

## Legal update

### Signed, sealed and in the mail: What CETA's signature means for transatlantic trade

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#### November 2016 International trade

This past weekend, Canadian and European leaders signed the Comprehensive Economic and Trade Agreement (CETA or the Agreement) after a last-minute deal was reached to quell dissent – at least for the time being – in the Belgian region of Wallonia. CETA's signature paves the way for ratification in both Canada and the EU, a process that is likely to pose its own challenges, particularly in Europe where ratification is required by each EU member state for those aspects of CETA that affect national jurisdiction. Nonetheless, with provisional application of aspects of CETA governed by the European Commission (EC) possible before full ratification, and as early as 2017, companies should start to consider how they can use the Agreement's tariff elimination, procurement, service liberalization and other ground-breaking provisions to their benefit.

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#### The rocky road to signature

On October 30, 2016, Canadian Prime Minister Justin Trudeau, alongside European Council President Donald Tusk and EC President Jean-Claude Juncker, signed the historic CETA trade deal during the EU-Canada Summit in Brussels. However, the route to signature was less than smooth.

In the aftermath of the Brexit vote this past summer, President Juncker informed EU leaders that the EC planned to bring CETA into effect without individual member countries ratifying the Agreement, which it could do if CETA covered only matters within the EC's exclusive competence – a matter of considerable debate. On July 5, 2016, the EC changed course and presented a proposal to the EU Council that the Agreement be put forward as a "mixed agreement" requiring ratification by all EU member states, but that the Agreement be provisionally applied pending its full entry into force.<sup>1</sup>

The EC then officially referred CETA to the EU Council with a proposal for its approval and signature, which was slated to take place during the Canada-EU Summit this fall.

However, as the Canada-EU Summit approached, the regional parliament of Wallonia, a region of Belgium, passed a resolution rejecting CETA's signature amid concerns about the Agreement's investor-state dispute settlement (ISDS) provisions, as well as concerns that CETA would threaten consumer, environmental, and labour standards. This prevented Belgium from approving the Agreement, which, in turn, threatened the unanimous approval by EU member states required for EC execution.

On October 27, 2016 (the originally scheduled CETA signature date), the Belgian government announced it had reached an agreement with Wallonia that allowed it to approve CETA's signature. However, the measures adopted to gain Wallonia's approval may pose further complications for CETA down the road. The agreement with Wallonia

contemplates that Belgium will ask the European Court of Justice to determine whether the ISDS system is compatible with EU treaties. It also stipulates that the ISDS system will not be provisionally applied pending ratification by all member states and notes that parties may terminate provisional application pursuant to the Agreement. Critically, the Belgian declaration indicates that several regions, including Wallonia, do not intend to ratify CETA with the Chapter 8 ISDS provisions as they stand at the time of signature.

Canada and the EU also agreed on the text of a Joint Interpretative Instrument, which is meant to have legal status and provide a binding interpretation of CETA's terms on specific issues.<sup>2</sup> The Joint Interpretative Instrument addresses many of the contentious elements of the Agreement and was no doubt meant, at least in part, to ease Wallonia's concerns. Among other things, the Joint Interpretative Instrument:

- Clarifies that CETA preserves the parties' ability to regulate economic activity in the public interest;
- Specifies that the parties will continue to have the ability to achieve legitimate public policy objectives (such as public health, social services, public education, safety, environment, public morals, privacy and data protection, and the promotion and protection of cultural diversity) and indicates that CETA will not lower standards and regulations related to food safety, product safety, consumer protection, health, environment or labour protection;
- Clarifies that regulatory cooperation is voluntary;
- Confirms the ability of procuring entities to use environmental-, social- and labour-related criteria in procurement tenders;
- Explicitly recognizes the right of the parties to set their own environmental priorities and to establish their own levels of environmental protection; and
- With respect to investment protection: clarifies that CETA will not result in foreign investors being treated more favourably than domestic investors; confirms that CETA requires a real economic link with the economies of Canada or the EU in order for a firm to benefit from the Agreement and prevents "shell" or "mail box" companies established in Canada or the EU by investors of other countries from bringing claims against Canada or the EU and its member states; and indicates that the parties have agreed to begin further work on a code of conduct to ensure the impartiality of tribunal members.<sup>3</sup>

With Belgium's hard-won agreement, the European Council formally recommended on October 28, 2016, that CETA be signed.

## **Next steps**

While full entry into force may take several years and continues to face many challenges, including upcoming elections in Germany and France, companies may be in a position to benefit from some elements of CETA by early 2017, when provisional application of the Agreement is expected.

Following signature of the Agreement, the Government of Canada moved quickly, introducing implementing legislation in the House of Commons the very next day (October 31, 2016) in order to ratify the Agreement in Canada. In Europe, the European Parliament will vote on CETA's ratification. After EU approval, but prior to national parliaments of EU member states each individually voting on ratification, parts of the Agreement are expected to be applied on a provisional basis. The sections of CETA that will be provisionally applied are those that fall within the EU's exclusive competence.

Overall, 90 per cent of the deal is expected to be provisionally applied, which might occur in early 2017. Sections of the Agreement that will not be subject to provisional application include most of the investment provisions in Chapter 8 and

certain provisions of Chapter 13 (Financial Services) in so far as they concern portfolio investment, protection of investment or the resolution of investment disputes between investors and states.<sup>4</sup>

## Conclusion

While hurdles to full entry into force remain, CETA's signature was nonetheless an important moment for transatlantic trade. Signature of CETA leaves the door open for approximately 90 per cent of the Agreement to be provisionally applied in early 2017. Companies should take steps now to be in a position in the coming months to take advantage of CETA's comprehensive scheme of tariff elimination, ambitious procurement provisions, and elimination of non-tariff barriers.

Erin Brown

## Footnotes

- <sup>1</sup> European Commission, [European Commission proposes signature and conclusion of EU-Canada trade deal](#); see also See [European Commission presents CETA proposal in the wake of Brexit](#).
- <sup>2</sup> European Council, [EU-Canada trade agreement: Council adopts decision to sign CETA](#).
- <sup>3</sup> [Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement \(CETA\) between Canada and the European Union and its Member States](#).
- <sup>4</sup> [Council Decision on the provisional application of CETA](#).

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