

Court of Justice of the European Union delivers Opinion 2/15 on the allocation of competences between the European Union and the Member States as regards the Free Trade Agreement between the European Union and Singapore

Introduction

17 May 2017

The Court of Justice of the European Union (“**CJEU**”) delivered on 16 May 2017 its long-awaited Opinion 2/15 on the allocation of competences between the European Union and the Member States as regards the Free Trade Agreement between the European Union and the Republic of Singapore (the “**EUSFTA**”), which is one of the first “new generation” trade agreements.

The CJEU concluded that, in essence, the European Union enjoys exclusive competences as regards all matters covered by the EUSFTA with the exception of non-direct foreign investment, investor-state dispute resolution covering all types of investments, and ancillary provisions regarding non-direct foreign investment. In so doing, the CJEU decided that the European Union enjoys very extensive exclusive competences in negotiating and concluding trade agreements with third countries, which might soon include the United Kingdom. At the same time, the implication of Opinion 2/15 is that the European Union should no longer pursue the policy of combining trade and investment in a single treaty.

1. THE SCOPE OF THE CJEU'S OPINION

1. At the outset, the CJEU emphasised that, in the context of the proceedings resulting in Opinion 2/15, its jurisdiction was limited only to the question of the allocation of competences between the European Union and the Member States to sign and conclude the EUSFTA. In particular, the Commission specifically requested the CJEU to decide which provisions of the EUSFTA fall within the exclusive competences of the European Union, the competences shared between the European Union and the Member States, and the competences of the Member States alone.

2. Against the background of public and political concerns about the substantive merits of investment chapters in the trade and investment agreements being negotiated and concluded by the European Union, the CJEU's underlining of the precise scope of the question put before it is welcome. It signals that, as regards the objections to the compatibility of such investment-related provisions of those agreements, the constitutional questions of European Union law have not yet been settled.

2. THE EUROPEAN UNION'S EXCLUSIVE COMPETENCES AS REGARDS TRADE

3. The CJEU started its analysis by examining what parts of the EUSFTA fall within the common commercial policy, defined in Article 207(1) of the Treaty on the Functioning of the European Union ("**TFEU**"), which, pursuant to Article 3(1)(e) TFEU, belongs to the (explicit) exclusive competence of the European Union. Consistent with the test laid down in previous judgments and opinions delivered after the entry into force of the Treaty of Lisbon, the CJEU confirmed that an EU act falls within the common commercial policy if it relates specifically to trade with one or more third States and has direct and immediate effects on it. The CJEU then went on to apply that test to the EUSFTA. In particular, it analysed whether the commitments in that agreement are intended to promote, facilitate or govern such trade and have direct and immediate effects on it.

4. As regards **market access**, it is not surprising that the CJEU found that those commitments regarding trade in goods which encompass the provisions of the EUSFTA regarding national treatment and market access for goods (Chapter 2 of the EUSFTA), trade remedies (Chapter 2 of the EUSFTA), technical barriers to trade (Chapter 4 of the EUSFTA), sanitary and phytosanitary measures (Chapter 5 of the EUSFTA), and customs and trade facilitation (Chapter 6 of the EUSFTA), fall within the common commercial policy. In the proceedings, the exclusive competence as regards those matters had not been significantly contested.

5. Similarly, the CJEU held that the commitments as regards **non-tariff barriers to trade and investment in renewable energy generation** (Chapter 7 of the EUSFTA) and **government procurement** (Chapter 10 of the EUSFTA) are matters belonging to the European Union's exclusive competence as regards the common commercial policy. However, the CJEU specified that that exclusive competence pertaining to government procurement is limited to the commitments under Chapter 10 of the EUSFTA that do not concern transport services falling outside the scope of the common commercial policy.

