BROKEN GOVERNMENTS ACROSS THE ATLANTIC: WHAT IS THE ROLE OF INFORMATION INFRASTRUCTURES?

Anne Meuwese

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ABSTRACT

EU-related procedures around 'policy information' or 'regulatory information' provide clues for possible new directions in attempts to improve such information and its use in the United States government. This Article presents two "information infrastructures" as the best shots at infusing political legislative process with regulatory analysis without technocratizing them and regulatory cooperation as an additional check on regulatory policies.

I. INTRODUCTION

The kind of comprehensive study of fault lines in the policy-making process that Peter Schuck has undertaken for his book *Why Government Fails So Often* has never been carried out in the context of the European Union (EU). But if public opinion is to be taken as a relevant indicator of government failure, Schuck's diagnosis certainly applies to Europe as well. Although EU leadership's approval ratings recovered somewhat from the dire situation in 2013 when there were only four EU countries with a clear majority approving, a 2015 poll suggested there is only one country (Ireland) where a majority thinks EU membership has left it better off.[1] Peter Schuck rightly states that a multi-jurisdictional comparison would make the exercise of pinpointing the drivers for government failure unmanageably complex.[2]

Across the Atlantic Ocean, the "brutal facts of public life" differ of course, as does the institutional context. To mention just one anomaly that complicates comparisons of EU-US policy performance: the EU institutions heavily rely on regulatory powers that have been 'delegated' to the supra-

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[1] Jan Sonnenschein & Sofia Kluch, *EU Leadership Regains Approval Across Europe*, GALLUP (March 2, 2015), http://www.gallup.com/poll/181772/leadership-regains-approval-across-europe.aspx; Anna Manchin, *EU Leadership Approval at Record Low in Spain, Greece* (January 8, 2014), http://www.gallup.com/poll/166757/leadership-approval-record-low-spain-greece.aspx.

[2] PETER SCHUCK, WHY GOVERNMENTS FAIL SO OFTEN 18-19 (2014).

national level; for public spending or infrastructural projects it mostly has to rely on member states.[3] The frequent references to policy experiences from abroad, and Europe in particular, throughout *Why Government Fails So Often*,[4] do show though that on concrete issues comparison is useful, as long as it occurs with a sufficient dose of contextual sensibility. A good reason to explore a comparison 'light' further is that, the EU may have something to offer exactly *because of* its ongoing legitimacy and performance crisis. Due to the (increasing) sense that European integration may not be inevitable and let alone 'ever closer', EU institutions have had relatively strong incentives for experimenting with institutional 'fixes' for policy failure.

Schuck concludes that among a multitude of solutions that are unfeasible because the systemic drivers of government failure they target are so deeply rooted, the one element that can be improved quite easily and relatively cheaply is 'policy information'.[5] Since this assertion tallies with the European experience, this brief commentary focuses on this particular aspect and proposes two developments involving the EU that are worth keeping an eye on for anyone interested in incremental improvement of the informational input into policy-making and legislative processes.

II. POLITICS AND REGULATORY IMPACT INFORMATION

An example of an 'informational solution' is presented in the final chapter of *Why Government Fails So Often*, where a legislative checklist for Congressional Committees to use in order to ensure that their statutes avoid the worst mistakes is proposed.[6] This hints on the one hand at a wish to involve Congress more in 'evidence-based lawmaking' and on the other at a resignation to fairly modest ambitions in this regard ('avoiding the worst mistakes'). Odd as it may seem, in the light of the aforementioned legitimacy crisis, to look to the European Union for hints on how to improve regulatory information structures there are policy areas where regulation at the EU level has been relatively successful. One of those is environmental protection of which the Clean Air for Europe Thematic Strategy from 2005 is a good example.[7]

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[3] GEONDOMENICO MAJONE, REGULATING EUROPE 2-3 (1996).
[4] *See* SCHUCK, *supra* note 3, at 384 (describing the Danish policy experience with housing programs).
[5] *Id.* at 391.
[6] *Id.* at 381.
[7] *Communication from the Commission to the Council and the European Parliament - Thematic Strategy on Air Pollution*, COM (2005) 446 final (Sept. 21, 2005); *Proposal for a Directive of the European Parliament and of the Council on Ambient Air Quality and Cleaner Air for Europe*, COM (2005) 447 final (Sept. 21, 2005).

