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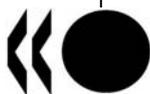
**Issues in the Comparison of Regulatory Oversight Bodies**

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## SUMMARY

1. This paper identifies the key concepts and issues relevant to comparing Regulatory Oversight Bodies (ROBs) across governance systems in different countries. The paper is intended to raise these issues for discussion among the representatives of the OECD member countries at the OECD Working Party on Regulatory Management and Reform in Paris on 21-22 October 2008. This will assist OECD to prepare a survey of these issues in member countries, in order to build the empirical data on which to pursue a subsequent comparative exercise; and to contribute to the overall project goal of developing common principles and good practices to help inform member countries regarding ROBs.

2. Regulation can solve social problems, but can also impose its own problems. Wherever states deploy regulation, demand also arises for oversight of the regulatory system to reduce the costs and side effects of regulation, promote efficiency in standard-setting and instrument choice, encourage consistency and transparency, and improve the overall social outcomes of regulation. Impact assessment (IA) and review by regulatory oversight bodies (ROBs) have therefore become an integral aspect of regulatory reform programs in many countries.

3. This paper identifies key issues to be addressed in a comparison of ROBs across countries. It addresses the similarities and differences of ROBs regarding their rationales, powers, tasks, structure, resources, scope of oversight, political legitimacy, and influence. It illustrates these issues with reference to the ROBs in the United States government and the European Commission, while inviting a broader set of comparative examples. A broader comparison of these attributes could help to inform countries' choices about how best to design, situate, and operate ROBs as part of a whole-of-government strategy to improve the quality of new and existing regulations. This paper is not intended to evaluate the performance of ROBs nor to give recommendations on the optimal design of ROBs; it is intended to identify the key issues and design features that should be assessed in comparing ROBs across countries.

## 1. PURPOSE OF THIS PAPER

4. This paper identifies the key concepts and issues relevant to comparing Regulatory Oversight Bodies (ROBs) across governance systems. 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), and market power (*e.g.* entry barriers), as well as correcting other problems such as unfairness. However, regulation can also impose its own problems, including compliance costs, inhibition of innovation, unaccountable decision making, and ancillary risks. Regulation can be captured or distorted by pressure groups and rent-seeking.

5. Wherever societies engage in economic activity (which is to say everywhere), demand arises for regulation by the state to curb the undesirable impacts of that economic activity. This may also in some cases result into providing rewards to rent-seekers. Rules may not be perfect either. As a result, wherever states deploy regulation, demand also arises for oversight of the regulatory system to reduce the costs and side effects of regulation, promote efficiency in standard-setting and instrument choice, encourage consistency and transparency, and improve the overall social outcomes of regulation. “*Quis custodiet ipsos custodes?*” asked the Roman poet Juvenal – “who will watch the watchers, who will guard the guardians?”<sup>1</sup> Today we ask: who will oversee the regulators?

6. Many countries now require some form of impact assessment (IA) to review the flow of new regulations, and many have deployed programs to review the stock of existing regulations by measuring and reducing regulatory burdens. Through these procedures of regulatory review, regulatory oversight bodies (ROBs) have become an integral aspect of regulatory reform programs in many countries.

7. A comparison of ROBs across countries will be useful to illuminate their differences in authority, structure, mandates, powers, resources, and influence. This comparison can then help to inform countries’ choices about how best to design, situate, and operate ROBs as part of a whole-of-government strategy to improve the quality of new and existing regulations. Both existing and new ROBs can benefit from this comparative study.

8. This paper is designed to stimulate thinking along these lines, toward a broader comparative study of national regulatory oversight bodies. This paper attempts to identify the key issues for discussion, and highlights their possible inclusion in a survey of ROBs in OECD member countries. This paper is not intended to evaluate the performance of ROBs nor to give recommendations on the optimal design of ROBs. The paper is only intended to identify the key issues and design features that should be assessed in comparing ROBs across countries.

9. Throughout this paper, reference is made to the experience of the United States and the European Union, which have established two ROBs to oversee two of the largest arrays of regulation in the world. These two examples of prominent ROBs are offered to illustrate the key issues, in order to show concretely how these issues arise and are handled, and how these issues might be studied with regard to other ROBs. These are initial examples offered to help identify and motivate discussion of the issues that a broader comparative study of ROBs in all OECD countries could address in greater detail.

1 Juvenal was asking who would oversee those assigned to guard the queen’s fidelity during the king’s absence, lest those guards betray their own duty.

**2. RATIONALES: WHY REGULATE, AND WHY OVERSEE THE REGULATORS?**

**2.1. Why regulate?**

10. Regulation can be warranted to correct market failures. These include:

- *Externalities.*

Markets are highly effective institutions for allocating resources efficiently, but markets may fail to do so when important impacts are not considered in decisions by market actors. These unconsidered impacts are termed externalities. For example, pollution can be an external harm of economic activity. Failure to consider the social and environmental harm of pollution results in an excessive level of pollution and an excessive level of the economic activity generating the pollution, compared to the levels that would obtain in an efficient market with this external harm considered in market actors' decisions. An essential function of regulation is to internalise externalities by inducing market actors to take these impacts into account in their decisions.

- *Asymmetric information.*

Markets may be inefficient where some actors have information that others do not, skewing their transactions. For example, consumers may be unaware of product defects, workers may be unaware of safety risks in the workplace, investors may be unaware of the risks of default or downturn in the activities underlying the loans or securities in which they invest, and insurers may have difficulty monitoring risks taken by their insured policy holders. Excessive risk, which would not be reflected in prices paid, may result from a lack of information. In such cases, appropriate regulation can improve market outcomes by ensuring that more symmetric and full information is available to the actors to make well-informed decisions.

- *Market power.*

Concentration of power to influence markets – to affect prices and supplies of goods, services, or factor inputs – can also result into market distortions. For example, a monopolist can raise prices while restricting supply to increase its profits; if competitors cannot enter the market to contest the monopoly price, consumers will be harmed. Regulation can improve market outcomes by limiting market power and ensuring that consumers are able to choose among competitive goods and services.

- *Discrimination and unfairness.*

Regulation may be needed to correct discrimination by market actors (or governments) against people because of their group association, or more generally to prevent unfairness in the allocation of rights, opportunities and responsibilities.

11. In the real-world context of imperfect markets, regulations can be necessary to adjust all of these market failures. Imperfect markets coupled with well-designed market-correcting regulations yield what economists call a "second best" outcome. But regulation is not perfect either, and it may need to be subject to quality controls.

## 2.2. Why oversee regulation

12. Regulatory oversight can be warranted to correct government failures. However, regulation itself can cause problems, such as by imposing high costs, inducing new risks, inhibiting innovation, or restricting market entry. Regulators may make mistakes, may choose poorly designed regulations, may neglect social goals other than their own assigned mission, may aggrandise their own power, or may be serving the interests of narrow interest groups rather than promoting broader public well-being. Political scientists and institutional economists have emphasised that in democracies, government decisions are not taken by a single ruler but instead represent a complex aggregation of preferences advocated by specific interest groups and often mediated through contending institutions. Because learning about issues and expressing political voice are costly, the shared general interests of the public at large may go underrepresented while the narrow interests of pressure groups are trumpeted.<sup>2</sup> This would lead to what economists call a “third best outcome”.

13. In short, there can be not only market failures but also government failures.<sup>3</sup> Imperfect markets coupled with imperfect regulations can yield imperfect results, sometimes, though not always, worse than no regulation. These problems call for some oversight of regulation to avoid a “third best” outcome, that is, to correct the limits and failures of regulation and regulatory instruments, and to try to move back past the second best toward a first best outcome.

14. Regulatory oversight to correct regulatory failures includes at least these challenges:

- *Managing costs and avoiding overregulation.*

Regulators may pursue their missions with tunnel vision, neglecting the social costs thereby imposed.<sup>4</sup> This may occur, for example, where regulators are pushed by legislatures or advocacy groups, such as consumer and environmental groups, to regulate despite (or overlooking) the social costs, or where regulators overestimate the risk to be regulated. Oversight can improve overall social outcomes by requiring regulators to pay better attention to these costs and risks, such as through Impact Assessments and related checks on the quality of regulatory decisions. Impact Assessments can be required and conducted *ex ante*, that is, to evaluate choices before the adoption of a proposed new regulation; and/or *ex post*, that is, to review the performance of existing regulations after they have been adopted and implemented (and to validate and improve the *ex ante* assessment methods used earlier).

- *Protecting against risks and avoiding under-regulation.*

Regulators may at other times fail to act, neglecting the social benefits thereby foregone. This may occur, for example, where regulators are pushed by advocacy groups, such as industry, not to regulate despite the net social gains, or where regulators underestimate the risk warranting regulation. Oversight can improve overall social outcomes by prompting regulators to pay better attention to these benefits and risks, and thus to develop new regulations.<sup>5</sup>

2 A classic on this point is Mancur Olson, *The Logic of Collective Action* (1971).

3 See Charles Wolf, *Markets or Governments: Choosing Between Imperfect Alternatives* (2d ed., 1993).

4 See Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Harvard Univ. Press, 1993).

5 See John D. Graham, *The Evolving Regulatory Role of the US OMB*, 1 *Rev. Env't'l Econ. Policy* 171-91 (2007); Richard L. Revesz & Michael A. Livermore, *Retaking Rationality* (2008).

- *Managing complex interconnected systems with multiple ancillary risks and inter-agency co-ordination problems.*

Regulators may pursue policies that reduce some risks while inducing new risks or shifting risks to other populations. This may occur where regulators are hampered by limited information, bounded decision domains, or the omitted voice of the affected populations.<sup>6</sup> Oversight can improve overall social outcomes by requiring regulators to confront and resolve these risk-risk tradeoffs through an evaluation of the full portfolio consequences of each regulatory option, including both ancillary harms and ancillary benefits, and through improved mechanisms of inter-agency co-ordination.<sup>7</sup>

- *Sharing best practices across regulatory agencies.*

Oversight may contribute to improved quality of regulation by helping regulators to share learning about better methods of analyzing risks, costs and regulations, and about better instruments or designs for regulatory policy.

- *Avoiding excessive oversight.*

If oversight is too burdensome on the regulator, the result may be delay, paralysis or attempts at circumvention. Insistence on excessive detail in impact assessments, for example, may lead regulators to take too long to act or to pad policy documents with extra pages of undue analysis. Or it may lead regulators to try to avoid oversight by characterising their policies as falling outside the categories that trigger oversight (*e.g.*, as guidance rather than rulemaking, or as a settlement of enforcement litigation, or as imposing fewer costs than the threshold for oversight).

### 2.3. Regulatory oversight bodies (ROBs)

15. Regulatory oversight can be defined as “hierarchical supervision of regulatory action by executive and legislative actors.”<sup>8</sup> A broader understanding of oversight also includes review by courts and independent bodies.<sup>9</sup> Thus, a ROB could in principle be located in any of these branches of government. This paper will focus mainly on ROBs located in the executive and legislative branches, with some mention of the courts but without an extensive analysis of the functions or types of judicial review in different legal systems. All of these institutions may help the state improve the quality of regulations; the focus here will be on mechanisms that governments can establish specifically to oversee and improve regulatory decisions. A typical ROB in many countries today is an office in the executive branch (centre of government) charged with supervising regulation government-wide. Some countries also have ROBs in the Parliament or legislature.

