BREXIT
& THE COMMON AGRICULTURAL POLICY

FINALLY, A CONCRETE CASE TO HELP YOU UNDERSTAND
THE BREXIT PROCESS
AND APPLY IT TO YOUR OWN SITUATION

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PACT EUROPEAN AFFAIRS

Founded in 2012 by Daniel Guéguen and Vicky Marissen, PACT European Affairs offers its international clients a unique position in Brussels, combining long-standing experience in lobbying with recognised expertise in the post-Lisbon EU decision-making procedures as well as strong capacity for action via social networks.

ARTICLE 50 AND ITS TRIGGERING

PREFERRING THE OPEN SEA TO EUROPE

"*If Britain must choose between Europe and the open sea, she must always choose the open sea*". This is what Winston Churchill told Charles de Gaulle who, agreeing with him, went on to block all attempts by the United Kingdom to join the European Economic Community.

President Pompidou – more pragmatic than his predecessor – opened the door, allowing the UK to become a member in 1973, although not without significant internal opposition!

In 1975, the Labour Prime Minister Harold Wilson held a referendum, asking the question "*Should the United Kingdom stay in the EEC?*" The answer was 67% in favour (with a 64% turnout).

The 1970s and 1980s saw successive British governments fight for a fairer budget deal. At the Fontainebleau Summit, Prime Minister Margaret Thatcher declared "*we are simply asking to have our own money back*", in the end achieving a lasting budgetary rebate of €4-7 billion every year.

With the Treaties of Maastricht (1993), Amsterdam (1999) and Lisbon (2009), the UK would obtain various derogations known as 'opt-outs':

- Exemption from **Euro membership** (1993);
- Choice to opt in or out of the **Area of Freedom, Security and Justice** (1993);
- Optional application of the **Schengen Agreement** (1999);
- Exemption from the **Charter of Fundamental Rights** (2009).

For years the United Kingdom was strongly opposed to Social Europe, one of the priorities of Jacques Delors but this initiative disappeared under the liberalism of the Barroso Commission.

As we can see, European integration has never been the British people's cup of tea!

BREXIT AND ARTICLE 50, AN AMBIGUOUS LEGAL FRAMEWORK

It was the Convention on the Future of Europe (2002-2003) that first floated the idea of adding an 'exit clause' to the EU treaties. Accepted by Member States during the Intergovernmental Conference that followed, it was included in the draft Constitutional Treaty, which was rejected in the French and Dutch referenda. The withdrawal clause – still very much alive – turned up in Article 50 of the Treaty of Lisbon.

Article 50 seems clear in its wording:

ARTICLE 50

TREATY ON THE EUROPEAN UNION (TEU)

1. *Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

2. *A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

3. *The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

4. *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*

5. *If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

It all appears straightforward. There is no time limit: the withdrawing Member State can wait as long as it wants before triggering Article 50, but having done this, the negotiations must be concluded within a two-year period which can only be extended with the unanimous agreement of the other Member States.

However, several experts dispute this reading of Article 50 and consider that its triggering only constitutes a statement of intent that can be reversed. Among them are many professors of European law, including the highly-respected Jean-Claude Piris, former Director General of the Council Legal Service.

To these eminent legal experts, we may add Donald Tusk, President of the European Council (where the 28 EU Heads of State and Government meet). In Mr Tusk's view: "*Having triggered Article 50, the United Kingdom can go back on its decision at any moment during the 2-year negotiation period*."

Thus, the common (and official) understanding of Article 50, which considers that the triggering of Article 50 amounts to a decision to leave the EU, is being challenged not only by prominent EU law experts, but also by the President of the European Council himself. According to them, the triggering of Article 50 only constitutes a simple statement of intent that can be reversed.

Deciding between these two positions is essential before proceeding any further on the subject. On this specific point (and on others, notably concerning the World Trade Organisation), we are entering a real *Terra Incognita*.

