

The Consumer Voice in Europe

THE INCOMPATIBLE CHEMISTRY BETWEEN THE EU AND THE US

BEUC Position on Chemicals in TTIP



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TTIP and Chemicals: Why It Matters?

Harmful chemicals are found in many products consumers come in very close, frequent and prolonged contact with. Examples are clothes, kitchen tools, toys, cosmetics, and the list goes on. The EU has put in place the World's most ambitious regime to control chemical risks and reduce exposure to dangerous substances. However, the nature and scope of the transatlantic trade deal could potentially weaken this protective safety net. Therefore, BEUC and its members closely follow the negotiations to ensure that TTIP under no circumstance will act to delay or undermine progress on reducing consumer exposure to toxic chemicals.

Recommendations

Ideally, a transatlantic agreement could offer opportunities to address shortcomings in current consumer protection frameworks and boost implementation of stronger chemicals laws on both sides of the Atlantic. For the ongoing TTIP negotiations to deliver reduced consumer exposure to harmful chemicals, BEUC calls on negotiators to conclude an agreement which:

- places the health of people and the environment at centre stage;
- maintains the highest safety and protection standards;
- encourages management of chemicals based on hazard and promotes substitution of harmful chemicals with safer alternatives
- embraces precaution as the guiding principle to authorise regulatory action in the face of scientific uncertainty;
- allows parties to adopt new initiatives aiming at improved safety;
- enables robust regulation of new and emerging health risk;
- improves risk communication on chemicals and facilitates exchange of information on dangerous substances in consumer products; and
- extends the legitimate right of consumers to be informed about the presence of harmful chemicals in products.

Better transatlantic cooperation on chemicals management should aim to foster mutual learning and exchange of best practices. However, any cooperative agreement needs to rest on a voluntary basis to ensure that a bilateral dialogue between regulators does not compromise or delay implementation of ambitious measures to protect consumer health and safety.

In parallel, a transatlantic cooperation mechanism should be designed to ensure stakeholder involvement and allow for public scrutiny. But accountability provisions need to be accompanied by appropriate safeguards to prevent regulatory chill and increased administrative burdens.

We emphasise that vague verbal reassurances by the negotiating parties are not enough: trust will only grow from transparency, effective legal safeguards in negotiating texts and improved communication. We in consequence insist on a bilateral commitment to discussions that are truly transparent and open to public input.

Better transatlantic cooperation on chemicals should in short aim to improve the well-being of citizens on both sides of the Atlantic. Reduction of non-tariff barriers should therefore only be pursued provided consumer protection and information rights remain untouched.

Regrettably, the negotiating parties have so far failed to deliver a bold, ambitious vision for transatlantic cooperation on chemicals that would bring real benefits to consumers and the environment. We see on the contrary a risk that current TTIP proposals would delay or thwart progress on reducing consumer exposure to toxic chemicals.

BEUC in consequence urges the negotiating parties to reconsider their approach to the chemicals sector. We emphasise that the health of people and the environment – rather than primarily economic considerations – must be at the heart of possible transatlantic free-trade agreement. Should the negotiating parties fail to reconsider their approach, we insist that chemicals are excluded from the scope of TTIP's sectoral *and* horizontal regulatory cooperation chapters to ensure that the ambitions and fundamental commitments of EU chemicals policy are preserved.

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1. A Consumer Vision for Better Transatlantic Cooperation on Chemicals

As consumers, we are constantly exposed to a cocktail of harmful chemicals found in almost every product we encounter in our daily lives. We use skin creams with parabens, computers with brominated flame retardants and hair dyes with resorcinol. Plastic containers and other food contact materials contain bisphenol A, while shower curtains incorporate phthalates. Children's toys are stuffed with nonylphenol, polycyclic aromatic hydrocarbons and plenty of other nasty substances. Chemical pollutants are further widespread in the air we breathe, the food we eat and the water we drink.

The long-term impact of this ubiquitous exposure is not fully understood. Scientists however increasingly link certain synthetic chemicals to a range of chronic and severe diseases such as obesity, cardiovascular diseases, cancer, diabetes and infertility. In the EU, the cost alone of exposure to endocrine disrupting chemicals (EDCs) – a diverse group of substances which can disrupt the hormonal system – has for example been estimated at euros 157 billion or 1.23 percent of gross domestic product – per year.¹

While important advances in tackling harmful chemicals have been made in recent years, not least with the 2006 enactment of the European Union Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation, progress on reducing consumer exposure remains frustratingly slow. The comparative product tests undertaken by BEUC's members thus frequently detect unwanted chemicals in products consumers come in very close, regular and prolonged contact with, such as textiles, shoes, toys, cosmetics, and the list goes on. Regrettably, much of the consumer exposure could be avoided as these chemicals are found in some but not in all tested products. A renewed drive to stem the growing toxics exposure is urgently needed if we want to achieve the vision for a non-toxic environment outlined in the EU's 7th Environmental Action Programme.²

Progress on reducing consumer exposure to dangerous chemicals remains frustratingly slow

Against this background, BEUC believes the ongoing negotiations over a transatlantic free-trade agreement, TTIP, in theory could offer unique opportunities to boost implementation of stronger chemicals protections on both sides of the Atlantic. A transatlantic agreement on substitution and restriction of chemicals of concern should in our view be a primary goal of these negotiations. An ideal outcome would therefore be an agreement which puts the health of people and the environment at centre stage; maintains the highest safety standards and promotes substitution of harmful chemicals with safer alternatives; embraces precaution as the guiding principle to authorise regulatory action and encourages management of chemicals based on hazard; allows parties to adopt new initiatives aimed at improved safety; enables robust regulation of new and emerging health risk; and extends the legitimate right of consumers to be informed about the presence of harmful chemicals in products.