16. One key attribute of an ROB is expertise, in the form of a trained professional staff capable of undertaking technical evaluation of regulatory impacts and options. These staff may be economists, but also experts in other fields of social science, law and policy, life science and physical science. Expertise can be an antidote to politicised distortions of regulation, or at least a means to reveal and make transparent the significant impacts, tradeoffs, and alternatives of regulatory choices – informing decision makers and

6 See John D. Graham & Jonathan B. Wiener, *Risk vs. Risk: Tradeoffs in Protecting Health and the Environment* (Harv. Univ. Press 1995).

7 See Graham & Wiener, *Risk vs. Risk*, *supra*; Jonathan B. Wiener, *Managing the Iatrogenic Risks of Risk Management*, 9 *Risk: Health Safety & Environment* 39-82 (1998); Revesz & Livermore, *Retaking Rationality*, *supra*.

8 Peter L. Lindseth, Alfred C. Aman, Jr., & Alan C. Raul, *Oversight*, in *Administrative Law of the European Union* (George A. Bermann et al., eds., ABA 2008), p.3.

9 See *id.* p.4.

the public of both the promise and pitfalls of regulation. By contrast, an ROB lacking expertise or headed by a non-expert political appointee may be viewed as exercising politicised influence over expert regulators, and may thereby undercut the ROB's own perceived legitimacy.<sup>10</sup>

17. A second key attribute of an ROB is political accountability, such as accountability to the centre of government (*e.g.* the Presidency or Prime Ministry) or to a powerful ministry (such as budget/finance), to ensure that regulation serves the program of these high-level official(s) who are in turn accountable to the electorate.<sup>11</sup> Political accountability is important, because ROB's need to be able to exert some influence on regulators who also have their own political constituencies. Just as regulators need oversight, so too ROB's warrant oversight, such as by the president or prime minister, by the legislature or parliament, and by the public.

18. An ROB faces possible tensions between these two key attributes. Expert technocratic criteria for regulation may or may not coincide with political democratic criteria. That is, the President's or Prime Minister's policy program may differ from the experts' advice regarding the optimal policy.<sup>12</sup> In such cases, the ROB may need to explain its expert technical analysis to a leader with a different priority and try to convince the leader to change course, or the ROB may be obliged to see the leader's priority override the ROB's expert technical analysis.

19. These tensions are partly mediated through the rules for the appointment and removal of ROB officials. Therefore an analysis of ROB's will need to address questions such as:

- Who has the power to appoint and remove the head of the ROB? How does the power to appoint/remove officials affect the performance of the ROB?
- What kind of expertise does the ROB have, or should it have? How does the ROB use its expertise and its political position to influence regulatory quality and decisions?
- Should political officials instruct the ROB on particular regulatory decisions (and do they)?

20. The ROB may have both a need for independence from political micro-management, to assure its neutrality and technocratic objectivity, and simultaneously a need to be close to power in order to have authority over other ministries and to carry forward the President's regulatory agenda.<sup>13</sup> In some cases, this tension can become acute.

21. Like any government body, an ROB may seek external social support to maintain its own budget and influence. If that support comes mainly from advocacy groups on one side of a debate (*e.g.* business groups), this may compromise the perceived legitimacy of the ROB's advice. Meanwhile, ROB's may also

10 Judicial oversight generally involves generalist professionals who are not experts in one regulatory topic, but who are experts in administrative law, and who are ideally independent, maintaining their perceived legitimacy by being shielded from political influence via secure job tenure.

11 See Lindseth, Aman, & Raul, Oversight, *supra*, p.8. Judicial review is typically not accountable to the electorate, but rather derives its legitimacy from its independence from politics.

12 See Stuart Shapiro, Politics and Regulatory Policy Analysis, Regulation magazine (Summer 2006) pp.40–45; John D. Graham, Appendix 3 in OECD, Implementing Regulatory Reform: Building the Case Through Results (December 2007).

13 See Elena Kagan, Presidential Administration, 114 Harvard Law Review 2246 (2001).

need to have their own external advisory bodies to offer useful insight and feedback, both on advances in technical analytic methods and on emerging issues in regulatory policy.<sup>14</sup>

#### 2.4. Examples of ROBs in OECD countries

22. A full list of ROBs in OECD member countries is available from the OECD project on regulatory management systems indicators. A summary is included as an Annex to this paper. It provides an initial overview of ROBs as they were described through questionnaires circulated in 2005.

23. For the purpose of initiating the discussion and identifying a few core parameters, a few country examples are discussed below. A full report will be able to consider a general sample of OECD countries. In many countries, of course, regulatory oversight functions are distributed across several different units.

24. A brief historical perspective related to ROBs in OECD countries helps illustrate the origins and objectives of ROBs. In the past, countries with a Roman law tradition have set up forms of ROBs, as part of Councils of State, as in France and Italy. These bodies served as advisors to the government on the legality of regulatory decisions. These bodies were also the superior level of the administrative courts, so they also exercised an adjudicative role meant to protect governments and avoid litigation in the civil courts regarding specific regulations. For example, in France after the Revolution, the Conseil d'Etat and the system of administrative courts were designed to shield the administrative state from being unduly constrained by the separate system of civil courts; the civil court judges were viewed as more sympathetic to the royal monarchy while the administrative courts were meant to be more sympathetic to the legislature and to its efforts to redistribute power and wealth in France after the Revolution. Today, the Conseil d'Etat, acting as both a court of appeals for the administrative courts and a supervisory body for the administrative state, brings significant expertise to bear on the legality of regulatory decisions.<sup>15</sup> However, it does not review impact assessments of proposed new regulations prepared by regulatory agencies.<sup>16</sup>

25. Modern ROBs, established since the 1970s, especially in common law countries such as the USA and UK, but also in other countries such as the Netherlands, and in the European Union, have a different origin. They were mainly created in response to stagnating economic conditions in the 1970s; a rising tide of regulation of health, safety and environmental risks; an accumulated array of economic regulation of sectors such as banking, communications, and transportation; and an academic literature on both the need for and problems with regulation.

26. Consider the ROBs in the US and the EU, two of the most prominent among OECD members, in order to stimulate discussion of ROBs more generally. In the late 18<sup>th</sup> century, the US Constitution's system of checks and balances among branches of government was designed to avoid the concentration of power that existed in monarchic regimes. By the 20<sup>th</sup> century, that foundational principle of checks and balances continued to animate the evolution of regulatory oversight. The US Administrative Procedure Act (APA) enacted in 1946 was a response to the "New Deal" expansion of federal regulation in the 1930s. The US Executive Orders on regulatory impact assessment issued beginning in the 1970s were in part a response to the "Great Society" expansion of health and environmental legislation in the 1960s and 1970s, as well as the slowing economy, accumulated economic regulation, and academic analysis, as just noted.

14 See OECD, *Implementing Regulatory Reform: Building the Case through Results* (December 2007).

15 See Breyer, *Breaking the Vicious Circle*, *supra*, part III.

16 See Frederic Boudier, France, in *International Regulatory Reform Report 2008* (Frank Frick & Tobias Ernst, eds., Verlag Bertelsmann Stiftung, 2008), pp.21-39; Sylvie Trosa, *La réforme de l'Etat : un nouveau management ? : valeurs et enjeux* (Ellipses, Paris. Collection Transversale-débats – 2008).

27. The US Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) was established by the Paperwork Reduction Act of 1980. OIRA was thus located in the Executive Office of the President, commonly referred to as belonging to the White House. The Administrator of OIRA is appointed by the President subject to confirmation by the Senate, and OIRA has approximately 50 expert non-political staff. OIRA replaced the prior Regulatory Analysis Review Group, established by President Carter. Whereas the RARG was an interagency working group that gathered when needed to review economic analyses under President Carter's Executive Order 12044 of 1978, OIRA is a centralised expert oversight body. President Reagan's Executive Order (EO) 12291 in 1981 formally made OIRA a ROB; it required agencies' to conduct regulatory impact assessments using benefit-cost analysis and to submit those IAs to OIRA for review, while giving OIRA the power to return an unsatisfactory regulation to the agency. This approach was reaffirmed by President Clinton's EO 12866 in 1993 broadening the scope of impacts to be considered in IAs using benefit-cost analysis to include distributional impacts and ancillary impacts, and enhancing transparency. This approach in turn has been retained by President George W. Bush with some minor modifications, such as the additional coverage of agency "guidance documents" under EO 13422 in January 2007. OIRA has also issued guidelines on the conduct of IA, notably through Circular A-4 in September 2003.

28. Thus, OIRA reflects a bipartisan consensus that the executive branch needs tools to oversee the regulatory state and manage its growth, regardless of which political party is in power. Presidents Carter, Reagan, George H.W. Bush, Clinton, and George W. Bush all adopted and implemented regulatory review through executive order (EO) and through OIRA's role as the ROB.

29. In Europe, the EU Impact Assessment Board (IAB) was created in late 2006 in the office of the Secretary-General of the Commission. The IAB grew out of the Better Regulation initiative, which was spurred by the Lisbon Agenda and the Mandelkern Report of 2001. Impact Assessment Guidelines were issued by the Commission in 2003, revised in 2005, and updated in 2006, with further revisions considered in 2008. The IAB's primary role is to oversee the quality of the IAs produced by the Directorates General when the latter propose new policies.

30. As in the US, albeit with a different institutional history and structure, the EU Better Regulation initiative and its Impact Assessment program, including creation of the IAB, adopted since 2001 have been in part a response to the growth of EU-level regulation, notably following the 1987 Single European Act and the 1992 Maastricht Treaty. The EU's adoption of the IA review process was also a way to support the Lisbon agenda. The setting up of the IAB drew lessons from the US, but also from the UK and Swedish examples, where significant improvements in the regulatory frameworks and deregulation had led to renewed economic growth. The EU Better Regulation initiative has now been supported through various presidencies of the Commission, including both the Prodi and Barroso Commissions, strengthening and formalising the IA process.

31. These trends have been mirrored in many other countries and jurisdictions, gradually spreading across almost all OECD countries. For example, the UK has had a Regulatory Impact Unit, followed by a Better Regulation Executive, with an advisory body, the Better Regulation Task Force, succeeded by Better Regulation Commission in 2006, and succeeded by the Risk and Regulation Advisory Council in 2008, and with scrutiny from the National Audit Office, the Panel for Regulatory Accountability, and the House of Commons. The Netherlands program to reduce administrative costs was overseen by the Inter-Ministerial Project Team (IPAL) in the Ministry of Finance, with external scrutiny by the Advisory Board on Administrative Burdens (ACTAL).<sup>17</sup> Countries such as Mexico, with COFEMER following on to the previous example of UDE, and Korea have also set up ROB's, influenced by examples in other OECD countries and by advice from the OECD.

