
**Resolution on Regulatory Coherence in the Transatlantic Trade and Investment
Partnership**

Introduction

At the launch of negotiations for a free trade agreement, called the Trade and Investment Partnership (TTIP), the European Union (EU) and the United States (US) have acknowledged that regulatory issues - cooperation and coherence - will be the most important and the most challenging for the trade negotiators. As stated in an EU-US High Level Working Group report¹, the goal is to agree on ways to make different existing regulations and standards compatible, by various means, "while achieving the levels of health, safety, and environmental protection that each side deems appropriate". According to the report, future regulations should be, where appropriate, harmonised prior to implementation and enforcement.

As made clear in previous statements², EU and US consumer groups are supportive of regulatory cooperation as a way to promote and exchange best practice, and providing its purpose is to improve, in the most effective way, the health, safety and economic well-being of people on both sides of the Atlantic, as well as protect the environment and other fundamental rights. However, regulatory processes on both sides of the Atlantic give us cause for doubt that such goals can be easily achieved under present conditions.

In the US, long-established rulemaking processes that included guarantees of transparency and public participation have been supplemented in the last two decades by centralised White House oversight and procedures³ which have distorted a predictable and evidence based regulatory process, governed by the Administrative Procedures Act.⁴ The increasing power of the Office of Management and Budget, and other White House offices, over regulatory agencies has resulted in "paralysis by analysis", a pro-industry bias in the rulemaking process, politicisation of science, regulatory under-kill and information gaps.⁵

There have been similar tendencies in the EU and its Member States, for example in emphasis on the need to reduce 'regulatory burdens' (costs related to legal compliance), and other costs to business in cost-benefit analysis, and discount potential future consumer or environmental detriments and costs that society would have to pay for down the line; or in increasing assumptions that less, or self-regulation, is "smarter" than taking legislative measures. While consumer organisations have acknowledged progress made at EU level in promoting better regulation in the last ten years or so,

¹ Final Report, High Level Working Group on Jobs and Growth, February 11, 2013 <http://trade.ec.europa.eu/doclib/html/150519.htm>

² TACD Response to Transatlantic Trade and Investment Partnership with 2012 Statement <http://bit.ly/ZauwgJ> and Comments of the TACD Concerning Proposed Transatlantic Trade and Investment Partnership USTR-2013-0019 <http://bit.ly/1cHIVzr>

³ Centralised political review of major regulations and other policies is carried out by the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget (OMB) mandated by a series of Executive Orders under the Raegan, Clinton and Bush administrations. http://www.whitehouse.gov/omb/OIRA_QsandAs

⁴ 1946 Administrative Procedures Act (APA) <http://www.archives.gov/federal-register/laws/administrative-procedure/>

⁵ TACD Position Paper and Resolution on Horizontal Regulatory Initiatives in EU US Regulatory Cooperation, 2007 <http://bit.ly/1ek3V1c>
See also TACD US-EU 2007 Summit Statement 'Safeguarding the Consumer Interest in Regulatory Methodologies' <http://bit.ly/l1FrOA>

there's much more to be done towards improved transparency, full accountability and policy-making that takes its evidence, in an unbiased and open manner, from all corners of society⁶.

EU-US regulatory cooperation is not a new concept. The two sides have been cooperating on the regulatory front for many years, in the context of the Transatlantic Economic Partnership, and produced two sets of common non-binding guidelines, principles and best practices on regulatory cooperation in 2002⁷ and 2011⁸, as well as some binding agreements, including Mutual Recognition Agreements (MRAs). However, as stated in an information document by EU trade authorities to the EU Council "... the existing EU-US MRAs have a limited scope and have also largely failed to deliver due to a multiplicity of reasons, and the potential for traditional regulatory cooperation through sectoral dialogues between regulators has not been fully exploited."⁹

Current mandates on regulatory issues within the EU-US trade agreement are more ambitious, going beyond mere cooperation and exchange of best practices and safety alerts, to regulatory 'coherence', 'convergence' and 'compatibility' in entire sectors within the context of a binding and enforceable trade agreement. To aid this, the EU trade chief has made a concrete proposal for the creation of a Regulatory Cooperation Council, consisting of the heads of principal EU and US regulatory agencies, trade representatives, the Commission's Secretariat General and the US Office for Information and Regulatory Affairs. This body would have an oversight role.¹⁰

