Trans Atlantic Consumer Dialogue

Coordinated by Consumers International

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# Resolution on Regulatory Cooperation in the Transatlantic Trade and Investment Partnership

## Introduction

At the launch of the free trade agreement, called the Transatlantic Trade and Investment Partnership (TTIP), the EU and the US have acknowledged that regulatory issues – cooperation and coherence – will be the most important and the most challenging for the trade negotiators. Now that both parties have submitted their legal text on Regulatory Cooperation in TTIP, we can see more clearly just what an enormous challenge this is. This is not because the two partners have fundamentally different values that they want to safeguard, but because the two legislative and regulatory systems have evolved and operate in very different ways; indeed, they have varying understandings of what constitutes a "regulation." Most importantly, they do not necessarily see eye to eye as to what constitutes effective protections for consumers, environment or workers, and in what sectors.

The EU has made its proposed text for the horizontal chapter on Regulatory Cooperation[1] public, a fact to be welcomed. It is mostly focused on building the structures for cooperation, and how wide and to whom the rules will apply. It casts its net so wide as to encompass all sectors of goods and services, and all EU and US legislative levels. It creates a red-tape leviathan, complete with an 'oversight' body, more avenues for lobbyists to influence, and additional impact assessments designed for trade matters only. On the redeeming side, the EU text does not contemplate an enforcement mechanism for regulatory cooperation obligations.

The US, on the other hand, allegedly (as its texts remain a secret) is more focused on good regulatory practice and transparency[2], which appears to mean essentially applying the US system of public online consultations and other administrative review processes to all EU primary and secondary law making,[3] including for the national laws of the 28 EU member countries.[4]

The two sides' proposals appear quite different – although neither seems directed at prioritising "cooperation" on the development of regulatory standards – and not developed with an understanding of the other's legal and regulatory system.

What both proposals seem to have in common is that either one would result in a de facto big slow-down of the regulatory process, at a time when it needs to be particularly alert and adaptable to a

[1] http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf.
[2] The broad US position is outlined on the USTR website at https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-2, see penultimate paragraph.
[3] In this context, primary and secondary law making on the EU side refers to EU-level regulations and directives with their respective delegated and implementing acts and not the EU Treaties which are also often referred to as "primary law".
[4] See EU Report on the Eighth Negotiating Round, page 4, at http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153175.pdf.

fast-paced age of new and novel technologies. A complex institutional infrastructure for regulatory cooperation will in practice inevitably lead to more possibilities for industry lobbying and likely to impair the ability of regulatory authorities to carry out their statutory obligations to protect public, environmental and worker health and safety.

More detailed comments on the EU proposed text are provided at the end of this resolution.[5]

## TACD Recommendations

TACD believes that cooperation among regulators to share information and raise consumer standards is desirable. But the TTIP regulatory cooperation chapter is not designed to strengthen consumer protections. Indeed, the primary emphasis of both EU and US proposals in this area (to the extent the US has explained publicly its objectives) is on forcing changes in each side's domestic regulatory process. TACD does not believe this is an appropriate component of TTIP and so strongly recommends that there be no general (or "horizontal") chapter on regulatory cooperation in TTIP at all.

If, however, the EU and US governments decide to proceed with such a chapter, TACD recommends

1. To the extent it addresses regulatory process, a regulatory cooperation chapter should be limited to an outline of good practice principles, including in particular the need for public comment and meaningful stakeholder involvement.

   Each party must be free to determine how these principles are to be implemented in their own jurisdictions, adapted and compatible to their own established regulatory processes. That is not to say that both systems do not need improvement – and indeed consumer groups have analysed the drawbacks and called for improvement in both; but it is not for a narrow trade-focused-only approach to impose what each party's regulatory processes should be like. Improvements in transparency and regulatory development should be geared primarily to ensuring the regulatory system better serves and represents the interest of consumers and citizens.

