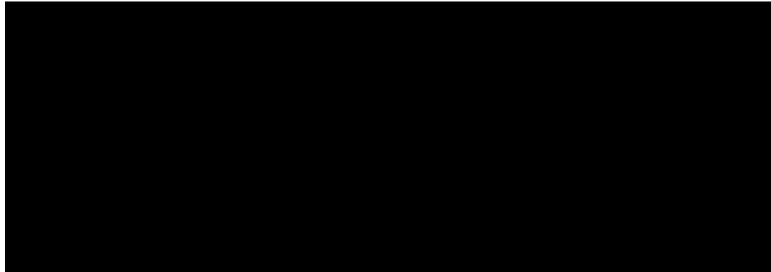


Complaint from foodwatch e.V. to the EU Ombudsman

Submitted: 30 November 2021

foodwatch e.V.

represented by Thilo Bode, Executive Director



Against which institution do you wish to complain?

European Commission – DG Trade

What is the decision or matter about which you complain?

The foodwatch complaint concerns two aspects of the **EU-Canada Comprehensive Economic and Trade Agreement (CETA)** and the role of DG Trade as the administrator of the CETA committees for the EU. These aspects form different parts of this complaint which can be taken together or separately as the Ombudsman sees fit.

1. Lack of Transparency of CETA Committee decision making

CETA is applied provisionally since 2017. Since then, the agreement has been in force almost in its entirety with few exceptions, one of which is the controversial investment court system. However CETA is a so called “living agreement”: the negotiations between Canada and the European Commission continue.

This process happens behind closed doors: numerous thematic committees staffed with representatives from Canada and the European Commission negotiate important issues like pesticide protection standards, food controls or genetic engineering standards. Despite these decisions having implications for all European citizens, it is not possible for them or civil society organisations to follow the negotiation process in detail. This is disturbing. European citizens have a right to know what the European Commission and Canada are deciding regarding these and other issues.

In 2015, the European Commission itself declared that: “Transparency is fundamental to better regulation” (page 23) and acknowledges that: “Lack of transparency undermines the

legitimacy of EU trade policy and public trust” (page 19).¹ They go on to state that “Transparency should apply at all stages of the negotiating cycle from the setting of objectives to the negotiations themselves and during the post-negotiation phase.” Yet, six years on, it is impossible to receive detailed information about the developments in CETA. Transparency must also continue in the implementation phase of a trade agreement.

An example: some pesticides that are banned in the EU because of their toxicity can be used in Canada. It also is no secret that Canada wants to get rid of the EU’s precautionary principle as a basis of pesticide standards on EU imports. A lot of money is at stake. Canadian agricultural exports worth 1.88 billion EUR per year are affected by European standards on Minimum Residue Levels (MRLs) of pesticides.² Decisions on pesticide standards within CETA will have an impact on the food quality of 447 million EU citizens and their health. This is an issue of profound public interest and the negotiations on it should be public. Yet, we have no way of knowing what is being negotiated.

The opacity of the committees’ work undermines the trust of EU citizens and civil society. Furthermore, a public debate on the European Commission’s negotiation strategy cannot take place because there is no information on their positions. There is also a higher probability of lobbying influence on the decision-making processes, when negotiations happen in secret with no public oversight.

Over the past two years, foodwatch has been working hard to find out what the European Commission and Canada are negotiating under the CETA trade agreement via publicly available documents as well as several access to documents requests (details in Annex 4 and Annex 5). We have learned little; the information is not satisfactory at all considering the sensitivity of the topics covered by CETA and the importance for the citizens of the EU. The accessible information is too superficial to get a real understanding of the negotiations between Canada and the European Commission.

Furthermore, we have the impression that parts of the requested preparatory documentation – namely briefing notes, emails, other internal correspondence, correspondence with stakeholders –, documents that clearly must exist, as well as minutes of different committees and documents and presentations discussed in the meetings of CETA committees have not been made accessible at all.

We have been in contact with the European Commission/DG Trade regarding our concerns on the lack of transparency explaining that the information provided is inadequate. The European Commission made it clear that from their point of view, the publicly available information is satisfactory.

