

## **IMPACT ASSESSMENT BOARD (IAB)**

**Luca DI DONATO<sup>1</sup>**

### *Abstract*

*This essay explores the role of the Impact Assessment Board (IAB) in the context of the European Commission's impact assessment system. The first part describes the Regulatory Oversight Bodies (ROBs) that aims to correct the failures of regulation and the limits of regulation. The second part explains the European Union Regulatory Oversight Bodies model, e.g. the IAB, created in November 2006 and located in the Commission Secretariat-General under the direct authority of the Commission President. The IAB examines and issues opinions on all the Commission's draft impact assessments. The Board has been analysed focusing on its tasks, powers, composition and the effects of its opinions. The third part, finally, describes the IAB's findings.*

The Impact Assessment Board (hereafter: IAB) was created in November 2006 and is located with in the Commission's Secretariat-General Department under the authority of the Commission President.

According to the **European Commission**, the IAB will: «provide widespread quality advice and control ensuring that the responsibility for preparing assessments and the relevant proposals remains with the relevant departments and Commissioners and contributes to ensuring that regulatory impact assessment approach is of high

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<sup>1</sup> Luca DI DONATO, Consulente presso Studiare Sviluppo S.r.l - Ministero dell'Economia e delle Finanze - Dipartimento delle Finanze

quality, that they examine different policy options and that they can be used throughout the legislative process» (COM 2006, 689).

The IAB is part of a wider Better Regulation of the European Commission, and it responding to repeat call for better quality assurance mechanisms and stronger coordination in the *ex-ante* assessment activities carried out by the various Directorate Generals (COM 2006, 689).

The IAB appears, at least *prima facie*, as the European version of the US Office of Information of Regulatory Affairs (OIRA) which is responsible for monitoring the regulatory proposals from federal agencies on the other side of the Atlantic (De Benedetto, Martelli, Rangone, 2011).

### *Context*

Regulation can solve social problems, but can also impose its own problems. (Wiener 2008). Indeed, on the one hand, regulation is a basic function of government (the state) in every country. Its main objectives include correcting market failures such as externalities; e.g. health, safety and environmental risks; asymmetric information, e.g. in financial markets or in labour markets; market power, e.g. entry barriers, as well as correcting other problems such as unfairness. On the other hand, regulation can also impose its own problems, including compliance costs, inhibition of innovation, unaccountable decision-making, and ancillary risks. Thus, there are not only market failures but also government failures (Majone 1994, 1996, 2010).

These problems call for an oversight body to correct the limits and failures of regulation and the regulatory instrument, such as the better regulations tools.

The idea, already developed in some jurisdictions, starts from the assumption that decisions taken using regulatory impact assessment approach, in particular impact assessment tools, inevitably require a certain amount of discretion: the selection of measures to be submitted to impact assessments; exploring some aspects while ignoring others; impact assessments carried out at too advanced a stage in the pro-

cess – all these issues can influence the final decision (Bassanini, Paparo, Tiberi, 2006; Radaelli and Meuwese 2008).

The implementation of a 'bad' impact assessment, therefore, risks frustrating the objective it seeks to achieve, while also resulting in adding an administrative burden to the decision-making mechanism. Thus, to reduce this broad discretion, it seems necessary to verify the correct application of the tools they use (Radaelli and Meuwese 2008).

According to literature, these issues raise the following question: «*Quis Custodiet Custodes?*» or «Who oversees the overseers?» (Alemanno 2009).

The OECD has highlighted that «a key role of oversight bodies is to coordinate and supervise, [...] and that Regulatory Impact Analysis (RIA) is undertaken appropriately» (OECD 1997, 2002, 2007).

These structures, generically called Regulatory Oversight Bodies (ROBs) are a disomogenea category that have the common purpose of maximising the efficiency and the effectiveness of control via the use of the levers «transparency, accountability, and evidence-based analysis» (Cordova-Novion and Jacobzone 2011; Jakobi 2012).

From a structural point of view Regulatory Oversight Bodies can have a certain degree of differentiation: «in fact, they may be set up in different forms (units, boards, committees, departments), or placed inside one of several administrative structures, e.g. the executive or legislative» (De Benedetto, Martelli, Rangone, 2011). In Europe, regulatory review was not formally established until after 2000. Based on a White paper on Governance and Mandelkern Group report, both issued in 2001, the European commission under President Prodi launched its formal Impact Assessment procedure as way to improve policy design.

The European Commission, according to the Communication on "Impact Assessment" intends: «to launch impact assessment as a tool to improve the quality and coherence of the policy development process [...]» (COM(2002)276).

