



Directorate-General for External Policies of the Union
DIRECTORATE B, Policy Department

This study was requested by the European Parliament's Delegation for Relations with the US (Chair Dr Christian EHLER) via the Committee on Foreign Affairs (Chair Mr Elmar BROK).

STUDY

THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP AND THE PARLIAMENTARY DIMENSION OF REGULATORY COOPERATION

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Abstract

The Transatlantic Trade and Investment Partnership (TTIP) presents a historic opportunity for the European Union and the United States to remove regulatory divergence – today's most prominent obstacle to trade exchanges –, thereby increasing economic growth for the citizens of both policies. Yet, with great promises come challenges too. The EU and the US have been attempting to reduce trade barriers since the 1970s, and parliamentarians from both sides of the Atlantic have since the 1990s been working to institutionalise these efforts through a variety of dialogues and committees, as epitomised by the Transatlantic Legislators' Dialogue (TLD). While this report reviews these efforts in detail, the general conclusion regarding past attempts at regulatory convergence is an overall lack of success: regulatory differences remain as neither side has the incentives to consider the extraterritorial effects of its regulations. **As an international agreement predicted to contain a Horizontal Chapter – an innovative approach to international trade treaty-making containing a framework for future regulatory cooperation – TTIP has the potential to transform this impasse, if approached correctly. The Horizontal Chapter would provide a 'gateway' for handling sectoral regulatory issues between the EU and the US, including by addressing both legislation and non-legislative acts, regardless of the level at which they are adopted and by whom. The development of such a framework for transatlantic regulatory cooperation – which is likely to be accompanied by the establishment of a Regulatory Cooperation Council (RCC), a mechanism that could ensure TTIP's operation – raises many important questions in relation to its interactions with the parties' respective legislatures, the European Parliament and the US Congress. This report examines the potential parliamentary roles, and their implications for the EU legal order – including issues of transparency, democracy, and accountability – in detail.** It concludes with recommendations designed to identify the most appropriate avenues to ensure parliamentary involvement and connect transatlantic parliamentary cooperation with the institutional operation of TTIP.

... 1.1.1 Societal preferences and risk tolerance

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...Characterizations of US and EU regulatory systems as sharply divergent (e.g. a precautionary Europe vs. a reactive America) are often exaggerated, because the reality of US and EU risk regulation is typically parity, punctuated by occasional disagreements (52). Even if Europe has shifted to provide more protective regulations than in the United States in some areas (53), this is not a universal phenomenon but is a function of particular features of individual cases on each side of the Atlantic. Indeed, regulations are by definition dynamic: they change and adapt over time. More generally, America and Europe are more alike than stereotypes imply (54). **Still, their different societal and institutional attitudes towards risk may indeed prompt different regulatory answers and explain many transatlantic divergences over time.**

1.1.2 Interest driven politics

According to some authors, the regulative behaviour of a state may also be influenced by the role of the election system (55). In particular, the European proportional representation would provide greater opportunity for coalition governments that often include also green parties. **The influence of this political presence in the EU political landscape could explain many of the precautionary-inspired regulatory measures adopted over the years in Europe.** In parallel, given the increasing polarization between Democrats and Republicans combined with the growing influence of the conservative wing of the latter party, would have prevented the adoption of precautionary measures (56). Moreover, it has also been argued that European officials would be more prone to address consumer concerns than their US counterparts (57). It must however be observed that the codification of the precautionary principle within the EU Treaties seems to suggest a bipartisan support to this regulatory approach to risk governance. Thus ascribing the precautionary stance developed over time in the EU largely appears as an oversimplification that does not necessarily reflects the reality of EU politics.

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1.1.3 Constitutional frameworks and institutional capacity

Non-tariff barriers are also the result of different constitutional frameworks and institutional capacity in the US and the EU regarding coordination and cooperation. While neither the EU nor the US systematically assess the extraterritorial effect of their regulations, the European Union's institutional framework seems more amenable to integrate this dimension.

