Thoughts on Transatlantic Regulatory Cooperation in Pharmaceuticals after #TTIPleaks

*Marco Rizzi**

I. Introduction

The leak of confidential documents on 2 May 2016 by Greenpeace Netherlands allows some preliminary conclusions on both the scope and success of the negotiations so far. As regards the pharmaceutical market,[1] the current state of affairs combines the promise of steps forward with the prospect of concerning standstills. This short opinion follows key points emerging from the leaked documents n.9 ("Regulatory Cooperation")[2] and n.16 ("Tactical State of Play")[3] that are directly relevant to the pharmaceutical market.

The themes that will be briefly discussed are, first, the regulatory cooperation mechanisms emerging from doc. n.9 in comparison to current cooperation processes in pharmaceutical regulation. The leaked papers suggest positive and commendable (yet far from conclusive) developments towards a more transparent and regulated framework for cooperation, while perpetuating concerns regarding fundamental policy choices and prevalence of mercantile imperatives over competing public interests.

Secondly this paper examines the sector-specific issues identified in paragraph 2.4 of doc. n.16. Concerns over general policy choices in regulatory cooperation are reflected in discussion of the progress of the negotiations as regards mutual recognition of Good Manufacturing Practices (GMP), on one hand, and the standstill on generic medicines and exchange of confidential trade secret information (CTSI), where the distance between the parties is substantial (recognising that cooperation in these areas is a priority for the EU while of minor interest to the US).

Finally a brief set of conclusions is offered on the persistent divergence of regulatory styles between the parties, underpinning the weakest links in the negotiation results (to date).

II. ICH and RCB: Steps forward but in which Direction?

1. An Element of Novelty: Towards Accountable Regulatory Cooperation…

Transnational regulatory cooperation between the US and the EU (the Parties) in the pharmaceutical sector has ben practiced for more than 25 years.[4] The regulatory cooperation chapter of TTIP attempts to institutionalise in a publicly accountable shape and under a cross-sectoral umbrella the *rapprochement* of regulatory regimes on both sides of the Atlantic. Doc. n.9 offers a rare opportunity to compare the EU and US positions.[5] To begin on a positive note, it transpires that the EU is making a sincere effort to transpose its schemes of "non-majoritarian"[6] accountability and legitimacy into this partnership. Looking specifically at Section III and parts of Section II of the chapter, one can identify a skeleton of "procedural democracy" that sounds familiar to EU lawyers. It is not clear what exactly is the US contribution, in

* Senior Lecturer in Law, University of Seychelles.

1 Identified as a relevant sector in EU Commission, "EU position on pharmaceutical products", 14 May 2014, available on the internet at <http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152471.pdf> (last accessed 19 May 2016).

2 TTIP leaks, Document n.9, "Initial Provisions for CHAPTER [ ] [EU: REGULATORY COOPERATION] [US: REGULATORY COHERENCE, TRANSPARENCY, AND OTHER GOOD REGULATORY PRACTICES]", available on the internet at <https://ttip-leaks.org/#docdoc9> (last accessed on 19 May 2016).

3 TTIP leaks, Document n.16, "Note – Tactical State of Play of the TTIP Negotiations", available on the internet at <https://ttip-leaks.org/#docdoc16> (last accessed on 19 May 2016).

4 ICH, "History", available on the internet at <http://www.ich.org/about/history.html> (last accessed 19 May 2016).

5 Alberto Alemanno, "The Regulatory Cooperation Chapter of the Transatlantic Trade and Inverstment Partnership: Institutional Structures and Democratic Consequences", 18 *Journal of International Economic Law* (2015), pp. 625 *et sqq.*, at 628, observing that the US do not share as much TTIP material as the EU.

6 Using the terminology first adopted by Giandomenico Majone, *Regulating Europe* (London: Routledge, 1996), at pp 12 *et sqq*.

particular regarding the design and functioning of the proposed Regulatory Cooperation Body (RCB). In a nutshell what emerges from the leaked papers confirms the model that has been analysed in detail in a number of contributions.[7] The pillars of this model are transparency and stakeholder consultation duties that are owed without discrimination to institutions, legal and natural persons of both Parties throughout the cycle of proposal, discussion and approval of regulatory acts.

