

Notes on meeting of the Trade Policy Committee (members) on July 15th, 2016 - Brussels

Summary

ITEM 3 - CETA: Member States (MS) stressed the high importance of the conclusion of CETA, not least regarding the credibility of the EU trade policy. Many MS (HUN, ROU, LVA, LUX, BEL, AUT and GER) welcomed the fact that COM ultimately had submitted CETA as a mixed agreement and thus the national Parliaments of CETA would vote on the agreement. A major discussion focus was the issue of provisional application of CETA and its extent. No MS objected to a provisional application of CETA, even if from SVN, HUN, AUT and BEL still - but less – critical nuances were heard. But it also became clear that the TPC could not accept - in the light of the mixed nature of CETA - the proposal by COM for provisional application of the agreement in its entirety; therefore TPC will call for exceptions. Its extent has yet to be determined. Overall, one should, according to COM supported by a number of MS, gear the scope of provisional application along the lines that had been practiced with those FTAs recently concluded. Moreover, it became apparent in any case investment protection will be excluded from provisional application. GER also pointed out, that the transparency requirements for administrative and judicial proceedings should be excluded from provisional implementation and GER announced that they would consider possible additional areas for exclusion. In order to not stand in the way of the signing of the agreement at the EU-CAN Summit in Oct. 2016 no MS explicitly spoke against the transfer of the proposed changes to CETA by the Presidency to the lawyer-linguists. HUN, GRC, SVN, AUT, GER and FRA informed the Presidency, that they reserve the right for further requests for changes to the treaty text. (...)

lunch:

Introduced by COM/Demarty an exchange took place on CETA and the future of EU trade policy. COM campaigned forcefully for the signing of CETA. CAN would not sign CETA without provisional application.

II. In detail

(...) **ITEM 3 - CETA**

Presidency explained that in the CETA discussions she had one prior objective in today's meeting (15 July) of the TPC: CETA is a trade-policy priority of the SVK-Presidency, which is why they hoped for consensus among MS on the proposed changes by the Presidency to the CETA treaty text. The textual amendments were necessary because CETA had been negotiated by COM as EU-only agreement, but now COM had presented a proposal for a decision on a mixed agreement. Only the truly necessary textual changes should be made, because also the CAN side would have to agree to these. If possible MS should indicate agreement to the proposed changes in the CETA treaty text in order to allow for a signing of CETA at the EU-CAN Summit in Oct. 2016. Presidency pointed out that already at the meeting of the trade attachés of MS on July 14 almost no more amendments were asked for. Presidency added that in today's session the discussion on provisional application on the basis of the COM non-paper (see m.d. 182/16) would begin.

--COM statement --

COM / Demarty emphasized the outstanding importance of CETA. It was important not only to complete a very good deal; CETA is also a litmus test for the EU's trade policy. CAN is a third country which stands very close to the EU. If the EU is not able to ratify this agreement, the EU trade policy would have a big credibility problem; it would be "close to death". COM had proposed to MS on July 6, 2016 draft resolutions for a mixed agreement, although COM has a different legal opinion. COM had done this because of the requirements of MS and herewith would like to enable a signature of CETA in Oct. 2016 and as soon as possible reach a provisional application of the agreement. COM stated that the CETA treaty text needed to be stabilized in light of the forthcoming EU-CAN Summit, hence the legal linguistic changes should soon be tackled. In order to take into account the mixed nature of the Agreement COM agreed to speak with CAN also about the amendment of Art. 30.8 and 30.9 of the agreement text. On the issue of the provisional application COM realized that the discussion would continue for a while. However, COM advocated exempting only a few areas from provisional application. Overall, one should orient the scope exceptions from provisional

application along the lines that had been practiced in recently concluded recently FTAs. According to the CETA treaty text CAN would also have a say on the question what is excluded from provisional application and what is not. COM has now presented a non-paper to the Presidency on the question of provisional application, which - without prejudice to COM's legal position – includes some possible solutions. For COM the EU-KOR agreement was a precedent for the scope of possible provisional application of CETA. Regarding the investment chapter COM noted that many MS have called for the exclusion of the investment protection provisions from provisional application and COM signaled its willingness to comply with this requirement. COM also showed willingness regarding FDI - in the interests of pragmatism but without relinquishing its legal position - not to speak of an exclusive competence of the EU and to include a corresponding clause here. However, COM argued for provisional application of the market access part of the investment chapter. Although the architecture of the investment chapter is "more difficult" than in earlier negotiated EU FTAs, but the areas of market access and investment protection are separable. COM also spoke out in favour of provisional application of the provisions for the transport sector. Similar provisions have been applied provisionally in earlier FTAs (Note: In the non-paper submitted by COM there is reference to the legal statements by MS and the Council regarding the transport sector rules in recent FTAs). The EU has an offensive interest here. CAN however would certainly welcome an exclusion of this part from the provisional application. COM argued explicitly for the provisional application of the sustainability chapter. CAN has now ratified one of the three open ILO core labor standards. The ratification of the two remaining core labor standards is to be expected soon. Also here a provisional application should be possible - irrespective of different legal positions of Council and COM. A signing of CETA without provisional application of the sustainability chapter would certainly be problematic for the EU's credibility.

