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## **Regulatory Cooperation How an EU-US trade deal risks creating a labyrinth of red tape**

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## Regulatory Cooperation: How an EU-US trade deal risks creating a labyrinth of red tape

For the most recent round of EU-US trade talks, the European Commission released an initial proposal for legal text on 'regulatory cooperation' in the Transatlantic Trade and Investment Partnership, TTIP. Regulatory cooperation is a key element of the proposed deal. As tariffs between the EU and the US are already relatively low, the main economic benefits attributed to TTIP by the European Commission are expected to come from harmonising regulatory standards between the EU and the US.

The objective of regulatory cooperation is to align existing and future rules and procedures in the EU and the US to 'reduce unnecessarily burdensome, duplicative or divergent regulatory requirements affecting trade or investment',<sup>1</sup> The Commission proposes to establish a Regulatory Cooperation Body, composed of civil servants from both sides, that will be tasked to assess if legislative acts in the EU or the US are compatible with each other and 'trade and investment' proof. If they are not, this body can make a number of proposals to increase harmonisation or reduce their impacts on, and costs for, business.

While striving for regulatory cooperation might seem sensible and uncontroversial, a careful reading of the proposal rings loud alarm bells. EU trade negotiators are proposing a system that erects high barriers in the form of a 'labyrinth of red tape' which would prevent the agreement of new standards to protect the public interest.

Of course, this is not about barriers for business, as the *raison d'être* for this proposal is to reduce what the Commission calls 'red tape' for companies. It is about burdens and barriers for European decision-makers and (potentially) national governments, and would have the effect of slowing down, weakening or stopping altogether the development of legislation in areas such as consumer protection, health and safety, the environment, labour, public procurement, energy and food.

It also gives unprecedented influence to business lobby groups which would receive increased power to stop or weaken new regulations that could negatively impact on trade and investment. The proposal prioritises trade and investment over any other interests. The system would give enormous power to a small group of unelected officials to stop or weaken regulations and standards even before elected bodies, such as parliaments, could have a say over them, thus undermining our democratic system.

Here are 10 reasons why the current European Commission proposal for regulatory cooperation poses serious risks to legislation and decision making in the public interest and is another reason why TTIP should be stopped.

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<sup>1</sup> [http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc\\_153120.pdf](http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf)  
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## **1. The proposal is likely to result in weaker or delayed EU laws to protect the public interest**

According to article 7 of the proposal, regulations need to be assessed for how they: (a) relate to international instruments; (b) take account of the regulatory approaches of the other party; and (c) impact on international trade and investment. Since the vast majority of new European regulations in the public interest will be different from – and in most cases stronger than – existing international or US standards and/or will lead to some costs for business (and thus impact trade and investment), this will allow the Regulatory Cooperation Body to question almost every new regulatory proposal of the European Union.

Regulatory Cooperation Body recommendations to harmonise EU and US standards or to reduce impacts on trade and investment will most likely result in weakening of the standard and/or delaying its introduction.

The proposal does not propose a check on how a regulation contributes to European sustainability objectives (such as emission reductions, safe labour conditions, transparency, human rights, food safety). If it did, it would be in the remit of the Regulatory Cooperation Body to argue for upgrading a regulatory proposal. By excluding sustainability checks, the assessment will almost certainly have a downgrading impact.

## **2. Regulatory Cooperation Body recommendations are geared towards slowing down, cancelling or weakening regulations in the public interest**

In case of divergence between EU and US regulatory acts or an impact on trade and investment (which means in reality most legislative initiatives), parties and the Regulatory Cooperation Body can recommend a number of measures to promote regulatory compatibility (article 11). All of the proposed measures can result in weakening, slowing down or completely stopping the acts:

