FEDERAL CONSTITUTIONAL COURT

- 2 BvR 1444/16 -

- 2 BvR 1482/16 -

- 2 BvR 1823/16 -

- 2 BvE 3/16 -

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaints

of Ms G(...),

and 68,015 other complainants,

– authorised representatives: 1. Prof. Dr. Andreas Fisahn,
Grüner Weg 83, 32130 Enger,
2. Prof. Dr. Martin Hochhuth,
Kaiser-Joseph-Straße 268, 79098 Freiburg –

against 1. the approval of CETA by the Federal Government in the Council of the European Union or the European Council,

2. alternatively, the approval of CETA by the European Union,

3. the approval of CETA by the *Bundestag*

here: application for a preliminary injunction

– 2 BvR 1444/16 –,

II. on the constitutional complaints

of Mr A(...),

and 62 other complainants,

– authorised representative: Prof. Dr. Andreas Fischer-Lescano, LL.M.,

Pflügerstraße 79 A, 12047 Berlin –

against 1. the failure by the German representative in the Council of the EU to reject the adoption of CETA, which is being sought by the Commission, and to reject the authorisation of the President of the Council to conclude CETA on behalf of the EU, which is also being sought by the Commission,

2. the failure by the German representative in the Council of the EU to reject the provisional application of CETA, which is being sought by the Commission on behalf of the EU

here: application for a preliminary injunction

– 2 BvR 1482/16 –,

III. on the constitutional complaints

1. of Mr H(…),

2. of Mr B(...),

3. of Dr. K(…),

and 125,009 other complainants,

– authorised representatives: 1. Prof. Dr. Bernhard Kempen,
Rheinblick 1, 53424 Oberwinter,
2. Prof. Dr. Wolfgang Weiß,
Sep-Ruf-Straße 33, 90480 Nürnberg –

against the approval by the German representative in the Council of the European Union of the signing, the conclusion and the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part and the EU and its Member States of the other part (CETA) or against the failure by the German representative in the Council to reject these Council decisions

here: application for a preliminary injunction

– 2 BvR 1823/16 –,

and

IV. on the application for a ruling in *Organstreit* proceedings to the effect that the respondent

1. violates the Basic Law and European law, and thus rights of the German *Bundestag*, through the failure by the German representative in the Council of the EU to reject the adoption of the Comprehensive Economic and Trade Agreement (CETA), which is being sought by the Commission, and through the authorisation of the President of the Council to conclude CETA on behalf of the EU, which is also being sought by the Commission,

2. violates the Basic Law and European law, and thus rights of the German *Bundestag*, through the failure by the German representative in the Council of the EU to reject the provisional application of CETA on behalf of the EU, which is being sought by the Commission

Applicant: Parliamentary group DIE LINKE in the German *Bundestag*,
represented by chairpersons
Dr. Dietmar Bartsch and Dr. Sahra Wagenknecht,
Platz der Republik 1, 11011 Berlin,

– authorised representative: Prof. Dr. Andreas Fischer-Lescano, LL.M.,
Pflügerstraße 79 A, 12047 Berlin –

Respondent: The Federal Government,
represented by the Federal Chancellor Dr. Angela Merkel,
Bundeskanzleramt, 10557 Berlin,

– authorised representative: Prof. Dr. Franz Mayer, LL.M.,
Lettestraße 3, 10437 Berlin –

here: application for a preliminary injunction

– 2 BvE 3/16 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on 7 December 2016:

Judgment

The proceedings on the applications for a preliminary injunction of 28 and 29 October and 2 November 2016 are combined for joint decision.

The applications are rejected.

R e a s o n s:

A.

In its Judgment of 13 October 2016, the Second Senate of the Federal Constitutional Court rejected several applications for a preliminary injunction aimed at barring the German representative in the Council of the European Union from lending his approval to decisions regarding the signing, the conclusion and the provisional application of the Comprehensive Economic and Trade Agreement between the European Union and its Member States of the one part and Canada of the other part (CETA). However, the Senate has made this rejection contingent on several requirements. With their renewed applications for a preliminary injunction, the applicants seek to bring about compliance with the requirements which, in their view, have not been respected. 1

I.

