

## **Regulatory cooperation at the core of TTIP and its likely consequences**

The TTIP is regarded as a '21st century trade agreement' because instead of dealing largely with tariff and import quota negotiations – the stuff of 20th century agreements and which are already very low – it deals largely with regulations.<sup>1</sup> Differences in regulations between countries are considered to be ‘non-tariff barriers’ to trade and investment. The key idea is that by lowering these differences in regulation and so the additional costs for exporters in meeting both, that trade and investment will be boosted and growth will take place as a result. For the TTIP this is said to produce large gains in transatlantic trade which will give a substantial economic boost, helping Europe, notably, to get out of the crisis.

The TTIP aims to put a set of institutions and processes in place that will enable these barriers to be overcome to the greatest degree possible.

The major innovation of the TTIP is that the constraints (“disciplines”) to perform such regulatory cooperation, including the detailed processes for carrying this out, would be given legal force, apparently for the first time in the history of trade agreements, and the force would be that of an international treaty, which takes priority over domestic legislation once it has been voted into law by the parliaments. Another innovation is that the Regulatory Cooperation Council would be a permanent body.<sup>2</sup>

There is considerable debate about whether the regulatory changes from the TTIP will lead to a reduction in regulatory standards or not, or perhaps even result in a higher level in some cases. This paper aims to contribute to this debate by trying to clarify the implications based on the available information on regulatory cooperation in the TTIP and the broader context.

The paper looks at this central subject of the TTIP, the apparatus that is to be put in place to deal with it and how it may function, and the consequences that appear likely. It is based inter alia on a close reading of the publicly available official documents (whether published or not). Among other things, it takes into account the transatlantic engagement in regulatory cooperation and exchange of regulatory ideas over some years. Some links with the EU developments in domestic regulation are also considered.

### **1. Regulations as red tape or saving the planet, and the economic benefits foreseen from aligning them across the Atlantic**

#### *Views of regulations and how the TTIP sees them*

Regulations are continually put forward in public debate as mere bureaucracy, red tape and a burden on business, and especially on SMEs, to the extent that this has often

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<sup>1</sup> It should be said that NAFTA and the WTO also dealt with regulations, though less thoroughly than is planned for the TTIP.

<sup>2</sup> A. Alemanno, *The Transatlantic Trade and Investment Partnership (TTIP) and Parliamentary Regulatory Cooperation*, Report to European Parliament DG for External Affairs, April 2014, pp. 43 n.156, 44). ‘While good regulatory practices appear also in other trade agreements, TTIP is set to become the first one that ensure their respect through an enforcement mechanism.’

become an accepted ‘fact’. Yet many of the most important regulations are actually the results of campaigns for protection against the worst forms of contaminated food, toxic chemicals, air and water pollution, exploitation at work, despoliation of the environment, noise, or over climate change, etc., and have a profound impact on the quality of life. Often, regulations were introduced following public enquiries after disasters or public health, financial or other scandals and campaigns, sometimes over decades or longer, by trade unions, consumer, environmental or other civil society organisations, and long public debates.

In recent decades the public policy rationale given for regulations has often followed an explicit economic logic of ‘internalising the externalities’, that it is more efficient (and more just) for companies to internalise the costs of, for example, pollution, rather than passing on the consequences to the public, where it is normally far more costly to clean up afterwards and to repair the effects. This is enshrined in the EU Treaty as “the polluter should pay”.

While business organisations today sometimes refer to regulations as by their nature restricting innovation, in fact they have often aimed to guide innovation in public interest directions such as the development of pollution control equipment, energy-saving techniques, safer products such as toys, food or machinery at work, and towards the substitution of safer materials for more toxic ones. On the other hand, business has often argued in favour of regulation also in order to avoid liability for dangerous products or production processes and to prevent competitors undercutting them using low-cost but dangerous approaches, or to reduce costs of having to inspect all their incoming parts or materials.

A focus on the costs or burdens of regulation is often the exclusive focus of ‘better regulation’ efforts at national level across the EU, and indeed the EU tool for examining regulations that is applied in the member states focuses exclusively on the costs.<sup>3</sup>

The EU level is said to be responsible today for over 90% of regulations in Europe, and so how they are addressed in the TTIP is of particular importance.

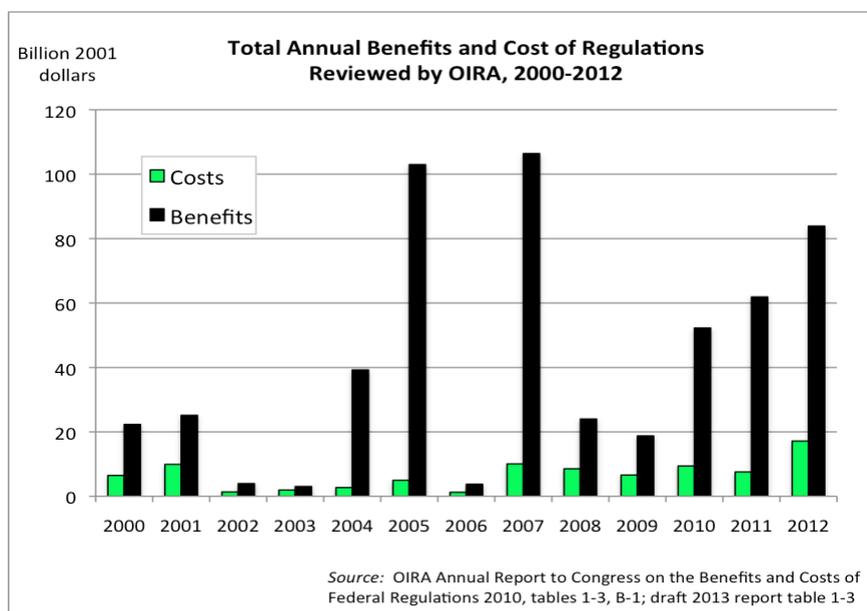
*The overall TTIP approach* has been to focus on regulatory differences across the Atlantic in terms of unnecessary duplication, and to focus on the elimination of the costs involved to the maximum degree possible in order to increase trade. This has been the approach in the presentations of the TTIP, runs through the design and ways of working of the institutions proposed, and is also the methodological approach of the main economic impact studies. Despite a general acknowledgement that regulations can bring benefits, they are very much secondary to the focus on the costs, if they are considered at all.<sup>4</sup> We discuss below some of the major differences in regulatory systems and in the resulting regulations across the Atlantic, and their implications in the TTIP context.