¹ This estimate includes *direct* costs such as hospital stays, physicians' services, nursing-home care and other medical costs as well as *indirect* costs resulting from lost worker productivity, early death and disability, and loss of intellectual abilities caused by prenatal exposure. This estimate however does not cover *intangible* cost such as a loss of life-quality.

² <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4399291/>
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013D1386>

An effective cooperation mechanism need not be compulsory to achieve its goals: rather a voluntary system is key to ensure that a bilateral dialogue between regulators does not compromise or delay implementation of ambitious provisions to protect consumer health and safety.

Better transatlantic cooperation should aim to foster mutual learning and exchange of best practice in chemicals management. Europe and the United States are home to the world's leading epidemiologists, toxicologists and endocrinologists and improved exchange of scientific experiences would greatly facilitate the identification and elimination of chemical risks. Priority should likewise be given to establishing a robust process for systematic phase-out of chemicals with SVHC³ properties in consumer products. As TTIP aims to enable a broader range of consumer goods to circulate in a wider market, the EU and the United States should also look to develop a joint strategy for quickly and efficiently exchanging information on dangerous

substances in consumer products, taking inspiration from the EU RAPEX system. Methods for communicating this information to the final consumer in a timely manner should also be on the TTIP agenda.

We insist that the basis for better transatlantic cooperation needs to be voluntary.⁴ An effective cooperation mechanism need not be compulsory to achieve its goals: rather a voluntary system is key to ensure that a bilateral dialogue between regulators does not compromise or delay implementation of ambitious provisions to protect consumer health and safety. While a transatlantic cooperation mechanism moreover should ensure stakeholder involvement and allow for public scrutiny, it needs to be accompanied by safeguards to prevent regulatory chill and increased administrative burdens. Better transatlantic cooperation on chemicals should in short aim to improve the well-being of citizens on both sides of the Atlantic, while reduction of non-tariff barriers should only be pursued provided consumer protections and information rights remain untouched.

2. Lack of Transparency in TTIP Raises Concerns for Consumer Safety

Will TTIP help deliver improved consumer protection against chemical risks? As negotiations stand, no! The European Commission has released a position paper⁵ broadly outlining a sectoral annex on 'chemicals' under TTIP. When read in combination with the Commission's position on a horizontal regulatory coherence

BEUC is concerned that 'enhanced cooperation' in the areas identified by the Commission could trigger future regulatory changes that would weaken existing consumer protection standards in the EU.

³ SVHC, short for Substances of Very High Concern, include chemicals identified as carcinogenic, mutagenic, or toxic for reproduction (CMR substances), persistent, bioaccumulative and toxic (PBT) or others of equivalent concern, such as EDCs and sensitizers.

⁴ BEUC, Optimising Regulatory Coherence in TTIP: Need to Focus on Regulators, not Regulations, October 2015. <http://www.beuc.eu/publications/beuc-x-2015-107-lau-regulatory-cooperation-in-ttip.pdf>

⁵ European Commission, EU position on chemicals, May 2014. http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

chapter,⁶ it becomes disappointingly clear that the EU's vision for the chemicals sector does not foresee a strengthening of consumer protections against toxic chemicals. The United States Government meanwhile ardently refuses to subject any of its TTIP proposals to public scrutiny. This lack of transparency is exacerbated by the vague nature of public statements on regulatory cooperation released by the U.S. Trade Representative (USTR), which employ ambiguous, ill-defined catch phrases such as transparency, evidence-based analysis, and whole-of-government coordination.⁷ In fact, the only elements of the U.S. position widely disclosed are steadfast opposition to stronger, more ambitious EU chemicals regulations and recurrent claims – echoed by industry⁸ – that past EU measures targeting harmful chemicals constitute major barriers to trade.⁹

Equally, we see a risk that TTIP would act to delay or thwart the development of ambitious EU regulations to address endocrine disrupting chemicals (EDCs), nanomaterials or other emerging health risks.

The European Commission has publicly and repeatedly committed to ensure that TTIP will not undermine or delay implementation of EU chemicals laws.¹⁰ Despite these commitments, BEUC nonetheless worries that TTIP ultimately will impact consumer safety and environmental protection negatively. We are in particular concerned that 'enhanced cooperation' in the areas identified by the Commission¹¹ could trigger future regulatory changes that would weaken existing consumer protection

standards in the EU. Equally, we see a risk that TTIP would act to delay – or worse still thwart – the development of ambitious EU regulations to address endocrine disrupting chemicals, nanomaterials or other emerging health risks. TTIP has already had a 'pre-cooling' effect on European initiatives on EDCs;¹² and we expect that with the conclusion of a formal agreement, this regulatory freeze will only intensify. We detail these concerns over the pages to follow. As neither side has released final textual proposals, these concerns are necessarily indicative rather than exhaustive. We therefore insist on a bilateral commitment to discussions that are truly transparent and open to public input.

