

The role of Treaty Committees in CETA and other recent EU free trade agreements

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Questions and answers:

- 1. What role do the Treaty Committees play in CETA? Why do these committees exist at all and have they always existed in this meaning at free trade agreements?**

The Treaty Committees in the EU-Canada free trade agreement (CETA) are decision-making bodies consisting of representatives of the contracting parties, usually representatives of Canada and of the EU Commission. With their decisions, the Treaty Committees are to further develop, supplement or implement the Treaty. 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). The fact that the mandate goes beyond application and implementation is demonstrated by the listing of its tasks in Art. 26.1 para. 4. The special committees also have decision-making powers (Art. 26.2 para. 4 at the end). There have long been decision-making treaty bodies in EU trade or association agreements. The best known is probably the Association Council in the Association Agreement between the EU and Turkey, which stipulates, for example, the access of Turkish workers to the labour market in the EU. Whereas in the past, however, decision-making powers were only laid down very sporadically in the agreements, and these powers were laid down in great detail, the use of these decision-making bodies in the new generation of free trade agreements has expanded considerably. In concrete terms, this means that in the agreements, starting with the

CETA agreement, a large number of Treaty Committees are set up (in CETA a total of 10), whose tasks are sometimes very far-reaching and which are also authorised to take binding decisions that go beyond the mere application of CETA rules, but concern decisions on important issues or represent the adoption of general rules. CETA and the newer Free Trade Agreements thus not only deploy many more of these bodies, but also give them much more numerous and comprehensive powers. The Treaty Committees have about 30 different decision-making powers. These Treaty Committees thus represent a new level of sovereignty. The free trade agreements delegate regulatory tasks to them.

2. What are the most important contractual bodies at CETA and their tasks?

The most important Treaty Committee is the CETA Joint Committee. It monitors the performance of tasks by the special committees and has the most extensive powers. It can terminate special committees, set up new ones and assign tasks to them (Art. 26.1 para. 5 lit. g, h). In addition, it may amend the CETA at certain points (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) and prescribe a binding interpretation of a CETA rule (Art. 26.1 e). It may also decide to amend the annexes and protocols of the CETA (Art. 30.2 para. 2). The special committees have a wide range of tasks. 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) should be emphasised here.

3. What is the composition of the members of the Treaty Committees?

In principle, the Treaty Committees consist of representatives of the EU and Canada, but not of those of the member states. For the CETA Joint Committee, it is explicitly stipulated that the Canadian Minister of Commerce and the EU Trade Commissioner, or their representatives, share the chairmanship (Art. 26.1 para. 1). The special committees are also chaired by a representative of Canada and one of the EU. In contrast to the CETA Joint Committee, it is not ruled out whether national representatives are also members. Due to the wording in CETA, this is obvious for the following special committees: Art. 5.14.1 provides for representatives of the regulatory

and the trade side of each contracting party with competence for SPS measures, Art. 6.14.2 for representatives of customs, trade or other competent authorities of the parties, Art. 13.18.1 refers to representatives of financial services authorities, Art. 19.19.1 generally refers to representatives of the Parties; Art. 21.6.3 states that the Regulatory Cooperation Forum shall be co-chaired by a senior representative of Canada and the Commission; other members may be "relevant officials of the Parties".

4. How do the decision-making processes for a Treaty Committee decision take place from the outset?

The Treaty Committees meet at least once a year, or more frequently at the request of a Party or the CETA Joint Committee. Either Party may, at any time, raise a question of application or interpretation with the CETA Joint Committee, thereby specifying a subject on which the Parties shall endeavour to meet within 30 days. The dates of the meetings and the agenda of each meeting shall be decided by the CETA Joint Committee itself (Art. 26.1, para. 2). The proposals for items on the agenda and the draft decisions shall be prepared between the parties. On the EU side, the EU Commission is responsible for this, coordinating with the member states in the Trade Policy Committee pursuant to Art. 207 (3) TFEU, which consists of representatives of the member states; the agenda of the Treaty Committees is the subject of the meetings of the Trade Policy Committee. The Commission then submits a draft Council Decision on the agenda items to the Council in preparation for a Treaty Committee meeting. In accordance with Art. 218 (9) TFEU, the Council then decides on the position to be taken by the EU Commission in the respective Treaty Committee on this point. Decisions on the proposed resolutions agreed between Canada and the EU are then taken in the Treaty Committee at a meeting which is generally attended in person; this requires unanimity between the EU and Canada. Both must agree to the decision. Then the decision is taken and binding and must be followed and implemented by the EU Member States on a regular basis without any ratification.

5. Why are the decisions of the Treaty Committees not sufficiently democratically legitimised (from the point of view of the Member States and the EU)? What exactly does "simplified procedure" mean and what is its legal basis?

