At a glance
May 2017

CJEU Opinion on the EU-Singapore Agreement

In 2015, the European Commission requested the opinion of the Court of Justice of the EU (CJEU) on the competence for conclusion of the EU-Singapore Free Trade Agreement (EUSFTA). The CJEU issued its opinion on 16 May 2017, holding that the EUSFTA covers shared competences with respect to: (i) non-direct foreign investment, (ii) investor-state dispute settlement (ISDS), and (iii) state-to-state dispute settlement relating to provisions regarding portfolio investment and ISDS. In its current form, therefore, the agreement would need to be concluded as a 'mixed agreement'.

Development of the common commercial policy and competence issues

The common commercial policy (CCP) has always been an exclusive competence of the EU and is as such included in Article 3(1)(e) of the Treaty on the Functioning of the European Union (TFEU), listing exclusive EU competences. The areas covered by the CCP have evolved over time. Originally, it included only trade in goods; with services and intellectual property rights initially considered shared competences. After several treaty modifications, culminating with the Lisbon Treaty, the CCP has been broadened to include all services (except transport services), commercial aspects of intellectual property rights (IPRs) and foreign direct investment (FDI). This evolution in the scope of the CCP led the Commission to consider whether some trade agreements fell under exclusive EU competence and can thus be concluded by the EU on its own. Many Member States argued that these agreements should be concluded as mixed agreements, which both the EU and its Member States must ratify. To clarify the nature of the EUSFTA, the Commission asked the CJEU for an opinion.

Box 1 – The different types of EU competences and implications for international agreements

The European Union is based on the principle of conferral, meaning that the EU acts within the limits of the competences conferred upon it by the Treaties. The competence involved governs the procedure for concluding a given agreement. Three types of competences exist in EU law: exclusive competence, shared competence and concurrent competence. Where there is an express **exclusive competence** (Article 3(1) TFEU), the EU alone is competent to conclude trade agreements. Agreements concluded in these areas are ratified solely at EU level, following the procedure under Article 218 TFEU. **Shared competences** under Article 4 TFEU (such as the internal market) can fall under both EU or Member State competence. Where the EU has acted, Member States are prevented from acting (except for areas mentioned in Articles 4(3) and 4(4) TFEU). Following the ERTA case (Case 22/70, *Commission* v *Council*) and subsequent case law, areas where the EU has acted internally may take on **implied exclusive external competence** – the exclusive competence for the conclusion of international agreements – if this is necessary for the exercise of the internal competence, or if it can affect EU measures taken (Article 3(2) TFEU). Where there is implied exclusive competence, the EU can conclude agreements on its own as in areas of express exclusive competences. In shared competences, where the EU has not acted internally, Member States retain their own competences. International agreements touching these competences have to be signed and ratified by both the EU and each Member State, and are referred to as 'mixed' agreements. **Concurrent competences** are competences where external action can take place both at EU or Member State level. EU competence in those areas is mainly to support, coordinate or supplement Member State actions and cannot lead to harmonisation.

Opinion of the Court of Justice

The CJEU delivered its Opinion 2/15 in full court on 16 May 2017. While the Court agrees with the earlier Opinion of the Advocate-General (AG) that the EUSFTA covers areas of shared competences, there are substantial differences in the way the Court allocated the competences (see box 2). These differences have important policy implications. Table 1 below sets out the different competences attributed to the various chapters of the agreement by the Court's opinion. The AG and the Court opinion both interpreted the ERTA case (see box 1) in a restrictive way, and concluded that implied exclusive external competences under Article 3(2) TFEU can only be found in cases where the EU has adopted secondary legislation and cannot be applied on the basis of a Treaty provision. This is the main reason why both the AG and the Court concluded that non-

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direct foreign investment must be considered a shared competence as there is no EU secondary legislation on the matter, and Article 63 TFEU (on the free movement of capital in the internal market) could not be used to justify implied exclusive competence. Contrary to what has been argued, the Opinion 2/15 does not seem to address the issue of 'facultative mixity'. Facultative mixity entails that, although the EU could have concluded an agreement as exclusive because of concurrent competence or implied exclusive competence, it still decides to conclude it as a mixed agreement because of a political choice.

