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*Launched in 1960, the European Banking Federation is the voice of the European banking sector from the European Union and European Free Trade Association countries. The EBF represents the interests of some 4,500 banks, large and small, wholesale and retail, local and cross-border financial institutions. Together, these banks account for over 80% of the total assets and deposits and some 80% of all bank loans in the EU alone.*

## Financial Regulatory Chapter and ISDS in TTIP

### I. Financial regulatory chapter

#### 1. General observations

The European Banking Federation (EBF) strongly supports the ongoing negotiations between the EU and the United States for the conclusion of the Transatlantic Trade and Investment Partnership Agreement (TTIP). As stated by negotiators on both sides, the TTIP goes far beyond ambitions of the traditional trade and investment agreements. It also aims for a more consistent regulatory framework between the two jurisdictions. In this respect, the EBF fully supports the general U.S. [objectives](#) underpinning the commencement of TTIP negotiations on regulatory issues, namely, fostering greater compatibility of U.S. and EU regulations and related standards development processes, with the objective of reducing costs associated with unnecessary regulatory differences, promoting transparency in the development and implementation of regulations and good regulatory practices, establishing mechanisms for future progress and pursuing regulatory cooperation initiatives where appropriate. We believe that, in order to achieve these ambitious aims, the TTIP should include not only a general (horizontal) chapter on regulatory cooperation but also sector specific regulatory frameworks.

The importance of the banking, and broader financial, sector for both economies is significant and cannot be underestimated. Assets of EU and U.S. based banks amount to nearly 55% of world banking assets and both regions account for over 80% of global derivatives business. In the EU banks employ over [3 million](#) people and in the U.S. more than [2 million](#) people. Moreover the level of investment by financial services sector from one region into another region is significant. In 2011, the U.S. financial institutions had direct investment amounting to roughly USD 430 billion in the EU and the EU financial institutions had invested nearly USD 330 billion in the USA. Therefore, there is a high degree of inter-connectedness between American and European financial markets and banks.

In the interest of both parties the negotiations should go beyond market access issues affecting the financial sector. We agree with the European Commission that the need to address regulatory barriers is particularly evident in the financial services sector. We fully support the EU Commission's [proposal for a principle-based approach](#) in order to achieve a transparent, accountable and rule-based process which would commit EU and U.S. regulators to work together towards strengthening financial stability. Including financial services in the negotiations and leading them to a successful outcome would enhance the efficiency of the transatlantic financial markets, facilitate trade, and deliver lower

cost products to consumers and investors.

On the contrary, as we have witnessed, lack of effective cooperation on both sides of the Atlantic in implementing financial regulation can lead to divergent and conflicting regulation which is damaging for financial markets' contribution to global growth and job creation.

## **2. Effective institutional arrangements**

The EBF believes that, in order to be meaningful, the financial regulatory chapter in the TTIP should be underpinned by effective institutional arrangements. Such arrangements should allow regulators from both sides of the Atlantic to meet on a regular basis to discuss planned and ongoing regulatory initiatives. These arrangements should help to prevent that either the United States or the European Union resort to regulatory unilateralism instead of aiming for the consistent implementation of internationally agreed standards and to extraterritorial application of national rules, resulting, eventually, in regulatory fragmentation, protectionism and retaliatory measures.

In particular we believe that:

- The Parties should ensure better cooperation on the international fora and should also work together to ensure consistent implementation and application of internationally agreed standards.
- The Parties should consult each other in advance on proposed financial regulation and other measures which may significantly affect market of the other Party.
- The Parties should cooperate towards achieving equivalence of both regulatory systems based on the objectives sought and agreed between them.
- These commitments should be underpinned by a robust institutional framework to ensure that the necessary expertise of financial regulators is available and represented.
- Finally the processes of regulatory cooperation should be transparent and should allow participation of affected stakeholders in the EU, U.S. and third countries.

## **3. Regulatory cooperation framework does not equal deregulation**

Since the beginning of the financial crisis, legislators and regulators on both sides of the Atlantic conducted an unprecedented overhaul of the financial markets regulatory framework resulting in safer and more resilient markets. The overwhelming majority of the legislation drafted to give effect to the principles agreed by the G20 in September 2009 at the Pittsburgh summit will have already been implemented by the time the TTIP is signed and ratified. Moreover, the EBF believes that the regulators will shortly resolve existing issues resulting in diverging regulatory approaches to implementation of the above-mentioned G20 principles which lead to market fragmentation and fracturing of liquidity between EU and U.S. markets.

Therefore, the EBF believes that the envisaged regulatory cooperation framework in the TTIP should be forward looking and should not be used to undermine already implemented regulations or to weaken the existing high standards of protection of the markets and market participants. Moreover, it should allow regulators to tackle all future issues affecting financial markets as they arise. However, learning from the current experience, we believe that the financial regulatory chapter in the TTIP should be designed to prevent re-appearance of the regulatory divergence which may lead to balkanization of the markets and regulatory arbitrage.

