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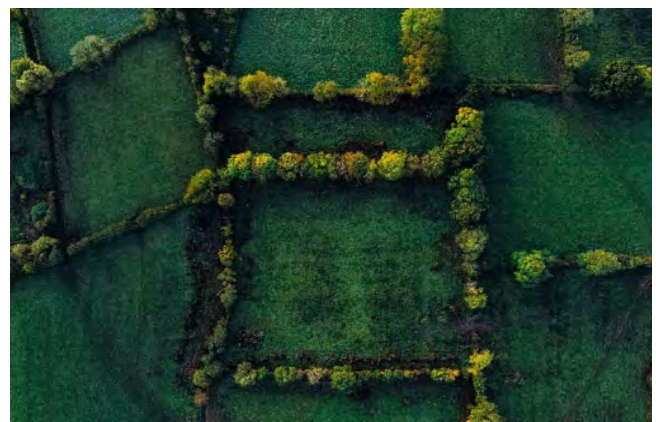
REGULATORY COOPERATION AT THE SERVICE OF CLIMATE AMBITIONS: ONE MIND, ONE HEART?

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SUMMARY

Plagued by continuous controversies, EU trade agreements continue to suffer from various, well-grounded or not, criticisms. Regulatory cooperation mechanisms (RegCoop) are often singled out as policy tools impeding the sustainable transition of European economy. In an effort to clarify the nature of RegCoop and its eventual shortcomings, this executive brief presents its different institutional forms used in Free Trade Agreements (FTAs). It uses insights gathered during a Ph.D. research comparing sectoral cooperation design, within the specific case of the Comprehensive Economic and Trade Agreement (CETA).

Currently, the Committee on Trade and Sustainable Development (CTSD) remains the main forum for environmental concerns in EU FTAs. Its legal competences remain however strictly limited, and its institutional format complex. This limits the committee's ability to take a stronger role in supporting EU climate ambitions. In the context of the recently adopted EU "Green Deal", this brief proposes several recommendations to harness the potential of horizontal and sectoral technical cooperation in EU FTAs. Besides opening technical dialogues to environmental experts, it suggests altering the overall objective of "reducing/removing regulatory obstacles", scheduled in the EU negotiating mandate. Furthermore, it proposes to integrate emission objectives and regulatory measurements, such as Production and Process Methods (PPM), directly into the negotiating mandate and sectoral cooperation.



INTRODUCTION

Released December 2019, the EC communication, "Green Deal", presents EU trade policy as a "platform" to implement ecological transition abroad and internally². Although the annex of the communication does not include "trade policy"³, this is not problematic *per se*. Instead, it reinforces the idea that trade Policy is not a finality, but rather an instrument pursuing other social and political objectives. Nevertheless, this absence neglects both the complex imbrication between domestic and international economic structures, as well as internal and external regulatory frameworks. As a matter of fact, in its current external policies approach the EC is taking stock of the transnational integration of several of its key economic sectors (e.g. Motor vehicles). Since the TTIP negotiation (2016), the EU has increased its efforts to include regulatory cooperation mechanisms into its trade policy and agreements.

Through promoting "Good Regulatory practices" in its FTAs, the EU aims at reducing or removing unnecessary technical barriers for firms active in cross-borders trade. It follows decades-old recommendations from the OECD,

which multiplied studies and formal declarations all presenting regulatory cooperation as the way forward for trade liberalisation³. To legitimize this shift, these substantiated communication efforts pointed out at the enabling factor of regulatory barriers reduction. Supposedly, removal or reduction of barriers would play a determinant role in favoring SMEs' participation in global trade. It is in the spirit of these OECD recommendations that bilateral regulatory negotiations were conducted by European institutions, such as for the recently concluded one with Canada, Japan and Mercosur.

Within this policy backdrop, it becomes interesting to ask whether regulatory cooperation can pursue other objectives than favouring firms' participation in global trade. Can the sustainable transition of goods/ services production be integrated into its mandate? Or is Regulatory Cooperation (RegCoop) inherently dependent on its original aim, namely market access facilitation? This line of interrogation is not without drastic implications. If RegCoop remains impossible to reform, this type of cooperation might become politically untenable. As illustrated by environmental concerns following the conclusion of the Mercosur negotiation, the ability of EU FTAs to contribute to climate objectives is instrumental for trade liberalization legitimacy.

