



Legal Opinion:

Transparency, Decision-Making Powers and
Democratic Accountability in CETA

prepared on behalf of foodwatch by

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Statement on Transparency, Decision-Making Powers and Democratic Accountability in the EU-Canada Comprehensive Economic and Trade Agreement (CETA)

1) Transparency of CETA Committee decision-making

With regard to the transparency of the work of the CETA Committees, the European Commission publishes the agenda (i.e. the agenda of the individual meetings) and summary reports of the Committee meetings. Full minutes of the meetings are not published. This is considered sufficient to get an overview of the work of the committees and the dialogues. It is expected that any formal decisions of the committees will be published.

Indeed, the CETA Joint Committee's decision on its Rules of Procedure (Decision 1/2018)ⁱ provides in Rule 8 (3) for the publication of provisional agendas and in Rule 9 (5) for the publication of "summary of the minutes". According to Rule 9 (2) and (3), quite detailed minutes are taken of the meetings, but these are not published. The "reports" published on the website of the European Commission on the individual meetings of the CETA Committees may therefore be taken to represent these "summaries of the minutes".

However, blackening in the reports or agendas are not foreseen under the above rules of procedure, except in the case of confidential information under Art. 26.4 CETA. Confidential information is information that is classified as confidential under national law.

In this respect, the Commission's practice of what they choose to make public is probably in line with the existing regulations, although the frequent practice of blackening raises concerns. It is not clear whether this really pertains merely to confidential information worthy of protection, which must not be disclosed to the public, or whether the blackening is made for other reasons.

Nevertheless, the summaries do not provide a satisfactory insight into the activities of the committees. This is particularly regrettable when it comes to the adoption of binding decisions in the CETA committees. Any kind of rulemaking or adoption of legal acts should be done in a transparent manner that allows the underlying positions and assumptions to be identified. This requires greater transparency in binding decision-making in treaty bodies than just the publication of agendas and of short meeting reports. The considerations made by the parties for the adoption of binding decisions by CETA committees can thus not be understood.

The transparency of binding decisions and their preparation must therefore go beyond the rules mentioned above. For, the EU has committed itself to transparency and closeness to the citizen, especially in the area of decision-making, see Article 1 (2) TEU ("decisions are taken as openly as possible and as closely as possible to the citizen") and Article 11 (1) and (2) TEU. The Commission promised to increase transparency, especially in the area of trade policy, in its 2015 Communication "Trade for All". This also includes transparency after the conclusion of negotiations in the implementation phase of an agreement.ⁱⁱ

This is stated in the Communication "Trade for All" on page 18:

"Policymaking needs to be transparent and the debate needs to be based on facts." ... "The Commission will also step up its efforts to promote an informed debate in Member States and a deeper dialogue with civil society at large. This is an opportunity to raise people's awareness about ongoing and planned trade and investment negotiations, and to get feedback on issues from stakeholders concerned."

The Commission does not do justice to this goal of increasing "people's awareness" when it comes to preparing and adopting binding decisions in FTA committees and other treaty bodies with its

attitude described above. Decisions in committees also contribute to policymaking in bilateral trade policy with Canada and represent - at the level of concrete issues - negotiations on these issues.

On page 19 of the Communication "Trade for All", the Commission promises a "more open policymaking process". In doing so, the Commission recognises the importance of transparency, especially when it comes to regulatory impacts of trade policy:

"Transparency is fundamental to better regulation. Lack of transparency undermines the legitimacy of EU trade policy and public trust. There is demand for more transparency in trade negotiations, particularly when they deal with domestic policy issues like regulation. 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. "

Of importance for domestic regulation are not only the negotiations on the agreements themselves, but also the subsequent implementation, in particular the drafting of binding decisions. As shown in more detail under point 2 below, the CETA Committees have significant decision-making powers.

2) The scope of the decision-making mandates of the CETA Committees

The decision-making powers of the CETA committees are not minor, but considerable. In particular, the committees *do* have the power to amend parts of CETA, as will be shown below.

Already the sheer number of decision-making mandates for the numerous committees in CETA is different from what we were used to so far under other Trade or Association Agreements. The committees in CETA are very active, as can be seen from the Commission's listing of relevant activities.ⁱⁱⁱ

The fact that not many decisions have been taken so far also says nothing about the scope and intensity of the mandates: Chapter 8 of CETA on investment protection, an essential part, is not yet in application.

With their decisions, the Treaty Committees are able to further develop, supplement, implement or even amend the content of CETA.

The mandate of the **CETA Joint Committee** is very broad: "The CETA Joint Committee is responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement" (Art. 26.1 para. 3 CETA).