TRIGGERING ARTICLE 50: THE BRITISH IN A DIFFICULT SPOT

By the morning of 24 June 2016, 51.8% of the UK had voted for 'Leave' and were hoping to see negotiations started immediately. And most probably, a just as significant percentage of Europeans on the continent were expecting British representatives in the EU Institutions to be side-lined.

Indeed, we saw the instant resignation of Jonathan Hill, the influential UK Commissioner for financial services, but he was quickly replaced by Julian King to whom the Commission granted the important security portfolio without much discussion. We also heard a promise of resignation from MEP Ian Duncan, Rapporteur for the ETS reform (the EU system for emission quotas) who in the end decided to remain at the request of his colleagues in the ENVI Committee.

Five months after the UK referendum (which, we must remember, was purely advisory) the triggering of Article 50 remains stalled. It was expected in the aftermath of the referendum, then before the end of 2016. Now it will be "*before the end of March 2017*", although nothing stops Prime Minister Theresa May from pushing back the deadline she herself has set.

The triggering of Article 50 is both simple and complicated. We could even say it is both very simple and very complicated. Very simple, because it would be enough for Ms May to inform President Tusk of her decision by diplomatic courier.

But very complicated, because by triggering Article 50, the UK Prime Minister will find herself confronted with three problems:

- It is doubtful that the British can simply declare "*We hereby trigger Article 50*" and start the process. Based on our sources, the launch of Article 50 must be accompanied by a kind of **'divorce agreement'** by which the United Kingdom would inform the European Union of **the terms of separation** it is proposing. Logically, the ball is in the British court and no negotiations can begin with the UK unless and until London has clearly stated its demands. However, as of now nothing is ready – neither at governmental nor administrative level – and many months will be required.

- The second problem has already been mentioned: is the triggering of Article 50 an irrevocable decision to leave the European Union, or merely a reversible statement of intent?

- The convergence of these two issues also impacts on the **internal political processes of the United Kingdom**. If it is merely a statement of intent, we can imagine that Theresa May can make the decision, giving herself time to flesh out the technical issues for negotiation with the EU 27.

  If it is a commitment involving a draft 'divorce settlement', it is unthinkable that such a proposal would not have to be approved by a vote in Westminster. But in any case, the UK Parliament will be involved in the negotiations and will have to approve the final outcome.

  Approval by the House of Commons, whether it happens *ex ante* or *ex post*, will not be easy, as there is currently a majority of MPs who (at least in the first place) supported the UK staying in the EU. Will an early election be necessary at some stage or other? Answering this question is not easy, as the legal conditions for calling an early election are draconian – the Prime Minister would either have to engineer a majority 'no confidence' motion against herself (!), or persuade two-thirds of MPs to vote to dissolve the House. All of these problems are already being widely discussed

in London, and several courts – notably the UK Supreme Court – have been asked the question 'When and how can the UK Parliament express its position on Brexit?'

The scenario of an early election is generally considered by commentators to be positive for Prime Minister May, as she would likely benefit from greater legitimacy. This analysis is in our view too optimistic, as an early election would be viewed as a second referendum, with every candidate being led to take a clear position for or against Brexit.

On 3 November 2016, the High Court's ruling "*Miller v. Secretary of State for Exiting the EU*" declared that the government cannot invoke Article 50 without the approval of Parliament. On the same day, the government announced that it will appeal this decision to the Supreme Court.

We are amazed, astounded, bewildered – words fail us – at how unprepared the UK authorities are. We saw it in the Cameron era, when a major referendum was held without any prior assessment of the consequences. It is equally the case under May, who believes she has the right to start negotiating Brexit on her own authority and without parliamentary approval. Who is advising these people? And what a bad idea to appeal the High Court's November ruling, given that the final outcome of the negotiations will have to be approved by Westminster as well as all future national regulations. Is Ms May trying to save face or just gain time?

This analysis highlights four main constraints:

1. **Clarification**: is the triggering of Article 50 a statement of intent or a decision?

