THE 'TUG WAR' ABOUT THE INCLUSION OF FINANCIAL SERVICES IN TTIP

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Introduction

The United States (US) and the European Union (EU) have the largest financial sectors worldwide and are the main trading partners in financial services. The combined level of bank assets in the US and the EU is about 50% of the world total and so is the combined level of stock market capitalisation. The combined level of debt securities markets in the US and the EU exceeds 60% of the world total.[1] Thus, financial services, which include banking, securities markets, insurance, are an important and controversial issue in the negotiations of the Transatlantic Trade and Investment Partnership (TTIP) (see Johnson and Scott 2013). Although market-access barriers to transatlantic trade in financial services are not very high, regulatory barriers are significant and have increased in the aftermath of the international financial crisis. This paper first concisely discusses the main fora and mechanisms for transatlantic regulatory cooperation in finance, also providing an overview of post-crisis regulatory reforms in the US and the EU. Subsequently, it examines the EU's attempt to include financial services regulation in TTIP and the US's opposition to this inclusion, explaining the rationales of each jurisdiction. Overall the paper argues that there is a paradox: the EU's desire to incorporate financial services regulations into TTIP is resisted by the US authorities, who fear a weakening of their own post-crisis regulatory standards.

Transatlantic regulatory cooperation in financial services

The US and the EU engage in regulatory cooperation in multilateral and bilateral financial fora (see Drezner 2007; Muegge 2014; Quaglia 2014a,b) and use distinctive regulatory mechanisms to deal with third countries. Internationally and bilaterally, the US had a predominant regulatory influence up to the 1990s. From then onwards the EU's regulatory influence has increased, especially after the international financial crisis, which was followed by somewhat different regulatory reforms in the US and the EU.

International and bilateral regulatory financial fora

Both jurisdictions are key players in *international* (to be precise, *transgovernmental*) *fora* of national financial regulators, such as the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commission (IOSCO), which issue soft law concerning a variety of financial services (Brummer 2014). In these multilateral fora, the US and the EU sometimes join forces to push through their regulatory agenda, as in the aftermath of the Asian financial crisis (Drezner 2007). Other times, the US and the EU disagree either substantially, for example on the need to regulate internationally hedge funds prior to the global financial crisis (Quaglia 2014a), or partly, for example on certain elements of the Basel I and Basel III accords that set capital requirements for internationally active banks (Howarth and Quaglia 2016).

Bilaterally, the Financial Markets Regulatory Dialogue, which was established in the early 2000s, brings together representatives of the European Commission, the European Supervisory Authorities (the European Banking Authority, European Insurance and Occupational Pensions Authority, and European Securities and Markets Authority), the US Treasury and US independent regulatory agencies, including the Federal Reserve, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission (SEC). By and large, there is agreement amongst US and EU policy-makers that this Dialogue delivered satisfactory results prior to the international financial crisis, for example promoting the convergence of accounting

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[1] https://www.ceps.eu/system/files/PB%20No%20302%20Financial%20Services%20and%20TTIP.pdf

[2] See David Lawton (Financial Conduct Authority), oral evidence to the House of Lords (2014), Transatlantic Trade and

standards (see Alexander et al. 2007). However, several European policy-makers and stakeholders hold the view that the Dialogue has become less effective in furthering regulatory cooperation after the crisis.

The US and the EU use specific *regulatory mechanisms* to deal with cross-border issues concerning financial services regulation. Non-US financial entities or products that want to enter the US market have to comply with US rules and register with US regulators. For example, the SEC allows non-US exchanges to operate in the US only if they register with the SEC as a US exchange. Since this registration has implications for the rules applied to the companies that trade on those exchanges, non-US exchanges refrain from entering the US market (Posner 2009). Sometimes, limited exemptions are granted by US regulators. For example non-US companies that want to be listed on the US stock exchange do not have to comply with all rules to which US listed companies are subject. Other times, specific US rules can be 'switched off' if foreign rules are deemed to be equivalent to the US rules — it is called 'substitute compliance'. However, unlike the EU's approach to equivalence, substitute compliance is not a holistic whole-jurisdiction assessment, it is a rule by rule assessment.[2]

The EU mainly makes use of equivalence provisions concerning third countries, whereby non-EU financial entities and products can access the EU market only if they are deemed to be subject to broadly equivalent rules in their home country. Equivalence is generally decided by the European Commission for each piece of legislation (eg alternative investment fund managers, rating agencies, Over the counter derivatives),[3] jurisdiction by jurisdiction. If the Commission determines that the US has equivalent rules on a certain issue, US financial entities and products can enter the EU market and continue to be supervised by US regulators applying US rules. Post-crisis the EU has made considerable use of equivalence, arguably as a way of gaining bargaining clout vis a vis third countries, including the US (Quaglia 2015b).