Since the launch of the impact assessment procedure in 2002, the European Commission has established an articulated evaluating system, with the task of supervising the quality of impact assessments performed by the Commission services.

However, notwithstanding the efforts put in place to establish mechanisms for quality control within the European system of impact assessments, a debate has started on how to create a new body that can better ensure regulatory control in the European Union (Meuwese 2007).

The participation of different levels has led to overlapping of controls (checks) and not procedures which are well-coordinated; in this way, the mechanism as above described has not contributed to the success of the existing system of regulatory control, and resulted in an «evaluation exercise poorly coordinated and supervised» (Renda 2006; Cecot *et al.* 2007).

At the European Parliament plenary discussion on Better Regulation on 4 April 2006, Commission President Barroso acknowledged the need to respond to the varying quality of Commission impact assessments after which the Commission committed itself to establishing a quality control body on 14 November 2006: the Impact Assessment Board (Lofstedt 2006).

The European Commission has adopted a system based on three distinct levels (Alemanno 2011; Benedetti 2012).

The first is represented by central units located within individual departments of the Commission itself: these are assigned the tasks of coordinating the operating units in preparing Impact Assessment drafts in their sectors (i.e. Inter-Service Consulting) (Alemanno 2011; Benedetti 2012).

The second level is represented by the General Secretariat to which, instead, is given the function of checking the quality of impact assessment drafts of the departments. In this way, the European Union has a hierarchical system, the apex of the pyramid is assigned to the highest office of the European Commission. The fundamental task is to guarantee that all European initiatives respond to subsidiarity and

proportionality requirements; applying systematic consultations towards stakeholders; and, including impact analysis on **Small and Medium Enterprises** (Alemanno 2011; Benedetti 2012).

Finally, the third level is based on the Inter-Service Steering Group (IASG): a inter-departmental committee that involves the Services of the Commission which concerned with the proposals under examination. The constitution of such committee is mandatory for regulatory proposals that have a transversal impact (Benedetti 2012).

The IAB is part of the third level: the Board intervenes after that regulation is evaluated by Directorate Generals and Secretariat General, but before of the IASG's control (Benedetti 2012).

The establishment of the IAB has not put an end to this heterogeneous oversight mechanism (Alemanno 2011).

### *Tasks and power*

First of all, according to article 1 of the Mandate - The Mandate and Rule of procedure are IAB's document-base - the IAB mission's is that «to improve the quality of the Commission's impact assessment by strengthening quality control and providing advice and support». Its main task is therefore to provide advice and issue opinions on the quality of the impact assessment as prepared by the department.

There are limits to the power the IAB has when carrying out its functions: in fact, the IAB can only postpone a draft impact assessment that appears critical in some parts, but «it cannot force the Directorate Generals – authors of the initiative – to change it in the desired direction» (Allio 2007).

The IAB has no veto power over the Commission's impact assessment (Torriti and Löfstedt 2009; Wiener and Alemanno 2011).

This choice seems refers to the actual European institutional architecture, in fact, «the conferral to the IAB of a return letter power might breach the principle of colle-

giality, which governs the functioning and the operation of the Commission» (Meuwese 2008; Alemanno 2008).

However, the IAB was given the power, according to article 4 of the Mandate, to send *prompt letters* in order to encourage the writing of impact assessments on relevant legislative proposals that do not fall within the Commission's Legislative and Work Programme (Meuwese and Senden 2009).

The Commission's Legislative and Work Programme, as is known, does not necessarily cover the proposals that have the greatest impact; therefore, the existence of *prompt letters* can help fill this gap; in particular forwards Commission initiatives with significant impacts, also including proposals of delegated and implementing acts.

In this way, even if the opinions are not binding, the IAB has the possibility to exert a **moral suasion** on Directorate Generals - it is also called *fonction d'incitation réglementaire* (Alemanno 2008).

Moreover, impact assessments not only is required by relevant legislative and non-legislative proposals, but also covering both Commission's delegated acts which are likely to have significant impacts and implementing acts, which procedures are defined by articles 290 and 291 TFEU that followed the entry into force of the **Lisbon Treaty** (Alemanno and Meuwese 2013).

In particular, impact assessment also accompanied comitology issues in order to enhance the transparency of regulatory process in which such comitology procedures are adopted that, as known, these are out of parliamentary control (Alemanno and Meuwese 2013).

