

BREXIT 'THE VIEW FROM BRUSSELS' - DEVELOPMENTS IN JUNE

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Legal Briefings - By **Eric White, Consultant**

The Brexit debate often looks different when viewed from Brussels rather than from London. That Brussels perspective however is important for businesses to keep in mind and therefore we publish a monthly view from our Brussels office on recent developments and the state of the negotiations.

In this View from Brussels we comment on parallel developments that have taken place in the international arena. Brexit will not only impact the trade relations between the UK and the EU. It will also have important consequences for the trade relations of both the UK and the EU with third countries with which they are bound through numerous free trade agreements ("FTAs") as well as the WTO Agreement. This briefing considers the roll-over of existing free trade agreements and the disentangling of the UK from the EU membership of the WTO.

INTRODUCTION

There has been little progress in the Brexit negotiations since the publication by the EU of a [draft Withdrawal Agreement](#) in March 2018. There have been well-publicised pronouncements from each side but these do not appear to have moved the parties closer together - especially not on the critical issues of the Irish border and the future relationship.

In this View from Brussels we comment on parallel developments that have taken place in the international arena. Brexit will not only impact the trade relations between the UK and the EU. It will also have important consequences for the trade relations of both the UK and the EU with third countries with which they are bound through numerous free trade agreements ("FTAs") as well as the WTO Agreement. In fact, by breaking up a well-established customs union with trading links all around the world, Brexit will create new hindrances to trade and impose additional costs on traders. The question arises as to who will have to bear the resultant costs. These hindrances will arise in a number of ways. First, duties, charges and controls will arise where they did not exist before. But more subtly, a third country will no longer be able to export to the UK and the EU as a single entity allowing its products to be exported to a single port in the EU and then circulate freely without having to pay additional charges or undergo further formalities. Later in this note we will discuss the problems that arise where quantities are limited by tariff rate quotas ("TRQs"). This impacts third countries even where the TRQs are maintained at the same level as they will lose the flexibility of exporting to whatever part of the EU-28 is most advantageous.

THE ROLL-OVER OF FREE TRADE AGREEMENTS

Brexit has the potential to severely disrupt trade between the UK and around 40 third countries with which the EU has FTAs of various types (for a summary of these agreements see [here](#)). These agreements will cease to apply to the UK when it is no longer a Member State of the Union, in particular because they contain territorial application clauses that provide that they apply to the territories in which the EU is applied (see our more detailed discussion [here](#)).

Article 124(1) of the draft Withdrawal Agreement provides that the UK will remain bound by all EU agreements during the transition period even though it will have no representation in these agreements. In a footnote, it is agreed that "The Union will notify the other parties to these agreements that during the transition period, the United Kingdom is to be treated as a Member State for the purposes of these agreements."

Such a notification will not by itself create an obligation for third countries to continue to grant the UK the treatment provided for in the FTA. However, since third countries have an evident interest in preserving stability in commercial relations, it is expected that this will lead to a *de facto* continued application of EU FTAs to the UK. By accepting such a notification, third countries may [tacitly agree](#) to interpret and apply these agreements as covering the UK during the transition period.

The Withdrawal Agreement also authorises the UK to negotiate and conclude new agreements with these third countries during the transition period provided that such agreements do not enter into force until after that period.

The multiplicity of interests affected by a trade negotiation and the complexity of approval procedures involved means that the negotiation of new FTAs takes many years. Therefore, the best that the UK can hope to achieve during a transition period of only 21 months is a "roll-over" of the EU's existing agreements - that is an agreement, probably by exchange of letters, that the parties will continue to grant each other the same treatment as before Brexit with as few modifications as possible. Even this will be a challenge.

The danger for the UK (but also for the EU) is that the third countries concerned ask for compensation for the impairment to their trade that Brexit has caused. This will not only require the UK (and possibly also the EU) to provide such compensation, it will also complicate and delay the process.

DISENTANGLING THE UK FROM THE EU MEMBERSHIP OF THE WTO

Similar considerations apply to the WTO Agreement although here all accept that the UK will remain a WTO Member after Brexit. At the time of its conclusion, the WTO Agreement was considered to go beyond the competence of the EU alone and to require conclusion by the Member States as well. Accordingly, the EU Member States became WTO Members alongside the EU. Today, following the Lisbon reforms to the EU treaties and the Singapore [Opinion](#) of the Court of Justice of the European Union, the EU would be exclusively competent for the WTO Agreement. As a consequence the EU Schedules of specific commitments for goods and services were presented both for the EU and for the Member States. Also, on ratification neither the EU nor the Member States expressed any limitation as to the obligations they were accepting and are considered bound by all the obligations.

