



## **EUROPEAN RISK FORUM – POLICY NOTE 02**

### **THE EUROPEAN COMMISSION'S IMPACT ASSESSMENT BOARD - INITIAL DEVELOPMENTS**

**2007**

## European Risk Forum

The European Risk Forum (ERF) is an expert-led and not-for-profit think tank with the aim of promoting high quality risk assessment and risk management decisions by the EU institutions, and raising the awareness of the risk management issues at EU-level.

In order to achieve this, the Forum applies the expertise of a well-established network of experts to 'horizontal', cross-sectoral issues. In particular, it addresses regulatory decision-making structures, tools and processes, as well as the risks and benefits of new and emerging technologies, of climate change, and of lifestyle choices.

The Forum believes that:

- High quality risk management decisions should take place within a structured framework that emphasises a rigorous and comprehensive understanding of the need for public policy action (risk assessment), and a transparent assessment of the workability, effectiveness, cost, benefits, and legitimacy of different policy options (risk management).
- Risk management decision-making processes should ensure that outcomes are capable of meeting agreed social objectives in a proportionate manner;
- Risk management decisions should minimise negative, unintended consequences (such as new, unintended risks, economic losses, reduced personal freedoms, or restrictions on consumer choice);
- The way in which risk management decisions are made should be structured, consistent, non-discriminatory, predictable, open, transparent, evidence-based, legitimate, accountable, and, over time, subject to review.

Achieving these goals is, the Forum believes, likely to require extensive use of evidence (especially science); rigorous definition of policy objectives; clear and comprehensive description and assessment of problems and their underlying causes; realistic understanding of the costs and benefits of policy options; and, extensive consultation.

The Forum works with all of the EU's institutions to promote ideas and debate. Original research is produced and is made widely available to opinion-formers and policy-makers at EU-level. As an expert group, the Forum brings together multiple sources of evidence (such as the experience of practitioners and policy-makers; non-EU good practices; and academic research) to assess issues and to identify new ideas. Indeed, direct engagement with opinion-formers and policy-makers, using an extensive programme of conferences, lunches, and roundtables, is a feature of the Forum's work.

The ERF is supported principally by the private sector. The ERF does not seek to promote any specific set of values, ideologies, or interests. Instead it considers high quality risk assessment and risk management decisions as being in the public interest. An advisory group of leading academics supports the ERF's work.

## EXECUTIVE SUMMARY

In 2002, the European Commission set up an integrated Impact Assessment (IA) system. It merges into a single regulatory process management tool the analysis of economic, social and environmental impacts of EU initiatives. The management of the system is outlined in “Guidelines” originally issued in 2003, revised in 2005 and updated in 2006. These provide a guiding policy document for the Commission Services rather than a set of mandatory procedural, methodological and technical requirements. The scope of application of the IA system covers all items included in the annual Commission Legislative and Work Programme (CLWP). The responsibility for carrying out Impact Assessments (IAs) lies with the lead Directorate-General (DG).

Since January 2007, the Impact Assessment Board, a new and centralised oversight institution, is required to check all draft IAs produced by the Commission Services at an early stage of their preparation, before they enter the inter-service consultation. The IAB is an initiative of the President of the European Commission and is chaired by the Deputy Secretary-General (who reports directly to the President), and it consists of four “independent” members. The latter are senior officials appointed by the main Directorates (DGs) responsible for the three analytical pillars: DG ECFIN, DG EMPL, DG ENTR, and DG ENV.

Compared to the mechanisms previously in place ensuring regulatory quality, the creation of the IAB constitutes an unprecedented innovation in the institutional setting of the Commission. It provides political and operational leadership to a system that was relatively un-coordinated and insufficiently supervised.

Whilst recognising the progress that the Commission has made in improving oversight mechanisms, and accepting the gradualist nature of the reform process being used, it is important to identify areas where, in the future, further reform could improve the effectiveness of the Impact Assessment Board. Possible change could include:

- Strengthen the formal powers of the IAB;
- Make members of the IAB independent of the Commission’s DGs;
- Establish transparent rules of procedure for selecting members of the IAB;
- Improve the transparency of the operation of the IAB;
- Establish formal consultation procedures so as to enable citizens and stakeholders to comment on IAs;
- Develop structured procedures and standards for the use of external expertise;
- Set out a formal mandate for the future role of the IAB;

## 1. PURPOSE OF THIS NOTE

This note sets out thoughts and comments on the most recent developments on Impact Assessment (IA) at EU-level, specifically in relation to the introduction of the European Commission's Impact Assessment Board (IAB).<sup>1</sup>

The comments are preliminary, and reflect the initial introduction and early work of the IAB. They should be reconsidered in the light of better evidence of the performance of the IAB.

