

COUNTDOWN TO THE REFERENDUM:

A series of articles by Matrix that will explore a number of legal topics surrounding the UK referendum on 23 June 2016.

9: Would the UK be able to rely on the WTO agreement if it were to leave the EU?

VINGE Dr Erik Lagerlof is a senior associate at the Swedish law firm [Vinge](#) and he has also been called to the Bar of England and Wales. Erik was previously working as legal secretary to the British judge at the European Court of Justice and he has been a visiting fellow at both the Lauterpacht Centre for International Law at Cambridge University and Harvard Law School. Erik was educated at Cambridge and he has a PhD in EU/international law from the European University Institute in Florence.

Erik advises companies and individuals in all matters related to EU and international law. He has recently been involved in a case concerning data protection laws that was heard by the European Court of Justice in Luxembourg earlier this year and he is currently engaged in multibillion arbitration proceedings in Sweden where a range of EU and international law issues appear.

Erik is also the author of a number of articles on EU and international law and is a regular speaker at conferences.

Synopsis

- *Examines the status of the WTO agreement as a mixed international agreement concluded by the EU together with its Member States.*
- *Considers the UK's position in relation to the WTO agreement in the event of a decision to leave the European Union.*
- *Argues that the UK would not continue to enjoy the rights and obligations it had as a Member State of the EU in relation to the WTO and other mixed international agreements concluded by the EU. The UK would have to negotiate such agreements from scratch.*
- *Highlights that were the UK to leave the EU, one consequence would be that the UK would no longer have any right to determine either the content of EU law or its interpretation or application within the EU.*

Introduction

1. One of the many contentious issues surrounding the referendum and the potential consequences of an exit from the European Union concerns the international agreements to which the UK is a party as an EU Member State. Would the UK continue to benefit from these agreements if it decides to leave the Union? The [WTO agreement](#) in particular seems to have been the focus of much debate.
2. It is argued by some that even if no trade deal can be agreed to with the EU after a departure from the Union, the UK will still be able to rely on the WTO agreement and its rules if the UK would go forward alone. The Treasury also relied upon the WTO option as the worst alternative to EU membership in its analysis of what it thinks would happen to the UK economy in the event of a vote to leave at the referendum on 23 June.
3. But what if the UK, after a possible departure from the EU, would not be able to rely on the WTO agreement in an effort to strengthen its international trade?
4. The purpose of this contribution is not to discuss potential virtues of the WTO agreement in itself, but to consider the perhaps more fundamental issue if the UK would continue to be a party to this agreement at all in the event of a Brexit.

The UK's position under the WTO agreement

5. An implication of EU membership, where the Member States have given power to the Union in some areas but not in others, is that the EU and the Member States cannot on their own conclude certain international agreements that touch upon a broader range of issues.
6. The solution to this particular characteristic of the relationship between the EU and the Member States is the mixed agreement; an international instrument whereby the EU and the Member States pool their respective legal competences together in order to act as a single contracting party and thereby jointly accept the rights and obligations of the international agreement.
7. The mixed agreements have been a common feature of EU and Member State external relations since the 1960s and they have been used within a vast range of policy areas, stretching from development cooperation to the management and conservation of the resources of the sea. These

agreements represent a telling example of how the EU and the Member States can actually work together to achieve considerable benefits.

8. A well-known, example of a mixed agreement is the WTO agreement that was concluded by the EU together with its Member States in 1994. The agreement entered into force in 1995.

Rights and obligations under the WTO agreement if the UK leaves the EU

9. Some say that the UK would still be a party to free trade agreements, including the WTO, concluded by the EU due to the so called presumption of continuity – a legal principle existing in international law – even if the UK would no longer be a Member State of the European Union.
10. It is possible to rely on the presumption of continuity in some cases where a state legally continues to function in an altered form after a certain event and therefore also continues to enjoy the rights and obligations it had before that particular event. For example, British practice accepted that the Russian Federation was the successor of the former Soviet Union. On the other hand, the surviving Federal Republic of Yugoslavia was not recognised as the continuation of the old Yugoslavia.
11. Does the presumption of continuity mean that the UK, outside the EU, could adopt the rights and obligations it had as a Member State of the EU in relation to the WTO and other international agreements concluded by the Union?
12. The simple answer is no. Although the UK entered into the WTO agreement as a sovereign state, it did so as a Member State of the European Union and it did so alongside the EU and the other Member States. The rights and obligations of that group would not follow the UK if it were to leave the EU. The relationship between the UK as a member of that joint contracting party and the UK alone would be too remote for it to be considered as the bearer of rights and obligations enjoyed by the EU and the Member States together.

What does this mean in practice?

13. The practical effect of the conclusion reached above is that the British position within the WTO would become highly uncertain if the UK leaves the EU. [As recently described](#) by the head of the World Trade Organisation, Roberto Azevêdo, Britain's trade commitments were negotiated by the EU and these would cease to apply if there were a decision to leave the Union.

14. In the event of a departure from the EU, the UK would accordingly have to start its renewed relationship with the WTO from scratch without the institutional machinery necessary to negotiate trade deals. Of course, it would have to do so while at the same time considering all those other mixed agreements concluded by the EU and the Member States where the British position would be similar to that it would be faced with in relation to the WTO.
15. These negotiations alone would prove a formidable task and would preoccupy a vast section of the UK civil service for quite some time. How those in favour of leaving the EU would go about handling all those international agreements that would be needed, when they intend to do so and what we could expect from these new deals are questions that thus far in the referendum debate have been left unanswered.

Dr Erik Lagerlof

Vinge

June 2016

Further information

Find out more about our EU law team at Matrix at matrixlaw.co.uk/practice-areas/eu-law/.