



## REGULATORY COOPERATION IN TTIP

### A risk for democratic policy making?

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The Transatlantic Trade and Investment Partnership (TTIP) negotiations between the European Union (EU) and the United States (US) have unleashed an unprecedented debate within the EU. This debate has mostly concentrated on three points of contention. First and foremost, critics<sup>1</sup> of the agreement have focussed on the inclusion of investor-state dispute settlement (ISDS) provisions. Second, opponents have lamented the lack of transparency shown in the process of negotiating the agreement, as well as the supposed unequal access of different societal groups both to information about as well as to the negotiators of the agreement. Third, adversaries have uttered the fear that TTIP might lead to the lowering of levels of social, environmental and health protection in the EU and to the sidelining of democratic decision-making over such regulations.

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## Introduction

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In this paper, I assess to what extent this final concern is pertinent. More specifically, I focus on the fear of critics of the TTIP negotiations that the potential provisions on regulatory cooperation in the agreement will limit the policy autonomy of the EU to adopt ambitious regulations in the future, sometimes also referred to as 'regulatory chill'. I start by briefly reviewing the different arguments made in the debate over regulatory cooperation in TTIP. Next, I analyse the EU's proposals for regulatory cooperation in the negotiations. I end with conclusions about the relevance of the concerns over this dimension of the agreement.

### **Different views on regulatory cooperation in TTIP: labyrinth or laboratory for ambitious regulations?**

While during the first months after the launch of the TTIP negotiations, the debate was preoccupied with ISDS and a number of specific regulatory differences between the EU and the US with great symbolic value, such as chlorinated chicken and hormone-treated beef, regulatory cooperation has come increasingly to the centre of attention<sup>2</sup>. This is only logical, as eliminating regulatory differences between the EU and the US is at the heart of TTIP. For both the EU and the US, a vast majority of the projected economic gains from this agreement is expected to come from eliminating non-tariff barriers, of which regulatory alignment is the crucial part<sup>3</sup>. Hence understandably, advocates and opponents of TTIP have been engaged in heated exchanges about the consequences of regulatory cooperation.

In February 2015, 170 civil society organisations denounced regulatory cooperation in the TTIP negotiations as 'a threat to democracy and an attempt to put the interests of big business before the protection of citizens, workers, and the environment'<sup>4</sup>. Their main concerns are that regulatory cooperation in TTIP: 'can only result in further barriers to developing public interest standards as these would need to be "trade and investment" proof'; 'gives unprecedented influence to business lobby groups to stop any new regulation that would impact on trade and investment'; 'strongly

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<sup>1</sup> When using the terms 'critics', 'opponents', 'adversaries', etc., I refer to both 'rejectionists' - organisations and individuals that reject the TTIP negotiations as such and do not believe it can be changed into an agreement that they could support - as well as 'revisionists' - organisations and individuals that do not principally repudiate the negotiations, but want to see its content substantially amended.

<sup>2</sup> For an overview of academic studies and official and stakeholders' positions on regulatory cooperation in TTIP, see: <http://epthinktank.eu/2015/02/17/ttip-regulatory-cooperation/>.

<sup>3</sup> De Ville, F. & Siles-Brügge, G. (2016) *TTIP: The Truth about the Transatlantic Trade and Investment Partnership*. Cambridge: Polity Press, pp. 26-27.

<sup>4</sup> [http://corporateeurope.org/sites/default/files/statement\\_regulatory\\_cooperation\\_feb\\_2015\\_2.pdf](http://corporateeurope.org/sites/default/files/statement_regulatory_cooperation_feb_2015_2.pdf).

prioritises trade and investment over the public interest’ and; gives ‘enormous power to a small group of unelected officials to stop and weaken regulations and standards even before democratically elected bodies, such as parliaments, would have a say over them, thus undermining our democratic system’.

