics’: The RSB in EU’s legislative process

During the last years, the RSB has become increasingly politicised, in spite of the fact that it is relatively unknown – even in Brussels. That the activities of the RSB spark controversy was also visible when conducting this study. While most people consulted for this study share the perception the RSB has become increasingly important, views on the RSB’s role and activities were polarised. Still, it is important to note that critique against the RSB comes from different political directions, and involves different institutions and organisations. However, the uniform critique may also indicate that the RSB’s role in EU’s legislative process should be communicated better or made more transparent. In the following section, I attempt to map the main points of criticism against the RSB using specific examples in the EU legislative process. I base my analysis on different reports, documents, newspaper articles, and elite interviews.

### 8.1. *Corporate Sustainability Due Diligence*

When the RSB issued a second negative opinion on the **Corporate Sustainability Due Diligence Directive (CSDD)** in November 2021 (Regulatory Scrutiny Board, 2021b), MEPs, interest groups, and NGOs argued that the RSB’s opinion was not only technical but explicitly political as it clearly **sided with the interests of the industry** (Agence Europe, 2022; Business & Human Rights Resource Centre, 2023). The CSDD, which is part of the European Green Deal, aims to enhance sustainable and responsible corporate behaviour throughout the global value chains. Since companies play a key role in developing a sustainable economy and society, the CSDD contends that they should be required to identify, pursue, end, and prevent adverse impacts of their activities on i) the environment (such as pollution or biodiversity loss) or on ii) human rights (such as the exploitation of workers or child labour) (European Commission, 2022f). As certain EU countries already had implemented corporate duty of care in supply chains, the Commission’s idea was to further harmonise this area at the EU level.<sup>14</sup> However, during the decision-making process, a rather classic left-right division emerged.

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<sup>14</sup> For a comparative analysis of the legal rights in EU countries in place prior to the directive, please see a policy brief by the European Parliament under: [https://www.europarl.europa.eu/Reg-Data/etudes/BRIE/2022/729424/EPRS\\_BRI\(2022\)729424\\_EN.pdf](https://www.europarl.europa.eu/Reg-Data/etudes/BRIE/2022/729424/EPRS_BRI(2022)729424_EN.pdf)

Intensive lobbying from the industry ensued when the proposal was drafted within the Commission. A report by two NGOs, Friends of the Earth (Europe and Germany) and Corporate Europe Observatory, revealed different strategies by multinational companies to pursue their interests. In particular, the practices in lobbying the DG JUST by Business Europe, who showed its strong opposition towards the CSDD already from the beginning, were criticised. The same was true for the European Brands Association (AIM), which inter alia brings together Arla, Coca-Cola, Danone, Ferrero, Lego, Mars, Nestlé, Nike, and Unilever (Agence Europe, 2021; BUND et al., 2022). Moreover, the report from the two NGOs reveals that Danish and Swedish industries tried to influence the RSB, and that several contacts occurred between Nordic industries and the RSB (BUND et al., 2022). The industry's main purpose was to ensure voluntary – instead of legal – measures when implementing the CSDD, thereby potentially undermining its ambitious social and environmental goals (BUND et al., 2022; Interview 4, 2022). In the **letters sent to the RSB**, the Danish and Swedish industries argued that there is insufficient evidence on the CSDD and that the better regulation would be 'too important to allow politically motivated proposals being window-dressed'.<sup>15</sup> The industry and their lobbyists further argued that questions of increased **costs and bureaucracy** – thus, the issues of cost/benefits and proportionality in the RSB's toolbox – must be at the forefront in order for them to remain competitive on the global market. Since the better regulation agenda and, consequently, the RSB primarily focus on such criteria, it might **explain why the RSB ended up** issuing a **negative opinion** on the CSDD two times. CEO criticised that the concept of proportionality has become more pronounced in recent years in EU legislation (Interview 4, 2022), thus, making regulations more difficult to achieve. The example of the CSDD and the industry's reasoning, thus, suggest that the RSB might not play a neutral role, but rather that it sides with big business.

