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EU–Singapore FTA is mixed agreement (ECJ) – How does EU trade policy go forward?

Introduction

On Tuesday 16 May 2017, the ECJ (European Court of Justice) published its final opinion on the EU-Singapore Free Trade Agreement (FTA). The court confirmed that, for the largest part, this deal falls within EU exclusive competency with some aspects requiring approval from national and regional governments. The ECJ opinion was eagerly awaited, given its potential to create clarity regarding the (future of) the EU's trade policy and on-going negotiations for FTAs across the globe.

The ECJ's EU-Singapore FTA opinion was issued at the European Commission's request in 2015, which asked whether, under the Treaties on the EU and the Functioning of the EU (TEU/TFEU), the Union has exclusive competence to sign and conclude the FTA with Singapore.

Amidst growing public concerns about the impact of FTAs on national policies, the EU-Singapore FTA has become the principal stake in a battle over competences between the Commission and Member States. The envisaged FTA was considered to be one of the first 'new generation' FTAs touching upon a much broader spectrum of matters closely related to trade, such as investment, government procurement, regulatory cooperation on standards, etc. It was up to the Court to decide whether these 'new' matters contain

a sufficient link to the common commercial policy, which is an exclusive EU competence. In its opinion, the Court referred to article 207(1) TFEU, which defines the content in the common commercial policy.

Whereas the current EU-Singapore FTA contains broader elements beyond trade, the ECJ opinion clarifies that only the components of the agreement which clearly relate to trade will fall within EU competency as defined by the common commercial policy. On the other hand, the ECJ concluded that a number of provisions fall within the shared competence of the EU and the Member States:

- Investment protection relating to non-direct investments between the EU and Singapore
- Investor-State dispute Settlement

Therefore, the ECJ opinion concluded that the FTA between the EU and Singapore constitutes a mixed agreement.

What are the consequences of the ECJ opinion?

“Where the opinion of the Court is adverse, the agreement may not enter into force unless it is amended or the Treaties are revised”. The ECJ has very clearly delineated the exclusive external competences of the EU, and its opinion is likely to set a precedent for all future EU trade deals. Compared to the earlier Opinion of the Advocate General in December 2016 which interpreted the EU exclusive competencies rather restrictively, the final ECJ opinion actually extends the EU exclusive competencies even further.

The European institutions welcomed the opinion as it confirms that trade is an exclusive EU competence, conforming to the common commercial policy and settled case law. More importantly, it also confirms that a series of other provisions, that are not-necessarily trade competences, also fall within scope for the EU to ensure a consistent and coherent external policy. Examples of such provisions are sustainable development, environmental standards, intellectual property and labour standards.

Therefore, the Commission and Member States will need to find a mutual consensus on how to deal with the investment-related provisions that are now defined as shared competences. With the final ECJ opinion on this matter, a viable solution to overcoming the current impasse in the ratification processes of EU FTAs may be to split FTAs into two separate but parallel negotiating tracks. Agreeing on a carve-out for the investment related chapters may equally provide for a (temporary) solution to advancing ratification of pending agreements.

In the coming weeks, the EU institutions are expected to agree on the way forward regarding the EU’s trade policy following the ECJ opinion, inter alia through discussions foreseen in the European Parliament International Trade Committee.

Way forward for pending FTAs and on-going negotiations

With a view to the ambitious EU trade agenda, the ECJ's final opinion offers a renewed confidence to pursue new FTAs and conclude ongoing negotiations. Still, despite the ECJ Opinion, for the EU-Singapore FTA to enter into force in its current form, ratification by all Member States' national (and regional) parliaments would be required. This puts the entry into force at risk as Member States continue to have veto power, since the agreement as a whole (including investment related provisions) is submitted for ratification, beyond the EU competency provisions.