17 See OECD, *Cutting Red Tape: Administrative Simplification in the Netherlands (2007)*.

## 2.5. Criteria for assessing the performance of ROB:

32. The ways in which the performance of an ROB is measured will depend on its objectives. Criteria might include:

- the quality of its comments on regulatory agencies' impact assessments and policies
- its ability to improve the quality of impact assessments,
- its influence on regulatory decisions,
- its capacity to drive reform and instil a new (evidence-based) regulatory culture // accountability
- its success in promoting efficiency or maximising social well-being,
- its success in promoting other social goals such as fairness,
- its transparency and openness to outside input
- its political accountability and legitimacy, and
- its sustainability over time.

33. Ideally, clear criteria need to be set when setting up a ROB. The performance of a ROB should be assessed and monitored to ensure accountability with a view to adjusting its operations and improving its performance over time. OECD countries can also learn from each other from governments' parallel experience with their ROB.

34. Evaluations are already available concerning the impact of ROB. Several reviews of US OIRA and its oversight of IAs have found that the process has influenced agencies to increase the net benefits of rules. These include both external studies<sup>18</sup> and OIRA's own self-evaluation.<sup>19</sup> In Europe, external reviews of the European Commission's IA process have also been performed.<sup>20</sup> For example, the IAB's self-evaluation found that in its first year of operation, the IAB had reviewed 102 IAs (*i.e.* almost all of the IAs prepared during that year), that its comments had resulted in improved quality of resubmitted IAs, and that it had helped establish a "culture of impact assessment" and evidence-based policy making among the

18 See Richard D Morgenstern, ed., *Economic Analysis at EPA: Assessing Regulatory Impact* (Washington, DC: RFF Press, 1997) (finding beneficial impact of impact assessment); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 *U. Chicago Law Review* 821 (2003) (finding that OIRA has had a discernible and beneficial influence on rules, with little evidence of bias); US GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of those Reviews* (Sept. 2003) (finding impact of OIRA on numerous regulations but seeking greater clarity on the direction and extent of this impact).

19 OMB, *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities* (Washington, DC: US Office of Management and Budget, 2005) (self-evaluation by OIRA, finding that its reviews increased net benefits of regulations).

20 See Andrea Renda, *Impact Assessment in the EU* (Center for European Policy Studies, 2006); Alberto Alemanno, *Quis Custodet Custodes dans le cadre de l'initiative "Mieux légiférer"?* *Revue du Droit de l'Union Européenne* 1 : 2008, pp.43-86.

DGs.<sup>21</sup> A parliamentary review of the UK Better Regulation Executive also found generally favourable results.<sup>22</sup>

35. An assessment of the function of ROBs through a comparative perspective could also yield useful results for OECD countries and their governments. The need for such studies has been underscored by analysts. However, a challenge in these kinds of studies is to identify the counterfactual baseline of what would have happened absent regulatory review.<sup>23</sup>

### **3. MANDATE AND POWERS OF ROBS**

#### **3.1. Authority of ROB.**

36. The authority of an ROB is usually set forth in its enabling document, such as statute (legislation) or executive order. Its authority may include one or more of the following powers:

- issuing guidelines for the conduct and quality of impact assessments and other evaluative tools,
- reviewing such impact assessments and recommending or requiring changes to improve quality,
- prompting the conduct of impact assessment
- reviewing proposed new regulatory actions and recommending or requiring changes,
- rejecting proposed regulations (where they fail a social welfare test or where they are not supported by adequate analysis),
- prompting the development of new regulations that would improve social welfare,
- reviewing existing regulations,
- measuring the costs and benefits of proposed and existing regulations,
- setting or enforcing a regulatory budget,
- other related authority

37. The type of authority accorded to an ROB may depend importantly on the source of its authority, that is, on the institution that created the ROB. For example, authority conferred by a statute enacted by the legislature may have broader application to reviews of future legislation, whereas authority conferred by order of the president or prime minister may be more confined to oversight within the executive branch, though this distinction itself depends on the constitutional structure of the government (see Part 4, below).

#### **3.2. Functions and Tasks**

38. Depending on their authority, ROBS may perform a variety of functions or tasks. A comparative study of ROBS across countries would compare the types of tasks ROBS perform and what they achieve in each task. These tasks may include:

- Quality control
  - *E.g.* via review of the quality of impact assessments

21 See Impact Assessment Board - Report for the year 2007 - Commission staff working document - Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Second strategic review of Better Regulation in the European Union {COM(2008) 32 final}, SEC/2008/0120 (January 2008), available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0120:EN:NOT>.

22 UK House of Commons, Regulatory Reform Committee, Getting Results: The BRE and its Regulatory Reform Agenda (July 2008) (finding generally favorable impact of the Better Regulation Executive).

23 See Cary Coglianese, Empirical Analysis and Administrative Law, (2002) Univ. Illinois L. Rev. 1111.

- Inhibiting undesirable policies
  - *E.g.* via “return” letters regarding proposed rules that fail a social welfare test or for which the IA is inadequate<sup>24</sup>
  - Raised to ROB’s attention by routine review of all major or significant proposed new policies<sup>25</sup>
  - Enforced by ROB or a higher executive power refusing to allow the policy to go forward until ROB approves
  - Enforced by courts<sup>26</sup>
- Promoting desirable policies
  - *E.g.* via “prompt” letters urging development of rules that have not yet been proposed<sup>27</sup>
  - Encouraging or requiring agency action?
  - Could be raised by the ROB on its own initiative<sup>28</sup>; or raised to the ROB as an appeal from an agency’s refusal to regulate (denial of a petition for rulemaking)<sup>29</sup>; or raised to the ROB by an expert advisory body.
- Capacity building, and early interaction with regulatory agencies (training)
  - Helping agencies do better IA
  - Issuing guidelines on how to conduct IA<sup>30</sup>
  - Early collaboration to shape the rule toward increasing net benefits – not just waiting to receive the proposed rule and then critiquing it.<sup>31</sup>
- Strategic planning of future policies
- Review of existing regulation
  - via IA
  - via focus on administrative cost
- Ex post (retrospective) evaluation
  - for policy revision
  - for validation and refinement of ex ante methods
- Toward evidence-based decision making – in medicine, engineering, regulation, and oversight – empiricism applied to the administrative state.<sup>32</sup>

24. OIRA has long exercised this power, since 1981, under EO 12291 and EO 12866. The IAB does not appear to have this power yet, but the Secretary-General has the power to issue a negative opinion.

25. See “Scope of oversight: selection of regulations for review,” in Part 5, below.

26. The European Courts may be starting to enforce such requirements, as in *Case C-310/04, Kingdom of Spain v. Council of the European Union (2006)* (holding that failure to conduct an IA is a breach of the proportionality principle), see Alberto Alemanno, *The Better Regulation Initiative at the Judicial Gate*, *European Law J.* (forthcoming 2008). In the US, courts will not enforce Presidential executive orders against executive agencies, but they will require agencies to abide by Congressional statutes, which may affect regulatory oversight in various directions (including enforcing legislative requirements to conduct IA, enforcing legislative prohibitions on some types of analysis, and enforcing legislative time limits on agency action notwithstanding ongoing OIRA review).

27. OIRA has begun to carry out this task since 2001, even though EO 12866 is not explicit about it. The IAB’s Rules of Procedure speak of prompt letters, but they are prompts to conduct an IA, not to develop a regulation.

28. OIRA has issued several prompt letters to agencies in this way since 2001.

29. See Revesz & Livermore, *Retaking Rationality*, *supra*.

30. See OIRA Circular A-4 (Sept. 2003), and the EU IA Guidelines (2005, updated 2006).

31. See Graham, *The Evolving Regulatory Role of the US OMB (2007)*, *supra*.

- Handling short-term pressures
  - co-ordinating and supervising action that responds to an immediate crisis
  - avoiding creating undue problems for the longer-term

### 3.3. Analytic methods

39. The powers of ROBs depend in part on which analytic tools they employ. These tools have been discussed at length in other OECD reports. They are not provided with a detailed discussion is not provided here.<sup>33</sup> The options include:

- Impact Assessment in general
  - Analysis of alternatives
  - Integrated IA: all types of impacts – social, health, environmental, economic, etc.
  - International impacts as well as domestic impacts.
- Benefit-cost analysis
  - For example this is referred to in the initial US Executive Order EO 12291 (1981): “benefits must outweigh costs” changed to EO 12866 (1993) (“benefits must justify costs”).<sup>34</sup>
  - EU IA Guidelines 2005, 2006 (“positive and negative impacts”). EU Nice Treaty art. 174 requires analysis of benefits and costs.
  - Quantitative analysis or inclusion of un-quantified impacts?<sup>35</sup>
  - Distributional impacts
- Cost-effectiveness analysis
  - Taking the legislative goal as given, and minimising the costs of achieving it: least burdensome means of accomplishing the objective.
  - Choosing among policy instruments (*e.g.* command-and-control, tax, cap and trade)
- Risk-risk trade-off analysis
  - Both ancillary harms and ancillary benefits.<sup>36</sup>

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32 See Wiener, *Managing the Iatrogenic Risks of Risk Management*, *supra*; Coglianese, *Empirical Analysis*, *supra*.

33 See Rex Deighton-Smith, *Methodological Frameworks for RIA: Valuation, Risk and Cost-Benefit Analysis* (OECD, Dec. 2007); Rex Deighton-Smith, *Determinants of Quality in RIA* (OECD, Dec. 2006). These are currently being prepared as part of a forthcoming publication OECD (2008) *Regulatory Impact Analysis, tool for policy coherence*, forthcoming.

34 One important change made in 1993 was the change from "outweigh" in EO 12291 to "justify" in EO 12866 (1993, still in effect). This change was made in EO 12866 in order to make clear both (i) that non-quantitative impacts matter in the decision, and (ii) that the impact assessment (with benefit-cost analysis) is a tool to inform decisions rather than a rule to dictate decisions, because the decisions are ultimately matters of judgment by accountable public officials. The EU IA Guidelines (2006 updated version) similarly say in section 1, p.4, that "IA is an aid to political decision-making, not a substitute for it," as well as in section 5.1 on p.39 (regarding "positive and negative impacts" and the inclusion of qualitative as well as quantitative factors) and sections 5.2 & 5.3 on pp.42-43 (regarding comparison of impacts across options) - - although somewhat surprisingly on p.40 they speak of "overall net impact" and in footnote 46 they define "net impact" as "positive impact minus negative impact." For further discussion of degrees of quantification in IA, see Jonathan B. Wiener, *Better Regulation in Europe*, 59 *Current Legal Problems* 447-518 (2006).

35 See Wiener, *Better Regulation in Europe*, *supra*; Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, in Mathew Adler and Eric Posner (eds), *Cost-Benefit Analysis* (Chicago: University of Chicago Press, 2001).