#### **4. Step beyond the dialogue**

The EBF believes that the existing framework for the EU-U.S. regulatory cooperation, the Financial Markets Regulatory Dialogue (FMRD), while important, should be improved and incorporated into the framework of the TTIP regulatory chapter. The FMRD had been designed and commenced well before the crisis of 2007/08 and its framework is outdated. It is not transparent and does not allow for wide participation of stakeholders, and, thus, not always tackles issues of greatest concern for market participants. Consequently, it has only rarely delivered desired outcomes. The EBF believes, that in the post-crisis environment dialogue between the regulators, while crucial, should be complemented by a binding obligation to act jointly towards uniform implementation of internationally agreed standards, leading to globally integrated, safer and more resilient financial markets. In order to preserve regulatory agencies' independence, they should retain an "opt-out" option on grounds of national regulatory principles if they cannot find agreement with their transatlantic counterparts. But such rejection of regulatory cooperation should be made transparent and explained to both political leadership and broader public in the U.S. and the EU.

Moreover, we believe that the financial regulatory chapter in the TTIP should provide for transparent cooperation procedures and should allow participation of a wide range of stakeholders to ensure that the regulators take into considerations opinions of market participants and views of the civil society.

#### **5. Complement to multilateral fora**

The EBF would also like to stress the important role of other international bodies with regard to regulations of international financial markets, like G20, FSB, BCBS, IOSCO, or IASB. However, we would like to point out that those bodies draw high level principles and are not tasked with implementation of those standards. Agreement on the principles, while crucial, constitutes only the very first step before they are applied by the markets. As the recent practice proves, problems arise often in the implementation phase. Implementation of the same internationally agreed principles by various national legislators and regulators often leads to discrepancies between the systems.

We believe that this is precisely what the financial regulatory framework in the TTIP should be designed to address and prevent. It should provide for a joint cooperation in the implementation phase of the high level principles developed by various international standard setters. Therefore, the EBF believes that the financial regulatory framework in the TTIP would be highly complementary and not contrary to work conducted in other international regulatory fora.

Transatlantic regulatory cooperation should also include unilateral regulatory projects with a view to, at least, minimising any unnecessary negative impact on transatlantic and international markets. Transatlantic consultation on such unilateral regulatory projects may also serve to build consensus in the above-mentioned international fora on similar "globalised" regulatory projects where appropriate.

Enhanced global cooperation at international level is crucial and must be developed. A closer partnership and a better integrated financial market between U.S. and Europe - currently the world largest financial market - would be instrumental in paving the way.

#### **6. Call to include the financial regulatory chapter in the TTIP**

The EBF would like to urge negotiators and regulators on both sides of the Atlantic to work jointly to develop a robust financial regulatory chapter within the framework of the TTIP. We believe that the negotiations constitute a historic occasion to bring closer our economies. By excluding a financial regulatory chapter from the ambit of the TTIP,

negotiators and regulators would miss a huge opportunity to safeguard regulatory compatibility of transatlantic and global financial markets regulation and may weaken the future role of both parties in setting the global financial standards.

## II. Investor-State Dispute Settlement

The EBF is of the opinion that the TTIP, and all future investment treaties signed on behalf of the EU, should set the same high standard of protection as the standard currently found in most existing European BITs. Therefore, we are opposed to exclusion of investment protection from investment treaties negotiated by the EU as this may significantly hamper flows of foreign direct investment and in turn slow down very fragile global recovery.

Moreover, we strongly believe that all investors should be covered by the same high standards of protection, in particular financial services should be treated equally with other types of investments for the purpose of investment protection. There should be no different rules for appointment of arbitrators in investment cases related to financial services. The disputes related to financial services should not be politicised.

However, the EBF is supportive of improving the existing ISDS system whenever possible, for instance:

- Some of the provisions should be clarified and better defined without diluting the quality of the protection. In particular they should not exclude types of investments that could evolve in the future.
- Exceptions provided in all new investment treaties should be limited to a minimum and should be clearly and narrowly defined as to preclude any abuse.
- Transparency of investment proceedings should be increased. However, this should strike a right balance between the public interest and protection of sensitive data and personal information. Transparency standards should not go beyond the currently adopted UNCITRAL Transparency rules, which already set higher standards than many national rules on transparency in court proceedings.
- It is desirable, and in many cases it can be of great assistance to arbitral tribunals, for contracting parties to be able to issue a mutually agreed interpretation of the provisions of the treaty. However, those interpretations should be treated as a guidance only and should not be binding on arbitral tribunals, in particular it should not bind tribunals in ongoing cases, as this could open a back door to abuses and politization of ISDS, something that ISDS was designed to prevent in the first place.
- We support creation of an appellate body for review of investment arbitral awards. However, this audacious decision as well as the drafting of the rules for such body should be taken in full consultation with all stakeholders.