According to the Judgment of 13 October 2016, the applications in the principal proceedings are neither inadmissible from the outset nor manifestly unfounded, at least in part. Yet on the basis of the weighing of consequences required, the applications for the injunction sought were unsuccessful (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 143, 65 <89 para. 41>). 2

1. a) A preliminary injunction that would have barred the German representative in the Council from lending his approval to the provisional application [of CETA] would have resulted in the Council not being able to take the decision, originally planned for 18 October 2016, to authorise the provisional application of the Agreement. […] The Senate deemed the disadvantages arising from such a decision to be very severe, since a preliminary injunction preventing the Federal Government's approval of the provisional application of CETA would have significantly interfered with the – generally broad – legislative discretion of the Federal Government in the fields of European, foreign and foreign economic policy and would probably have had negative effects on European external trade policy and the international status of the European Union in general (cf. BVerfGE 143, 65 <90 and 91 paras. 45 et seq.>). 3

b) Compared with this, the Senate held that the disadvantages arising from the non-issuance of a preliminary injunction – as was the case here – with the subsequent finding in the principal proceedings that the Federal Government's participation in the passing of the decision by the Council was unconstitutional would be less severe. […] 4

2. Yet according to the Senate's view, the risks [associated with the non-issuance of a preliminary injunction] could be avoided when suitable safeguards are provided, at least for the period of provisional application (cf. BVerfGE 143, 65 <98 and 99 para. 66 et seq.>). 5

a) In its Judgment of 13 October 2016, the Senate assumed that the Federal Government would not approve the provisional application of CETA for areas that in its view remain subject to the competence of the Member States and that it would voice such reservations. Accordingly, the Senate assumed that in particular provisions on the following matters will not be subject to provisional application: investment protection, including the dispute settlement system (Chapters 8 and 13 CETA), portfolio investment (Chapter 8 and 13 CETA), international maritime transport (Chapter 14 CETA), the mutual recognition of professional qualifications (Chapter 11 CETA) and labour protection (Chapter 23 CETA) (cf. BVerfGE 143, 65 <100 para. 70>). 6

The Senate also pointed out that any encroachment on the constitutional identity (Art. 79(3) of the Basic Law, *Grundgesetz* – GG) brought about by the competences and procedures of the committee system could – at least in the context of provisional application – be countered in various ways. For instance, an inter-institutional agreement might ensure that decisions taken pursuant to Art. 30.2(2) CETA may only be passed on the basis of a common position pursuant to Art. 218(9) of the Treaty on the Functioning of the European Union (TFEU) unanimously adopted by the Council. […] 7

c) Finally, the Senate made it clear that the Federal Government has, as a final resort, the possibility of terminating the provisional application of the Agreement by means of written notification pursuant to Art. 30.7(3) letter c CETA […]. In this respect, the Senate deemed it necessary that the Federal Government declare, in a manner that has bearing in international law, this understanding of Art. 30.7(3) letter c CETA and notify the other parties to the Agreement accordingly (cf. BVerfGE 143, 65 <100 and 101 para. 72>). 8

II.

1. […] 9

2. […]

3. The European Commission, the Council of the European Union, the Member States and the Council Legal Service issued a total of 38 statements and declarations regarding the understanding and interpretation of CETA. When the decision on the signing of CETA was adopted by the Council of the European Union (cf. Council document 10972/1/16 REV 1 of 26 October 2016), these statements and declarations 10

were entered in the Council Minutes (Council document 13463/1/16 REV 1 of 27 October 2016).

[…] 11

III.

1. […] [O]n 27 October 2016 the General Secretariat of the Council initiated a written procedure in which the Member States of the European Union were to approve the Council's proposals for decision by 11:59 p.m. on 28 October 2016. 12

2. The Federal Government transmitted its approval of the proposals for decision at 12:17 p.m. on 28 October 2016. In a letter to the Secretary General of the Council of the European Union and the Permanent Representative of Canada to the European Union, the Permanent Representative of the Federal Republic of Germany to the European Union made the following declaration on 28 October 2016: 13

> (…) The Federal Republic of Germany hereby declares that, as a Party to the Comprehensive Economic and Trade Agreement (CETA) between Canada of the one part, and the European Union and its Member States, of the other part, it can exercise its rights deriving from Art. 30.7(3) letter c CETA. The necessary steps will be taken in accordance with EU procedures (…).

One of the reasons cited for this declaration was the Judgment of the Second Senate of the Federal Constitutional Court of 13 October 2016. In addition, the addressees were asked to accept this declaration as an instrument relating to the above-mentioned treaty. 14

3. At 10:15 p.m. on 28 October 2016, the Council announced in its press release 623/16 that it had adopted by written procedure a package of decisions on the Comprehensive Economic and Trade Agreement with Canada (CETA), including a decision on signature of the agreement, a decision on the provisional application of the agreement and a decision to request the consent of the European Parliament for the conclusion of the agreement. […] The representatives of Canada and the European Union signed the Agreement on 30 October 2016. 15

B.

