

February 29th 2008

**AmCham EU's comments on the EC-OMB Joint Draft Report on the
*Review of the application of EU and US regulatory impact assessment
guidelines on the analysis of impacts on international trade and
investment***

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) welcomes the *Review of the application of EU and US regulatory impact assessment guidelines on the analysis of impacts on international trade and investment* prepared by the Secretariat General of the European Commission (EC) and the US Office of Management and Budget (OMB) as a crucial step towards the establishment of a common set of regulatory principles on both sides of the Atlantic.

AmCham EU strongly supports the EC-OMB dialogue on horizontal transatlantic regulatory issues and the broader *Framework for Advancing Transatlantic Economic Integration between the EU and the US*. In order to reduce frictions in this \$3.75 trillion transatlantic market (much of which stems from regulatory barriers) and to strengthen economic integration, common regulatory methodologies should be created in the long run.

The impact of new legislation on trade and investment is often a considerable proportion of the overall economic impact of a proposal. AmCham EU considers this first review of the application of EU and US regulatory impact assessment guidelines, in relation to impacts on trade and investment, as a major step forward in promoting better quality regulation and minimising unnecessary regulatory divergences, thereby facilitating trade and investment.

AmCham EU further welcomes the OMB's and EC's invitation to comment on the joint draft report. We would like to take this opportunity to provide comments on options for improving the analysis of the effects of regulations on international trade and investment.

General Considerations

Impact assessments are one of the most effective tools in enhancing competitiveness by ensuring quality legislation. The quality of an impact assessment is as important as ensuring that it is carried out. In a position paper on impact assessments dated October 25th 2005, AmCham EU emphasised the importance of including international trade and investment considerations in the impact assessment guidelines.

AmCham EU is pleased to see, therefore, that an increasing proportion of recent impact assessments in the EU and the US reflect a growing awareness of the international context for policy decision-making. As the joint draft report correctly notes, in the EU, the analysis of international impacts received more impetus after the fundamental revision of the Impact Assessment guidelines in 2005 and the creation of the Impact Assessment Board in 2006. Since its creation, the Impact Assessment Board has already screened about 80 initiatives of which 60 had an international aspect and of which 40 had been commented upon and/or modified by the Board. In the US, the Executive Order (EO) No. 12866, Regulatory Planning and Review, issued in 1993, and the OMB circular A-4, Regulatory Analysis Guidance of 2003, although largely geared towards domestic impacts of regulations, do require consideration of international trade impacts for economically significant rules.

However, there are still a considerable number of recent impact assessments which exclude considerations on international trade and investment. Both the EU and the US should improve the enforcement of their existing impact assessment commitments. Moreover, both the US and EU impact assessment rules and guidelines lack clear guidance on how to consider the international trade and investment effects of regulations.

Recommendations

AmCham EU would like to comment on the specific conclusions of the joint draft report:

- 1) **Impact Assessment Methodologies:** In the EU, all legislative items on the Commission's legislative and work programme, as well as some less formal actions, require impact assessments. European impact assessments appear to be a tool for informing legislators about, and legitimising, the Commission's choices in formulating legislative proposals. However, in the US – even though impact assessments may be carried out in preparing for legislative measures – impact analysis is mainly understood as a means by which executive action may be disciplined and influenced.

Indeed, these differing impact assessment practices on both sides of the Atlantic necessitate the development of a methodological framework to help ensure the comparability of the EU and US impact assessment systems. The goal of this initiative should be to **create impact assessments for all upcoming legislative and policy actions affecting international commerce** – as commercial markets have become global, this is a large and increasing percentage of proposed law. Thereby it should be ensured that **all assessments take due account of the regulations' impact on international trade and investment**. Ideally such impact assessments would be carried out by a third party operating under an agreed-upon methodological framework.

- 2) **Early warning:** We fully agree that it is crucial to "establish ways to indicate whether a planned regulatory or legislative initiative might have an impact on international trade or investment, or might otherwise be of interest to U.S., EU or third countries."¹ In this regard, we strongly recommend full **implementation of the agreed 2002 Guidelines on Regulatory Cooperation and Transparency** which require **early warning** through notification of anticipated new regulations and completion of impact assessments for all proposed regulations that take into account the effect of the regulation on transatlantic trade and investment.