A recent study found that because of specific EU policies to reduce air pollution across Europe, in combination with new technologies, 80,000 deaths are prevented each year and there is a 35% reduction of fine particles in the atmosphere over the last 40 years.[8] In the case of European clean air policies, the particular European brand of regulatory impact analysis can be credited with at least a small part of the success. The most eye-catching difference between the American and European toolkits for regulatory analysis is that at the EU level legislative bills that need approval from the European Parliament undergo an impact assessment as well. The initial assessment is carried out by the European Commission, the sole institution empower to initiate legislation, but the European Parliament committed to additionally assessing the impacts whenever it introduces substantial amendments.[9] This latter element exactly has not gotten off the ground too well, but the procedure is managing better than any other in the world to engage a parliament in a discourse of impacts or at the very least to have turned the idea that a parliament should care about the evidence base of legislation into a mainstream one. Simplifying somewhat, a unique combination of methodology and presentation is at the core of this achievement. Paragraph 14 of the 2016 version of the Interinstitutional Agreement on Better Law-making states the following:

> The European Parliament and the Council, upon considering Commission legislative proposals, will take full account of the Commission's impact assessments. To that end, impact assessments shall be presented in such a way as to facilitate the consideration by the European Parliament and the Council of the choices made by the Commission.

One concrete way in which the presentation of regulatory impact information is facilitating consideration by the political decision-makers is the 'best practice' of reporting on the findings of the impact analysis in a 'decision matrix'. In the more than ten years that the European Union has been experimenting with impact assessment it has become a champion of multi-

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[8] S. T. Turnock et al, *The Impact of European Legislative and Technology Measures to Reduce Air Pollutants on Air Quality, Human Health and Climate*, ENVTL. RES. LETTERS, Feb. 2016.

[9] Interinstitutional Agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission, 2016 O.J. (L 123) 1 (stipulating that "[t]he European Parliament and the Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission's proposal"). A very similar agreement had been in place since 2003.

criteria analysis. Multi-criteria analysis evolved from critique of conventional cost benefit, its main strengths being that it escapes the inherent uncertainties linked with monetization and that it weighs up multiple options and competing interests using numerous decision criteria.[10] European regulatory policy explicitly allows for a variety of decision criteria, on the grounds that mandatory efficiency-based decision-making would be in violation of the treaties.

The argument here would not be that multi-criteria analysis is inherently superior to cost-benefit analysis – which in many cases still takes center stage – but that because it offers greater opportunities to highlight trade-offs involved in policy-making. This happens in the aforementioned matrix, which shows how different options perform in relation to different criteria (efficiency, cost-effectiveness, fundamental rights, coherence…). For instance, the impact assessment produced by the European Commission on the Clean Air for Europe Thematic Strategy in the succinct presentation of the aggregated effects, clearly distinguished between overall efficiency (i.e. the greatest net-benefits to European society) and cost-effectiveness.[11] The discussion that followed between the European Commission and the European Parliament regarding the appropriate ambition level of the new policy was prompted by this way of presenting regulatory impact information.

Of course, many counter-anecdotes can be found in the European experience, which I am – I cannot emphasize this enough – not presenting for its perfection, but for its potential on some very specific points. The Clean Air Strategy Example merely shows that multi-criteria analysis *can* be a good starting point for data-based accountability mechanisms involving *political* decision-makers. It allows or presenting options when reporting on the basis for legislative or regulatory policy choices, which offers an opening for actual political engagement whilst simultaneously framing the terms in which the final decision would need to be explained.

Certainly, a further defining feature of the European policy process is that procedures for 'legislation' and 'rule-making' are much more similar than in the US, for a start each involving the European Commission and the European Parliament, albeit in different roles. I do not suggest that it is feasible in the short term for the US Congress to all of a sudden start taking note of decision matrixes; the anecdote and brief explanation of the European preference for the use of multi-criteria analysis in impact analysis process merely demonstrates that, beyond the checklist idea, well designed 'information infrastructures' may stand a chance in the longer term.

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[10] OLIVIER VARDAKOULIAS, NEW ECON. FOUND., ECONOMICS IN POLICY-MAKING BRIEFING 6: MULTI-CRITERIA ANALYSIS 2 (2013), http://www.neweconomics.org/page/-/publications/Economics_in_policymaking_Briefing_6.pdf.

[11] *Annex to: The Communication on Thematic Strategy on Air Pollution and The Directive on "Ambient Air Quality and Cleaner Air for Europe,"* SEC (2005) 1133 (Sept. 21, 2005).