Before the international financial crisis

Up to the late 1990s, the US had a predominant influence in international regulatory fora and in bilateral relations, given its market size (Drezner 2007) and regulatory capacity (Posner 2009). Moreover, the EU was often unable to speak with one voice, given its idiosyncratic arrangements for external representation (Muegge 2011) and the different preferences of the member states rooted in the distinctive configurations of their national financial systems and regulatory approaches (Howarth and Quaglia 2015). In the 2000s, the EU engaged in the 'completion of the single financial market' by promoting financial integration and by developing greater regulatory capacity in several financial services. Consequently, the EU has become more influential in international and bilateral negotiations (Posner 2009; Quaglia 2014a,b), even though the internal and external cohesiveness of the EU sometimes remains elusive (see for example, Moschella and Quaglia 2015).

After the international financial crisis

In the aftermath of the international financial crisis, the road map of regulatory reforms worldwide was set by the Group of Twenty (G 20) with the assistance of the Financial Stability Board (FSB). Afterwards, transgovernmental sectoral fora of national financial regulators issued new or revised standards, such as the Basel III accord, which needed to be implemented by the signatory jurisdictions in order to become legally binding (Brummer 2014). International standards tended to be rather general so as to accommodate different market structures and regulatory frameworks

[2] See David Lawton (Financial Conduct Authority), oral evidence to the House of Lords (2014), Transatlantic Trade and Investment Partnership report, London.

[3] Over the counter (OTC) derivatives are traded directly between two parties, not via a stock exchange. Derivatives are financial product, the value of which derives from and is dependent on the value of an underlying asset.

across jurisdictions. Thus, the specific content of post crisis financial regulation was determined at the national level, or the regional level in the case of the EU, following domestic decision-making processes (for an overview, see Maynz 2015). For example, the G 20 in London in April 2009 agreed that hedge funds should be regulated. Subsequently, the IOSCO issued six 'High Level Principles' for hedge fund regulation. However, the issuing of detailed rules was left to national jurisdictions. Furthermore, international standards were not set on certain issues, such as the structure of the banking industry, and the matter was left for individual jurisdictions to regulate.

Table 1: Main transatlantic differences in post crisis regulatory reforms

	US	**EU**
Timing	Dodd Frank act (2010), but enacting legislation adopted afterwards	Various pieces of legislation adopted from 2009 onwards
Competent authorities	Congress and financial regulators	Council and European Parliament, European Supervisory Authorities
Content	Monolithic approach: comprehensive post-crisis regulatory framework (Dodd-Frank Act) Stricter than EU in banking (prudential regulation, bank structure and resolution)	Piecemeal approach: rating agencies (2009), hedge funds (2010), OTC (2011), short selling (2012) etc Stricter than US on hedge funds, rating agencies, short selling, proposed transaction tax
Financial system	Capital markets-based	Bank-based

Post crisis, the US and the EU adopted a vast array of new legislation in a relatively limited amount of time. Several of these rules had direct or indirect implications for third countries (see, for example, Pagliari 2013b). The regulatory reforms concerned banking (capital and liquidity, resolution and bank structure) and securities markets broadly conceived (rating agencies, hedge funds, over the counter derivatives etc). There were three main differences regarding the regulatory reforms in the US and the EU: timing, content and competent authorities. As for *timing* and competent authorities, the Dodd Frank act, which provided a comprehensive post-crisis regulatory framework in the US, was issued by the Congress in 2010 (see Woolley and Ziegler 2012). However, its enacting regulation, which is *competence* of financial regulators, is still under way (Ryan and Ziegler 2015). The EU, instead, did not adopt a comprehensive regulatory blueprint for post crisis reforms, it took a piecemeal approach, whereby various pieces of EU legislation (for example on rating agencies, hedge funds etc) were adopted from 2009 onwards. Regulatory reforms in the EU were slowed down by the need to deal with the sovereign debt crisis in the euro area from 2010 onwards (Quaglia 2015b). As for *content*, regulatory reforms on both sides of the Atlantic covered similar issues. Overall, US post crisis regulation was stricter than EU regulation, especially in banking (eg capital and liquidity requirements, resolution regimes and rules on bank structure) (Jones and Macarthy 2016; Woolley and Ziegler 2012; Ryan and Ziegler 2015). However, EU rules on rating agencies, hedge funds and derivatives were as strict as the ones adopted in the US. Moreover, the EU, unlike the US, adopted legislation banning short selling and officially proposed a financial transaction tax (this initiative involves only some EU member states).