3. The Widening Transatlantic Rift in Chemicals Management

Government intervention to control chemical risks is invariably confounded by a lack of reliable toxicity and exposure information on the vast majority of chemical substances in commercial use. Against this background, the EU in 2006 adopted legislation setting up a

⁶ European Commission, TTIP – Initial Provisions for CHAPTER [] - Regulatory Cooperation, 4 May 2015. http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf

⁷ See e.g. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/March/US-Objectives-US-Benefits-In-the-TTIP-a-Detailed-View>

⁸ See e.g. Joseph DiGangi, REACH and the Long Arm of the Chemical Industry, September 2004. <http://multinationalmonitor.org/mm2004/09012004/september04corp3.html>

⁹ The Office of the United States Trade Representative (USTR). 2014 Report on Technical Barriers to Trade. April 2014. <http://www.ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>

¹⁰ See e.g. European Commission, MEMO: Chemicals in TTIP – Publication of EU non-papers "Draft outline for provisions on chemicals" and "How to put ideas for cooperation under TTIP into practice – a few examples", 21 November 2014. http://trade.ec.europa.eu/doclib/docs/2014/november/tradoc_152914.pdf

¹¹ The Commission has identified four main areas in which convergence may be sought to increase regulatory efficiencies and reduce costs for industry: i) cooperation in prioritising chemicals for assessment and assessment methodologies; ii) promoting alignment in classification and labelling of chemicals; iii) cooperation on new and emerging issues; and iv) enhanced information sharing and protection of confidential business information. http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

¹² Stéphane Horel and Corporate Europe Observatory, A Toxic Affair: How the Chemical Lobby Blocked Action on Hormone Disrupting Chemicals, May 2015. http://corporateeurope.org/sites/default/files/toxic_lobby_edc.pdf

new system for the registration, evaluation, authorisation and restriction of chemicals, REACH. One of the core objectives of the Regulation is thus to create pressure on companies to develop better information on their chemicals.¹³ The ambitious new EU chemicals regime is in large measure a reaction to three decades of – negative – experience in the United States under the Toxic Substances Control Act (TSCA). REACH adopts several techniques that reverse the approach to chemicals management taken under TSCA, the most important of which are prescribing precaution in the face of scientific uncertainty and shifting the burden of proof from regulators to industry.

3.1. From Regulating Chemicals with Caution to Precaution in Approving Them

Since the Maastricht Treaty, the 'precautionary principle'¹⁴ has been enshrined in EU environmental law as the basis for sound risk management. REACH in consequence demands that risk managers should act to protect the public where a chemical is suspected to presents an unacceptable risk to health even if scientific uncertainty remains. Where substances are shown to be of very high concern on the basis of their *intrinsic* hazards,¹⁵ REACH stipulates that each specific use of these chemicals requires specific authorisation. All other uses are prohibited, without a need to actually prove exposure to the public or to the environment. In doing so, the EU has adopted a hazard-based approach to identification and authorisation of substances of very high concern.

U.S. chemicals laws in contrast mandates regulatory action only, where a chemical is found to present an 'unreasonable' risk of injury to health and the environment. 'Unreasonable' here describes an undefined, nonzero level of risk determined on an *ad hoc* basis by balancing both health considerations and non-health concerns such as technology, feasibility, and cost.¹⁶ Although the unreasonable risk standard does not demand definitive proof of harm, it does require 'substantial evidence' that a risk exists. Reliance on the 'unreasonable risk' standard and the demand for substantial evidence of harm has in effect created an unworkable system of toxic substance control: under TSCA, the U.S. has thus failed to ban a single chemical since 1991. That is, where TSCA urges caution in regulating chemicals, REACH urges precaution in approving them.¹⁷

3.2. From 'No Data, No Problem' to 'No Data, No Market'

A second fundamental difference between TSCA and REACH lies with who bears responsibility for determining a chemical's safety. Under TSCA, the burden of proof falls squarely on the regulator (and thus, on the public) rather than on the commercial interests seeking to bring a chemical to market. While the Act's preamble states that responsibility for generating information on chemicals should lie with the producer, the opposite has been the case in practice. TSCA directs the U.S. Environmental Protection Agency (EPA) to screen all chemical substances on the market to ensure that they do not present an unreasonable risk to human health or the environment. No substance however needs to

¹³ European Commission, REACH in brief, February 2007.

¹⁴ One widely accepted version of the precautionary principle, the 1992 Rio Declaration, reads: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." European Commission, Communication from the Commission on the precautionary principle, February 2000.
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN>

¹⁵ This includes CMR and PBT substances or others of equivalent concern, such as EDCs and sensitizers.

¹⁶ That is, in order to justify a decision to limit use of a chemical, U.S. regulators thus must demonstrate not only the scientifically established risks of a chemical, but also that the chemical's public health risks outweigh its social benefits, and that the selected regulatory approach to preventing harm is the 'least burdensome' in comparison with alternative approaches. See John S. Applegate. 1991. "The Perils of Unreasonable Risk: Information, Regulatory Policy, and Toxic Substances Control."
<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1715&context=facpub>

¹⁷ John S. Applegate. 2008. "Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform."
<http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1441&context=facpub>

be tested unless there is some prior evidence that it presents a potential risk; yet, this provision creates a regulatory 'Catch 22': before the EPA can ask a producer to provide data to support its risk assessment, the agency needs to show that the chemical presents a risk. EPA in other words needs toxicity and exposure data that producers are not obligated to provide unless EPA can first show that a risk exists. As a result, EPA has required testing of fewer than two hundred chemicals over the past four decades. In a 2005 review, the U.S. Government Accountability Office concluded that "EPA does not routinely assess existing chemicals, has limited information on their health and environmental risks, and has issued few regulations controlling such chemicals."¹⁸

REACH takes the opposite track. The general principle embodied in the Regulation is that chemical risks should be controlled, eliminated, mitigated, or justified by their creators. Rather than assume that chemicals are safe until regulators can prove otherwise, manufacturers, importers and users of chemicals are required to provide evidence necessary and sufficient to prove that their substances are safe *before* they can be introduced on the European market.¹⁹ If a substance is of very high concern, proof is further required that it either can be used safely for a specific use or that the benefits of continued use outweigh the cost for society. REACH thus demands that better information be generated and that, in the absence of such information, chemicals be highly restricted or prohibited outright. In short, REACH moves the status quo from 'no data, no problem' to 'no data, no market'.