The mandate goes beyond application and implementation (see Art. 26.1 para. 4 CETA). The Treaty Committees in CETA have approximately 30 different decision-making powers. The central CETA Joint Committee oversees the special Committees and has the most extensive powers:

- It can effectively amend the institutional structure of CETA beyond the current situation established in the CETA. For, the CETA Joint Committee may terminate special committees, set up new ones and assign tasks to them (Art. 26.1 para. 5 lit. g, h CETA).^{iv}
- It can also amend the CETA on specific points (see Art. 26.1 para. 5 lit. c) in conjunction with Art. 4.7 para. 1 f), Art. 8.1, Art. 8.10 para. 3, Art. 20.22), i.e. the CETA Joint Committee can decide on the extension of the concept of intellectual property, Art. 8.1 CETA, or on the meaning of fair and equitable treatment of investors, Art. 8.10.3 CETA. It may amend or supplement CETA provisions with respect to the Harmonized System, Art. 2.13.1 b) CETA, and consider amendments to Chapter 4 of the CETA, Art. 4.7.1 f read in

conjunction with Art. 26.1.5 c) CETA, or make amendments to Chapter 23, Art. 23.11.5 CETA. Under Art. 20.22.1 read in conjunction with Article 26.1.5 c), the CETA Joint Committee may, by amending Annex 20-A, add or remove protected geographical indications of origin. The Joint Management Committee shall amend the Annexes to Chapter 5, Art. 5.14.2 (d) CETA (the latter, admittedly, is subject to approval by the parties, whereas all the other above-mentioned decision-making powers do not need subsequent approval by the parties).

- The CETA Joint Committee can prescribe a binding interpretation of the CETA provisions (Art. 26.1.5 e) which is another form of amending CETA.
- It may decide to amend the annexes and protocols of the CETA (Art. 30.2 para. 2 CETA) which are integral parts of CETA (Art. 30.1 CETA).
- Among the special committees, the competence of the Committee on Trade in Goods to decide on measures to implement the exchange of product warnings between the EU and Canada (Art. 21.7 para. 5), or the competence of the Committee on Services and Investment to amend the code of conduct of the judges of the Investment Court and the applicable procedural rules (Art. 8.44 para. 2 and 3 b) CETA) should also be considered in this context of changing or amending CETA rules.

These Treaty Committees thus represent a new and far-reaching level of exercising comprehensive public powers by executive institutions, all the more if compared to pre-existing EU trade agreements and the comparatively limited competences of the treaty bodies established therein (e.g. the FTA with South Korea or the Customs Union with Turkey). This comprehensive extent of delegation of public powers to treaty bodies calls for greater transparency of their decision-making activities than hitherto.

The following examples illustrate the potentially far-reaching impact Committee decision-making has on rules in the EU:

a) Lowering EU public health control standards

Effective import checks on food products are essential for protecting the health of consumers.

According to the current CETA text, import checks must be carried out on 100 per cent of all live animal imports (see Annex 5-J to CETA). However, the SPS Joint Management Committee (a specific committee provided for in Article 5.14 CETA read in conjunction with Article 26.2 para. 1 lit. d CETA) can recognise the equivalence of differing standards or change the frequency of import checks.

Technically this is done by adopting a decision which amends Annex 5-J to Chapter 5, as mandated in Article 5.14 para. 2 lit d CETA; alternatively, the SPS Joint Committee may recommend to the CETA Joint Committee that changes be made with respect to the frequency of checks in Annex 5-J.

This means that the control standards could be lowered at any time in the future by committee decisions. This could undermine the sanitary and phytosanitary standards applied in the context of import checks, resulting in unsatisfactory health protection for consumers in the EU.

Apparently, the contracting parties have discussed the management of import checks at great length. The minutes from the CETA SPS Committee's discussions about the provisions on import checks in the text of the treaty and their possible amendment are roughly 30 pages long.

However, the fact that these 30 pages are almost entirely blacked out is unsettling, particularly because the health of the imported animals and the confirmation that they are free of infectious diseases are not only of commercial importance for the importing market players, but also of pivotal importance for the health of consumers in the EU.

b) Freezing of EU Standards of Protection

Pursuant to Art. 5.6 para. 3 CETA, Annex 5-E CETA stipulates in which areas SPS measures^v by Canada are to be regarded as equivalent to EU requirements, for which further conditions can be stipulated there. In CETA Annex 5-E, equivalence is already established in a binding manner under international law, in accordance with the conditions set out therein, and factually limited to what is explicitly mentioned there. Thus, equivalence currently applies to the measures explicitly listed in Annex 5-E. Annex 5-E contains in its section A certain sanitary measures for certain animal products. Section B for phytosanitary measures is currently empty. However, this Annex may be filled by a decision of the SPS Committee under Article 5.14 para. 2 lit. d) CETA or by a decision of the CETA Joint Committee.

Thus, both the CETA Joint Committee and the SPS Joint Management Committee can each make decisions on the recognition of SPS standards as equivalent.

The special significance of such decisions lies in their international legal nature. Once standards of protection are recognised as equivalent in the context of CETA, these standards are subject to a binding commitment for the EU under international law. Accordingly, CETA, as an international treaty, stipulates what must be later implemented by way of EU secondary legislation or national legislation with respect to imports from Canada. This means that, if the EU or its Member States adopt rules or apply regulations that conflict with the CETA obligations, these rules would automatically be a violation of international law.

