

Is CETA a mixed agreement?

The Comprehensive Economic and Trade Agreement (CETA) with Canada is currently being translated into the EU's official languages. Once the translations are available, the European Commission can propose that the Council sign and conclude the agreement on behalf of the European Union. It is not yet decided whether the agreement in its entirety would fall under the exclusive competence of the European Union or would also touch upon Member States' competences. In the latter case, ratification by the Member States would also be necessary for the agreement to come into force. The Commission's proposal is expected on 5 July 2016. If the Commission presents a proposal for an 'EU-only' agreement, the Council would need unanimity to change this.

Next steps in the procedure

EU-Canada negotiations for a Comprehensive Economic and Trade Agreement ([CETA](#)) began in May 2009, and were declared concluded at the EU-Canada Summit on 26 September 2009. The agreement's overall aim is to increase flows of goods, services and investment to the benefit of both partners. The 'legal scrubbing' (review) of the agreement was completed in February 2016. Not least thanks to pressure exerted by the European Parliament, the investment provisions were substantially changed, so that the new [consolidated version](#) contains the new [Investment Court System](#) (ICS) to replace the former Investor State Dispute Settlement.

Translation into the EU's official languages is ongoing. Nevertheless, the Commission has published a [summary](#) of the outcomes of the negotiations (also available in [French](#) and [German](#)). Commissioner Cecilia Malmström [announced](#) to the European Parliament that all language versions will be made available on the [Register of Commission documents](#), once the translations are available and checked by lawyer-linguists to make sure that all language versions are equally coherent and legally sound. They can also be expected to appear without delay on the Commission's [website on CETA](#). Once the translations are available, the Commission can make proposals to the Council to [sign and conclude](#) the agreement. If, following its internal debate, the Council takes the decision to do so, the Presidency designates a person (often the Commissioner for Trade) to formally sign the agreement on behalf of the European Union.

After the deal has been signed by the two contracting parties, the Council forwards the agreement, together with the draft decision for its conclusion, to the European Parliament. The INTA Committee has nominated [Artis Pabriks](#) (EPP, Latvia) as [standing rapporteur](#) for matters concerning Canada. Once the proposal to approve the agreement has reached the European Parliament, the [consent procedure](#) can be launched, possibly accompanied by a parliamentary resolution (Rule 99 of the European Parliament's [rules of procedure](#)). The aim is to have CETA [signed in 2016](#), possibly at the EU-Canada summit planned for October 2016. The Commission ([and Canada](#)) want to have it enter into force in 2017.

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The EU and Member States conclude agreements that contain elements of both exclusive EU and Member States' competences jointly, as 'mixed' agreements. Consequently, they need to be signed and ratified by both the EU and Member States to enter into force. When submitting CETA to the Council for signature, the Commission must decide whether to present it as a 'mixed' or an 'EU-only' agreement. Originally, the Commission is [reported to have](#) planned the publication of its proposal for signature for 15 June 2016. It is now expected for [5 July 2016](#). Currently, the Commission is [reported to favour presenting](#) CETA as an 'EU-only' agreement.

In contrast, many Member States have [for a long time](#) argued for CETA to be a mixed agreement, as did [trade ministers](#) in [the Foreign Affairs Council](#) on [13 May 2016](#). So have many national parliaments. [A letter](#) to the



European Commission signed in June 2014 by 21 chairs of relevant committees in national parliaments also asks for CETA, and the Transatlantic Trade and Investment Partnership (TTIP), to be considered as mixed agreements, since both 'contain provisions that concern policy areas which are within the competences of the Member States'. The [bi-annual report](#) (May 2015) of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) points in the same direction, as do more recent resolutions of, among others, the [French](#), [German](#), [Dutch](#), [Luxembourgish](#) and [Walloon](#) parliaments. The INTA Committee chair, Bernd Lange (S&D, Germany) also advocates [involving](#) parliamentarians from the 28 Member States.

A main point of discussion is [provisions on investment](#). Concerning foreign investment, Article [207 TFEU](#) makes foreign direct investment (FDI) part of the [Common Commercial Policy](#) and hence an exclusive EU competence, but does not mention other forms of investment, e.g. portfolio investment. Foreign investment is usually divided into foreign direct investment (FDI) where the foreign investor takes a long-term perspective and wants to influence the management decisions within in the company abroad (thus wants to exert direct control) and portfolio investment where this is not the case. Member States argue that portfolio investment is not part of exclusive EU competence, as it is not mentioned in Article 207 TFEU, whereas the Commission sees the EU competence on FDI 'complemented by an [implied competence on portfolio investments](#) derived from the internal market chapter on free movement of capital'.

To clarify the situation, the Commission decided to [request](#) the opinion of the Court of Justice of the EU (CJEU) on the competence of the EU to sign and conclude the EU Free Trade Agreement with Singapore. The Commission asked which provisions of the agreement would fall under exclusive or shared EU competences and whether the agreement would contain provisions that fall under the exclusive competence of Member States. The case is still pending, with a ruling [expected at the end of 2016](#) or in early 2017. Although the CJEU opinion will be on the agreement with Singapore, it will certainly have a bearing on future trade agreements. Still, the Commission allows for the possibility that, for CETA, it will present proposals for signature and conclusion to the Council [before that CJEU ruling](#).

If the Commission presents a proposal for an 'EU-only' agreement, the Council needs unanimity to change this (Article 293 [TFEU](#)), as it [has done](#), e.g., with the FTA with [Peru and Colombia](#). As stated above, many voices in Member States plead for CETA to be regarded as a mixed agreement. Moreover, many national parliaments can be expected to pressure their government to throw [their weight in the Council](#) behind a 'mixed' agreement. However, [some](#) Member States are reported to put more emphasis on having CETA adopted and ratified [as quickly as possible](#), so that the unanimity needed to alter an 'EU-only' proposal is far from certain. Moreover Bulgaria and Romania have raised [visa issues with Canada](#) which are not directly related to CETA, but could have influenced their position in the Council. Should the decision be blocked in the Council, the Commission can decide to modify its proposal to untangle the situation.

Provisional application

When approving the proposal to sign the agreement, the Council can also decide to provisionally apply the agreement (Article 218(5) [TFEU](#)). Although the Treaties give the right to decide to the Council, politically important trade agreements are usually not applied provisionally before the European Parliament has given its consent. Commissioner Malmström has [declared her support](#) for this practice. The question of provisional application prior to ratification would also need to be discussed with the Canadian government, of course.

For a mixed agreement, a Council decision on provisional application can only cover the parts of the agreement falling under the EU's exclusive competence, and utmost attention will certainly be required to clearly distinguish those elements within the circa 1 600 pages of CETA. Articles 30.7 and 30.08 of [CETA](#) contain arrangements relating to provisional application. Article 30.8 specifies that 'if the provisional application of this Agreement is terminated and this Agreement does not enter into force, a claim may be submitted under Section F of Chapter Eight (Investment) within a period no longer than three years following the date of termination of the provisional application, regarding any matter arising during the provisional application of this Agreement, in accordance with the rules and procedures established in this Agreement.'

This provision has been highlighted by [voices cautioning](#) about the agreement, reflected for example in the [Dutch parliament](#), asking the government to oppose to a provisional application of the ICS system and to [debate](#) with the national parliament before taking a position on provisional application. The Walloon parliament [rejects](#) the provisional application of CETA altogether, and a Council debate on provisional application can be expected to be lively.