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<sup>15</sup> To access these letters, see: i) Letter from Danish Industry to RSB, 10 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20DI%2010.3.2021.pdf>, ii) Letter from the Confederation of Swedish Enterprise to RSB, 15 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Swedish%20Enterprise%2015.3.2021.pdf> and iii) Letter from RSB Chair Gaffey to Danish Industry, 18 March 2021: <https://corporateeurope.org/sites/default/files/2022-05/Letter%20from%20Gaffey%20RSB%20to%20DI%2018.3.2021.pdf>. See further the Confederation of Swedish Enterprise view on the question of CSDD and subsidiarity, 22 April 2022: [https://www.svensktnaringsliv.se/bilder\\_och\\_dokument/xmm3lo\\_subsiarity-check-on-corporate-sustainability-due-diligence-prop\\_1184703.html/Subsidiarity+check+on+Corporate+Sustainability+Due+Diligence+proposal.pdf](https://www.svensktnaringsliv.se/bilder_och_dokument/xmm3lo_subsiarity-check-on-corporate-sustainability-due-diligence-prop_1184703.html/Subsidiarity+check+on+Corporate+Sustainability+Due+Diligence+proposal.pdf) and the comments by Swedish Securities Markets Association (SSMA), 6 May 2022: <https://svenskvardepappersmarknad.se/wp-content/uploads/2022/05/SSMA-Comments-on-CSDD-Proposal-May-2022.pdf>

Moreover, this tendency seems to be further enhanced by the Commission under von der Leyen, which strongly emphasises removals of obstacles for the industry, while also including a SME Relief Package in 2022 (European Commission, 2022a). Therefore, as one interviewee pointed out, it would be hard to assess whether the lobbying contacts impacted the RSB or if their activities reflect the overall policy priorities of the Commission. Put differently, lobbying from the industry might have reinforced ideas that were already in place (Interview 4, 2022). However, many EU policy-makers have expressed concerns about the role of the RSB, as the above-mentioned example seems to suggest that a draft proposal for EU legislation is politicised already before legislators see it and have a chance to make a decision on the proposal (Interview 6, 2022). In sum, the discussions on the CSDD and the role of the Commission and the RSB became highly politicised, and this course of events was enhanced due to the fact that the RSB's opinions are only made public after the Commission's proposal is finalised (Interview 7, 2023).

When looking at the RSB's opinion on the CSDD, the main criticism was that the problem definition was too vague and that evidence was lacking that EU companies would not already fulfil the outlined requirements. Moreover, the RSB argued that the policy options should be limited in scope but that key choices were not fully identified and assessed. Additionally, the RSB argued that the impacts would not have been assessed in a balanced and neutral manner and the report would not sufficiently outline the proportionality of the preferred option (Regulatory Scrutiny Board, 2021b). Some of these points in the RSB's opinion were also supported by conservative political groups and MEPs in the European Parliament (Interview 3, 2022).

Another huge controversy, however, was that the **Commission internally** did not represent a uniform opinion on the CSDD. The two Commissioners responsible for the act (both can be classified as Liberals) – Didier Reynders (Commissioner for Justice) and Thierry Breton (Commissioner for Internal Market) from DG JUST and DG GROW – were not on the same page and advocated different views on the act. While Didier Reynders first was responsible for the act and made strong commitments on due diligence, Thierry Breton was later entrusted with the act and had different priorities concerning the interests of the companies. As a result of these changes in competencies, a behind-the-scenes battle between the two different DGs within the Commission emerged (Agence Europe, 2021).

The question of how to assess the impacts of the CSDD, and whether it could be considered justified in times of crisis, were indeed valid discussions according to one of my interviewees (Interview 3, 2022). Even so, controversies over the legislative act were remarkable. Due to the high level of politicisation, a balanced compromise on the CSDD was however complicated (Interview 3, 2022; Interview 6, 2022). Still, the Commission pressed ahead with the legislative act despite two negative opinions from the RSB. Yet, in the end, the proposal on the CSDD was **watered down**, and only very few companies were covered by the act, while **SMEs were exempted** altogether (Agence Europe, 2022; European Commission, 2022f). This created huge controversy and led critics to question the RSB's veto position in the legislative process (Interview 6, 2022). While six out of seven interviewees argued that the work of the RSB is important, five also held the view that the Board should not add to politicisation, like it did in the case of the CSDD. Importantly, some argue that its role should be limited to giving expert advice that should be made publicly available to the legislators to allow an informed and democratic decision-making (Interview 3, 2022; Interview 6, 2022; Interview 7, 2023). Briefly after the adoption of the CSDD, over 80 organisations signed a letter criticising the gender-blind approach of the Commission in this legislative act<sup>16</sup> and called for a more gender-responsive corporate sustainability legislation (Business & Human Rights Resource Centre, 2023).

