

This **TEXTUAL PROPOSAL** is the European Union's proposal for legal text on "Regulatory Cooperation" in TTIP. It was tabled for discussion with the US in the negotiating round of 20-24 April 2015 and made public on 4 May 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.

## **TTIP – Initial Provisions for CHAPTER [ ] - Regulatory Cooperation**

*General notes:*

- 1. The present document represents an initial draft which will need to be completed and refined by more detailed proposals in a number of areas.*
- 2. Furthermore, as TTIP negotiations progress, the provisions in this Chapter may be reviewed in the light of developments in other Chapters, and vice versa, with a view to resolving possible duplications, overlaps or inconsistencies. In particular, there is a need to consider the relationship with the TBT and SPS chapters as well as with specific or sectoral provisions, including those on Financial Services. Specific or sectoral provisions are intended to respond to the specific needs of a sector. It will be important to strive as far as possible for coherence and consistency between the approaches and solutions embodied in the specific or sectoral provisions, on the one hand, and those in other parts of TTIP (including this Chapter), on the other hand. In case of overlap or doubt, the specific or sectoral provisions shall prevail, and it remains open at this stage whether in some sectors, such as for example chemicals, such specific or sectoral provisions might have a comprehensive character.*
- 3. The institutional and decision-making modalities in the horizontal chapter regarding the update, modification or addition of specific or sectoral provisions will need to be discussed as negotiations on the regulatory cluster and the general institutional provisions of TTIP proceed.*
- 4. Given that the provisions of this Chapter concern predominantly procedures for cooperation, they may not lend themselves to the application of dispute settlement rules. Alternative mechanisms for ensuring proper application could be explored, such as regular monitoring and reporting, including to the political level (Joint Ministerial Body). As regards the specific or sectoral provisions of the TTIP regulatory cluster, further reflection will be required as regards the most appropriate mechanisms of ensuring proper application. In respect of cooperation on financial services, the EU has expressed the view that provisions should not be subject to dispute settlement.*
- 5. The scope of this Chapter is determined by the definition of "regulatory acts" and by the provisions of Article 3. Only those regulatory acts that fulfill the criteria in Article 3.1 (i.e. subject-matter of regulatory acts) are covered. Accordingly, this chapter does not cover legislation at central or non-central level which establishes the framework or principles*

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*applicable on a cross-sectoral basis to achieve public policy objectives, such as acts determining the principles of, inter alia, competition, company law, consumer protection, IPR protection, the protection of personal data or the protection of the environment.*

Preamble<sup>1</sup> to the TTIP: The Parties, having regard to:

- the importance of regulation to achieve public policy objectives, and their right to regulate and adopt measures to ensure that these objectives are protected at the level that each Party considers appropriate, in line with its respective principles;

## **Section I: Objectives, definitions and scope**

### **Article 1 - General Objectives and Principles**

1. The general objectives of this Chapter<sup>2</sup> are:
  - a) To reinforce regulatory cooperation thereby facilitating trade and investment in a way that supports the Parties' efforts to stimulate growth and jobs, while pursuing a high level of protection of *inter alia*: the environment; consumers; public health, working conditions; social protection and social security; human, animal and plant life; animal welfare; health and safety; personal data; cybersecurity; cultural diversity; and preserving financial stability;
  - b) To reduce unnecessarily burdensome, duplicative or divergent regulatory requirements affecting trade or investment, particularly given their impact on small and medium sized enterprises, by promoting the compatibility of envisaged and existing EU and US regulatory acts;
  - c) To promote an effective regulatory environment, which is transparent and predictable for citizens and economic operators;

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<sup>1</sup> NB: These considerations are of a broader nature and would fit best in the preamble to the TTIP Agreement.

<sup>2</sup> NB: The provisions as set forth in this Chapter cannot be interpreted or applied as to oblige either Party to change its fundamental principles governing regulation in its jurisdiction, for example in the areas of risk assessment and risk management.