To answer these questions, this executive brief uses insights and findings gathered during a Ph.D. research on regulatory cooperation in CETA. By investigating and comparing regulatory mechanisms, it uncovers different forms of regulatory institutionalization between the EU and Canada. Following this analysis, this brief proposes several recommendations aimed at harnessing the potential of RegCoop to support Green Deal implementation. The purpose is to demonstrate that while liberalization remains RegCoop's cardinal principle, it remains possible to use regulatory tools to pursue sustainable transitioning. It requires however altering significantly current practices

KEY FINDINGS

CETA regulatory Institutions, from the CTSD to sectoral cooperation: Incompatibility or wasted opportunity?

Before proceeding to the CETA mechanisms themselves, it is key to stress the role of the negotiating mandate adopted at the EU level. The mandate defines and specifies the scope of "liberalization" pursued by EC officials. As an illustration, for both CETA and EU-Japan, EU directives

call for removing "obstacles to trade and investment", including through "the reduction of unnecessary regulatory differences" and/or greater alignment with "international regulatory and standards"⁴. The mandate determines the purpose of regulatory cooperation, namely market access facilitation, which will condition the entire approach of the negotiation. It is this overarching role of the mandate that institutionalizes the prioritization given to regulatory obstacles faced by firms within EU FTAs.

Under its umbrella, each EU FTA establishes different committees and mechanisms to pursue this objective. It is also the case for the Committee on Trade and Sustainable Development (CTSD). The CTSD is specifically dedicated to social and environmental issues covering relevant chapters of EU FTAs, notably Trade and Sustainable Development, Trade and Labour, and Trade and Environment. Despite its formal large scope, it has only limited competences, restricted to provide only voluntary comments and panel reports. Concretely, Civil society organizations are invited to submit comments to the committee, concerning the implementation of these three pillars: development, labour and environment.

Aware of their limited room of action, these same actors have called the attention of the EC on the implementation shortcomings of this mechanism⁵. These problems are not unrelated to the CTSD's institutional structure. Its complex rules of proceedings limit its ability to intervene in the agreement. Its functions of monitoring and influencing technical issues pertaining to a large spectrum of economic sectors are also curtailed. This is damageable, as the CTSD could play a role in supporting the use of specific technical requirements needed for sustainable economic transition.

Besides CTSD, RegCoop includes several other mechanisms, divided in two main approaches: horizontal and sectoral. Horizontal cooperation groups a series of voluntary prescriptions and "best practices", overall ensuring the non-discrimination and transparency of domestic regulations. They do not constrain legally public administration in terms of substance but provide channels of communication for technical exchanges of information. Potentially applicable to a wide spectrum of regulatory activities, horizontal cooperation's consequences remain

uncertain. One of its currently most institutionalized forms remains the Regulatory Cooperation Forum (RCF) adopted within CETA. Following a previous round of consultations, closed in February 2018, several submissions are currently under review by EU and Canadian authorities⁶.

Disposing of larger competences, sectoral cooperation includes a series of bilateral dialogues and communication channels that the EU and Canada have established for managing their cooperation. It includes specific sectors such as Forest products or geographical indications, and more transversal ones such as Agriculture, Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary measures (SPS). Market access issues occupy a prominent place in the agenda of this sectoral cooperation. These fora address specific regulatory issues identified by trade associations as harming their cross-border economic activities.

The mandate's directives set their number and fields of competences. The negotiating parties determine however directly their composition, selecting representatives according to the economic rationales and the legal competence of the domestic authorities. Concretely, delegates from DG Health will attend the joint sectoral group on Pharmaceuticals, while DG Growth representatives will take part in the bilateral dialogues on Motor vehicles. This institutionalization corresponds to the functional technical logic that animates the cooperation. The purpose of the delegated experts is to find solutions to resolve regulatory obstacles.

In retrospect, while the objectives of "Trade for All"⁷ remained the priority in EU agenda, this institutionalization approach focusing on market access was particularly effective at promoting EU interests abroad. With the adoption of the "Green Deal" however, this focus on increasing the "participation to global trade" for all types of firms might become problematic. This could lead to diverging priorities between domestic and international levels, undermining European efforts in coherence and consistency building.

While RegCoop provisions in EU FTAs mention international standards, it remains for the purpose of facilitating trade rather than upgrading production systems towards more sustainability. Consequently, current horizontal and sectoral cooperation do not contain climate and sustainability ambitions in their technical activities. In addition to the current shortcomings of CTSD institutionalization format, the concentration of

environmental competences inside this committee also prevents harnessing the technical work being done in bilateral committees. Complementary to the CTSD, sectoral channels of communication could play a useful role in assuring that both parties use technical discussions to support sustainable transition.

