

## **POLICY BRIEFING**

# **The Neglected Side to TTIP – Horizontal Regulatory Provisions<sup>1</sup>**

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April 2016

## SUMMARY

While not attracting as much attention as Investor-to-State Dispute Settlement (ISDS) in the heated discussion regarding the Transatlantic Trade and Investment Partnership (TTIP), proposals for TTIP to become a ‘living agreement’ – tackling regulatory barriers to trade beyond its eventual signature and ratification – are arguably more central to TTIP’s goal of achieving greater regulatory convergence between the EU and the US (De Ville and Siles-Brügge 2016). They include articles on ‘good regulatory practices’ (GRPs) – intended to ensure improved regulatory processes by ensuring these are more transparent, open to stakeholder input and subject to appropriate impact assessment – and ‘regulatory cooperation’, increased international collaboration between EU and US regulators on the elaboration of rules and standards. They have also been the subject of competing claims from the European Commission – which sees them as improving regulatory decision-making – and NGOs – which see them as having a ‘chilling effect’ on the ability of governments to enact ambitious public policy measures to protect their citizens from the harms of, for example, environmental damage, public health and/or faulty consumer items.

Against this backdrop, this policy paper assesses the potential impact of the proposals. There is inevitably some uncertainty here, as we are essentially dealing with matters of ‘soft law’ rather than provisions enforceable via formal dispute settlement. But by charting the evolution of the Commission proposals for chapters on GRPs and regulatory proposals from the initial Commission position paper (July 2013) to the latest negotiating proposals (February 2016),<sup>2</sup> we can better appreciate negotiator’s intentions and their response to the twin pressures of domestic opposition (from civil society and some Member States) and US negotiators (who are less keen on regulatory cooperation and more so on binding GRPs). Crucially, this shows that the Commission initially not only wanted to have regulatory cooperation and GRPs cover all levels of decision-making, but that they envisaged a procedure to amend TTIP’s regulatory provisions without the need for domestic ratification. While the Commission has moved away from this particularly controversial proposal, and otherwise also toned down its ambitions for regulatory cooperation chapter, the direction of travel still appears to be to circumscribe the space for public policymaking.

## A MORE LIMITED SCOPE

The first issue to consider is the scope of the horizontal regulatory chapter(s) – i.e. which regulatory authorities and which types of decisions they would cover. The initial position paper betrayed the very ambitious desire to cover ‘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’ as well as all manner of ‘product or service requirements’ (European Commission 2013: 2, emphasis added). Future proposals have been more modest on both scores – even if they still cover a wide range of measures. For regulatory cooperation, they now only cover sectors featured in a sectoral Annex of TTIP. That said, the provisions on regulatory cooperation and GRPs still cover a wide array of decisions taken at central level (by the EU and the US government) – including not only primary legislation in the EU and US (Regulations, Directives and Bills of Congress) but also secondary legislation (EU delegated and implementing acts, actions of US Federal Agencies) as well as non-binding guidance notes related to product and service standards. The scope of the specific GRP chapter, moreover, is not limited to sectors covered by TTIP.

## THE ‘RIGHT TO REGULATE’

One of the key demands of civil society groups has been to enshrine the ‘right to regulate’ in the text of the horizontal regulatory chapter (e.g. BEUC 2015). On this count, the Commission’s proposals have certainly evolved to feature such provisions more heavily. In the latest proposals, a statement on the ‘right to regulate’ has been included in the text of both the GRP and regulatory cooperation chapters (European Commission 2016a: 1; European Commission 2016b: 2). In the regulatory cooperation chapter, there is, moreover, a provision that emphasises that the Parties are not bound to any particular regulatory outcome. Finally, the objective of regulatory cooperation is no longer just to foster increased trade and investment, but rather also to ‘contribute to the Parties’ activities pursuing public policy objectives such as inter alia a high level of protection of: public health; human, animal and plant life and health [etc...].’ (European Commission 2016b: 1). On one hand, such measures are meaningful in that they have served to (at

least partially) challenge the view espoused by trade negotiators in the EU that regulatory cooperation and GRPs are largely politically neutral exercises targeting the elimination of unnecessary red tape (European Commission 2013). But there are caveats. Any progress on this front has to be weighed up against the fact that the context for GRPs and regulatory cooperation remains a trade agreement, whose primary purpose it is still to cut barriers to transatlantic exchange.