## 2. THE COMMISSION'S IMPACT ASSESSMENT SYSTEM

The integrated IA system was announced in July 2002 and entered into force in 2003. Drawing from three main policies of the European Union (the Lisbon Strategy; the Sustainable Development Strategy, and the European Governance debate), the system seeks to merge into a single tool the analysis of economic, social and environmental impacts of EU initiatives. As such, it replaces the sectoral instruments previously in place, and it applies to all services of the Commission.

The management of the system is outlined in "Guidelines" originally issued in 2003, revised in 2005 and updated in 2006. The Guidelines are conceived to be a guiding policy document for the services rather than a set of mandatory procedural, methodological and technical requirements.

Further to a revision of the system in 2005, the Commission now carries out "Roadmaps" and "Impact Assessments", the thoroughness of which is regulated by the so-called principle of "proportionate analysis".

The scope of application of the IA system covers all items included in the annual Commission Legislative and Work Programme (CLWP).

The responsibility for carrying out Impact Assessments (IAs) lies with the lead Directorate-General (DG). IAs are normally not outsourced and not subject to external consultation or peer-review. Nonetheless, Inter-Service Steering Groups (for cross-cutting proposals) and Inter-Service Consultation are mandatory steps before the adoption of the proposal.

In the period between 2003 and 2006, the Commission has carried out 195 IAs. Some 100 IAs are planned for 2007.

**Since January 2007, draft IAs are reviewed by a centralised oversight body, the Impact Assessment Board (IAB). This replaces earlier, de-centralised oversight mechanisms.**

<sup>1</sup> See [http://ec.europa.eu/governance/impact/iab\\_en.htm](http://ec.europa.eu/governance/impact/iab_en.htm).

<sup>2</sup> Article 1 of the IAB's rules of procedure, available at

[http://ec.europa.eu/governance/impact/docs/key\\_docs/iab\\_rules\\_of\\_procedure\\_final.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/iab_rules_of_procedure_final.pdf).

<sup>3</sup> IAB Mandate, at [http://ec.europa.eu/governance/impact/docs/key\\_docs/iab\\_mandate\\_annex\\_sec\\_2006\\_1457\\_3.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/iab_mandate_annex_sec_2006_1457_3.pdf).

### 3. THE IMPACT ASSESSMENT BOARD (IAB)

#### 3.1. PREVIOUS OVERSIGHT MECHANISMS

Compared to the mechanisms previously in place ensuring regulatory quality, the creation of the IAB constitutes an unprecedented innovation in the institutional setting of the Commission.

Before the IAB, quality scrutiny was ensured in a partially de-centralised manner, through the following three mechanisms:

- **Level 1: the work of IA units within each DG.** The DGs have been progressively urged to establish such units in the course of the last years with the aim of controlling the drafts IAs prepared by the operational units. Yet, the IA Guidelines leave the DGs free to organise their IA work. While in theory this enables a smoother reform and it better tailors structures to the characteristics of the various policies, this approach has led to internal inconsistencies in the quality of both the IAs produced and the scrutiny performed on them.
- **Level 2: the guidance and quality control role of the Secretariat-General,** as envisaged by the IA Guidelines. Evidence has shown, however, that the Secretariat-General has not been able to establish itself as an effective oversight body yet. Lack of resources (both quantitatively and qualitatively), internal political resistance, and the absence of explicit quality standards in the Guidelines have clearly hindered its work in this respect.
- **Level 3: the inter-service consultation.** This takes place before the adoption of any proposal by the Commission and is not only meant to contribute to policy integration but also to expand and improve the quality of the original IA. However, this mechanism intervenes at a far too late stage in the preparation of the IA document. In some cases, political considerations and timing have significantly limited its effectiveness.

#### 3.2. ROLE OF THE IMPACT ASSESSMENT BOARD

The IAB, a new and centralised oversight institution, is supposed to check all draft IAs produced by the Commission Services at an early stage of their preparation, before they enter the inter-service consultation. The IAB is an emanation of the President. It is chaired by the Deputy Secretary-General (who reports directly to the President), and it consists of four “independent” members. The latter are senior officials appointed by the main DGs responsible for the three analytical pillars: DG ECFIN, DG EMPL, DG ENTR, and DG ENV.<sup>2</sup>

With the introduction of the IAB, the IA system follows the following steps:

- 1) The Lead DG sends the draft IA to the IAB;

<sup>2</sup> Article 1 of the IAB’s rules of procedure, available at

[http://ec.europa.eu/governance/impact/docs/key\\_docs/iab\\_rules\\_of\\_procedure\\_final.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/iab_rules_of_procedure_final.pdf).