The IAB may also be asked to give their opinion on specific impact assessment. According to article 5(3) of the Rule of procedure: «on request of departments, and at the discretion of the Chair, the Board may provide advice on impact assessments during the course of their being drawn up. The Board can ask departments to report on the progress of the impact assessment work».

Although it is difficult to predict what role it could play in the development of impact assessment: «between the Secretariat General - which is essentially responsible for the quality control upstream and IAB itself - which is basically the task of quality control in the valley. The risk is that, with the involvement of the IAB, in counseling (for the preparation of impact assessment) becomes the same way both judge and party politics. It was expected that such a situation could compromise the independence and credibility of the Board» (Alemanno 2008).

### *Composition*

The members of the IAB are: the Deputy Secretary-General responsible for Smart Regulation and eight permanent officials at Director level of the following areas: macroeconomic; microeconomic; environmental and social.

The Deputy Secretary-General is the chair and represents the Board. The Board's members are appointed by the Chair on the basis of their competence and independence. They are appointed by the Commission President for a 2-year term and are directly responsible to him.

According the article 3(1) of Rules of procedures, they shall act independently of their personal interests and the interests of their home departments.

In case of the conflict of interest, according to article 3(3), the Chair «shall decide on how to deal with cases where independence of a member is questioned».

The IAB's members can be influenced in their work - this is especially true when the IAB should consider a project of those Services that are not representatives of the Board. In these circumstances, «the risk could be that the quality control of the IAB is particularly heavy for delaying (boycott) the development of the proposal. Given the growing confrontation between the different branches of the Commission who compete to implement their respective programs, such a scenario boycott should not be overlooked in the context of the current criteria for the composition of the IAB».

According to doctrine, the only way to ensure complete independence from the services of the Committee is interpreted widely to article 3 of the Mandate, forbidding members to express their opinion on the draft impact assessment issued by their service (Alemanno 2008).

However, the IAB's independence seems to be formal, rather than substantial. In fact, the IAB is led by the Deputy Secretary-General, but it is subordinated to instructions of the Commission's President. This feature has raised questions from other European Union institutions (Benedetti 2011).

The European Parliament has called for the following measures to strengthen: «(i) the independence of members of the IAB, who must be scrutinized by the European Parliament and the Council prior to appointment and no longer be subject to the instructions of the Commission President; (ii) the involvement of experts from all policy areas as well as all stakeholder groups affected in the IAB's work [...]» (European Parliament 2011).

Apart from the composition and independence issues, the question of the criteria for membership on the Board, there is also a crucial question regarding the effectiveness of the organism (Alemanno 2008).

The article 1 of the Rules of procedure establish that members must have great competence in one of four areas that characterises the Regulatory Impact Assessment approach: macroeconomic, microeconomic, environmental and social. Therefore, on the one hand, in this way IAB has the necessary expertise to assess Regulatory Impact Assessment integrated (Benedetti 2011); on the other hand, this choice «seems surprising, especially in light of the mission of the Committee: to provide advice and contribute to the development of a culture of impact assessment of the Commission» (Alemanno 2008).



### *Functioning*

All impact assessments of the Commission service are scrutinized by the Board which assesses the quality of their draft impact assessment report.

After a review of the draft impact assessment, the Board sends its detailed observations to the relative Directorate Generals in the form of a «checklist of the quality», through which the IAB will: (i) check the application of the Commission's guidelines as well as standards on impact assessments work - *Conformity Test*; (ii) deliver an opinion as to whether the degree of analysis in the impact assessment is proportional to the potential economic, social and environmental objectives of the proposed initiative - *principle of proportionate analysis* (iii) and assess whether the analysis is of sufficient quality with reference to the reliability of the data and the methods used - *suitability test* (Alemanno 2008).

When the Board concludes that substantial improvements are needed on a number of significant areas, it issues an opinion to the author service making recommendations on how the draft impact assessment should be improved; in this way, IAB can demand (request) a resubmission of a new impact assessment report.

In certain cases, the second opinion may again be negative, and a second resubmission called for. Albeit rare, a third negative opinion may be issued. When the opinions positive is the file can move forward once Board recommendations are taken into account.

In general, «the opinions of the Board are not binding and its evaluation on impact assessment quality is weak, and in this way, it cannot be considered the Commission's regulatory watchdog, but the IAB's functions can have some effects on the European Commission's impact assessment system» (Alemanno 2009, 2011).

This section explores the Board's activities: the IAB's first full year of operation was 2007, it examined 100 draft impact assessments.

