Explanatory Statement

The Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) establishes a new and comprehensive institutional framework for cooperation between Canada and the EU. It comprises 30 chapters (230 pages) as well as numerous annexes (1368 pages).

The Council is obliged to obtain the consent of the European Parliament prior to concluding the Agreement (Art. 218(6)(iii) TFEU).

1. Impossibility to make a substantive assessment in light of the calendar adopted by INTA

Civil society has raised various concerns in substance about CETA. Many provisions of CETA concern issues that fall into the competence of the Committee on the Environment, Public Health and Food Safety (ENVI) as far as EU legislation is concerned. A good reference point for a proper assessment of CETA in light of the European Parliament's right to approve or reject a proposed act would be the ENVI opinion on the negotiations of a Transatlantic Trade and Investment Partnership with the United States of 16 April 2015[1].

According to Rule 99(4) of the Rules of Procedure, Parliament should normally vote on the consent within six month after the referral. The referral is expected for 21 November 2016, so Parliament could take until May 2017. Council has requested the EP position for 17 February. However, INTA wants to vote on 5 December, with a possible plenary vote in either December or in January. The unreasonably fast timetable by INTA does not allow any proper scrutiny by ENVI so as to do justice to the prerogatives of the European Parliament. Such an assessment therefore needs to be made by MEPs at the plenary level, without proper input from the committees concerned.

It is highly regrettable that INTA is not interested in the sectorial expertise of ENVI. This is all the more regrettable insofar as contrary to TTIP, there is no CETA monitoring group established in the Parliament, and there was no access to documents by Parliament during the negotiation process.

2. Concerns about lack of democratic control by the European Parliament with regard to decisions by the Joint Committee of CETA on issues that fall into the competence of ENVI: the need for an interinstitutional agreement to ensure democratic control

a) The CETA Joint Committee: it has major decision-making powers

1 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARL%2BPE-544.393%2B02%2BDOC%2BPDF%2BV0%2F%2FEN

A key objective of CETA is the reduction or elimination of barriers to trade and investment (see CETA, second preamble, as well as principles of regulatory cooperation in Art. 21.2). This involves in particular the reduction or elimination of non-tariff barriers, i.e. of diverging provisions in laws and standards. This is to be achieved in the context of future regulatory cooperation, which has a very broad scope, including special chapters on technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS).

In CETA, the decision-making power lays with the CETA Joint Committee (JC), which can take legally binding decisions, subject to the completion of any necessary internal requirements and procedures (see Article 26.3 CETA). According to the established hierarchy of norms, international agreements override EU secondary law. In other words, a JC decision could oblige the European Parliament to adopt a specific piece of legislation.

The JC cannot only take binding decisions as such, but it can also take decision to adopt binding interpretations of the provisions of CETA (Art. 26.1(5)(e)). Moreover, CETA is a so-called 'living agreement', which means that the parties to the agreement are not limited by the specific terms of the agreement, but can extend its provisions as desired. According to Article 30.2(2), the JC may decide to amend the protocols and annexes of this Agreement. While several annexes are exempt from this possibility, key annexes such as the annexes on SPS can be modified by this procedure.

b) SPS measures: key provisions related to food and feed policy are not yet adopted

SPS measures concern decisions with regard to the very sensitive sector of EU food and feed policy[2]. The key provision with regard to SPS measures can be found in Article 5.6(1): "*The importing Party shall accept the SPS measure of the exporting Party as equivalent to its own if the exporting Party objectively demonstrates to the importing Party that its measure achieves the importing Party's appropriate level of SPS protection*" (own emphasis added). According to Art 5.6(2), Annex 5-D sets out principles and guidelines to determine, recognise, and maintain equivalence. However, there are no guidelines yet in this Annex, they are only to be agreed at a later stage (by the JC). So the key basis for determining and recognising equivalence has yet to be adopted.

2 SPS measures under CETA are defined by reference to Annex A of the WTO SPS Agreement. In general, SPS measures can be applied to "*protect human, animal or plant life or health within the territory of a country from risks arising from plant pests (insects, bacteria, virus), additives, residues (of pesticides or veterinary drugs), contaminants (heavy metals), toxins or disease-causing organisms in foods, beverages or feedstuffs, and diseases carried by animals*" (see Commission fact sheet at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150986.pdf)

The EU and Canada have taken very different approaches as regards food and feed safety regulation, specifically with respect to authorisation, labelling and controls in the food and feed chain for GMOs, traceability of meat, pathogen treatments, pesticides and food from cloned animals. Canada has taken WTO disputes against EU legislation inter alia on hormones in beef and GMOs. The EU environmental and food safety regulations are based on the precautionary principle and the 'farm-to-fork' approach that establish stricter EU rules and should thus be maintained (see ENVI opinion on TTIP resolution, Recital N). There is a potential risk that future guidelines on determining and recognising equivalence could undermine the precautionary principle and the EU farm-to-fork approach.