I.

Complainants nos. I to IV once again seek a preliminary injunction obliging the Federal Government to approve the signing and the provisional application of CETA only on condition of fulfilling certain specific requirements and alternatively, in case the decisions on the signing and provisional application have already been taken, to prevent provisional application after the fact until these requirements have been met. […] 16

II.

C.[…] 17

The applications for a preliminary injunction pursuant to § 32 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) are unsuccessful. 18

I.

[…] 19

II.

The applications are […] unfounded. There are no circumstances that could give rise to a different assessment of the consequences that might follow from the rejection of the preliminary injunction than the assessment made in the Judgment of the Senate of 13 October 2016. The Federal Government did meet the requirements the Senate set out in its judgment before it approved the above-mentioned decisions. 20

1. The Federal Government did not approve the provisional application of CETA for areas specified in the Judgment of 13 October 2016. 21

a) The Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part of 5 October 2016 (Council document 10974/16) specified that with regard to Chapter Eight of the Agreement (Investment), only Arts. 8.1 to 8.8, 8.13 and 8.15, with the exception of paragraph 3 thereof, and 8.16 will be provisionally applied, and only insofar as foreign direct investment is concerned. In addition, Art. 1(1) letter b of the Decision determines that with regard to Chapter 13 of the Agreement (Financial Services), Arts. 13.2(3) and (4), 13.3., 13.4, 13.9 and 13.21 will not be provisionally applied insofar as they concern portfolio investment, the protection of investment or the resolution of investment disputes between investors and states […]. It is not objectionable that Chapters 8 and 13 have not been entirely excluded from provisional application. 22

aa) The provisions declared provisionally applicable in Chapter 8 CETA only concern definitions (Art. 8.1 CETA), the scope of Chapter 8 (Art. 8.2 CETA), its relation to other chapters (Art. 8.3 CETA), market access for investors (Art. 8.4 CETA), the prohibition of imposing certain requirements on investors (Art. 8.5 CETA), and provisions on non-discriminatory treatment (Art. 8.6 to 8.8 CETA), capital transfers without restriction or delay (Art. 8.13 CETA) and certain reservations and exceptions regarding Arts. 8.4 to 8.8 CETA (Art. 8.15 CETA). Thus, in particular Section F of Chapter 8, which concerns the resolution of investment disputes between investors and states (Arts. 8.18 to 8.45 CETA) and also includes the provisions on establishing an investment tribunal, is excluded from provisional application. 23

bb) Arts. 13.2(3) and (4), 13.3, 13.4, 13.9 and 13.21 CETA are excluded from the provisional application of CETA insofar as they concern portfolio investment, invest- 24

ment protection or the resolution of investment disputes between investors and states. Specifically, they cover how Chapter 8 applies to measures concerning investors of one Party that invest in financial service suppliers that are not financial institutions as well as to measures relating to the investments of these investors in such financial service suppliers (Art. 13.2(2) letter a CETA) and to measures, other than measures relating to the supply of financial services, relating to investors of a Party or investments of those investors in financial institutions (Art. 13.2(2) letter b CETA), and also cover the incorporation of individual provisions of Chapter 8 into Chapter 13 as parts thereof (Chapter 13.2(3) CETA), the incorporation of Art. 8.6 CETA (national treatment, Art. 13.3 CETA) and of Art. 8.7 CETA (most-favoured-nation treatment, Art. 13.4 CETA), performance requirements for investments in financial institutions (Art. 13.9 CETA) and investment disputes concerning financial services (Art. 13.21 CETA). Thus, the Senate's expectation that provisions on investment protection, including the tribunal system, and on portfolio investment also in the field of financial services not be covered by provisional application has been fulfilled.

b) It is true that Chapter 14 CETA, which contains provisions on international maritime transport services, has not expressly been excluded from provisional application. However, among the Statements to the Council Minutes of 27 October 2016 (Council document 13463/1/16 REV 1), no. 3 contains a Council statement on the provisional application of provisions on transport and transport services, declaring that the allocation of competences between the EU and the Member States in this field is not affected by the decision on provisional application and the Member States are not prevented from exercising their competences in respect of Canada in matters not covered by CETA, or in respect of another third country in the field of transport services falling within the said scope. As CETA does not include a chapter on transport and transport services in general, it may be assumed for now that the Council statement on this matter covers all CETA provisions referring to any type of transport and transport services, in particular those concerning international maritime transport within the meaning of Chapter 14 CETA. 25

