

The impact of Brexit on EU trade relations

24 June 2016

On 23 June 2016, a referendum was held on whether the United Kingdom (“UK”) should leave the European Union (“EU”). The results – 52% of the electorate voted in favour of the UK’s exit from the EU (the so-called “Brexit”) – will have an impact on future EU trade relations.

1. IMPACT OF BREXIT DURING THE EXIT PROCEDURE

The referendum vote of 23 June 2016 does not imply an immediate exit of the UK from the EU; it merely represents the initial stage of a cumbersome negotiating process.

Article 50 of the Treaty on European Union (“TEU”), introduced by the Treaty of Lisbon, explicitly grants Member States the legal right to withdraw from the EU. In order to do so, the UK must follow the procedural steps laid down in Article 50:

- First, the UK Government must notify the European Council of its intention to initiate the procedures to leave the EU.
- Upon receipt of such notification, the EU will have to negotiate a **withdrawal agreement** with the UK setting out the necessary arrangements in light of future relations between Brussels and London. Such agreement shall be concluded on behalf of the EU with a **qualified majority vote of the Council**, after obtaining the consent of the European Parliament.
- According to Article 50(3) of the TEU, **the EU Treaties will cease to apply to the UK from the date of entry into force of the withdrawal agreement** between the EU and the UK. If the parties fail to reach a mutually satisfactory agreement, the Treaties will no longer apply to the UK as of **two years** after the date of the notification by the UK Government of its intention to leave the EU, **unless the European Council decides to extend** the negotiating period with an unanimous vote. Pursuant to Paragraph 4, the UK Government will not participate in the discussions of the European Council or the Council concerning the matter during the negotiating period.

2. UK WITHDRAWAL FROM THE EU CUSTOMS TERRITORY

Once the UK has officially withdrawn from the EU, the UK will no longer be part of the EU customs territory, unless both parties were to agree otherwise. As a consequence of the UK’s withdrawal from the EU customs territory, goods imported from the UK into the EU will now be subject to the EU Common Customs Tariff. Conversely, goods imported into the UK will be made subject to the customs duties to be imposed by the UK as part of its national customs tariff.

In order to mitigate such an impact of Brexit on the application of tariffs, the UK and the EU could agree upon one of the following scenarios:

- The UK could join the **European Economic Area** (“EEA”). By doing so, the UK would remain part of the European Single Market and benefit from the free movement of goods, services, people and capital within the EEA. While there is free trade within the EEA, EEA members are not part of the EU’s customs union, which would enable the UK to set its own external tariffs vis-à-vis the rest of the world.
- The UK could rejoin the **European Free Trade Association** (“EFTA”), which provides for free trade with the EU in all non-agricultural goods and which has FTAs with the EU and numerous other countries. By doing so, UK goods would be guaranteed tariff-free access to the EU and vice versa.
- The trade relations between the UK and the EU could be regulated through comprehensive **free trade agreements** (FTAs), covering, amongst others, trade in goods, services and investment protection. The EU already has a similar FTA in force with Korea, and has concluded another with Canada.
- Alternatively, the EU could decide not to implement any of the above arrangements with the UK. In such a scenario, trade relations between the UK and the EU are likely to be governed by the rules contained in the **WTO Agreements**.

3. IMPACT OF BREXIT ON TRADE DEFENCE INSTRUMENTS

EU trade defence instruments (TDIs) – antidumping, countervailing duties and safeguard measures – will continue to apply to imports into the UK until a withdrawal agreement is reached or until the expiry of the two-year period as required under Article 50 TEU.

After Brexit, the application of EU TDIs to the UK will depend on the as yet unknown content of the withdrawal agreement concluded between the EU and the UK. Once again, a number of scenarios can be identified:

- Should the EU and the UK agree on the latter’s remaining a party of the EU’s customs union, the EU TDIs are likely to remain applicable vis-à-vis the UK.
- In case of disagreement – or should the agreement imply the UK’s withdrawal from the EU’s customs union – the EU TDIs will no longer apply to imports into the UK. Moreover, existing EU TDIs would have to be reviewed in light of the substantially changed circumstances of Brexit. Indeed, the original

determinations on injury and causal link would no longer reflect the changed composition of the EU market.