## Good Regulatory Practices: entrenching ‘Notice and Comment’ and ‘Better Regulation’?

On GRPs, contrary to other areas, the EU’s approach has actually been to stipulate more onerous requirements over the course of the negotiations. This is probably a reflection of the US’s influence during the negotiations, which is much keener on exporting its ‘notice and comment’ model<sup>3</sup> of regulatory decision-making via GRPs than on regulatory cooperation provisions that it sees as difficult to have its fiercely independent federal regulatory agencies (as well as sub-federal entities) comply with (Siles-Brügge et al. 2015). In this vein, the February 2016 EU’s textual proposal consisted, for the first time, of standalone GRP and regulatory cooperation chapters.

### Early warning, stakeholder consultations and the parallels to US ‘notice and comment’

As in previous draft proposals, the latest GRP text states in Article 5 (‘Early Information’) that the parties ‘shall make publicly available at least once a year a list of planned major regulatory acts’ (European Commission 2016a: 2). However, when it comes to Article 6 (‘Stakeholder Consultations’) the provisions are more onerous than in previous drafts; policymakers not only have to ‘publish either draft regulatory acts or consultation documents that provide sufficient details’ for stakeholders to be able to comment meaningfully but they also have to ‘consider’ and publish the comments received, including an explanation of the results of the consultation (European Commission 2016a: 3). To some NGOs this ‘could be considered as codifying EU Better Regulation and US style Notice and Comment’<sup>4</sup> giving (US and other) stakeholders the opportunity to comment on EU implementing and delegated acts (T&E et al. 2016: 3-4), which is one of

the key innovations of the latest Better Regulation package (see Note 4). Moreover, it is unclear at which point such ‘draft’ documents would have to be released for comment – i.e. whether this could be used to pressure the Commission to release documents before their adoption by the College (T&E et al. 2016: 4).

### *Impact assessments: paralysis by analysis?*

The GRP chapter also ‘affirm[s] [the] intentions’ of the parties to ‘carry out [...] a regulatory impact assessment for planned regulatory acts’ which (among other things) ‘consider[] the need for the proposed regulatory act’, examine ‘feasible [...] alternatives [...] (including the option of not regulating)’ and ‘take account of the regulatory approaches of the other Party’ (European Commission 2016b: 4). While the language here suggests that there is no formal obligation to conduct impact assessments, the article clearly dovetail the Better Regulation Agenda at the EU Level (and in particular the new ‘Interinstitutional Agreement on Better Law-Making’, see Note 3) which institutionalises impact assessment processes at the EU level that seek to minimise the regulatory burden. Together with moves to institute ‘early information’ and greater stakeholder involvement these have been criticised for potentially leading to ‘paralysis by analysis’ in the regulatory process (De Ville and Siles-Brügge 2016: 85; EPHA et al. 2016).

### *International coordination: binding the ‘Better Regulation’ Agenda?*

Arguably most crucial, however, is the addition of Article 3 in this latest draft. This is innocuously entitled ‘Internal coordination’ and commits each party to ‘maintain internal coordination processes or mechanisms to foster good regulatory practices, including transparent planning, stakeholder consultation, impact assessments and retrospective evaluations of regulatory acts’ (European Commission 2016b: 2). While the article is ambiguously formulated (like many other aspects of the proposal) it could be read as committing the EU to all the aforementioned components of its Better Regulation Agenda (T&E et al. 2016: 2), weaker language in other articles of the GRP chapter notwithstanding.

## Regulatory cooperation: lowering the level of ambition

While the text on GRPs has been strengthened over the course of the negotiations the text on regulatory cooperation has been diluted a little. The initial Commission position paper spelled out three key areas for regulatory cooperation: ‘an improved bilateral mechanism’ for each party to comment on planned regulatory acts (and receive a reply); ‘a general mandate for regulators to engage in international regulatory cooperation’ that might culminate in greater regulatory convergence and the possibility for such initiatives to be based on stakeholder input (European Commission 2013: 3, 5).