   Furthermore, guidelines for cooperation between the EU and the US already exist, agreed in the framework of the Transatlantic Economic Partnership in 2002[6] and 2011[7], as do structures for cooperation such as the Transatlantic Economic Council (since 2007)[8] and various technical or high level working groups. It is not clear why new structures are needed, and why they would be more effective than the old structures, and why the high costs entailed to put them in place would be justified. In any case, the primary authority for any regulatory cooperation should reside with the agencies charged with those responsibilities, and which have the right expertise, rather than any centralised body. Imposing new burdens on already overstretched and resource

[5] A more general background to TTIP regulatory coherence and TACD's initial (2013) position on the issue can be found at http://test.tacd.org/wp-content/uploads/2014/01/TACD-TTIP-Resolution-on-Regulatory-Coherence-in-the-Transatlantic-Trade-and-Investment-Partnership.pdf.
[6] http://ec.europa.eu/enterprise/policies/international/files/guidelines3_en.pdf.
[7] http://ec.europa.eu/enterprise/policies/international/files/ec-us-hlrcf-2011-june-regulatory-principles-and-best-practices_en.pdf.
[8] http://ec.europa.eu/growth/industry/international-aspects/cooperation-governments/eu-us/index_en.htm.

hungry agencies is not going to deliver any more results through a trade agreement than any previous voluntary arrangements – except perhaps lead to more state-to-state disputes.

2. The scope of the horizontal regulatory cooperation chapter in TTIP should be limited to the specific sectors under negotiation to ensure that sectors that may not be included, such as privacy protections or cultural audio/visual sectors, are not "accidentally" included.

3. The application field of the horizontal regulatory cooperation chapter should be limited to EU level and US federal level regulations. The EU level is responsible for the vast majority of regulations in Europe (some 80 percent for consumer protection laws), while any national or local regulatory action would take into account the EU single market requirements in any case, so it is hard to see why extending the breath of TTIP beyond the EU level is necessary at all. EU Regulations (unlike Directives) are adopted 'verbatim' by Member States, and so the national level will fall at least partially within a EU-level only scope. Furthermore, in the EU, the treaties stipulate that Members States should not be prevented from maintaining or introducing more stringent protective measures.

   For the US, the current EU text proposal would cover much more than US regulations subject to notice and comment and administrative review – and its requirements would imply a fundamental change in US laws and practice. The federal government cannot dictate the legislative and regulatory processes of state and local governments; it would be unconstitutional.

4. The proposed text from both parties must be made publicly available. We urge the US to be more transparent, and follow the EU example in publishing its legal texts. It is absurd, particularly in the context of this chapter, that the US calls for transparency and public involvement and accountability with a legal text that is neither transparent nor accountable. Wide civil society distrust and suspicion of the process can only be assuaged by the evidence of the legal text.

5. The chapter should not require the conduct of additional impact assessments that are narrowly defined on trade issues and go beyond the nationally conducted assessments. If it does, then impact assessments referred to in the chapter must be tightly defined, as the impact assessments in the EU and the US do not currently mean the same thing.[9] Impact assessments need to take into account the implications of proposed legislation on consumers' daily lives, public health, safety or privacy rights and expectations. They should be flexible and not overly reliant on false notions of certainty or quantification, given the challenges posed by low-probability catastrophic scenarios, the problems attendant to reliance on industry estimates of cost, and the inherent limits in developing metrics for matters such as people's health and safety. Impact assessments should also focus not only on the burdens and costs, but also on the benefits of legislation, as well as potential future costs to society if no action is taken (for example increased costs of climate disruption if there is no action on greenhouse gas

[9] In the US impact assessments are *de facto* of economic nature, i.e. comparisons of monetised costs and monetised benefits, and cost-effectiveness analysis (see note 6), although they may include some very modest consideration of non-economic factors; in the EU there's development of specific guidance for assessing the social ramifications and impact on fundamental rights (see note 7).

emissions). The chapter must not create any new rights for parties to challenge regulations based on impact assessments.

6. It must be made clear that regulatory cooperation is not subject to the investment rules of the TTIP, and that no party may cite alleged noncompliance with regulatory cooperation rules in connection with an investment claim under TTIP. It is conceivable that private investors would be able to challenge regulatory action for failing to comply with the terms of the regulatory cooperation chapter, on the grounds that such failure violates an obligation for 'fair and equitable' treatment, or based on similar legal theories.