In the US, regulatory agencies are primarily focused on domestic issues. As a result, they fail to routinely consider the transatlantic trading implications of their decisions. **Further complicating any efforts at coordination is the federal structure of the US government. Although federal agencies have significant power, regulation in some sectors, such as insurance, is decentralized and left to individual states. The result is that regulations in the US are largely domestically-focused.** It is to address this concern that President Obama issued Executive Order 13609 on 1 May, 2012. EO 13609 calls on all US federal agencies to “reduce, eliminate, or prevent unnecessary differences in regulatory requirements” (new and existing) that may pose barriers to trade; to identify which forthcoming regulations may have significant international impacts; **and to consider approaches taken in foreign regulations as part of the work plan of a regulatory cooperation council (RCC)**⁵⁸. The EO asks the Regulatory Working Group created in EO 12866 (1993), chaired by the OIRA Administrator, to oversee this effort.

In contrast, the EU appears more capable of coordinating at an institutional level. The structure of the EU is designed to facilitate coordination on trade both within member states and on transatlantic issues. The result is that it is much easier to institute an institution-wide policy of considering transatlantic trade implications for EU regulations than it is in the US.

1.1.4 Conclusions

Although the literature on the topic provides many intriguing explanations for regulatory divergences in the EU and the US, **no overarching theory seems capable of providing a satisfactory answer to the problem of transatlantic regulatory variation.**

Many of the identified variables are not only different but also very often interconnected. It appears indeed clear that no factor alone may suffice to explain regulatory choices. At the same time, no research ascribes regulatory divergence to cultural factors alone, nor focuses solely on national political cultures or families of law. It appears generally accepted today that regulatory styles – assuming they exist – may vary over time and across policy fields. **A better understanding of the origin of regulatory variation in relation to similar policy challenges could be crucial for enhancing regulatory convergence across the Atlantic. An improved mutual understanding of each other regulatory framework could be conducive to this result (59).**

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(52) Wiener, J.B., ‘The Real Pattern of Precaution’, in Wiener, J.B., Rogers, M.D., Hammitt, J.K, and Sand, P.H. (eds.), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe*, RFF Press/Earthscan, Washington D.C., 2011, pp. 519- 565.

(53) As illustrated by many authors, this is largely due to the relative absence of EU regulatory framework for safety, health and the environment before the establishment of the EU internal market in 1992. See, e.g., Christoforou T., ‘The Precautionary Principle, Risk Assessment, and the Comparative Role of Science in the European Community and the US Legal Systems’, in Vig, N. J. and Faure, M.G. (eds.), *Green Giants? Environmental Policies of the United States and the European Union*, Cambridge, MIT Press, 2004, pp. 31 et sqq; Vogel, D., ‘The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe’, (2002) 33 *British Journal of Political Science*, pp. 557-580; Vogel, D., *The Politics of Precaution*.

(54) Hood C., Rothstein H. and Baldwin R., *The Government of Risk: Understanding Risk Regulation Regimes*, OUP, 2004.

(55) Majone, G., ‘Political Institutions and the Principle of Precaution’, in Wiener, Rogers, Hammitt, and Sand (eds.), *The Reality of Precaution*, pp. 411-433.

(56) Vogel, *The Politics of Precaution*.

(57) Ziegler, O., *EU Regulatory Decision Making and the Role of the United States*, Springer, Wiesbaden, 2012.

(58) This EO extends also to independent agencies over which however OIRA has no formal authority.

(59) Bergkamp, L. and Kogan, L., ‘The Precautionary Principle and Post-Modern Regulatory Process: Why the TTIP Negotiations Should Openly Engage the Fundamentals EU-US Differences’, (2013) 4 *European Journal of Risk Regulation*, pp. 493-507

...REFERENCES

(p. 59)

...Bergkamp, L. and Kogan, L., ‘The Precautionary Principle and Post-Modern Regulatory Process: Why the TTIP Negotiations Should Openly Engage the Fundamentals EU-US Differences’, (2013) 4 *European Journal of Risk Regulation*, pp. 493-507.

Bermann G.A., Herdegen M., and Lindseth P., *Transatlantic Regulatory Cooperation – Legal Problems and Political Prospects*, Oxford University Press, 2000.

Bignami, F. and Charnovitz, S., ‘Transatlantic Civil Society Dialogues’, in Pollack and Shaffer (eds.), *Transatlantic Governance in the Global Economy*, Rowman & Littlefield Publishers, 2001, pp. 274-275.

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