LOBBY CONTROL
Initiative für Transparenz und Demokratie

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DG Trade and DG GROW

Subject: Submission on regulatory cooperation activities in the Regulatory Cooperation Forum (RCF) under CETA

Köln, 16.2.2018

Dear DG Trade, Dear DG GROW,

thank you very much for giving us the chance to comment on the work of the CETA Regulatory Cooperation Forum (RCF). LobbyControl is a lobby watchdog organisation aiming at lobby transparency and democratic accountability in the EU.

As we generally take a critical stance towards regulatory cooperation in CETA, we would like to stress and outline this critique in our contribution to this stakeholder consultation. You find our critique below on page 2-5.

Generally, we want to highlight that we would welcome **a maximum of transparency in the work of the RCF**. In our view, there should be a **public record in a timely manner of (1) all proposals for harmonization, (2) of the working group agendas, (3) of participants and meetings within the regulatory cooperation framework, and (4) summaries of what stage the cooperation initiative is at**. This would increase the overall democratic accountability of the RCF.

Thank you very much for taking into account our critical assessment and our demand for transparency. Please also note that we would appreciate to be kept informed about the further RCF implementation process.

Best regards

Dr. Max Bank (LobbyControl)

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Regulatory Cooperation under CETA: A critical asssessment

1. Differing regulatory systems

There are significant differences between the way Canada and the EU regulates. Normally, they are the result of Canadian and European representatives making legitimate choices to create new rules, or strengthen existing ones, based on a perceived public benefit. Canada is, for instance, the fifth largest producer of genetically modified products (GMOs) in the world. These differences in the way Canada and the EU regulate should be respected.

In chapter 21, CETA establishes institutions and processes for the alignment of regulations between the European Union and Canada. New and existing laws will go through a burdensome process in order to converge or otherwise make them equivalent. As this process is based on an international treaty, it stands above domestic legislation and institutions.

In principle, the regulatory cooperation chapter in CETA covers a vast area, including many domestic regulations that have little or no relationship to, or significant impact on, trade. Yet, the project of regulatory cooperation or convergence is central to the new generation of trade agreements like TPP, TTIP and CETA. These so called living agreements make the abolition of 'non-tariff barriers' a permanent project long after CETA has been ratified and political attention has waned.

2. The experience with post-NAFTA and US-EU regulatory cooperation

In post-NAFTA efforts to harmonise Canadian and US regulations, notably the joint Regulatory Cooperation Council established in 2011, stakeholder input and involvement is clearly aimed primarily at business, focuses on trade impacts, and takes place in relation to sectors (e.g pesticides, chemicals, management, pharmaceuticals and biologics). Efforts at transatlantic regulatory cooperation since 1995 must also be taken into account, since they have already led to lower social and environmental standards in some cases. A very prominent example of past regulatory cooperation is the Safe Harbour agreement that resulted in weaker data protections for EU citizens and was declared illegal by the European Court of Justice. We are concerned that this may happen again under the RCF in CETA.

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Delays and pressure to harmonise regulations

Regulatory cooperation in CETA might delay and prevent new regulations, and chapter 21 applies pressure to harmonize wherever one Party to the agreement prefers that course of action. Article 21.2.6 states, 'Parties may undertake regulatory co-operation activities on a voluntary basis'. They can decline, but 'if a Party refuses to initiate regulatory co-operation or withdraws from such co-operation, it should be prepared to explain the reasons for its decision to the other Party'. In this way, CETA may put diplomatic and bureaucratic pressure on the Parties to undertake regulatory cooperation even in sensitive policy areas such as GMOs.

Article 21.4(b) and 21.4(e) state the Parties will endeavour to share information 'throughout the regulatory development process', and that this consultation and exchange 'should begin as early as possible in that process [...] so that comments and proposals for amendments may be taken into account'. This 'early warning system' would enable the other Party (i.e. the Canadian government) to make comments and propose amendments to draft regulations before the European Parliament has seen them. That is a lot of power to give a foreign entity over a domestic democratic institution.