- *Mutual recognition of equivalence of regulatory acts*  
This is likely to result in US companies being allowed to enter the EU market with products or services that comply with – often lower – US standards, and vice versa. So even though the regulations have not been changed, the result is a lowering of protection. Furthermore, EU companies will face an uneven playing field when they have to comply with higher domestic standards. This is likely to result in pressure to lower EU standards.
- *Harmonisation of regulatory acts through the development of new international instruments or the approximation of rules and procedures on a bilateral basis*  
This, in other words, attempts to agree on joint EU-US or even global standards. This will almost inevitably lead to substantial delays and could mean legislative acts are abandoned when there is no international agreement.
- *Simplification of regulatory acts in line with shared principles and guidelines*  
Although this wording is vague, it is likely to be interpreted as making simpler rules so the costs for business are reduced, which in most cases is likely to lead to a weakening of standards.

### **3. The proposal will also cover all member state legislative acts**

While the proposal published by the Commission in January only refers to EU regulatory acts and US federal statutes, it says explicitly in article 12 that the Commission will table further proposals to extend the scope of the proposal to acts of US states and EU member states. Thus every future legislative act from an EU member state will be subject to scrutiny by the Regulatory Cooperation Body as well, giving the body enormous power to influence regulations at all levels in Europe as well as the US.

### **4. The proposal for regulatory cooperation goes far beyond the scope of TTIP and it also covers implementing and delegated acts**

According to article 3 all regulatory acts of the EU are covered by the proposal for regulatory cooperation. This includes sectors and products that are not included in the TTIP negotiations. Not only does this imply that the scope of TTIP is unacceptably extended beyond the official mandate, but it also risks that all issues, products or areas that are exempted in TTIP can be affected at a later stage by measures resulting from the regulatory cooperation mechanism.

The Regulatory Cooperation Body is not restricted to interfering in the process of establishing main legislative acts, such as regulations and directives, but it can also make recommendations regarding delegated and implementation acts. These are a type of secondary act or legislation intended to amend non-essential elements of main legislative acts or ensuring uniform implementation of legislative acts across the EU. The Commission has a much stronger lead in implementing and delegated acts and the democratic scrutiny of other EU bodies, such as the Council and European Parliament, is weaker. Public and media attention is also often lacking about these complicated and in-transparent (comitology) processes.

As the devil is in the details, key decisions are often taken during these processes. There is a significant risk that pressure from the Regulatory Cooperation Body will result in the weakening of implementing and delegated acts. In this case it would be practically impossible for changes to be reversed by the European Parliament or other democratically elected institutions.

### **5. Regulatory cooperation provides business with enormous influence**

The current EU proposal on regulatory cooperation has been strongly influenced by business lobbying.<sup>2</sup> It is therefore no surprise that it will provide business with enormous influence to weaken or delay legislation that business considers a “trade irritant”: basically any kind of public interest standard or law that creates extra costs for companies. Though all rights granted to external stakeholders in principle also apply to citizens and civil society organisations, in reality it is mainly business which benefits, for two reasons. Firstly, it is mostly business lobby groups that have the resources to effectively follow and influence the work of the Regulatory Cooperation Body. Secondly, as mentioned under point 2, the Regulatory Cooperation Body can mostly be used to weaken or delay regulations. As it is not

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<sup>2</sup> In late 2012, BusinessEurope and the US Chamber of Commerce had several meetings with the EU Commission to push their proposals for regulatory cooperation: <http://corporateeurope.org/sites/default/files/busseurope-uschamber-paper.pdf>

See also: <http://corporateeurope.org/international-trade/2015/01/ttip-regulations-handcuffed>

possible to use the body to change legislative acts that do not sufficiently contribute to sustainability objectives, civil society will find very little value in using the system.

Article 6 describes, in a very prescriptive way, that the EU needs to include in each regulatory process a stakeholder consultation and that it shall take into account the contributions received. The Regulatory Cooperation Body will also, according to article 15, organise a yearly meeting with stakeholders to exchange views. Stakeholders can present their views and observations and make concrete suggestions. The Regulatory Cooperation Body shall give careful consideration to such suggestions. A written reply shall be provided to stakeholders without undue delay. This system will provide business groups with the ultimate tool by which to object to new pieces of legislation and to make the case that they can result in extra costs for companies. It comes as no surprise that business groups are lobbying so strongly for regulatory cooperation in TTIP.

