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The EU Singapore Free Trade Agreements Cannot Enter Into Force, EU Court Rules

By Philip Torbøl, Neil A. Baylis, Nicholas M. Hanna, and Sara Aparicio Hill

On 17 October 2014 the European Union and Singapore concluded negotiations a comprehensive Free Trade Agreement (the "**EUSFTA**"). The EUSFTA should have then been signed, ratified and would have subsequently entered into force. However, the EUSFTA has ended up being the battlefield of a dispute between the European Commission (who negotiated the EUSFTA on behalf of the EU) and the Member States of the EU, regarding the former's exclusive competence to negotiate comprehensive trade agreements.

A recurring issue in similar trade agreement negotiations has been whether they are the exclusive competence of the EU; or whether the competence is shared between the EU and the Member States ("Mixed Agreements"). Mixed Agreements would require ratification by the Parliaments of all Member States, and thereby adding a layer of complexity to the ratification process.

In 2015, the European Commission requested an Opinion from the CJEU on whether the EU had exclusive competence to sign and ratify the EUSFTA. The CJEU has now ruled that the EUSFTA is a Mixed Agreement and can only be concluded by the EU and the Member States acting jointly.

In particular, the CJEU concluded that the EU's external competence is shared with the Member States in the fields of (i) non-direct foreign investment ('portfolio' investments made without any intention to influence the management and control of an undertaking); and (ii) the regime governing dispute settlement between investors and States.

Nonetheless, the CJEU has also highlighted the areas in which the EU's external competence is exclusive. This is the case in matters such as (i) access to the EU market and the Singapore markets for goods and services; (ii) protection of direct foreign investments of Singapore nationals in the European Union (and vice versa); (iii) intellectual property rights; (iv) competition matters (combating anti-competitive activity, and laying down a framework for concentrations, monopolies and subsidies); and (v) sustainable development.

The Opinion of the CJEU concludes that the envisaged EUSFTA may not enter into force unless it is amended or the Treaties are revised.

The EU Trade Commissioner visited Singapore earlier in March, and sent a strong message that the EU and Singapore intend to move forward with the EUSFTA, which will nonetheless have to be adapted to the CJEU's ruling. The European Commission could choose to amend the EUSFTA, splitting it into two separate agreements, based on the areas that would require ratification at national level and the ones that would not. The EUSFTA is viewed as the scene setter for a future and more ambitious EU – ASEAN bloc to bloc trade agreement. Therefore, it is in both parties' best interest to try and expedite ratification and application of the EUSFTA.

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The Impact of the CJEU Opinion on Brexit

But the consequences of the CJEU Opinion go much beyond the EUSFTA that it was specifically at stake. In particular, its repercussions on the future negotiation of a trade agreement between the EU and the UK have sparked more interest than its effect on the actual EUSFTA.

With membership of the EEA or EFTA looking to be an unlikely outcome of Brexit, it is difficult to imagine how the UK will avoid entering into a free trade agreement with the EU. The UK has expressed the view that such an agreement could be put in place relatively quickly to avoid disruption to business and allow trade to continue to flow between the UK and EU. However, to the extent any FTA would require the consent of each and all the EU Member States' Parliaments (a) this could easily add a year to the ratification process; and (b) any one Member State could easily veto the entire agreement making a swift negotiation process very unlikely as all 27 Member States would need to have agreed to the terms for it to have any chance of being approved. Only recently, the Belgian region of Wallonia's Parliament held hostage the Comprehensive Economic and Trade Agreement between the EU and Canada.

However, a clarification on exactly which areas are of mixed competence between the Member States and the European Commission is a welcome fact, and it will increase legal certainty for the negotiation of any future mixed trade agreements.

The Opinion states that matters purely related to trade should be within the exclusive competence of the EU. This means that many relevant areas to both the EU and the UK, such as access to the single market or customs duties, can be negotiated directly between the EU and the UK without Member State interference. In other words, it is possible that an FTA could be drafted to avoid the need for Member State approval, which would result in faster process and most likely a more commercially viable agreement. It remains though to be seen if the FTA can entirely avoid dealing with issues that pertain to areas for which the EU and Member States have joint competence. For instance, foreign portfolio investment is a vital tool for investors to diversify their risk. Also, a lack of certainty regarding dispute settlement between investors and States can make any investment in a foreign country less attractive.

In any event, the future EU and UK trade agreement is likely to be unique. Firstly, it will take place in the highly politicised context of Brexit. Further, it will be the first time the EU sits opposite a party, who is such a close trading partner, and with almost identical rules and trading standards. Even though this proximity could make negotiations much easier, the political climate, the willingness of both parties and the conditions under which the UK will leave the EU will weigh heavily on the approach to, and the extent and depth of, a future trade agreement.

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Authors:

Philip Torbøl
philip.torbol@klgates.com
+32.(0)2.336.1903

Neil A. Baylis
neil.baylis@klgates.com
+44.(0)20.7360.8140

Nicholas M. Hanna
nicholas.hanna@klgates.com
+65.6507.8109

Sara Aparicio Hill
sara.apariciohill@klgates.com
+65.6507.8187