6. A more contentious issue in the proceedings had been the extent to which the commitments as regards **services, establishment and electronic commerce** (Chapter 8 of the EUSFTA) also fall entirely within the common commercial policy. Whilst trade in services in general is a matter that is expressly identified in Article 207(1) TFEU, the CJEU helpfully clarified that this meant that all four modes of services covered by the World Trade Organization ("WTO") agreements – i.e., the supply of a service from the territory of one WTO Member into the territory of another Member, the supply of a service in the territory of one Member to a consumer of another Member, the supply of a service by a service provider of one Member through commercial presence in the territory of another Member, and the supply of a service by a service provider of one Member through presence of natural persons of a Member in the territory of another Member – therefore fall within the common commercial policy.

7. At the same time, even after the entry into force of the Treaty of Lisbon and the widening of the definition of the common commercial policy resulting from that treaty amendment, Article 207(5) TFEU continues to exclude international agreements in the field of transport from the scope of the common commercial policy. The CJEU interpreted that exception to cover not only transport services in themselves but also other services that are inherently linked to a physical act of moving persons or goods from one place to another by a means of transport. As regards that latter category, the CJEU found that aircraft repair and maintenance services during which an aircraft is withdrawn from service, the selling and marketing of air transport services, and computer reservation system services do not fall within the scope of the transport exception and therefore belong to the common commercial policy.

8. For other transport and transport-related services covered by the EUSFTA, it was not possible to conclude that those parts of Chapter 8 also fall within the (explicit) exclusive competence of the European Union as regards the common commercial policy. That was also not contested by most parties in the proceedings, even though the Commission had advanced an argument that sought to limit the scope of the transport exception in Article 207(5) TFEU. The CJEU therefore turned to the other bases in the TFEU to examine whether the European Union enjoys exclusive competence. In particular, the CJEU examined whether, pursuant to Article 3(2) TFEU, the provisions of the EUSFTA relating to international maritime transport services, rail transport services, road transport services, internal waterway transport services, and services inherently linked to those transport services fall within the European Union's (implied) exclusive competence on the grounds that those provisions, in essence, affect the common rules adopted by the European Union as regards those services. Applying the test laid down in previous case-law concerning this basis for (implied) exclusive competence, the CJEU concluded that, as regards international maritime transport services, rail transport services and road transport services, the European Union had already adopted common rules and that the commitments in the EUSFTA largely cover those common rules. The CJEU added that the commitments concerning internal waterways transport are of an extremely limited scope and therefore should not be taken into account for deciding on the allocation of competences with respect to Chapter 8. As regards the commitments in the EUSFTA relating to public procurement in the sector of transport services, the CJEU also found that those commitments fall, on the same basis, within the exclusive competence of the European Union.

9. As regards **intellectual property protection** (Chapter 11 of the EUSFTA), the CJEU found that the provisions in that chapter relating to copyright and related rights, trade marks, geographical indications, designs, patents, test data and plant varieties comprise both existing multilateral international obligations and bilateral commitments between the European Union and Singapore. Those provisions guarantee that entrepreneurs of the European Union and Singapore enjoy an adequate level of protection of their intellectual property rights. By ensuring that those entrepreneurs enjoy, in the territory of the other party to the EUSFTA, standards of protection of intellectual property rights displaying a degree of homogeneity, those provisions therefore contribute to their participation, on an equal footing, in the free trade of goods and services between the European Union and Singapore. The same conclusion applied to, on the one hand, the provisions of the EUSFTA obliging the parties to the EUSFTA to provide for certain categories of procedures and civil judicial measures enabling persons concerned to rely on and enforce their intellectual property rights and, on the other hand, the provisions of the EUSFTA requiring each party to that agreement to establish methods for identifying counterfeit or pirated goods by the customs authorities and to provide for the possibility for holders of intellectual property rights to obtain suspension of the release of those goods if infringement or piracy is suspected. In that context, the CJEU offered no further detailed explanation of the connection between those standards of intellectual property rights protection and trade in goods and services. Finally, as regards moral rights, the CJEU found that the reference in the EUSFTA to multilateral agreements including moral rights is insufficient to conclude that moral rights form, in their own right, a separate component of the EUSFTA. As a result, the CJEU did not reach any separate conclusions on the allocation of competences with respect to moral rights. It followed that the entire chapter of the EUSFTA on intellectual property protection falls within the European Union's exclusive competences.