Representatives of Friends of the Earth Europe, Corporate Europe Observatory and LobbyControl called the EU proposal for regulatory cooperation a ‘labyrinth of red tape [that] would create an effective blockade of every new environmental, health or labour standard in the EU’<sup>5</sup>. Monique Goyens, Director General of the European Consumer Organisation BEUC, has termed the regulatory cooperation chapter proposed by the EU ‘a surreal institutionalisation of lobbying’<sup>6</sup>. Some of these concerns have been concurred by academics. For example, Lester and Barbee have argued that ‘[i]f every regulation that has an impact on trade – i.e. just about all regulations – requires consideration of how the other side regulates the same issues, the role of bureaucracy in dealing with these issues could actually increase, and as a result this approach may actually raise more problems than it solves’<sup>7</sup>.

In response, the European Commission has time and again refuted these concerns. It has stressed that: also under TTIP, ‘we will keep our high levels of protection. In a number of areas EU and US regulations provide similarly high levels of protection and could be compatible. In others, we will keep our different levels of protection’; ‘TTIP will reaffirm governments’ right to regulate to achieve legitimate public policy objectives’ and; ‘TTIP will not change the rules set out in the EU treaties about how our regulations are made’<sup>8</sup>.

Over time, the European Commission has not only rebutted criticisms about regulatory cooperation but has also started stressing potential benefits beyond the facilitation of trade and investment. In a speech in Berlin in February 2015, EU Trade Commissioner Cecilia Malmström summed up this potential value of regulatory cooperation in TTIP: ‘[a]mbitious regulatory cooperation helps us make better decisions because regulators can share expertise and data’; ‘[a]mbitious regulatory cooperation on the enforcement of rules cuts costs. Double EU and US inspections of the same factories for compliance with the same rules is wasteful. We should use our limited resources for more important priorities’ and; ‘[a]mbitious removal of trade barriers ... lowers prices for the government as well as consumers. That means making governments’ money go further, helping pay for things like better public services and enforcement of regulations’<sup>9</sup>.

Some academics share this positive view on the consequences of regulatory cooperation<sup>10</sup>. Alemanno and Wiener, for example, see potential for TTIP to ‘become a kind of transatlantic policy laboratory’ that helps regulators on both sides to identify the best solutions to regulatory problems<sup>11</sup>. They argue that ‘the horizontal chapter of TTIP ... appears capable of pursuing not only the immediate gains of regulatory convergence but also longer term learning from regulatory variation. Regulatory divergence would no longer be addressed only as a problem to be solved with a single

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<sup>5</sup> <https://euobserver.com/opinion/128350>.

<sup>6</sup> <http://www.beuc.eu/blog/regulatory-cooperation-perhaps-boring-but-the-ttip-storm-on-the-horizon/>.

<sup>7</sup> Lester, S & Barbee, I. (2013) ‘The challenge of cooperation: Regulatory trade barriers in the Transatlantic Trade and Investment Partnership’, *Journal of International Economic Law*, 16(4): 847-867, p. 865.

<sup>8</sup> [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153002.1%20RegCo.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153002.1%20RegCo.pdf).

<sup>9</sup> [http://europa.eu/rapid/press-release\\_SPEECH-15-4473\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4473_en.htm).

<sup>10</sup> Wiener, J.B. & Alemanno, A. (2015) ‘The future of international regulatory cooperation: TTIP as a learning process toward a global policy laboratory’, *Law and Contemporary Problems*, 78(4): 101-134.

<sup>11</sup> *Ibid.*, p. 132.

template solution, that is, convergence, but would also be tackled as a more complex phenomenon that is not only a problem of regulatory barriers to trade but also an opportunity to furnish part of the solution ... [T]he horizontal coherence chapter of TTIP has the potential to offer a new avenue enabling both sides to experiment and learn from regulatory variation'<sup>12</sup>.

In sum, while the critics of TTIP argue that the regulatory cooperation provisions of an eventual agreement risk limiting the policy autonomy for governments to adopt regulations in the public interest, the advocates argue that regulatory cooperation will not result in any constraint on current or future regulations, but will even improve their quality and enforcement. How should these different arguments about the pros and cons of regulatory cooperation be assessed? In the next two sections, I try to answer that question by analysing the letter and the spirit of the EU's proposals for regulatory cooperation in TTIP.