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<sup>3</sup> The Standard Cost Model. See L. Vogel’s contribution in L. Vogel and E. Van den Abeele, *Better regulation: A critical assessment*, ETUI, 2010.

<sup>4</sup> The CEPR authors acknowledge in a more recent TTIP impact study that ‘most NTBs are based on domestic regulations that address certain market failures’ (CEPR, *Quantifying the Impact of a Transatlantic Trade and Investment Partnership (T-TIP) Agreement on Portugal*, July 2014, p. 22). However, this does not come into their actual analysis, and there is no effort to analyse the effect of these ‘market failures’ in this approach.

Some comparisons have been made of the benefits and costs of regulations as a whole. For the US, the Office of Information and Regulatory Affairs puts together estimates every year; the benefits greatly outweigh the costs on average, as in the graph below, by a factor of six over the period covered.<sup>5</sup>



The TTIP is addressing the lighter-shaded parts, in green. It should also be said that these numbers are from cost-benefit studies, about which there are considerable problems as we discuss below. However, the biggest problem in this respect is their tendency to underestimate the benefits, not the costs.<sup>6</sup>

It is clear that any discussion of the TTIP needs to take the benefits of regulations into account also, however those benefits are conceived, and consider what will happen to them under the TTIP.

#### *The economic gains foreseen from making 'compatible' regulations across the Atlantic*

To put the TTIP's regulatory cooperation in context, we need to have a look at the gains estimated for the TTIP, which are of course the rationale for making the regulations 'compatible'. Despite much more upbeat presentations of their results, a closer look at the official impact studies shows that in fact they foresee extremely small economic gains even on the most optimistic assumptions. On these most optimistic assumptions, the 'Ambitious' scenario as in the main impact study, a gain of 1/20 of one per cent per annum in growth rate for a period of ten years is foreseen for Europe, which includes an increase in disposable income in Europe of €2.60 per week for each person (€1.50 in the more realistic 'Less Ambitious' scenario), in both cases the price of a cup of coffee per person per week.<sup>7</sup>

<sup>5</sup> The regulations included are regulations that are being reviewed and that have an impact of \$100 million or more on the economy in any year, either in costs or benefits.

<sup>6</sup> F. Ackerman and L. Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing*, 2004; F. Ackerman, *Poisoned for Pennies: The Economics of Toxics and Precaution*, 2008.

<sup>7</sup> CEPR, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment*, 2013. The calculation of disposable income here is from Table 18 and Eurostat's corresponding projection of EU

This economic gain of a weekly cup of coffee needs to be considered alongside the effects on regulations, and especially on the benefits they bring.

We first to consider what is being planned for regulatory cooperation.

## 2. What the TTIP proposes for regulatory cooperation and its significance

### *Reducing costs and increasing trade as the sole objective for regulatory cooperation*

There is a single objective for the regulatory cooperation efforts in TTIP, ‘to reduce the adverse impact on trade and investment ... [from] ... unnecessary costs and administrative delays stemming from regulation’; this is to be done through greater ‘regulatory compatibility’ (the joint US-EU High Level Working Group report which has served as the reference document for the TTIP negotiations). This is essentially repeated in the Council mandate to launch the negotiations and the EU position papers on regulation.<sup>8</sup>

This perspective on regulation colours all the design and work practices proposed for the TTIP, and all the official and semi-official economic impact studies at EU and national levels.

At the same time, it is stated that this ‘compatibility’ would be carried out ‘while achieving the levels of health, safety, and environmental protection that each side deems appropriate, or otherwise meeting legitimate regulatory objectives’ (HLWG report). This is restated in the Council mandate in terms of ‘[t]he right of the Parties to take measures necessary to achieve legitimate public policy objectives on the basis of the level of protection of health, safety, labour, consumers, the environment and the promotion of cultural diversity ... that they deem appropriate’ (item 6).

However, this is put formally in terms of a qualification on the main objective of increasing trade and investment. Bartl and Fahey point out that a ‘vast scholarship’ shows that for trade officials in such situations, ‘the normative commitment to free trade and open markets will tend to shove other normative concerns to a secondary status – reinterpreting these as a “by-product” of the primary normative concern’. They give a number of references as examples.<sup>9</sup> While both trade and regulatory officials are to be

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population for 2027, the year used by the study for these calculations. Some presentations identify a considerable increase in exports from the TTIP, without mentioning the corresponding increase in imports which the CEPR study foresees to be slightly larger than the increase in exports (Tables 20, 21). For detailed examination of the main impact studies see W. Raza, J. Grumiller, L. Taylor, B. Tröster and R. Von Arnim, *ASSESS TTIP: Assessing the Claimed Benefits of the Transatlantic Trade and Investment Partnership (TTIP)*, Austrian Foundation for Development Research, 2014.

<sup>8</sup> Respectively: High Level Working Group on Jobs and Growth (HLWG), Final Report, February 11 2013; European Council, ‘Directives for the negotiation’, June 17, 2013; European Commission, ‘Trade Cross-cutting disciplines and Institutional provisions: Initial EU position paper’, July 2013; European Commission, ‘TTIP: Cross-cutting disciplines and Institutional provisions: Position paper - Chapter on Regulatory Coherence’, December 2013.

<sup>9</sup> M. Bartl and E. Fahey, ‘A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)’, in E. Fahey and D. Curtin (eds.), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders*, 2014, forthcoming.

involved in the TTIP institutions, the pressure on the regulatory officials working there with trade as the overarching objective is likely to be great.

A commentary on the parallel Canada-European Union Comprehensive Economic and Trade Agreement (CETA), casts considerable doubt on the effectiveness of similar statements there, based on detailed examination of the final text and in the light of how effective such declarations are in international trade agreements in general.<sup>10</sup>

*Differences in regulations across the Atlantic – How will the TTIP deal with it?*

The TTIP proposes three forms of action to achieve regulatory compatibility: *harmonisation* of the standards and tests from both sides of the Atlantic (for future regulations), and either *recognition of equivalence* or *mutual recognition* of those on the other side (for existing regulations).<sup>11</sup> Mutual recognition in particular can result in different levels or standards being put in competition with each other, which if the costs are also different, can have major effects, and this raises the issue of a race to the bottom in regulation, as for example happened across the Atlantic in finance in the years before the recent crisis.<sup>12</sup>

The most frequently used examples of regulatory differences given by those advocating the benefits of TTIP tend to be of two kinds. One is duplication on both sides of the Atlantic of administration or paperwork that is performed differently but has the same purpose. More substantial cases mentioned are those that involve differing procedures such as different safety tests that have nevertheless the same functional result. Costs are saved by avoiding this duplication.

