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Constitutional Complaint against CETA

Preamble

An alliance consisting of *Mehr Demokratie*, *foodwatch* and *Campact* has initiated a constitutional complaint against the 'Comprehensive Economic Trade Agreement' – hereinafter referred to as: CETA), which was submitted to the German Constitutional Court (see A.) on 31 August. In addition, an application for interim measures has also been filed (see B.). The aim is to prevent CETA, or parts thereof, from taking provisional effect when it is signed and before it is ratified.

However, this constitutional complaint can only address certain points of criticism in relation to CETA. Matters that are considered politically wrong and a cause of concern from a democratic point of view do not necessarily mean that they are prohibited under constitutional law. Furthermore, for legal reasons a national constitutional court will only have a very limited ability to review a contract that has been concluded by the European Union. Yet it is not possible for the relevant citizens to take action against CETA before the Court of Justice of the European Union (CJEU).

Until further notice the constitutional complaint is made on the presumption of the following framework conditions for the conclusion of the agreement: The European Council is scheduled to decide on the conclusion, signature and the provisional application of CETA on 18 October 2016 so that the agreement can be signed at the EU-Canada summit on 27 October 2016. The current position of the Commission is that CETA is a mixed agreement. This is reflected in the proposals, which the Commission has submitted to the Council in relation to the voting on the CETA. Although the proposals of the Commission have been made without prejudice to the outcome of the current examination of the CJEU concerning the free trade agreement between the EU and Singapore, which is expected in 2017.

If applicable, CETA should be claimed as an 'EU only' agreement making the ratification by the member states unnecessary.

It is also unclear whether the vote in the European Council will require unanimity, or whether a qualified majority will suffice. The complainants presume that CETA can only be adopted with a unanimous vote.

A. Constitutional complaint

I. Permissibility

1. Capacity to be a party to legal proceedings

125.047 persons have become parties to the constitutional complaint. These complainants are German nationals who are eligible to vote and who can refer to Art. 38 (1) 1st sentence German Grundgesetz (Basic Law) (democratic participation by taking part in elections), which is why they have the capacity to be a party to this legal proceeding.

2. Subject matter of the complaint

The constitutional complaint is (initially) directed against the act of approval of the German representative in the Council on the proposals submitted by the Commission on 5 July 2016 with regard to the conclusion and the provisional application of CETA. The acquiescence of the German representative in the Council is an exercise of German public authority which can in principle be challenged by the constitutional complaint. This is because the wording and the contents of the aforesaid proposal from the Commission can only be interpreted to mean that depending on the CJEU's assessment of the EU-Singapore agreement the ratification processes in the member states may be aborted and CETA will be solely ratified by the Union. Hence the participation of the German Council representative would be the final act of the German state on the conclusion of CETA, which would subsequently also become an integral part of the German legal system without this requiring an additional step. This is all the more true for a decision regarding the provisional application, which has been designed from the outset to be implemented without the involvement of the parliaments of the member states.

3. Authority to bring the complaint and 'right to democracy'

With regard to CETA, the complainants believe that their rights to democratic participation (Art. 38 (1) 1st sentence Basic Law) have been violated by the challenged acts of public authority. The case law of the German Constitutional Court demonstrates that this right, which is equivalent to the constitutional right, is not exhausted by the formal act of electing the German Bundestag but furthermore comprises the right of the Bundestag to retain the competence to in principle be able to extend democracy into all areas of life. Art. 38 (1) 1st sentence Basic Law prevents the depletion of the substantial powers of the Bundestag by entering into extensive commitments under international law. The German Constitutional Court recently confirmed this by recognising the 'right to democracy'. This applies to the law on treaties relating to additional stages of integration of the European Union as well as to all other international treaties of the Federal Republic of Germany.

4. Strict criteria

The German Constitutional Court believes its supervisory duty is to review whether actions affect the non-transferrable core of the German constitutional identity (identity review) or whether they are based on sufficiently qualified transgressions of competences on part of Union members (ultra vires review)

The identity review relates to the constitutional core having to remain intact throughout all obligations under international treaties. The submission to an 'investment court' intended in CETA as well as the committee structure of the agreement may activate the mechanism of the identity review. The accompanying provisions of the agreement violate broad areas of the principles of the rule of law and democracy, which is why an effect on the Basic Law cannot be precluded.

The ultra vires review rectifies sufficiently qualified breaches of competence of the EU and its bodies when they act beyond the scope of the sovereign powers transferred to them in Art. 23 (1) 2nd sentence Basic Law. It appears to be plausible that the decisions of the Council in relation to CETA are 'ultra vires' because the Union does not have the relevant competence to submit Germany to an 'investment court', to establish committees with authoritative decision-making powers or to abolish the European precautionary principle. Furthermore, it is probable that a

decision made solely by the Council on the preliminary application of CETA is ultra vires because the scope of the Union's competence does not extend to these areas. In fact this would already require the cooperation of the Bundestag.

In contrast, the constitutional complaint cannot be used to review the anticipated negative effects of CETA for instance the insufficient protection of public services at communal level. Cities and municipalities would only be able to do so via a communal constitutional complaint. Other points of criticism, e.g. the non-transparent and, from a democratic perspective, barely legitimate negotiation process of CETA or the fact that the agreement restricts the general law-making powers of the legislators, cannot be challenged at all under constitutional law.

II. Substance

The rights of the complainants under Art. 38 (1) 1st sentence Basic Law (right to democratic participation) have been violated. The identity review of the German Constitutional Court set forth in Art. 38 (1) 1st sentence Basic Law comprises the review whether and to what extent the core of the constitution is affected by commitments under international treaties. The principles laid down in Art. 79 (3) Basic Law, in particular the principles of the rule of law and democracy, belong to this core ('eternity guarantee'). Both principles are concerned in this matter. At the same time CETA demonstrates sufficiently qualified transgressions of competence so that all associated Council decisions are also ultra vires.