4. TTIP Should Not Compromise the Right to Regulate Toxic Chemicals

Given the dismal record of toxic substance control in the United States, BEUC cautions against a transatlantic free-trade agreement that would seek to align EU and U.S. chemicals management frameworks. The regulatory 'philosophies' informing chemicals legislation on either side of the Atlantic are too different with regard to fundamental principles – and convergence would from a European perspective inevitably come at the expense of consumer safety and environmental protection. The basis for a chemicals annex to TTIP therefore has to be that both sides maintain their capacity to regulate: policy-makers on both sides of the Atlantic must retain the right to define the level of protection from hazardous chemicals they and their respective publics find appropriate; this should also include the right to adopt ambitious environmental, health and safety measures beyond the regulator determined 'appropriate level of protection' allowed in the WTO SPS Agreement.

TTIP should under no circumstance adversely affect the scope and pace of REACH implementation – nor that of other chemicals related EU laws. Neither should TTIP delay or impede needed action on harmful chemicals, such as endocrine disruptors.

BEUC takes note of the Commission's conclusion that "neither full harmonization nor mutual recognition is feasible in the area of chemicals."²⁰ We welcome this commitment;

¹⁸ Government Accountability Office, Chemical Regulation: Options Exist to Improve EPA's Ability to Assess Health Risks and Manage Its Chemical Review Program, June 2005.
<http://www.gao.gov/assets/250/246667.pdf>

¹⁹ European Commission, REACH in brief, February 2007.

²⁰ European Commission, EU position on chemicals, May 2014.
http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

yet we urge the Commission to resist pressure, whether from U.S. negotiators or industry, to conclude a TTIP agreement that could undermine existing EU chemicals safety standards. TTIP should under no circumstance adversely affect the scope and pace of REACH implementation – nor that of other chemicals related EU laws. Neither should TTIP delay or impede needed action on harmful chemicals, such as endocrine disruptors. Beyond 2018, EU chemicals policy aims to achieve a non-toxic environment that is conducive to public health, innovation and the development of sustainable substitutes. TTIP should neither hinder nor lower these ambitions. BEUC thus calls on the Commission to preserve the fundamental commitments of EU chemicals policy, including adherence to the precautionary principle, under a possible transatlantic free-trade agreement.

5. Exclude Chemicals from the Scope of TTIP's Horizontal Chapter

BEUC insists on strict limits to regulatory cooperation.²¹ Regulatory cooperation should in our view be restricted to areas where the EU and the U.S. offer similar levels of protection for consumers. For the chemicals area, this condition is not met. We believe that an improved dialogue between agencies and authorities does not require a complex and costly structure. The existing Statement of Intent between the U.S. EPA and the European chemicals agency, ECHA,²² illustrates that a complex institutional framework is not required for collaboration between EU and U.S. regulatory agencies. We moreover take note of the Commission's commitment to "ensure that the approaches and solutions outlined [for the chemicals sector] are not counteracted by other parts of TTIP."²³ We welcome this commitment and in consequence call on the Commission to exclude chemicals from the scope of TTIP's horizontal regulatory cooperation chapter.

BEUC takes note of the Commission's commitment to "ensure that the approaches and solutions outlined [for the chemicals sector] are not counteracted by other parts of TTIP."

Should chemicals nonetheless remain within the scope of TTIP's regulatory chapter, it is paramount that the EU guarantees that the specific provisions agreed for chemicals would prevail, in case of conflict, over the provisions in other parts of TTIP. In this context, BEUC finds that the proposed creation of an overarching, regulatory cooperation body, with or without a subsidiary body for the chemical sector,²⁴ poses significant risks of slowing

law-making processes, increasing demands on regulators at both European and Member State levels, and undermining democracy in a critical area of public safety. In particular, and as a result of the sharp differences in EU and U.S. approaches to chemicals management, BEUC worries that regulatory cooperation aimed at avoiding 'trade irritants' will delay implementation of existing laws and weaken the ambition of new laws targeting emerging risks.

²¹ BEUC, Optimising Regulatory Coherence in TTIP: Need to Focus on Regulators, Not Regulations, October 2015. <http://www.beuc.eu/publications/beuc-x-2015-107 - lau-regulatory-cooperation-in-ttip.pdf>

²² Signed in December 2010, the Statement of Intent seeks to strengthen the scientific dialogue between the EU and the U.S. and to enhance cooperation on technical matters and other issues of common interest including chemical hazards and emerging risks of chemical substances, risk management tools, scientific collaboration and information exchange, including best practice on how to more efficiently address chemicals of concern. http://echa.europa.eu/documents/10162/13606/soi_echa_us_epa_20101220_en.pdf

²³ European Commission, EU position on chemicals, May 2014. http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

²⁴ European Commission, Outline for provision on chemicals, September 2014. http://trade.ec.europa.eu/doclib/docs/2014/november/tradoc_152912.pdf

TTIP will be a living agreement, and although the Commission at present has ruled out harmonisation for the chemicals sector, these provisions suggest that it could be introduced at a later stage – and certainly for regulation of emerging risks. The focus on reducing non-tariff barriers thus in short raises concerns that TTIP will be used as a backdoor mechanism to reduce protections. We again urge the Commission to respect the recommendations of the European Parliament, as set out in the resolution adopted on 8 July 2015. The European Parliament notably demanded that the horizontal chapter on regulatory cooperation should “not affect standards that have yet to be set in areas where the legislation or the standards are very different in the U.S. as compared with the EU, such as, for example, the implementation of 12 existing (framework) legislation (e.g. REACH), [...] or future definitions affecting the level of protection (e.g. endocrine disrupting chemicals)”.²⁵

In parallel, while we agree that there should be accountability towards stakeholders, accountability provisions should be accompanied by effective safeguards to prevent delays through abuse of commenting opportunities. Specifically, the provisions designed to involve stakeholders should not serve to introduce a sort of notice and comment system as exists in the U.S. A major reason behind the virtual standstill of U.S. chemical control processes is thus the continuous barrage of letters, meetings, follow-up memoranda, formal and post-rule comments, petitions for reconsideration, and notices of appeal that serve as an industry strategy to exhaust federal agencies.²⁶

We moreover emphasise that consultation processes, whether under the auspice of a regulatory cooperation body or a ‘chemicals working group’ as outlined by the Commission,²⁷ need to be inclusive and representative: these regulatory bodies should not establish an institutional framework for greater industry and foreign government influence under the guise of regulatory cooperation. Stakeholders representing businesses have more resources than smaller stakeholders such as NGOs to optimise their input and as a result to influence regulators. Should chemicals remain subject to regulatory cooperation under TTIP, it is in short essential to establish procedures that will prevent regulatory capture by corporate interests.