In 2008, the Board examined and issued an opinion on 135 draft impact assessments. In 2009, the IAB examined all of the impact assessments produced by the Commission services. On 79 impact assessments evaluated in total, the IAB issued 106 opinions, 30 of which were on resubmitted impact assessment reports. As was the case in 2008, the IAB noted a continued shift in the nature of quality concerns from the basic elements of the impact assessments, which continue to improve, to more substantial analytical issues. However, there was still a slight increase in the resubmission rate from 33% to 37%, indicating that improvements in quality remain a challenge.

In 2010, the Board considered 66 impact assessments reports over 23 meetings. It issued 83 opinions, with 18 being on resubmitted reports. In particular, the impact assessment reports showed a heavy concentration on financial regulation as the Commission addressed problems that had become apparent in the financial crisis. Thus, the responsible service - Internal Market and Services - therefore produced the largest number of reports - 16 out of 66 or one quarter. In contrast, it had only produced 11% of reports on average in the three previous years (European Commission 2010).

In 2011, the IAB considered 104 impact assessments reports and issued 138 opinions, 35 of them are on resubmitted reports. It also examined 43 Multiannual Financial Framework (MFF) impact assessments reports being considered as standard upon first scrutiny.

Finally, in 2012, the IAB issued 144 opinions, 47 of them are on resubmitted reports. In particular, the opinions issued by the IAB were concerned 97 impact assessments – there is a slight decrease compared to 104 in 2011. Instead, it is further increased, compared to previous years (77% in 2011, 74% in 2010 and 68% in 2009), the percentage of impact assessments carried out on the legislative acts (78%) compared to those involving the so-called “Non-legislative proposals”.

As regards the type of initiative, the proportion of impact assessments reports concerning legislative proposals, as opposed to non-legislative proposals, was higher than previously, confirming the trend observed since 2007 for the Commission's impact assessment work to focus on initiatives likely to have significant impacts.

### *IAB's findings*

Since its creation, there have been great expectations from the IAB's findings: in fact, a number of studies have argued that the IAB's activities seem to produce positive effects on impact assessment quality, but its powers are more limited and risk reducing its efficacy.

The European Court of Auditors (ECA) has analysed whether impact assessments have supported decision-making in European Union institutions. This analysis relied on: a comparison to other international impact assessment systems, an analysis of a sample of Commission impact assessment's, interviews and surveys with people involved in performing, reviewing and using the Commission's impact assessments, both within and outside the Commission (ECA 2010).

The European Court of Auditors has investigated whether the IAB has produced effects on impact assessment quality. According to the Commission staff interviewed in connection with the in-depth case studies, the creation of the IAB as an internal quality review body has put pressure on the Directorate Generals to present good quality draft reports. It has also added transparency to the system since all IAB opinions are published on the European Commission impact assessment website (ECA 2010).

In particular, the European Court of Auditors has recommended, firstly, that «considering that the Commission initiative has to go through interdepartmental consultation, decision-making by the members of the Commission and translation, the IAB opinion can only have a substantive effect on the final version of the underlying initi-

ative if the IAB review takes place early enough in the process»; secondly, the effectiveness of the quality review is subject to its timely availability (ECA 2010).

The Centre for European Policy Studies (CEPS) confirmed that the quality of the European Commission impact assessment system seems to have been positively affected by the creation of IAB (O. Fritsch *et al.* 2012).

According to this study, impact assessment tools within the European Commission and United Kingdom contexts – these are the two dimensions that are compared – can be understood examining their existing regulatory oversight bodies (O. Fritsch *et al.* 2012).

«It is interesting to look at the different work methodologies of the two models in order to underline some differences. The Regulatory Policy Committee (RPC) is the United Kingdom independent body with its own secretariat that does not take instructions from Cabinet Offices or other branches of the government. Then, the Regulatory Policy Committee, rather than publishing opinions on completed impact assessments, interacts with departments during the production phase and suggests modifications or types of analysis» (O. Fritsch *et al.* 2012).

Instead, the European Commission impact assessment system has a different structure. The IAB «publishes its opinions on the impact assessments produced by the different Directorate Generals - contrast this with the work 'behind the scenes' of the RPC, but in fairness, parts of the European Commission's work on impact assessments do take place behind 'closed doors'. The Commission only publishes the final version of impact assessments, together with IAB's opinion on previous drafts and the corresponding legislative proposal; earlier impact assessment drafts, in contrast, are not made public» (O. Fritsch *et al.* 2012).

In 2007, «when the IAB became operational, several indicators show a sharp increase in the order of magnitude of 20 to 30%, e.g. for the quantification of costs and benefits, the monetisation of costs and benefits, and the evaluation of the three main categories of impacts» (Fritsch *et al.* 2012).

