



## **EUA Special Update**

### **on the EU's Comprehensive Economic and Trade Agreement (CETA) with Canada**

**March 2017**

- The European Parliament has voted, by 408 votes to 254, with 33 abstentions, to “confirm” the CETA.<sup>1</sup> The Canadian House of Commons has also voted, by 263 to 50, for ratification.
- All is not yet decided, however. The CETA is a “mixed” agreement, not an “EU-only” agreement. This means that the approval of Council and Parliament is insufficient. It must still be ratified by all member state parliaments, as well as by those regional parliaments that have the appropriate legal competence – 38<sup>2</sup> parliaments in all. On the Canadian side, CETA now moves to the Senate.
- It is unclear what the outcomes will be or how long the process will take.
- Meanwhile, it is likely that some features of the agreement will be applied provisionally, during the summer of 2017.

With the [text agreed](#) between the negotiating parties in October 2016, but with vigorous debate still to come, this is an opportune moment to review the implications of the CETA for higher education.

This Update will be useful to all in higher education who are interested in:

- Mutual recognition of qualifications
- Trade in higher education services

**Higher Education Institutions contemplating the trading of higher education services with Canada should undertake due diligence and seek legal advice.**

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<sup>1</sup> The full breakdown of the votes can be viewed [here](#).

<sup>2</sup> This figure includes the UK.

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## 1 Preliminary remarks

1.1 This briefing focuses on the detail of the **EU side of the CETA**. On the Canadian side, the Agreement involves federal administrations as well as those at provincial and territorial levels. This is not a case of the complex confronting the simple. The full consolidated text runs 1 500 pages. EU higher education institutions (HEIs) contemplating trading HE services with Canada should undertake due diligence and seek legal advice.

1.2 The EU typically adopts an aggressive posture where services are concerned. It wants to boost the level of its exports; the representative body at the EU level – the European Services Forum – is an enthusiastic supporter of the CETA. In the area of HE services, the picture is nuanced. Some member states are wide open to trade with Canada. Others are more defensive and their reservations are set out in Section 5 below.

1.3 Universities Canada (the national rectors' conference) has not taken any position on the CETA. The **Board of EUA** issued a [Statement](#) in 2015, which focused principally on the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TiSA) – now shelved by the Trump administration – but also considered the CETA. The Board declared, *inter alia*, that:

HE benefits individuals, society and the world at large in ways that are not easily quantifiable. It is a public responsibility to which all citizens have right of access and not a commodity to be transacted by commercial interests on a for-profit basis. **It should not be subject to international trade regimes.** [emphasis added]

## 2 Background

2.1 In 2016, the Commission decided that the CETA was a **“mixed” agreement**. Voting by Council and Parliament was insufficient; the CETA would also require ratification by national and relevant regional parliaments. This was a political decision, taken in response to rising public opposition to provisions relating to the environment, labour, agriculture, and the dispute settlement mechanism.<sup>3</sup>

2.2 It was not a legal ruling. And yet, had the Court of Justice been consulted, it would probably have reached the same conclusion, on the grounds that certain aspects of CETA do not fall within the exclusive competence of the European Union, but are matters either of shared competence or of

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<sup>3</sup> For a summary of the objections and a full list of campaigning organisations, see the Seattle to Brussels Network statement [here](#).

exclusive member state competence. This, at least, is what is suggested by the [Advocate-General's Opinion](#) re the EU-Singapore Free Trade Agreement (EUSFTA), the final ruling on which is expected soon.

2.3 The Walloon parliament had earlier refused to authorise the Belgian federal authorities to sign the CETA, voicing strong objections to its provisions on agriculture, public services and dispute resolution. These were shelved in last-minute negotiations, which elicited from the EU and Canada a [Joint Interpretative Instrument](#). The Instrument confirms (a) that member states have the right to regulate, *inter alia*, public education services; (b) that they are under no obligation to privatise; and (c) that there is no standstill mechanism preventing governments from reversing privatisations undertaken by previous administrations.<sup>4</sup>

2.4 The episode triggered the drafting of the [Namur Declaration](#), which *inter alia* demands that Parties to EU trade agreements sign up in advance to in-force agreements on human rights, labour conventions, and agreements on climate change. The Declaration also insists that “public services [...], as defined in the Parties’ respective legislation, should be wholly excluded from the scope of such treaties.”