### **Changes on regulatory cooperation in the EU's proposals**

The TTIP negotiations are divided into 24 chapters. One of them specifically deals with regulatory cooperation. The European Commission has repeatedly published its position on and textual proposal for this chapter<sup>13</sup>. My analysis below is based on the latest version of the EU's proposal made public on 4 May 2015<sup>14</sup>. I compare this text with the EU's first proposal of July 2013<sup>15</sup>, as this helps us identifying both the initial intentions of the European Commission as well as how it subsequently incorporated the critics' concerns.

The May 2015 version of the chapter on regulatory cooperation is divided into three sections: an introductory one on 'Objectives, definitions and principles' and two substantial ones on 'Good regulatory practices' and 'Regulatory cooperation'.

The section on 'Good regulatory practices' is further divided into three subsections:

- The subsection on 'Early information on planned acts' obliges the parties to publish at least once a year a list of planned regulatory acts and to make publicly available, as early as possible, information on planning and timing for specific regulatory acts.
- Another subsection on 'Stakeholders consultations' obliges the parties to give opportunity to stakeholders to provide input to the preparation of regulatory acts and to take these contributions into account.
- Under the final subsection 'Analytical tools', the parties are prescribed to consider during impact assessments how alternative solutions: relate to international instruments; compare with how the other party adopted or is planning to adopt regulatory acts on the same matter and; will impact on international trade or investment, in particular between the parties.

In sum, this section prescribes a number of procedural rules that regulators should follow when developing new regulations.

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<sup>12</sup> Ibid., pp. 130-131.

<sup>13</sup> At the time of writing, the proposal of the United States for the regulatory cooperation chapter has not been made public. However, the American position can be inferred from the objectives included in the 'Bipartisan Congressional Trade Priorities and Accountability Act of 2015' (better known as Trade Promotion Authority Act). Section 2(b)(7) on 'Regulatory Principles' of this bill outlines the negotiation priorities for the US on regulatory cooperation. In general, these priorities are in line with the EU position discussed below, although they go beyond EU provisions on good regulatory practices (by inter alia requiring that proposed regulations be based on sound science and cost benefit analysis), but go less far on regulatory cooperation. See <https://www.govtrack.us/congress/bills/114/s995>.

<sup>14</sup> [http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153403.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf).

<sup>15</sup> [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151622.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf).

The section on 'Regulatory cooperation' puts forward obligations for the EU and the US to cooperate bilaterally in order to seek increased compatibility between their respective regulatory frameworks and establishes mechanisms to that end. This includes the obligation to enter into an exchange on planned or existing regulatory acts at central and (but formulated in softer language) non-central level. These exchanges may take place at any stage of the preparation of planned regulatory acts, including before the adoption of a Commission proposal. During this exchange, a party may propose a joint examination of possible means to promote regulatory compatibility, including through mutual recognition, harmonisation or simplification. The other party shall promptly respond to this proposal and substantiate that response. Besides obligations and mechanisms for bilateral cooperation, it also sets up a 'Regulatory Cooperation Body' (RCB). This RCB should monitor and facilitate the implementation of the chapter, including through the preparation and publication of an Annual Regulatory Cooperation Programme (ARCP) reflecting common priorities of the parties. Once a year, the RCB shall hold a meeting open to the participation of stakeholders to exchange views on the ARCP. The RCB shall be composed of regulators and representatives responsible for regulatory coordination activities as well as for international trade.

When comparing the latest EU proposal as discussed above with the initial position paper of July 2013, it is clear that it has responded to some of the concerns discussed in the previous section, more specifically with regard to the general objectives of regulatory cooperation, the scope of the obligations, and the competence of the RCB.