-- Reactions by MS: -

a) General

All MS took the floor under this agenda item. Many MS (SWE, FRA, ITA, GBR, ESP, PRT, NLD, DNK, BGR, CZE, LVA, EST, LTU) pointed out, that CETA is a fundamental, excellent or even

the best ever negotiated trade agreement. Several MS (FRA, ITA, IRL, LUX, EST) reaffirmed the COM position that the ratification of the agreement is of very high significance for the credibility and functioning of the EU trade policy. Also GER underlined that a positive decision on CETA is in everyone's interests. It would be necessary to create the conditions for the signing of CETA at the EU-CAN Summit. However, the further procedure should allow EU MS sufficient time to respect the participation rights of national parliaments before the Council decision on CETA (in Germany: the opportunity to comment). HUN, ROU, LVA, LUX, BEL, AUT and GER welcomed the fact that COM had now presented CETA as a mixed agreement. GER underlined that hereby it was ensured that national parliaments can co-decide about CETA (similarly: FRA). This would ensure a widespread acceptance of the agreement. SVN, GRC, BEL and GER spoke in favor of the existing customary practice summary of combining the decisions on the signature and provisional application. SVN justified this with the desire of their national parliament to have clarity before signing, which areas fall under provisional application. HUN however welcomed the separation of decisions on the signature and provisional application. GER urged the Presidency to make the further schedule of the discussions known. There is still much detail work to be done. Moreover GER suggested that in view of the political importance of the agreement, a special meeting of the Council (for foreign affairs/trade) should deal with the decisions on signature, provisional application and conclusion of CETA in the late summer / autumn 2016. This proposal was later supported during lunch by NLD and IRL.

b) Changes to the CETA treaty text

Several MS (FIN, GRC, LUX, EST, PRT, DNK) strongly supported the proposal by the Presidency to amend the CETA treaty text. However, HUN, GRC, SVN, AUT, GER and FRA informed the Presidency that they would have to further check the textual changes to the text - also in view of the limited time - and that they would possibly put forward further requests for changes. In order not to stand in the way of a possible signing of the agreement at the EU-CAN Summit in Oct. 2016 no MS spoke explicitly against the conveyance of the proposal by the Presidency for

changes to the CETA treaty text to the lawyer-linguists. POL voiced a critic of the Investment Chapter and the investment protection part in particular, namely that with regard to the appointment of judges each MS should be able to appoint a judge/tribunal member

c) Signature and conclusion

Several MS (LTU, GRC, BGR, PRT, EST, CZE, DNK) welcomed the changes proposed by the Presidency to the COM-resolution proposals for the signing and conclusion of the Agreement. The agreement should be rapidly signed in Oct. 2016 (FIN, HRV, LVA, IRL, ITA, SWE, ESP, MLT). GER pointed out that now the conditions for the signing of CETA need be created. BEL informed the meeting, that at the current moment it could not take a position on the signing of the agreement. ROU - in light of the unresolved visa issue - also did not see itself in a position to support the signature at this time. Similarly BGR: Regarding the visa issue there was still no clear commitment and no practical steps by CAN. In this context GRC complained again about the insufficient protection of its geographical origin 'Feta'.

d) Provisional application

Many MS (ITA, ESP, PRT, FIN, HRV, LVA, LTU, CYP) were in favor of a rapid provisional application. No MS turned against a provisional application of CETA. Sceptical nuances could be heard from SVN, HUN, AUT and BEL - but now in a reduced form. SVN with the hint, that it should be examined to what extent provisional application is possible. AUT welcomed that now an open and fact-based discussion can be conducted; BEL clarified that at this stage no final decisions on the provisional application would have to be taken. Some MS (IRL, ESP, LUX, EST, PRT, CZE, DNK) called for a comprehensive, far-reaching provisional application; FIN for provisional application and the provisions for maritime transport (as DNK) and sustainable development (as DNK and PRT) with a complementary explanation of division of powers. MLT declared itself open to options that took the concerns regarding provisional application of parts of the texts on transport and sustainability into account. ESP and PRT demanded provisional application of the market access part of the investment chapter; PRT however pointed out that in any case, legal certainty was required. SWE,