Leveraging market forces and climate momentum for deepening technical cooperation

The content of institutionalized cooperation is also an area where international cooperation for sustainability could be strengthened. This would require deepening the mandate of the CTSD and horizontal/vertical cooperation. While the focus is currently on removing barriers to trade, adding sustainable production transition of goods and services to the mandate is both possible and needed.

This would require that the EU leverages its market size to encourage its partners towards more ambitious technical cooperation. To note that the European Commission already pursues this strategy for several sectors, such as UNECE motor vehicles standards, Pharmaceuticals Good Manufacturing Practices, Geographical indications and Forest Law Enforcement, Governance and Trade (FLEGT) programme for timber. In continuity with these ongoing efforts, EU's ambition should expand to add Process and production Methods (PPM) into EU bilateral technical works.

While PPM remains a controversial subject at WTO, a certain degree of flexibility remains in the jurisprudence⁸. In fact, PPM are not prohibited *per se*⁹, instead the debate situates itself between product-related PPM (pr-PPM) and Non-product related PPM (npr-PPM). While in pr-PPM it is possible to test the final product and assess its compliance with the regulatory goal (e.g. chemical residue in food), npr-PPM is not detectable after production and might thus be discriminatory (e.g. use of recycled materials). The latter requires a more intrusive approach towards the domestic production process and might impede national sovereignty.

Despite its controversies, the use of npr-PPM in trade is already practiced by the EU. For example, under CETA the EU monitors beef meat production on Canadian soil. The purpose is to ensure exporter compliance with the EU's non-hormone policy in meat. PPM in sectoral dialogues would similarly require upgrading the depth and extent of other sectoral cooperation, and to set minimal technical thresholds within the agreement text. While such a move remains politically difficult and would impact international

negotiation processes, it is particularly necessary in the context of the “Green Deal”. Indeed, the divergence of ambition between the EU’s internal and external regulatory efforts might have unintended consequences. Without stepping up the content and depth of the bilateral cooperation, a situation might appear where producers located in the EU will face increasingly different complying costs, depending whether their products are destined for domestic markets or for exports.

In sum, an important gap exists between the EU’s ambitions presented in the “Green Deal” and how international regulatory cooperation is currently implemented in EU FTAs. To solve this discrepancy, three areas of improvement can be identified. First, the EU negotiating mandate needs to better reflect climate objectives, especially when specifying the purpose of regulatory cooperation. The reduction of regulatory barriers to trade needs to be complemented by a joint commitment from both sides (EU and its partners) to use technical discussions for jointly transitioning economic activities towards sustainable models, in line with emission objectives.

Second, the institutionalization of sectoral cooperation needs to include climate objectives and ambitions within the legal mandate of bilateral dialogues. To do so, the participation in these technical discussions of environmental experts, familiar with the sectors technical challenges, can be a solution. Last, sectoral cooperation needs also to openly use PPMs to monitor and assist the joint sustainable transition of economic sectors. These three recommendations suggest a path to explore in order to harness the potential of RegCoop for Climate objectives. These propositions also aim at respecting WTO principles, while exploring legal gaps to adopt innovative approaches. In fact, the ambitious objectives that the EU sets itself require harmonizing both its domestic and international regulatory approaches. Only a comprehensive and coherent approach will allow to efficiently support economic transitioning, while retaining legitimacy in the eyes of European citizens.

POLICY RECOMMENDATIONS

- Part of the negotiation mandate dedicated to regulatory cooperation should include the role of technical cooperation in supporting the transition of production towards sustainability. This implies translating into TBT chapters, for instance, technical exchanges and cooperation on the most up-to-date and stringent regulatory practices available.
- Institutional arrangements made by DG TRADE for trade negotiations should reflect environmental objectives for each technical discussion and bilateral dialogue conducted under its authority. This includes the participation in bilateral discussions of either Civil society representatives, recognized environmental experts or responsible public authorities from DG ENV and/or national equivalent. Dialogues’ agenda should also include
 - the adoption of a joint roadmap for transitioning towards sustainability with measurable indicators and accountable mechanisms by non-state actors.
- Provisions on sectoral cooperation should include standards on environmental production methods, with a joint commitment from both sides to adopt the latest and most stringent standards developed by recognized International Standardization Organizations.

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SUGGESTED READING

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