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# ECJ’s Opinion on the Singapore Free Trade Agreement and the implications for brokering the Brexit deal

The European Court of Justice's Opinion on questions of the process for concluding a bilateral free trade agreement between the EU and the Republic of Singapore is particularly important as it will determine which provisions will require approval and subsequent ratification from all remaining EU Member States in any UK-EU deal brokered in the context of Brexit.

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## In brief

On 16 May 2017, the European Court of Justice (ECJ) handed down its Opinion on questions of the process for concluding a bilateral free trade agreement between the EU and the Republic of Singapore (the Agreement).

The Opinion offers insight into what the European Union may agree with third party States exclusively, without the unanimous backing of Member States. The Opinion is particularly important as it will determine which provisions will require approval and subsequent ratification from all remaining EU Member States in any UK-EU deal brokered in the context of Brexit.

## Background

On 20 September 2013, following nearly three years of negotiations, the EU and the Republic of Singapore agreed the text of the Agreement. The Agreement governs various matters, including (i) market access, (ii) investment protection, (iii) intellectual property protection, (iv) competition and (v) sustainable development.

The Agreement is one of the first in a raft of “new-generation” trade deals that govern a wide range of topics, including intellectual property, public procurement and investment. At the Commission’s request, the ECJ issued its Opinion determining whether the EU has exclusive competence enabling it to sign and conclude the envisaged Agreement without unanimous sign-off from EU Member States.

Under Article 3(1)(e) TFEU, the European Union has exclusive competence in the area of the common commercial policy. “Exclusive competence” in this regard means that only the EU can act. Further, under Article 207(1) TFEU, that policy “shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action”.

In the event that the EU has exclusive competence, Article 2(1) TFEU states that “only the Union may legislate and adopt legally binding acts”. Article 207 TFEU, which concerns the common commercial policy, states that for the negotiation and conclusion of such agreements, the Council shall act by a qualified majority. A qualified majority is defined as at least 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States. A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member (Article 238(3)(a) TFEU).

Under Article 4 TFEU, “shared competence” applies in regard to several economic areas, including the internal market, social policy, agriculture, the environment, consumer protection, transport, energy, trans-European networks, areas of freedom, security and justice, and common safety concerns. Having “shared competence” effectively means that both the EU and its Member States may adopt legally binding acts in the area concerned. For agreements covering areas of shared competency with EU Member States, representatives from Member State governments have to give their mandate for negotiations. This means that decisions are taken together with the Council of the European Union by common accord (agreement of all the Member States).

## ECJ Opinion

The Opinion dissected the Agreement into areas on which the EU may conclude an agreement with a non-EU jurisdiction exclusively (Article 3 TFEU), and those that require unanimous Member State agreement under the shared competence regime. (Article 4 TFEU).

The importance of the Opinion lies in the Court’s broad interpretation of the conceptual scope of the common commercial policy, where the EU has exclusive competence. The Court, however, also noted that the Agreement contained some provisions that require Member State ratification. As a result, in the Court’s view, the Agreement cannot be concluded by the EU alone and requires unanimous backing of the Member States.

The ECJ determined that the EU has exclusive competence so far as provisions of an agreement concern the following matters:

- access to the EU and Singapore markets for goods and services
- direct foreign investments of Singapore nationals in the EU and vice versa
- intellectual property rights
- anti-competitive activity
- sustainable development (which the ECJ found that the objective of sustainable development now forms an integral

part of the common commercial policy of the EU), and
- information exchange and obligations regarding notification, verification, cooperation, mediation, transparency and dispute settlements (unless those rules relate to the field of non-direct foreign investment.

However, on two specific items of the Agreement, the Court concluded that the EU does not have exclusive competence. These topics are (i) non-direct foreign investments and (ii) the regime governing dispute settlement between investors and States.

In regard to (i) non-direct foreign investments, the EU will only have exclusive jurisdiction in the event that the proposed agreement affects EU acts or alters their scope. As this was not the case, the EU did not have exclusive competence and requires the backing of the Member States.

The EU and Member States also have shared competence as regards dispute settlement between investors and States. A regime that removes disputes from the jurisdiction of the courts of the Member States cannot be established without the Member States' consent. As a result, such an agreement can only be concluded by the EU and the Member States jointly.

## Conclusion

The ECJ concluded that the Agreement between the EU and the Republic of Singapore falls within the exclusive competence of the EU, with the exception of those provisions that fall within the shared competence between the EU and the Member States. Specifically, those provisions include investment protection (so far as they relate to non-direct investment between the EU and the Republic of Singapore), investor-state dispute settlement, and provisions pertaining to transparency, dispute resolution and mediation (to the extent that the latter relate to investments).

## How does the EU-Singapore deal differ from the EU-Canada agreement?

The EU-Canada negotiations for a comprehensive Economic and Trade Agreement (CETA) were concluded in 2014 and the European Council decided to sign the deal in October 2016. Unlike the EU-Singapore agreement, the majority view was that CETA was not a "mixed" agreement, and only concerned issues that fell under the exclusive competence of the European Union. However, in order to allow for a speedy signature and to prevent political dispute as to whether the EU should be given exclusive competence over the matter, CETA was treated as a "mixed" agreement as a number of Member States considered the Agreement to govern areas of shared competence.

On 15 February 2017, the European Parliament voted in favour of CETA. The EU national parliaments must still ratify CETA before it can take full effect.

## Can the EU exclusively agree a Brexit deal?

Agreements that work toward the common commercial policy by intending to promote, facilitate or govern trade and have direct and immediate effects on it can be concluded by the EU exclusively, without the input of Member States. Such decisions are to be taken by the Council of the European Union by a qualified majority.

However, any deal brokered between the EU and the UK governing areas that do not concern the common commercial policy will require unanimous ratification from all EU Member States. This could result in the negotiations entering a long and drawn out process, however it should not prevent the majority of an agreement provisionally applying. Commentators have suggested that the Opinion may also provide an issues-map for the UK Government, if the UK wishes to seek to avoid a Member State vetoing a potential deal.

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