### Bilateral regulatory exchanges

While earlier drafts referred to the first have abandoned the formal term ‘regulatory exchange’; only speak more vaguely of ‘provid[ing] opportunities for cooperation and information exchange’ (rather than a formal comment and reply system) when ‘developing new or amending existing regulatory measures’ (rather than all measures) and, crucially, state that this does not imply an obligation to share texts before they are made public. Moreover, the language concerning regulatory cooperation for non-central authorities has also been diluted, such that these will be ‘encourage[d]’ (by central authorities) to pursue cooperation only in areas of ‘common interest’. But much of the ambitious spirit of the earlier proposals remains: the principle of the regulatory exchange remains in place (‘opportunities’ must be offered for ‘cooperation and information exchange’); regulators are explicitly called upon to ‘take account of the approaches by the other Party’ to regulating when amending or devising new proposals and a new Article x.8 calls for parties to ‘keep each other informed’ and provide opportunities for comment ‘on any legislative proposals’ (including Bills of Congress introduced by Members) (European Commission 2016b: 5, 8).

### Further regulatory cooperation and stakeholder involvement

EU proposals for further regulatory cooperation (the ‘general mandate’ of the initial position paper) have also been softened over the negotiations. There is no longer a link between the regulatory exchanges and further regulatory cooperation and regulatory authorities no longer have to provide a justification in responding to (e.g. turning down)



such requests. However, there is also text on stakeholder involvement in such exchanges, such that ‘natural or legal persons’ can not only provide input to initiate further regulatory cooperation but also submit formal proposals that the parties ‘shall provide timely feedback’ on (European Commission 2016b: 6). While the Commission has also included language in a footnote to signal its intent that no type of stakeholder will be privileged and the input of SMEs and ‘public interest groups’ will be sought particularly – the fact remains that larger, well-resourced business groups who already have the ear of the Commission on such trade and regulatory matters are likely to be in a favourable position. Moreover, such initiatives are said ‘to be unduly biased toward seeing regulation as a trade irritant’ (T&E et al. 2016: 7).

## No longer bypassing domestic ratification but...

The institutional architecture to govern regulatory cooperation is the area where the Commission has arguably backpedalled the most in the face of criticism. Most controversially, the initial proposal spoke of ‘[a] streamlined procedure to amend sectoral annexes of TTIP or to add new ones, through a simplified mechanism not entailing domestic ratification procedures’ (European Commission 2013: 2, emphasis in the original). Bypassing domestic legislatures was explicitly ruled out in subsequent negotiating proposals in the face of considerable pressure (De Ville and Siles-Brügge 2016: 75): the latest regulatory cooperation chapter draft states that the institutional structure ‘will not have the power to adopt legal acts’ (European Commission 2016b: 10). The latest proposals for the first time also explicitly rule out subjecting either the GRP or regulatory cooperation chapters to formal state-to-state dispute settlement (this was also the gist of a cover note attached to the February and April 2015 textual proposals). The question is how meaningful this is. After all, the key function of the chapter(s) is to more subtly shape the regulatory environment – and reinforce on-going internal developments in the EU’s case – rather than provide a set of internationally-enforceable provisions. Subtle US pressure – by referencing international commitments undergone in TTIP – may be all that is needed to induce ‘regulatory chill’, as has arguably already occurred in the case of the EU’s regulation of pesticides or fuel quality (De Ville and Siles-Brügge 2016: 86-8).

### *The Regulatory Cooperation Body: is it gone for good?*

The initial Commission position paper also called for the inclusion of a ‘regulatory cooperation body’ (RCB), tasked with coordinating the regulatory cooperation work, and composed of trade officials and regulators (although chaired by the former). This body was the subject of hefty criticism from public interest groups. But while in response to such criticism the current draft only includes a placeholder in an annex for ‘provisions on the institutional set-up for regulatory cooperation under TTIP’, this spells out a series of functions and essential ‘elements’ of such a structure which closely mirror early iterations (European Commission 2016b: 9-10).

## CONCLUSION

The latest European Commission proposals on GRPs and regulatory cooperation clearly represent a moderation in the level of ambition seen at the start of the negotiations. Where once EU officials were seeking to have such provisions cover all manner of regulations at all levels of decision-making, the scope has now been reduced to the central level and (for regulatory cooperation) only those sectors explicitly covered by TTIP. The ‘right to regulate’ has been enshrined in the text of both proposals and non-economic objectives are explicitly listed as objectives of regulatory cooperation. Moreover, there is no longer any talk of expedited procedures for amending the regulatory components of TTIP without undergoing ratification procedures, the proposed – and much criticised – RCB has been removed from the proposal (for now) and the chapters are (for the first time) explicitly excluded from the read of dispute settlement proceedings.