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- d) To further the development, adoption and strengthening of international instruments, and their timely implementation and application, as a means to work together more effectively with each other and with third countries to strive toward consistent regulatory outcomes.
2. This Chapter provides a framework for cooperation among regulators and encourages the application of good regulatory practices. It will help identify and make use of possibilities for cooperation in areas or sectors of common interest. Its provisions do not entail any obligation to achieve any particular regulatory outcome.
3. The provisions of this Chapter do not restrict the right of each Party to maintain, adopt and apply timely measures to achieve legitimate public policy objectives, such as those mentioned in paragraph 1, at the level of protection that it considers appropriate, in accordance with its regulatory framework and principles. Nothing in this Chapter shall affect or limit the ability of governments to provide or support services of general interest.
4. The Parties reaffirm their shared commitment to good regulatory principles and practices, as laid down in the OECD Recommendation of 22 March 2012 on Regulatory Policy and Governance.

## **Article 2- Definitions**

For the purposes of this Chapter the following definitions shall apply:

a) "regulatory acts at central level" means:

for the EU:

Regulations and Directives within the meaning of Article 288 of the Treaty on the Functioning of the European Union, including:

- i. Regulations and Directives adopted under a legislative procedure in accordance with that Treaty;
- ii. Delegated and Implementing acts adopted pursuant to Articles 290 and 291 of that Treaty.

for the US:

- i. Federal Statutes;

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ii. (A) Rules as defined in 5 USC § 551 (4); (B) Orders, as defined in 5 USC § 551 (6); and (C) Guidance documents, as defined in Executive Order 12,866 § 3(g) issued by any federal agency, government corporation, government controlled corporation or other establishment in the executive branch of government covered by 5 USC § 552 (f) (1) of the Administrative Procedures Act, as amended;

iii Executive Orders and [other executive documents that lay down general rules or mandate conduct by government bodies].

"Regulatory acts at central level" do not include acts addressed to individual natural or legal persons.

b) "regulators and competent authorities at central level" means:

i. for the EU, the European Commission;

ii. for the US, US Federal agencies [defined by the Administrative Procedures Act (APA); 5 U.S.C. § 552 (f)].

c) "regulatory acts at non-central level" means:

for the EU:

- laws and regulations adopted by the central national authorities of an EU Member State, except those that transpose into domestic law European Union acts.

for the US:

- laws and regulations adopted by the central authorities of a US State.

"Regulatory acts at non-central level" do not include acts addressed to individual natural or legal persons.

d) "regulators and competent authorities at non-central level" means:

i. For the EU, the central government authorities of an EU Member State;

ii. For the US, the central government authorities of a US State.

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e) "international instruments"<sup>3</sup> means documents adopted by international bodies or fora in which both Parties' regulators and competent authorities at central level participate, including as observers, and which provide requirements or related procedures, recommendations or guidelines on the supply or use of a service, such as for example authorization, licensing, qualification or on characteristics or related production methods, presentation or use of a product.

### Article 3 – Scope

*[The scope of this chapter will need to be further reviewed at a later stage in the negotiations]*

1. The provisions of Section II apply to regulatory acts at central level<sup>4</sup> in areas not excluded from the scope of TTIP provisions, which:
  - a) determine requirements or related procedures for the supply or use of a service<sup>5</sup> in the territory of a Party, such as for example authorization, licensing, or qualification; or
  - b) determine requirements or related procedures applying to goods marketed in the territory of a Party concerning their characteristics or related production methods, their presentation or their use.
2. The provisions of Section III apply to regulatory acts at central and non-central level in areas not excluded from the scope of TTIP provisions, which fulfil the criteria in paragraph 1 and that have or are likely to have a significant impact<sup>6</sup> on trade or

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<sup>3</sup> NB: This definition captures documents produced by international bodies in which both the Commission and US federal government or one or more of its agencies participate, including for example bodies like the UNECE, OECD, IMDRF, the ICH or the World Health Organisation; but the definition excludes bodies such as IEC, ISO, the ESOs, or US private standardisation bodies. The TBT Chapter is expected to cover cooperation in the area of product standards, generally; sectoral provisions in TTIP may also cover cooperation on standards.