It is possible to contrast the main features of the TTIP's RCB against those of the current preferred platform for cooperation on pharmaceutical regulation, the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH). ICH is itself undergoing a process of organisational change the extent of which is yet to be fully publicised.[8] The following comments are therefore based on the structure as it operated until the end of 2015. So far there is no reason to anticipate changes to the *modus operandi* of the ICH Steering Committee. This leaves the essence of the following comments intact. ICH has operated for 25 years as a hybrid public-private platform for regulators and regional representatives of the pharmaceutical industries of the EU, the US and Japan to harmonise regulatory requirements for marketing authorisation in their respective markets. The ICH machinery[9] is characterized by the "behind closed doors" nature of the Steering Committee's decision-making. In essence, consultative steps are required at the level of regional administrative agencies (FDA and EMA in particular) at an early stage of the "five-step" procedure leading to the adoption of harmonised guidelines to ensure local stakeholders' involvement.[10] However the decision-making process within the Steering Committee is not transparent. The fate of regional comments cannot be traced; there is no duty to justify the adoption, dismissal or modification of said comments in the final product.[11]

The TTIP's RCB as it emerges from the leaked papers, in combination with the provisions laid down in Section II of the chapter, confirm a strong adherence to principles of deliberative democracy. Article X.23 and X.24 in conjunction with Articles X.6, X.7 and X.8[12] are a textbook application of those principles. From this perspective an RCB structure dealing with pharmaceutical regulatory cooperation would represent a significant attempt at claiming back transnational (in this case transatlantic) regulatory decision-making to a public sphere with clear accountability mechanisms. Admittedly, while stakeholder participation is emphasized, legislatures are missing from the equation. The role of domestic democratic institutions is pushed back to the adoption of regulatory instruments emerging from the transnational cooperation within the Parties' own legal frameworks. In this sense, the lack of involvement of the European Parliament (EP), raised by civil society observers and commentators,[13] is largely an EU issue and not a TTIP one (as further discussed below). However, we do learn from the leaked Article X.23.6 that the negotiators are contemplating the introduction of "provisions on the interaction of the RCB with legislative bodies", thus leaving the door open to a role for Parliaments within TTIP (which would be an interesting platform for the EU to bring back the EP in decision-making involving technical regulatory matters). This observation is a useful *trait d'union* with the remarks in the following paragraph.

2. …Or Much of the Same?

Whether or not TTIP will introduce a mechanism allowing the EP to gain an active role within the RCB,

7 See among which in particular Alemanno, "The Regulatory Cooperation Chapter of the Transatlantic Trade and Inverstment Partnership", *supra* note 5; Peter Chase and Jacques Pelkmans, "This time it's different: Turbo-charging regulatory cooperation in TTIP", Special Report no. 110 *CEPS* (2015); Alberto Alemanno, "The Regulatory Cooperation Chapter of the TTIP – Challenges and Opportunities", 20 *European Policy Analysis* (2015), at pp. 7 *et sqq*.

8 ICH, "Organisational Changes", available on the internet at <http://www.ich.org/about/organisational-changes.html> (last accessed 19 May 2016).

9 Marco Rizzi, "Non-Measurable Negotiations: The EU between Transnational Regulation of Pharmaceuticals and Private Law", in Marise Cremona and Hans-W. Micklitz (eds.), *Private Law in the External Relations of the EU* (Oxford: Oxford University Press, 2016), pp. 273 *et sqq.*, at pp. 283 *et sqq*.

10 ICH, "Formal ICH Procedure", available on the internet at http://www.ich.org/about/process-of-harmonisation/formalproc.html (last accessed 19 May 2016).

11 Rizzi, "Non-Measurable Negotiations", *supra* note 9, at p. 285.

12 TTIP leaks, Document n.9, *supra* note 2, Artt. X.23 "Establishment of the Regulatory Cooperation Body", X.24 "Participation of stakeholders", X.6 "Early Information on Planned Acts", X.7 "Stakeholder Consultation", X.8 "Transparent Development of Regulation".

