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Trade, Labor and EU Law Perspectives

The Feasibility of Falling Back: the UK, the EU and the WTO – After Brexit

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Source: <https://www.reuters.com>

The legal position of the UK within the WTO is not in doubt: the UK has always been a full Member of the WTO and will remain so post-Brexit – the problem lies in determining the exact terms and conditions of its membership.

It is unlikely that any issues will arise regarding the rights and obligations of all WTO Members vis-à-vis all other WTO Members for the protection of their collective interest. Such *erga omnes partes* rights and obligations include, for example, the prohibition on discrimination and the protection of intellectual property rights. The UK could simply continue to adhere to the commitments it undertook as an EU Member State and hope that the other WTO Members will return the favour.

But it will be far more difficult to determine the UK's quantifiable rights and obligations within the WTO after Brexit, as these are bundled with those of the EU in the EU Schedules of Concessions and Commitments concerning goods and services. Unless and until the UK negotiated its own Schedules, through what is likely to amount to a lengthy process, it will remain unclear which specific obligations it has towards other WTO Members, and *vice versa*.

The first problem is that the EU's current WTO commitments are unclear. Furthermore, three specific areas with regard to goods might turn out to be particularly problematic: tariff-rate quotas (TRQs), EU-wide value chains and agricultural subsidies. Other difficulties concern the divergence and enforcement of regulatory standards, trade remedies and dispute settlement.

Current EU commitments are unclear

The first problem with allocating part of the EU's commitments to the UK is that, due to the changes in EU membership and corresponding adjustments to the EU's quantifiable commitments over the last two decades, there is uncertainty regarding the specific share of these commitments which would be transferred to the UK. 'Falling back on WTO trading terms,' furthermore, will have significant repercussions for manufacturers, service suppliers and consumers, as illustrated with regard to the most important goods (such as motor vehicles and pharmaceutical, computer and electronic products) and services (such as financial, business and travel-related services) exported from the UK to the EU, and *vice versa*.

Tariff-rate quotas (TRQs), EU-wide value chains and agricultural subsidies

First, the UK will probably have the right to access other WTO Members' TRQs when allocated on a non-discriminatory basis. Regarding the UK's share of the EU's TRQs, the UK and the EU stated that they will seek to 'maintain the existing levels of market access available to other WTO Members',^[1] which seems to follow the current practice of extrapolating quota shares from a representative period of three years' import data.^[2] If the WTO members believe, however, that the UK and the EU's concessions have diminished in value after Brexit (which is contingent on their trade relations), they may contend that the EU and the UK have to offer greater concessions to compensate for the negative effect. For example, one of the roughly one hundred products subject to an EU TRQ is high-quality beef, which includes a quota of 40,000 tonnes.^[3] Distinguishing the UK's share of this quota would implicate the interests of, and likely require negotiations with, major beef exporting countries, such as Argentina, Australia, Brazil, Paraguay and the US. Absent an EU-UK trade deal, furthermore, the UK and EU would each potentially face the other's desire to expand each TRQ, to accommodate cross-Channel beef exports previously exempt from such quotas.

Second, a hard Brexit might create specific problems for EU-wide value chains. An EU-wide value chain refers to a situation where a particular product travels between different EU countries at different stages of its production. This type of production chain requires cross-border transportation of goods within the EU, perhaps multiple times. Currently, the single market simplifies the operation of EU-wide value chains. After Brexit, however, the cost of maintaining those EU-wide value chains which include operations in the UK could increase. Even though mechanisms could be put in place to mitigate the accumulation of costs, as already exist under the EU Customs Code, these procedures are likely to be seen as rather cumbersome by exporters. Complex, multi-step production process such as automobile manufacture, for example, would either require extensive record-keeping and administrative efforts to take advantage of customs

provisions applicable to, inter alia, inward processing procedures, or incur delays for inspection and tariff expenses with each trip between the EU and the UK.



Source: <https://ec.europa.eu>

Third, there are no WTO rules determining the apportionment of agricultural subsidy commitments, while such subsidies are crucial for the survival of certain agricultural sectors both in the UK and on the continent, so this may become a contested issue. The UK's subsidisation rights could be determined over a representative period of three years applied to the EU's total subsidy commitments – but this would need to be agreed between both parties.

Regulatory standards and trade remedies

WTO Members have commitments beyond the Schedules of Commitments under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). At least two areas of post-Brexit concern can be identified: first, the increasing divergence between UK and EU standards, with ensuing enforcement issues, and second, the implementation of trade remedies. The UK will have to balance exercising its regained flexibility to conclude its own trade deals with maintaining high safety standards, impacting goods from consumer electronics to food, to which the British public is accustomed, and which are necessary for 'frictionless trading' with the EU. The WTO does not provide an alternative regulatory system as the relevant WTO rules mainly serve to ensure that Members' regulations, standards and procedures are non-discriminatory and do not create unnecessary impediments to trade while recognizing their right to adopt measures that accomplish legitimate policy objectives. Both parties will need to cooperate intensively if they wish to limit the administrative burden imposed by the EU to ensure compliance with its regulatory standards.