47 Boulevard Saint Michel, B – 1040 Brussels, Belgium  
Telephone + 32 2 400 00 88 Facsimile + 32 2 400 00 33  
www.riskforum.eu email: info@riskforum.eu

- 2) The IAB sends the DG detailed comments;
- 3) The DG responds either in writing or orally at an IAB meeting;
- 4) The IAB issues an opinion (and may require a second review);
- 5) The DG takes note of the IAB opinion and revises the draft;
- 6) Inter-service consultation starts (the IAB opinion is posted on the Commission intranet);
- 7) The opinion accompanies the proposal to the College;
- 8) The opinion is published along with the proposal once the latter is adopted by the Commission.

### 3.3. IAB - POSITIVE FEATURES

In light of the above, it is clear that the decision to introduce a centralised body directly reporting to the President grants **political and operational leadership** to a system that was relatively un-coordinated and insufficiently supervised. The IAB intervenes between Level 2 and Level 3 of the IA development process. In this respect, the Board **successfully complements** the existing structures – it does not replace them – notably by creating **incentives** for improving regulatory quality (rather than direct sanctioning).

The possibility for the IAB to issue “**prompt letters**”, moreover, may potentially fill the structural gap caused by the excessively broad and undetermined scope of application of the IA system. Currently, all items included in the CLWP irrespective of their nature and relevance. Through its prompt letters, the IAB might be instrumental in identifying those items (notably under the comitology procedures) that are not included in the CLWP, but which could benefit from an IA.<sup>3</sup>

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<sup>3</sup> IAB Mandate, at [http://ec.europa.eu/governance/impact/docs/key\\_docs/iab\\_mandate\\_annex\\_sec\\_2006\\_1457\\_3.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/iab_mandate_annex_sec_2006_1457_3.pdf), point 4.

### 3.2. IAB - GAPS AND AREAS FOR FURTHER IMPROVEMENT

Despite these major changes in the institutional architecture of the IA process, the Commission has in fact not gone down the entire road, as envisaged by the OECD and European Policy Centre (EPC) recommendations.<sup>4</sup> With the formula chosen, the current mandate and *modus operandi* of the IAB make it just a first but incomplete move in the right direction.

A number of criticisms can currently be made to the IAB:

- **The powers conferred on the Board are ‘soft’.** From an external perspective, its influence is almost exclusively based on the perceived independence and credibility of the opinions issued. To date, the IAB has not been entrusted with a formal veto power over the draft IAs and cannot force a DG to re-do its IA. Its opinions are taken on board by the concerned services on the grounds that failure to do so may undermine the standing of the proposal during the subsequent inter-service consultation. Based on the fear to be “named and shamed” by the Board during the inter-service consultation and at the level of the College, the adherence by the DGs to the IAB opinions relies predominantly on the internal credibility of the scrutiny system.

The choice of not granting the IAB any formal power to issue “letters of returns” (as it is the case of the US OIRA) seems to be somehow inevitable within the actual legal architecture of the Commission. This in fact is governed by the principle of collegiality, to which a central body with fully-fledge powers would be contrary. Indeed, the principle not only requires “the equal participation of the Commissioners in the adoption of decisions”, but it also implies that these “decisions should be the subject of collective deliberation.” The rationale behind this is that all the members of the College of Commissioners bear collective responsibility at the political level for Commission’s decisions.<sup>5</sup>

- **IAB’s members are not formally independent of DGs.** While the IAB is required “to act independently of the policy making departments”<sup>6</sup>, apart from the Deputy Secretary-General who sits *de iure* within the body, the other four members are appointed by the Directors-General heading the DGs to which they belong.<sup>7</sup> The question of the formal and factual independence of the IAB members from their hierarchy becomes even more relevant when one realises that the members are not only appointed by their own DGs, but they may also be removed by them at any moment.<sup>8</sup>

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<sup>4</sup> See EPC Occasional Paper on *Regulatory Impact Analysis: Improving the Quality of EU Regulatory Activity*, September 2001 (esp. Recommendations 6-8, p.18) and Lorenzo Allio, *Impact Assessment in the European Commission. An Evaluation* (2005-2006), unpublished paper prepared for the EPC, November 2006, p.8-9.

<sup>5</sup> Judgment of the Court (Fifth Chamber) of 8 June 1999, *Commission of the European Communities v Federal Republic of Germany*, Case C-198/97, ECR 3257, at paragraphs 19.

<sup>6</sup> COM(2006) 689, at 8.

<sup>7</sup> See Article 1, paragraph 3, of the IAB Rules of procedure.