<sup>4</sup> NB: Further reflection will be required regarding regulatory acts at non-central level.

<sup>5</sup> This Chapter shall not apply to regulatory acts concerning those services to which Section 1 of Chapter II [Liberalisation of investment] and Chapter III [Cross border supply of services] of Title [Services & Investment] do not apply.

<sup>6</sup> NB: The regulators and competent authorities at central level of each Party will identify regulatory acts at central level that may have a significant impact on EU-US trade (see also Article 9 par. 1). Further discussion will be needed on how to identify these acts at the non-central level.

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investment between the Parties. Regulatory acts at central or non-central level concerning the matters covered by [specific or sectoral provisions concerning goods and services, to be identified] fall in any event within the scope of this Chapter.

#### **Article 4 – Relationship with specific or sectoral provisions**

1. In case of any inconsistency between the provisions of this Chapter and the provisions laid down in [specific or sectoral provisions concerning goods and services, to be identified], the latter shall prevail.<sup>7</sup>
2. Regulatory cooperation in financial services shall follow specific provisions set out in [to be identified – *FS chapter/section....*].

*[Placeholder for Article on: (a) exchange of confidential information between regulators and competent authorities; (b) information exchanged pursuant to this Chapter to promote regulatory cooperation may not be used for other purposes without the agreement of the Party which provided it]*

### **Section II: Good Regulatory Practices**

#### **Sub-section II.1. Transparency**

#### **Article 5 – Early information on planned acts**

1. Each Party shall make publicly available at least once a year a list of planned regulatory acts at central level<sup>8</sup>, providing information on their respective scope and objectives.<sup>9</sup>

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<sup>7</sup> NB: The relationship of specific and sectoral provisions in TTIP and the Horizontal Chapter will need to be kept under review as both sets of provisions are taking shape.

<sup>8</sup> NB: Draft regulatory acts proposed by the US Administration to Congress are considered as "planned" acts, as are bills introduced by Congressmen.

<sup>9</sup> NB: Parties can in practice comply with this provision by publishing a more comprehensive list of regulatory acts.

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2. For planned regulatory acts at central level undergoing impact assessment each Party shall make publicly available, as early as possible, information on planning and timing leading to their adoption, including on planned stakeholder consultations and potential for significant impacts on trade or investment.
3. *[Placeholder – a provision on the publication and entry into force of adopted regulatory acts may be envisaged in this Chapter, taking into account whether a horizontal provision is included elsewhere in the TTIP text]*

## **Article 6– Stakeholder Consultations**

When preparing regulatory acts at central level undergoing impact assessment, the regulating Party shall offer a reasonable opportunity for any interested natural or legal person, on a non-discriminatory basis, to provide input through a public consultation process, and shall take into account<sup>10</sup> the contributions received. The regulating Party should make use of electronic means of communication and seek to use dedicated single access webportals, where possible.

## **Sub-section II.2 Regulatory Policy Instruments**

### **Article 7- Analytical Tools**

1. The Parties affirm their intention to carry out, in accordance with their respective rules and procedures, an impact assessment for planned regulatory acts at central level.
2. Whenever carrying out impact assessments on regulatory acts at central level, the regulating Party shall, among other aspects, including non-economic impacts that the Parties examine if provided for by their respective procedures, assess how the options under consideration:
  - a) relate to relevant international instruments;

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<sup>10</sup> NB: This is an obligation for regulators to examine comments on their merits, but not to take on board suggestions put forward by stakeholders. The language used ("take into account") is standard in international agreements dealing with regulatory matters and consultation: for instance, see Article 2.9.4 of the TBT Agreement.

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- b) take account of the regulatory approaches of the other Party, when the other Party has adopted or is planning to adopt regulatory acts on the same matter;
  - c) impact on international trade or investment<sup>11</sup>.
3. With regard to regulatory acts at central level:
- a) The findings of impact assessments shall be published no later than the proposed or final regulatory acts;
  - b) The Parties shall promote the exchange of information on available relevant evidence and data, on their practice to assess impacts on international trade or investment, as well as on the methodology and economic assumptions applied in regulatory policy analysis<sup>12</sup>;
  - c) the Parties shall promote the exchange of experience and share information on planned ex-post evaluations and retrospective reviews.