Box 2 – Main differences between the opinions of the Advocate-General and the Court

- **Transport Services**: Transport services are outside the scope of the CCP (beyond the remit of Article 207 TFEU). The main question was to what extent the areas covered by EUSFTA were covered by secondary legislation – in which case they could fall under implied exclusive external competence pursuant to Article 3(2) TFEU. Contrary to the AG, the Court concluded that EU competence was exclusive in all the transport chapters as the areas covered by the EUSFTA could alter or affect rules in secondary EU legislation.
- **IPR**: The AG's Opinion held that the chapter on IPRs falls under the shared competence of the EU because of the presence of provisions relating to moral rights. The CCP is considered to include only economic IPRs (*commercial aspects of intellectual property (*Article 207 TFEU)) and not moral rights (Opinion 3/15). The Court nevertheless arrives at a different conclusion than the AG in relation to EUSFTA. It determines that references to moral rights conventions are not sufficient to conclude that there is a competence in the first place. References to such conventions are purely instrumental to the achievement of the objective of trade liberalisation and regulating moral rights is not an objective. Thus the chapter falls under Article 207 TFEU and is an exclusive EU competence.
- **Trade and sustainable development (TSD)**: A similar question existed with regard to the TSD chapter. The issue here was whether the TSD provisions were a *standalone* competence (in which case it would be a shared competence under Article 4 TFEU) or whether the chapter was only *instrumental* to the achievement of the CCP objectives. As opposed to the AG, the Court concluded that the TSD chapter fell under the CCP's scope for three main reasons. (1) First, the TSD chapter is necessary to ensure coherence between trade and other EU objectives as required by Article 207(1) TFEU, and therefore TSD is part of the CCP's objectives. (2) Second, the reference to international agreements on labour or environment does not change the finding that TSD chapters are mainly instrumental to trade as the enforcement of the obligations stemming from these agreements are covered by the interpretation, mediation and dispute-resolution mechanisms in those international agreements and not by the EUSFTA state-to-state dispute settlement. (3) Third, unlike the AG, the Court does not consider that TSD provisions aim at regulating labour and environmental standards but merely seek to regulate trade liberalisation in line with TSD obligations.
- **ISDS provisions:** The Court determines that the EU has no exclusive competence to adopt measures concerning the investor-state dispute settlement mechanism. The AG does not address ISDS as a separate matter.

Table 1 – Competences classified by the Court as opposed to the Advocate-General

Competence area	External competence for the Court	External competence for the AG
Chapters related to market access of goods	Exclusive	Exclusive
Services (except transport)	Exclusive	Exclusive
Transport services	Exclusive	Shared
Provisions related to foreign direct investment	Exclusive	Exclusive
Provisions related to non-FDI investments	Shared	Shared
Investor-state dispute settlement	Shared	Shared
Trade and sustainable development	Exclusive	Shared
Intellectual property rights	Exclusive	Shared
Competition rules	Exclusive	Exclusive

Policy implications

Though Opinion 2/15 is only valid for the EUSFTA, it has authoritative value for the interpretation of similar trade agreements in the future. As such, the opinion has important policy implications. As opposed to the AG's opinion, it allows for a distinction between investment-related and non-investment-related provisions, thus the two elements could be divided procedurally. The non-investment chapters could be concluded exclusively by the EU if they were in a separate agreement (which would not be the case had the Court followed the AG's opinion). The reasons why the Court did not follow the AG opinion on some issues may illuminate some of the boundaries that separate certain non-investment chapters from the realm of shared competences. On the other hand, EU investment agreements will have to be concluded as mixed agreements, in so far as they concern non-direct foreign investment and/or investor-state dispute settlement mechanisms.