10. As regards **competition** (Chapter 12 of the EUSFTA), unsurprisingly the CJEU found that the provisions of that chapter, which also includes provisions on subsidies, form part of the liberalisation of trade between the European Union and Singapore. In particular, many of those provisions specifically relate to the combatting of anti-competitive behaviour and concentrations whose object or effect is to prevent trade between the European Union and Singapore from taking place in healthy conditions of competition. As a result, the CJEU held that that entire chapter falls within the exclusive competence of the European Union with respect to the common commercial policy.

11. As regards the provisions of the EUSFTA relating to **sustainable development** (Chapter 13), the CJEU emphasised that the EUSFTA is part of a new generation of trade agreements aimed at encompassing the “classical” elements of trade regulation, as well as other aspects relevant or even essential to international trade. In that context, the CJEU stressed that the Treaties expressly provide that the common commercial policy is to be conducted in the context of the principles and objectives of the European Union’s external action, which include principles and objectives relating to sustainable development linked to the preservation and improvement of the quality of the environment and the sustainable management of global natural resources. Against that background, the CJEU found that the objective of sustainable development now forms an integral part of the common commercial policy. Consistent therewith, the CJEU held that Chapter 13, which covers, in particular, environmental protection and social protection of workers, and also the interpretation, mediation and dispute resolution of the commitments found in that chapter, fall within the common commercial policy.

12. Finally, as regards the **institutional provisions** of the EUSFTA on exchange of information, notification, verification cooperation, mediation, decision-making power and transparency, the CJEU found that their presence in the EUSFTA cannot have an effect on the nature of the competence of the European Union to conclude that agreement. Such provisions are ancillary to the substantive provisions which they accompany and as a result the question of allocation of competences as regards those provisions must be settled in parallel with the conclusions on the exclusive or shared competence with respect to those substantive provisions. That conclusion also applied to the EUSFTA provisions on investment.

13. The Court addressed separately the provisions on **dispute settlement** between the European Union and Singapore (as distinct from the provisions on investor-state dispute settlement). Emphasising that its conclusions as regards those provisions concerned only the allocation of competences and not their material compatibility with the Treaties, the CJEU confirmed that the competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court, which is created or designated by such agreements to interpret and apply their provisions. Taking into account also the fact that the provisions on dispute settlement do not, unlike the provisions on investor-state dispute resolution, remove disputes from the jurisdiction of the courts of the Member States or, the CJEU added, of the European Union, the competence of the European Union as regards those provisions had to be parallel to its competence as regards the substantive provisions of the EUSFTA.

3. THE EUROPEAN UNION'S COMPETENCES AS REGARDS INVESTMENT

14. Opinion 2/15 offered the first opportunity for the CJEU to interpret in detail the scope of the European Union's exclusive competence for foreign direct investment as part of the definition of the common commercial policy and to explain the allocation of competences as regards investment matters not relating to foreign direct investment.

15. As regards the commitments concerning investment in general, laid down in Chapter 9 of the EUSFTA (covering both direct investment and other types of investment), the CJEU explained that the European Union's exclusive competence with respect to foreign direct investment covers any commitment, towards a third State relating to investments made by natural or legal persons of that third State in the European Union and vice versa, which enables effective participation in the management or control of a company carrying out an economic activity. Significantly, such commitments may relate also to the protection of foreign direct investment after their admission.

16. Importantly, the CJEU also interpreted the inclusion of "foreign direct investment" in the definition of the common commercial policy to mean that the framers of the TFEU did not intend to include other types of foreign investment in the common commercial policy. The question of the allocation of competences as regards the commitments in the EUSFTA with respect to such non-direct investment therefore had to be settled on the basis of other provisions of the EUSFTA. In that context, the Commission had argued in favour of exclusive competence on the basis of Article 3(2) TFEU, in particular on the same ground on which the CJEU concluded that the European Union enjoys (implied) exclusive competence as regards the commitments in, in particular, Chapter 8 of the EUSFTA on transport and transport related services. However, the CJEU rejected the Commission's novel interpretation according to which the European Union would enjoy (implied) exclusive competence because the commitments under the EUSFTA regarding non-direct investment would affect the "common rules" in Article 63 TFEU concerning free movement of capital. The term "common rules" had previously been interpreted as meaning, in essence, secondary law adopted on the basis of the Treaties and not primary law. Taking into account the historical origins and the rationale of Article 3(2) of the TFEU, the CJEU could not side with the Commission on this question of principle. However, the CJEU did accept that such commitments fall within the shared competences of the European Union because the conclusion of an international agreement relating to non-direct investment may prove necessary in order to achieve, within the framework of the European Union's policies, the establishment of free movement of capital and payments.

