

Regulatory Convergence: Seven Consumer Concerns

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The Public Locked Out

- Text to remain secret
- On US side, access to 600 corporate advisors (handful of consumer, labor, enviro)
- Even Members of Congress denied access
- **Most vital in the area of regulatory convergence, where new concepts are originating**



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1. Cost Benefit Analysis

US regulators (executive and independent federal agencies) and competent authorities in the EU (Commission services), when carrying out impact assessment/cost benefit analysis on proposed regulatory measures covered by this Chapter, should assess impacts on international and in particular transatlantic trade. Impact assessment should be informed by **appropriate input from stakeholders** concerned. The impact assessment/cost benefit analysis should be published together with the proposed or final measure.

Both sides will exchange, upon request, information on underlying assumptions, scientific evidence and data as well as methodology applied.

-- EU Position Paper on Regulatory Coherence

Cost-Benefit Analysis: Junk Science

- Industry routinely overstates costs
- CBA regularly ignores dynamic reductions in cost through innovation and economies of scale
- Non-economic benefits (e.g., saved lives, privacy) routinely and unavoidably understated or ignored because of monetization challenges
- Inability to deal with enormous risk (financial collapse, climate change)



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2. Trade Impact Assessment

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-- EU Position Paper on Regulatory Coherence

Trade Impact Assessment Concerns

- This is inherently a commercial measurement, unconcerned with other values (even cost-benefit).
- Oblivious to Precautionary Principle
- In best case scenario, involves delay.



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Displaced Alternative Decision Frameworks

- Precautionary Principle
 - Burden on industry rather than government
- Best Available Technology
- Mission Driven: Clean water, safe workplaces
- Holistic and systemic analysis: synergies, interactions, system stability/fragility
- Notably absent from EU paper: working together to achieve the protective purpose of regulation

3. Overbroad Application

The Horizontal Chapter on Regulatory Coherence should cover, in principle, any planned and existing regulatory measures of general application with significant (potential or actual) impact on international (and in particular transatlantic) trade. For the EU side, this would include EU primary legislation (regulations and directives), as well as implementing measures adopted at EU level and delegated acts (“non-legislative acts”). On the US side, this would include Congress Bills as well as rules by US federal executive and **independent agencies**. The rules of this Chapter should also extend to regulations by **US States** and **EU Member States**, subject to possible adaptations.

-- EU Position Paper on Regulatory Coherence

Impact of Broad Application

- Looking just from the U.S. side, it is important to note that:
 - Independent agencies are not subject to the cost-benefit requirements of executive agencies, or to OIRA review
 - U.S. states are not subject to federal standards relating to the rulemaking process

4. Regulatory Cooperation Council?

A Regulatory Cooperation Council (RCC) will be established with participation from senior level representatives from regulators/competent authorities and trade representatives, as well as Commission's Secretariat General (SG) and the US Office for Information and Regulatory Affairs (OIRA). The RCC will meet at least twice a year and will prepare a yearly Regulatory Programme.

-- EU Position Paper on Regulatory Coherence



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OIRA: One-Way Ratchet

- OIRA delays and weakens, but never strengthens rules
- Much less coordination than overriding of agency expertise
- Long delays common
- Non-experts override expert decisions
- “Mother May I” meetings – agencies seek OIRA permission to start rulemaking
- Political delays



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5. Notice and Comment

- U.S. notice-and-comment practice is very different than theory. Notice and comment is embedded in a system massively tilted in favor of industry
- Worry that the practical effect of this demand would be to give early access to multinationals and partner governments to influence rulemaking process.
 - Including to gain access, influence and pressure on EU Member States and U.S. states.

The Ugly Reality of U.S. Rulemaking

- Complexity
- Requirements for review
- Delay
- Pernicious cost-benefit analysis requirements and displacement of other decisional grounds, including precaution
- Structured regulatory weakening by the Office of Information and Regulatory Analysis (OIRA)
- OIRA as a cover for political challenges
- Judicial review
- Standing imbalance
- Hardening of soft norms
- Regulatory Lookbacks

Judicial Review Overwhelmingly Favors Industry

- Public interest groups – very notably including Public Citizen – litigate extensively, but the deck is stacked against us
- With some exceptions, cost-benefit works only to challenge rules as too expensive
- Major disparity in “standing” – right of parties to bring a case
 - Affected industry almost always has standing; hard for citizens

Tyranny of Soft Norms

- *Business Roundtable v. SEC*: DC Appeals Court holds that failure to conduct adequate cost-benefit analysis – even though no such requirement was required – makes rule arbitrary
- Case involved issue relating to shareholder voting and democracy: how does one value benefits?

6. Intersection with Investor-State Dispute Resolution

- What is the intersection between ISDS and regulatory coherence? Does purported failure to adequately conduct cost-benefit analysis give rise to an ISDS challenge? Why not?



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7. Secrecy Texts and Regulatory Convergence

“In the United States, we maintain transparency by publishing an agenda of upcoming regulations twice a year.

“Later, we publish the text of proposed regulations in the Federal Register. We flag proposed rules that have potential implications for international trade so that our trading partners can focus on those regulations, and we make sure that any underlying regulatory impact assessments are available on a single online portal, with enough time and notice for all stakeholders – from anywhere in the world -- to provide comments.

“This is especially important for small and medium-sized enterprises, which can't necessarily afford to weigh in on these issues in person in Washington or Brussels, or hire consultants to do so on their behalf. **If notice of a regulation under consideration comes too late – only once it has been transmitted or when regulators are no longer in a position to revise their proposal – there might be the illusion of inclusion, but not meaningful participation.**

-- Michael Froman, September 30, 2013

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