²⁵ European Parliament resolution of 8 July 2015 containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)) (Point 2, c i).

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20150708+SIT+DOC+PDF+V0//EN&language=EN>

²⁶ Wendy E. Wager, Administrative Law, Filter Failure, and Information Capture, April 2010.

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1463&context=dli>

²⁷ European Commission, Outline for provision on chemicals, September 2014.

http://trade.ec.europa.eu/doclib/docs/2014/november/tradoc_152912.pdf

6. Cooperation on Chemicals Assessment Risks Paralysis by Analysis

An enduring failure of chemicals regulation is the dearth of reliable toxicity and exposure data on the majority of chemical substances in commercial use. Better transatlantic cooperation should therefore aim to urgently close the knowledge gaps on toxic chemicals, strengthen mutual learning and improve risk communication. Priority needs in particular be given to a robust process for systematic identification and elimination of chemicals with SVHC properties in consumer products. Restriction and substitution of chemicals of concern should in short be at the heart of a transatlantic agreement on cooperation in chemicals management.

Better transatlantic cooperation should aim to urgently close the knowledge gaps on toxic chemicals, strengthen mutual learning and improve risk communication.

6.1. Risk of Significant Delay in Regulating Chemicals of Concerns

Although BEUC welcomes initiatives to address the persistent ignorance surrounding toxic chemicals, including where they intend to avoid duplications of efforts, we nonetheless remain sceptical of the Commission's proposal for enhanced cooperation in prioritising chemicals for assessment and assessment methodologies.²⁸ In our view, the TTIP provisions tabled to underpin transatlantic cooperation on drawing up lists of priority chemicals – all with the aim of efficiency gains in regulatory activity – threaten to introduce significant delay in regulating chemicals of concern. We specifically object to the proposed provisions defining legal obligations to both notify planned activities and respond to comments expressed by the other side.²⁹ Consultation obligations, especially if linked to requirements for feedback within set deadlines, will delay risk assessments further – or could even threaten to reduce the number of chemicals undergoing risk assessment.

According to the Commission,³⁰ a consultation requirement under TTIP should respect “the deadlines foreseen under REACH and CLP, and therefore would not lead to any delays.” While we appreciate this commitment, we do not share the Commission's assessment. A compulsory cooperation mechanism will inevitably increase administrative burdens for EU and Member State authorities, especially where views on risk management options diverge. Due to the fundamental differences in how chemical risks are assessed and managed on either side of the Atlantic, the result will invariably be further delay in existing EU processes that threatens to impede the development of new, stronger chemicals regulations. We therefore again emphasise that a voluntary system will be key to ensure that a bilateral dialogue between regulators does not compromise progress on regulating chemical risks.

²⁸ European Commission, EU position on chemicals, May 2014.

http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

²⁹ European Commission, Outline for provision on chemicals, September 2014.

http://trade.ec.europa.eu/doclib/docs/2014/november/tradoc_152912.pdf

³⁰ European Commission, Discussion non-paper: How to put ideas for cooperation under TTIP into practice – a few examples, September 2014.

http://trade.ec.europa.eu/doclib/docs/2014/november/tradoc_152913.pdf

6.2. Limited Potential for Substantial Regulatory Efficiencies

Significant substantial differences exist between EU and U.S. chemicals management frameworks:³¹ several of the REACH processes, where chemicals are scrutinised and prioritised, have no direct equivalent in the U.S. In our view, these differences effectively limit the scope for TTIP to realise any worthwhile efficiencies; rather, the only foreseeable consequence of an obligation to consider and respond to comments from U.S. regulators, whether linked to strict rules about deadlines or not, would be to divert scarce resources from a progressive EU agenda on harmful chemicals.

Moreover, very little actual overlap exists between current EU and U.S. priority lists. A comparison by the Center for International Environmental Law and ClientEarth for example suggests that out of a total of 288 chemicals on the REACH Community Rolling Action Plan (CoRAP) and the TSCA Work Plan list, only 32 overlap.³² The Commission itself identifies an overlap for merely 17 substances.³³ As the EU and the U.S. are not to a noteworthy extent duplicating efforts, we in short fail to see the potential for substantial regulatory efficiencies.

6.3. Clear Risks of Lowering Ambitions of Future EU Chemicals Regulations

BEUC sees a clear risk that attempts to coordinate priorities for chemicals undergoing risk assessment would further delay existing EU processes. For over a decade, the U.S. government and the chemicals industry have claimed that EU chemicals legislation is a major barrier to trade.³⁴ In light of longstanding U.S. pressure for the EU to weaken its current more precautionary approach, we are in particular concerned that these TTIP provisions could create new avenues for U.S. policy-makers to aggressively pressure the EU to lower ambitions for consumer safety and environmental protection.

We are in particular concerned that TTIP provisions could create new avenues for U.S. policy-makers to aggressively pressure the EU to lower ambitions for consumer safety & environmental protection.