However, alongside regulations that are essentially duplications of this kind there are many that are at significantly different levels or standards on one or other side of the Atlantic, levels of safety, health or financial regulations for example. The consequences of aligning regulations in these can be dramatically different from those above.

A study done for the European Commission by Ecorys (2009) examined differences in regulations from a business point of view, in considerable detail in a wide range of sectors, and lists the regulations that according to business perspectives on each side of the Atlantic should be tackled as priorities in the TTIP (see annex to this paper). It is apparent from these lists that many are cases where standards or levels of regulations differ between the two sides of the Atlantic, and sometimes quite strongly. They range for example from regulations for potentially toxic chemicals to regulations related to climate

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<sup>10</sup> Canadian Centre for Policy Alternatives, *Making Sense of the CETA: An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement*, September 2014, esp. pp. 15, 41-46.

<sup>11</sup> This is set out in the final report of the US-EU High Level Working Group (HLWG), February 2013. Mutual recognition is defined by a leading academic in the field as follows: '[u]nder a policy of mutual recognition, regulators retain separate standards for internally-produced products, but agree to recognize the other jurisdiction's standards for products imported from it, albeit sometimes subject to significant conditions and controls' (G. Shaffer, 'Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance through Mutual Recognition and Safe Harbor Agreements', *Columbia Journal of European Law*, Fall 2002, 29-77). The exporting country has the responsibility to see that the products or services conform to the regulations.

<sup>12</sup> N. Roubini and S. Mihm, *Crisis Economics*, 2011.

change, pricing of pharmaceuticals, labour regulations and food labelling.<sup>13</sup> The annex to this paper includes examples of items from those priority lists where the difference in levels or standards across the Atlantic appear very considerable.

If we consider specific areas, differences are can be quite marked. For example, in Food and Beverages, the basic approaches to food safety regulation are fundamentally different. EU food safety legislation is based on the information flow along the food value chain for traceability while the US authorities focus on testing the final product. Regulation in the Chemicals sector faces similar problems. The basic approaches differ with the USA placing ‘relatively greater reliance on self-regulation, ... the EU ... on the use of regulations’ (Ecorys, p. 62). The highest priority item given for the TTIP by US firms and industry experts in the Ecorys study is the difference between the US Toxic Substances Control Act and the EU’s REACH, these being the centrepieces of chemicals regulation on each side of the Atlantic. Unlike REACH, the TSCA has had very limited success in dealing with toxic chemicals, managing to ban just 5 chemicals or chemical families out of the 83,000 chemicals in the regulating agency’s database.<sup>14</sup>

Further and often major differences arise due to contrasting approaches to international agreements. The US Congress has always taken a fiercely independent position on such engagements and over the past hundred years has refused to ratify many international agreements that involve regulations which would constrain the US. The US has not ratified the most basic international agreements in chemicals such as the Stockholm Convention,<sup>15</sup> has ratified only two of the eight ILO conventions which address issues such as forced labour and child labour, and according to a recent report will not participate in an internationally binding treaty in the next Climate Change Conference in Paris in 2015.<sup>16</sup>

As a clearer picture has emerged over time of the actual differences in regulation and regulatory regimes across the Atlantic, mutual recognition, which does not necessarily require a formal assessment of equivalence of regulations, has been increasingly emphasised as the key means to deal with this, as in a recent report from the Konrad Adenauer Stiftung.<sup>17</sup>

This is also reflected in a recent report for the European Parliament, which raises major worries on this score, saying that if there was alignment of regulations it could well lead to alignment with the lower level of regulation, or alternatively if there was mutual recognition of different levels of regulation, the lower costs at the lower level of regulation were likely to push out the higher level of regulation (e.g. where there is a

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<sup>13</sup> Ecorys, *Non-Tariff Measures in EU-US Trade and Investment: An Economic Analysis - Final Report*, 2009. The lists are in Annex IX.

<sup>14</sup> US Government Accountability Office (GAO), *EPA has Increased Efforts to Assess and Control Chemicals but Could Strengthen Its Approach*, 2013; GAO, *Comparison of U.S. and Recently Enacted European Union Approaches to Protect against the Risks of Toxic Chemicals*, 2007.

<sup>15</sup> The Stockholm Convention on Persistent Organic Pollutants (2001) agreed to ban nine of the twelve most dangerous of these chemicals (‘chemical substances that persist in the environment, bio-accumulate through the food web, and pose a risk of causing adverse effects to human health and the environment’) and to limit the use of DDT to malaria control.

<sup>16</sup> ‘Obama Pursuing Climate Accord in Lieu of Treaty’, *New York Times*, August 26th, 2014.

<sup>17</sup> Konrad Adenauer Stiftung, *The Impact of TTIP: Volume 1: Economic effects on the transatlantic partners, third countries and the global trade order*, June 2014, p. 12.

higher level of animal welfare).<sup>18</sup> This was a study of the agro-food sector but the same principle applies to a number of other sectors where standards are at substantially different levels across the Atlantic and where producers' costs are correspondingly different.

## **How the TTIP is to function**

### *Institutions of the TTIP and what they are to do*

The TTIP is to be 'a living agreement' and so is to establish institutions and practices to last for the long term. Given this importance, a close examination would seem to be warranted. This section aims to contribute to this from the available information in the various official documents.

Firstly, the key institution is to be a Regulatory Cooperation Council, assisted by working groups addressing specific areas. The RCC itself would prepare an annual working plan of priority issues to be tackled, and meet at least twice a year. It would include senior level representatives from regulators and trade representatives, as well as the leading body overseeing regulation on each side, i.e. the Commission's Secretariat General and the US Office for Information and Regulatory Affairs (OIRA).

It would 'consider and analyse', 'with the help of the relevant working groups substantive joint submissions from EU and US stakeholders or submissions from either Party' on how to deepen regulatory cooperation.<sup>19</sup> As the only two sources identified to initiate this work, this formulation is perhaps worth noting.

