CLIFFORD
CHANCE

Briefing note 28 December 2016

The EU-Singapore FTA: a mixed agreement?

On 21 December 2016, the Advocate General of the Court of Justice of the European Union issued an Opinion that the EU does not have exclusive competence to conclude its free trade agreement with Singapore because it is a "mixed agreement". This means that the agreement must be entered into by the EU and by each Member State in accordance with its own domestic processes. This Opinion, if followed by the Court, will have implications for any trade agreement that might be reached between the UK and the EU following Brexit.

The Opinion

The Advocate General, Eleanor Sharpston QC, states in her Opinion that the EU-Singapore free trade agreement is a mixed agreement. As a result, this FTA can only be entered into by the European Union and the Member States acting jointly, not by the European Union acting alone. This is contrary to the argument of the European Commission, which was supported by the European Parliament.

The Opinion provides useful clarification as to which elements of trade deals fall under EU competence, and which do not. For example, the Advocate General concluded that trade in goods, trade in services and foreign direct investment are all within the EU's exclusive competence. However, she considered that the EU's competence is shared with the Member States in respect of: (i) trade in transport services and government procurement provisions that apply to transport services; (ii) investment other than foreign direct investment; (iii) the non-commercial aspects of intellectual property rights; (iv) labour and environmental standards that fall within the scope of either social policy or environmental policy; and (v) dispute settlement, mediation and transparency mechanisms in so far as they apply to the parts of the agreement for which the EU enjoys shared external competence. In addition, provisions which terminate bilateral agreements between Member States and the third country are deemed to be the exclusive competence of those Member States.

The Advocate General's Opinion is not binding on the CJEU and, while the CJEU usually follows the Advocate General's opinion, it does not always do so. No definitive conclusions can therefore be drawn until the final judgment is given, probably in 2017.

The Impact

If the CJEU follows the Advocate General's Opinion, future EU FTAs are more likely to have to be entered into as mixed agreements, and therefore to require the approval of each of the EU's member states. This is because FTAs have become increasingly more complex over time, covering issues that fall outside the EU's exclusive competence, such as investment and labour standards. The ratification process within the EU's member states can be a significant stumbling block in finalising mixed agreements, especially as in some states (e.g. the Netherlands) this can include a referendum or, in others (e.g. Belgium) approval from all federal states. However, even where the EU has exclusive competence, the decision to sign and conclude trade agreements lies with the Council, meaning that Member States are still required to approve it, although usually on a qualified majority basis.

It is possible for free trade agreements to be applied provisionally, even before ratification. For example, the EU-South Korea trade deal was signed in October 2009 and provisionally applied from July 2011, although the ratification process was not completed until 13 December 2015. The EU-Canada trade deal (commonly referred to as CETA) is being entered into as a mixed agreement and is expected to be provisionally applicable before the ratification process is complete.

While the shape of the future relationship between the UK and the EU is still unclear, it could eventually take the form of a comprehensive free trade agreement. If the CJEU follows the Advocate General's Opinion, an EU-UK FTA of this kind would have to be entered into as a mixed agreement. Given the growing popular challenges to free trade, this would increase significantly the risk of the process becoming politicised and lengthy, as well as giving every Member State a veto.

Authors

Chris Bates
Partner

T: +44 20 7006 1041
E: chris.bates
@cliffordchance.com

Jessica Gladstone
Partner

T: +44 20 7006 5953
E: jessica.gladstone
@cliffordchance.com

Simon James
Partner

T: +44 20 7006 8405
E: simon.james
@cliffordchance.com

Michel Petite
Avocat of Counsel

T: +33 14405 5244
E: michel.petite
@cliffordchance.com

Alice Darling
Lawyer

T: +44 20 7006 1686
E: alice.darling
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2016

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.