AK EUROPA

June 2015

Legal Opinion

Prof. Dr. iur. Peter-Tobias Stoll
Dr. iur. Till Patrik Holterhus, MLE
Ass. iur. Henner Gött

The regulatory cooperation planned between the European Union and Canada as well as the USA according to the CETA and TTIP drafts

www.akeuropa.eu

Executive Summary

This legal opinion concerns the institutionalised regulatory cooperation envisaged in CETA and TTIP. It examines how the interests of the social partners, the consumers and the environment are endangered or guaranteed.

1. As well as the reduction and abolition of customs duties (tariff-based trade restrictions), CETA and TTIP are aimed at dismantling restrictions to trade through regulations (non-tariff trade restrictions). This is to happen inter alia within the context of regulatory cooperation.

2. Regulatory cooperation here means the future cooperation of the contractual parties in regulatory questions (for example by harmonisation, reciprocal recognition or compliance testing) only after ratification of CETA and TTIP.

3. The area of application of the regulatory cooperation in CETA and TTIP, apart from a few exceptions, includes all regulations which have a bearing on trade in goods or services. On the EU side, not only the regulations of the Union but also those of the member states are included.

4. Many of these regulations also serve to protect social partners, consumers and the environment.

5. For regulatory cooperation CETA and TTIP each contain their own chapters with general provisions. These are respectively supplemented or modified for individual subject areas with special provisions in further chapters.

6. Particular importance is given to the main committees envisaged in CETA and TTIP respectively ("CETA Joint Committee" and "TTIP Joint Ministerial Body") as well as the sub-committees specifically dealing with regulatory cooperation ("CETA Regulatory Cooperation Forum" and "TTIP Regulatory Cooperation Body"). These each have representatives of both contractual parties and adopt unanimous decisions.

7. In line with their own work programme, the committees mentioned deal with regulations currently valid and those planned belonging to both sides. Harmonisation, reciprocal recognition and compliance testing are envisaged as methods of overcoming divergences that get in the way of trade.

8. In the TTIP, atypically, "simplification" is mentioned as a method. This concept does not have any background in external trade but rather is common in the context of discussions concerning reform to get rid of bureaucracy and to simplify administration. In TTIP regulatory cooperation is thus limited not only to overcoming divergences getting in the way of trade but also aims at a reduction of unnecessary and cumbersome regulations.

9. In TTIP regulatory cooperation also includes regulations in the process of being drawn up. In this respect, an obligation to inform and a right to submit comments are envisaged inter alia, whereby such intended regulations can become the object of regulatory cooperation early on.

10. Decisions, which are binding under international law, can be made by the main committee (CETA). Included in this are amendments to the annexes, enclosures, protocols and notes. In the context of regulatory cooperation this could have significant further developments of the agreement as a consequence. Ultimately, it remains unclear, however, how far the authorisation to make a binding decision goes in the context of regulatory cooperation. Clarification is urgently required here.

11. It is also not sufficiently clear whether and in which cases resolutions of the main committee (CETA), which are binding under international law, require the consent of the respective internal organs responsible of the contractual parties, in particular of the EU parliament. The adequate involvement of the EU parliament should be ensured, particularly in decisions of far-reaching significance.

12. Insofar as envisaged by CETA and TTIP, the regulatory sovereignty of the contractual parties (the "right to regulate") should not be affected in any way but this absolute objective is hardly attainable. The mere existence of binding provisions on regulatory cooperation logically limits the right to regulate to a certain extent. The crucial factor therefore is how the right to regulate is positioned and protected in actual fact in the context of regulatory cooperation.

13. As well as the right to regulate, CETA and TTIP emphasise the efforts to ensure the highest protection standards possible. However, within the context of the provisions on regulatory cooperation, comparatively little weight is accorded to these requirements. The right to regulate and protection standards are only being included in the agreement texts with limitations or with weak wording. This should be rectified.

14. The precautionary principle as a core element in European regulatory policy hardly appears as a concept in CETA and the parts of the TTIP known so far. Exception rules, giving due regard to precaution in very specific form are only to be found in CETA with regard to occupational health and safety and environmental protection. This lack of any firm anchoring of the precautionary principle is also not exactly made up for by the reference to, or the incorporation of, WTO law as, in WTO law, only time-limited regulations may be based on precautionary aspects, whilst for all other cases a science-based approach is to be established. Therefore efforts must be made on behalf of a general anchoring of the precautionary principle going beyond derogation provisions.

15. It is to be welcomed that CETA and TTIP envisage special chapters on sustainable development concerning work standards and environmental protection. These chapters and the activity envisaged therein are, however, to a great extent not linked to the regulatory cooperation. As realising sustainable development is particularly dependent on regulation, here too improvements should be made.

16. In various contexts both agreements envisage participation by groups in society but remain vague on this. In order to achieve an adequate participation by civil society and social partners, the often patchy provisions should be made more precise. Furthermore, one should ensure that the groups in civil society are also represented in the activities and bodies

relevant for their work and that their involvement can have a sufficient effect on the results.

17. The far-reaching possibilities of the future regulatory cooperation ("living agreements") will not be sufficiently legitimised democratically by the European Parliament dealing with it once only at the conclusion of the agreement. At all events, with reference to significant aspects of regulatory cooperation, the European Parliament should also be decisively involved after the agreement has been concluded.

18. CETA and TTIP affect (also in the context of regulatory cooperation) areas which, according to EU law, fall within the area of responsibility of the member states. At the same time, as things stand at present, only the EU itself, but not the member states, is directly involved in the work on regulatory cooperation. In the relationship of the EU to its member states in this respect there exists a tension between the need for the EU to maintain a presence with a standard foreign policy in CETA and TTIP on the one hand and, on the other, the right of the member states to the independent exertion of the powers they have. In order to create a balance between these conflicting interests, a corresponding agreement between the EU and its member states appears appropriate.

This legal opinion was produced on behalf of the Vienna Chamber of Labour by

- **Prof. Dr. iur. Peter-Tobias Stoll**, Director, Department of International Commercial and Environmental Law, Institute for International and European Law, Faculty of Law, Georg-August-University Göttingen

- **Dr. iur. Till Patrik Holterhus, MLE.**, Academic Assistant

- **Ass. iur. Henner Gött**, LL.M. (Cambridge), PhD student at the Institute