It would also consider amendments to the sectoral annexes agreed in the TTIP 'and the addition of new ones'. This also is of great importance as it can make major changes in specific areas as well as add major subjects to the TTIP *after* the agreement has been signed and approved by the respective parliaments. This corresponds to the statement elsewhere in the document that the TTIP would be a 'living agreement' able 'to incorporate new areas over time'. The potential implications of this are of course huge. Further, this would be done by 'a simplified mechanism not entailing domestic ratification procedures'; the profound implications of this are considered below when addressing issues of democracy.<sup>20</sup>

Second, the working groups will do the detailed work on achieving 'regulatory compatibility' using the methods already mentioned: harmonisation of future regulations, and recognition of equivalence or mutual recognition for existing ones.

The working groups are to be chaired by the relevant regulatory authorities, but otherwise no information is given on who will be the members of these, apart from working groups for SPS, which are to be expert representatives of the two Parties, according to the draft

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<sup>18</sup> J. Bureau et al, *Risks and Opportunities for the EU Agri-Food Sector in a Possible EU-US Trade Agreement*, study for European Parliament, DG for Internal Policies, Policy Department, Structural and Cohesion Policies, July 2014.

<sup>19</sup> European Commission, 'Position Paper – Chapter on Regulatory Coherence' (note 8 above).

<sup>20</sup> All the quotations in this paragraph are from the European Commission, Initial Position Paper (note 8 above). Emphasis added.

TTIP chapter on this area.<sup>21</sup> No indication is given as to whether these expert representatives might include private sector participants on either side.

Third, a ‘multi-stakeholder advisory committee’ is to be established with an apparently major role. It ‘would regularly meet with and work with EU competent authorities and US regulators *in crafting regulatory measures or taking decisions* how to further compatibility of existing one[s] (e.g. through mutual reliance, recognition, etc.).’ (EU Position Paper, emphasis added). The potential major importance of this is discussed in the next section.

Apart from these institutions and their functions, regulators’ ways of operating are also to be included in the legal agreement. We now look at these.

### *The ‘discipline’ of ‘good regulatory practice’*

The term ‘good regulatory practice’ is used repeatedly in all the official documents, beginning with the basic document establishing the framework for negotiation (the HLWG report) – where it is put forward as a ‘discipline’ that will have to be obeyed. However, it is nowhere indicated in the documents what this key phrase actually means. Nevertheless the Commission’s ‘Initial Position Paper’ refers on this to the US-EU High-Level Regulatory Cooperation Forum’s ‘Common Understanding on Regulatory Principles and Best Practices’ agreed in June 2011. (More on the HLRCF below).

This 2011 joint document shows some quite striking features. It is a short, just three and a half pages long, but the repeated mention of consultations, especially with ‘stakeholders’ or synonyms like ‘interested parties’ is especially noticeable. ‘Stakeholders’ is mentioned 7 times, and synonyms like ‘business’ and ‘interested parties’ as well as public consultation a further six. We indicate below that the stakeholders with the main interest and ability to engage in these consultations for the TTIP are overwhelmingly likely to be business.

Another interesting feature is the emphasis on burdens (for ‘citizens and business’) and the need for ‘flexibility’ on disclosure requirements and performance standards for both (though the latter surely only refer to business). There is however no mention of how the benefits of regulations might be increased or how the transatlantic exchanges might lead to this. Again for these work practices one side of regulation is highlighted, i.e. the cost, especially for business, but not the other, the benefits that regulations are intended to have.

Impact assessment is to be carried out on proposed regulatory measures, including the impact on international and transatlantic trade. In the most recent document, it is to be informed by ‘appropriate input’ from stakeholders, and information on ‘underlying assumptions, scientific evidence and data as well as methodology applied’ are to be shared with the other side.<sup>22</sup> This means that the impact assessment could be challenged, something the OIRA is highly practised in under the US system. With the considerable

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<sup>21</sup> Draft SPS chapter of TTIP, 27/5/14. [http://www.iatp.org/files/2014.07\\_TTIP\\_SPS\\_Chapter\\_0.pdf](http://www.iatp.org/files/2014.07_TTIP_SPS_Chapter_0.pdf).

<sup>22</sup> The EU Position Paper on Regulatory Coherence, December 2013. In the EU system, the Commission is responsible for the formal impact assessment.

difference in impact assessment systems as discussed below this could make for considerable exchanges and potential delays in regulation.

While this may affect significantly the EU and to a lesser extent the United States, if instituted as an international ‘discipline’ it would be a heavy burden on poorer countries before they could regulate, and be likely to result in them regulating less.<sup>23</sup>

### 3. The key role for ‘stakeholders’ in the TTIP – what does it mean?

‘Stakeholders’ are to play a fundamental role in the TTIP. This is apparent from the documents available and especially the most recent ones.

Their planned role in the TTIP institutions progresses, initially from being more implied in the joint High Level Working Group foundational document, to the published June 2013 EU ‘initial position paper’ on ‘Trade Cross-cutting disciplines and Institutional provisions’, which says that the stakeholders could make proposals about the recognition of equivalence of the regulations on the two sides (i.e. for just one of the three methods of dealing with differences in regulations), and further they would do it *through the authorities* on one or the other side of the Atlantic.

This document does nevertheless refer to the US-EU ‘Common Understanding and Regulatory Practices’, agreed at the meeting of the High Level Regulatory Cooperation Forum (HLRCF) of June 2011. We have indicated above in the discussion of ‘good regulatory practice’ that stakeholders appear very strongly in that document.

The third document, the leaked EU ‘Position paper’ on ‘Cross-cutting disciplines and Institutional provisions – Chapter on Regulatory Coherence’ (Dec. 2013) goes much further than the published ‘initial position paper’ of six months earlier and has a sharply increased and quite central role for stakeholders. Now:

- Stakeholders are to be one of the two sources for changing regulations under the TTIP. Joint requests from stakeholders in the US and EU are to be made on how to deepen regulatory compatibility for both upcoming and existing regulatory measures. A reply is to be given on the outcome of the assessment (of the proposals) and its rationale.
- Impact assessments are to be informed by appropriate input from stakeholders.