2.5 The CETA, in line with the General Agreement on Trade in Services (GATS), does indeed exclude **public services** “supplied in the exercise of governmental authority [...] neither on a commercial basis nor in competition with one or more service suppliers.”<sup>5</sup> However, EUA briefings have on many occasions pointed to the legal uncertainty clouding the concept of “public higher education”.

2.6 In the CETA, the EU has in fact gone further than the GATS:

**The EU reserves the right to adopt or maintain any measure with regard to the supply of all educational services which receive public funding or state support in any form, and are therefore not considered to be privately funded.<sup>6</sup>**

2.7 This suggests that any level of public funding or state support might allow an HEI to argue that it is not “privately funded” and that therefore its activities fall outside the scope of the CETA. But the assumption should not be regarded as safe. The principal legal competence for HE lies with the member state; the possible exclusion of HE services from the CETA would therefore be the object of member state governmental decision in the first instance, and of EU case law subsequently.

2.8 The process of CETA ratification by the myriad national and regional parliaments could take years, rather than months. **Provisional application** as per Article 30.7, by contrast, could be only weeks away. Provisional application will in fact be partial application, although the details are not yet clear. The introduction of the Investment Court System (ICS) for dispute resolution is likely to be delayed.

2.9 Trade in higher education services, on the other hand, is likely to feature in the partial application. To be sure, education is not an exclusive competence of the EU. Trade, however, is. Member states exercise their competence in education by entering whatever reservations are

<sup>4</sup> According to the [CEPS Commentary by Guillaume Van der Loo](#), the Joint Interpretative Instrument is legally binding.

<sup>5</sup> GATS Article 1.3 (b) and (c).

<sup>6</sup> Consolidated text, p.1305

consistent with their own legal systems and political persuasions. Section 5 below looks at these in detail.

### 3 Mutual Recognition Agreements (MRAs)<sup>7</sup>

3.1 Canada and the EU have agreed to **procedures**<sup>8</sup> allowing the recognition of each other's professional qualifications. As a first step, professional bodies from each side will meet on a voluntary basis to set the parameters of recognition. They will then make a recommendation to a Joint Committee on Mutual Recognition which, if it approves, will refer the draft MRA to authorities empowered to ensure that it is consistent with the legislation in force in each of the Parties. Canadian accountants and lawyers expressed an early interest.

3.2 GATS Article 7 spells out the principles on which recognition must be based: it is not automatic; it must not be discriminatory; it should be justifiable in the framework of emerging multilateral (i.e. World Trade Organisation [WTO]) consensus.

3.3 The CETA's arrangements for MRAs grew out of a bilateral Franco-Québécois agreement based on the EU Directive on the Recognition of Professional Qualifications.<sup>9</sup> The liberal professions have seen the greatest take-up of recognition, with nurses and engineers heading the list of professionals entering the other Party's labour market. The ratio of inward to outward mobility on the French side has been about 1:7.

3.4 In the CETA, certain **criteria** have to be satisfied by the drafters of an MRA:

A recommendation shall provide an assessment of the potential value of an MRA, on the basis of criteria such as the existing level of market openness, industry needs, and business opportunities, for example, the number of professionals likely to benefit from the MRA, the existence of other MRAs in the sector, and expected gains in terms of economic and business development. In addition, it shall provide an assessment as to the compatibility of the licensing or qualification regimes of the Parties and the intended approach for the negotiation of an MRA.<sup>10</sup>

3.5 Non-binding **guidelines** on the negotiation of MRAs are set out in Annex 11-A. They envisage four steps:

1. *"Verification of equivalency"*: This step looks at the scope of professional qualification and practice.
2. *"Evaluation of substantial differences"*: These may exist in "essential knowledge", in the content or duration of basic training, and in the congruence of component disciplines.
3. *"Compensatory measures"*: Taking the form of adaptation periods or aptitude tests: these mirror the provisions informing the General System in the EU Directive.
4. *"Identification of the conditions for recognition"*: This consists of a summary of the above steps, setting out precisely what they represent for the profession concerned.