- Administrative/paperwork costs
  - For example, this was addressed in the US Paperwork Reduction Act, at the origin of OIRA. Requirements to assess the administrative burden now exist in a large set of countries, as part of efforts towards Cutting Red Tape. The Standard Cost Model (SCM) has been used in many instances to support such estimates.
- Scientific analyses
  - Role of ROBs in overseeing the science of risk regulation: crucial to benefits estimates, but ROBs may lack the needed scientific expertise.<sup>37</sup>
  - This is illustrated in the US example: Efforts to draft guidelines on (scientific) risk assessment methods by US agencies: unissued draft EO in 1992; Best Practices guidance in 1996; Circular A-4 in 2003; OIRA Proposed Bulletin on Risk Assessment 2006, and NAS review 2006; then OIRA withdrew the Proposed Bulletin and re-issued its main points as a memorandum to agencies. Over the period 2001-07, OIRA strengthened its staffing in terms of scientists.

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36 See Graham & Wiener, *Risk vs. Risk* (1995), *supra*; Revesz & Livermore, *Retaking Rationality* (2008), *supra*.

37 See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, AEI-Brookings (2006) (advocating OIRA role to co-ordinate science).

#### 4. STRUCTURE: CONSTITUTIONAL AND INSTITUTIONAL DESIGN

##### 4.1. Location of ROB in structure of government.

40. An ROB may be located in a variety of institutions. Options include:

- the center of government in the executive branch (reporting to the President or Prime Minister);
- an interagency working group;
- an independent government watchdog office, such as an auditor or ombudsman or inspector general;
- an external advisory group;
- a government ministry for reform of regulation or state reform;
- a legislative committee;
- a technical body attached to the legislature;
- judicial review by the courts;
- review by member states of a union or federation;
- external nongovernmental actors such as advocacy groups, think tanks, academic researchers, and the news media;

41. The choice among these locations is always a question of comparative institutional analysis: which institution is best equipped and best placed to perform oversight in each system of governance. Often, a mix of the above is desirable.

42. Different constitutional structures may warrant different locations. A center-of-government ROB may work well in many countries, but other approaches may be best suited to some countries' structures of governance. Countries have to assess their own structures and needs in the light of their institutional history.

43. For example, in the US, the location of the main ROB – OMB/OIRA – is a function of the horizontal separation of powers in the federal government. In response to New Deal expansion of federal regulatory state, the courts were asked by petitioners to undertake judicial review of agency regulation. They were also empowered by Congress' enactment of the Administrative Procedure Act (APA) in 1946 requiring procedures for notice and public comment, and requiring that regulations not be "arbitrary or capricious". Three decades later, in response to the Great Society expansion of federal regulation in the 1960s, the courts intensified their review with the development of the "hard look" doctrine in the 1970s. Meanwhile, Federal sectoral agencies<sup>38</sup> were a contested terrain in the US constitutional structure, sharing both executive and legislative functions in some cases, as well as some adjudicatory functions.

44. The US ROB was established by Congress in 1980, Congress created OIRA within OMB, part of the Executive Office of the President, in the Paperwork Reduction Act. Just after taking office in early 1981, President Reagan issued EO 12291, which gave OIRA the power to review new agency regulations and associated RIAs. President Clinton later reaffirmed this role for OIRA in EO 12866, which is still in force. The ROB in the US system (*i.e.* OIRA) has substantially, although not exclusively, been oriented as a check on legislative (Congressional) pressure to regulate. But the ROB operates only at the second stage by reviewing agencies' implementing regulations, not the legislation enacted by the Congress itself. It is aimed at countering the agencies' mission-driven tunnel vision, though some argue that public choice

38. Which would be called independent regulatory authorities in other countries.

theory implies that agencies will regulate too little.<sup>39</sup> The US has no RIA process nor ROB to address Congressional legislation itself. Compared to the courts and the executive branch, Congress has played a smaller role in regulatory review. Congress holds episodic committee hearings on specific policy areas. The General Accountability Office (GAO) attached to the Congress issues occasional reports on regulatory matters. Congress did enact the Unfunded Mandates Reform Act (UMRA, 1995), calling for nonbinding analyses of new regulations; and a provision calling for annual reports by OMB/OIRA to the Congress on the aggregate costs and benefits of federal regulation over the last decade. But, in general, the Congress has not strongly favoured regulatory oversight. Congress has no ROB of its own equipped to carry out such a function. Some in Congress initially resisted the Presidency's efforts to oversee regulation through OMB/OIRA. The Congress considered, but not did enact, broad regulatory reform legislation in the mid-1990s. Congress even de-funded its own expert advisory bodies, the Office of Technology Assessment (OTA) and the Administrative Conference of the US (ACUS).

45. The UK parliamentary system manifests a different oversight structure. The Better Regulation Executive (BRE) was created in 2005, succeeding the Regulatory Impact Unit, and was initially located at the center-of-government, in the Cabinet Office reporting to Prime Minister, although by July 2007 the BRE was moved to the Department for Business, Enterprise and Regulatory Reform. The BRE has an independent advisory body (Better Regulation Task Force, succeeded by Better Regulation Commission in 2006, succeeded by Risk and Regulation Advisory Council in 2008). The BRE issues guidelines for conducting impact assessments, reviews impact assessments, and issues an annual report to Parliament. The Panel for Regulatory Accountability is a cabinet subcommittee that provides scrutiny of major policy proposals. The National Audit Office reviewed regulatory reform efforts in 2005. The BRE itself can be reviewed by Parliament, as initially illustrated by the House of Commons report in July 2008.<sup>40</sup>

46. The EU has a hybrid system. In contrast to the US system in which the roles of the principals (the Congress, the Presidency) and the agents (the federal agencies) are fairly easy to identify, with lateral oversight by the courts and internal oversight by the President's executive office (OIRA), in the EU the roles of principals and agents are more fragmented and interwoven across several institutions. These include the European Commission exercising internal oversight through its Secretariat-General, inter-service consultation practices, and new IAB, the Council, the Parliament, and the member states, with lateral oversight by bodies such as the European Court of Justice, the European Court of Auditors, which reviews the budget, and the European Ombudsman (which can investigate "maladministration").<sup>41</sup> Indeed, in the last 10 years the European Commission has undertaken a sweeping effort to introduce better regulatory oversight mechanisms, mainly to further European economic competitiveness,<sup>42</sup> but also to strengthen the institutional framework through greater accountability.

47. The ROB in the EU that most closely corresponds to the US OMB/OIRA is the European Commission's relatively new Impact Assessment Board (IAB), created in late 2006, and located in the Commission's Secretariat-General. Significantly, the European IAB reviews draft impact assessments of legislation, not only impact assessments of agency rulemaking as in the US OIRA.

39 Compare Breyer, *Breaking the Vicious Circle* (1993), *supra*, with Revesz & Livermore, *Retaking Rationality* (2008), *supra*.

40 See UK House of Commons, Regulatory Reform Committee, *Getting Results: The BRE and its Regulatory Reform Agenda* (July 2008).

41 See Lindseth, Aman & Raul, *Oversight* (2008), *supra*, pp.3-20.

42 See Ragnar Lofstedt et al., *Key Lessons and Recommendations*, in *International Regulatory Reform Report 2008* (Frank Frick & Tobias Ernst, eds., Verlag Bertelsmann Stiftung 2008), p.135 (observing that the EU has done more on regulatory reform from 1998-2008 than it had in all the years from 1956-1997).

48. The different approach to the structure of oversight in the EU system compared to the US derives from the different structures of governance. In the US, legislation begins in the Congress, a political body, which enacts statutes and can thereby create regulatory agencies and delegate tasks to these agencies. The agencies possess technocratic expertise that the Congress lacks, and Congress often relies on the agencies to determine essential issues such as the appropriate level of protection of health and environment. OIRA in turn is also a highly technical body, staffed by professional experts, and reporting to the President. The heads of the agencies and the head of OIRA are all appointed by the President. However, there are sometimes challenges to maintain policy direction of the agencies, each of which has its own constituencies among the public and in Congressional committees, and some of whose heads are legally shielded from being easily removed by the President. Thus in the US, OIRA exercises technocratic review of regulatory power delegated by Congress to the federal executive power acting through its agencies. In the EU, by contrast, legislation begins exclusively in the Commission which is mainly a technical executive body, although the political accountability and authority of the Commission's president is growing. The Commission proposes new initiatives to the Council and the Parliament, both political bodies. The Council is made up of the relevant ministers of the member states – a kind of legislature composed of national executives – and the Parliament is a large legislature of elected representatives seated by party not by member state. The adage is that “the Commission proposes, the Council disposes.”

49. Moreover, within the Commission and its DGs, many staff and observers point to a tradition of collaborative harmony or collegiality rather than adversarial or hierarchical relations; the “college of Commissioners” (each from a different member state, and appointed together as a slate) makes its decisions in a consensual style. This emphasis on harmony and collegiality may derive from several factors, among them the original purpose of the European Community to heal and unify the continent. This may also be related to the substantially smaller and more close-knit size of the entire Commission personnel compared to the larger US multi-agency administration. While the style is collegial, internal debates do occur. Whatever its origins, this collegial style may help explain the more limited powers of the IAB, compared to OIRA, to reject or “return” impact assessments and policy proposals to the agencies.<sup>43</sup> On the other hand, the influence of the IAB report on other DGs and on the College of Commissioners may induce the proponent DG to improve its IA or its policy. The Secretary-General may also issue a negative opinion on a policy.<sup>44</sup> In the US, by contrast, there is a strong tradition of using adversarial debate to test and shape decisions, not only in courts but also in the executive and legislative branches.<sup>45</sup>

50. Further, unlike the strong nationally elected Presidency in the US, the President of the European Commission is appointed along with his fellow Commissioners for a five-year term. Recently, though, the President of the Commission is now appointed first before the rest of the slate is chosen, and he has been authorised to request the resignation of an individual Commissioner as opposed to the resignation of the entire college of Commissioners.

51. The member states of the EU have a larger role in the EU institutions: indeed a basic role as the underlying source of democratic legitimacy for the unelected Commissioners and a very practical role in selecting the Commissioners and voting in the Council – although the members of the European Parliament, like those of the US Congress, are directly elected. This situation differs from the member states of the US in relation to the US federal government, where the states' governors have no direct voice in the Congress or the executive branch. The Better Regulation initiative in the EU was led by several

43 See Lorenzo Allio, *The European Commission's Impact Assessment Board: Initial Developments*, European Risk Forum Background Note 02 (2007), p.5.

44 See European Commission, *Impact Assessment Guidelines*, updated March 2006, pp.14-15.

45 See Robert A Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, Mass: Harvard University Press, 2001).

Commission Presidencies, with significant support from key member states acting individually and linked together in the series of rotating six-month presidencies of the Council.

52. Thus in the EU, the IAB exercises technical review of proposals by its own branch of governance, in a setting that softens overt discord, before those proposals go to the political branches for assent and then often to the member states for implementation. The structural role of regulatory “oversight” is thus different in the EU, where legislation comes initially from the technical branch and where the Commission internally follows a collegial structure and style, than it is in the US. In the US, legislation comes initially from the most political branch and where the agencies occupy a constitutional position between the Congress, pushing regulatory legislation, and the Presidency, seeking to manage the administrative state through technocratic expertise in a hierarchical structure.