Trade agreements require parties to seek the 'least trade restrictive measure' regulatory objective. This puts a high burden of proof on governments to show the 'necessity' of a regulation. The TTIP adds an additional burden on governments to justify the exercise of their regulatory authority by submitting all regulations, implementing measures and even domestic judicial ruling on regulations to review under the proposed Investor State Dispute Settlement (ISDS) chapter.¹¹

Regulatory challenges whether threatened or adjudicated under the ISDS may put competent authorities with statutory duties to protect public health, the environment, food safety and other consumer protections under conflicting pressures. They may opt for the 'safe mode' of regulation, and delegate authority to industry self-regulation, as occurred during the decade of self-regulation in financial services, resulting in defaults of the global financial institutions and consequent loss of jobs and economic growth.

TACD Recommendations

As stated in our initial response¹² we consider, as a first fundamental principle, that an agreement aiming for regulatory convergence can only be acceptable if it requires the highest standards of consumer and other protections, while not limiting the US and the EU from adopting and enforcing higher standards when market, science or technological developments so require. The firm statements from both sides that standards will not be lowered are welcomed, but assurance alone is

⁶ Smart Regulation: BEUC response to the stakeholder consultation, Ref: x/2012/070 - 21/09/2012 <http://bit.ly/1ba5qAe>

⁷ Guidelines on Regulatory Cooperation and Transparency, April 2002 <http://bit.ly/1ixTIRI>

⁸ Common Understanding on Regulatory Principles and Best Practices, June 2011 <http://1.usa.gov/1fmCsPe>

⁹ European Commission, Note For The Attention Of The Trade Policy Committee, Brussels, April 2013 TRADE/E.1/ D (2013).

¹⁰ Speech at the Aspen Institute Prague Annual Conference / Prague, Czech Republic 10 October 2013,

http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151822.pdf and leaked EU position paper available at <http://bit.ly/1hXgJhT>

¹¹ See TACD Resolution on Investor State Dispute Settlement, <http://bit.ly/1hyKqps>

¹² See note 2

not enough: as long as there is information asymmetry between negotiators, industry and civil society representatives as to what is being negotiated, concerns and doubts will persist.

Therefore, our second fundamental principle is that of transparency. This is a much abused and vaguely defined term. It is most often interpreted as information provision, in the form of documents and briefings, which - while welcome - are not enough. Transparency in this context also means accountability: trade agreements derogate from the normal rules of law making. The TTIP will result in adaptation of regulatory frameworks that apply in the US and the EU following procedures outside the normal democratic processes. The negotiating powers have been entrusted to non-elected officials, which imply a shift of legislative power from the elected to the non-elected. The Congress in the US and the Council and the European Parliament in the EU have only limited power in terms of shaping the detail of the content of the pact. So it is vitally important, as a counter-balance, that negotiators are accountable to their citizens and share with them the objectives, conditions and consequences of the negotiations, and allow for meaningful input by those who will be primarily affected by these initiatives.

In support of these over-arching principles we make the following recommendations for general adoption in the negotiation text and agreement:

1. First and foremost, to ensure an open process, there must be publication of negotiating texts as they are developed. So far no convincing arguments for secrecy has been put forward to us, while there are many precedents for disclosing negotiating texts including by the US in past agreements¹³. As long as texts remain secret, the information imbalance will continue to generate distrust from civil society, no matter what the officials say. And periodical leaks of other secretive negotiations, such as the Trans-Pacific Partnership (TPP), only serve to reinforce such mistrust and confirm that civil society fears are fully justified.¹⁴
2. TACD also urges the EU and the US to create a formal Advisory Committee consisting of key representatives of consumer, labour, environment, standards and civil society organisations, fully briefed and provided the opportunity to provide expert and detailed input on a regular basis. The EU has moved in this direction and has just established an informal multi-stakeholder advisory experts' group due to start meeting in January 2014; there is as yet no equivalent in the US.
3. Independent regulatory and enforcement agencies should play a key role in the negotiations, and share the negotiating table with the trade representatives. The institutional mechanisms of the agreement should adopt a set of best practices from each partner's regulatory processes, with active input from stakeholders. Primary authority for any regulatory cooperation should reside with the agencies charged with those responsibilities, which have the right expertise, rather than a centralised body.
4. As it is enshrined in the Lisbon Treaty, the precautionary principle is non-negotiable and should apply in cases when the scientific evidence is not conclusive to determine a level of protection with certainty, but there is need for policy makers to establish the appropriate level of protection regarding health, safety and the environment. If the trade agreement is to achieve