BEUC is especially alarmed that talks on minimising trade barriers could undermine needed Community action on nanomaterials and EDCs. Unlike corresponding U.S. lists, the EU CoRAP list includes several substances that are either nanomaterials or possible hormone disrupting chemicals. As a consultation mechanism would grant privileged access to U.S. entities in the review and revision process of CoRAP, we expect that TTIP will offer possibilities for the U.S. to request that the EU reconsider or revise a decision to identify and prioritise a chemical of concern.

³¹ See e.g. Center for International Environmental Law and ClientEarth, Toxic Partnership: A critique of the ACC-CEFIC proposal for trans-Atlantic cooperation on chemicals, March 2014.
http://ciel.org/Publications/ToxicPartnership_Mar2014.pdf

³² Center for International Environmental Law and ClientEarth, Toxic Partnership: A critique of the ACC-CEFIC proposal for trans-Atlantic cooperation on chemicals, March 2014.
http://ciel.org/Publications/ToxicPartnership_Mar2014.pdf

³³ European Commission, Chemicals in TTIP – What is under discussion? What will it mean for REACH? Presentation given at the REACH Information and Experience Exchange Forum (RIEF IV), Brussels, Belgium, 19 June 2015.

³⁴ See e.g. The Office of the United States Trade Representative (USTR). 2014 Report on Technical Barriers to Trade. April 2014.
<http://www.ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>

BEUC in consequence urges the Commission to establish effective safeguards to ensure that TTIP under no circumstance will impede the scope and pace of substance evaluation in the EU. BEUC further cautions against attempts to establish a joint prioritisation process as this would almost certainly sharply reduce the number of toxic chemicals that progress to the final stages of risk management.

6.4. No Need to Duplicate Policy Processes that Already Exist

Many of the activities identified in the Commission's proposal have already been completed, or unsuccessfully attempted, within the OECD's multilateral regulatory cooperation efforts on chemicals. This includes efforts to cooperate on risk assessments, with little to no success due to differences between the EU and U.S. chemical regulatory regimes. On the other hand, the existing Statement of Intent between U.S. EPA and ECHA again illustrates that TTIP is not required for collaboration between EU and U.S. regulatory agencies.

Under REACH, all processes for prioritisation, hazard identification and risk management of chemicals are carried out transparently, either through open public consultations or through stakeholder consultations. Industry and foreign governments alike are already able to participate in these EU consultations. We thus see little need for or benefit to creating a process for increased (or even separate) U.S. participation in EU processes.

BEUC in short doubts that 'enhanced' cooperation on chemicals assessment as envisioned by the Commission would result in major efficiencies. On the contrary, we expect that the provisions outlined by the Commission would create duplicative inefficiencies, with little added value to the general public or consumer safety.

7. TTIP Could Limit Progress on Regulating New and Emerging Risks

EDCs, combination and low dosage effects of chemicals, and nanomaterials represent risks to consumer safety which are currently not being addressed in a comprehensive manner. At the same time, the transition to a circular economy will create new consumer risks where recycled secondary raw materials and reused consumer products incorporate toxic legacy chemicals.³⁵ BEUC believes that better transatlantic cooperation on these and other emerging issues, especially in relation to definitions and test methodologies, is desirable. However, we question the extent to which a mandatory consultation mechanism as envisioned by the Commission³⁶ would facilitate the development of common criteria, principles and measures. EDCs, nanomaterials and mixture toxicity are yet other examples of areas where legislative processes, although disappointingly slow and not comprehensive, are underway in the EU, but equivalent action in the United States either lags far behind, or is altogether absent. Rather than accelerate – or even advance – existing EU processes, a mandatory consultation requirement in our view carries a significant risk of introducing a freeze on the development of necessary measures to tackle these largely unregulated risks.

³⁵ European Commission, Closing the loop - An EU action plan for the Circular Economy, December 2015. http://eur-lex.europa.eu/resource.html?uri=cellar:8a8ef5e8-99a0-11e5-b3b7-01aa75ed71a1.0012.02/DOC_1&format=PDF

³⁶ European Commission, EU position on chemicals, May 2014. http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

BEUC is in this context especially alarmed by the Commission's observation that cooperation in this area "has the greatest potential to avoid trade irritants in the future."³⁷ We protest the premise that measures to protect consumer safety should constitute trade 'irritants' and remind the Commission that consumer protection laws exist to benefit society as a whole. With U.S. rejection of the precautionary principle as the basis for sound risk management, we however worry that this observation should reflect an abnegation of a fundamental EU responsibility to protect consumers from EDCs or other emerging health risks. A consultation requirement under TTIP would moreover afford U.S. entities greater opportunities to intervene in EU processes on new and emerging issues under pretence of their potential to act as trade barriers. The U.S. Trade Representative (USTR) has thus for example highlighted the prospect of stronger EU measures for EDCs as potential trade barriers.³⁸ Regrettably, the threat that strong EDC criteria would jeopardise TTIP appears already to have had an adverse effect on the EU decision-making process.³⁹

A mandatory consultation requirement on emerging risks carries significant risk of introducing a freeze on the development of necessary measures to tackle e.g. EDCs, nanomaterials and mixture toxicity.

