
# WHAT DOES THE SINGAPORE FTA DECISION MEAN FOR THE EU'S FTAS AND BREXIT?

On 16 May 2017 the Court of Justice of the European Union ruled that the EU could not conclude the proposed Free Trade Agreement with Singapore alone, but that it would also have to be ratified by the EU's member states in order for it to come into force.

This long-awaited ruling will shape the EU's trade policy for years to come, and sets a precedent for future trade negotiations between the EU and third countries, including any free trade agreement that the UK may look to conclude with the EU once it has left.

This briefing summarises the opinion of the CJEU, and asks what it means for the EU's trade policy, and whether it is good or bad news for the UK.

## What was at stake?

The EU and Singapore completed the negotiations for a comprehensive free trade agreement on 17 October 2014. It was one of the first of a 'new generation' of free trade agreements for the EU. In addition to the "classical provisions" on the reduction of customs duties and of non-tariff barriers to trade in goods and services, the agreement included provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development.

The question for the court was, *"Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore?"*

The Commission argued that the matters covered by the FTA were largely covered by the EU's "Common Commercial Policy", which is an exclusive competence of the EU. The European Parliament agreed.

If the Court ruled in favour of the Commission, it would mean that the FTA could be concluded solely by the EU Council acting under the qualified majority voting procedure with the consent of the European Parliament (Article 218 of the Treaty on the Functioning of the EU), without need for further consent from individual member states.

The European Council and all the member states which submitted observations to the Court, including the UK, argued that the agreement did not fall solely within the exclusive competence of the European Union, but that it also covered competencies shared between the EU and member states, making it a 'mixed agreement'.

If the Court ruled in favour of the European Council and the member states it would mean that the FTA would have to be concluded by the EU Council, and also ratified by the member states according to their national procedures. In practice, this means that 38 national and regional parliaments must separately approve the agreement.

## What did the court rule?

The CJEU opinion confirmed the Advocate General's Opinion given in December 2016, which stated that the FTA, as it stands, is a mixed agreement and will therefore need to be agreed and ratified by each member state in accordance with its own domestic procedures.

The Advocate General, Eleanor Sharpston QC, stated in her opinion on 21 December 2016 that FTA was a mixed agreement on the basis that the European Commission's authority is shared with member states in respect of trade in transport services, investment other than foreign direct investment, intellectual property rights, labour and environmental standards and dispute settlement mechanisms.

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The CJEU opinion agreed with the AG's opinion that the FTA was mixed, but departed from the AG's reasoning as to the extent to which that was the case. The CJEU stated that the EU had exclusive competence in the following matters as far as the agreement was concerned:

- goods and services including all transport services and in the fields of public procurement and of energy generation from sustainable non-fossil sources
- direct foreign investments of Singapore nationals in the EU and vice versa
- intellectual property
- competition
- sustainable development
- rules relating to exchange of information and to obligations governing notification, verification, cooperation, mediation, transparency and dispute settlement between the parties, unless those rules relate to the field of non-direct foreign investment

The Court stated that in respect of only two aspects of the agreement does the EU not have exclusive competence:

- non-direct foreign investment (i.e. 'portfolio' investments made without any intention to influence the management and control of an undertaking)
- Investor-state dispute settlement mechanisms

The result is that any future EU free trade agreement that covers either of these matters will require the approval of each of the EU's member states.

## What does this mean for the EU's trade agreements in the future?

Despite concluding that the FTA is a mixed agreement and therefore subject to both EU Council and individual member state approval, the decision substantially adopts the position advanced by the Commission and the European Parliament and strengthens the Common Commercial Policy as an instrument of exclusive competence of the EU.

As shown by the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which was nearly overturned in October 2016 when the Belgian regional government of Wallonia threatened not to sign the deal, approval within each of the EU's member states can be a significant stumbling block in finalising mixed agreements, as well as being very time consuming.

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Investor-state dispute settlement and indirect foreign investment could be dealt with in a separate bilateral investment treaty (BIT).

Leading MEPs have suggested that separate agreements are the way forward. Guy Verhofstadt MEP, the European Parliament's Brexit coordinator said shortly after the decision, "For the limited areas of shared competence defined by the court, we should in the future envisage separate agreements, concluded jointly by the EU and member states and ratified by national parliaments. Such a separation would enhance the ability of the EU to conclude trade deals."

David Martin MEP, the European Parliament's rapporteur on the EU-Singapore FTA, said that "the investment protection part of the EU-Singapore free trade agreement should be kept separate from the other chapters." Such a split could speed up approval of any agreement.

The issue of "splitting" agreements it not entirely straightforward however. The main difficulty is that the decision is mostly in the hands of the member states as they decide on the mandate given to the Commission, and ultimately adopt the Treaty. As seen with the example of CETA, EU member states cannot resist demands from their own national Parliaments to hold national ratification. This is particularly true if the treaty in question is a politically sensitive one.

It was previously relatively easy for member states to insist that certain issues were "mixed", and it is true that after the Singapore decision the matter is much clearer.

## Is it good or bad news for the UK?

Though the CJEU's decision is largely contrary to the arguments put to the CJEU by the UK, the decision is likely to be welcomed by UK government negotiators. It opens up the possibility of the UK being able to conclude a FTA on a wide range of issues whilst avoiding a lengthy ratification process by member states and the ultimate risk that one or more of the member state national or regional assemblies could veto the agreement.

On the other hand, the UK has said that "nothing is agreed until everything is agreed" whilst the EU has indicated that it will not agree "sector by sector"

agreements. Furthermore, the UK has made clear that it wishes to conclude an agreement across a very wide range of areas, including immigration and security – coverage of either would make an FTA a mixed agreement. Neither of these areas were in issue in the Singapore case.

Post-Brexit, the UK will not be subject to the burdens that this case brings to the EU and leaves it free to conduct swifter ratifications of its FTAs.

The CJEU's judgment opens up the possibility of a comprehensive agreement being reached between the UK and the EU, and put into two or more separate instruments subject to exclusive EU and mixed ratification procedures respectively.

Such an approach is not without its own challenges however. Due to the political significance of a possible future EU-UK FTA, there is the strong possibility that member states will not let it happen on the basis of exclusive competence unless it only amounts to a low level Trade Agreement. Even if a splitting can be engineered, the part which is exclusively "trade" will most likely have its entry into force made conditional to the ratification to the other "mixed" part.

These and other questions will be critical to the progress of negotiations between the UK and EU, and EU and other third countries in the years to come.

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