53. The location of an ROB may be a function of its role in acting as a check on pressure to regulate. In the US, OIRA in the executive branch supervises the agencies that have been charged by Congress to regulate; in part, OIRA checks the flow of legislative momentum by interposing an analytic step to improve regulatory outcomes. In the EU, the Commission has the sole power to introduce legislation, so its own IAB may be less well situated to check the Commission’s own regulatory agenda unless it draws its authority from the President of the Commission and the Secretary General acting on his behalf.

54. If the ROB is intended not only to check excessive regulation, via Impact Assessment of new proposed regulations, but also to promote worthwhile regulation where it is lacking, as OIRA has undertaken via its “prompt” letters, and to review the stock of existing regulation, then the ideal location is at the center of government, supplemented by an external advisory body to help propose prompt opportunities and to help assess the stick of current regulations. In any case, the ROB would be located wherever its combination of expertise and power is greatest to influence regulatory decisions. For example, this leads back to housing the ROB in a strong presidency, as in the US, and as is evolving in the EU.

55. Oversight need not be limited to a single ROB in each national or supranational administrative system. A plural oversight system could involve several ROBAs, each located in a different part of the regulatory structure. Indeed the US has not only OIRA in the executive, but also potent judicial review, and numerous scientific advisory bodies. The EU has the new IAB in the Commission, but also aspects of oversight exercised by several other institutions including the inter-service consultation among the DGs, as well as the Council, the Parliament, the Ombudsman, the Court of Auditors, and the Court of Justice, and the member states themselves. The optimal number and location of ROBAs will differ from system to system.

56. Oversight can also be located in networks of internal or external communities of experts. For example, internal government networks of interagency working groups can supply oversight. These include the former RARG in the Carter administration, and interagency consultation on proposed actions as under the EU system of Inter-Service Consultation, and the US system of interagency consultation on RIAs submitted to OIRA.<sup>46</sup> The European Commission IAB itself builds on the pre-existing system of inter-service consultation on DGs’ impact assessments.<sup>47</sup> Additionally, external networks of nongovernmental experts such as science advisory bodies and public comment can provide useful advice.<sup>48</sup>

46 This also includes consultation on EIAs submitted to EPA under NEPA, and consultation on biological opinions submitted under the Endangered Species Act.

47 See Lorenzo Allio, *The European Commission’s Impact Assessment Board: Initial Developments*, European Risk Forum Background Note 02 (2007).

48 See Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Harvard Univ. Press, 1990); Granger Morgan, book on science advisory bodies.

57. There is of course always the question whether such external bodies actually influence government decisions. ROBs themselves may have external advisory bodies, as the UK BRE has had its BR Task Force, which then became the BR Commission, and is now being converted to its Risk and Regulation Advisory Council. These have been discussed in previous OECD work on advocacy bodies.<sup>49</sup> US OMB/OIRA has no standing external advisory body, but might well be advised to create one, for example to provide regular suggestions to OIRA for new “prompt” letters, proposing new regulations that would yield net benefits, and for existing regulations deserving of reassessment and possible revision.

#### **4.2. Rules of procedure for ROBs**

58. The specific rules of procedure of a ROB can be important in determining its effectiveness, quality, and perceived legitimacy. US OMB/OIRA follows rules of procedure established in EO 12866, including rules regarding the timetable to review agency Impact Assessments, the transparency of OIRA’s contacts with outside parties, and the opportunity for an agency to appeal an OIRA decision. EO 12866 (Sept. 1993) replaced the earlier EO 12291 (Feb. 1981), and significantly changed OIRA’s rules of procedure, notably by requiring much greater transparency. EO 12866 was itself slightly modified by EO 13422 (Jan. 2007). The European Commission’s IAB has rules of procedure issued in early 2007, governing the composition and voting of the 5-member IAB, the timing of reviews of IAs, transparency of IAB deliberations, and sources of internal and external expertise. In addition, US OMB has guidelines for impact assessment, mainly in Circular A-4, Sept. 2003, as does the European IAB, mainly in its IA Guidelines of June 2005, revised March 2006, and currently considering revisions.

##### ***4.2.1. Rules of procedure for review of new proposed regulations and associated Impact Assessments:***

- *Leadership of the ROB: number and affiliation.*

US OIRA is headed by a single Administrator who is nominated by the President subject to confirmation by the Senate. OIRA has permanent career staff who are not seconded by the agencies they oversee. By contrast, the EU IAB is a five-member board, chaired by the Deputy Secretary-General responsible for regulatory matters, with four additional members who are senior officials of DG EcFin, DG Employment, DG Enterprise, and DG Environment. These four DGs span the three areas of economic, social and environmental impacts, although there is no representative from DG SANCO (Health and Consumer issues). The IAB’s rules say that its members must act independently of their home DGs, but it could be worth examining actual IAB decisions to see if conscious or unconscious bias afflicts voting in IAB decisions.<sup>50</sup> The advantages of single heads vs. collegial boards could be discussed through further analysis. And it remains to be seen whether a 5-member board can operate effectively to review IAs, compared to OIRA’s single Administrator (irrespective of the home affiliations of the IAB members). The IAB’s self-evaluation in early 2008 sought to allay these concerns.

49 OECD (2008) Implementing Regulatory Reform: Building the Case Through Results (Dec. 2007), chapter 3 on “The Role of Advocacy Bodies.”

50 Impact Assessment Board - Report for the year 2007 - Commission staff working document - Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Second strategic review of Better Regulation in the European Union {COM(2008) 32 final}, SEC/2008/0120, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0120:EN:NOT> (January 2008).

- *Time to review.*

In the EU IAB, the time to review represents at least one month before inter-service consultation begins. In the US OIRA, the time for review represents up to 90 days from receipt of proposed rule. Too short a time period may make meaningful review of complex IAs difficult or impossible. But too long a time period may impose unwarranted delay on needed new rules and may undermine morale. In the late 1990s, a significant number of proposed rules had accumulated waiting longer than 90 days for review; in 2001 and 2002, OIRA made substantial progress in reducing the time for review below 90 days.<sup>51</sup>

- *Who can participate in review.*

The EU IAB rules expressly allow the IAB to solicit advice from outside experts. OIRA can receive communications from parties outside government but does not seem to have the standard practice of soliciting advice from outside experts. Both the IAB and OIRA have processes of Inter-service (or interagency) Consultation on proposed rules.

- *Opportunity for the regulatory agency to be heard and to hear critiques.*

EO 12866 calls for the agency proposing the rule to be invited to have a representative present whenever OIA staffs meet with an outside party about the rule.

- *Appeals to higher authority.*

EO 12866 provided that disputes over a return letter could be appealed to a cabinet-level committee chaired by the Vice President. Under the recent administration, this responsibility has been shifted from the Vice President to the President's Chief of Staff.

- *Influence of statutory deadlines, court orders; etc.*

In the US, a statutory deadline or a court-ordered deadline will force the agency to act (*e.g.* to publish a proposed rule) even if OIRA has not yet completed its review.

- *Public access to information about the review.*

EO 12866 added transparency provisions to ensure public awareness of the OIRA process, including a record of those who met with OIRA regarding each rule. In the current administration, despite efforts to withhold information in other parts of the administration, OIRA went further than required by EO 12866 by posting almost all its return letters, prompt letters, and all other important documents on its public web site.<sup>52</sup>

59. Other key rules of ROB procedure, such as the criteria for which regulations are selected to be reviewed, and the power to reject or prompt new regulations, are addressed in other parts of this paper.

#### **4.2.2. Rules of procedure for review and revision of the existing stock of regulations:**

60. Many of the rules of procedure, such as those regarding transparency, could be the same for reviews of existing regulations as for review of new proposed regulations. One difference is that the event triggering review, namely the proposal of a new rule, does not occur for existing regulations, so some other way must be found to identify existing rules for review. OIRA during the current Bush administration issued a public call for nominations of rules warranting a "look-back". However, this may require explaining the criteria on which it selected the rules that were then reviewed.<sup>53</sup> An alternative would be an

51 See GAO (2003), *supra*.

52 See the OIRA website at [www.omb.gov](http://www.omb.gov), and GAO (2003), *supra*.

53 See GAO (2003), *supra*.

external advisory body charged with routinely nominating some existing rules for review each year; or more drastically, a “sunset” law that made all existing rules expire at some point unless they were reviewed and re-issued. This approach has been adopted by many countries when conducting broad reviews of their regulatory stock. For reducing the administrative costs of existing information regulations, some ROBs have induced ministries to report on their existing burdens by linking those reports to the annual budget cycle.<sup>54</sup>

#### 4.3. Resources of ROBs

61. The effectiveness of an ROB will depend in part on its inputs: the resources it has to get things done. These include:

- Staffing.

Details here may matter. For example, whether the ROB has career staff vs. political staff, how long the staff stay in their jobs, and whether they are permanent independent staff vs. staff seconded (co-opted) from agencies, will make a difference in the ROB’s ability to work with agencies or ministries, to be familiar with the issues, and to remain unbiased by agency affiliation. Some information on the staffing of the ROBs has been collected as part of the indicators general project (See annex), but it will deserve further review and update.

- Skills, expertise.

ROBs are often staffed by a mix of lawyers and economists. Should ROBs add other types of experts as well, such as in psychology, toxicology, epidemiology, biology, medicine, engineering, decision science?

- Reliance on other units of government and outside groups for information about subjects of oversight; input from outside government which may favour their constituencies

*E.g.* US OIRA may rely on agencies representing industry to be regulated (*e.g.* DOE, USDA) for some information.

*E.g.* before the creation of the IAB, the EU Secretary General initially relied on economists in DG Enterprise to review IAs. This may have *appeared* biased, even if there was *no actual bias*. The IAB is now building its own staff. The IAB can also solicit outside expert advice.

- How do regulations come to the ROB for review:

For example, In the EU, the Commission’s Legislative and Work Programme (CLWP) provides a list, plus the IAB can prompt others to do IA. In the US, EO 12498 in 1984 required agencies to submit a regulatory program and calendar. Information is also available as part of indicators of which countries have legislative programmes formally announced in advance.

- Role of outside voices

*e.g.* industry, environmental groups, experts, and transparency of such communications.

- Transparency regarding those who communicate with the ROB during a review.

#### 4.4. International relations among ROBs.

62. ROBs may interact across national borders. ROBs may directly engage in consultation, co-operation, exchanges of staff, and other methods of sharing ideas. Even without such direct collaboration, ROBs may study and learn from each others’ experiences, in a process of borrowing and diffusion of ideas.