This situation would have serious consequences for a multitude of areas that directly affect the daily lives of citizens, consumers and workers, as well as companies. Additionally, it allows CETA to weaken the parliaments. Through the mutual recognition of product and process standards as equivalent in the context of the CETA agreement, standards of protection are being effectively frozen owing to the fact that it is subsequently much more difficult to raise any standards related to imports.

Although a contracting party can later raise the standards for its own internal market, it cannot demand that imports from its trading partner also comply with such new standards after a recognition of equivalence has been made.

Therefore, in practice, a standard that has been recognised as equivalent will remain unchanged due to the requirement of giving equal treatment to all providers in a market. Changes effectively can only be made through negotiations between the contracting parties. This means that, once the responsible SPS Committee or CETA Joint Committee recognises Canada's lower standards for sanitary and phytosanitary measures in the context of import checks as equivalent to those of the EU, these standards can no longer be raised by one of the parties without breaking international law.

3) The democratic accountability and thus legitimacy of the decisions of the CETA Committees

The decision-making of the CETA committees takes place on the basis of Council decisions pursuant to Article 218 (9) TFEU in a so-called simplified procedure to produce binding decisions under international law in the CETA committees. In its decisions pursuant to Article 218 (9) TFEU, the Council prepares the positions to be taken by the EU in the committees; this also prepares the decisions of the treaty committees. Even if this corresponds to the institutional rules currently found in EU law, concerns remain about the democratic legitimacy of this procedure.

This is because the procedure under Article 218 (9) TFEU is deficient from a democratic point of view. In this procedure, only the Council decides on the decisions of the CETA committees. The European Parliament cannot co-decide; it is only informed. There are also no other mechanisms of parliamentary or public accountability of the CETA committees for their decisions. Scholars soon complained about this deficit of democratic control. Taking the procedure the way it is written does not correspond to the equal rights of the Council and the European Parliament in shaping trade relations, as established by the CJEU in relation to Article 218 (6) TFEU. The Council and the EP have symmetrical powers in terms of legislating and treaty-making; they "enjoy the same powers in relation to a given field, in compliance with the institutional balance provided for by the Treaties".^{vi}

It is therefore precisely in line with the institutional balance to observe this 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; Art. 218 (9) TFEU does not prevent the application of more intensive legitimation structures for committee decisions, nor does it explicitly exclude the European Parliament from being asked to consent. In established constitutional practice, the European Parliament is involved in the Council's decision-making on the provisional application of trade agreements pursuant to Art 218 (5) TFEU, without this being explicitly provided for in the TFEU. So, consequently, under Article 218 (9) one should apply the same level of Parliament involvement.

In terms of constitutional law, the democratic deficit of the simplified procedure under Article 218 (9) TFEU has also been addressed by the German Federal Constitutional Court - from the perspective of national constitutional law, which in this respect must also be respected by the EU by virtue of Article 4 (2) TEU - even though the Court has not yet made its final decision. In the CETA ruling of the Federal Constitutional Court of 13.10.2016, in para. 59, 65 the Court clearly identified the democratic problem:

"Moreover, it cannot be ruled out completely that the set-up of the committee system as provided for in CETA encroaches on the principle of democracy, which forms part of the constitutional identity of the Basic Law. ... Democratic legitimation and oversight of such decisions appears uncertain and will likely only be guaranteed if decisions affecting the competences of the Member States or the scope of the European integration agenda are only taken with Germany's approval."^{vii}

The Commission's lack of sensitivity to ensure the democratic accountability and responsibility of any exercise of sovereign power in CETA committees established by the EU is at odds with its commitments to the need for stronger and broader legitimacy of trade policy as outlined above in reference to the Communication "Trade for All".

ⁱ https://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157677.pdf

ⁱⁱ Trade for All. Towards a more responsible trade and investment policy. COM (2015).

ⁱⁱⁱ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>

^{iv} Also the German Constitutional Court assesses these powers to be amendment powers, see its decision of 13 October 2016, at para. 60

(https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/10/rs20161013_2bvr136816en.html): “The significant powers of the CETA Joint Committee include, insofar as provided in CETA, the power to decide on amendments to the Agreement (Art. 26.1(5) letter c of the CETA draft) and to amend its protocols and annexes (Art. 30.2(2) first sentence of the CETA draft). Yet in quantitative terms, protocols and annexes make up the largest part of the Agreement in question. Moreover, the CETA Joint Committee may, by decision, add other categories of intellectual property to the definition of “intellectual property rights” (Art. 8.1 “intellectual property rights”, second sentence of the CETA draft).”

^v According to Art. 5.1 para. 1 lit a) CETA, the notion of the term is identical to the relevant definition in the SPS Agreement of the WTO, Annex A.

^{vi} CJEU, Case C-658/11 ECLI:EU:C:2014:2025, para 56.

^{vii} Reference as in endnote iv