<sup>7</sup> For more detailed discussion of MRAs across the full range of current EU trade negotiations, see [EUA's Special Update of June 2016](#)

<sup>8</sup> CETA Chapter 11 (pp.87-89 of the consolidated text)

<sup>9</sup> Directive 2005/36/EU, amended as Directive 2013/55/EU

<sup>10</sup> Article 11.3.2

3.6 Annex 11-A also contains guidelines dealing with individual applications, appeals, contact points, and so on.

3.7 Two **departures from the letter and spirit of the amended Directive** are worth noting:

- “Equivalency” has a wider meaning in the CETA. While in the amended Directive it covers measurable factors, such as level of attainment, course duration or credit points, in the CETA it is used more broadly to apply to course content as well as to the component disciplines of professional practice.
- In the amended Directive, “substantial differences” in the General System are no longer specifiable in terms of course duration. Moreover, they must be expressed in terms of course content, i.e. in terms of knowledge, skills and competences, rather than of knowledge alone.

3.8 European higher education institutions (HEIs) will need to be aware of emerging MRAs, the scope for EU-Canadian joint curriculum development and research, and the expanding career opportunities for their graduates.

## 4 Mode 4 service provision

4.1 An MRA will not necessarily confer licence to practise, although it may constitute a prerequisite. Nor will it, of itself, give access to the marketplace of the other Party. The scope of professional **mobility of natural persons**, whether employed or self-employed, is set out in the detail of the CETA. In GATS terminology, this is known as mode 4. Mode 4 is “the supply of a service [...] by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”<sup>11</sup>

4.2 Article 10.8 of the CETA limits entry by independent professionals and contractual service suppliers to university graduates or equivalent. Independent professionals must have six years of relevant prior experience and persons working for contractual service suppliers must have three. Annex 10E gives further details of limitations.

4.3 The third body of mobile individuals – the inter-company transfers – fall into the category of “key personnel” and are covered by Article 10.7. These might, for example, be academic and administrative staff transferred from an EU home to a Canadian branch campus or vice versa. Unless specific reservations have been taken by individual member states, the CETA sets no limit on the numbers of transferees and waives all requirements for work permits; it does, however, fix limits on the duration of stay for different categories of staff. Annex 10B gives further details.

4.4 GATS mode 3 covers the setting up of a **commercial presence**, such as a branch campus. Here, EU member states have had the opportunity to file their own reservations, in line with their national competence in higher education. The next section looks in detail at these reservations.

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<sup>11</sup> GATS Article 1.2

## 5 The EU's position on HE services in the CETA

5.1 The reservations are set out in two annexes, I and II. They detail the extent to which particular member states have chosen to depart from the general principles on national treatment and market access spelt out in Chapter 9.

5.2 The principal of **national treatment** dictates that service providers of one Party operating in the territory of the other Party will benefit from treatment no less favourable than that accorded to domestic providers. Likewise, the basis of **market access** is the question of what limits, if any, are to be set on the volume of services which can be delivered in each Party by the other Party.

5.3 There are exceptions. These belong to one of two categories. Annex I lists **measures already in existence, which the EU wishes to keep in place**. Specifically,

Any member state of the EU, when selling or disposing of its equity interests in, or the assets of, an existing state enterprise or an existing governmental entity providing [...] education services, may prohibit or impose limitations on the ownership of such interests or assets, and on the ability of owners of such interests and assets to control any resulting enterprise, by investors of Canada [...]. With respect to such a sale or other disposition, any member state of the EU may adopt or maintain any measure relating to the nationality of senior management or members of the boards of directors, as well as any measure limiting the number of suppliers.

5.4 Eight member states list additional reservations:

Austria	The provision of privately funded university level education services in the area of applied sciences requires an authorisation from the competent authority, the Council for Higher Education (Fachhochschulrat). [...] The applicant for a private university requires an authorisation from the competent authority (the Austrian Accreditation Council).
Czech Republic	Establishment in the EU is required to apply for state approval to operate as a privately funded higher education institution.
France	Nationality of a member state of the EU is required in order to teach in a privately funded educational institution. However, nationals of Canada may obtain an authorisation from the relevant competent authorities in order to teach in primary, secondary and higher level educational institutions. Nationals of Canada may also obtain an authorisation from the relevant competent authorities in order to establish and operate or manage primary, secondary or higher level educational institutions. Such authorisation is granted on a discretionary basis.
Greece	Education at university level shall be provided exclusively by institutions that are fully self-governed public law legal persons. However, Law 3696/2008 permits the establishment by EU residents (natural or legal persons) of private tertiary education institutions granting certificates that are not recognised as being equivalent to university degrees.
Italy	An economic needs test is applied for the opening of privately funded universities authorised to issue recognised diplomas or degrees based on a three year programme. Main criteria: population and density of existing establishments. Only Italian juridical persons may be authorised to issue state recognised

	diplomas.
Malta	Service suppliers seeking to provide privately funded higher or adult education services must obtain a licence from the Ministry of Education and Employment. The decision on whether to issue a licence may be discretionary.
Slovak Republic	Establishment in a member state of the EU is required to apply for state approval to operate as a privately funded higher education institution.
Spain	An authorisation is required in order to open a privately funded university which issues recognised diplomas or degrees; the procedure involves obtaining the advice of the Parliament. An economic needs test is applied, main criteria are population size and density of existing establishments.