54 See OECD, Cutting Red Tape: Administrative Simplification in the Netherlands (2007).

63. The OECD plays a useful and unique role here as an international intergovernmental organisation. In Europe, the DEBR network of experts on Better Regulation provides for an opportunity of exchange among its members. This role can be supplemented with additional bilateral instances. For example, the US-EU High-Level Dialogue on Regulatory Co-operation, began in 2005 as a joint effort of US OMB/OIRA and the European Commission. This process has now evolved into the Transatlantic Economic Council,<sup>55</sup> which has been effective in bringing together top officials of ROBs and regulatory agencies, as well as leading scholars of regulation, to learn how the US and Europe each handles common problems and to gain insights on new options.

## 5. SCOPE OF OVERSIGHT

### 5.1. Scope of oversight: New and existing regulations.

64. Some ROBs focus mainly on the flow of new regulations while giving less attention to the existing stock of rules. For example US OIRA has focused on *ex ante* impact assessment of new regulations, with only occasional attention to the stock of existing rules.

65. Some ROBs do the opposite, focusing on the burden of existing rules while focusing less on new regulations as this may not fall within their mandates. Countries that have developed mainly strategies to reduce administrative burden through the Standard Cost Model (SCM), compliance cost evaluations, “simplification,” and “regulatory budgets” have taken this approach. The Netherlands has been a leader in this area, but the UK has also made major strides in reducing administrative burden.<sup>5657</sup>

66. The relative advantages of cutting administrative burdens can be discussed. Information-based regulations can also be warranted in some cases.<sup>58</sup> For example, the European Commission recognised this by adding Box 11 to its revised IA Guidelines on 15 March 2006, stating that “The fact that one option would impose lower administrative costs is *not* in itself a sufficient reason to prefer it. For example, a measure . . . likely to impose relatively fewer administrative costs [by mandating specific technical standards, instead of requiring labels that disclose product data] . . . could give manufacturers less flexibility and could reduce consumer choice, [so that] its overall costs may be higher than the ‘administrative’ requirement to display data . . .”

### 5.2. Scope of oversight: Topical areas of regulation

67. In principle, an ROB could oversee all regulation, covering all topics. In practice, ROBs have often been limited to a lesser scope of oversight. ROBs often focus on one type of regulation, such as those rules imposing administrative burden (information collection costs), while not receiving a mandate for

55 See [http://ec.europa.eu/enterprise/enterprise\\_policy/inter\\_rel/tcc/index\\_en.htm](http://ec.europa.eu/enterprise/enterprise_policy/inter_rel/tcc/index_en.htm).

56 See UK House of Commons, Regulatory Reform Committee, Getting Results: The BRE and its Regulatory Reform Agenda (July 2008).

57 See OECD, Cutting Red Tape: Administrative Simplification in the Netherlands (2007).

58 See OECD, Cutting Red Tape: Administrative Simplification in the Netherlands (2007); Jonathan B. Wiener, Better Regulation in Europe, 59 Current Legal Problems 447, 500-01 (2006).

assessing other regulations that impose other kinds of social costs. ROBs often seem to focus on health, safety, security and environmental regulations (sometimes called “social regulation” or “risk regulation”) while sometimes having curtailed powers in the area of banking, finance, competition, trade, and other “economic regulation.” In some countries sensitive areas such as defence, or taxation/fiscal policy (Mexico for example), can be exempted of the review process. This however depends on countries' specific choices.

68. Expanding the scope of oversight could bring the benefits of oversight to those areas, such as through impact assessments that improve outcomes measured by social well-being. Expanding the scope of oversight could help alleviate the problem that a narrow scope gives the misimpression that oversight tools, such as benefit-cost analysis, are biased against the subjects of their current narrow application.

69. For example, extending benefit-cost analysis beyond social regulation to cover economic regulation and government projects as well would help demonstrate that cost-benefit analysis need not be biased against health or the environment. Benefit-cost analysis would now be deployed to assess environmentally damaging projects such as dams, deforestation and power plants – as it had been in its early uses decades ago.<sup>59</sup> Early in the modern environmental movement, benefit-cost analysis was seen as a useful tool for environmental protection when applied to evaluate country wide projects in the US and elsewhere.<sup>60</sup>

70. At the same time, expanding the scope of oversight could stretch ROBs' capacity, and could bring ROBs into conflict with other institutions already active in those areas.

71. In the US, OIRA has tended to place its emphasis on *ex ante* impact assessment of proposed new regulations addressing health, safety, and environmental risks. It has over the last several years (at least since Sept. 11, 2001) begun addressing proposed new regulations of homeland security risks as well. On a related front, OIRA could also oversee international treaty commitments (via impact assessments) as well as domestic regulatory policies; the US State Department has recently proposed requiring agencies to consult with OMB/OIRA earlier, on the regulatory impacts of pending new international agreements,<sup>61</sup> and the State Department already requires agencies to consult with OMB before making new budgetary commitments in international agreements.<sup>62</sup> In Europe, many ROBs at national level are considering the impact of proposed EU wide policies, as to assess their impact at national level.

72. ROBs could extend their role further, addressing existing as well as new regulations. They could address decisions not to regulate, or to deregulate, as well as to regulate,<sup>63</sup> and also economic policy and projects. For example, a US statute, section 201 of the Trade Act of 1974, 19 USC 2251(a), already calls

59 See the Federal Flood Control Act of 1936 (requiring that the “benefits to whomsoever they may accrue are in excess of the estimated costs,” 33 USC § 701(a); Alan V Kneese, Whatever Happened to Benefit-Cost Analysis? (2000) 116 Water Resources Updates 58–61 (2000), at <http://www.ucowr.siu.edu/updates/116/index.html> ; Maynard M Hufschmidt, Benefit-Cost Analysis: 1933–85, 116 Water Resources Update 42–9 (2000), at <http://www.ucowr.siu.edu/updates/116/index.html>.

60 See e.g. Richard L Berkman and W Kip Viscusi, Damming The West: Ralph Nader's Study Group Report on the Bureau of Reclamation (New York: Grossman Publishers, 1973) (using BCA to critique federal dams); Calvert Cliffs Co-ordinating Committee v AEC, 449 F 2d 1109 (DC Cir 1971) (finding that the EIS provision in NEPA section 102(2)(C) requires BCA of federal projects such as nuclear power plants, in order to take into account their previously neglected environmental costs), cert denied, 404 US 942 (1972).

61 71 Fed Reg 28831 (18 May 2006).

62 See 22 CFR § 181.4(e).

63 See Revesz & Livermore, Retaking Rationality (2008), supra.

for benefit-cost analysis of trade measures, but this law appears not (yet) to have implied oversight of such analyses by OIRA.

73. Another area of potential expanded scope for regulatory oversight is the banking, finance and insurance sector, as well as fiscal policies. In many countries, these policies are handled in a separate way, and are not subject to regulatory quality oversight. For example, in the US, Fiscal spending and taxation policy has traditionally been handled by the budget side of OMB, whereas OIRA is on the management side. Banking and finance agencies such as the Securities and Exchange Commission (SEC), the Department of the Treasury, and the Federal Reserve Bank have not been subject to OIRA oversight, although policies of the Department of Housing and Urban Development (HUD), which governs among other things the mortgage loans made by Fannie Mae, have been subject to OIRA review. The current mortgage crisis in September-October 2008 and the dramatic shift to restructure banking and financial markets to rescue the economy from this crisis in the US and Europe might suggest that past choices by markets and regulators have been suboptimal, to say the least. This could imply that this area could benefit from oversight on benefit-cost criteria by ROBs. For example a key issue in the debate in the US Congress over the \$700 billion rescue plan was the call for greater oversight over future such federal financial regulation.

### **5.3. Scope of oversight: Types of legal action**

74. ROBs differ in what type of legal action they oversee. This may include legislation, rulemaking, guidance documents and other avenues. Under EO 12866, US OIRA oversees regulations promulgated by federal agencies. Since January 2007, EO 13422 has added guidance documents issued by agencies.

75. In Europe, the IA Guidelines and IAB oversight apply to legislation proposed by the European Commission, and indeed to all matters in the Commission's annual Legislative and Work Programme (CLWP). Some important decisions handled through "comitology" may fall outside this scope of review, but the IAB is expressly authorised to reach out with a prompt letter to identify such decisions warranting an IA.<sup>64</sup>

76. However, the nature of the US institutional system, with the separation of powers, prevents for the moment extending OIRA's role or establishing a new ROB to supervise impact assessment of legislation proposed in the Congress. However, to the extent that agency regulations are costly and warrant oversight, much of that derives from the underlying legislation impelling the agency to issue that regulation. This underlines the issue of the oversight of regulatory quality within Parliaments. From the indicators' project, information tends to show that this exist in some countries. However, in many countries, finding an oversight mechanism to enable Parliament to conduct and heed impact assessments on its own legislative proposals, and ex post assessments of laws already enacted, could help fill significant gaps.

### **5.4. Scope of oversight: Selection of which regulations to review.**

77. Any ROB with limited oversight resources (staff, funding, time) must have some criteria for selecting which regulations to review. In the US, EO 12866 makes the cut by using a threshold of the magnitude of impact, requiring an IA for any regulation imposing \$100 million or more in impacts. In 2003, OIRA added the criterion that any regulation posing an impact exceeding \$1 billion should be accompanied by an IA using formal probabilistic scenarios to assess its impacts.

64 See IAB Mandate, point 4, 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).

78. The European Commission takes a different approach. Under its IA Guidelines, it employs the concept of “proportionate analysis,” meaning that the degree of analysis should be greater where the potential impacts of the regulation are larger. This approach avoids the sharp disjunctions and potential estimation errors or agencies’ efforts to avoid review by undercounting impacts of the dollar-value thresholds used in the US.

79. Broader definitions could also be considered. For example, strictly speaking, the degree of analysis should be greater not where the potential impacts or stakes are larger, but where the potential *change* spurred in those impacts by the IA is larger.

### **5.5. Scope of oversight: Analytic methods**

80. The scope of ROBs’ oversight is sometimes limited in, and could be expanded to, areas where it nominally already applies, but cannot yet guide decision making, because of other legal barriers such as statutory restrictions on the type of analysis to be used by the regulatory agency. In some legal systems, executive branch oversight applies impact assessment to agency rulemakings, but the legislation delegating regulatory power from the legislature to the agency can restrict the kind of policy analysis that the agency can use to support its rulemaking.

81. For example, this is sometimes the case in the USA, where the President requires benefit-cost analysis of major rules under EO 12866 with review by OMB/OIRA, but Congress has sometimes required (or the courts so infer from statutory language) that agencies are not to use benefit-cost analysis in developing these rules. One example is the setting of national ambient air quality standards under section 109 of the Clean Air Act, where the courts have held that the statute forbids EPA to consider cost.<sup>65</sup> In such cases, the agency prepares an impact assessment using benefit-cost analysis for OIRA review under EO 12866, but the agency does not refer to the benefit-cost analysis in setting standards in the rule itself.<sup>66</sup>

82. In the early 1990s, Congress considered but did not enact a law including a “supermandate” to require benefit-cost analysis in all major rulemakings notwithstanding prior statutory restrictions on such analysis. Another option would be a “superauthorisation,” permitting but not requiring agencies to use benefit-cost analysis in major rules notwithstanding prior statutory restrictions on such analysis. This approach was taken within one statute in the 1996 amendments to the Safe Drinking Water Act, but has not yet been enacted more broadly.

