

TTIP regulatory cooperation in the financial sector

The EC proposal of 2 October 2013 *

1.1 Introduction

The EC wants to have a binding far reaching agreement with the US to come to a joint regulatory regime for the financial sector – which is convenient for the financial industry - with the intention to impose EU-US standards on the rest of the world.

As the EC explains: “Regulatory cooperation agreed in TTIP would have implications for domestic regulation” in EU (member states inclusive) and the US. In other words, no less that the democratic right to regulate finance – still a lot needs to be done – is at stake.

From well-informed sources, the EC made the following proposal during the negotiation session specific addressing financial services on 27 November 2013. At that session, the US continued to indicate that it is not willing to go along with the proposal. Since the EC insists that TTIP “must include financial regulation”, it will remain on the agenda. Also, financial services are also being discussed in the trade chapters where an attack on regulation is also being negotiated.

1.2 The EC’s aim in TTIP

- ☐ Agree on a framework for stronger regulatory cooperation
- ☐ Ensure consistently implemented international standards and close supervisory cooperation.
- ☐ Seek to establish “regulatory consistency” based on international standards: would enable the EU and US to rely on each other’s rules
- ☐ Provide the framework of future cooperation for financial regulators, who would “respect domestic regulatory systems” and objectives and concerns, and seek to water down EU or US regulatory standards. It would “simply provide a platform for discussion and problem solving”: develop mechanisms for ironing out difference in both regimes, which undermine the objectives of the legislation and regulators.

1.3 The legal implications of the TTIP regulatory cooperation framework, and their impact

- ☐ The TTIP commitment on regulatory cooperation, taken in trade negotiations, would be legally binding for all EU institutions when enacting legislative acts, incl. for member states: it is a legal obligation to cooperate.
- ☐ EU or national legislative acts based on the regulatory commitments cannot (as a rule) be challenged before EU courts by market operators.
- ☐ The TTIP principles of regulatory cooperation would be binding on the EU: they would need to be followed when developing implementing rules of regulation
- ☐ It would provide the legal basis for possibility to enhance supervisory cooperation, incl. exchange of financial data necessary for supervision of financial institutions and enforcement of regulation, and allowing reciprocal transmission of data through proper channels.
- ☐ Exemptions from the regulatory commitments in exceptional circumstances, in a way that least affects financial or economic interests of the other party.

These legal obligations would affect the EU regulatory decision-making and supervision as follows:

- ☐ Whenever the EC proposes new legislation with a potential significant impact on transatlantic trade in financial services, the Commission will conduct consultations with the US in advance* of presenting a regulatory proposal to the European Parliament and the Council of Ministers.
- ☐ After the Parliament and Council agreed on an EU law, the regulatory cooperation principles will be applied for the implementation of the law.

1.4 The EC's aspired outcome

The outcome of regulatory cooperation would be that EU or/and US rules which affect operators from both jurisdictions “reflect” the principle of financial stability, financial efficiency and mutual reliance, and be implemented through close supervisory cooperation.

The EC's aspired impact and goal of the regulatory framework are:

- ☐ Regulatory coherence for deeply connected markets and avoid risky regulatory arbitrage and financial instability;
- ☐ Strengthening trust between EU and US regulators;
- ☐ Avoid regulatory barriers that can unnecessarily damage market functioning;
- ☐ Better management of prudential cross-border risks;
- ☐ Avoidance of regulatory complexity;
- ☐ More effective enforcement of financial regulations;
- ☐ Promote consistent high quality global regulatory standards, consistency of global regulatory standards given the EU and US leadership roles in shaping and implementing international standards.

1.5 What will be done?

The EU will conduct consultations on consistency (or inter-operability) of the implementing rules, nl.:

- ☐ Exchange information: The consultation process among regulators for future rules/legislation.
- ☐ Initiate the equivalence process: conduct a process leading to mutual reliance/equivalence/substituted compliance.
- ☐ Conduct the process based on the principles e.g. outcomes-based assessment of rules and effective enforcement.

A Joint EU/US Financial Regulatory Forum will be set up and operated by EU and US regulators, supervisors and independent senior supervisory experts (see below: final paragraph). In this Forum, the EU or the US may raise matters to be resolved, of:

- ☐ No effective enforcement of own legislation;
- ☐ No adequate supervisory cooperation (incl. necessary data sharing);
- ☐ Lowering of standards of prudential regulation through weakening laws.