An assessment of whether or not a new initiative might have significant international trade implications should be conducted at the **earliest stage of the policy development process**. In the EU, the annual Commission Work Programme and the 'Roadmaps' should put a stronger emphasis on international trade and investment impacts of upcoming legislative and policy initiatives.² In the US, current practices make it difficult to anticipate what will be coming out of Congress. The planning of US legislative and regulatory initiatives should become much more transparent and presented early in the policy process.

- 3) **Sharing of impact assessments:** As emphasised in our Position Paper on Advancing Transatlantic Economic Integration dated October 26th 2007, **early sharing** of impact assessments should be built into both the EU and the US systems. We therefore fully agree that both sides should **"make their proposed policies and accompanying impact assessments public"**³ as early as possible in the process which would allow the other side to respond if it expects international trade and investment issues to be significant. In this context, we would like to stress that the EU and the US should publish their impact assessments for comment in advance of releasing proposed regulations for comment. We recommend the creation of a common, publicly available **EU-US website or online platform** for proposals with transatlantic impacts.
- 4) **Consultation:** We fully support that authorities, businesses, and citizens of the EU, U.S. and third countries should be given the opportunity to be part of **public consultations** and to comment on planned initiatives.⁴ Stakeholder consultation should be an integral part of the impact assessments. **Stakeholders on both sides of the Atlantic should be involved** at an early stage in the preparation of proposals, so that the legislator understands where a specific expertise is to be found and where the major impact will be. However, this is currently not always the case. In this respect, the Evaluation of the Commission's Impact Assessment

¹ See C.1), p. 25 of the joint draft report.

² See European Commission, Impact Assessment Guidelines, SEC(2005) 791: "As major impact assessments require early planning of time and resources, they are integrated into the Commission's annual Strategic Planning and Programming (SPP) cycle. To help plan the impact assessment work, services are requested to establish 'Roadmaps' for the initiatives they have put forward for inclusion in the Annual Policy Strategy (APS) and the Work Programme (see Impact Assessment Guidelines: Annexes - Annex 1). For WP items which follow from an APS initiative, it will be necessary to update and resubmit the Roadmap prepared at the time of the APS." (p. 6-7)

³ See C.3), p. 25 of the joint draft report.

⁴ See C.2), p. 25 of the joint draft report.

System of April 2007 has revealed that “regarding stakeholders from outside the EU, these were only consulted for three out of the 20 [impact assessments] examined, all of which had a clear development/external co-operation component (Review of the sugar regime; Communication on interconnecting Africa; and General Programme solidarity and migration flows). In these cases, representatives of partner countries (ACP, AU) and organisations (NEPAD, UNHR, IOM) were consulted. No evidence was found that stakeholders from outside the EU were consulted for any of the remaining IAs that were assessed in depth.”⁵ Moreover, all stakeholders should have **sufficient time to respond** to proposed regulations.

- 5) **Sustainability Impact Assessments:** In this context, we would like to welcome the establishment by the European Commission of a specific type of consultation, the so called Sustainability Impact Assessment (SIA). SIAs are conducted when preparing external trade policy initiatives to identify the potential economic, social and environmental impacts of any given trade agreement.⁶ These bilateral and/or regional trade agreements may also have impacts on transatlantic economic operations. We consider SIAs to be as important as 'ordinary' impact assessments for major legislative proposals. Therefore, they should be better integrated into the EU's overall impact assessment system and also be accompanied by a system of quality control. As for other major legislative proposals, SIAs should be conducted and results should be known before the Commission enters into negotiations on a multilateral or bilateral level and preferably before it requests a negotiating mandate from Member States. This would ensure that any potential impact is duly taken into account in the European Commission's policy-making and negotiation strategy. Third countries/parties should also be consulted at an early stage of the process (see above). Ideally the US should also assess the impacts of their bilateral/regional trade agreements.
- 6) **Taking due account of trade and investment impacts:** As regards the methodologies concerning the impact on trade and investment *per se*, we clearly see the need for improvement. As stated by a large majority of stakeholders in the Evaluation of the Commission's Impact Assessment System of April 2007: “[... the Impact Assessment] system's approach should be refined to facilitate a more in-depth analysis of the economic impacts (e.g. impacts on competitiveness, trade and investment, administrative burden; [...].”⁷
We fully agree with the joint report that, if the preliminary analysis identifies potential impact areas of a proposal on international trade and investment, clear guidance should be provided on both sides of the Atlantic on how to make

