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RECENT DEVELOPMENTS IN EU TRADE AND INVESTMENT POLICY

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Legal Briefings – By **Lode Van Den Hende** and **Jérémie Charles**

The EU trade and investment policy has gone through a number of recent developments since the opinion of the Court of Justice of the European Union concerning the EU-Singapore Free Trade Agreement. This article addresses and details these developments.

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Moves to accelerate free trade agreements

On May 16 2017 the European Court of Justice (ECJ) handed down its opinion in Case 2/15, regarding the European Union's competence to conclude its proposed free trade agreement (FTA) with Singapore. The ECJ ruled on provisions relating to:

- the protection of non-direct (ie, portfolio) foreign investments; and
- investor-state dispute settlement mechanisms which go beyond the European Union's exclusive competence.

The ECJ confirmed that Article 207 of the Treaty on the Functioning of the European Union gave the European Union exclusive competence to implement its common commercial policy, which includes concluding trade agreements comprising provisions concerning both the admission and protection of foreign direct investment. However, the ECJ found non-direct foreign investment to fall outside of the scope of the European Union's common commercial policy and thus to be excluded from the European Union's exclusive competence. The ECJ also highlighted the fact that the proposed investor-state dispute settlement mechanism would have removed disputes from the jurisdiction of member state courts. On this basis, it concluded that such provisions required the consent of member states and therefore exceeded the European Union's exclusive competence.

The consequences of the ECJ's opinion are that FTA proposals incorporating provisions on the protection of non-direct foreign investments or investor-state dispute settlement mechanisms should be treated as mixed agreements, requiring ratification from not only the European Union, but also each member state. This was bound to have an appreciable effect on the negotiation and contents of future EU FTAs, as exemplified by President Juncker's recent proposals to open FTA negotiations with Australia and New Zealand, excluding any provisions relating to investment protection or the resolution of investment disputes.

The decision to keep the provisions of the proposed FTAs within the boundaries of exclusive EU competence can be seen as the European Commission's recognition that the need to involve each member state, and the additional time and complication that this will inevitably require, outweighs the benefits of including provisions on non-direct foreign investment or investor-state dispute settlement in EU FTAs. These concerns are well illustrated by the ability of Belgium's Wallonia region to delay the passage of the Comprehensive Economic and Trade Agreement (CETA) with Canada (see here for a more detailed piece on the conclusion of CETA). The recent State of the Union speech saw Juncker emphasise the need for the European Union to be efficient when negotiating FTAs, acknowledging that potential trade partners from across the globe have been "lining up at the EU's door". He also expressed an intention to conclude the proposed agreements with Australia and New Zealand before the end of the commission's existing mandate (ie, before 2019) as a substitute to the now-stalled EU-US Transatlantic Trade and Investment Partnership. In this regard, Juncker highlighted that the European Union must ensure that its "own institutional set-up is fit for purpose so that it can ratify and implement agreements in an effective manner and preserve its reputation as a credible negotiating partner". On that basis, investment protection and the resolution of investment disputes will likely be dealt with in separate mixed agreements that require ratification at member state level.

Investment court system under scrutiny

On September 6 2017 the ECJ received a request from Belgium for an opinion on the legality of the investment court system under the EU treaties. The investment court system had been incorporated into the recently negotiated CETA, which had initially been met with opposition (notably from Wallonia) due to the rights it confers on investors to challenge the decisions of member state governments. Belgium – which did not itself take any position on the questions referred to the ECJ – submitted the request as part of a compromise reached with Wallonia on this issue.

More specifically, Belgium asked the ECJ to provide an opinion regarding the compatibility of the investment court system with:

- the ECJ's exclusive competence to provide the definitive interpretation of EU law;
- the general principle of equality and the 'practical effect' requirement of EU law;
- the right of access to the ECJ; and
- the right to an independent and impartial judiciary (see here for a more detailed note on Belgium's request).

These developments emphasise the political sensitivities surrounding trade and investment agreements, providing further evidence of the inevitable complications that will arise if FTAs are to require ratification from each member state. This also bears relation to the ECJ opinion on the EU-Singapore FTA. Whereas that decision addressed the European Union's competence to enter agreements including investor-state dispute mechanisms, these questions address the compatibility of the mechanism itself.

EU regulatory intervention in investment review

In his State of the Union speech of September 13 2017, Juncker stated that "Europe must always defend its strategic interests" and that foreign, state-owned companies should be able to invest in European technology or infrastructure with "transparency, with scrutiny and debate". It is on this basis that the commission has proposed a new framework for the screening of foreign direct investment on grounds of security and public order.

The proposal leaves most of the power with the member states. It does not oblige member states to enact a screening mechanism, but rather creates the framework that enables them to do so should they wish. The other purpose of the proposal is to facilitate exchange of information. It includes a mechanism to facilitate cooperation between member states and the commission which can be activated when a member state considers that an investment by a foreign entity in another member state may have a detrimental effect on the security or public order of another. In such a scenario, the concerned member state can submit its comments to the relevant member state and the commission. In addition, the proposal confers on the commission the right to conduct screening on grounds of security or public order in those instances where the proposed investments may have a detrimental effect on projects or programmes of EU interest.

The ECJ's opinion on the EU-Singapore FTA acknowledged that the European Union has exclusive competence on matters affecting foreign direct investment. Accordingly, existing member states' foreign direct investment screening regimes were liable to be challenged as a violation of the European Union's exclusive competence. The commission's proposals are a means of resolving this issue.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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