## Summary

Provisions for regulatory cooperation, where relevant, should be limited to the individual sector chapters. Horizontal regulatory cooperation should be restricted to:

- General regulatory good practice principles that must apply to every sector – and in particular principles of transparency and public consultations, and meaningful stakeholder engagement at all stages.
- The scope of the chapter application – to cover only EU level regulation and US federal level regulations.
- The sectors of the chapter application – to cover only the sectors under negotiation, not specifically mandate excluded sectors such as data privacy or culture/audio-visual.
- Impact assessments – no requirement for separate trade impact assessments to be included (or in any of the sectoral chapters). There must be clear definitions of impact assessments to make clear they include consumer, worker and environmental impacts, have a balanced focus on both costs and benefits of legislation, not mirror US-style "cost-benefit analysis," and not give procedural or substantive right to challenge a rule based on impact assessments.
- Relationship with the investment chapter in TTIP – the chapter must make clear that private investors cannot challenge regulatory actions under the provisions of the horizontal regulatory cooperation chapter or any of the (relevant) provisions of the sectoral chapters.
- Transparency – the negotiating text of both sides must be made available as it progresses to the public, not just governments and parliamentarians. It is absurd that the US demands transparency and accountability in a text that is not transparent or accountable.

## Background: TACD Analysis of the EU text proposal on regulatory cooperation[10]

### Summary

The chapter on regulatory cooperation is part of a trio of chapters in TTIP which cover issues that apply to all the product and services sectors under negotiation (the other two cover product standards (TBT) and Food Safety and Animal and Plant Health (SPS)). The EU's text proposal on regulatory cooperation was submitted to the US for the February 2015 negotiation round, and made public on 10 February 2015. These comments address this particular published version.

The EU proposal is unusually vague for a trade text. The whole chapter is drafted around efforts and endeavours rather than obligations. However, the complex web of the proposed processes, procedures and institutional structures, if they ever come to fruition, will in reality hugely increase the burden on the public purse, most likely cause a significant slowdown and chill on regulatory processes and give extra possibility for lobbying to those with big resources to do so, i.e. big corporate interest.

The proposal also has a massively wide scope. Most notably from a US vantage point, it would cover not significant US regulations, but all regulation regardless of size, as well as guidances, orders and, most startlingly, federal statutes. The proposal also contains a placeholder for a future provision related to non-central regulatory acts, including actions by the US states. For the EU, this means that it will be extended to national regulatory acts. This would imply that national or regional authorities who are entitled to apply the principle of subsidiarity and take regulatory actions will also be submitted to this burdensome process.

The scope also extends to all planned regulatory acts, which implies sectors that are excluded from the TTIP by the EU mandate could also be potentially covered.

The EU proposal requires impact assessments, and a meaningful consultation process related to those assessments, for all regulations, guidance, orders and statutes that relate to services and goods – something not required in most cases under US law, and very hard to imagine for proposed statutes. The assessments must include (additional) trade and investment impacts, something not required under US or EU laws.

The EU proposal contemplates ill-defined regulatory exchanges and the creation of a Regulatory Cooperation Body of uncertain powers. There is the potential for the creation of significant burdens for regulators.

The EU proposal does not include any enforcement language.

Irrespective of the direct enforcement provisions of this chapter, there are reasons to be concerned about its interaction with an investment chapter. It is conceivable that private investors would be able to challenge regulatory action for failing to comply with the terms of the regulatory cooperation chapter, on the grounds that such failure violates an obligation for "fair and equitable" treatment, or based on similar legal theories.

[10] http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf.

## Textual analysis

***Breadth of covered acts*** (Art. 3): The proposal provides that all central level regulatory acts would be covered on the EU side, in all sectors. This is a massively wide scope, and would include also sectors and regulations that are excluded by the EU mandate. For example, it could cover data protection regulations (despite repeated reassurances that it will be excluded), or cultural/audio visual sectors that are specifically excluded by the EU mandate.