Apart from the EU-Singapore FTA (which was already concluded in 2014), a number of FTAs are awaiting ratification in the year to come. Amongst these, the ratification and (provisional) entry into force of the EU-Canada FTA (CETA) is especially awaited by European businesses. CETA was already submitted for approval by the European Commission as a "mixed agreement". Similarly, the EU-Vietnam FTA (concluded in 2015), as well as the EPA's with East and West Africa are pending ratification. The coming weeks may provide answers for businesses with respect to these agreements' (provisional) entry into force.

At the same time, new FTAs are being pursued by the European Commission with the approval of Member States. Amongst those, the EU-Japan FTA talks (launched in 2013) are especially promising, and nearing potential conclusion in 2017 after 17 rounds of negotiations. The economic gains of the EU-Japan agreement are assessed at a similar magnitude as a potential agreement with the US. The EU is equally aiming for an EU-ASEAN wide FTA in the coming years, but continues to negotiate with the Philippines and Indonesia separately. A resumption of talks with India is equally planned, as well as new negotiations to upgrade the EU-Turkey Customs Union, and negotiations with Australia and New Zealand.

Finally, regarding Brexit, the ECJ final opinion also sends a strong signal to Great Britain in the lead up to Brexit negotiations on the future trade and investment relationship between the EU and the United Kingdom. Although there can be no doubt that the Commission will lead any future trade negotiations, the Member States' approval would most likely be required on those (investment-related) provisions that are now confirmed as a shared competence between the EU and its Member States.

Although the EU currently has a solution in the provisional application of those agreements pending ratification (including Canada and Vietnam), ratification by all Member States will be required for full application of the FTA. For FTAs under negotiation, agreement will need to be reached between EU institutions on the appropriate way to negotiate and ensure valuable outcomes.

What does it mean for you?

In a changing global trade environment, increasingly dominated by non-tariff barriers (such as technical and safety standards, services and investment restrictions, e-commerce related issues or government procurement limitations), FTAs are also broadening in scope. For EU businesses, FTA benefits

nowadays extend far beyond the lowering of customs duties when exporting to or importing from FTA partners.

Under the EU's [Trade for All strategy](#), the broadened scope of EU FTAs is confirmed towards harmonised rules with regard to safety, security and technical standards, the liberalisation of services markets, more transparency and decreased inefficiencies in cross border trade, investment protection in foreign markets and fairer intellectual property protection. Indeed, in a digital economy, the EU also emphasises the need to address new types of barriers that include data storage, processing and transferring. These new barriers often touch upon (domestic) investment regulations, which are now determined as a shared EU competency and hence positions the EU as a less attractive negotiating partner on that matter.

The EU also wants to create a more level playing field for EU companies between the single market and other markets by agreeing on sustainability related commitments, including on labour, environmental protection and human rights.

For companies active in global markets, commitments undertaken by the EU and the trading partner under the FTA may hence provide benefits beyond the lowering of customs duties, for example with respect to mutual recognition of certification. In addition, FTAs can be utilised to hold government institutions accountable for the commitments undertaken, and/or challenge government decisions that are in breach of these attained freedoms and protections under the FTA before independent tribunals.

What to do?

The ECJ Opinion paves the way for pending FTAs to be proposed for provisional entry into force (Singapore, Canada and Vietnam) in the coming months. Companies can prepare with an FTA review:

- Re-assess the current usage of trade preferences granted under FTAs
- Based on global trade flows, determine whether the new FTAs can prove valuable and whether conditions can be fulfilled in terms of preferential rules of origin, direct delivery provisions etc.
- Assess whether FTAs can be instrumental in addressing local market access issues and non-tariff barriers.

A global and forward-looking perspective on FTAs (beyond those negotiated by the EU) is required. Starting from insights on global trade flows and key issues in markets, companies are advised to develop an integrated trade and investment strategy to capitalise on FTAs and domestic market opening. Such a strategy can guide the implementation of a company-wide trade program that ensures compliance whilst looking out for opportunities provided by FTAs and/or risks as a result of domestic policy changes.

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