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<sup>23</sup> The Trans Pacific Partnership (TPP), being negotiated a little in advance of the TTIP, includes a number of ‘developing countries’ and gives perhaps a foretaste of this. It includes the obligation of ‘regulatory good practice’, which there includes impact assessment (with a stronger cost-benefit analysis emphasis), ‘transparency’, and extensive consultation with ‘stakeholders’, all with apparently similar implications to those argued here to be likely for the TTIP, though the involvement of stakeholders appears less strongly in the TPP document. It does not have the strong institutional basis to be established in the TTIP, notably the Regulatory Cooperation Council, instead focusing on ‘regulatory coherence’, which would emphasise the establishment of a central body in each country dealing with regulatory activities such as the work of ministries, as was previously emphasised for the EU, and regulatory practices. See below, esp. section 4. Perhaps it could be considered as being at an earlier stage of regulatory cooperation than envisaged across the Atlantic for the TTIP, but moving very much in the same direction. The draft TPP Regulatory Coherence chapter is available at <http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificRegulatoryCoherence.pdf>.

- A ‘multi-stakeholder advisory committee’ is ‘to regularly meet and *work with ... the regulators in crafting regulatory measures or [in] taking decisions* how to further compatibility of existing one[s] (e.g. through mutual reliance, [mutual] recognition etc.)’ (emphasis added).<sup>24</sup>

In addition, for impact assessments, details on the ‘underlying assumptions, scientific evidence and data as well as methodology applied’ are to be supplied to the other ‘side’, which given the apparent role of the 600 corporate advisors in the US trade advisory system who are said have access to texts, would almost certainly mean sharing them with companies in the US at least, and quite likely companies from Europe also.<sup>25</sup>

What could be the significance of these proposals if they are implemented?

First, to recall, all the activities are to be carried out with the formal objective of increasing trade and investment across the Atlantic. While all ‘stakeholders’ recognised in this context – i.e. consumers, business, trade unions, and possibly environmental organisations (mentioned in one document, the HLWG report, as having been consulted) and ‘other organisations’ (mentioned also in the HLWG report in the same fashion) – could in principle participate in these activities, just one of these groups in particular has both the interest and the resources to do so: business and in particular large business and its associations. None of the other ‘stakeholders’ apart from business will have either the incentive or the resources to participate in potentially very costly and time-consuming activities to increase trade and investment across the Atlantic, including campaigning effectively on both sides, even more so as the economic benefits are to be very small indeed even on the most optimistic assumptions of the impact studies. For business, a potential incentive is to lessen the private cost of regulation to them.

The consequences of business engaging with regulators in “crafting” regulations or “taking decisions” on, notably, mutual recognition, would appear to be tilting the balance very much towards deregulation, and the consequent externalising of the effects that currently regulation restrains companies from imposing on the public.

On the question of transparency, this is in general of course a very good thing for democracy. However, the system being proposed appears to put the regulators, acting in principle in the public interest, in a goldfish bowl, and the companies acting in their private interest could operate their lobbying in the shadows. This would appear to give them a substantial strategic advantage enabling them with their vast resources to query decisions at every turn and to lobby the superiors and the bodies to which the regulators report, potentially up to ministerial or Commissioner level and above.

Fourth, delays for new regulations appear inevitable as major additional steps and requirements will be necessary. According to the Financial Times, ‘[t]he US is using transatlantic trade negotiations to push for a fundamental change in the way business regulations are drafted in the EU to allow business groups greater input earlier in the

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<sup>24</sup> <http://corporateeurope.org/sites/default/files/ttip-regulatory-coherence-2-12-2013.pdf>

<sup>25</sup> L. Wallach, ‘TAFTA: Context of the Transatlantic Free Trade Agreement Negotiations’, presentation slides, Public Citizen, July 2013.

process', quoting from top US trade officials.<sup>26</sup> In the US, this approach has resulted in a number of major delays and blockages to new regulation; it is described as 'the delay game' by the National Resources Defense Council in their report of the same name.<sup>27</sup>

A related question is how the regulatory authorities will get the resources to perform all these additional activities in other than a highly passive way, generally accepting what is proposed, and perhaps even more so under what could be a continued regime of austerity in Europe. The US system, which appears to be the inspiration for these proposals, is on many accounts very constrained by such requirements, and specifically as reports from the US Government Accountability Office have indicated for the case of the failure of the regulatory authorities to make significant progress in regulating under the key US chemicals legislation, the Toxic Substances Control Act.<sup>28</sup> Similar concerns have been raised specifically but sharply in the context of the TTIP, with reference to the leaked proposal in one of the major regulatory domains, Sanitary and Phytosanitary Issues (SPS), which deals with food safety and animal and plant health. The Institute for Agriculture and Trade Policy (a large US NGO) sees this basic resources issue as a key problem with TTIP in that domain.<sup>29</sup>

An important question is how can the public interest or *intérêt générale* be achieved in this context?

There is no doubt that companies who are operating on both sides of the Atlantic will have an excellent knowledge of the details of the differences in regulations and their implications for business and trade. The big problem in this context is that they are interested parties and have interests in specific regulatory outcomes even where those clash strongly with the public interest. Much of regulation are concerned with just this, the difference between, often short-term, private interests and the public interest and are made up of measures to deal with that conflict such as taxing or banning various types of pollution.

To conclude on this, with the major role given to 'stakeholders' in the workings of the TTIP bodies, as well as the processes of the RCC and its working groups appearing to be not at all transparent as discussed below, this would appear to hand over to business a preponderant position in affecting regulations in their particular interest.

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<sup>26</sup> 'US pushes for greater transparency in EU business regulation', *Financial Times*, February 23, 2014. Precisely the same point is made by Shaffer in a 2002 paper in the context of earlier initiatives for transatlantic cooperation (section IV of his paper referred to in note 11 above), indicating that this appears to have been the approach for quite some time.

<sup>27</sup> J. Sass and D. Rosenberg, *The Delay Game: How the Chemical Industry Ducks Regulation of the Most Toxic Substances*, National Resources Defense Council, 2011.

<sup>28</sup> A. Gomez, *Chemical Regulation: Observations on the Toxic Substances Control Act and EPA Implementation*, Government Accountability Office, 2013. Government Accountability Office, *EPA has Increased Efforts to Assess and Control Chemicals but Could Strengthen Its Approach*, 2013.

<sup>29</sup> Institute for Agriculture and Trade Policy, *Analysis of the draft Transatlantic Trade and Investment Partnership (TTIP) chapter on food safety, and animal and plant health issues*, July 2014.

#### 4. Transatlantic exchange of ideas on regulation and some indications of their impact

A key part of the context for regulatory cooperation has been an extensive exchange of ideas on regulation across the Atlantic from especially the 1990s.

