Regulatory Scrutiny in Transition

*Anne Meuwese**

So none of the wild rumours came true in the end. Those expecting representatives of Parliament and Council on the Regulatory Scrutiny Board, or seats for 'main stakeholders' were likely either disappointed or relieved when the European Commission's reinforced Better Regulation package was published on 19 May 2015.[1] As it turns out the transformation of the Impact Assessment Board, which had been in the air for a while is a partial one only, for the moment at least. Indeed, the former Impact Assessment Board got a stronger mandate and a broader reach, apart from a new name, yet it retains very much the character of an 'in-house' body. The long-awaited 'external members' of the Regulatory Scrutiny Board will be recruited as temporary agents, turning 'independence' to some extent into an issue of labour law.

The Board has always been a prime example of the European art of reconciling the seemingly irreconcilable through carefully crafted compromising. Ever since then Commission President Barroso subscribed to "the need for a separate scrutiny of impact assessments; a kind of 'four eyes' principle" in a plenary debate with the European Parliament in 2006, the Commission has struggled with the concrete institutional design to accompany the intended 'independence' (in Barroso's words at the time "I agree that an independent check should be carried out independently of the services that propose legislation").[2]

True independence, both in a formal and in a 'de facto' sense, is most likely unattainable in this context and perhaps also undesirable given the need to retain the impact assessment's relevance to the policy process. Therefore the question is which model for quality control of impact assessments approximates 'independence' most fittingly. The original institutional design shaped 'independence' in a setting relying prominently on 'peer review'. The idea was – as a manner of speaking and in some cases in actuality – that knowing that the high officials appointed to the Board 'on personal title' could one day be your boss would provide an effective incentive for taking the Board's scrutiny seriously. This model appears to have been helpful in putting the Board, and impact assessment as an important vehicle for policy deliberation within the Commission, on the radar within the organization. However, it also led to a very proceduralised approach ("would you please explain a bit better why you chose this method over another?") which means that this model has now probably ran its course.[3]

In the new design 'independence' is approximated by seeking a degree of isolation from the policy process on the part of the Board's members. The chairman of the Board gets the status of director-general – this post went to Marianne Klingbeil, who is highly experienced in Better Regulation matters –, the internal members will be on Board duty fulltime and the external members are selected transparently via rigorous and objective selection procedures "on the basis of their proven academic expertise in impact assessment, ex-post evaluation and regulatory policy generally"[4]. The safeguards offered regarding the selection of the external members go some way to reassure the citizen that these seats will not go to lobbyists. Yet, the temporary nature of the positions, even if they are ranked as Director, Principal Adviser or Adviser, will make it necessary for the Commission to try and avoid the 'revolving door' phenomenon[5] in its recruitment.

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1 Communication from the Commission, Better regulation for better results - An EU agenda, 19 May 2015, COM(2015) 215 final.

2 European Parliament, debate 'Monitoring the application of Community law (2003-2004) - Better lawmaking 2004: application of the principle of subsidiarity - The implementation consequences and impact of the internal market legislation in force - Strategy for the simplification of the regulatory environment (debate)', 4 April 2006, Strasbourg, accessible at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20060404+ITEM-013+DOC+XML+V0//EN&language=EN.

3 Anne Meuwese & Suren Gomtsian, "Regulatory scrutiny of subsidiarity and proportionality", *Maastricht Journal of European and Comparative Law* (forthcoming 2015).

4 Communication from the Commission, Better regulation for better results - An EU agenda, 19 May 2015, COM(2015) 215 final, p. 3.

5 Wikipedia definition of 'revolving door': "a movement of personnel between roles as legislators and regulators and the industries affected by the legislation and regulation", https://en.wikipedia.org/wiki/Revolving_door_(politics).

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The search for a *sui generis* 'impact assessment watchdog' makes a lot of sense in the light of the constitutional specificities of the European Union lawmaking process. A 'Regulatory Policy Committtee' like in the United Kingdom would need an explicit basis in the Treaties, and the close link to presidential supervision of executive rulemaking which OIRA embodies in the United States would simply not fit the EU's lawmaking process. Also, none of the existing institutional models for regulatory scrutiny comes without their own drawbacks. However, in the search for the optimal model for scrutiny of European Commission impact assessments – and I do see the current proposal for a Regulatory Scrutiny Board as a step forward in this search - we can still learn a few things from the various models around. Below, I briefly visit two models less commonly thought of in connection to the debate on regulatory scrutiny of Commission impact assessments.

The first of these is the option of moving closer to the Council of State model, in which the emphasis is less on technocratic assessment and more on 'statemanship'. This could, however, most likely only work if the documents to scrutinize would have the status of 'belonging to the legislator' rather than 'internal working documents of the Commission', as impact assessments still are. A second model can be found outside the realm of 'regulation' but in many ways actually comes closest to the design of the Impact Assessment Board/Regulatory Scrutiny Board so far. In the United States, 'Offices of Goodness' have achieved some successes in providing an 'institutional home' within agencies for particular values deemed important for administrative practice by Congress. What characterizes these offices is that they have a variety of tools available to them. As Schlanger reports in an insightful article on the topic, these include inclusion in working groups, clearance authority, advice-giving; training and technical assistance, program review, complaint investigation, outreach, document generation and congressional reporting. [6] If we focus a bit less on the obvious novelty in the design of the Regulatory Scrutiny Board, the addition of external members, and look at the expansion of activities the new Board is expected to undertake the Offices of Goodness may actually provide an interesting good practice. The Commission is already planning for the scope of the Board to extend to "the most significant retrospective evaluations and 'fitness checks' of existing policies to ensure that the Commission's policy making is based on high quality evaluation of what is already in place in line with the 'evaluate first' principle".[7] The new Regulatory Scrutiny Board is also given the competence to "offer advice to individual Commission services regarding the application and interpretation of the relevant guidelines in particularly challenging assessments/evaluations and on methodological issues" as well as "advice on horizontal issues relating to the further development of the Commission's impact assessment and evaluation/fitness check processes and guidelines".[8]

Inspired by the 'Offices of Goodness', it is worth considering adding to the toolkit of the new Board a type of complaint investigation and the possibility to scrutinise impact assessments as they are being prepared instead of just the 'end products'.

Although, judging from the reactions by Member States in particular,[9] a tripartite Board for all three institutions seems to be the end game, the institutions are not yet ready for a radical institutional design of that kind. It looks like the Regulatory Scrutiny Board, in its current set-up will be an interim solution, not necessarily a bad one, but with much riding on the selection of the 'external' members and the implementation of the move away from the 'peer review' model of the Impact Assessment Board.

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6 Margo Schlanger, "Offices of Goodness: Influence Without Authority in Federal Agencies", *Cardozo Law Review*, Vol. 36, No. 2, 2014.

7 Communication to the Commission on 'Regulatory Scrutiny Board. Mission, tasks and staff', 19 May 2015, C(2015) 3262 final, p. 2. See also, the Decision of the President of the European Commission on the establishment of an independent Regulatory Scrutiny Board, 19 May 2015, C(2015) 3263 final.

8 *Ibid*.

9 Dutch House of Representatives (Tweede Kamer der Staten-Generaal; parliamentary year 2014-2015), Fiche on 'Better Regulation', series 22 112, nr. 1983.

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