We do not agree. It already is a scandal, how much effort, time, and energy was necessary to receive at least a superficial overview regarding the Committees’ meetings. To actually know the course of the discussions is not possible because the CETA Joint Committee decided at a certain point that detailed minutes of Committee meetings should no longer be

¹ [Trade for All - Towards a more responsible trade and investment policy \(europa.eu\)](https://ec.europa.eu/trade/policy/press/pr/2015/09/091515_en.htm)

² Ref. Ares (2021)1164445 – 10/02/2021: Annotated Agenda 2020 Canada-EU CETA Agriculture Committee meeting, 21 September 2020 (included in Annex 5 as it is not publicly available)

taken. We only learned this in a zoom meeting with DG Trade in October 2020. We have asked for but still not received a written documentation of that decision.

All in all, the available published summary reports do not provide sufficient insight into the activities of the committees, which is necessary due to the importance of such negotiations and decisions.

This is particularly regrettable when it comes to the adoption of binding decisions in the CETA committees that have de-facto legislative character (more on this aspect in point 2 of our complaint). It is crucial for democratic bodies to do such rule-making in a transparent manner that allows the underlying positions and assumptions (and alternatives) to be identified, especially on sensitive and critical issues such as pesticide or GMO regulation. To our knowledge, even Members of the European Parliament do not have access to more detailed information from the CETA committees – which also is adding to the second point we are raising in our complaint: the democratic deficit of CETA decisions due to a lack of accountability.

A detailed overview on the information available on CETA is attached as Annex 4 and Annex 5.

2. Scope of the decision-making mandates of the CETA Committees and lack of democratic accountability of their decisions

The second part of our complaint concerns the democratic deficits of CETA.

The CETA Committees' decisions can have far-reaching consequences for EU citizens: for example on hygiene controls of meat imports or on pesticide safety standards. Many of those decisions are binding under international law. For example, once the responsible SPS Committee or the CETA Joint Committee recognizes standards for sanitary and phytosanitary measures in the context of import checks as equivalent, these standards can no longer be raised by one of the parties without engaging in consultations with the other. Unilateral changes would be a violation of international law. It is appalling that such decisions are made in secret (complaint 1) with no public debate and without the democratic control of the European or national parliaments.

CETA is side-lining the European Parliament and thus the elected representative of the European citizens. The Council of the European Union agrees on the positions to be adopted on the EU's behalf in the Committees, whilst the European Parliament cannot express an opinion and is merely an observer. No other mechanisms of parliamentary or public accountability of the CETA committees exist for their decisions.

As CETA is a living agreement, negotiations between Canada and the European Commission still go on. This happens behind closed doors in the treaty Committees. The Committees have far reaching mandates of decision-making that go far beyond application and implementation (see Art. 26.1 para. 4 CETA) of CETA. With their decisions, the committees can further **develop, supplement, implement or even amend the agreement, not only annexes.**

This means essentially that the European and national parliaments, by ratifying CETA, give the executive a blank cheque. The parliaments are excluded from the decision-making procedure of the Committees. This is especially worrying because certain Committees, especially the Joint Committee, can even change the text of the CETA-agreement itself as well as the annexes. Some annexes or their sections have even been left empty and “to be agreed at a later stage” – it will be the Committees filling in the gaps later. For example Section B of Annex 5-E dealing with phytosanitary measures and parts of ANNEX 5-D dealing with the guidelines to determine, recognise and maintain equivalence. To our understanding, the Committees’ decisions can thus lead to the lowering of EU public health control standards when e.g. accepting lower standards in Canada as equivalent to European standards.

foodwatch sees the side-lining of the parliaments in CETA as a severe democratic deficit that undermines the balance of power between European institutions.

We have also confronted the European Commission/DG Trade with our concerns regarding the democratic accountability of the CETA Committee decisions. The European Commission in their letters simply stated that the implementation of CETA fully respects the relevant provisions of the EU Treaties and claimed that the Committees do not have the power to change the agreement.