83. Thus, more generally, in such systems of separated power over regulation, the scope of regulatory oversight could be expanded by empowering this oversight to be effective in applying types of analysis notwithstanding prior or other restrictions on such types of analysis. In the EU, for example, where legislation is initiated by the Commission and it is the Commission that has called for impact assessments, there does not appear to be any restriction in particular pieces of legislation on the use of impact assessments that compare benefits and costs. The European Commission’s Impact Assessment Guidelines and IAB review thus cover all policies in the Commission’s Legislative and Work Programme (CLWP). Indeed the IA conducted by DG Environment on the Clean Air for Europe (CAFÉ) policy – the EU counterpart of the US EPA’s ambient air quality standards – was an extensive analysis of benefits and costs that many regard as one of the best quality IAs prepared by the Commission to date.

65 See *Whitman v. American Trucking Assns.*, 531 U.S. 457 (2001).

66 See *Whitman v. American Trucking Assns.*, 531 U.S. 457, 471 n.4 (2001).

## 6. POLITICAL ECONOMY OF ROBs

84. The sustainability or longevity of an ROB may depend not only on its ability to conduct good reviews that improve the quality of impact assessments and of regulations, but also on its ability to navigate the array of interest groups pressing for different regulatory policies.

85. Oversight can play an important role in overcoming interest group distortions in regulation. Regulatory agencies may be captured or steered by interest group constituencies, such as regulated industry or regulatory beneficiaries. A longstanding concern has been that wealthy industry groups will capture their regulators, leading to under-regulation or to selective regulation that favours one industry segment over another.<sup>67</sup> An ROB can help remedy such capture via “prompt” letters and other methods to get the agency to act. On the other hand, perhaps the agency could be beholden to environmentalist groups and to a legislature driven by public fear, leading to neglect of costs and overregulation. In such cases, an ROB can help check overregulation by requiring attention to cost and careful analysis of the risks being affected. More generally, agencies suffer from tunnel vision, mission-focus, and neglect of side effects on other constituencies and other social goals. ROBs and IAs try to ensure that mission-focused agencies do not develop tunnel vision or blinders around their mission to the neglect of other interests, but rather that they consider all important consequences of each policy option.

86. Meanwhile, an ROB can help reduce inconsistency across agencies, such as in the scientific factors used to extrapolate bioassay tests from animals to humans, or in the monetary valuation of a statistical life. An ROB can help counteract the agency’s “internalities,” *i.e.* the agency’s self-interest to expand its own budget or power.<sup>68</sup>

87. A difficulty in all of these cases is that the ROB’s product is often a diffuse general benefit, such as lower overall social costs. Such general benefits may be underprovided because there is no special constituency favouring such measures. Incentives also exist to free ride on others’ investments of effort.<sup>69</sup> Thus the ROB itself may have inadequate incentives to protect the public. This problem might be addressed through a President or Prime Minister, who perhaps alone may channel the general interests of the broad electorate and may be held accountable for regulatory costs and errors. Or it might be addressed through the professional values inculcated in ROB staff to serve social well-being. It is plausible that the rise of regulatory oversight since the 1970s reflects both presidents’ and prime ministers’ incentives to manage the regulatory state, and the growth of a community of experts on regulation eager to serve in this role.

88. At the same time, the ROB may itself be subject to interest group pressures and needs to keep sufficient authority to exert its influence on other agencies. Indeed, the lack of a general constituency for good government or economic efficiency via impact assessment, and budgetary pressures to maintain staffing and other resources of the ROB, may push the ROB into alliances with government agencies representing interest groups who favour impact assessment for more parochial reasons ( *e.g.*, relieving burdens on industry irrespective of social net benefit). Accordingly, some critics of ROBs fear that they risk being captured by industry influence, yielding an antiregulatory bias.

67 See Gabriel Kolko, *Railroads and Regulation 1877–1916* (New York: Norton; 1965); Bruce A. Ackerman & William T. Hassler, *Clean Coal/Dirty Air* (New Haven, CT: Yale University Press; 1981).

68 See Wolf, *Markets or Government* (1993), *supra*.

69 See Olson, *The Logic of Collective action* (1971), *supra*.

89. There may be interest in locating ROB functions at a motivated and economics-oriented ministry, especially if the centre of government lacks the institutional capacity and resources to carry out regulatory review and oversight. But this strategy also carries its own risk, as the perceived objectivity and legitimacy of the oversight process could be affected in the long term.

90. Responses to this kind of concern about political economy include:

- *Transparency.*

For example, in the US the sunshine procedures adopted in EO 12866 improved public awareness of who was contacting OIRA on which topics. Posting all of OIRA business on OIRA's website was another important step: all agency IAs are made public, as part of notice & comment on the proposed rule and the issuance of the final rule; as well as OIRA comments to the agency and any return or prompt letter are posted in the rulemaking docket and on the OIRA website.<sup>70</sup> OIRA's annual report on the costs and benefits of federal regulations reaches a broader audience than each individual review, and showcases the value of OIRA oversight to the country as a whole. In the EU, information disclosure requirements are not as developed, as the draft IA is not published, but only the final IA being published.<sup>71</sup> A description on the availability of public notice and comment procedures as part of IA processes exists in rough form in the indicators project but will need to be completed by more thorough analysis.

- *Even-handed application of impact assessment.*

One reason that IA and its analytic methods are sometimes seen as antiregulatory is that they tend to be applied selectively to regulations on health and environmental protection. By applying IA and its analytic methods to the following:

- other domains of regulation, such as banking and finance, trade, and counterterrorism;
- both ancillary harms and ancillary benefits in IAs;
- deregulatory decisions as well as to regulatory decisions; and
- prompting development of desirable new regulations as well as returning undesirable proposed regulations,

the ROB would both improve decisions in those domains, and help demonstrate the unbiased character of the IA approach.

- *Accountability.*

Locating the ROB in a politically accountable part of the centre-of-government, such as the presidency or prime minister's office, can help ensure that it is understood to be accountable to the electorate and exercising good judgment. This can be appealing to the broader public and help to counter the technocratic bias, and also allay the fear linked to the role of regulated industry or other interest groups.

91. The ultimate protection for a ROB may be its ability to show that it exercises oversight effectively and even-handedly, delivering high quality analysis that has improved overall regulatory outcomes. Still, the ROB will need the backing of a policy reform leader, possibly at the centre of government, and perceived legitimacy among regulated parties, regulatory beneficiaries, and the public.

70 For a review, see GAO, Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of those Reviews (Sept. 2003) (noting improvements in OIRA transparency, while calling for additional steps).

71 See See Lorenzo Allio, The European Commission's Impact Assessment Board: Initial Developments, European Risk Forum Background Note 02 (2007), pp.6-7. The IAB may have improved its transparency over the past year.

## ANNEX: REGULATORY QUALITY OVERSIGHT BODIES IN OECD COUNTRIES

Countries	Name & location	Date	Main mission	Resources & Comments
<b>Australia</b>	Office of Regulation Review in the Productivity Commission	1998	<ul style="list-style-type: none"> <li>- Advise departments/regulatory agencies on appropriate quality control for development of regulatory proposals and review of existing regulations</li> <li>- Encourage right use of regulation and reduction of unnecessary regulation</li> <li>- Examine and advise the government on Regulation Impact</li> </ul>	- A staff of approximately 20
<b>Austria</b>	The Legal Service of the Federal Chancellery		<ul style="list-style-type: none"> <li>- Secure regulatory quality at federal level surveying the compliance of drafts with national constitutional law, European law and regulatory policies</li> <li>- Securing the clarity, comprehensibility and coherence of regulation</li> <li>- Develop new regulatory policies and legislative guidelines</li> </ul>	
<b>Belgium</b>	Agency for administrative simplification in the Prime Minister's Office		<ul style="list-style-type: none"> <li>- Initiate simplification projects in all domains, Stimulate simplification projects, Co-ordinate the simplification policy on administrative level</li> <li>- Develop tools (measure administrative burdens)</li> </ul>	
<b>Canada</b>	Regulatory Affairs and Orders in Council Secretariat, Privacy Council Office		<ul style="list-style-type: none"> <li>- Develop and manage the government's regulatory reform and research agendas</li> <li>- Support to the Cabinet on regulatory matters, including secretariat services for the Cabinet committee that approves most federal regulations</li> </ul>	- The President of the Treasury Board has a mandate for promoting the implementation of Smart Regulation in Canada
<b>Czech Rep.</b>	Department for Regulatory Reform and Quality of Public Administration in the Ministry of Interior		<ul style="list-style-type: none"> <li>- Prepare strategy materials in the area of central state administration reform and regulatory reform, co-ordination of these reforms</li> <li>- Oversight of RIA quality</li> </ul>	- The Department has 30 employees 20 of which are dealing with regulatory reform agenda
<b>Denmark</b>	Division for Better Regulation in the Ministry of Finance		<ul style="list-style-type: none"> <li>- Ensuring high quality in new and existing regulation.</li> <li>- Develop Governments regulatory policies, and co-ordinate the preparation and examination of the governments annual law planning programme</li> <li>- Co-ordinate the governments annual action plans for simplification</li> <li>- SCM-measurement of the administrative burdens and assist other ministries in performing Business Impact Analysis as part of their RIA-process</li> <li>* Ministry of Justice, a division on law quality is monitoring the legal coherence and quality of draft regulation</li> </ul>	<ul style="list-style-type: none"> <li>- Ministry of Finance : a Head of Division and six heads of section</li> <li>- Danish Commerce and Companies Agency: a Head of Division and fifteen heads of section</li> <li>- Ministry of Justice: a Head of Division and four heads of section</li> </ul>