### **Section III: Regulatory Cooperation**<sup>13</sup>

*[NB: See general note on the relationship of this Chapter with other TTIP Chapters]*

#### **Article 8– Bilateral cooperation mechanism**

1. The Parties hereby establish a bilateral mechanism to support regulatory cooperation between their regulators and competent authorities to foster information exchange and to seek increased compatibility between their respective regulatory frameworks, where appropriate.

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<sup>11</sup> NB: In this context, this will include EU-US trade and investment, which is understood to include the interests of investors of the other Party.

<sup>12</sup> NB: Any exchange of information needs to respect the rules to be agreed on the exchange of confidential information, see placeholder in Article 9, and needs to be consistent with each Party's legal framework as to information protected by intellectual property rights.

<sup>13</sup> NB: Except where indicated otherwise Articles in this section apply to *both* regulatory acts at central and non-central level (notably Articles 12-16).



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2. The mechanism would further aim at identifying priority areas for regulatory cooperation to be reflected in the Annual Regulatory Cooperation Programme referred to paragraph 2(a) of Article 14.
3. Each Party shall designate an office to act as a Focal Point responsible for exchanging information about envisaged and existing regulatory acts. Those exchanges include submissions concerning acts that are being prepared or reviewed by each Party's legislative authorities.

*[Placeholder for further details on the Focal Points at the non-central level.]*

#### **Article 9- Information and Regulatory Exchanges on regulatory acts at central level<sup>14</sup>**

1. When a Party publishes a list of planned regulatory acts at central level referred to in Article 5.1<sup>15</sup>, it shall identify those acts that are likely to have a significant impact on international trade or investment, including trade or investment between the Parties, and it shall inform the other Party through their respective Focal Points.
2. A Party shall also regularly inform the other Party about proposed regulatory acts at central level that are likely to have a significant impact on international trade or investment, including trade or investment between the Parties, where those proposed acts do not originate from the executive branch and were not included in the most recent list published pursuant to Article 5.1.
3. Upon the request of a Party made via the respective Focal Points, the Parties shall enter into an exchange on planned or existing regulatory acts at central level.
4. Regulatory exchanges shall be led by the regulators and competent authorities at central level responsible for or following the regulatory acts concerned.
5. The Parties shall participate constructively in regulatory exchanges. In addition to the information made available in accordance with Article 5 a Party shall provide to the

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<sup>14</sup> NB: The mechanism established under Article 9 does not preclude the existence of regular direct contacts between the regulators and competent regulatory authorities at central or non-central level, as the case may be, while keeping the Focal Points duly informed about these.

<sup>15</sup> NB: This obligation on the US side also covers US Federal Statutes.

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other Party, if the other Party so requests, complementary available information related to the planned regulatory acts under discussion.

6. The cooperation may take the form of meetings, written exchanges or any other appropriate means of direct communication. Each point of substance raised by one Party shall be addressed and answered by the other Party.
7. Each Party shall communicate without delay to its legislative authorities and via its Focal point specific written comments or statements received from the other Party concerning regulatory acts at central level which are being prepared or reviewed by those bodies. Legislative bodies shall not be obliged to respond to comments put forward by the other Party.

#### **Article 10– Promoting regulatory compatibility at central level**

1. This Article shall apply to areas of regulation where mutual benefits can be realised without compromising the achievement of legitimate public policy objectives such as those covered in Article 1.
2. When a regulatory exchange has been initiated pursuant to Article 9 with regard to a planned or existing regulatory act at central level, a Party may propose to the other Party a joint examination of possible means to promote regulatory compatibility, including through the following methods:
  - a) Mutual recognition of equivalence of regulatory acts, in full or in part, based on evidence that the relevant regulatory acts achieve equivalent outcomes as regards the fulfilment of the public policy goals pursued by both Parties;
  - b) Harmonisation of regulatory acts, or of their essential elements, through:
    - i. Application of existing international instruments or, if relevant instruments do not exist, cooperation between the Parties to promote the development of a new international instrument;
    - ii. Approximation of rules and procedures on a bilateral basis or
  - c) Simplification of regulatory acts in line with shared legal or administrative principles and guidelines.
3. A proposal under paragraph 1 shall be duly substantiated, including as regards the choice of the method. The Party receiving a proposal for a joint examination shall respond to the requesting Party without undue delay informing the latter of its decision. Every response should be substantiated.