We do not agree with this interpretation. The scope of Committee decisions is far reaching and has an internationally legal binding character. And these decisions are taken without the democratic control of the European Parliament. While the Committee’s work may be in line with the relevant legislation, our concerns remain nonetheless. **The European Commission was not able to dispel our doubts about the democratic deficits of CETA.**

foodwatch maintains that the European Parliament must be substantially involved in the implementation of CETA. Art. 218 (9) TFEU does not prevent the application of more intensive legitimisation structures for committee decisions, nor does it explicitly exclude the European Parliament from being asked to consent. It would be in line with the institutional balance to observe the equality of the Council and the European Parliament also after the conclusion of trade agreements in the further development of bilateral trade relations through binding decisions of CETA committees.

Additionally, we think that CETA Committee decisions may lead to the freezing of EU standards, thus affecting the g-autonomy of the EU. For example, if the EU would like to raise its safety standards on pesticides. After a mutual recognition of pesticide standards, a unilateral raising of these standards would not be possible anymore without a consultation process with Canada. After much back and forth in letters, we finally learned from DG Trade, that the SPS Chapter of CETA is subject to dispute settlement. This means, if there was disagreement in such a consultation process, it could lead to be sanctioned by the CETA Dispute Settlement Panel for raising standards unilaterally. This setting will make it much more difficult to raise European standards in the future if e.g. new scientific insights are gained. Thus, CETA will potentially be freezing EU standards at the status quo.

To sum up: The decision-making process in the committees provided for in CETA is setting a new and very high standard for the exercise of sovereign powers by executive bodies. In our opinion, such a comprehensive delegation of sovereign powers to treaty bodies requires a high degree of transparency and it causes a lack of democratic accountability.

foodwatch is deeply concerned about the lack of transparency and democratic accountability of the CETA Committees' work. We further think that CETA is affecting the governmental autonomy of the EU, as the internationally binding legal implications of CETA make unilateral changes in regulation very improbable when it can result in a dispute settlement process. These issues need to be tackled immediately.

A legal opinion on which we base our criticism is attached as Annex 2 as well as our letter exchange with the European Commission on the democratic deficits of CETA Committees in Annex 1.

When did you become aware of it?

We became aware of the extent of the issues at a video meeting with DG Trade on 20 October 2020.

We received a legal opinion on the issue in February 2021 (Annex 2).

We then tried to get answers to our concerns via written exchange with the European Commission (Annex 1).

What do you consider that the EU institution or body has done wrong?

1. Lack of Transparency of CETA Committee decision making

The European Commission is not putting in place its self-acclaimed intention to be more transparent in trade and investment negotiations. The information provided to the public or via access to documents requests do not allow an interested citizen or civil society to know and understand what is happening in CETA Committees. Further, we had the impression that certain types of documents (e.g. emails, briefing notes, correspondence with stakeholders) were not given to us via the access to documents requests. We also did not receive detailed minutes of committee meetings or documents and presentations discussed in the meetings of CETA committees. Far-reaching decisions are therefore being made out of the public eye, not to mention the lack of democratic scrutiny.

2. The scope of the decision-making mandates of the CETA Committees and the lack of democratic accountability of these decisions

The CETA Committees can take far-reaching, internationally binding decisions that can change the content of the agreement and its annexes, thus the Committees have de-facto legislative competences. At the same time, there is no democratic control of these decisions, the European Parliament is side-lined in the CETA framework. The decisions taken on CETA

committee decisions are lacking democratic accountability and public control. This needs to be tackled.

What, in your view, should the institution or body do to put things right?

Concerning the far-reaching decision-making mandates of the committees and the lack of necessary democratic accountability of such decisions, the European Commission should as a first step acknowledge the gravity and extent of the issue.

Following that:

1. Lack of Transparency of CETA Committee decision making

Detailed minutes of every committee meeting should be taken and made public, alongside a list of who was present at each meeting and the decisions taken. Presentations at meetings and other key documentation in the understanding of the discussions taking place must also be made available. Interested EU citizens must be able to understand how decisions that affect them are made and what is decided.

The access to documents regulation 1049(2001) does not exclude any source of information, therefore email correspondence (internal and external) as well as briefing positions that are relevant to the decisions being taken at the meetings must also be made public.