1. Submission to the jurisdiction of the 'investment court'

The submission of the Federal Republic of Germany to the jurisdiction of the 'investment court' that follows from CETA and is established in Chapter 8 Section F CETA, violates the principles of the rule of law and democracy in several aspects.

The principle of the rule of law prescribes that legal standards must be clear and at least sufficiently definable, among others. This is not the case for the principal conditions, which grant to private investors the opportunity to bring a claim before

the 'investment court'. In particular the limits of 'indirect expropriation', which is attempted in CETA, are unclear and it is also unclear what the commitment to a 'fair and equitable treatment' actually entails. Additionally, the crucial requirements of procedural equality of arms and access to the court under the rule of law are being violated because CETA (only) gives Canadian investors direct advantages against the Federal Republic of Germany in terms of the choice of law and legal proceedings. This results in a structural inequality of the parties before the 'investment court' to the detriment of Germany but also to the detriment of German private citizens.

Additionally, in a constitutional state it is a matter for the national courts to hand down the law. A deviation from this division of powers, which is embedded in the Basic Law (Art. 92 Basic Law), is only possible in the event of pure civil law disputes. In public law, thus in constellations where the state and citizens are opposed, it is only possible to deviate from the national judicial monopoly under strict conditions. The greater the potential to interfere with matters of public interest the less a parallel private arbitration law is permissible. Because CETA pursues the most far-reaching approach possible in terms of investment law, decisions of unimaginable magnitude could affect the public interests of the Federal Republic of Germany. This is not compatible with the national judicial monopoly. At the same time this would remove the jurisdiction of the lawful judge (Art. 101 (1) 2nd sentence Basic Law). The personnel structure of the investment jurisdiction established in CETA also does not conform to the principles of the rule of law because and insofar as the judges have no objective or official authority.

Also, national sovereign rights would be assigned to the 'investment court' via CETA, which under the integration program provided for by the German constitution, can only be granted to the EU (in addition to Germany). If the EU assigns these sovereign rights further, this will take place without the involvement of the Bundestag. As a result, the principle of democracy would be violated. As a result of the structure of the 'investment jurisdiction' the democratically authorised legislator would also be disproportionately restricted beyond the actual exercising of public powers. Against the backdrop of an often uncertain outcome of the proceedings, which the claiming investor can noticeably influence as a result of the significant potential for coercion, the legislator will feel compelled to let the planned project 'cool off', which is also referred to as a 'chilling effect' or 'regulatory chill'. In

view of this emerging risk, particularly for landmark legislative decisions, it is expected that crucial political decisions can no longer be made independently but will actually be made under the impending threat of an investor claim with an uncertain outcome.

2. CETA Joint Committee

The *CETA Joint Committee* and the regulation committees subordinate to this committee, as provided for by Chapter 26 CETA, violate the structure of democratic policy forming, which is embedded in the Basic Law.

The CETA Joint Committee is authorised in several parts of the agreement to issue unilateral procedural rules and even to made amendments to the agreement. The contracting states shall subsequently submit to these decisions. This authority is given solely to the CETA Joint Committee i.e. there is no requirement for a national procedure or the consent from the contracting states. This alone violates the principle of democracy set forth in the Basic Law. The fact that there are no representatives of the German government in the CETA Joint Committee is completely unconstitutional. It is not guaranteed that even one German representative is involved in this Committee. Bearing in mind that the composition is equal between the EU and Canada it is not, however, structured in proportion to the member states. A correlation between the legitimacy of the extensive decisions of the committees and the democratic intention of the German voter cannot be created in this manner under any circumstances.

3. The European precautionary principle

The precautionary principle is a binding legal principle of the Union's legal system. It is based on the belief that a high level of health and environmental protection can only be ensured if measures are already taken when there is a suspected risk, thus before the risks materialise or damages occur. This principle cannot be changed by the Union committees. The precautionary principle is, however, thwarted by CETA because it pursues the opposite approach, which is common in Canada and is exclusively subject to the law of the World Trade Association (WTO).

Therefore, under CETA it would also be possible to launch goods that are potentially hazardous to health on the German market. Indeed, the WTO law does not recognise the precautionary principle. For example, the WTO dispute resolution panel has decided in the framework of the WTO treaty on plant protection and health regulations that the EU's import ban on beef containing hormones, which was issued under the precautionary principle, is unlawful and sanctions have been issued against the EU. Under CETA, protective measures, which the EU has implemented by reference to the precautionary principle, are at risk of being considered unlawful in the relationship between the EU and Canada. However, such a paradigm shift is not covered by the legal system of the Union and is therefore ultra vires.

4. The provisional application of CETA

International agreements such as CETA must be ratified by the Bundestag in the Federal Republic of Germany, Art 59 (2) Basic Law. The same applies to the (possibly international) provisional application of such agreements because they impose the same international obligations as a final agreement would. A provisional application of an international agreement is in reality a stand-alone international agreement with a simplified option for termination at international level, which the Bundestag must approve. The current EU law does nothing to alter this fact. Nevertheless, if the EU alone declares CETA to have provisional effect, such a Union act would evidently transgress the scope of competence allocated to the Union – thus it is ultra vires.

B. Applications for interim measures

By filing the application for interim measures, the complainants will attempt to prevent the German representative in the Council from consenting to the conclusion of the agreement and to the provisional application of CETA before the German Constitutional Court has made a decision on the constitutional complaint in their main proceedings. Otherwise the complainants would be confronted with a fait accompli; CETA would – at least with regard to the provisional application – have long since become an integral part of the German legal system, with all of its negative effects.