FIN, DNK, SVN, LVA and IRL - similarly also GER – called, in line with COM, for provisional application similar to previously concluded FTAs or the EU-KOR FTA, supplemented by the removal of investment protection from the provisional application. The following MS spoke explicitly against the provisional application of the following CETA-chapters:

- transport (AUT, FRA),
- sustainability chapter in parts (AUT, FRA),
- culture subsidies (AUT),
- investment protection (GER, FIN, LUX, PRT),
- mediation (FRA)
- criminal sanctions to protect intellectual property (FRA),
- overall investment chapter (HUN, LTU).

FRA announced another reconsideration of its explicitly raised points. GER disagreed with the COM-proposal to provisionally apply the entire agreement. CETA is a mixed agreement, because it touches Member States' competences. These areas should be excluded from provisional application. This would apply in particular to the provisions excluded already in previous agreements (transparency requirements for administrative procedures) and to the rules on investment protection. Other possible areas should still be checked. Regarding the investment chapter FRA, LTU, AUT and BGR saw the separation of market access and investment protection as difficult because these two areas were difficult to separate in the investment chapter text. In general a number of MS declared (SVN, GRC, LTU, AUT, ROU, ESP, PRT, CYP, CZE, GER) that provisional application should not affect the competences of the MS; it should take place only where the EU unquestionably has the competence. GER reiterated that provisional application should only happen after the European Parliament's consent.

--Statement by Legal Service of the Council -

JD Council discussed the necessary significant changes to the CETA treaty text. CETA had been negotiated by the COM as EU-only agreement, which is also being mirrored in the structure of the agreement. Since CETA is a mixed agreement now, the necessary changes to the CETA treaty text would have to be made.

Regarding the exclusion of parts of the CETA treaty text from provisional application the Legal Service made the following

comments: COM would propose in its non-paper the partial application of the CETA investment chapter, here the market access part. Legal Service of the Council can at this stage not say anything about how in a provisional application of the investment chapter the market access part could be separated in view of the complex legal texts. There were cross references in the CETA treaty text which complicated a separation. But Legal Service would use the summer to check / clarify this issue. For the transport sector Legal Services stated, that here there was a mixed competence. The Council therefore has a choice whether he wants to exercise the jurisdiction. Here a political decision should be taken.

--Response by COM -

COM welcomed the fact that many MS shared the COM-considerations for an extensive, comprehensive provisional application in principle. Regarding the investment chapter COM said that in its view it is legally possible to separate market access and investment protection, even though it was not easy. COM appealed to the MS - as to itself- to now be pragmatic in view of the known conflicts of competence. If COM was able to propose a mixed agreement but maintain its legal position, then this pragmatism should also now be reflected in the MS. On GER's requirement to exclude transparency requirements for administrative procedures COM was open, especially since there was already a precedent with the EU agreements with COL / PER. COM also showed openness regarding FRA's demand to exempt criminal provisions from provisional application, because there was also already a precedent here. Regarding the visa issue COM stated that this was not the subject of CETA, but that it hopes for positive results for ROU and BGR. Regarding GRC COM said that for the protection of the geographical indication of 'Feta' the best possible result had been achieved. Regarding the Investment Court system, which COM had developed with the unanimous support from MS, the national parliaments would now have the final say, because investment protection will be excluded from provisional application.

--Conclusions by the Presidency-

TPC Members acknowledged the adjusted CETA treaty text, which will now be forwarded by the Council Secretariat to the lawyer

linguists for further processing. TPC Members also took note of the COM non-paper on provisional application and held an initial political exchange on questions of provisional application of CETA.

(...)

ITEM 5. 2 - ECJ proceedings for EU SGP FTA:

Legal Service of the Council informed about the fact that the ECJ in the process of forming an opinion regarding the FTA with SGP (Rs 2/15.) has scheduled a one and a half-day oral examination for the 12th and 13th Sept. 2016th. The ECJ had forwarded a number of questions to COM and the other institutions. According to the Legal Service of Council it will take approximately another half a year after the hearing until the opinion is available.

(...)

Lunch

Introduced by COM / Demarty there was an an exchange of views on CETA and the future of the EU trade policy. COM campaigned forcefully for signature and provisional application of CETA. CAN will not sign CETA without provisional application. This was a pioneering modern agreement. Moreover, the output of the SGP ECJ procedure would have no effect on CETA. Overall, now the ability to have a EU trade policy in times of globalization was at stake. Also from the perspective of the MS trade policy is at a crossroads.

[end of informally translated notes]