## *8.2. EU Circular Economy and the consumers' right to repair*

As part of the European Green Deal and the development of a circular economy, the Commission announced the establishment of a **consumers' 'right to repair'** (European Commission, 2020d). This right to repair refers to the right to repair products during the legal guarantee, the right to repair after the legal guarantee has expired, and the right for consumers to repair products themselves (European Parliament, 2022b). While the EU legislative process is still ongoing as of writing this study, we see a divide between consumers' and industry interests. Organisations, such as Right to Repair Europe, the European Consumer Organisation (BEUC and ANEC), and Rreuse, argue for extending the product lifetimes and call for an easier dis-

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<sup>16</sup> Please see the letter under: <https://actionaid.nl/wp-content/uploads/2022/03/CSDDD-Gender-responsive-ness-open-letter-to-EC-MEPs-and-Council.pdf>

mantling of products to easier repair, upgrade, and recycle them. In contrast, business organisations such as Business Europe, Applia, Digital Europe or EuroCommerce tend to oppose consumer-led repairs and a general consumers' right to repair, arguing that traders must have a say on who can repair their products (European Parliament, 2022b).

Therefore, this legislative proposal is already polarised. The fact that the **RSB issued a negative opinion** on its draft impact assessment enhanced this polarisation. For example, Right to Repair Europe argues that with this negative opinion, the RSB **delays the initiative** thereby obstructing environmental legislation (Right to Repair, 2022). Importantly, since the legislative proposal is not yet finalised and the Commission's services need to incorporate the advice from the RSB first, the RSB's opinion is not yet public. This created criticism and green MEPs demanded **more transparency** from the Commission, **access to the RSB's documents**, and asked for the reasons for the RSB's negative opinion (European Parliament, 2022c). In addition, other MEPs and interest groups asked the Commission to publish this specific opinion, but the **Commission denied access** to the relevant RSB's documents (Interview 6, 2022). As a result, MEPs could not even see the reasoning of the RSB, which obstructs transparency and prevents access to crucial documents in the legislative process (Interview 6, 2022; Interview 7, 2023).

### *8.3. Labour market policies: Work-life balance and minimum wages*

The RSB issued negative opinions also on reports accompanying EU labour law proposals, such as the **Work-Life Balance Directive** (WLBD) and the **Directive on Minimum Wages**. Yet, in these cases the RSB only issued **one negative opinion** while the **second** was in both cases **positive with reservations**. The WLBD promotes a more equal sharing of parental leave through a paternity leave (10 days, to be paid at the level of sick pay), and earmarked parental leave (2 months, to be paid at a level decided by member states) (Directive (EU) 2019/1158). Moreover, the directive achieves a more gender-equal participation in the labour market. In 2017, the **RSB's first opinion on the WLBD was negative** arguing that the scope of initiative was unclear and that the report (draft impact assessment) does not sufficiently take member states' different systems and practices into account. Moreover, it does not clearly justify the need for EU actions in this area and the options would not address the short-, medium-, and long-term benefits and costs for member states in a sufficient manner (Regulatory Scrutiny



Board, 2017b). The Commission finalised its proposal in 2017, but since the proposal was highly contested, it took until 2019 to adopt it. For example, the Nordic countries argued that the Commission's proposal would breach the principle of subsidiarity, thereby undermining the social partners' autonomy. Other member states like Germany and France opposed the WLBD in the Council of the EU due to the incurred financial burdens for member states since the suggested provisions imply new financial costs in some member states to be borne by states, employers and/or employees. Furthermore, the proposal was contested from a value-based perspective. For example, in Poland centre-right parties and governments favouring traditional family values, i.e. male breadwinner-female carer model, perceived that the WLBD abridges family autonomy in deciding on care arrangements (de la Porte et al., 2022; Pircher et al., 2023). Interestingly, the **member states' varying positions** included the same questions as already **outlined by the RSB**: the question of subsidiarity, financial costs, and different traditions/systems in place in the member states. Yet whether the RSB foresaw these diverging stances and regulatory tensions among the member states or if the Board was already influenced by these positions during the consultation process is impossible to assess in this current study, but should gain scholarly attention. Eventually, these questions led to a **watering down** of the directive in the legislative process (de la Porte et al., 2022: 11-12).