In the initial position paper, the overall objectives of the regulatory provisions of the TTIP were defined as 'to eliminate, reduce or prevent unnecessary "behind the border" obstacles to trade and investment. In general terms (although this may not be applicable in all cases), the ultimate goal would be a more integrated transatlantic market where goods and services originating in one party in accordance with its regulatory requirements could be marketed in the other without adaptations or requirements'<sup>16</sup>. This reveals that the initial primary objective of regulatory cooperation was to maximise trade and investment through widely applied mutual recognition. In the latest textual proposal, the general objectives are defined in a somewhat more moderate tone.

In terms of scope, the initial EU position paper stated that 'the TTIP regulatory provisions would apply to regulation defined in a broad sense, i.e. covering all measures of general application, including both legislation and implementing acts regardless of the level at which they are adopted and of the body which adopts them'. The latest textual proposal clarifies that the scope of the Chapter 'does not cover legislation at central and non-central level which establishes the framework or principles applicable on a cross-sectorial basis to achieve public policy objectives'. Furthermore, the definition of the 'non-central level' (institutions below the supranational level) is limited to 'central authorities of an EU Member State', while this level is exempted from the obligations of the section on 'Good regulatory practices'.

Finally, while the initial proposal foresaw for the RCB '[a] streamlined procedure to amend the sectorial annexes of TTIP or to add new ones, through a simplified mechanism not entailing domestic ratification procedures', the latest textual proposal clarified that 'updates, modifications or additions will be adopted in accordance with the internal procedures of each party. The RCB will not have the power to adopt legal acts'.

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<sup>16</sup> [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151622.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf), p. 3.

This analysis shows that the critiques against regulatory cooperation in TTIP have been taken into account to some extent. But also the latest proposal for a regulatory cooperation chapter still imposes disciplines on regulators, when developing new regulations, to take into account alternatives that are used or under consideration at the international level or by the other party, as well as the effects on trade and investment. In addition, the chapter obliges regulators to engage with stakeholders and regulatory, oversight and trade officials from the other side from very early on and throughout the decision-making process. While the more extreme critiques are somewhat exaggerated, the claim that regulatory decision-making risks to be slowed down and increasingly subject to trade and investment considerations seems plausible. On the other hand, the European Commission has moderated its proposal to some extent in response to these concerns. It can therefore claim that TTIP will not automatically result in lower levels of protection in the EU, that the right to regulate is not legally restricted, and that the general, treaty-based decision-making procedures in the EU will not be changed.

To sum up, there is no guarantee that regulatory cooperation in TTIP will not affect the capacity of governments to adopt ambitious regulations in the public interest. A definitive assessment of the arguments about regulatory cooperation will ultimately depend on the dynamics that will guide this cooperation. While this is difficult to predict, I suggest a few considerations in the final section.

### **Regulatory cooperation: by whom, for whom and for what?**

Although the latest EU proposal for regulatory cooperation allows TTIP's advocates to claim that it will not limit governments' autonomy, the spirit of the agreement justifies some concerns. Regulatory cooperation in TTIP is pursued in the context of a trade and investment liberalisation agenda that tends to view regulations as 'non-tariff barriers' in the first place. This is reflected by the way in which differences in regulations have been treated in TTIP impact studies as non-tariff barriers to trade and quantified as 'tariff equivalents' to be reduced as much as possible<sup>17</sup>. Moreover, in the chapter on regulatory cooperation, the emphasis is on how the trade and investment impact of regulations can be minimised. There is much less focus on how transatlantic regulatory cooperation can be pursued to maximise social, health or environmental protection. It is understandable that concerns about TTIP are not only based on the letter of the proposals but also on the normative context in which they are rooted.

