What does the entry into force of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) mean?

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After a vote in the European Parliament on February 15, 2017, the Comprehensive Economic and Trade Agreement ("CETA" or the "Agreement") between the European Union and Canada can enter into force as early as April 2017 for the provisions receiving provisional application. Under Article 30.7 of CETA, the provisional entry into force of the Agreement can occur in the month following the ratification from European and Canadian Parliaments. Ratification from the Canadian Parliament is expected at the latest in March 2017 and therefore CETA will likely have provisional application starting April 2017.

What is a provisional application?

It is important to note that CETA has been qualified as a "mixed" treaty by the European Commission, meaning that the treaty covers both exclusive competences of the European Union (EU) as well as "shared competences", i.e. areas of competences that the EU shares with the EU Member States. As such, CETA's entry into force requires ratification by the EU Member States, which could take several years. Therefore, the provisional application of the Agreement can reduce the inconveniences inherent in the lengthy ratification process.

In fact, the decision to introduce a provisional application mechanism into CETA is not uncommon to agreements concluded by the EU, particularly trade agreements. For example, the Ukraine-European Union Association Agreement[1] is currently being applied on a provisional basis. In essence, provisional application allows the beneficial effects of a free trade agreement to take effect without waiting for the ratification by the EU Member States.

What does the provisional application mean in practical terms?

A recurring principle in free trade agreements concluded by the EU is that the Council of the EU can decide, under Article 3 of the *Treaty on the Functioning of the European Union Treaty* (TFEU), which treaty provisions falling within the exclusive competence of the EU could enjoy provisional application; this is in contrast to the competences "shared" with the Member States. Falling within the exclusive competences of the EU pursuant to Article 3 of the TFEU, for example, is the so-called "Common Commercial Policy". Certain shared competences will still be applicable provisionally as long as their application conforms to the division of competences between the EU and its Member States.

In practical terms, as far as CETA is concerned, the EU will be able to provisionally apply those provisions that stem from the EU's exclusive competence, which represents more or less 95 percent of CETA. As previously noted, certain shared competences will also be applied provisionally[2], including:

- Article 20.7 concerning the protection of copyright and other related rights, the provisional application is possible to the extent to which it does not affect the division of competences between the EU and Member States;
- Certain provisions relating to transport services; while this is an area of shared competence, its provisional application is possible to the extent to which it does not affect the division of competences between the EU and the Member States. Moreover, the provisional application of these provisions does not preclude the Member States from exercising their competences with Canada in matters not covered by CETA, or with another third country in the area of transport services;
- Chapters 22, 23 and 24 on trade and sustainable development, trade and labor, and trade and the environment, respectively; the provisional application is possible to the extent to which the provisional application does not affect the separation of competences between the EU and its Member States in the domain and without precluding the Member State's ability to exercise their competence with Canada in matters not covered by the CETA, or with a third country.

What will the repercussions of the provisional application be on small and medium-sized businesses?

CETA's provisional application and entry into force will result in a significant reduction of customs duties, specifically some 98 percent of duty rates on both sides of the Atlantic will be affected. The provisional application will also eliminate some non-tariff barriers and increase quotas for certain agricultural products. It will also result in free access to the public procurement markets of the parties of the Agreement. This is a considerable result, especially for the manufacturing industry, which will enjoy more opportunities in both markets.

CETA will bring greater legal security in the area of trade in services, increased workers' mobility and an overall framework that will ensure the recognition of workers' qualifications. These measures will further stimulate trade in services between the EU and Canada. CETA will trigger an increased protection of European pharmaceutical patents in Canada. CETA's provisional application will encourage mutual investments in the financial services industry and stimulate competition and liberalize financial exchanges. Simply put, about 95 percent of CETA's covered scope will apply immediately after its provisional application is triggered.

Which major provisions will be suspended until CETA's complete ratification by national and regional parliaments?

Chapter eight of CETA will not be applied during the provisional implementation. This chapter has already created controversy particularly concerning the mechanisms for the settlement of disputes between investors and the Member States where these investments take place.[3] Nearly the entire arbitration process of the *Investment Court System* (ICS) provided for under CETA is excluded from provisional application, that being all the provisions concerning the procedure for *Investor-state dispute settlement* (ISDS). This new mechanism will only take effect after CETA is ratified by Parliaments of the Member States. The EU's Court of Justice will equally have to decide in a few months (earliest at the end of 2017), at Belgium's request, on the compatibility of the ICS mechanism with the European treaties. [4] A negative decision could prevent the application of this crucial chapter, or even, in the most extreme of cases, lead to a reopening of negotiations.