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4. In addition to regulatory exchanges pursuant to Article 9, the Parties agree to cooperate, in areas of common interest, with respect to pre-normative research, and to exchange scientific and technical information relevant for this purpose.<sup>16</sup>

#### **Article 11 – Information and Regulatory Exchanges on regulatory acts at non-central level**

1. The Parties encourage regulatory exchanges on regulatory acts at non-central level in areas or sectors where there may be common interest.
2. Regulators and competent authorities of one Party will, upon request of another Party, provide information through its Focal Point on specific planned regulatory acts or planned changes to existing regulatory acts at non-central level, in order to allow identification of areas of common interest.
3. If one Party makes a request to engage in a regulatory exchange on specific planned or existing regulatory acts at non-central level, the requested Party will take steps to accommodate such a regulatory exchange.<sup>17</sup> The regulators and competent authorities at non-central level concerned will determine their interest in entering into a regulatory exchange.
4. These exchanges will be led by the regulators and competent authorities responsible for the regulatory acts. The regulators and competent authorities at central level of both Parties will facilitate the exchanges.
5. Paragraphs 1 to 4 shall be without prejudice to more detailed provisions on regulatory cooperation concerning regulatory acts at the non-central level in [specific or sectoral provisions<sup>18</sup> – *to be identified*] of this Agreement.

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<sup>16</sup> NB: See Footnote 12.

<sup>17</sup> The US Party, upon receipt of a request, shall solicit the responsible regulators and competent authorities at non-central level to engage in regulatory exchanges.

<sup>18</sup> NB: This will include for instance any provisions regarding mutual recognition of professional qualifications.

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### **Article 12– Timing of Regulatory Exchanges**

1. When a regulatory exchange on a planned or existing regulatory act is requested under Article 9 paragraph 3 or Article 11 paragraph 3, it shall start promptly.
2. With regard to planned regulatory acts at central level, regulatory exchanges may take place at any stage of their preparation<sup>19</sup>. Exchanges may continue until the adoption of the regulatory act.
3. Regulatory exchanges shall not prejudice the right to regulate in a timely manner, particularly in cases of urgency or in accordance with deadlines under domestic law. Nothing in this Chapter obliges a Party to suspend or delay steps foreseen under its domestic regulatory procedure.

### **Article 13– Promoting International Regulatory Cooperation**

1. The Parties agree to co-operate between themselves, and with third countries, with a view to strengthening, developing and promoting the implementation of international instruments *inter alia* by presenting joint initiatives, proposals and approaches in international bodies or fora, especially in areas where regulatory exchanges have been initiated or concluded pursuant to this Chapter and in areas covered by [specific or sectoral provisions – to be identified] of this Agreement.
2. The Parties reaffirm their intention to implement within their respective domestic systems those international instruments they have contributed to, as provided for in those international instruments.

### **Article 14- Establishment of the Regulatory Cooperation Body**

1. The Parties hereby establish a Regulatory Cooperation Body (hereafter "RCB") in order to monitor and facilitate the implementation of the provisions set out in this Chapter for both regulatory acts at central and non-central level and of the [specific or

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<sup>19</sup> For greater certainty, a dialogue may take place after the regulating Party has announced, through the publication of the list envisaged in Article 5.1, its intention to regulate, and: (a) in the case of the US, before the publication of a draft for consultation or (b) in the case of the EU, before the adoption of a Commission proposal. This note is not applicable to the proposed regulatory acts referred to in Article 9.2.

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sectoral provisions concerning goods and services – to be identified] of this Agreement.