BEUC insists that the Commission should resist pressure from the USTR and from industry against an ambitious EU policy on EDCs as well as on other emerging health risks such as nanomaterials. We specifically call on the Commission to establish concrete guarantees and legal safeguards to ensure that new TTIP provisions under no circumstance distort or impede the capacity to adopt more ambitious measures regarding health, safety and environmental protection in accordance with the precautionary principle. One element of such a guarantee would be for the Commission to set forth an ambitious agenda on regulating EDCs with clear objectives and observable deadlines. The pace of EU action on EDCs is already scandalously slow and TTIP should not serve as a distraction from existing legal obligations. We therefore warmly welcome the EU Court of Justice's recent criticism of the Commission for its failure to take action on EDC.⁴⁰

8. Safeguard and Extend the Consumers' Right to Know

Consumers' right to be informed about the presence of substances of concern in products is a major achievement of EU chemicals legislation. We believe an obvious focus for transatlantic cooperation should be how to extend information disclosure obligations and strengthen implementation of existing consumer right-to-know rights.⁴¹ BEUC is however concerned that TTIP ultimately will limit access to vital information should the final agreement include new rules governing how governments and the public access information, the types of information eligible to be confidential business information (CBI),

³⁷ European Commission, EU position on chemicals, May 2014.
http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

³⁸ The Office of the United States Trade Representative (USTR). 2014 Report on Technical Barriers to Trade. April 2014.
<http://www.ustr.gov/sites/default/files/2014%20TBT%20Report.pdf>

³⁹ Stéphane Horel and Corporate Europe Observatory, A Toxic Affair: How the Chemical Lobby Blocked Action on Hormone Disrupting Chemicals, May 2015.
http://corporateeurope.org/sites/default/files/toxic_lobby_edc.pdf

⁴⁰ General Court of the European Union, Press Release No 145/15, Luxembourg, 16 December 2015.
<http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150145en.pdf>

⁴¹ Research by BEUC and our members thus demonstrates that the REACH provisions guaranteeing the consumers' right to know is in urgent need of improvement. See BEUC, Consumers, Chemicals, Companies – How much are we told? October 2011.
<http://www.beuc.eu/publications/2011-09794-01-e.pdf>

and for how long it can be protected. Agreeing on rules for whether, when and how information about chemical safety is exchanged could make it harder for innovators, citizens, and regulators to access information on hazardous chemicals, thus hampering efforts to transition to safer alternatives. TTIP would in consequence undermine and disregard right-to-know provisions for chemical-related risks found in existing EU laws.

BEUC believes an obvious focus for transatlantic cooperation should be how to extend disclosure obligations on chemicals and strengthen implementation of existing consumer right-to-know rights.

There are significant substantive differences between relevant U.S. and EU laws on access to information, intellectual property and trade secrets.⁴² In the EU, access to information is regulated both directly under REACH and indirectly under the United Nations Aarhus Convention, which obliges parties to disclose and disseminate certain environmental information. Both require a highly restrictive approach to CBI requests, i.e. the norm should be release of information, and confidentiality claims are only acceptable when a business is proven to be

harmed by disclosure in relation to precise use, composition of mixture and precise tonnage. Information on exposure scenarios to chemicals for example cannot be considered confidential.⁴³

Unlike the EU, the U.S. is not a party to the Aarhus Convention nor does TSCA define an equivalent duty for manufacturers to communicate information on hazardous chemicals to consumers and the public. TSCA instead strictly prohibits disclosure of confidential business information, and chemical companies routinely claim much of the data submitted to U.S. regulators as such. Abuse of confidentiality claims under TSCA is thus generally regarded as one of the Act's major flaws:⁴⁴ to illustrate, the identities of an estimated 16,000 chemicals are currently covered by CBI claims under TSCA, with little or no public access to information on these chemicals as a result.⁴⁵

BEUC welcomes the Commission's commitment to clarify "to what extent the definitions of CBI is equivalent in the EU and in the US" before further measures are agreed.⁴⁶ However, we strongly caution against attempts to harmonise definitions of CBI. A common standard will in our view retard efforts to extend existing disclosure obligations and convergence from a European perspective can only come at the expense of the consumers' legitimate right to be informed about toxic chemicals.

We likewise warn against provisions that would limit the capacity of regulators to exchange information without the prior consent of the data rights-holder (industry). At present, U.S. EPA already has the authority to compel industry to disclose information submitted to EU regulators; TSCA however strictly limits the scope for EPA to share industry-submitted information with foreign governments or with other Federal entities. We therefore insist that the Commission rejects proposals to implement more stringent standards on trade

⁴² For an overview, see Center for International Environmental Law and ClientEarth, Toxic Partnership: A critique of the ACC-CEFIC proposal for trans-Atlantic cooperation on chemicals, March 2014.

⁴³ Center for International Environmental Law and ClientEarth, Toxic Partnership: A critique of the ACC-CEFIC proposal for trans-Atlantic cooperation on chemicals, March 2014.

⁴⁴ Government Accountability Office, Chemical Regulation: Options Exist to Improve EPA's Ability to Assess Health Risks and Manage Its Chemical Review Program, June 2005.
<http://www.gao.gov/assets/250/246667.pdf>

⁴⁵ Center for International Environmental Law and ClientEarth, Toxic Partnership: A critique of the ACC-CEFIC proposal for trans-Atlantic cooperation on chemicals, March 2014.

⁴⁶ European Commission, EU position on chemicals, May 2014.
http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152468.pdf

secrets as this would limit public access to information, adversely affecting incentives for innovation in safer alternatives.

Regrettably, and under pressure of the TTIP negotiations, the Commission has proposed a harmonised EU approach to trade secrets which now threatens to undermine consumer right-to-know measures across many sectors, including chemicals. Since 2013, discussions on the proposed Trade Secrets Directive have progressed at an unusually rapid pace and under a worrying lack of public and media scrutiny. The Directive could enable companies to circumvent obligations to disclose information on hazardous products, such as chemicals in plastics, clothing, cleaning products, and other activities that can cause severe damage to the environment and human health.

We insist that the Trade Secrets Directive should not apply where a company has an obligation to disclose information, including trade secrets, for reasons of public interest, or as a consequence of a legal obligation to provide the information to a regulatory authority. With or without TTIP, BEUC rejects any measure on trade secrets protection that could allow businesses to bypass their disclosure obligations and thus endanger public access to information. The consumers' right to know is a major achievement of EU chemicals legislation and should be protected.