In addition, excluded from the provisional application are some of the other provisions related to financial services and taxation. This is the case with respect to the provisions governing portfolio investment, the protection of investments or ISDS. Having said that, these provisions will enjoy provisional application with respect to access to the market of

foreign direct investment. This is done in an effort to increase the threshold of participation that European businesses can have in the capital of Canadian companies, since the conditions set by Canadians are more restrictive in comparison to those in place in the EU.

Lastly, provisions relating to the illegal copying of cinematographic work or the transparency of administrative procedures, among others, will not be applied during the provisional phase.

What interpretation should be given to the provisional application?

The fundamental rule is that, in the case of provisional application of CETA or of some of its provisions, the parties understand that the entry into force of this Agreement is the date of its provisional application.

Therefore, all provisions that are not expressly excluded from provisional application should normally enter into force in April 2017 because of the assimilation rule provided for in Article 30.7 of CETA. For example, the elimination of 97.7 percent of EU's tariffs and 98.2 percent of Canada's tariffs should enter into force within two months. Similarly, the rules applicable to other products for which liberalization is foreseen, i.e. where their tariff is reduced to zero within a period of three, five or seven years, should logically start to apply immediately following provisional application.

Is the implementation of the Agreement weakened by its provisional application?

The provisional application of the Agreement is like two swords of Damocles hanging over our heads: on one hand, there is the possibility that each Party (the EU and Canada) could unilaterally put an end to the provisional application of the Agreement, and on the other hand, the possibility that internal ratification procedures fail, which would only happen later rather than sooner.

The first danger stems from a well-known principle in the law of treaties whereby the provisional application of a treaty not yet entered into force is a "unilateral act" done by one of the parties who may decide at any time to terminate said application. In this context, Article 30.7 of CETA provides a short delay: after written notification to the other party, the provisional application will end on the first day of the second month following the notification. It may seem unlikely that relations between the EU and Canada suddenly deteriorate to that extent, but it remains true that the provisional application of the Agreement stems from unilateral commitments made by the parties who can, at any time, remove themselves from the Agreement. We can easily imagine the complexity of the solutions that would have to be put in place in such an event, for example if border tariffs had to be reinstated or obstacles blocking the free movement of persons had to be put up.

Of course, the second danger is more obvious and concerns Canada as much as the EU. The Council of the EU has raised concern of the possibility that CETA will not be ratified by all Member States. Firstly, even in the case of a Member State not ratifying the Agreement, this does not mean that the full entry into force of the Agreement would not occur. If, for example, opposition to the investment and dispute resolution provisions leads to the Agreement not entering fully into effect following the non-ratification by one or multiple national and/or federal Parliaments, a new negotiation could still be carried out within the EU in order to amend the “problematic” provisions of the Agreement or within Canada since such modification of the Agreement is not the sole right of the EU but is regulated by the international law of treaties.

However, if the Council or the Commission officially recognize that the ratification process has failed—which, it must

be noted, means after final negotiations have failed between European institutions and the recalcitrant State(s)—the provisional application under Article 30.7 of CETA would be fatally compromised.

In conclusion, even if the worst-case scenario is worrisome, small and medium-sized businesses can still benefit from the provisional application of this multifaceted commercial agreement, which will only help to create a real synergy between our two markets.

To learn more about the Agreement, please read the book entitled “The Comprehensive Economic and Trade Agreement between Canada and the EU: An Overview”.

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1. *Ukraine-European Union Association Agreement*. See also European External Action, "*EU-Ukraine Association Agreement: beginning of provisional application*", November 1st, 2014, http://collections.internetmemory.org/haeu/content/20160313172652 / http://eeas.europa.eu/top_stories/2014/011114_ukraine_agreement_en.htm↩

2. Declarations annexed to the European Union’s resolution– Document UE 13463/1/16 REV 1] ↩

3. Declaration from the Council of the European Union, *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part*, October 27, 2016, Statement No. 36 by the Commission and the Council on investment protection and the Investment Court System (‘ICS’) and Statement by the Kingdom of Belgium on the conditions attached to full powers of the Federal State and the federated entities, for the signing of CETA, para B, first paragraph. ↩

4. See statement by the Kingdom of Belgium on the conditions attached to full powers of the Federal State and the federated entities, for the signing of CETA, para B, second paragraph, “Belgium will ask the European Court of Justice for an opinion on the compatibility of the ICS with the European treaties, in particular in the light of Opinion 1/2014.”↩

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