13 Alemanno, "The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership", *supra* note 5, at pp. 636 *et sqq.*, describing the mechanisms under Art. 218 TFEU.

the issues with the proposed architecture lie elsewhere. While a greater involvement of the only truly representative institution of the EU could certainly constitute a positive development, it would also depart from EU consolidated models of non-majoritarian governance.[14] Therefore, should legislative institutions' involvement fail to find its way into the negotiations, a "representative democracy deficit" would hardly be attributable to TTIP. The concerns are of different nature and we can focus on two specifically.

First, there is a general issue: is a trade partnership the correct instrument to set up a general mechanism of regulatory cooperation? It has been eloquently argued that using a trade and investment partnership to build regulatory cooperation bears the risk of implying a "discursive shift in favor of economic and trade interests"[15] over competing policy objectives such as, in our case, patient and consumer welfare. While obviously speculative (the partnership is far from being operative, if it will ever be) this observation deserves attention especially in conjunction with the linked issue of having a sole umbrella mechanism of cooperation (the RCB) for regulated sectors. The precise architecture of the RCB and its relationship to sectoral regulation remains to be determined.[16] Should the structural obstacles and uncertainties be overcome, the risk would be that RCB's role to "monitor and facilitate implementation of the provisions set out in [the Regulatory Cooperation] Chapter" could translate into a cross-sectoral catalyst for economic and trade interests in EU policy. To give substance to this concern let us turn to a second objection.

The issue revolves around the centrality of the so-called "international instruments" as defined in Article X.2(d): "documents adopted by international bodies or fora in which both Parties' regulators [...] participate", including guidelines of the sort produced by ICH for the registration of pharmaceuticals. The combined reading of Articles X.21 ("Promoting Regulatory Compatibility") and X.22 ("Promoting International Regulatory Cooperation"), together with Article X.6 of doc. n. 10 ("Technical Barriers to Trade") on "Standardisation" (or "Standards" in the US version, which adopts a much sharper wording than the EU one),[17] suggest a potential picture in which the RCB works as the tipping point of strategic discussions to determine areas of cooperation while *de facto* delegating the discussion on substance to those international fora. In other words, while the RCB with its inclusive and transparent structure throws the "accountability deficit" of ICH-like bodies out of the window, it welcomes it back through the front door by promoting prompt adoption of "international instruments". This brings us back to the original objection. If RCB is to be a point of strategic discussion for the identification and development of areas of regulatory cooperation, having it operate under the umbrella of a partnership primarily aimed at facilitating trade and investment runs the risk of a discursive shift in EU policy catalysing economic and trade interests.[18] This would contradict the spirit of recent EU reforms in pharmaceutical regulation that constitute a serious legislative attempt to enforce public accountability on a market where private economic interests have traditionally played a dominant role.[19]

III. "Tactical state of play" of Sector-specific Negotiations on Pharmaceuticals

Against the backdrop of the general observations suggested above we can now turn our attention to three areas of specific cooperation in the pharmaceutical sector identified in doc. n.16: GMP inspections, generic medicines and CTSI.

14 A wonderful account of the perils of such models can be found in Peter Mair, *Ruling the Void – The Hollowing of Western Democracy* (London: Verso, 2013).

15 Christiane Gerstetter, "Regulatory Cooperation under TTIP – A Risk for Democracy and National Regulation?", *Heinrich Böll Stiftung – TTIP Series* (2014), at pp. 6 *et sqq*.

16 TTIP leaks, Document n. 9, *supra* note 2, Art. 23(2)(c); and TTIP leaks, Document n.16, *supra* note 3, para. 2.1 "Regulatory Coherence": "a number of important issues remain to be addressed: scope (both in terms of measures and authorities covered), the question of how to identify the cooperation activities that should be covered, and the architecture (relationship of the regulatory cooperation chapter with sectors), including the institutional mechanism, which will be crucial to the future operability of regulatory cooperation."

17 TTIP leaks, Document n.10, "Chapter [_] Technical Barriers to Trade", Art. 6, available on the internet at < https://ttip-leaks.org/#docdoc10> (last accessed 19 May 2016).

18 On the accountability deficit of such a prospect see Ernst-Ulrich Petersmann, "Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?", 18 *Journal of International Economic Law* (2015), pp. 579 *et sqq*.

19 Regulation (EU) No 536/2014 of the European Parliament and of the Council on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, OJ 2014 L 158/2.