<sup>8</sup> Article 2 of the IAB Rules of procedure. – Moreover, there is evidence that IAB members still rely on their respective services for expertise and background work (the support unit in the Secretariat General being still under-equipped).

- **IAB Rules of procedure are also silent on the criteria for the selection of the IAB members.**<sup>9</sup> The qualification of the officials appointed to a scrutinising body is a crucial factor contributing to its effectiveness and credibility: the role of the IAB is to “offer advice and support in developing a culture of impact assessment inside the Commission.”<sup>10</sup>
- **The operation of the Board lacks transparency.** The creation of the IAB is, in part, a response to a series of criticisms of the quality of the IAs produced. Improving the transparency of the system was a remedy broadly advocated to address the serious concerns by the European Parliament, business, and (environmental) NGOs about the respect of the balance between the three pillars and the degree of quantification. With the current functioning of the IAB, however, the Commission has not managed to establish a system whose transparency fully satisfies the expectations of stakeholders.

Although the IAB’s opinions are eventually made public once the policy initiative is adopted by the Commission<sup>11</sup>, a number of considerations limit the significance of this measure.

- The IAB opinion concerns the draft IA, which differs from the final document, and is not published. As a result, the public is not in a position to assess the actual extent to which the publicly available IA has been modified further to the comments of the IAB and the inter-service consultation.
- The public is also not well informed on the stage at which the IAB intervenes. There is no formal description of the procedures followed by the Commission in the preparation of IAs. An idea of the functioning of the IAB was only given at the meeting organised with the stakeholders in June 2007.<sup>12</sup>
- There is currently no mechanism in place allowing interested parties to provide comments on the IAs. At no stage does the Commission organise meetings with stakeholders and interested parties in order to receive and respond to comments on the quality of the IA under examination. This would undeniably strengthen the IA validation process as well as, ultimately, the acceptance of the IA document.
- The IAB Rules of procedures do contemplate recourse by the Board to not better specified “external expertise”. However, this must be motivated by “particularly complex or problematic issues related to individual impact

<sup>9</sup> Article 1 governing the appointment of the IAB’s members states that appointees must be permanent officials at Directorate level coming from the DGs represented within the Board. They are not required to show a specific expertise on (regulatory) IA or on other disciplines relevant to the exercise of the attributed oversight activities.

<sup>10</sup> European Commission, *A Strategic Review of Better Regulation in the EU*, COM(2006) 690 final, of 14 November 2006, p.8.

<sup>11</sup> See [http://ec.europa.eu/governance/impact/cia\\_2007\\_en.htm](http://ec.europa.eu/governance/impact/cia_2007_en.htm). – Legally, the publication of the IAB’s opinions before the final adoption of the Commission proposal creates the situation in which an opinion on a draft IA is disclosed before the content of the Commission proposal itself. This would be somehow problematic to the extent a Commission initiative, before formal adoption by the College, does not acquire yet the status of Commission proposal. – I thank Alberto Alemanno for this remark.

<sup>12</sup> See the Commission presentation at the “European Commission Impact Assessment: Discussion with Stakeholders”, 28 June 2007, at [http://ec.europa.eu/governance/better\\_regulation/iase.htm](http://ec.europa.eu/governance/better_regulation/iase.htm), PPT presentation on the IAB, slide 4.



assessments”<sup>13</sup>, and no formal and accountable mechanism is introduced to allow solicited parties to intervene in the process. Neither do the Rules of procedure contemplate quality standard requirements and criteria for the choice of the expertise sought.

- Whilst IAB’s opinions are in principle published, Regulation 1049/2001 regarding public access to EU official documents applies.<sup>14</sup> This implies that in exceptional circumstances an opinion may be withheld from direct public access. This may occur if the responsible DG so requests and justifies its request to the IAB. This undermines certainty of publication, although it should be noted that the same Regulation 1049/2001 still allows individuals to request the access to an opinion whose publication was not approved. In such cases, the IAB is expected to review such a request in detail in accordance with Regulation 1049/2001.<sup>15</sup>
- **The existing mandate of the IAB may create future problems.** It envisages a possible expansion of the IAB’s tasks to encompass advice on “horizontal issues relating to the further development of the Commission’s impact assessment system”<sup>16</sup>. These horizontal tasks may potentially overlap with the ones of the Secretariat General (for instance in the design of training systems and the development of guidelines), thereby causing organisational problems and inconsistencies. More importantly, structured rules should govern such future activity by the IAB, otherwise the same body would be called to evaluate the validity of and compliance with a system that it contributed to establish. This would inevitably damage the credibility and legitimacy of the system.