9. Progress on Reducing Toxics Exposure under Threat by an Investment Court System

BEUC welcomes the Commission's recent decision to abandon the flawed ISDS; nevertheless, we believe that the revamped Investment Court System (ICS) fails to address some of the core flaws in ISDS. For the chemicals area, the most troubling aspect of ICS remains its failure to provide sufficient protections of the right to regulate.

While the ICS proposal⁴⁷ now includes a specific article on the right to regulate, this is insufficient to prevent investor claims from exerting a regulatory chill effect. Indeed, under the new ICS proposal, foreign investors can still threaten to sue governments for compensation where they, for example, adopt a regulation to limit consumer exposure to nanomaterials. While the regulation would be upheld as intended, compensation might nonetheless need to be paid to the investor. The prospect of financial liabilities alone could therefore act to deter governments from introducing the new regulation in the first place.

BEUC maintains that there is no convincing evidence for a parallel judicial system between two of the most developed legal systems in the world. Existing levels of investor protection in the EU and the U.S. are surely sufficient to guarantee legal security for investors.

BEUC maintains that there is no convincing evidence for a parallel judicial system between two of the most developed legal systems in the world. Existing levels of investor protection in the EU and the U.S. are surely sufficient to guarantee legal security for investors. Should the investment court system or some version thereof, nonetheless, be included in TTIP, BEUC insists that safeguards are needed to ensure investor claims are not allowed to

⁴⁷ European Commission, Transatlantic Trade and Investment Partnership, TRADE IN SERVICES, INVESTMENT AND E-COMMERCE, CHAPTER II – INVESTMENT, 12 November 2015.
http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf

undermine or delay implementation of measures to reduce exposure to toxic chemicals. In our view, such a safeguard can best be achieved through either a general clause making claims on public interest legislation inadmissible or a hard exclusion of chemicals from the scope of a future investment court system.

10. Conclusion

We opened this position paper with an appeal for a TTIP agreement that will create a robust process for systematic identification and elimination of chemicals risks. Better transatlantic cooperation should in our view aim to foster mutual learning and exchange of best practice in chemicals management. Priority should in particular be given to phasing-out chemicals with SVHC properties in consumer products. An effective cooperation mechanism however does not need to be compulsory to achieve its goals: rather a voluntary system is key to ensure that a bilateral dialogue between regulators does not compromise or delay implementation of ambitious consumer protections.

The Commission's proposal for a chemicals annex to TTIP falls disappointingly short of this mark. As we have highlighted, we on the contrary see a risk that current TTIP proposals will delay – or worse still thwart – progress on reducing consumer exposure to toxic chemicals. TTIP will be a living agreement, and although the Commission at present has ruled out harmonisation for the chemicals sector, the tabled proposals for sectoral and horizontal regulatory cooperation chapters suggest that it could be introduced at a later stage. For over a decade, the U.S. government and the chemicals industry have claimed that EU chemicals legislation is a major barrier to trade. As foreseen by the Commission, critical regulatory processes would occur under little or no public scrutiny; and these TTIP provisions would therefore create new avenues for U.S. policy-makers to aggressively pressure the EU to lower ambitions for consumer safety and environmental protection. The focus on reducing non-tariff barriers thus in short raises concerns that TTIP will be used as a backdoor mechanism to reduce protections.

BEUC urges the Commission to reconsider its approach to ensure that a transatlantic agreement brings real benefits to consumers and the environment.

BEUC in consequence urges the Commission to reconsider its approach to the chemicals sector. As consumers, we have a legitimate right to expect that the

products we buy, the food we eat and the water we drink are safe. We would therefore like to see a bolder, more ambitious EU vision for transatlantic cooperation on toxic chemicals that would bring real benefits to consumers and the environment. At the same time, the existing U.S. EPA – ECHA Statement of Intent demonstrates that a compulsory mechanism is not required for collaboration between EU and U.S. regulatory agencies. We instead reiterate that a voluntary system will be key to ensure that a bilateral dialogue between regulators does not compromise progress on regulating chemical risks. BEUC again appeals for the European Commission to pursue a TTIP agreement that brings substantial benefits to consumers. Reducing non-tariff barriers should only be done provided consumer protection and information rights remain untouched.⁴⁸

⁴⁸ BEUC, Food and the Transatlantic Trade & Investment Partnership (TTIP), May 2014.
http://www.beuc.eu/publications/beuc-x-2014-030_ipa_beuc_position_paper_ttip_food.pdf

Should the Commission fail to reconsider its approach to a chemicals annex in TTIP, we insist that chemicals are excluded from the scope of TTIP's sectoral *and* horizontal regulatory cooperation chapters to ensure that the ambitions and fundamental commitments of EU chemicals policy are preserved. We also demand that measures to reduce exposure to toxic chemicals needs to be excluded from the scope of a possible TTIP investment court system.

Should chemicals nonetheless remain within the scope of TTIP's regulatory cooperation chapters, it is paramount that effective guarantees are established to ensure that TTIP under no circumstance will act to delay or undermine implementation of stronger chemicals laws. We emphasise that vague verbal reassurances on TTIP are not enough: trust will only grow from transparency, effective legal safeguards in negotiating texts and improved communication.

A second method for establishing credible safeguards would be for the Commission to make ambitious commitments to address chemicals of concern, such as EDCs. These commitments need necessarily be linked to indisputable deadlines in EU chemicals legislation on which the Commission can be held accountable by the European Parliament, the Council, and the public. With or without TTIP, however, a renewed drive to achieve the vision for non-toxic environment should remain a priority for all.

END



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