1. Something new: Moving forward on GMP

The leaked document shows encouraging steps forward in an area that has traditionally seen divergence between the US and EU: the Good Manufacturing Practices. Over the past ten years, GMP has been an object of debate as the EU always understood GMP to be an integral part of the Good Clinical Practice (GCP) requirements, whereas the US have been separating the two both conceptually and in the relevant regulatory instruments.[20] What emerges from the tactical state of play is that both regions have agreed that mutual recognition of GMP inspections would be highly beneficial. If taken in isolation from broader considerations of the place of GMPs in the overall regulatory architecture, inspections on GMPs can be a relatively straightforward and "mechanical" exercise, requiring less controversial and sensitive evaluation than those required in GCP inspections:[21] in light of the limited resources at the disposal of regulatory agencies, mutual recognition of GMP inspections would result in a net gain for everyone. This seems to be appreciated by both Parties, with the FDA showing willingness to rely on the results of Joint Audits Program (JAP), an internal peer review mechanism used by Member States (MSs) authorities, while the Commission is putting pressure on MSs to accelerate the JAP process. This is certainly a comforting sign of trust that could speed up a fruitful partnership.

2. At a Standstill: Generic Medicines and CTSI

While GMP cooperation is progressing, other key areas appear to be at a standstill. Generic medicines have been identified by the EU as a key strategic area for cooperation to be pursued alongside the TTIP negotiations.[22] Yet "the FDA did not show interest in working on generics",[23] claiming on the one hand a lack of resources to examine the EU proposal and on the other hand the intention to exclude scientific work from TTIP. The latter consideration is particularly surprising given the insistence of US negotiators on evidence-based decision-making spelled out for instance in Article X.14 of doc. n.9.[24] As regards CTSI, while the Parties agree that "this is an important matter", the hang-up is the legal instrument to be used for the exchange of such information. The question on the table is whether it should be via a separate instrument to be signed by each MS and EU institution (Commission and EMA) individually, as the FDA is requesting, or whether the circulation of CTSI could be governed directly via TTIP as proposed by the Commission.

It is entirely possible that both of these obstacles are temporary and attributable solely to the material and procedural constraints recalled above, that is, resources and appropriate legal formula (though the FDA's position on the latter begs the question: what is the point of promoting regulatory cooperation in the first place if key issues are subject to further burdensome bureaucratic requirements...?). It is however possible that a more profound divergence is at play both in regulatory styles and in pharmaceutical product litigation. While the EU is committed to move towards full transparency in marketing authorisation data availability with the new Clinical Trials Regulation,[25] commercially sensitive information in the US is still very much proprietary and confidential, with the result that availability is largely based either on voluntary release or as a result of litigation.[26] This is not the place to analyse the role of litigation in American regulation, but the volume and relative accessibility of private judicial remedies are among the key factors making business-friendly CTSI regulations relatively sustainable in that jurisdiction.[27] Litigation

20 John Simmons and David Bernstein, "Navigating Differences between FDA and EMA for Regulatory Compliance During Drug Development", 2 *BioPharm International* (2006), available on the internet at <http://www.biopharminternational.com/navigating-differences-between-fda-and-emea-regulatory-compliance-during-drug-development> (last accessed 19 May 2016).

21 On the controversial nature of the GCP guidelines see Rizzi, "Non-Measurable Negotiations", *supra* note 9, at p. 283.

22 EU Commission, "Technical Paper for Regulatory Cooperation on Generic Medicines – Proposal of the European Union", 26 January 2016, available on the internet at <http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154172.pdf> (last accessed 19 May 2016).

23 TTIP leaks, Document n.16, *supra* note 3, para. 2.4.

24 TTIP leaks, Document n.9, *supra* note 2, Art. X.14 "Decision-Making Based on Evidence".

25 Regulation (EU) No 536/2014, *supra* note 19.

26 Marco Rizzi, "The Complex Case for Another Hard Look – Transnational Pharmaceutical Regulation and the Pedagogical Role of Courts" (PhD thesis on file at the European University Institute, 2015), pp. 155 *et sqq*.