The post-crisis regulatory divergence between the US and the EU can be ascribed to their different domestic political economy and political priorities. Banks provide most of the funding to the real economy in Europe, which has a *bank-based* financial system, hence there is the concern, which is

skilfully exploited by banks, that strict banking regulation would be detrimental to economic growth (Howarth and Quaglia 2015). By contrast, most of the funding to companies in the US is provided by *capital markets*, which are better developed there than in the EU. Indeed, the main rating agencies, the majority of hedge fund managers and most OTC derivatives trading are located in the US. Moreover, the reform of financial services regulation has greater domestic political salience in the US than in the EU (see Pagliari 2013a), given the sizable domestic economic and political impact of the crisis in the US, where the international financial crisis began.

The different post-crisis reforms in the US and the EU raise the concern of a 'potential clash' between regulatory regimes,[4] as TTIP Chief Negotiator Ignacio Garcia-Bercero for the EU (2014) put it. From a legal perspective, the main issues concern the terms of access to each other's markets, the equivalence between different sets of national rules (even when US and EU rules similar, they are not the identical – and in financial regulation the devil is in the details) and the extra-territorial effects of those rules (notably on OTC derivatives) (Quaglia 2016). From a political economy perspective, the issues at stake concern the competitiveness of the national financial industry, the hindrances to cross-border business, and the ability of national policy-makers to promote financial stability on their territory (Jones and Macartney 2016). The main post-crisis transatlantic regulatory disputes (or latent disputes) concern prudential rules for banks, rules on the structure of the banking industry, Over the Counter (OTC) derivatives and hedge funds. These disputes mainly involve US rules, even though the formulation of equivalence provisions in EU legislation is also controversial (Quaglia 2015).

TTIP and financial services

Trade liberalisation in financial services is dealt with by the General Agreement on Trade in Services (GATS, which entered into force in 1995) and is subject to the so-called 'prudential carve out' for domestic regulation to ensure that the opening of markets the agreement is intended to achieve does not jeopardize prudential regulation and supervision. The carve-out allows national authorities not to comply with their GATS commitments if a measure is taken for prudential reasons (such as the 'protection of investors, depositors, policy holders', or 'to ensure the integrity and stability of the financial system')[5] and not with the intent of avoiding GATS obligations. On the one hand, the liberalisation of trade in financial services requires the reduction or the removal of regulatory barriers to trade in financial services. On the other hand, it is not easy to draw a distinction between regulations that are barriers to trade and regulations that are necessary for prudential purposes (for a discussion of prudential carve out and TTIP see Barbee and Lester 2014).

Since both the US and the EU included financial services in prior free trade agreements, they implicitly recognized that the TTIP accord would also cover this sector, but they disagreed about what to include in the financial services chapter. The US preferred to handle financial services as in prior trade negotiations by including market access in the TTIP. But the US Trade Representative Michael Froman (2013) argued 'that nothing we do in a trade agreement should undermine the ability of regulators on both sides to regulate in the public interest' and that regulatory cooperation should be negotiated within 'existing and appropriate global forums, such as the G-20 and international standard setting bodies, in parallel alongside the TTIP negotiations'. US policy-makers argued that financial regulation was not a trade issue (*Financial Times*, 27 January 2013).