However, these changes notwithstanding, this paper argues that there is still a strong possibility that the proposals will inhibit public interest decision-making. Not only does the scope of the proposed chapters remain significant (covering both primary and secondary legislation at the EU and US federal level) but many of the fundamental features of GRPs and regulatory cooperation criticised by public interest groups in earlier drafts have remained in the latest draft: ‘early information’ on planned regulation; increased possibilities for comment on draft regulation from external regulators and stakeholders; entrenched impact assessment practices – and the possibility of an institutional structure intended to promote regulatory convergence. In the case of GRPs, there is now even



wording (in Article 3) that could be read as committing the EU to maintaining its ‘Better Regulation’ Agenda.

In conclusion, we could say that the impact of the horizontal regulatory chapter(s) is not to formally change the legislative framework, directly bypassing parliaments and elected officials – as advocates of the agreement often accuse critics of arguing (e.g. Bull 2014). Rather, its impact is more subtle. Deploying instruments of ‘soft law’, its purpose is shaping the discursive context in which regulation is crafted by privileging certain voices (business) and considerations (reducing the impact of regulation on international trade) (see also Gerstetter 2014; De Ville 2016). In doing so, it reinforces dynamics already taking place internally within the EU (the Better Regulation Agenda, and especially the latest Better Regulation Package), which are seeing the EU move closer to the US’s ‘notice and comment’ system of regulating. Thus, in contrast to seeing the proposed provisions on regulatory cooperation as a neutral ‘policy laboratory’ in which regulators from both sides can rationally deliberate on the best regulatory practice (Wiener and Alemanno 2015), this can be seen as an attempt to shape the regulatory environment in particular ways. The problem, of course, is that making such an argument runs against the (formally correct claim) by the Commission that its proposals do not imply a direct usurping of regulatory power (as the ‘streamlined procedure’ would have implied’) and that the objective is to set high standards (something now explicitly stated in the proposal on regulatory cooperation). Against such a backdrop, one of the aims of this exercise has been to highlight how many of the principles expressed in a less guarded fashion at the start of the TTIP negotiations (in the Commission’s initial position paper) remain alive and well in the latest EU proposals.

## NOTES

<sup>1</sup> This paper has benefitted from a University of Manchester Impact Acceleration Account, funded by the UK Economic and Social Research Council, and jointly held with Nicolette Butler in the School of Law.

<sup>2</sup> More specifically, the analysis is based on the initial July 2013 position paper (European Commission 2013); the first proposal to US negotiators in February 2015 (European Commission 2015a); the second proposal from April 2015 (European Commission 2015b) and the latest proposals (from February 2016) for separate chapters on GRPs and regulatory cooperation (European Commission 2016a,b).

<sup>3</sup> Under the US Administrative Procedures Act, US federal agencies (which have considerable autonomy to set detailed regulatory requirements, with US Congressional Bills only setting broad parameters) must a) publish draft regulations; b) provide opportunities for comment by stakeholders for a certain period; c) review any comments; d) take these into account where appropriate; e) when issuing the final rule, provide a response to comments and an explanation of why a particular decision was adopting instead of alternatives (including the possibility of not regulating) (Parker and Alemanno 2014: 5-6).

<sup>4</sup> The EU's internal Better Regulation Agenda – which, in the words of the Commission 'is about designing EU policies and laws so that they achieve their objectives at minimum cost' (European Commission 2016c) has been given a key impetus under the current Juncker Commission. In its bid to cut 'red tape' for businesses it has led to the Commission seeking approval of a new 'Interinstitutional Agreement on Better Law-Making' (in agreement with the Council and European Parliament) (European Parliament et al. 2015). Currently only awaiting approval by the European Parliament plenary, this would entail, amongst other things: a) conducting impact assessments for primary and secondary subject to approval by a 'Regulatory Scrutiny Board' (European Commission 2015c: 9); b) earlier opportunities for stakeholder feedback and opportunities to comment on both draft primary and secondary legislation; c) greater emphasis on the ex post evaluation of legislation.

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