27 Ibid.; for a recent discussion on the comparatively smaller role of product liability in the EU see Barend Van Leeuwen and Paul Verbruggen, "Resuscitating EU Product Liability Law?", 5 *European Review of Private Law* (2015), pp. 899 *et sqq*.

in the EU does not play a comparable role with the result that transparency in the pharmaceutical sector has to be pursued principally through regulatory means. It is not just a matter of technicalities: the philosophies underpinning the two regulatory architectures remain fundamentally different. Conversely, generic medicines in the US receive a special protection from litigation in the form of a federal preemption of state tort law (where FDA approval shields manufacturers from liability under certain circumstances).[28] It is not therefore entirely surprising that the US would wish to maintain a higher degree of domestic control over approval of products benefitting from such special treatment (thus explaining the lack of interest in discussing the EU proposal on the matter).

The intention of these quick thoughts is not to identify litigation as the sole factor slowing down negotiations. Litigation is rather a tell-tale sign of persisting sectoral divergence between US and EU approaches to regulation.

IV. Conclusion

Sector-specific divergence still permeates regulatory styles. This is true as regards the specific architecture of pharmaceutical regulation as recalled above, but it also applies to key elements of the general cooperation mechanism devised in doc. n.9, such as Article X.13 on regulatory impact assessment (RIA). Here the US version makes reference to "not regulation" as an implicitly preferred option, whereas the EU limits itself to a requirement of measuring impact on international trade while being more proactive in advocating for a cooperative spirit mindful of each Party's regulatory approach.[29] Limiting our observations to the pharmaceutical sector, the impression is that for the partnership to take a shape better suited to EU objectives it is paramount that obstacles are overcome in generics and CTSI. Generics are too central to healthcare systems and patients of both sides of the Atlantic[30] to be justifiably ignored if the partnership is to take multifaceted interests seriously. As for CTSI the EU has spent too much political capital towards transparency in recent times to have the issue stall on technicalities. If the EU's vision is to gain substance, the degree of cooperation in both areas can be subject to negotiation but not so their inclusion.

Are aggregate convergences[31] in risk regulation sufficient to prompt the creation of a general cross-sectoral cooperation mechanism or are sectorial specificities still too pronounced to make it a successful (or desirable) project? To embrace the full scope of regulatory cooperation, a partnership needs a shared analytical frame of reference and (at least as regards pharmaceuticals) the proposed regulatory mechanism, with its potential catalyst effect on the adoption of "international instruments", appears better tailored for the US architecture, where litigation plays a prominent role, than for the EU. The leaked papers reveal that there is still significant scope for negotiation and we identify two specific issues where the EU could push to capitalise on the positive aspects of the RCB design and lessen the risk of it becoming a catalysing tool for minimally accountable transnational practices. First, the promotion of international regulatory cooperation should be more clearly framed within the procedural context and mechanisms of the RCB. In particular, implementation as described in Article X.22.1 and 2 could benefit from clearer wording and more direct reference to the overall deliberative scheme. Secondly, the EU could push for a watchdog role of the EP under Article X.23.6. While many would raise an eyebrow at seeing the legislature directly involved in this area, one must concede that relying on stakeholders alone is not necessarily an optimal choice. In particular, civil society's ability to effectively and competently represent its interests is not always a realistic prospect. At least if the frantic debate surrounding TTIP is anything to go by...

28 As established for failure to warn claims by the US Supreme Court decision *PLIVA, Inc. v Mensing* 131 S. Ct. 2567, 2581 (2011) on the basis that if federal law requires generic manufacturers to use the same labeling as their brand-name counterparts it is impossible for them to simultaneously comply both with federal law and a state tort law duty to provide an enhanced label.

29 TTIP leaks, Document n.9, *supra* note 2, Art. X.13 "[EU: Analytical Tools] [US: Regulatory Impact Assessment]".

30 EU Commission, "Technical Paper for Regulatory Cooperation on Generic Medicines", *supra* note 22, at p. 1.

31 Jonathan Wiener and Alberto Alemanno, "The Future of International Regulatory Cooperation: TTIP as a Learning Process Towards a Global Policy Laboratory", 78 *Law and Contemporary Problems* (2015), pp. 103 *et sqq.*, at p. 104: "empirical research finds that U.S. and European risk regulation over the past four decades has exhibited overall average *parity*, with occasional divergences as selective precaution is applied on *both* sides to *particular* risks".