<b>Countries</b>	<b>Name &amp; location</b>	<b>Date</b>	<b>Main mission</b>	<b>Resources &amp; Comments</b>
<b>Finland</b>	Bureau of Legislative Inspection, Ministry of justice			
<b>France</b>	Quality and simplification service, ministry of Finance	2006	<ul style="list-style-type: none"> <li>- Develop Government's regulatory policies and tool;</li> <li>- Co-ordinate the Government's annual action plans for legal simplification;</li> <li>- Direct measurement of the administrative burdens including redesign of procedures to reduce burden;</li> <li>- Central management and quality control of all official forms;</li> <li>- Promote the use of clear language in all administrative communications;</li> <li>* Within the PM's office, there is a section planning and managing the legislative output; the Conseil d'Etat is the main guarantor of quality of draft regulation</li> </ul>	<p>12 staff on Better Regulation issues including burden measurement: 2, official forms (5), simplification (4).</p> <p>A new RIA policy is under way (July 2006)</p> <p>This unit has an interministerial role.</p>
<b>Germany</b>	Regulatory control council		<ul style="list-style-type: none"> <li>- This body will be associated to the Federal Chancellery and has to assess the red tape and the necessity of new and existing laws</li> </ul>	<ul style="list-style-type: none"> <li>- Regulatory control council is scheduled to begin its work in autumn 2006</li> </ul>
<b>Greece</b>	Central Regulatory Impact Unit, General Secretariat of the Government, Prime minister's Office		<ul style="list-style-type: none"> <li>- Coordinate the vertical ministerial units and provide guidelines on RIA</li> <li>- Draft reports for the prime Minister's edicts &amp; Ministers Council regulations</li> <li>- Report the progress of better regulation policy to the Parliament</li> <li>* Ministry of the Interior, Public Administration is responsible for some parts of the better regulation agenda, such as simplification and codification</li> </ul>	
<b>Hungary</b>	Ministry of Justice		<ul style="list-style-type: none"> <li>- General quality assurance and control of the legislation</li> </ul>	
<b>Iceland</b>	Consultative committee on official monitoring rules, office of the Prime Minister		<ul style="list-style-type: none"> <li>- Examine monitoring rules or the implementation of specific activities</li> <li>- Comment on parliamentary bills/draft government instructions on rules</li> <li>- Keep track that the review of monitoring rules is consistent with Act. no. 27/1999 and present suggestions for review where appropriate</li> <li>- Advise government authorities on the review of monitoring rules and implementation of monitoring in keeping with the objectives of Act. no. 27/1999</li> <li>* The Prime Minister reports to parliament every three years</li> </ul>	<ul style="list-style-type: none"> <li>- The committee has no permanent staff but uses the staff of the ministry and independent consultants</li> </ul>
<b>Ireland</b>	Better Regulation Unit in the Public Service Modernisation Division, Prime Minister's Department		<ul style="list-style-type: none"> <li>- Overseeing regulatory impact analysis</li> <li>- Supporting implementation of EU Action Plan of Better Regulation and representing Ireland at other international bodies</li> <li>- Performing advocacy role in relation to better regulation issues at national level</li> </ul>	
<b>Italy</b>	Presidency of Council of Ministers		<ul style="list-style-type: none"> <li>- Promoting regulatory policy/monitoring/reporting/co-ordinating ministries activities</li> </ul>	<ul style="list-style-type: none"> <li>- RIA unit has 4 staff members and 5 advisors, under the supervision of the Head of Department</li> </ul>
<b>Japan</b>	Council of the Promotion of Regulatory Reform		<ul style="list-style-type: none"> <li>- Researching and deliberating what is necessary to push ahead with structural reforms of social economy, 1) necessary items about the reform of the nature of the regulations when outsourcing central/local governments' operations/office works; 2) other fundamental items about the nature of regulations</li> </ul>	

Countries	Name & location	Date	Main mission	Resources & Comments
<b>Korea</b>	The Office of Regulatory Reform (ORR), the Prime Minister's Office	1998	- Support the Regulatory Reform Committee which examines newly establishing or strengthening regulations of each ministry * The Regulatory Reform Task Force (RRTF) under the Office of regulatory reform plays the role of improving existing regulations, or bulk regulations that affect many ministries	- ORR : 40 staff members (1 deputy minister level; 2 director general level; 10 director level; 4 Special experts; 23 staff members) - RRTF : staff of 53 (3 director general level; 6 director level; 23 special experts; 15 members)
<b>Luxembourg</b>	<i>Missing</i>			
<b>Mexico</b>	Federal Regulatory Improvement Commission, Ministry of Economy		- Improve the quality of the regulatory framework by means of the Biennial Programs of Regulatory Improvement (PBMR) - Integrate & maintain updated the Federal Register of Formalities and Services - Review/improve federal drafts generating fulfillment costs to the citizens - Collaborate & offer technical support to the States and Municipalities to establish regulatory reform programs	
<b>Netherlands</b>	Bodies within the Ministries of Justice, Finance, Economic Affairs and Council of State Actal	2000	- Since 2000 the independent Advisory Board on Administrative Burdens (Actal) has been scrutinising impact assessments with specific attention for the quantification of administrative burdens. Because of Actal's independent status it plays no direct role in deciding whether a legislative proposal is ready to go ahead to the Council of Ministers, but its opinions are made public alongside the legislative proposal and can thus play a role in Parliamentary debate	- Also the Minister of Finance on occasion does draw on Actal's judgement when proposals are discussed in the Council of Ministers
<b>Norway</b>	Ministry of Modernisation			
<b>New Zealand</b>	Ministry of Economic Development		- The RIA Unit has issued guidelines for the preparation of Regulatory Impact Statements - Review RISs and provides adequacy statements on them - Provide training & advice on regulatory issues to officials to build capability for undertaking regulatory impact analysis	- From the 8 staff members in the Regulatory Policy Unit, approximately 4 full-time equivalents are dedicated to the work of the RIA Unit - Other Ministry of Economic Development staff may assist
<b>Poland</b>	Inter-ministerial Regulatory Quality Team (Minister for Economic Affairs & Labour is the head of the team) Department for Economic Regulation in the Ministry of Economic Affairs and Labour		- Development of draft government positions on regulatory reform - Undertaking measures on administrative burdens and eliminating needless administrative burdens and procedures to entities - Development of RIA guidelines - Providing access to information and dissemination of knowledge ❖ Other issues pertaining to regulatory quality as commissioned by the Council of Ministers or the Prime Minister Implementation of Regulatory Reform Programme * The team is a consulting and advisory body to the President of the Council	- The Team is composed of representatives, including those in the rank of a secretary of state, undersecretary of state, president or deputy president, from 21 ministries and bodies of state administration
<b>Portugal</b>	<i>Missing</i>			

Countries	Name & location	Date	Main mission	Resources & Comments
<b>Spain</b>	Ministry of Public Administration, Prime Minister's Office Agency for Evaluating Public Policies		<ul style="list-style-type: none"> <li>- Prime Minister's Office: dealing with quality on drafting regulations</li> <li>- Public Administration Ministry: dealing with Better Regulation Policy and promoting of government wide progress on regulatory reform</li> <li>- Comisión de Secretarios de Estado y Subsecretarios: monitoring the quality of all regulations produced by ministries before presenting the text to the Council of Ministries</li> <li>- Agency for Evaluating Public Policies has been created at the end of 2006 and began to work 01 January. It monitors quality of RIAs and develops guidances</li> </ul>	
<b>Sweden</b>	Legal Secretariat within the Prime Minister's Office Division for Legal and Linguistic Revision, Ministry of Justice Better Regulation Unit, Ministry of Industry, Employment and Communication		<ul style="list-style-type: none"> <li>- No specific body responsible for promoting the regulatory reform. The head of the Legal Secretariat within the Prime Minister's Office has a special responsibility for general quality of regulations including regulations being lawful, consistent and uniform</li> <li>- The role of the Better Regulation Unit within the Business Division at the Ministry of Industry should also be noted for its role with RIA and SMEs</li> <li>- All ministers have a responsibility for promoting regulatory reform</li> </ul>	* The Division for Legal and Linguistic Revision in the Ministry of Justice, language experts and legal advisors provide legal and linguistic services to the officials in the ten ministries
<b>Switzerland</b>	Federal Chancellery, Federal Office for Justice, Seco, Federal Finance Administration		<ul style="list-style-type: none"> <li>- The Federal Chancellery is responsible for checking draft laws, the legal conformity of texts and use of clear language</li> <li>- In close collaboration with the Federal Chancellery, the Federal Office for Justice is in charge of supervising draft text laws, and elaborating consultation opinions linked to issues of constitutional and administrative law</li> <li>- Seco is in charge of RIA and economic impact analysis, administrative simplification measures and of measures in favor of SMEs</li> <li>- The Federal Finance Administration is in charge of checking the financial consequences of legal acts and in charge of establishing guidelines applicable to the regulation of financial markets</li> </ul>	

Countries	Name & location	Date	Main mission	Resources & Comments
<b>Turkey</b>	General Directorate of Laws and Decrees, General Directorate of Legislative Development and Publication, Department of Administrative Development		<ul style="list-style-type: none"> <li>- The duties of General Directorate of Laws &amp; Decrees are to examine the drafts of laws, decree laws, regulations elaborated by Ministries as well as by laws issued by the Council of Ministers and the drafts concerning the decisions of the Cabinet in terms of compliance with the Constitution, laws, general legal rules, development plans and programs as well as the Government Program; to render them debatable at the Cabinet, provide coordination among public institutions and agencies about the issues falling within the duty of the General Directorate and determine the principles regarding legislation preparation and guidelines</li> <li>- The General Directorate of Legislative Development &amp; Publication examines draft by laws which will be issued by individual public agencies, collects and classifies the legal documents, determines the ones those in effect, publishes the legislations in effect as single text with their annexes and amendments, and disseminates the Legislation in electronic media</li> <li>- The Department of Administrative Development has to conduct research and examinations for determining targets/policies/measures about developing the public management and to have those performed, to evaluate them and draw up proposals, to stay in touch with the institutions in charge of developing public management, to provide coordination among those institutions and conduct studies required for the administrative procedures/operations to be simplified</li> </ul>	- In the above mentioned departments 60, 80 and 26 personnel are employed and 34, 17 and 9 of which are experts respectively. Also all three departments which are considered as the responsible departments for regulatory reform and regulatory quality are attached to a single undersecretary (Undersecretary of Prime Ministry)
<b>United Kingdom</b>	Better Regulation Executive (BRE), Cabinet Office * previously carried out by the Regulatory Impact Unit	2005	<ul style="list-style-type: none"> <li>- Scrutinising new policy proposals from Departments and Regulators</li> <li>- speeding up the legislative process to make it easier for Departments to take through deregulatory measures</li> <li>- working with Departments and Regulators to reduce existing regulatory burdens affecting business and frontline staff in the public sector</li> <li>- Newly added mandate of the BRE: <ul style="list-style-type: none"> <li>▪ regulate only when necessary</li> <li>▪ set exacting targets for reducing the cost of administering regulations</li> <li>▪ rationalise inspection/enforcement arrangements for business &amp; public sector</li> </ul> </li> </ul>	- In addition to the BRE, there are the Better Regulation Units (BRUs) in each department, Staffing levels: 70 (April 2005 figures) Resources: £3.4m ( 2004/05 outturn)
<b>United States</b>	Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget		- Manage and coordinate Federal rulemaking, and oversees Federal information management, statistical policy, and information technology policy	- OIRA's staffing level was 50 "full time equivalents" and its budget was \$7 million (In Fiscal Year 2005)
<b>European Commission</b>	Secretariat General to the Commission Better Regulation Unit		<ul style="list-style-type: none"> <li>- Co-design, coordination, monitoring and reporting</li> <li>- Monitor the process and evaluate the appropriateness of the IA produced by the sectoral services.</li> </ul>	<ul style="list-style-type: none"> <li>- Better regulation unit backed by 3 units (consultation of interested parties, monitoring IA quality, enforcement)</li> <li>- 20 persons for Better regulation unit (5 administrators with support staff + administrative staff responsible for maintaining registers on expert groups and committees / comitology)</li> </ul>

Source: OECD Indicators of Regulatory Management System Quality.