The Commission needs to be more proactive in its disclosure of information in order to meet its self-proclaimed aims of better transparency in trade. There must be a list of all available documentation – some immediately available and others that need to be requested, but which together will provide a complete picture of what is being discussed, by whom, what their positions are and what decisions are being taken.

2. The scope of the decision-making mandates of the CETA Committees and democratic accountability of those decisions

The European Commission should initiate proceedings to institutionalise the involvement of the European Parliament in the CETA Committees' decisions. In line with democratic principles, the agreement of the European Parliament should be obligatory for decisions taken by CETA Committees so that democratic control and the balance between executive and legislative bodies is reinstated. This would mean that important decisions cannot be made by the executive behind closed doors.

The time and resources need to be given to our elected representatives in order to be able to carry out this role effectively.

In addition there must be other checks and balances – via stakeholders and national parliaments as would be fit for such an open agreement as CETA.

In respect to the potential effect of CETA on the governmental autonomy of the EU and the internationally binding legal implications of such trade agreement, we suggest to include

expiring dates for the mutual recognition of protection standards like e.g. for pesticides or at least foresee regular review processes.

If far-reaching reforms are not put in place, we need to consider whether trade agreements such as CETA actually can exist in our democracy.

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes.

A meeting took place on 20 October 2020 followed by an exchange of e-mails and letters (Annex 1).

We received a legal opinion from Prof. Wolfgang Weiss in February 2021 (Annex 2), and used this as the basis of our first letter to the European Commission (DG Trade).

The European Commission's answer did not address our concerns satisfactorily, which we highlighted in our second letter. As we are still unsatisfied with the responses we are turning to the Ombudsman.

Has the object of your complaint already been settled by a court or is it pending before a court?

There is a constitutional complaint pending before the Federal Constitutional Court in Germany concerning CETA. It is directed against the consent of the German representative in the Council of the European Union to the signing, conclusion and provisional application of the Comprehensive Economic and Trade Agreement between Canada and the European Union or against the German representative in the Council not rejecting these Council decisions. It was filed in August of 2016 (reference number 2 BvR 1823/16).

The aspects "Scope of the decision-making mandates of the CETA Committees" and "Lack of democratic accountability and legitimacy of the decisions of the CETA Committees" play a role in that proceeding. However, the Federal Constitutional Court will examine these points only in connection with an *ultra vires review* or an *identity review*. According to the identity review, the Court examines whether a measure taken by an institution of the European Union has effects which affect the constitutional identity protected by Article 79 (3) of the constitution. In view of the fact that the committees have such broad mandates, it will be necessary to consider that this affects the autonomy of the German Parliament (Bundestag), the democratic structure of legislation and thus an essential element of the state structures guaranteed in Art. 79 Paragraph 3 of the constitution.

Ultra vires review can only be considered if a breach of competences on the part of the European bodies is sufficiently qualified. This is contingent on the act of the authority of the European Union being manifestly in breach of competences and the impugned act leading to

a structurally significant shift to the detriment of the Member States in the structure of competences (Order of 6 July 2010 – 2 BvR 2661/06).

The Union has no competence to establish committees for the implementation of CETA (Chapter 26 CETA) by treaty, which may then make institutional changes or additions. The CETA Joint Committee and the special committees have the power to adopt legal acts supplementing or amending the institutional framework of CETA. The Constitutional Court will have to decide whether this violates the competence bar, which Article 218 (9) TFEU establishes for institutional developments of international treaties of the Union.

The current complaint has a different objective, which the Constitutional Court will not settle.

We have also filed a lawsuit regarding one specific access to documents request before the General Court of the European Union. The case has the reference number T-643/21.

List of Annexes

Annex 1: [Correspondence with the European Commission](#)

Annex 2: [Legal opinion on Transparency, Decision-Making Powers and Democratic Accountability in CETA](#)

Annex 3: [Annotated Agenda 2020 Canada-EU CETA Agriculture Committee meeting, 21 September 2020](#)

Annex 4: [Lack of Transparency of CETA Committee decision making](#)

Annex 5: [List of Documents on CETA received from EC](#)

Annex 6: [Constitutional Complaint in Germany](#)