Global Counsel

Is the ECJ judgement a big deal for a big EU-UK deal?

Blog post by Senior Director Stephen Adams, 22 May 2017

Last week's ECJ judgement on the 'mixity' question in EU trade agreements was a big one for EU trade policy. The ECJ overturned the Advocate General and years of practice by declaring that almost all of the things the European Commission negotiates on in FTAs should be treated in this respect as the exclusive competence of the EU. This includes big areas like transport policy, labour and environmental rights and IP protection.

This matters because where trade deals are 'mixed' in any way, they must be ratified both unanimously by European member states in Council and by a majority in the European Parliament, but also by all EU national (and in some cases, regional) parliaments. It is via this prerogative that the Walloon parliament in Belgium has been holding up the final ratification of the EU-Canada FTA. EU states have conventionally liked the way that even a small drop of mixity tightens their grip on the ratification process. This judgement loosens their fingers – in theory.

The judgement got a lot of interest because it could be read to suggest that the EU had been handed some of its swagger back on trade policy. It has been set free to negotiate and deal without looking over its shoulder at obstructive national politicians looking to make trouble. It certainly got lot of attention in the UK, because it might be read to suggest that Wallonia (and other EU Parliaments) will not get a say on an EU-UK FTA, which could thus prove easier to ratify at speed. This might in turn put less pressure on any transitional arrangements that the EU and the UK might put in place to bridge the UK's exit from the EU and the entry into force of a future EU-UK trade deal.

Putting to one side the irony of British Eurosceptics toasting the judicial activism of the ECJ, you have to make one (or both) of two assumptions to get to such a conclusion. The first is that the EU-UK FTA will not be wider in scope or substance than the EU-Singapore FTA on which the ECJ's judgement was founded and is ultimately bounded. This is a very comprehensive FTA by modern standards, but an EU-UK deal could easily cover issues such as migration, energy policy or aspects of regulatory convergence, or administrative cooperation that triggered mixity – or sufficient uncertainty to have the same political effect. As one example, the ECJ ruled explicitly that mechanisms for protecting inward investors via arbitration systems outside a national court system are mixed, and the UK could well want such protections, which are a conventional form of investor protection.

Assuming an EU-UK deal did cover such mixed issues, you need to assume that the EU would agree to divide a deal with the UK into two or more agreements, separating mixed and unmixed issues and ratifying them separately by the two different tracks. This is not impossible, but it would mean explicitly cutting national parliaments out of decisions on which they are likely to see themselves as having an important role, especially given the sensitivity of a future deal with the UK.

In the end, it is EU member states that decide whether to inject mixity into trade deals. EU negotiating mandates for FTAs with no mixed elements are adopted by qualified majority and mixed mandates require

unanimous adoption, and in both cases isolated states demanding it could be blocked or ignored. But the question may be how likely it is that the Council would face down a group of member states (or a big enough member state) under pressure from national parliamentarians concerned that their right of oversight was being taken away. Just as the current Commission conceded it on CETA, even though it believed it would win an ECJ judgement saying it had no obligation to, this will be a question of politics as well as law. This could be true of any future large or sensitive EU deal.

So, the odds actually seem pretty good on an EU-UK deal still finding its way to Wallonia. However, as with CETA, the European Council and European Parliament will maintain the power to provisionally apply aspects of the agreement covered by exclusive competence, including tariff cuts, while waiting for final ratification. This judgement potentially widens the scope for such provisional application. But that may be the limit of its power to shape the way the EU signs off on its future relationship with the UK.

The ECJ's delimitation of competences in the EU-Singapore FTA

Elements of the EU-Singapore FTA as assessed by the ECJ	
Mixed competence	Exclusive competence
Regulatory cooperation	
	Non-tariff barriers
	Food safety and animal and plant health
Market access	
→	Transport services
	All other services
	Rules of origin
	Elimination of customs duties
	E-commerce
	Public procurement
Rules	
→	Intellectual property
→	Sustainable development (labour and environmental standards)
→	State-to-state dispute settlement
	Competition
	Transparency
	Trade facilitation
	Protection of FDI
Protection of non-direct foreign investment	
Investor-state dispute settlement	

→ Transferred by ECJ Opinion

Source: GC Analysis