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CJEU Opinion on whether the EU can conclude the EU-Singapore Free Trade Agreement alone ([Opinion 2/15](#)) – what does it mean for Brexit?

Opinion of the Court – Article 218(11) TFEU – Free Trade Agreement between the EU and Singapore

On May 16, 2017, the Court of Justice of the European Union (CJEU) issued its Opinion on whether the European Union (EU) has exclusive competence to sign and conclude the free trade agreement with Singapore ('EUSFTA' or 'the Agreement'). The CJEU's Opinion was requested by the European Commission under the provisions of Article 218(11) of the Treaty on the Functioning of the European Union (TFEU).

According to the Court, the provisions of the EUSFTA 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. Therefore, the Agreement in its current form can only be concluded by the EU and the Member States acting together.

Background

The EUSFTA was negotiated between Singapore and the European Commission acting on behalf of the EU (following an authorization given to it by the Council of the EU) and contains provisions typical to a bilateral free trade agreement, such as on the reduction of customs duties and non-tariff barriers, but also provisions on various other issues, including intellectual property protection, investment, public procurement,

competition and sustainable development. The EUSFTA also provides for a mechanism to settle disputes between investors and States.

The Opinion notes that differences of opinion on the EU's competence to conclude the EUSFTA arose during consultations between the Commission and the Council's Trade Policy Committee, which advises and assists the Commission in negotiating agreements with third countries in the area of the common commercial policy. The Commission therefore requested an Opinion from the CJEU under Article 218(11) TFEU, on whether the EU has exclusive competence enabling it to sign and conclude the Agreement alone.

The Court's Opinion

The CJEU examined the various commitments contained in the EUSFTA and concluded that although the EU has exclusive competence in a number of areas covered by the Agreement, that is not the case in respect of non-direct foreign investment, i.e. portfolio investments, including with regard to exchange of information, and to obligations governing notification, verification, cooperation, mediation, transparency and dispute settlement.

Competence is also shared with the Member States as regards the mechanism for dispute settlement between investors and States contained in the Agreement. Under such a regime, disputes are essentially removed from the jurisdiction of the courts of the Member States, and therefore the mechanism cannot be introduced without the consent of the Member States.

The CJEU is therefore of the opinion that the EUSFTA, in its current form, cannot be concluded by the EU alone, but can only be concluded by the EU and the Member States acting together.

EU Tax Centre comment

It is worth noting that, pursuant to Article 218(11) TFEU, where the CJEU renders an unfavourable Opinion, the disputed Agreement cannot enter into force unless it is amended or the EU treaties are revised. It remains to be seen how the CJEU's Opinion will be used by the EU in its future negotiations for a potential free trade agreement with the UK. It seems that, in theory, the CJEU's reasoning allows for a trade agreement to be designed to only contain commitments in areas where the EU has exclusive competence and can therefore sign and conclude agreements alone. However, given the intention of the UK to secure the freest and most frictionless trade possible in goods and services in an ambitious and comprehensive Free Trade Agreement it cannot be ruled out that this

CJEU Opinion will cause additional delay in the negotiations between the EU and the UK.

Should you have any questions, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



Robert van der Jagt
Chairman, KPMG's EU Tax Centre and
Partner, Meijburg & Co

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KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

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