Another example is the **Directive on Minimum Wages**, which was presented by the Commission in 2020. The directive's aims are to ensure that every worker in the Union earns adequate minimum wages. Furthermore, the directive promotes collective bargaining on wages and improves the enforcement and monitoring of minimum wage protection (Directive (EU) 2022/2041). As in the case of the WLBD, the **first opinion by the RSB** on its draft impact assessment **was negative**. The reasons for this were similar to the WLBD, the question of subsidiarity, the insufficient explanations on the different systems in the member states, as well as other factors. However, the second opinion then was positive with reservations (Council of the EU, 2020). In the negotiations, the same regulatory tensions as in the case of the WLBD and as outlined by the RSB emerged. Yet, the question on subsidiarity became central in the Nordic countries, leading them to contest the directive (Sjödén, 2022). The main reason for that is that the universality of collective bargaining in the Nordic countries will mean that fewer workers are affected by minimum wages as nowadays. Yet, on an overall EU scale the benefits will be high as many EU countries have low unionisation rates in place and many are

not covered by collective bargaining (Lillie 2022). Initial opposition also came from a neoliberal alliance in Austria and the Netherlands as well as right-wing populists in Poland and Hungary. Eventually, the directive was adopted in October 2022, but became more vague and less binding than some would have wanted in order to find a compromise. As in the case of the WLBD, the extent to which the RSB was influenced by these varying positions in assessing the draft impact assessment is unclear. However, given the high contestation of the legislative proposals, future scholarly research should focus on this specific question.

#### 8.4. *Shortcomings of the RSB*

The **independence** of the RSB is **challenged** from various sides. Alongside the structural bias favouring the Commission (see section 7), the RSB has also been criticised for sharing the views of the Commission, thereby, hindering a more balanced approach that is needed to accurately review draft impact assessments (Interview 3, 2022). Moreover, while the RSB is supposed to be independent in its decision-making, the example of the CSDD and other legislation cast doubts over its *de facto* independence. As shown in the case of the CSDD, the chair or members of the RSB may also receive letters from different stakeholders and it is impossible to assess to what extent these requests may influence the RSB since it is a process ‘behind closed door’. Additionally, it is also important for the RSB and its internal members to hold a certain degree of independence from the Commission and ensure that the internal members will not face any disadvantages by acting in the Board (Interview 3, 2022). However, the Commission internal conflicts around the CSDD also highlight that the Commission itself is no homogenous actor, which might uphold checks and balances with regard to the RSB (Interview 6, 2022). As a result of these difficulties, critical voices claim that it is of utmost importance that the **RSB becomes more independent** from the Commission (Interview 7, 2023). Importantly, the RSB should not worsen the inter-institutional balance by cultivating more contact with one legislator, the Council of the EU, than the other – the European Parliament (Interview 4, 2022; Interview 6, 2022). Yet, this topic should receive closer scholarly attention in future and could not be researched in detail in this study.

The *de facto* **veto position** of the RSB is potentially wide-ranging. In case of a second negative opinion by the RSB, only the Vice-President for Inter-institutional Relations and Foresight may

submit the initiative to the College of Commissioners to decide whether or not to go ahead with the proposal (European Commission, 2022g). This is indeed an impressive power for a non-elected review body and it remains unclear why this position is needed. For example, in case of the CSDD, the issue was already politicised before the legislators saw the proposal. In general, a draft impact assessment and the RSB opinion should signal political authority. The strength of such a signal would normally increase the credibility of the Board (Interview 6, 2022). Yet, in case of the CSDD, the RSB itself was also politicised due to the second negative opinion. Thus, the internal decision-making process in the Commission, and the subsequent policy outcome, largely took place behind closed doors. This procedure has received sharp criticism as decision-making in a democracy is a political process that should be the task of legislators under the full observation of the media, the different parties, and the citizens (Interview 6, 2022).