#### 4. CONCLUSIONS

One possible conclusion drawn from this analysis is that of a rather weak regulatory oversight body. Particularly if it is compared to the US model (OIRA), concerns related to the expertise and independence of the IAB members, as well as the transparency of its procedures and functioning, raise legitimate doubts about the effective powers of the Board.

Nonetheless, it is necessary to consider the IAB both in its institutional context and in temporal perspective. The Commission has traditionally preferred piece-meal reforms to abrupt U-turns. This has been the case also for the creation of the IAB, which is clearly a child of its time in this respect

At first, faced with the rising pressure for an external independent IA body,<sup>17</sup> the Commission has focused on complementing the existing quality and control mechanisms, rather than replacing them completely (or, even worse, losing control

<sup>13</sup> Article 15 of the Rules of procedure.

<sup>14</sup> Article 16, paragraph 3 of the Rules of procedure.

<sup>15</sup> I owe this remark to Alberto Alemanno.

<sup>16</sup> IAB Mandate (See Footnote 3), point 6.

<sup>17</sup> As advocated by business organisations, the European Parliament (e.g. through the so-called *Doorn Report*) and position papers issued by national government, notably the UK, NL and Germany.

over the whole scrutiny function).<sup>18</sup> As conceived by the Commission, the IAB clearly follows two internal logics: first, compatibility with the existing legal principles, tools and procedures; and second, the potential concerns about the initiative from within its services. As many of the points outlined above show, most of the current features of the IAB have been influenced by these factors, as well as by the real attempt of the Commission to ensure effective oversight.

Some of the current IAB weaknesses are the direct results of that specific institutional strategy. It is legitimate to believe that over time and once the institutional innovation is digested by the services, further centralising measures may well be introduced.

Under this perspective, the limitations of the IAB should not be over-emphasised when judging the quality supervision system of the Commission as a whole. Rather, the contribution of the Board must be assessed within the wider context of the existing oversight mechanisms. Two examples illustrate this point:

- It is true that the IAB itself cannot veto a flawed draft IA. However, such a power can be exercised by the Secretariat General,<sup>19</sup> and the IAB's (negative) opinion may be used by other DGs or even Commissioners to question the initiative itself.
- More broadly, the general availability of IAB opinions may encourage concerned stakeholders or other institutions to formulate criticism about the IA document or the initiative itself. This is a sort of "soft power" that the IAB may indirectly use in order to stimulate services to perform better.

At this stage, it seems that the effectiveness of the Board lies more in its providing incentives to the services to enter the inter-service consultation "better equipped" (i.e. with a better IA) than acting as a strict watchdog on the quality of the drafts submitted.

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<sup>18</sup> The gradual change approach was explicitly confirmed also by C. Day at the Commission event of 28 June 2007 (See Footnote 15), at [http://ec.europa.eu/governance/impact/docs/key\\_docs/speech\\_cd\\_rev2.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/speech_cd_rev2.pdf), p.2.

<sup>19</sup> If the IA report subject to review should not reach a satisfactory level of quality, the Secretariat-General may issue "a suspended or unfavourable opinion". See Impact Assessment Guidelines, SEC(2005) 791, at [http://ec.europa.eu/governance/impact/docs/key\\_docs/sec\\_2005\\_0791\\_en.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_en.pdf), p.15.

## 5. RECOMMENDATIONS

Whilst recognising the progress that the Commission has made in improving oversight mechanisms, and accepting the gradualist nature of the reform process being used, it is important to identify areas where, in the future, further reform could improve the effectiveness of the Impact Assessment Board. Possible change could include:

- **Strengthen the formal powers of the IAB** through establishment of rights to veto inadequate IAs and to issue “prompt letters” requiring other important regulatory activities, not included in the scope of the current IA system, to be subject to review;
- **Make members of the IAB independent** of the Commission’s DGs;
- **Establish transparent rules of procedure for selecting members of the IAB**, emphasising the qualifications needed for membership;
- **Improve the transparency of the operation of the IAB** by publishing draft IAs (on which IAB members comment) and setting out rules of procedure;
- **Establish formal consultation procedures so as to enable citizens and stakeholders to comment on IAs**, providing additional knowledge and expertise on which the IAB can carry out its work;
- **Develop structured procedures and standards for the use of external expertise**, allowing the IAB to make greater use of experts in an open and transparent manner;
- **Set out a formal mandate for the future role of the IAB**, ensuring that overlaps with other central institutions, most notably the Secretary-General, are minimised;

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This background note was written by Lorenzo Allio, a Fellow of Kings College London, with help from members of the Forum. However, the views and opinions expressed in this paper do not necessarily state or reflect those of the European Risk Forum.