However, some of the specific commitments in goods are quantitative in nature in the form of tariff rate quotas and agricultural subsidy limits (TRQs and AMSs) and the question arises as to what will be the obligations of the remaining EU and the UK following Brexit?

One possible approach, and that which the EU initially appeared to take, would be that the EU obligations remain unchanged (just as they did not change automatically on accessions of new Member States to the EU) and the UK would have to negotiate its own commitments with the other WTO members. It is considered that Article XI of the WTO Agreement makes it impossible to be a WTO Member without schedules.

A second approach, that the UK seemed to espouse, was that the UK had always had its own set of specific commitments but that these were subsumed into (or bundled together with) those of the EU and simply had to be extracted by means of a "rectification" of schedules that should not require renegotiation. This appears to have been adopted by the EU when it realised that it could use the occasion of Brexit to reduce its TRQs (and therefore maintain the level of protection of its agriculture).

Finally, one could also take a more literal approach to the construction of the schedules and consider that both the UK and the EU should have unchanged schedules following Brexit. A consequence of this would be that the rest of the world would have almost double the low-tariff access that it had before Brexit. (Both the EU and the UK would maintain the same numbers for the TRQs. Since they would have access to each other TRQs, this would leave something less than double the original TRQs for other Members.)

In October 2017, the EU and the UK sent a [joint letter](#) to the other Members of the WTO effectively adopting the second of the above approaches and proposing (in the absence of reliable import data because of the customs union) to divide the TRQs according to consumption statistics for the products over the last three years. Seven other WTO Members immediately [rejected](#) this approach arguing that it resulted in a diminution of their export opportunities and calling for negotiations.

Since then, informal discussions have taken place but evidently no agreement has been reached. The European Commission has recently [recommended](#) to the Council the opening of negotiations under Article XXVIII GATT on the splitting of the TRQs following Brexit. At the same time, the Commission has made a [legislative proposal](#) that advances new reduced TRQs for the EU based on its calculation of the share of imports attributable to the EU-27. Knowing that these will not be accepted by the rest of the Membership at the levels proposed, the Commission proposes that it should be authorised by the Council to modify these TRQs by delegated act to reflect the outcome of negotiations (and even in the light of "pertinent information that it may receive either in the context of negotiations under Article XXVIII of the General Agreement on Tariffs and Trade 1994 or through other means"). At the same time it proposes to authorise the UK to negotiate for itself at the WTO.

Another feature of the Commission's proposal is that it expresses an assumption that the UK will continue to be treated in the WTO as an EU Member State covered by the EU schedules during the transition period in the same way that it expects third countries to accept the UK as covered by the FTAs. Again this is convenient and may be accepted by all but is questionable legally.

It is worthy of note that the Commission is inviting comments on this legislative proposal (including therefore its proposals for dividing the TRQs) until [17 July](#).

There are many other issues relating to Brexit to be resolved at the WTO. One is the accession of the UK to the Government Procurement Agreement, rendered necessary by the fact that this was an EU-only agreement which the UK never ratified. Another is the rectification or renegotiation of the UK's schedule of services commitments. This will give rise to many complex issues. However, the reliance of WTO Members on services commitments appears low and the schedules are already rather unclear. It is noteworthy that the consolidation of the documents detailing the limitations of the commitments of newly-acceded Member States has been extremely slow and so it may well be many years before the UK services schedules are finalised.

An important legal issue will be the status of the transition period for WTO purposes. During this period the UK and the EU will be providing preferential treatment to each other's exports. A fundamental principle of the WTO is that any such treatment must be immediately and unconditionally accorded to all other Members. Customs unions and free trade agreements are allowed as an exception to this principle and so are interim agreements preparing for such customs unions and free trade agreements. It is however not at all clear that the exception applies to temporary agreements to prepare for a reduction of trade liberalisation.

The UK seems to assume that it will be entitled to continue applying the antidumping, anti-subsidy and safeguard measures of the EU following Brexit (as evidenced by its [invitation](#) to interested parties to indicate which duties should be continued). This is not at all a safe assumption. Such measures require justification based on an investigation of conditions prevailing in a particular territory. Therefore an investigation conducted by the European Commission for the whole EU does not appear to be a valid basis for the UK to apply duties following Brexit. Because of the significant effects of such measures, it is likely that such continuation will be challenged at the WTO immediately following Brexit.

[Brexit hub](#)

KEY CONTACTS

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



ERIC WHITE
CONSULTANT,
BRUSSELS
+32 2 518 1826
eric.white@hsf.com



**LODE VAN DEN
HENDE**
PARTNER, BRUSSELS
+32 2 518 1831
Lode.VanDenHende@hsf.com

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