Andrea Renda explores the development of impact assessment in the European Union and its study confirms that «the Commission impact assessment system is firmly nested into the Commission's policy cycle».

The European Commission has «certainly achieved important results in mainstreaming impact assessment in its policy-making process, though important margins for improvement remain» (Renda 2010).

This study observes that «at the end of 2009, the European Commission had completed 475 impact assessments. The number of impact assessments has been increasing significantly since 2006, although 2009 marked a slow-down due mostly to the transition towards a new European Commission and a new European Parliament.

In 2010, at least 140 impact assessments were expected according to the available 2010 roadmaps. In any event, available data show that the Commission impact assessments have become more complete and transparent over time» (Renda 2010).

Thus, the European Union experience with impact assessment is considered as being fairly successful, but margins for improvement certainly exist. In particular «expanded competence of the Commission calls for a stronger oversight on the quality of the Commission impact assessments. This can be achieved in several ways, including strengthening the IAB» (Renda 2010).

«Demand for quality assurance systems within the Commission led to the appointment of the IAB, which in turn generated significant pressure on Directorate Generals. Indeed, Directorate Generals such as Internal Market and Services and Enterprise and Industry are working on their own, expanded version of the impact assessment guidelines to make sure their officials produce better proposals and do not elicit negative comments by the IAB» (Renda 2010).

The Directorate General for Internal Policies examines tasks and procedures of impact assessments carried out in the European Commission and in eight member

states: Denmark, France, Germany, Hungary, Italy, Poland, the Netherlands and the United Kingdom (De Palo *et al.* 2011).

The comparative study focused on the European evaluation system and recognised that it has introduced both centralised and decentralised scrutiny mechanisms. The individual Inter-Service Steering Groups provide a decentralised form of scrutiny, since they are set up to support individual impact assessments, while the IAB acts as a central scrutinising body. In both cases, «it appears that the focus is on impact assessment quality control, rather than on formal or procedural checks» (De Palo *et al.* 2011).

Another issue explored by research is linked to independence: «although the IAB is formally an independent body, its members are director-level officials from Commission departments and they are appointed by the President of the Commission. This means that the IAB is, in practice, internal to the European Commission and thus only independent to a certain extent» (De Palo *et al.* 2011).

Even if the IAB's members act with their own professional expertise, in practice «there are situations where Directors of individual Directorate Generals scrutinise assessments produced by their Directorate Generals» (De Palo *et al.* 2011).

Such issues have raised some questions about the composition of the IAB as well as has the participation of other European institutions (in particular the European Parliament as mentioned above) in impact assessments scrutiny (De Palo *et al.* 2011).

This research has confirmed the general positive consensus that the IAB contributes to an improved quality of impact assessment, but the Court of Auditors has also confirmed that the IAB's opinions are often available quite late in the policy process and thus possibly limiting the effectiveness of the feedback mechanism.

The European Parliament Committee on Industry, Research and Energy (ITRE) has commissioned Copenhagen Economics to carry out a study on the implementation

of the so-called Small Medium Enterprises (SME) test in member state and European Commission services (Frelle-Petersen and Winther 2011).

Briefly, the SME test is a procedure – according to the Small Business Act - whereby the impacts of new legislative or other policy proposals on Small and Medium sized Enterprises are assessed.

The study was carried out in seven member state - Austria, Denmark, Germany, Italy, Latvia, Romania and United Kingdom and the European Commission.

The study's findings are that member states and the European Commission are facing different challenges and barriers in relation to the implementation of the SME test. In particular, the study shows that control mechanisms can play an important role both in the dissemination of better regulation, and in the applying of SME test (Frelle-Petersen and Winther 2011).

I focused on the European Commission that seems to have a well-institutionalised SME test procedure, in fact as noted the study: «the SME test is being used more and more consistently across European Union services» (Frelle-Petersen and Winther 2011).

Among the key factors that can explain the more consistent use of the SME test is the establishment of the IAB (Frelle-Petersen and Winther 2011).

The IAB's role as an external control mechanism has pushed the Directorate Generals to set higher internal standards to satisfy the SME test.

Interviews with European Commission services show that the IAB has a strong disciplinary effect: «the reason is that the IAB can publish critical opinions if a specific operational unit does not live up to the impact assessment guidelines. Individual European Commission officers describe the risk of receiving a critical opinion from the IAB as 'a big threat'» (Frelle-Petersen and Winther 2011).

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