III. REGULATORY COOPERATION AND A NEW TYPE
OF POLICY INFORMATION

The term 'information infrastructure' is also applicable to a second development with an underexplored potential for regulatory policy learning: horizontal regulatory cooperation between the EU and the US as currently driven by the negotiations of the Transatlantic Trade and Investment Partnership (TTIP). The trade-driven need to coordinate regulatory policies may lead to a shared forum for discussing regulatory policies that may include a variety of public policy considerations far beyond trade. In a recent special issue of Law & Contemporary Problems on regulatory cooperation Alberto Alemanno and Jonathan Wiener have argued in favor of learning from transatlantic regulatory variation.[12] What could this look like in more concrete terms? The European Commission now systematically publishes negotiation texts, including recently a chapter on shared Good Regulatory Practices.[13] One example of a proposal for a shared practice is on the type of impact analysis both the US and the EU would commit to carry out on 'regulatory acts':

> When carrying out a regulatory impact assessment […] each
> Party shall ensure that it:
>
> a. considers the need for the proposed regulatory act and the nature and the significance of the problem the regulatory act is intended to address;
> b. examines feasible regulatory and non-regulatory alternatives (including the option of not regulating), if any, that would achieve the objective of the regulatory act;
> c. assesses potential short and long term social, economic, and environmental impacts of such alternatives and the anticipated costs and benefits (quantitative, qualitative, or both, recognizing that some costs and benefits are difficult to quantify).[14]

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[12] Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Step Toward a Global Regulatory Laboratory*, 78 LAW & CONTEMP. PROBS. 103 (2015).

[13] EUROPEAN UNION, *TTIP-EU Proposal for Chapter: Good Regulatory Practices*, *in* EU-EU TTIP NEGOTIATIONS (2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_1 54380.pdf.

[14] *Id*. at art. 8 para. 2-c.

The European Commission wants to include congressional bills in the shared definition of 'regulatory acts', which matches its own attempts to extend evidence-based lawmaking to 'primary legislative processes' as discussed above. This, however, is very unlikely to be accepted by the US, where agencies with rulemaking powers are likely seen as more natural addressees of 'shared regulatory practices'. A further proposed chapter seeks to establish strengthened 'rules of the game' for regulatory cooperation in specialized areas.[15] An earlier proposal for a 'Regulatory Cooperation Body' was aborted, most likely for lack of support from the US side, and instead the negotiators are clearly still searching for the appropriate institutional framework for ensuring future regulations are not (too) incompatible, an endeavor that is hoped to have a more general quality-enhancing effect too.

The negotiation text published by the European Commission shows that it is thinking in the direction of offering regulators from the other side early opportunities for cooperation and information exchange,[16] and a joint commitment to take into account each other's approaches on their merits[17] "before we go ahead and regulate."[18] So the idea is not for the US and the EU to start drafting regulatory policies together, but rather that the mutual commitment to take into account policy frameworks and regulatory ideas from the other side of the ocean could serve as an additional test for bias in the policy process. Taken to the extreme this could even take the shape of peer reviews of regulatory frameworks, but even without such strong institutionalization, regulatory cooperation presents an opportunity for a different type of information to enter domestic policy processes. Exchanges based on regulatory information such as the ones promoted under a possible future TTIP could therefore be a valuable addition to the *range of sources* of solutions identified in *Why Government Fails So Often*.

IV. CONCLUDING REMARKS

The remarks above are intended to echo the call for incrementalism from Peter Schuck's insightful book.[19] Rather than using the European experiment for expanding or validating Schuck's already multi-dimensional

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[15] EUROPEAN UNION, *TTIP-EU Proposal for Chapter: Regulatory Cooperation, in* EU-EU TTIP NEGOTIATIONS (2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_1543 77.pdf.

[16] *Id*. at art. x.4 para. 2-a.

[17] *Id*. at art. x.4 para. 2-b.

[18] EUROPEAN COMM'N, REGULATORY COOPERATION IN TTIP: AN INTRODUCTION TO THE EU'S REVISED PROPOSAL 5 (2016), http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc 154378.pdf.

[19] SCHUCK, *supra* note 3, at 34.

diagnosis of government failure, the aim was to highlight EU-related procedures around 'policy information' or 'regulatory information' that provide clues for possible new directions in attempts to improve such information and its use. The two 'information infrastructures' presented here, multi-criteria analysis as our best shot at infusing political legislative process with regulatory analysis without technocratizing them and regulatory cooperation as an additional check on regulatory policies, are very different in nature. One is an almost technical device that is representative for a uniquely European style of impact analysis, the other an ideational 'highway in the sky' across the Atlantic and neither is a catch-all solution for the problems Schuck identifies. However, they do represent worthwhile avenues for further thinking about solutions geared towards avoiding unnecessary policy failures.