17. A separate question arising in the context of the EUSFTA chapter on investment was the question of competence of the European Union to terminate and replace, by concluding the EUSFTA, existing bilateral investment agreements between the Member States and the European Union. The CJEU resolved that question by establishing a generally applicable principle according to which, whenever the European Union acquires exclusive competence in a field and negotiates and concludes with a third State an agreement relating to that field, the European Union takes the place of its Member States. As a result, the European Union enjoys exclusive competence to terminate and replace such existing agreements in so far as they concern matters falling within the exclusive competence of the European Union, meaning in this context the provisions applying to direct investment.

18. Apart from the CJEU's general conclusions regarding the institutional provisions of the EUSFTA on exchange of information, notification, verification cooperation, mediation, decision-making power and transparency, it addressed separately the provisions of chapter 9 of the EUSFTA on investor-state dispute settlement. Unlike those other institutional provisions, the CJEU found that the provisions of chapter 9 were not of a purely ancillary nature because the regime they establish removes disputes from the jurisdiction of the courts of the Member States. Therefore such a regime could not be created without the Member States' consent.

4. CONCLUSION

19. Opinion 2/15 sets a new milestone in the European Union's pursuit of a common commercial policy. Underlying that opinion is the CJEU's strong preference for the European Union to adopt and execute a dynamic common commercial policy that embraces, apart from the well-established provisions of trade agreements relating to tariff and non-tariff barriers to trade in goods and services, provisions relating to labour protection and environmental protection. Opinion 2/15 therefore strengthens the European Commission's efforts in linking trade and sustainable development inside and outside the WTO. It may also result in renewed efforts to move international negotiations regarding the many distinct and varied aspects of international regulation implicating or relating to sustainable development from other international fora to the WTO. Furthermore, it signifies that, as regards all of those trade matters, it is for the European Union alone to negotiate and conclude an agreement with the United Kingdom on the future relationship of the United Kingdom with the European Union following the end of its EU membership.

20. Whilst Opinion 2/15 promotes a unified approach in negotiating and concluding international agreements relating to trade and trade-related matters, it also suggests that it might be preferable to negotiate and conclude investments agreements separately from trade agreements. That implication of Opinion 2/15 is also relevant to the Brexit negotiations. Unlike trade agreements, only a part of investment agreements falls within the exclusive competence of the European Union. That is primarily the case because bilateral agreements do not distinguish between direct investment and other types of investment whereas the constitutional rules laid down in the Treaties as regards the allocation of competences do make that distinction.

21. In that regard, it is important to underline that, in concluding that aspects of the EUSFTA relating to non-direct investment and investor-state dispute resolution fall within the shared competences of the European Union, the CJEU found that that meant that (as regards non-direct investment) the European Union may not approve the EUSFTA alone and (as regards investor-state dispute resolution) the consent of the Member States is required. The CJEU thus appears to take the view that where an agreement covers matters falling within the shared competences of the European Union, both the European Union and the Member States must become parties to that agreement.

22. Finally, the CJEU established two important principles whose reach extends beyond the context of trade and investment agreements. The first principle is that, whenever the European Union acquires exclusive competence in a field, it assumes the place of the Member States, including with respect to international agreements which the Member States previously concluded with a third State. The second principle is that international agreements establishing dispute resolution mechanisms that concern subject matters that also fall within the jurisdiction of the courts of the Member States necessarily require the consent of the Member States.

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