This brings us to our next issues – the questions of **RSB’s transparency and accountability**. The reports and opinions by the Board are published online only *after* the Commission’s adopts and publishes the proposal. Thus, the process leading up to the draft legislation, which includes the main work by the RSB, is not transparent and, consequently, prone to severe criticism (Interview 4, 2022; Interview 7, 2023) which emerged when the RSB issued a negative opinion on the **consumer’s rights to repair products**. Yet, **access was also denied** when a journalist asked the Commission to grant access to all declarations of interests of current and past members of the RSB. The case was forwarded to the **European Ombudsman** where it is currently (January 2023) under investigation<sup>17</sup>

In sum, an issue that needs to be addressed and should gain more scholarly attention is the **RSB’s lack of accountability**. In a democratic polity, accountability is an important aspect of the political system. Accountability refers to the principle that those who hold power are also responsible for their actions. For example, when citizens delegate power to elected officials through elections, these officials can be also held accountable if they act in a manner that is unethical or divergent to the people’s interests. The same applies for governments or regulatory agencies that are also held accountable by the public (Scholten, 2014). At the EU level,

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<sup>17</sup> Please see the complaint under <https://www.ombudsman.europa.eu/de/opening-summary/en/164973> and the request under: [https://www.asktheeu.org/en/request/regulatory\\_scrutiny\\_board\\_intere#comment-1076](https://www.asktheeu.org/en/request/regulatory_scrutiny_board_intere#comment-1076)

this principle also applies to the Council of the EU and the European Parliament. However, this mechanism is already constrained in the case of the Commission (only the possibility of veto from the European Parliament), and it is virtually absent in case of the RSB. Since the RSB is *de jure* independent and its work is often non-transparent, this lack of accountability becomes even more troubling. Thus, the question emerges what happens if unsound practices are established with the RSB or if these contradicts the interest of the people.

## 9. Policy recommendations and Conclusion

This study has analysed the **role of the RSB and asked to what extent the RSB influences the EU legislative process**. Based on the analysis of the better regulation agenda and the development of the RSB, as well as the activities of the RSB and the main voices of critics in selected examples, I derive concrete policy recommendations for the RSB in EU's legislative process. These recommendations involve four topics that concern i) an evaluation of the better regulation agenda and the RSB's toolbox in light of current challenges, ii) the classification of RSB's opinions, iv) the abolishment of the veto position, and v) the need to enhance the transparency of the Board and facilitate the access to RSB's documents.

First, to ensure the quality of the draft impact assessments, I argue that the **better regulation agenda** as well as the **RSB toolbox** should be **evaluated** again to assess if the realisation of goals can be more efficiently achieved than utilising arithmetic measures like the 'one-in, one-out' principle. Moreover, even though the Commission pursues an integrated approach, section 6 in this report outlines that the draft impact assessments primarily assess economic impacts. This seems to be in contrast to the current high ambitions in the area of sustainability of the current Commission under Ursula von der Leyen. **To ensure higher social and environmental standards, smarter than less regulation is often needed**. It is more important to achieve political support for the better regulation strategy than having a narrow focus on principles like the regulatory offsetting. This also aligns with the Lisbon Treaty, stating that the Union shall work towards a sustainable development in Europe (Art. 3, TEU). Specifically, impact assessments should **account for long-term impacts on society** to a greater extent than it currently does. Moreover, I argue that it is important to ensure an evidence-based and transparent process, which should imply a greater emphasis on securing that the (often commissioned) scientific studies underlying the impact assessments are not biased. Additionally, it should be clearly defined what the term 'evidence-based' means since its definition is hard to establish in a democratic polity with divergent interests. The results of this study indicate further that the consultation processes and the cooperation with the RSB through the upstream meetings should be given sufficient time, so that potential weaknesses can be thoroughly addressed.

Second, concerning the **RSB's opinions**, I argue that the **classification of positive versus negative opinions is not necessarily needed**. Specifically, the classification of second negative

opinion can be criticised as it tends to politicise the EU legislative process. Even more so, if it only happens in exceptional cases. The idea behind the RSB is to provide quality control of draft impact assessments, fitness checks, and selected evaluations and, therefore, the RSB's opinions should be taken into account when drafting the impact assessment that accompany the legislative proposal within the Commission. Yet, in the following legislative process, it should be up to the legislators to discuss the proposal and interpret the RSB's opinions. This brings us to our next policy recommendation.