## **6. Interference with regulatory acts can happen at any stage of the process**

Article 10 states that regulatory exchanges (discussions between the EU and the US on how to address a potential impact of a new EU regulation on trade and investment or a divergence with rules in the US) may take place at any stage of their preparation and may continue until the adoption of the regulatory act. That means that at every stage of the process, the US, companies and the Regulatory Cooperation Body can raise questions and request the measures mentioned under point 2. This provides them with continuous opportunities to weaken and delay regulatory acts.

## **7. The chilling effect – potentially the biggest negative impact of regulatory cooperation**

Similarly to how the ‘investor-state dispute settlement’ mechanism (ISDS) has been shown to lead to “regulatory chill” – a hesitance among policy makers to pass new regulation – the biggest impact of regulatory cooperation might also be its preventative effect. If EU regulators are aware that at any stage of the regulatory process, their work can be challenged by the US or the Regulatory Cooperation Body and they can be pressured to take numerous suggestions into account leading to a serious weakening or delay of their proposal, it would significantly influence their decision making and policy choices. Regulatory cooperation is thus very likely to have an impact on policy makers’ willingness and appetite to strive for new, higher standards to protect the public interest, and/or induce them to weaken proposed standards from the start in anticipation of them being sent back to the drawing board by the Regulatory Cooperation Body.

## **8. Parliaments are side-lined**

Regulatory cooperation as it is proposed in TTIP will undermine the democratic functioning of the EU and its member states. It allows a foreign country and a body consisting of non-elected civil servants to scrutinise legislative proposals and push for their reconsideration even before democratically elected bodies, such as the European Parliament, national parliaments and member state governments, have the possibility to judge them. This gives enormous power to a small group of persons, who are not accountable to the European public, to prioritise trade and investment concerns over all other interests, before elected representatives can have their say. Thus the proposal threatens basic democratic principles.

### **9. The Regulatory Cooperation Body will have strong persuasive powers**

A key element of the EU proposal on regulatory cooperation is that the Regulatory Cooperation Body can make a number of proposals to increase harmonisation of acts or reduce their impacts on and costs for business. While the Regulatory Cooperation Body does not have the direct power to change regulations, and governments' right to regulate is officially recognised, the proposal nevertheless gives the body strong persuasive powers that cannot easily be ignored by legislators at EU and member state level. Parties have to present a yearly list of planned regulatory acts to the Regulatory Cooperation Body (article 5); parties have to make an assessment of how each regulatory act relates to US and international laws and impacts business (article 7); parties have an obligation to enter into an exchange if there is a complaint through the Regulatory Cooperation Body (article 9); parties shall contribute constructively (article 9), act promptly (article 10) and respond without undue delay (article 11).

### **10. Regulatory cooperation creates enormous red tape for governments**

Regulatory cooperation, as it is proposed by the EU in TTIP, is a system that intentionally introduces a large number of hurdles and barriers for the regulatory processes of the EU and its member states. It provides the US and business with strong incentives to weaken and delay, or even stop, new legislation. It asks regulators to follow procedures likely to result in many years of delay, and obliges them to give serious consideration to every possible concern raised, regardless of its relevance to the policy making process.

The proposal thus creates an enormous bureaucracy of civil servants who will have to evaluate every possible national and EU law for how they relates to similar laws in the US. This will undoubtedly lead to endless, often fruitless, negotiations with US legislators about harmonising the rules. All of these processes and bureaucracies will create new layers of red tape for governments resulting in high costs (to tax payers) and increasing unwillingness of EU and member state regulators to even attempt to introduce new laws to protect the public interest.



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