In contrast, the EU wanted to move beyond what had been done in previous trade agreements. With the support of the financial industry and certain member states, EU officials argued that leaving out any discussion of regulation of the financial services industry in the proposed TTIP would be an

[4] Ignacio Garcia-Bercero, oral evidence to the House of Lords (2014), Transatlantic Trade and Investment Partnership Report, London.
[5] Paragraph 2 of the Annex on Financial Services of GATS

omission (*Financial Times*, 27 January 2013) (Jones and Macartney 2016). In June 2013, the Council of Ministers' directives for the negotiations of TTIP stated the aims of 'regulatory harmonisation, equivalence, or mutual recognition, where appropriate' (p. 13). With reference to 'sectors of significant importance to the transatlantic economy, including, financial services' the objectives were 'ensuring the removal of existing NTBs, preventing the adoption of new NTBs and allowing market access' as well as 'common frameworks for prudential cooperation' (Council of the European Union 2013, p. 13). The member states most keen to include financial services regulation in TTIP were the UK and France because of the large size of their financial sector and its links across the Atlantic.

In January 2014,[6] the European Commission outlined four points on which regulatory cooperation between the EU and the US should be based: the 'timely adoption of international standards'; 'mutual consultation' before adopting new measures; joint examination of existing rules; assessing possibilities for 'mutual reliance, equivalence/substituted compliance'. The proposal for 'mutual consultations in advance of any new financial measures that may significantly affect the provision of financial services between the EU and the US and to avoid introducing rules unduly affecting the jurisdiction of the other party' (European Commission 2014, p. 3) was seen as potentially undermining the ability of national legislatures to adopt financial regulation designed to protect financial stability. In March 2014, the Commission circulated a position paper to the US to 'be included to the EU proposal for services and investment chapter, Section VI – Financial services', which elaborate the points mentioned above, but scaled down the proposal for mutual consultation.

In May 2014, a (leaked) document produced by the Commission for the EU Trade Policy Committee, revealed that the EU offer did not contain any commitment on financial services reflecting the view that 'there should be close parallelism in the negotiations on market access and regulatory aspects of financial services. Given the firm US opposition to include financial services regulatory cooperation in TTIP, it is considered appropriate not to include any commitment on financial services to the EU's market access offer at this stage. The situation may change in the future if the US shows willingness to engage solidly on regulatory cooperation' (European Commission 2014, p. 2). It was clearly an attempt to put pressure on the US to revise their negotiation position on financial regulatory cooperation in TTIP (see also *Euractive,* 13 June 2014).

Table 2: Pro and cons concerning the inclusion of financial services in TTIP

US	**EU**
Against the inclusion of financial services in TTIP: - Avoiding downwards regulatory pressure - Financial regulation to be discussed in international fora - Financial regulation is not a trade issue of competence of trade officials, competence of national financial regulators	*In favour* of the inclusion of financial services in TTIP: - Removing regulatory barriers to transatlantic trade in finance - Solving transatlantic regulatory disputes - Financial regulation is a trade issue, to be negotiated by trade officials

The EU is keen to include financial regulation in TTIP for three main reasons. The stated EU objective is to ensure that 'regulations of both sides do not conflict' with a view to removing obstacles that arise because global standards are applied differently in the US and the EU, or regulatory frameworks diverge, or they are applied extraterritorially (Garcia-Bercero 2014). According to EU policy-makers and the financial industry it is inconceivable to have a transatlantic agreement that partly deals with regulatory cooperation without ensuring close cooperation between financial regulators. Second, the EU is keen to find a way to solve ongoing transatlantic regulatory disputes in finance and to limit

[6] http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152101.pdf

them in the future. Third, EU policy-makers prefer to negotiate with one set of US policy-makers (namely, trade officials) in the context of the TTIP, rather than to negotiate with a multitude of US financial regulators. Moreover, EU policy-makers hope that US negotiators in the context of TTIP would be more amenable to compromise than US financial regulators, whose primary mission is securing financial stability and consumer protection domestically (these views were gathered through conversations with policy-makers and a systematic survey of press coverage).