The normative and institutional context in which regulatory cooperation will take place after the eventual entry into force of TTIP is hence crucial to assess its likely consequences. Will regulators, whose principal mission is to protect the public health or the environment, drive regulatory cooperation, or will primarily trade officials, whose mandate is to facilitate trade and investment, deliver this task? Will the main objective of regulatory cooperation be a reduction of regulatory trade and investment barriers (in line with the target to reduce 'red tape' for businesses in the EU by 25% as part of the 'better regulation' agenda), or the search for solutions that most effectively attain high levels of protection? Embedded in the institutional architecture and normative principles of TTIP, it is likely that regulators will have to justify their proposals before trade officials and with regard to trade and investment effects, rather than the other way around. Sociologically, it is probable that regulators will internalise the provisions in TTIP. They might be less inclined to pursue regulatory solutions that deviate from how their colleagues on the other side tackle (or don't) similar problems in order to avoid that the regulatory discipline and regulatory cooperation mechanisms come into operation.

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<sup>17</sup> De Ville, F. & Siles-Brügge, G. (2016), Chapter 1.



Finally, regulatory cooperation is pursued through ‘soft’ mechanisms<sup>18</sup>, without legislative or veto powers for mechanisms or institutions established by TTIP. The most recent EU proposal also clarifies that ‘given that the provisions of this Chapter concern predominantly procedures for cooperation, they may not lend themselves to the application of dispute settlement rules’. Moreover, all stakeholders are given the right to become involved in regulatory cooperation. However, all these reassurances do not preclude that some societal groups have greater abilities to make use of these soft participatory opportunities than others. Regulatory cooperation in TTIP adds another layer of policy-making on top of an already complex multi-level governance system, which requires ever more resources for organisations to follow and contribute to. In the case of regulatory cooperation in TTIP, the opportunity for greater involvement for stakeholders in regulatory decision-making at both sides and within the transatlantic regulatory cooperation body might be easier for multinational enterprises which are already active in monitoring both markets, than for smaller civil society organisations whose activities have until now been restricted to monitoring national or European regulatory policy-making.

In sum, the regulatory cooperation chapter of TTIP, even as it applies mainly soft tools, is more likely to discourage ambitious regulatory action rather than to encourage it<sup>19</sup>.

## Conclusions

Regulatory cooperation in TTIP is alternatively seen, by supporters, as a mere ‘bridge’ to bring regulators on both side of the Atlantic together to search for similar regulatory solutions and, by opponents, as ‘a bridge too far’ in curtailing the policy space for governments to regulate in the public interest. This analysis has shown that the textual proposal of the European Commission contains some evidence for both sides.

A strict, formalistic reading of the EU’s May 2015 regulatory cooperation proposal allows advocates of TTIP to claim that it will neither lead to a lowering of levels of protection, nor to the curtailing of the policy autonomy of governments to regulate in the public interest. However, when read in the normative context of the agreement, it is clear that regulatory cooperation is primarily aimed at reducing barriers to trade and investment, and that this results in putting the burden of proof of the necessity and of the least-trade restrictiveness of their proposals on regulators, rather than being aimed at searching for regulatory solutions that most effectively attain high levels of protection.

Recently, the European Commission has started to shift its discourse on regulatory cooperation from promoting liberalisation (without lowering levels of protection) towards emphasising the positive effects for effective and efficient regulatory policy-making. If it is serious about the normative priority of protection over liberalisation (as demanded by the critics of TTIP), this should be reflected in the objectives of the chapter and the substantial provisions on good regulatory practices, regulatory cooperation and the composition and operations procedures of the regulatory cooperation body.

Finally, it should be noted that the question of policy autonomy for governments extends beyond the chapter on regulatory cooperation. Other chapters may potentially constrain the policy space for democratic decision-making, such as those on technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), government procurement, services or investment as well as sectorial

<sup>18</sup> The most recent EU proposal also clarifies that ‘given that the provisions of this Chapter concern predominantly procedures for cooperation, they may not lend themselves to the application of dispute settlement rules’.

<sup>19</sup> <https://www.socialeurope.eu/2015/11/ttips-regulatory-cooperation-and-the-politics-of-learning/>.



annexes on, for example, cars or chemicals. Turning TTIP into an agreement that puts trade and investment at the service of social, health and environmental objectives rather than disciplining such regulatory policies at the service of trade and investment, requires much wider reform.