Dispute settlement

Under the WTO rules, Members can justifiably use trade measures ('trade remedies') to restrict imports in the form of anti-dumping duties (*being* import duties imposed in response to pricing practices of private firms that are deemed 'unfair' and that cause or threaten 'material injury' to an industry in the importing State), countervailing duties (*being* import duties imposed in response to certain subsidies provided to exporters by their governments that cause or threaten 'material injury' to industries in the importing State) and safeguards (*being* import measures, usually tariffs or quotas, imposed in response to a surge in imports that causes or threatens 'serious injury' to a domestic industry). Generally speaking, each of these trade remedies must be preceded by an investigation specific to the remedy sought. The UK will have to conduct its own investigations, unless it adopts a practice of mirroring the EU remedies without any investigation of its own. Such mirroring could, however, be considered a violation of WTO rules in and of itself, dependent upon

when the mirroring takes place.



Source: <https://eastsidefm.org>

After the UK leaves the Single Market, trade with EU Member States will no longer be governed by internal EU law and procedures, including provisions for redress in case disputes arise. The European Commission will no longer investigate trade practices that are allegedly unfair to the UK or its traders. The UK and its traders will also no longer be able to bring claims before the Court of Justice of the EU. As with other non-Member State trade, and assuming no EU-UK trade agreement is concluded that provides otherwise, redress would only be possible within the WTO dispute settlement mechanism. This mechanism has, compared to the EU adjudicatory system, at least two significant disadvantages. First, it does not provide compensation for damage caused (merely obliges a Member to withdraw certain measures for the future but does not repair injuries inflicted in the past). Second, it does not allow for private parties to bring claims.

Conclusion

In sum, the terms and conditions of the WTO fall-back option and the extent to which the WTO could act as a safety net for the UK's future economic relations depend, to a great extent, on successful negotiations with all other WTO members. This situation would be further complicated if the UK's negotiations with the EU were to break down, since the EU's cooperation is crucial. There are significant differences between EU and WTO membership, in terms of the applicable trade rules and their economic impact, as well as compliance and dispute settlement procedures. Imposing new regulations and processes will inevitably entail additional costs and delays, regardless of any mitigation agreements. Economic impacts depend not only on trade barriers and procedural changes, but also on the effect on bilateral trade flows, economic growth rates and prospects, currency adjustments, and the fact that UK exporters will be competing in the EU market with established players from third States, such as China, Japan and the USA.

Finally, this post has concentrated mainly on the legal consequences of using WTO rules as a default position in case of 'no deal'. But the effect of leaving the EU without a comprehensive cooperation agreement would have repercussions far beyond matters addressed within the WTO, such as human rights and environmental protection, law enforcement, national security, research

and development, data protection, science and technology, etc. The EU-UK relationship covers much more than trade so the WTO fall-back option will in any case leave major legal vacuums. The mantra “no deal is better than a bad deal” is misleading; the WTO fall-back option falls far short of providing an adequate safety net, even for trade matters.

For more analysis, see: Freya Baetens, “‘No Deal is Better than a Bad Deal’? The fallacy of the WTO Fall-Back Option as a Post-Brexit Safety Net’, 55 *Common Market Law Review* 2/3 (2018) pp. 133-174

[1] Joint Letter by the EU and UK, to the WTO Membership (11 Oct. 2017), p.2, available at https://ec.europa.eu/commission/sites/beta-political/files/letter_from_eu_and_uk_permanent_representatives.pdf.

[2] Article XIII of the General Agreements on Tariffs and Trade [GATT]

[3] For more detail, see Ungphakorn, “The Hilton beef quota: A taste of what post-Brexit UK faces in the WTO”, Trade & Blog, 10 Aug. 2016, available at <https://www.tradeandblog.wordpress.com/2016/08/10/hilton-beef-quota/#disclaimer>.

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This entry was posted on Wednesday, October 17th, 2018 at 6:51 pm and is filed under [Brexit](#), [Customs](#) generally refer to taxes that are imposed on goods imported into or exported out of a country and are enforced by customs authorities. The European Union (EU) has its own customs union, meaning that within the EU there is a uniform system for handling the import, export and transit of goods. A common set of rules has been implemented, referred to as the Union Customs Code (UCC). No customs duties are to be paid at the borders between EU countries after a good from outside the EU has first entered.“>Customs, EU, EU law is the body of law, consisting of primary and secondary legislation, that relates to the European Union. Primary legislation most importantly refers to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Secondary EU legislation, such as Directives and Regulations, is based on the principles and objectives as laid down in the Treaties (TEU and TFEU).“>EU Law, Free Trade Agreement, General Agreement of Trade in Services (GATS), The Single Market (also known as the internal market and, originally, the common market) refers to the European Union as a trade bloc without any internal borders or other regulatory obstacles to the free movement of goods, persons, services, and capital. The European Single Market is one of the EU’s greatest achievements as it has stimulated economic growth and made life easier for European businesses and consumers by stimulating competition and trade, improving efficiency, raising quality and cutting prices.“>Single Market, Trade Law, TRIPS,

UK, WTO

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