c) Precautionary principle: not part of CETA, nor of Joint Interpretative Instrument

Possible non-respect for the precautionary principle is corroborated further by lacking/ incoherent references to precaution/the precautionary principle in the various texts. There is no reference to precaution (in the context of environmental policies) nor to the precautionary principle in CETA. In the Joint Interpretative Instrument, one finds the following: "*The European Union and its Member States and Canada reaffirm the commitments with respect to precaution that they have undertaken in international agreements*" (Preamble, point d)[3]. Thus, 'precaution' is only referred to in the context of international agreements, not in the context of the EU Treaty. In other words, in the context of CETA, Canada is not required to accept the precautionary principle enshrined in Art. 191 TFEU.

d) Application of CETA: need for clear implementation rules to ensure that European Parliament is fully informed

CETA is above all an institutional framework - the key decisions in substance are yet to be taken. While the Council has to give a mandate to the Commission for decisions by the JC, the European Parliament is to be immediately and fully informed with regards to decisions by the JC at all stages of the procedure (Art. 218(10) TFEU).

The new Interinstitutional Agreement on Better Law-Making, which entered into force on 13 April 2016, includes the following in its point 40: *"The three Institutions acknowledge the importance of ensuring that each Institution can exercise its rights and fulfil its obligations enshrined in the Treaties as interpreted by the Court of Justice of the European Union regarding the negotiation and conclusion of international agreements. The three Institutions commit to meet within six months after the entry into force of this Agreement in order to negotiate improved practical arrangements for cooperation and information-sharing within the framework of the Treaties, as interpreted by the Court of Justice of the European Union"*[4]*.*

So while the need of improving practical arrangements for cooperation and information-sharing is acknowledged, negotiations are yet to start.

It is of major importance that the comprehensive information rights of the European Parliament as laid down in Art. 218(10) TFEU are clearly established in practice.

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3 http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf

4 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2016:123:FULL&from=EN

e) Decisions by the Joint Committee on binding interpretations of CETA and of modification of CETA: need for an interinstitutional agreement to ensure oversight by the European Parliament

According to Art. 10(2) TEU, the EU follows the principle of dual legitimation: Member States are represented in the European Council and in the Council, and citizens are directly represented by the European Parliament.

The ENVI resolution on TTIP stated the following: "*whereas under no circumstances can a trade agreement modify existing legislation in contracting countries; whereas the implementation of existing legislation as well as the adoption of future legislation must remain in the hands of democratically elected bodies respecting established procedures*" (Recital O).

As stated before, the JC cannot only take binding decisions as such that might require a modification of Union law, but it can also take decision to adopt binding interpretations of CETA as well as to modify certain parts of CETA.

So how does the decision-making function on the EU side? According to Art. 218(9) TFEU, Council shall adopt a decision establishing the Union position to be adopted in a body set up by an agreement. For such decisions, the Council shall act by a qualified majority, except in areas which require unanimity (Art. 218(8) TFEU). This includes acts that supplement or amend the agreement, except acts that supplement or amend the institutional framework of the agreement.

However, according to statement 19 from the Council and the Members States annexed to the Council minutes on the occasion of the adoption of the Council decision authorising the signature of CETA, "*The Council and the Member States recall that where a decision of the CETA Joint Committee falls within the competence of the Member States the position to be taken by the Union and its Member States within the CETA Joint Committee shall be adopted by common accord*"[5] (own emphasis added).

In other words, in derogation from the normal procedures, Member States have obtained the need for unanimity for any decision that falls into their competence. In a similar vein, where a JC decision falls within the competence of the Union, there should be some form of control right by the European Parliament, at least with regard to the adoption of binding interpretations as well as modifications of CETA.

According to CETA Art. 30.2 "*The Parties may approve the CETA Joint Committee's decision in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment*."

5 http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=ADV&DOC_ID=ST-13463-2016-REV-1-COR-1

The Council is obliged to obtain the consent of the European Parliament prior to concluding the Agreement. Given the potentially far-reaching decisions that can be taken by the JC which would affect Union legislation, the right of the JC to adopt binding interpretations of CETA, as well as to amend parts of CETA itself, including with regard to measures that fall under the competence of ENVI (e.g. SPS), it would be highly problematic for the European Parliament to be excluded from any control over such JC decisions.

To respect the principle of democracy for the Union's action on the international scene (Art. 207(1) TFEU in conjunction with Art. 21 TEU), it would be of paramount importance to develop an interinstitutional agreement that would guarantee control rights for the European Parliament for future decisions of the JC which would require a modification of EU law, which would adopt a binding interpretation of CETA's provisions, or amend it. The Commission should commit to first make the any proposals it deems appropriate at EU level subject to the applicable procedures before seeking empowerment by Council to take decision in the JC. Otherwise, there are serious concerns that the JC could take important decisions in a manner that is not sufficiently democratically legitimate.