Transatlantic regulatory cooperation began in the mid-1990s, concerned especially with technical issues such as technical standards and related conformity assessment. Despite high-level impetus, overall these had disappointing results due in substantial part to the major differences in regulatory and standards systems across the Atlantic, though cooperation did develop in a few limited areas.<sup>30</sup> A new initiative began in 2005 with the establishment of the High Level Regulatory Cooperation Forum, which discussed broad approaches and techniques in regulation, which had both official and ‘stakeholder’ (with especially business participation) parts to their meetings.

The proposals on regulation stemming from this, the 2011 US-EU ‘Common Understanding on Regulatory Principles and Best Practices’ as well as major consultations by the group of EU and US officials preparing the TTIP (the High Level Working Group) and submissions to a ‘Joint EU-US solicitation on regulatory issues’ in 2012 by companies across the Atlantic appear to be at the basis of most of the regulatory proposals for the TTIP.

This regulatory cooperation was preceded by several years of exchanges involving think-tanks and academics on both sides of the Atlantic, with both personnel exchanges and publications (often joint) in working papers series and journals dealing with regulation. The ideas appeared to flow especially in one direction, with many of the papers dealing with comparisons of the US and Europe, and often giving more advice to Europe than the US. An example is the American Enterprise Institute-Brookings Institution Joint Center for Regulatory Studies, and the paper by its two leading lights, R. Hahn and R. Litan, *Counting Regulatory Benefits and Costs: Lessons for the U.S. and Europe*, 2004, which had two recommendations for the EU: to adopt cost-benefit analysis and strong centralised regulatory oversight. These two are of special significance as they embody some of the core elements of the US regulatory system (apart from stakeholder participation).

Cost-benefit is seen as a purely technical function done by economists, aiming to quantify in monetary terms all the costs and benefits of regulatory options for a particular regulatory proposal and choosing on the basis of the highest net benefits, if they do indeed end up as positive. This has been severely criticised for putting monetary values on the priceless such as human lives and species loss, as well as for understating the importance of the future, and especially the longer-term future, through the use of high discount rates.<sup>31</sup>

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<sup>30</sup> CEN/CENELEC, *Position Paper on EU-US Transatlantic Trade and Investment Partnership (TTIP) – Technical Barriers to Trade – Initial EU Position Paper*, September 2013; European Commission, *EU-US TTIP: Technical Barriers to Trade: Initial position paper*, June 2013; G. Shaffer (ref. in note 11 above).

<sup>31</sup> For a critique of cost-benefit analysis as practised in US regulation, see F. Ackerman and L. Heinzerling, *Priceless*; F. Ackerman, *Poisoned for Pennies*. When cost-benefit analysis is practised in the EU essentially the same methods are used; they are generally considered by practitioners as uncontroversial. See also S. Rose-Ackerman, ‘Precaution, Proportionality, and Cost/Benefit Analysis: False Analogies’, *European Journal of Risk Regulation*, no. 2, 2013.

The strong centralised oversight as practised in the US by the OIRA (Office for Information and Regulatory Affairs) in the White House, has acted in practice as a significant brake on regulatory proposals, and in certain domains like the environment in particular, according to various critiques.<sup>32</sup>

The EU has had a more multi-faceted impact analysis which covered a wider range of issues and did not try to monetise all, and which argued that in the end regulatory decisions were political choices that would weigh up the options. However, cost-benefit analysis has gradually been increasing at the EU level.<sup>33</sup> Centralised oversight also has been increasing at the EU level in the European Commission.

Another example is a Brussels ‘think-tank’ chaired by a senior manager of a large US chemical company. This sent to the EU summit in October 2013 a proposal on “the innovation principle” which would be used alongside the precautionary principle and thereby qualify it, signed by nine major chemical and three other companies. This organization indicates that it has regular lunchtime discussions which have included the top officials in the European Commission dealing with regulations, people in a European Agency giving scientific advice to the Commission, leading figures in European Parliamentary Committees and a judge from the European court of justice, and that it has academic advisers from both the US and Europe, which include the former head of the OIRA in the Bush administration, an editor of a risk regulation journal in Europe, and a former director-general of EuropaBio, ‘Europe’s largest and most influential biotech industry group, whose members include Monsanto, Bayer and other biotechnology companies’ according to Wikipedia.<sup>34</sup>

Another issue which is not developed here is a sustained attack on the precautionary principle – the centrepiece of European regulation in certain areas especially concerned with the environment, health and safety, and enshrined in the EU Treaty – which has been undertaken for several years now on both sides of the Atlantic in the world of think-tanks, some of which have excellent access to the leading ‘decision-makers’, as well as in academic regulation and law journals. One of the approaches appears to be to limit its application so that it is virtually never invoked. The REACH chemicals directive, which is based on the precautionary principle, has come under particular critique. A key issue is the approach to the use of science in this context. One of the priorities identified by business to be addressed in the TTIP as a regulatory barrier in Europe is the precautionary principle (see annex to this paper). The extent to which the TTIP will affect this is an interesting question.<sup>35</sup> Bartl has pointed out ‘[t]he entire omission of the precautionary

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<sup>32</sup> e.g. L. Heinzerling’s ‘Who is running the OIRA?’ and ‘20 years of 12866’, Center for Progressive Reform, April and September 2013 respectively, and D. Michaels, *Doubt is Their Product*, 2008, p. 179.

<sup>33</sup> A. Alemanno, ‘EU Risk Regulation moves a step closer to Cost-Benefit Analysis’, <http://albertoalemanno.eu/articles/eu-risk-regulation-moves-a-step-closer-to-cost-benefit-analysis>; O. Fritsch, C. Radaelli, L. Schrefler, A. Renda, *Regulatory Quality in the European Commission and the UK: Old questions and new findings*, CEPS, 2012. With the next revision of the Commission’s Impact Assessment Guidelines due in December 2014, it will be interesting to observe how the systems across the Atlantic become more aligned or not.

<sup>34</sup> [www.riskforum.eu](http://www.riskforum.eu). List of academic advisors accessed 5/1/14.