⁵ See Evaluation of the Commission's Impact Assessment System, April 2007, p. 75 et sqq. Available at: http://ec.europa.eu/governance/impact/docs/key_docs/tep_eias_final_report.pdf.

⁶ See p. 5 of the joint draft report. See also DG Trade website on SIAs: "The Commission's Communication on Impact Assessment (COM 2002 276) introduced a comprehensive regulatory and assessment framework for all policy areas, including trade. Complementarities and synergies between Sustainability Impact Assessment and Impact Assessment will be developed further by methodological improvements." (<http://ec.europa.eu/trade/issues/global/sia/faqs.htm>)

⁷ See Evaluation of the Commission's Impact Assessment System, April 2007, p. 42. Available at: http://ec.europa.eu/governance/impact/docs/key_docs/tep_eias_final_report.pdf.

decision makers aware of the international impact.⁸ We support the four proposed elements for consideration in the US and EU impact assessment rules.⁹ In this context, we recommend the addition of a bullet point as follows: "an analysis of international benchmarks both in terms of competitiveness and regulation pressure and trends (in particular, include comparisons with regulations in main trading partners e.g. EU, US, Japan...)".

- 7) **WTO rules:** Should international trade and investment impacts be found in new regulation, the impact assessment should further include an appropriate international law examination, to define the legal parameters for such legislation with respect to WTO rules. Such action will avoid future conflicts that could potentially require withdrawal of non-compliant legislation, wasting the vast resources required to move legislation from conception to transposition.
- 8) **Re-assessing impact:** The impact on international trade and investment of an adopted regulation should be re-evaluated at some point after its implementation. Input should be fully solicited from stakeholders as part of this *ex post* procedure.

Conclusion

Addressing future regulations in a manner that takes into account their impact on international trade and investment is crucial to building an effective, consistent, and cooperative regulatory system between the United States and the EU. This would greatly influence regulators around the world. The EU and US should be working in tandem through the OECD and various multinational standard-setting bodies toward truly global approaches to regulation.

2008 and 2009 will see key elections in the US and the EU. In this context, AmCham EU stresses the importance of keeping up the momentum of advancing transatlantic economic integration. AmCham EU welcomes the strengthening of the horizontal OMB-EC dialogue and its close links to the work of the Transatlantic Economic Council (TEC). We appreciate the prominence given to the EU and US impact assessments guidelines on the agenda of the EU-US High Level Regulatory Cooperation Forum and the TEC. The TEC, together with the EU-US High Level Regulatory Cooperation Forum, should set an appropriate roadmap defining the necessary next steps to establish a consolidated transatlantic regulatory impact assessment methodology. We hope that the OMB-EC dialogue will assist in the elaboration and implementation of such a roadmap.

AmCham EU is committed to fostering transatlantic economic integration and promoting better quality regulation. Minimising unnecessary regulatory divergences strengthens trade and investment. AmCham EU endorses the concept of a legally-binding Agreement on Regulatory Cooperation, as proffered by the US Chamber of Commerce. Transparency, access, consultation and common methodologies can and

⁸ See C.4), p. 25 of the joint draft report.

⁹ See C.4), p. 25 of the joint draft report.

should improve the alignment of new regulations in the future. AmCham EU stands ready to assist policy makers in achieving these goals.

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The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure an optimum business and investment climate in Europe. AmCham EU facilitates the resolution of EU – US issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to €702 billion, and currently supports over 4.1 million jobs.