Lower protections for Canadian and European citizens?

Regulatory cooperation at the horizontal and sectorial levels is particularly dangerous for regulations in the public interest. For instance, CETA includes a chapter on bilateral dialogues and cooperation (chapter 25) with a section on biotechnology (Article 25.2), which covers 'any relevant issue of mutual interest to the Parties', and specifically 'any new legislation in the field of biotechnology'.

Furthermore, chapter 21 contains a potential attack on the precautionary principle. Article 21.4(n)(iv) urges the Parties to 'conduct cooperative research agendas in order to [...] establish, when appropriate, a common scientific basis'. This refers to the aftercare principle, or so-called science-based approach, which is applied in Canada and the United States. An attack on the precautionary principle could weaken EU environmental protection laws and hinder the introduction of new rules and regulations to protect the environment and public health in the future.

To give an example of the risk to public interest regulation, Canada has been highly litigious in the World Trade Organisation (WTO). In two high-profile cases, Canada joined with the US in disputes against the EU on growth hormones in beef and market access for GMOs. In both cases the EU argued on the basis of the precautionary principle and lost. Given the weak legal reference in CETA to this otherwise well-

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established principle, the chances of these countries accepting strong precautionary regulation by the EU in the future will be effectively nil. Therefore, we hope that you will always make sure that the precautionary principle is respected when applying regulatory cooperation initiatives with Canada.

Business influence and lack of transparency

Chapter 21 of CETA provides the basis for a very ambitious model of regulatory cooperation that might lead to undue and secret corporate influence on the legislative process. Its vague language also leaves a lot of space for interpretation in the future by trade lawyers and arbitrators - on the way regulatory cooperation should work between Canada and the EU.

For instance, CETA states that, when regulating, 'each Party shall, when appropriate, consider the regulatory measures or initiatives of the other party on the same or related topics' (Article 21.5) There is no indication that any of this will be an open process. For the EU, the consideration of North American regulations could possibly take place before any formal proposal is made to the European Parliament and Council. We ask you to make this process as open and transparent as possible and to offer mechanisms for the European Parliament and the Council to control and participate in this process.

CETA will create a Regulatory Cooperation Forum (RCF) composed of officials from the two Parties, but with the potential for meetings to be opened to 'other interested parties'. The RCF is tasked with reviewing progress on regulatory cooperation and reporting to the CETA Joint Committee. It would also discuss regulatory policy issues raised through consultations each Party has with 'private entities'.

Beyond this, the RCF is only vaguely described, lacks accountability, and remains open to the direct influence of business lobbyists - the one group with sufficient resources to attend such meetings. The public and elected representatives on both sides of the Atlantic may only become aware that consultations are occurring after the legislative proposals resulting from them are introduced.

The work of the RCF is intertwined in CETA with other important institutions, such as the aforementioned CETA Joint Committee, other specialised committees, and sectoral dialogues. The most active of this last group of subcommittees will almost certainly be the one established for Biotech Market Access Issues. But all specialised committees would prepare draft decisions for the CETA Joint Committee (Article 26.2.4). It seems likely these decisions, having been agreed by the two Parties with input from business groups, would be rubber stamped at this stage, giving CETA subcommittees considerable power in practice.

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The process of regulatory cooperation, outlined in great detail in Article 21.4, is striking for what it leaves out. In all the examples of cooperation activities there is no mention of transparency features such as the publication of agendas, reports or participant lists from meetings. We would therefore ask for maximum transparency of the RCF under CETA. There should be a public record in a timely manner of all proposals for harmonization (1), the working group agendas (2), participants and meetings (3), and summaries of what stage the cooperation initiative is at (4). This would increase the overall democratic accountability of the RCF.

Thank you very much again for taking into account our submission, especially our demand for transparency of the RCF procedures.

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