By contrast, the US authorities oppose the inclusion of financial services in TTIP arguing that cooperation in this area should take place in parallel with TTIP, not as part of TTIP. The main opposition comes from the US Treasury and financial regulators, which object to including in trade negotiations regulatory matters that are their responsibility and argue that financial regulatory cooperation should continue separately in existing international fora of national regulators (Froman 2013). Part of the Congress is also hostile to the inclusion of financial services regulation in TTIP. For example, in December 2014, a group of Congressperson sent a letter to the Obama administration warning against TTIP provisions that could restrict Congress' ability to prevent another financial crisis.[7] US policy-makers fear the dilution and/or the delay in the implementation of the Dodd Frank act and its enacting regulation (Jones and Macartney 2016). To be precise, there is the concern that the financial industry would strategically use regulatory convergence with the EU in order to undo post crisis regulatory reforms in the US (these views were gathered through conversations with policy-makers and a systematic survey of press coverage).

The financial industry in the EU and the US calls for the inclusion of financial services regulation in TTIP (Jones and Macartney 2016), arguing that transatlantic regulatory divergence could cause market fragmentation and reduce cross border trade. The industry points out that regulatory barriers to trade are significant in financial services. According to the British Chamber of Commerce, EU non-tariff barriers against US exports amount to 11.3%, while US barriers against EU exports are estimated to be about 32% in financial services. Hence, the financial industry supports the negotiating position of the EU. For example, a senior representative of the TheCityUK commented that the Commission's policy proposals 'reflected so closely the approach of TheCityUK that a bystander would have thought it came straight out of our brochure on TTIP'.[8] Several joint letters and position papers were submitted by financial industry associations, especially by big transnational financial players, advocating the inclusion of financial services regulation in TTIP. For example, there was a joint statement by the main US and European financial services trade associations, coordinated by the Institute for International Finance (March 2014)[9] and a joint letter of the City of London and Paris Europlace (April 2015).[10]

Some academics and NGOs (eg Corporate Europe Observatory, Finance Watch, Global Policy Network) consider the pressure from the financial industry to include financial regulation in TTIP as an attempt to engage in 'venue shopping' across the Atlantic. Jones and Macartney (2016) argue that since the 'US authorities' moved faster and harder than their EU counterparts in implementing the G20 agenda', the financial industry is eager to dilute or slow down the application of US rules by promoting convergence towards (lower) EU standards in the context of TTIP. Corporate Europe Observatory (2014) is critical of the EU's reference to 'internationally agreed standards' that have to be fully respected in the framework of regulatory cooperation because these standards, which are not always as stringent as national standards, would then become maximum standards. Similarly, there are criticisms of other proposed EU measures, namely 'mutual reliance/equivalence/substituted compliance', which would allow US financial entities to operate in

[7] http://www.bilaterals.org/?congressional-financial-services
[8] http://www.thecityuk.com/blog/without-financial-services-the-ttip-could-be-made-to-look-a-monkey/
[9] https://www.iif.com/news/regulatory-affairs/us-and-european-financial-services-trade-associations-statement-ttip
[10] http://ec.europa.eu/carol/?fuseaction=download&documentId=090166e59e484e6f&title=Anglo-French_letter%20on%20TTIP%20to%20Commissioner%20Malmstr%C3%B6m.pdf

the EU following US rules, and vice versa, potentially triggering a race to the lowest common denominator. For example, since US banking rules are stricter than EU rules, if EU banks were allowed to operate in the US following mainly or only EU rules, US banks would be put at a disadvantage. In turn, this would increase lobby pressure on the US authorities to lower their domestic regulation to the EU level (Corporate Europe Observatory 2014). In October 2014, a joint letter by 52 civil society groups pointed out that TTIP 'could undermine new financial regulations and potentially create significant risks to the global financial system, as well as to investors and consumers'.[11]

Conclusion

The inclusion of financial services regulation in TTIP is a contested issue. On the one hand, trade liberalisation could impinge upon the regulatory power of sovereign states, which has become a matter of concern following the international financial crisis. Previous trade agreements safeguarded the regulatory sovereignty of states, but this has resulted in some regulatory divergence, especially following domestic post crisis regulatory reforms in various jurisdictions. On the other hand, different regulatory frameworks could cause market fragmentation, reduce cross border trade and potentially trigger regulatory arbitrage. Moreover, transatlantic regulatory divergence concerning financial regulation confront third countries, especially in Asia, with the dilemma of having to side one way or the other.

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[11] https://www.globalpolicy.org/component/content/article/270-general/52694-warning-from-civil-society-ttip-threatens-to-undermine-financial-reform.html

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