¹³ Examples of negotiations where texts are or were made public include: the current Doha Round negotiations at the World Trade Organisation <http://bit.ly/jmUSL>; the Free Trade Area of the Americas <http://bit.ly/S3c63N>; the Multilateral Agreement on Investment (later texts) <http://bit.ly/10ewMyb>

¹⁴ See for example analysis of the leaked TPP chapter on intellectual property by TACD member organisations EFF <https://www.eff.org/issues/tpp> and KEI <http://keionline.org/node/1825> 'The document confirms fears that the negotiating parties are prepared to expand the reach of intellectual property rights, and shrink consumer rights and safeguards'

regulatory coherence, one goal should be that US agencies find ways to incorporate the precautionary principle in regulatory decisions, especially related to new and emerging technologies, public health threats or environmental harms.

5. Impact assessments are a valuable tool for policy making, but they need tight definitions and guidelines, as the impact assessments in the EU and the US do not currently mean the same thing and cannot be 'converged' or 'harmonised'¹⁵. Impact assessments need to take into account the implications of proposed legislation on consumers' daily lives, and ensure the right balance of economic costs with less easily measurable factors such as impact on 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 curbing greenhouse gas emissions).
6. Negotiators should ensure evidence-based regulatory cooperation, without imposing limits, such as claims that public health data is confidential business information, on data necessary to be gathered by health, consumer, safety or environmental agencies. Regulation must be inspired and informed by an accurate knowledge of all the factors involved. Consumer organisations have an important role to play, as many test goods and services and handle and record consumer complaints. The issue of inequality of resources in terms of submitting data or research between stakeholders with specific interests (such as sectoral businesses) and those with more diffuse interests (for e.g. consumer organisations) should also be tackled.
7. Negotiators should tightly define key terms such as 'mutual recognition', 'regulatory coherence' or 'convergence', and the conditions and guiding principles which should be applied when looking at different sectors. A non-exhaustive annex of such applications should be included in a regulatory convergence chapter to illustrate what otherwise might be ambiguous legal framing. Regulations by their nature evolve with changed circumstances and developments in particular societies, and can depend on many variables such as culture, or weather conditions; any firm prescriptions on convergence would imply that the right of countries to regulate beyond the terms of the agreement may be difficult in future. Similarly, mutual recognition could be acceptable if the end goal (in terms of product safety for example) is the same in both partner jurisdictions; however, the path by which this goal is achieved may also be not acceptable in one of the jurisdictions (for example testing cosmetics on animals). In this context, it is key to adopt a holistic regulatory approach, i.e. the effects of mutual recognition must be studied not only in the primary sector concerned, but also in other sectors: if the effect of a measure is the same on consumer health, but has negative consequences for the environment, this should be taken into consideration when discussing the acceptability of mutual recognition of measures in a certain sector.
8. The TTIP will most likely require setting procedures for the adoption of future legislation, which could be more productive than attempting convergence of existing regulatory frameworks. Mention has been that in the future, in the EU, for each new proposal of legislation, a trade impact assessment will have to be made. It is essential in this context to provide for clear and transparent criteria and procedures for the preparation of such trade impact assessments. It is equally important to define what would be the relative weight of the results of these assessments with regard to other parameters, such as consumer welfare, consumer health and safety, etc.

¹⁵ 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 5); in the EU there's development of specific guidance for assessing the social ramifications and impact on fundamental rights (see note 6)