Other than these explicit restrictions, full market access is guaranteed for as long as the CETA remains in force.

5.5 Annex II lists **measures already in existence, which the EU wishes to keep in place and for which it reserves the right to modify or strengthen in the future.** In this respect, seventeen member states have “taken no reservations” (i.e. set no limits) to trade in HE services in the framework of the CETA: Belgium, Croatia, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, UK. The remaining 11 member states have imposed restrictions as follows:

Austria Bulgaria	[reserve] the right to adopt or maintain any measure with regard to the supply of privately funded higher education services.
Cyprus Finland Malta Romania	[reserve] the right to adopt or maintain any measure with respect to the supply of privately funded primary, secondary, higher, and adult education services.
Czech Republic	In the Czech Republic, the majority of the members of the board of directors of an establishment providing privately-funded education services must be nationals of the Czech Republic.
Italy	Italy reserves the right to require establishment [of HE service providers]
Slovak Republic	EEA residency requirement for providers of all privately funded education services other than post-secondary technical and vocational education services. An economic needs test may apply, the number of schools being established may be limited by local authorities. In the Slovak Republic, the majority of the members of the board of directors of an establishment providing education services must be nationals of the Slovak Republic.
Slovenia	The majority of the members of the board of directors of an establishment providing privately funded secondary or higher education services must be Slovenian nationals.
Sweden	Sweden reserves the right to adopt or maintain any measure with respect to educational services suppliers that are approved by public authorities to provide education. This reservation applies to privately funded educational services suppliers with some form of state support, inter alia educational service suppliers recognised by the state, educational services suppliers under state supervision or education which entitles to study support.

5.6 Despite the fact that HE does not appear in the list<sup>12</sup> of services tradable via **public procurement**, the EU schedule contains the following provision:

Where the supply of privately funded education services by a foreign provider is permitted, participation of private operators in the education system may be subject to concession allocated on a non-discriminatory basis.<sup>13</sup>

Effectively, this refers to public-private partnerships (PPPs) that allow private providers to operate a service on an on-going rather than a one-off basis. The procedures set down in the CETA must be consistent with [Directive 2014/23/EU](#) on the award of concession contracts. The concession option is open to any member state which has not taken a relevant reservation (as per 5.5 above).

## 6 Engagement of HE sector with trade negotiations

6.1 Some aspects of the CETA remain unclear. Will it accommodate the EU's proposed Multilateral Investment Court, if and when the structure of the MIC is agreed? Will any single member state be able to veto the CETA's provisional application? These are questions which would preoccupy only those HE systems in member states which private enterprise is an actual or a possible reality.

6.2 But which member states are these? The CETA's negative listing has allowed some member states explicitly to close off any incursion by private HE operators. In the remainder, the interface of public and private is likely to be both uncertain, because of the terseness of the GATS wording, and unstable, because of the fluctuations in national and regional HE policies and budgets.

6.3 All of which raises the question of how far national HE sectors in general are consulted – or even aware – when the EU and member states embark on trade negotiations. A combination of public pressure and the liberal instincts of Commissioner Malmström mean that the mandates given to the negotiators are now public. The leaking of confidential negotiating papers has become more common. Headline issues, such as agriculture, fisheries and health, may command public attention. None of this means necessarily that the HE community is party to decisions touching on the regulatory environment in which it works.

6.4 The EU is currently prospecting or negotiating a plethora of trade deals, including with Australia, India, Indonesia, Japan, the Mercosul, Mexico, Morocco, New Zealand, Philippines, Tunisia and Vietnam. These may move ahead more quickly than expected, in response to the protectionist posture of the Trump administration. In terms both of MRAs and HE service provision, they should be carefully monitored by national HE communities in Europe.

**Please feel free to comment and to forward this Update to other interested parties**

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<sup>12</sup> Annex 19-5, attached to Chapter 19 on government procurement

<sup>13</sup> Consolidated text, p.1305