<sup>35</sup> On the precautionary principle, a recent and well-informed discussion of it and its use can be found in R. Von Schomberg, ‘The Precautionary Principle: Its Use Within Hard and Soft Law’, *European Journal of Risk Regulation*, 2012. The evidence in a variety of areas is reviewed in two major reports with multiple contributors published by the European Environment Agency, *Late lessons from early warnings: the precautionary principle 1896–2000*, 2002, and *Late lessons from early warnings: Science, precaution,*

principle from the TTIP' and says that this 'may raise concerns regarding the violation of general principles of EU law.'<sup>36</sup>

The influence of the US on Europe appears to have been considerable in practice. A recent report for the European Parliament says that the High Level Regulatory Cooperation Forum:

played a role in sharing the ideas on regulatory impact assessment and oversight that led the European Commission to issue its Impact Assessment Guidelines (2005, 2006, and 2009) and to create its Impact Assessment Board (IAB) in 2006.<sup>37</sup>

For years there had been a major push to introduce 'Regulatory Impact Assessment' in Europe by the think-tanks and academics, and with detailed indications of how it should be done in Europe. While detailed impact assessment obviously can make more transparent how decisions are arrived at, and depending on whether it is accessible to a broad public or done in an esoteric technical fashion, can have various advantages most particularly if it helps open democratic debate in the making of the decisions concerned, it also has other potentials. The advantages for business in particular are articulated in a 2012 paper (the quotations are lengthy to enable the issue to emerge more clearly):

For rent-seeking firms, administrative requirements to 'give reasons' and perform economic analysis of proposed regulations are essential mechanisms to control the exercise of regulatory power delegated to bureaucracies (Balla, 1998). (493)

By requiring agencies to provide information on costs and benefits of proposed regulation, RIA provides the political principal and the core pressure groups with an effective tool to check on adverse regulatory impacts. The role played by RIA in the range of tools for political control of regulatory activities is unique. Instead of controlling agencies ex-ante (e.g. on the budget) or ex-post (e.g. by reviewing rules in Court), RIA produces control exactly when rules are being formulated. As a type of administrative procedure, it is effective in several ways. First, it allows well-organized interest groups to monitor the agency's decision-making process alerting the political principal [i.e. the political party in government] and her regulatory oversight units [...] These bodies can question the quality and analytic validity of the RIAs produced by the regulators, and effectively hinder or delay the regulatory process. Second, RIA 'imposes delay, affording ample time for politicians to intervene before an agency can present them with a *fait accompli*' (McCubbins et al., 1989: 481). Third, by 'stacking the deck' to benefit the political interests represented in the coalition supporting the principal, RIA moves power from agencies towards the most powerful constituencies (McCubbins et al., 1987: 273-4). (493-4)

Bearing in mind these caveats and adaptations, we provide a theoretical framework that revolves around the politics of implementation. To adopt and endorse RIA creates benefits for elected politicians. They can show to international organizations that they are following the bandwagon of modernization. Domestically, they send a signal to the business community that they are catering to business groups by providing favourable conditions.' (494)<sup>38</sup>

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*innovation*, 2013. For links with its application under EU law and an argument that it is incompatible with full cost-benefit analysis, see S. Rose-Ackerman, 'Precaution, Proportionality, and Cost/Benefit Analysis: False Analogies', *European Journal of Risk Regulation*, no. 2, 2013.

<sup>36</sup> M. Bartl, 'Democratic Legitimacy', mimeo, 2014, about the TTIP.

<sup>37</sup> A. Alemanno, *The Transatlantic Trade and Investment Partnership (TTIP) and Parliamentary Regulatory Cooperation*, Report to European Parliament DG for External Affairs, April 2014.

<sup>38</sup> F. De Francesco, C. Radaelli, V. Troeger, 'Implementing regulatory innovations in Europe: the case of impact assessment', *Journal of European Public Policy*, 2012, 491-511. 'RIA' refers to Regulatory Impact Analysis. While the quotes here are from what is called the theoretical part of the paper, from the context they appear to be based on empirical generalisations which are also considered as theory.

This bears out some of the themes of this paper, that setting the rules in particular ways that have considerable similarities to what is proposed for the TTIP, gives considerable advantages to the most well-resourced groups; in the case of the TTIP this, by far, is the large businesses operating across the Atlantic.

## 5. The potential link to the domestic regulation agenda

There would also appear to be a link between the TTIP and the domestic regulation agendas, both in terms of ways of working as well as ideas. Under the TTIP ‘regulators ... should engage in bilateral and international regulatory cooperation as part of fulfilling their domestic objectives’ (EU Position Paper on Regulatory Coherence). This is intended as a ‘discipline’ and is to be compulsory.

To take a quick look at the EU regulation developments, it has been engaging in a Better Regulation agenda for some years, with a small number of member states doing so for a longer period. The most recent form is the Regulator Fitness (REFIT) programme, which in October 2013 issued a list of regulations it will not proceed with, though the preparatory work had been done, and a further list of regulations that would be repealed.<sup>39</sup>

The areas where it will not proceed are identified as: ‘[t]his includes initiatives in the area of occupational safety and health for hairdressers; muscular skeletal disorders and screen displays, environmental tobacco smoke and carcinogens and mutagens’ (p. 8). This is heavily oriented towards health and safety at work. A review of the Commission’s programme in this area over 2007-2012 had been done by three consultancies, and the 230-page final report recommended (in their own words) ‘that a new strategy should focus clearly on musculoskeletal disorders, stress and occupational cancer deaths’. The correspondence between the most important priorities identified in this review and the Commission’s REFIT priorities for stopping regulation is striking. This also followed a major UK report in 2011 advocating to the UK government to cut back on regulation and its enforcement in that field (the Lofstedt Report), and recommended engaging strongly with Europe on the area.

Another development at the EU level, the High-Level Group of Independent Stakeholders, more commonly referred to as the Stoiber Group, instituted in 2007 to address regulations, is said to have a strong deregulation agenda. Its emphasis is very much on the burdens of regulation.

The new European Commission (the set of Commissioners) to take up its functions later this year has designed a new layer of Vice-Presidents above the Commissioners. Combined with the priorities and some changes in structure indicated for the new

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For a critique of Regulatory Impact Assessment as applied in the United States, see W. Harrington, L. Heinzerling and R. Morgenstern, eds., *Reforming Regulatory Impact Analysis*, Resources for the Future, 2009.

<sup>39</sup> European Commission, *Regulatory Fitness and Performance (REFIT): Results and Next Steps*, COM(2013) 685 final, 2.10.13, p. 8.

Commission, this would appear likely to hinder the advancement of new proposals for regulation.<sup>40</sup>

A strong move towards deregulation appears to be at foot in the EU at central EU level. Its interaction with the TTIP and in particular with the lack of democratic control over the TTIP's institutions and procedures, would seem to indicate a considerable possibility of an acceleration of deregulatory agendas in Europe.

