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The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone

The provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the EU, so that the agreement cannot, as it stands, be concluded without the participation of the Member States

On 20 September 2013, the EU and Singapore initialled the text of a free trade agreement. The agreement is one of the first 'new generation' bilateral free trade agreements, that is to say, a trade agreement which contains, in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers in the field of trade in goods and services, provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development.

The Commission submitted a request to the Court of Justice for an opinion to determine whether the EU has exclusive competence enabling it to sign and conclude the envisaged agreement by itself. The Commission and the Parliament contend that that is the case. The Council and the governments of all the Member States which submitted observations to the Court[1] assert that the EU cannot conclude the agreement by itself because certain parts of the agreement fall within a competence shared between the EU and the Member States, or even within the exclusive competence of the Member States.

In today's opinion, the Court, after making it clear that the opinion relates only to the issue of whether the EU has exclusive competence and not to whether the content of the agreement is compatible with EU law, holds that **the free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone**, because some of the provisions envisaged fall within competences shared between the European Union and the Member States. It follows that **the free trade agreement with Singapore can, as it stands, be concluded only by the EU and the Member States acting together**.

In particular, the Court declares that **the EU has exclusive competence** so far as concerns the parts of the agreement relating to the following matters:

- access to the EU market and the Singapore market so far as concerns goods and services (including all transport services)[2] and in the fields of public procurement and of energy generation from sustainable non-fossil sources;
- the provisions concerning protection of direct foreign investments of Singapore nationals in the EU (and vice versa);
- the provisions concerning intellectual property rights;

[1] Written observations were lodged by all the Member States with the exception of Belgium, Croatia, Estonia and Sweden. Belgium nevertheless appeared at the hearing and made oral observations.
[2] Whether it be maritime transport, rail transport or road transport, the Court holds that the commitments contained in the envisaged agreement that relate to transport services may affect EU regulations or alter their scope, so that, in accordance with Article 3(2) TFEU, the European Union has exclusive competence to approve those commitments.

- the provisions designed to combat anti-competitive activity and to lay down a framework for concentrations, monopolies and subsidies;

- the provisions concerning sustainable development (the Court finds that the objective of sustainable development now forms an integral part of the common commercial policy of the EU and that the envisaged agreement is intended to make liberalisation of trade between the EU and Singapore subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection);

- the 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 (see below).

Ultimately, **it is in respect of only two aspects of the agreement that**, according to the Court, **the EU is not endowed with exclusive competence**, namely the field of **non-direct foreign investment** ('portfolio' investments made without any intention to influence the management and control of an undertaking) and the regime governing **dispute settlement between investors and States**.

In order for the EU to have exclusive competence in the field of non-direct foreign investment, conclusion of the agreement would have to be capable of affecting EU acts or altering their scope. As that is not the case, the Court concludes that the EU does not have exclusive competence. It has, on the other hand, a competence shared with the Member States. That conclusion also extends to the rules relating to exchange of information, and to the obligations governing notification, verification, cooperation, mediation, transparency and dispute settlement, as regards non-direct foreign investment (see above).

The regime governing dispute settlement between investors and States also falls within a competence shared between the EU and the Member States. Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be established without the Member States' consent.

It follows that the free trade agreement can, as it stands, only be concluded by the EU and the Member States jointly.

NOTE: A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties or as to competence to conclude that agreement. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Press contact: Holly Gallagher ☎ (+352) 4303 3355

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