2. The RCB's functions shall be:

- a) The preparation and publication of an Annual Regulatory Co-operation Programme reflecting common priorities of the Parties and the outcomes of past or ongoing regulatory cooperation initiatives under section III of this Chapter, including information on the follow-up, the steps envisaged and timeframes proposed in relation to these identified common priorities;
- b) The monitoring of the implementation of the provisions of this Chapter, including the [specific or sectoral provisions concerning goods and services] of this Agreement, and reporting to the Joint Ministerial Body on the progress in achieving agreed co-operation programmes;
- c) *[Placeholder on technical preparation of proposals for the update, modification or addition of specific or sectoral provisions. Such updates, modifications or additions will be adopted in accordance with the internal procedures of each Party. The RCB will not have the power to adopt legal acts];*
- d) The consideration of new initiatives for regulatory co-operation, on the basis of input from either Party or its stakeholders, as the case may be, including of proposals for increased regulatory compatibility in accordance with Article 11;
- e) The preparation of joint initiatives or proposals for international regulatory instruments in line with Article 13, paragraph 1;
- f) Ensuring transparency in regulatory cooperation between the Parties;
- g) The examination of any other issue concerning the application of this Chapter or of [specific or sectoral provisions concerning goods and services] raised by a Party.

3. In the domain of financial services the functions as set out under in paragraph 2 shall be performed by the [Joint EU/US Financial Regulatory Forum (FRF)], which shall ensure appropriate information to the RCB. Any decisions concerning financial services should be taken by the competent authorities acting within the framework of the FRF.

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4. The RCB may create sectoral working groups [as defined in annex x<sup>20</sup>] and delegate certain tasks to them or to such other working groups that may be set up by the Joint Ministerial body.
5. The agenda and the minutes of the meetings of the RCB shall be made public.

[6. Placeholder – provisions on the interaction of the RCB with legislative bodies]

#### **Article 15- Participation of stakeholders**

1. The RCB shall hold, at least once a year, a meeting open to the participation of stakeholders to exchange views on the Annual Regulatory Co-operation Programme.
2. The annual meeting shall be prepared jointly by the co-chairs of the RCB with the involvement [NB: depending on whether these groups are established] of the co-chairs of the Civil Society Contact Groups, ensuring a balanced representation of business, consumers, public health, trade unions, environmental groups and other relevant public interest associations [to be agreed in more detail in the Rules of Procedures of the RCB, see Article 15 par. 2]. Participation of stakeholders shall not be conditional on them being directly affected by the items on the agenda of each meeting.
3. Each Party shall provide for means to allow stakeholders to submit their general views and observations or to present to the RCB concrete suggestions for further regulatory co-operation between the Parties. Any concrete suggestion received from stakeholders by one Party shall be referred to the other Party and shall be given careful consideration by the relevant sectoral working group that shall present recommendations to the RCB. If a relevant sectoral working group does not exist, the suggestion shall be discussed directly by the RCB. On proposals that have been considered by the RCB a written reply shall be provided by the latter to stakeholders without undue delay. These written replies shall also be published as part of the Annual Regulatory Co-operation Programme referred to in Article 14 paragraph 2 lit. a).
4. Procedures shall be developed for any sectoral working groups to allow stakeholders to consult with Civil Society representatives covering the different interests mentioned in Article 15.

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### **Article 16 –Composition and Rules of Procedure**

1. The RCB shall be composed of representatives of the Parties, including at the non-central level. It shall include senior representatives of regulators and competent authorities, as well representatives responsible for regulatory coordination activities and international trade matters at the central level. In addition, whenever the RCB considers cooperation in relation to specific regulatory acts at central or non-central level, the relevant regulators and competent authorities responsible for those acts shall be invited to participate in RCB meetings.
2. Each Party shall nominate their representatives in the RCB by (date) and provide relevant information and contact details. The Parties shall identify a first set of areas of possible future cooperation by (date).
3. *[Placeholder for more detailed provisions on the composition, chairmanship and Rules of Procedure of the RCB].*

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20 The sectoral working groups may also consider specific cooperation initiatives related to regulatory acts at non- central level in areas of common interest for the relevant regulators and competent authorities.