Democratic legitimacy in the EU also requires that essential decisions or the enactment of legislation be legitimized by the people. In the representative system, this type of sovereignty is exercised by the EU legislator. A delegation of essential decisions or of legislation to executive actors may either not take place at all or only if the EU legislator has effective control possibilities. The exercise of sovereignty by Treaty Committees takes place without the participation of a parliament. Only executive actors act in a Treaty Committee and also in the preparation of its decisions. This is no longer democratically legitimate if these actors not only take executive decisions, but also decide essential questions or even enact general rules like a legislator, at least when parliaments have no say in this. As set out in question 4 above, only the Commission and the Council of Ministers are responsible for preparing the decision-making process in a Treaty Committee and finalising the EU position. The European Parliament is not involved, nor are national parliaments, even if the Treaty Committees are active in areas for which the Member States are also responsible. The European Parliament is only informed of Council decisions (Art. 218 (10) TFEU), sometimes only afterwards. The European Parliament may draft a resolution on the Commission's draft decisions, but it has no effect whatsoever. The Commission is not obliged to take these into account when drafting drafts, nor is the Council obliged to do so when taking decisions. As mentioned above, no involvement of the European Parliament is provided for in the Council decision under Art. 218 (9) TFEU. This is a democratic deficit, since the European Parliament decides on legislative matters, important decisions, but also on the conclusion of trade agreements on an equal footing with the Council, and has the same rights as the Council. The ECJ has expressly stated this. In contrast, the European Parliament does not participate in the decision-making of Treaty Committees, although, as shown in questions 1 and 2, the decisions relate to areas which are in fact legislative powers of the EU legislator or which could require an amendment of EU legislation in their implementation. The amendment of the CETA, which is assigned to the Treaty Committees, is a treaty amendment which actually requires the approval of the European Parliament. The delegation of treaty amendments to Treaty Committees, whose decisions are prepared for the EU in accordance with Article 218 (9), replaces

the normal treaty amendment procedure. The Treaty is thus being amended in a simplified procedure which specifically dispenses with the consent of the European Parliament that would otherwise be required. One might argue that the European Parliament has approved these delegations as a whole by approving CETA. However, a general agreement on decision-making powers cannot suffice to legitimize concrete decisions when they concern essential issues or the adoption of general standards. The democratic principle demands effective democratic control of such sovereignty by the EU legislator, and thus also by the European Parliament. Such control rights do not exist, however. The European Parliament may not prevent, amend or withdraw a Treaty Committee decision. It is only informed, and subsequently receives overall annual reports on the implementation and application of the free trade agreements, which also report on the activities of the Treaty Committees. This does not allow effective control.

6. How can the decisions of a Treaty Committee be revoked?

The withdrawal or amendment of a Treaty Committee decision is not specifically regulated. Therefore, in accordance with general principles of law, the act may be amended or repealed only in the procedure in which it was adopted. Hence the same procedure applies to the amendment or repeal of a decision as to its adoption: the decision is taken by consensus in the committees; Canada and the EU must be in agreement. The preparation of the EU position is again the responsibility of the Commission and the EU position is adopted by the Council. The European Parliament is not even consulted.

7. What do you personally see as the greatest dangers of the role of the Treaty Committees, both legally and politically?

The free trade agreements of the new generation establish a system of treaty committees that are authorized to perform independent acts of sovereignty without having parliamentary legitimacy in their exercise of sovereignty. These Treaty Committees are entrusted with rule-making tasks and with amendments to the Treaty text. Such far-reaching transfers of sovereignty by the EU to new international law bodies require an extended democratic control in this respect, which does not yet exist. The CETA, like the other new free trade agreements, extends the rights of the executive branch without the need for accompanying parliamentary control rights. This also applies to democracy at national level. The control of the development of European

integration by national parliaments is made even more difficult by the establishment of a further level of sovereignty. In general, my concerns are not directed against any institutionalization of international cooperation and EU participation in it. The exercise of sovereignty can be delegated to international bodies to a limited extent and with legal safeguards. However, these limits must be respected: The scope must be limited to executive tasks, and further powers require intensified parliamentary scrutiny over the exercise of delegated powers. These extended control rights exist just as little in the CETA as in other agreements. Nor have they been created in Union or national accompanying legislation. The delegation of significant sovereign decisions, particularly in the area of rule-making and treaty amendment, cannot take place without effective parliamentary control mechanisms. The ever-increasing proliferation of Treaty Committees threatens to establish an ever denser new level of sovereignty without steps being taken to democratically legitimize it. The national parliaments in particular are called upon to do just that. They must demand more intensive parliamentary control rights for this type of exercise of sovereignty. Increased reporting obligations are not enough. The limits of such delegations must be defined by clear rules on parliamentary participation before the deployment of such Treaty Committees continues to escalate. As already mentioned, the CETA Joint Committee may even further expand these institutional structures.