1.6 What regulations would be covered - the scope of regulator cooperation

- ☐ The regulations on the G-20 regulatory agenda;
- ☐ New legislation which may not be based on international standards when no such international standards exist;
- ☐ EU and US regulation, and proposals thereto, that affect operators of both EU and US;
- ☐ All areas of financial regulation unless agreed otherwise.

As a result, all EU and US laws and implementing rules should reflect the principles of financial stability, financial efficiency, mutual reliance and avoidance of extra-territoriality, implemented through timely consultations and close supervisor cooperation.

1.7 The detailed principles of regulatory cooperation to “strengthen stability”

- ☐ Endeavour to ensure timely and consistent implementation and application of internationally agreed standards for regulation and supervision of financial services, fighting tax evasion and tax avoidance.

- ☐ Consultations in advance of proposed financial regulation and when taking prudential measures which significantly affect financial services providers/market operators from both jurisdictions: with a view to ensuring the interoperability of future regulation and measures.
- ☐ Regulatory frameworks should contain provisions for mutual reliance/equivalence/substituted compliance with the regulatory and supervisory framework of the other party.
- ☐ Commit to rely on the rules of the other party, once assessed as being equivalent in outcome.
- ☐ Provide effective enforcement of prudential rules, and cooperation between regulators, for implementing internationally agreed standards or other prudential rules on which both parties rely.
- ☐ Avoid introducing rules unduly affecting the jurisdiction of the other party, unless overriding prudential reason, while respecting the rules of the prudential carve out.
- ☐ Jointly examine any measures that have the effect of creating barriers to trade in financial services with a view of eliminating those effects* while being allowed to take prudential measures in compliance of the prudential carve out, not being disproportional and not damaging financial stability.
- ☐ Financial services regulators have the power to apply the above mentioned cooperation.

1.8 The process of mutual reliance/equivalence/substituted compliance would contain the following elements:

- ☐ Agree on mutual compliance of each other's rules after the equivalence/substituted compliance test(s) have been positive.
- ☐ Agree to apply outcome-based mutual reliance assessments/tests, i.e. to achieve the same results while not having identical rules.
- ☐ Agree to cooperate and consult each other when conducting the assessment, and allow for mutual acceptable results.
- ☐ Agree to allow for comments before reaching a final conclusion and specify the conditions by which the assessment could be reconsidered.
- ☐ Agree on detailed procedural guidelines to determine mutual reliance/equivalence/substituted compliance for each specific area of financial regulation.
- ☐ Parties are allowed to review the reliance on the rules of the other party in accordance with the prudential carve out and when the following circumstances occur:
 - ☐ No effective enforcement of own legislation
 - ☐ No adequate supervisory cooperation (incl. necessary data sharing)
 - ☐ Lowering of standards of prudential regulation (through weakening laws)
 - ☐ The review would need to be done according to the following principles:
 - ☐ Advanced notification
 - ☐ Joint review within the process of mediation/settlement of disagreements (as stipulated in TTIP text on financial regulatory cooperation: see below point 8)
- ☐ Aiming at final and mutually agreeable solutions which can be reviewed in new circumstances.
- ☐ Finding a solution when problems occur from reviewing the reliance, should be done in a least harmful way for the financial and economic interests of the other party.

1.9 Mediation/settlements of disagreements

TTIP would establish a binding process of technical mediation for the settlement of disagreements:

- ☐ Used in case of review of mutual reliance/equivalence/substituted compliance;
- ☐ Used in cases of presumed breaches of the regulatory commitments;
- ☐ With the commitment to act in good faith to resolve the disagreements;
- ☐ With the involvement of regulators and supervisors as well as independent senior supervisory experts in the process.

1.10 A Joint Financial Regulatory Forum

A Joint Financial Regulatory Forum would be established through the TTIP agreement that would (see also above, point 4):

- ☐ Be in charge of regulator cooperation between the parties;
- ☐ Have governance rules of the Forum that would be agreed within the framework of the TTIP;
- ☐ Be chaired by high level representatives of the regulatory authority in charge of financial services policy of each party;
- ☐ Meet annually;
- ☐ Be composed by working groups* of regulators and supervisors of each party;
- ☐ Receive annual reports from Working groups conduct periodic review and consultations and report annually to the Forum

* Note:

This document provides the basics and technical details of what the EC proposed to the US, transcribed by Myriam Vander Stichele (SOMO) based on well-informed sources. The introduction and the underlining in this document is mine. More information can be found on: <http://somo.nl/news-en/free-trade-agreement-will-give-banks-free-rein><http://somo.nl/news-en/free-trade-agreement-will-give-banks-free-rein>. For your comments, contact: <mailto:mvanderstichele@somo.nl>.