If the UK were to withdraw from the EU's customs union, it would have to establish a new regime on TDIs, which would require the enactment of new regulations on anti-dumping, subsidies and safeguards as well as the creation of a national investigating authority.

4. IMPACT OF BREXIT ON THE EU'S FREE TRADE AGREEMENTS

The EU is currently party to 36 trade agreements (or international agreements with a trade component) outside the scope of the WTO. These agreements will continue to apply to the UK during the interim period provided by the EU Treaties for the negotiation of the UK's withdrawal. Once concluded, Brexit is likely to imply the **termination of such agreements vis-à-vis the UK**.

While it is true that both the UK as an EU Member State and the EU itself are original contracting parties to such trade agreements, it cannot be overlooked that the latter usually contain specific provisions concerning their **territorial application**. For instance, Article 15.5 of the Korea-EU FTA states that the agreement shall apply "to the territories in which the Treaty on EU and the Treaty on the Functioning of the EU are applied and under the conditions laid down in those Treaties". Since the EU treaties will no longer apply to the UK after Brexit, the UK will no longer be covered by the territorial application of the trade agreements containing similar language.

In this respect, different possible scenarios could be envisaged:

- The UK may seek membership to these trade agreements as a third party. The effective accession of the UK would then be conditional upon consent of the EU and the concerned trading partner;
- The UK may opt to negotiate separate FTAs with non-EU countries.

It must be noted that the termination of FTAs vis-à-vis the UK could have an even broader impact at the bilateral level. Similar to the scenario described above concerning the renegotiation of concessions under the WTO, the preferential trading partners of the EU may consider EU concessions to be less valuable after Brexit. This could empower the trade partners to seek **the renegotiation of EU concessions** in the framework of the relevant FTA.

Even if the trade agreements do not automatically cease to apply vis-à-vis the UK after Brexit is concluded, the parties to such agreements could potentially terminate or withdraw from the agreements by invoking Brexit as a "fundamental change in circumstances" pursuant to Article 62 of the Vienna Convention on the Law of the Treaties.

5. IMPACT OF BREXIT ON THE UK'S AND EU'S WTO MEMBERSHIP

The UK joined the WTO in 1995 under the terms of its EU membership, including the EU's common external tariff, to which it will no longer be bound after Brexit. While the UK is likely to remain a Member of the WTO, it will have to **renegotiate its own terms of membership** with the other 161 WTO Members, including negotiations on its schedules of concessions and MFN tariff lines on imports.

It is the first time that the WTO will have to go through such discussions with an existing Member, and the procedures to do so remain unclear. Moreover, during such negotiation period, the UK will be the only WTO Member without a list of commitments. According to Roberto Azevêdo, Director-General of the WTO, it is "theoretically possible" that WTO Members could treat the UK as they would treat a non-WTO Member, raising the possibility of significant trade barriers to British goods and services.¹

In addition, while the EU's WTO concessions would formally remain unchanged, the economic value of such EU concessions obtained by other Members would substantially decrease due to the fact that the EU concessions would no longer include the UK market. This decrease in value could **empower WTO Members to request the EU to renegotiate its WTO concessions** as contained in its GATT and GATS schedules.

Following Brexit, it could be argued that the EU is modifying its level of concessions as initially agreed upon and included in its schedules. As such, it is arguable that the EU would have to offer adequate compensation to the affected WTO Members. Such compensation could take the form of **lowered tariffs or duty-free quotas**. Under certain conditions, if other WTO Members were not satisfied with the EU's offer for compensation, they could claim the right to withdraw concessions for an equivalent amount. This possibility of renegotiation is of particular relevance for manufacturing countries currently exporting merchandise to the services-driven UK market on the basis of beneficial EU concessions within the WTO.

6. CONCLUSION

The referendum held on 23 June 2016 has generated a considerable degree of uncertainty with regard to future EU trade relations vis-à-vis the UK. While the referendum will not have an immediate impact, we have set out above a number of scenarios that are likely to arise in the aftermath of Brexit. Van Bael & Bellis will closely monitor the withdrawal negotiations and will update clients on the state of play of the UK's withdrawal from the EU.

¹ See *World trade chief says post-Brexit 'WTO option' may be unfeasible for UK*, available at <http://www.reuters.com/article/us-britain-eu-wto-idUSKCN0YS1LA> (last accessed: 24 June 2016).

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