[…] Ultimately, it can thus […] be assumed for now that the Council decision on the provisional application of CETA will likely not qualify as an *ultra vires* act (cf. BVerfGE 143, 65 <98 para. 67>). 26

In its Judgment of 13 October 2016, the Senate expressed the expectation that provisions on the mutual recognition of professional qualifications (Chapter 11 CETA) and on labour protection (Chapter 23 CETA) would be excluded from provisional application insofar as the Member States' competences are concerned. These expectations were expressly taken into account in statement no. 4 (Statement from the Council relevant to the provisional application of Chapters 22, 23 and 24) and no. 16 (Statement from the Council relevant to the provisional application of mutual recognition of professional qualifications) in the Statements to the Council Minutes of 27 October 2016 (Council document 13463/1/16 REV 1). In this context as well, […] the Council decision on the provisional application of CETA, also with a view to Chapter 27

11, is unlikely to qualify as an *ultra vires* act (see paras. 26 and 27 above).

d) It is not necessary to decide at this point whether and to what extent the European Union may not have competence for certain further areas covered by CETA not specified in the Judgment of 13 October 2016, as claimed by complainants nos. II and IV, since the Council has comprehensively declared that the provisional application of CETA is limited to areas falling within the legislative competence of the European Union and laid this down in the general statement no. 15 of the Council in the Statements to the Council Minutes of 27 October 2016 (Council document 13463/1/16 REV 1). 28

2. It is unlikely that the competences and procedures of the committee system will encroach on the constitutional identity (Art. 79(3) GG). It does not follow from the wording of the statements on the decisions of the CETA Joint Committee (Commission declaration no. 18 and statement from the Council and the Member States no. 19, Council document 13463/1/16 REV 1) that Germany's approval (cf. BVerfGE 143, 65 <98 para. 65>), which is likely required to guarantee democratic legitimation and oversight of decisions taken by the CETA Joint Committee, will be obtained in every case. However, statement no. 19 from the Council and the Member States must be interpreted in such a way that all Member-State concerns will be taken into consideration when decisions are taken in the CETA Joint Committee in the context of the provisional application of CETA. Otherwise, statement no. 19 from the Council and the Member States would not make sense, as the CETA Joint Committee cannot decide on matters falling within the competence of the Member States in the context of provisional application in any case. Therefore, statement no. 19 from the Council and the Member States can only be understood to the effect that the position taken by the European Union and its Member States in the CETA Joint Committee on a decision of that Committee must always be determined by mutual agreement. In this context, the Commission declaration no. 18 must also be taken into consideration. It is stated in this declaration that the Commission does not intend "to make any proposal under Article 218(9) TFEU with a view to amending CETA or with a view to adopting a binding interpretation of CETA before completion of the main proceedings before the German Constitutional Court". 29

3. Finally, in statement no. 21 of the Statements to the Council Minutes of 27 October 2016 (Council document 13463/1/16 REV 1), Germany, together with Austria, declared that as Parties to CETA they may exercise their rights which derive from Article 30.7(3) letter c CETA. It is true that this statement continues as follows: "The necessary steps will be taken in accordance with EU procedures." However, it is not apparent that this reference would restrict the right deriving from Article 30.7(3) letter c CETA to unilaterally terminate the provisional application of the Agreement. 30

The Federal Government submitted this declaration by means of the two letters dated 28 October 2016 from the Permanent Representative of the Federal Republic of Germany to the European Union, to the Secretary General of the Council on the one 31

hand, and to the Permanent Representative of Canada to the European Union on the other, in a manner that has bearing in international law. Potential doubts as to the significance of this declaration are in any case dispelled by the fact that, by way of explanation of the declaration included therein, the letters of the Permanent Representative of the Federal Republic of Germany to the European Union refer to the Senate's Judgment of 13 October 2016, which clearly established the necessity of maintaining the possibility of terminating the provisional application of the Agreement pursuant to Art. 30.7(3) letter c CETA.

Voßkuhle Huber Hermanns

Müller Kessal-Wulf König

Maidowski Langenfeld

Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 7. Dezember 2016 - 2 BvR 1444/16, 2 BvE 3/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16

Zitiervorschlag BVerfG, Beschluss des Zweiten Senats vom 7. Dezember 2016 - 2 BvR 1444/16, 2 BvE 3/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16 - Rn. (1 - 31), http://www.bverfg.de/e/rs20161207_2bvr144416en.html

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