Third, I argue that the **RSB's veto position should be abolished**. More precisely, it is unclear why the better regulation agenda would require such a veto position for a non-elected oversight body with a semi-independent status in the EU legislative process. From a democratic viewpoint, it is reasonable to argue that EU legislators should rely on the experts' opinion. However, the veto position of the RSB after a second opinion – as shown in some cases – eventually only delays the legislative process for initiatives that have been adopted later on anyway. Yet, such a position primarily leads to increased politicisation and polarisation among policy-makers. More specifically, before it is possible to form an informed opinion in the Council of the EU and the European Parliament, the act is already heatedly discussed in a polarised manner within the Commission. My conclusion is that such a procedure undermines the power of the legislators by giving a non-elected body an unwarranted possibility of shaping EU legislation. In line with this, I argue that a **better inter-institutional embedding** of the RSB would be good since even policy-makers in Brussels are unaware of the Board. More precisely, a closer cooperation with EU legislators would help to make the RSB's work transparent and to understand the content of the RSB's opinions.

Fourth, I argue that **increased transparency of the RSB** is needed. For example, the RSB's opinions could be made officially available directly after their adoption and not only after the Commission has finalised the draft proposal. This would ensure a more transparent decision-making process within the Commission and provide access to crucial documents in the early stages of legislation. Another aspect of this increased transparency would be to explain the work of the RSB and its activities to other EU institutions and to the wider public. This would also include different forms of information provided by the RSB rather than only meetings between RSB's members and policy-makers. Without full transparency – as it is now the case – any lobbying contacts cannot be excluded. Since the RSB assesses the quality of draft impact

assessment, fitness checks, and evaluations, it would be further helpful to make these **official documents more easily accessible to citizens**. For example, the database where the RSB's opinions are published should be organised in a more consistent and comparable manner. Moreover, if citizens aim to find a specific RSB opinion on a given legislative act, it is quite difficult and time-consuming to do so. One idea could be to better link the impact assessment as well as the **RSB's opinions** to the specific legislative act in EUR-Lex. In addition, it would be interesting to receive more statistical data on the RSB's work. In line with this, the **annual reports** of the RSB provide room for improvement in providing more detailed information in a more comparable manner that is stable over the years and over the different presidencies.

My analysis indicates that the RSB enhances the tendency that important policy-making in the EU takes place behind closed doors, and that de facto power holders lack public mandate but cannot be held accountable. Moreover, the structure and priorities of the RSB indeed imply that it potentially exerts a biased influence. The analysis of the RSB in this study demonstrates that expert opinions increasingly shape the legislative process. The long-standing argument that the externalising of policy-making to non-partisan supranational institutions fosters de-politicisation (Bartolini, 2005; Mair, 2013) and decreases political conflicts (Katz & Mair, 2009) holds in this case. This is a worrying development as we see a clear trend that **experts** and their opinions are integrated **parts of increased politicisation and polarisation**. Eventually, this poses severe challenges to the experts and to the EU legislative process. **This calls for a re-thinking of the current RSB**. An increase from seven to nine members in the RSB, as introduced in January 2023, will not be sufficient. Alternatives on how these experts assess draft impact assessments, fitness checks, and selected evaluations in a more independent manner, where they seldom can focus on the content and not become politicised themselves, shall be considered.

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## **Appendix**

### List of Interviews

- Interview 1: Member of the Regulatory Scrutiny Board (RSB), 29.9.2022.
- Interview 2: Former Member of the Regulatory Scrutiny Board (RSB), 21.10.2022.
- Interview 3: Member of the European Parliament (MEP, EPP), 09.11.2022.
- Interview 4: Corporate Europe Observatory (CEO) official, 11.11.2022.
- Interview 5: Civil society organisation official, 17.11.2022.
- Interview 6: Member of the European Parliament (MEP, S&D), 30.11.2022.
- Interview 7: Member of the European Parliament (MEP, S&D), 18.01.2023.









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