On the US side, the proposal would cover much more than regulations. It would apply to US statutes, which are adopted by Congress through prescribed legislative process, but without the administrative review process that characterises regulations. It would also apply to orders, which are the outcome of administrative adjudications, not an agency policymaking process; guidance documents, which interpret and explain regulations, and are typically adopted with less formal process than regulations; and executive orders, which are issued directly by the president.

There is also a placeholder for ***Regulatory acts at non-central level*** (Art. 12): Although an earlier leaked proposal from the EU contained provisions related to sub-central regulation, the tabled draft contains only a placeholder paragraph. This potentially means that legislation planned by a Member State would be also covered by all the procedures set out in the chapter, if it is deemed to have a "significant" impact on trade (this term incidentally is used throughout the chapter, but it is not quantified or defined).

Any obligation affecting EU national or regional levels, or the US states would raise serious questions.

***Early information on planned acts*** (Art. 5.1): The proposal requires publication of planned regulatory acts at least once a year. While the US executive does prepare a regular listing of planned regulatory acts, these do not include orders – again, the outcome of adjudications – and guidance documents. This requirement seems plainly infeasible as regards proposed US legislation. There is no feasible and practical way for the executive branch to make a judgment about what legislative proposals put forward in the US Congress may become law.

***Stakeholder consultation*** (Art. 6): The proposal requires a US notice-and-comment like procedure – or, some form of public consultation by which comments from any persons or companies shall be taken into account by each side – for every regulatory act. This requirement applies to all regulatory acts undergoing impact assessment; Article 7 makes clear that this obligation applies to all regulatory acts. The article is quite general and not specific, so it is not clear for example at what stage in the regulating process the public consultation would take place. There is also no requirement to publish all comments. In US law, there is no obligation to take into account public comments regarding orders or federal statutes.

***Analytic tools*** (Art. 7.1): The EU proposal would require impact assessments – a term not defined – for all regulatory acts. There is no cut off in terms of regulatory actions that are too small to require such action. Indeed, a category of regulatory actions with "significant impact" on trade and investment are subject to separate, additional requirements.

In the US, cost-benefit analysis – which is how "impact analysis" effectively translates into the US context – is only required for significant regulations, and not even for all significant regulation. The EU language would dramatically expand impact assessments requirements for regulations and for

guidances, including those regulations and guidances with little effect on the economy or on trade. It would impose a duty to conduct assessments on orders, a strange notion for the outcome of adjudication.

And, the EU proposal would require impact assessments for all federal statutes, before they could be finalised.

***Analytic tools*** (Art. 7.2): The proposal would require impact assessments to assess regulatory actions for their relationship to international instruments, the regulatory approach of the other party, and the impact on trade and investment. None of these obligations exists under current US law, for regulations, orders, guidances, or statutes.

For both the EU and the US, the obligation to conduct a trade and investment impact assessment would impose a considerable additional burden, with huge potentials for time delays.

***Information and Regulatory Exchanges*** (Art. 9): The proposal establishes a formalised process for regulatory dialogue related to regulatory acts with significant impact on trade and investment, with an obligation to respond to each point of substance raised by the other party. “Significant impact” is not defined. This might constitute a significant burden on regulators on both sides of the Atlantic.

It is hard to understand how this obligation would be imposed as regards US orders and statutes.

Article 10 states that the regulatory dialogue does not oblige suspension or delays in the issuance of regulations, but it is hard to see how the process can be conducted in good faith without at least the possibility of regulatory delay.

Footnote 14 contemplates a regulatory exchange before publication of a draft for consultation, which seems to suggest that the parties to the agreement would enter the regulatory process even before any chance for public engagement.

***Establishment of the Regulatory Cooperation Body*** (Art. 14): The proposed Regulatory Cooperation Body (RCB) has very broad but ill-defined powers and duties in the areas of coordination, monitoring, and proposal of new initiatives. It is very hard to assess how it would function.

***Enforcement:*** Notably absent from the EU proposal is any enforcement mechanism, either by the parties or private parties. It is hard to contemplate such a chapter without an enforcement mechanism, and it certainly has not been the US practice to enter into such agreements.