## 6. Democratic control over and engagement in regulation

Because of the importance of regulations for people's lives, and because wide debate is necessary to bring out the implications of different potential directions for regulations, broad public participation and debate is frequently necessary for major regulations. Bartl and Fahey have discussed the significance of the distinction here between technocratic approaches, which the TTIP appears to be following, and democratic approaches 'which require the problematisation of politically controversial questions'.<sup>41</sup>

On some occasions the European system at the EU as well as lower levels has made possible such wide debates over regulatory questions such as the REACH chemicals directive. The major lack of transparency apparent so far for planned workings of the TTIP's institutions seems to offer little or no possibilities for this.<sup>42</sup>

There also appears to be no indication so far that the European Parliament will have any significant oversight role on those institutions, to judge from a recent report for the Parliament.<sup>43</sup>

## 7. The outcome for regulations from the TTIP

Looking closely at the official documents on the design and functioning of the TTIP, and considering the broader context including the historical background of previous regulation and exchange of ideas across the Atlantic, as well as considering the potential link with domestic EU regulation as we have done above, some conclusions can be drawn about the likely impact of the TTIP on regulations and their effects. They all appear to point in the same direction.

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<sup>40</sup> In the new Commission, responsibility for some key regulatory areas are transferred for example into DG Enterprise, and out of DG Environment and the DG responsible for health, and there appears to be a major downgrading of climate change. More specifically, the responsibility for regulation of pharmaceuticals is moved from the directorate-general dealing with health to the internal market and industry (enterprise) DG; for dealing with the European Chemicals Agency (which gives scientific advice) from the environment DG to the same DG; and climate change is moved from being the sole responsibility of one commissioner to putting it together with energy under a single commissioner who is now in turn to be under a vice-president called simply 'Vice-President for Energy Union'. There is no explicit mention in either of their mandates of the EU objective of diminishing greenhouse gases, or any reference to the climate summit in Paris in 2015. <http://ec.europa.eu/about/juncker-commission>, accessed 12/9/14.

<sup>41</sup> M. Bartl and E. Fahey, 'A Postnational Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)'.

<sup>42</sup> A. Alemanno, *The Transatlantic Trade and Investment Partnership (TTIP) and Parliamentary Regulatory Cooperation*.

<sup>43</sup> See note 42.

With the single *formal* priority of increasing transatlantic trade and investment, it seems likely there would be considerable pressure on regulators to recognise regulations from the other side, notably through mutual recognition even when there may be different levels of regulations.

The focus in the TTIP on the costs of regulations in order to increase trade and not on the often much greater benefits is likely to lead in the same direction.

With a likely major influence of the stakeholder with the greatest resources, large business, on the work of the TTIP, a similar impetus can be anticipated.

The seemingly almost complete lack of transparency in the workings of the TTIP combined with the absence of any significant role identified so far for either the broad public or the European Parliament (and a fortiori the national parliaments), again points the same way.

The directions of regulatory reform at the EU level may link with the workings of the TTIP so that they reinforce each other, most likely in a deregulatory direction.

We have not discussed the Investor-State Dispute Settlement system that is also planned for the TTIP, which it has been argued would have a “regulatory chill” effect. Even if ISDS were to be dropped from the agreement in the end due to opposition, the issues addressed here would remain.

With the massive benefits that result from many regulations as discussed at the beginning of this paper, whether the potentially very large loss of control over regulation is worth the cup of coffee per week per person in economic gains forecast for the TTIP, is a judgement people and groups need to make for themselves.

Ronan O’Brien  
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## **Annex 1. Priority NTMs for a transatlantic agreement in Ecorys study, Annex IX (a selection)**

*Note:* The Ecorys tables were done from a business perspective. The selection here from the larger list is based on items that may differ significantly in level of regulation across the Atlantic, or are otherwise of interest for the discussion here. ‘EU to US’ means that they are of concern to suppliers from the EU when exporting to the US, and vice versa for ‘US to EU’.

### ***Automotives***

<b>EU to US</b>
Taxation of cars with high fuel consumption (CAFE = Corporate Average Fuel Economy)
Gas Guzzler Tax
Requirements to Reduce Idling Emissions from New and In-Use Trucks, Beginning in 2008
<b>US to EU</b>
REACH regulation
Safety and health measures
WEEE Directive (2002/96/EC) [Waste Electrical and Electronic Directive]

### ***Chemicals***

<b>EU to US</b>
Classification and labelling requirements for chemical products
Restrictions on use of specific chemicals
Imported pesticides/biocides must be notified to the EPA [Environmental Protection Agency]
<b>US to EU</b>
Divergence in risk assessment requirements between REACH and TSCA
RoHS and restrictions on hazardous substances [RoHS: ‘Restriction of the use of certain hazardous substances in electrical and electronic equipment’]
Product Labelling requirements (including eco-labelling)
Testing requirements / Risk assessment for plant protection and biocidal products
Restrictions on use of dangerous substances in consumer products (Dangerous Substances Directive, 76/769/EEC)
Registration requirements for biocidal products that contain active substances
EU Intellectual property rights which are less broad than the US ones
Testing requirements / Risk assessment for pesticides / biocidal products and pesticides
REACH risk assessment requirements which differ from those applied in US
Candidate list of substances of very high concern in REACH

***Food & Beverages***

<b>EU to US</b>
Certification of agricultural products as organic
High and different level of SPS measures [SPS: Sanitary and Phytosanitary Standards*]
<b>US to EU</b>
EU product standards (SPS) which differ (are more strict) from international standards
EU labeling requirement laws
Traceability and labeling of biotechnology foods
Maximum limits on mycotoxins for a variety of foodstuffs (including cereals, fruit and nuts)
Requirements on US products to classify them as “organic”
Protection of geographical indicators (GIs) of wine and spirits
REACH regulations
High and different level of SPS measures

***Pharmaceuticals***

<b>EU to US</b>
Restrictions or bans on use of specific chemicals
Prior authorization for sensitive product categories
<b>US to EU</b>
International reference pricing
Therapeutic reference pricing

***Insurance services***

<b>EU to US</b>
Collateral requirements (or especially US reinsurance services)
Federal excise tax for insurers (cascading tax)
<b>US to EU</b>
Regulatory capital requirements in reinsurance
The proposed EC legislation known as Solvency II

***Transportation services***

<b>EU to US</b>
Environmental regulations e.g. Clean Air Act
Restrictions on the use of foreign temporary workers
<b>US to EU</b>
Restrictions on the use of foreign temporary workers