2. **Content:** what kind of divorce settlement will the United Kingdom propose to the EU 27?

3. **Politics:** how will Westminster give its approval to the terms of the future negotiations?

4. **Regional consultation:** how will the semi-autonomous regions of the UK – Scotland, Wales and Northern Ireland – be involved in the negotiations?

Put briefly, all of this demonstrates that the 'end March 2017' deadline for triggering Article 50 is in fact virtual.

ONCE ARTICLE 50 IS TRIGGERED, THE BALL IS IN THE COURT OF THE EU 27

The triggering of Article 50 by the UK will mark the starting point of negotiations, leading to an agreement between the UK and the EU that sets down the practical arrangements for UK's exit from the European Union.

As underlined previously, we cannot imagine a formal withdrawal request without it being accompanied by a 'divorce settlement' proposal determining the UK's position as a pre-condition for the coming negotiations. Such a document requires time, because it will evidently have to describe in detail the framework of the future relationship that London wishes to have with the EU.

The current unanimous position of EU leaders on this point seems very clear to us: no negotiation can begin until the United Kingdom presents its draft divorce settlement. This is even more the case given that the EU's position on Brexit has not yet been agreed upon. We know for sure that informal – and secret – conversations have already started between Member States and the British government (via a working group mandated by the Council of Ministers). However, the aim is not to negotiate, but rather to determine a sort of '**landing zone'**, and in particular the 'red lines' that cannot be crossed.

LONG AND COMPLEX PRELIMINARY DISCUSSIONS

Article 50 TEU is very clear: once triggered, the United Kingdom's withdrawal request will require the EU to hold a series of discussions and take a number of preliminary decisions, which will be structured in three stages:

- Stage 1 involves the setting of guidelines by the **European Council** (the EU Heads of State and Government). According to information we received from the most reliable sources, these guidelines will take the form of a very detailed document which experts are already working on. It will contain much more than general principles. We are talking about a substantial text, similar in volume to the Multiannual Financial Framework published in 2014 which was a 70-page document. How will this text be adopted by the European Council? There are two possibilities: by consensus or by unanimous vote, which is not the same thing. We can imagine that the complexity of Stage 1 will be huge.

- Stage 2 will see the **European Commission** tabling recommendations on the basis of the European Council guidelines. These recommendations will serve as signposts for the scope of the future negotiations, the agenda, the working methods and the

negotiation team (or teams). They will be a kind of draft negotiating mandate, like that used for negotiating an international agreement.

- Stage 3 will involve the **Member States** – not the European Council as in Stage 1, but the classic General Affairs Council. The latter will adopt (or amend) the draft negotiating mandate proposed by the Commission, establish a very strict system for overseeing (or rather supervising) the negotiations and appoint the Chief Negotiator or the negotiating team, which is not the same.

  As Article 50 specifies, this third stage will be conducted on the basis of Article 238 paragraph 3 of the Treaty on the Functioning of the EU. This means that Member States will have to reach a super-qualified majority: 72% of Member States (i.e. 20 out of 27) representing at least 65% of the EU population.

The length, complexity and difficulty of these preliminary stages to the actual negotiations are obvious.

Drawing lessons from citizens' protests against trade agreements with the United States (TTIP) and Canada (CETA), and given the importance of the relationship between the EU and the UK, steps will undoubtedly have to be taken to ensure that the public are kept regularly informed about the process, with clarity and transparency.

Ensuring that citizens are kept informed will be the responsibility of the European Parliament, which will be called upon to approve the draft intergovernmental treaty between the EU 27 and the United Kingdom once the negotiations are completed. This approval will be sought via the consent procedure, which requires an absolute majority of MEPs (i.e. 376 votes out of 751, regardless of the number of MEPs attending the vote).

SELECTING THE CHIEF NEGOTIATOR: ANOTHER HEADACHE

Even before the start of pre-negotiations, the EU Institutions have already appointed three negotiators!

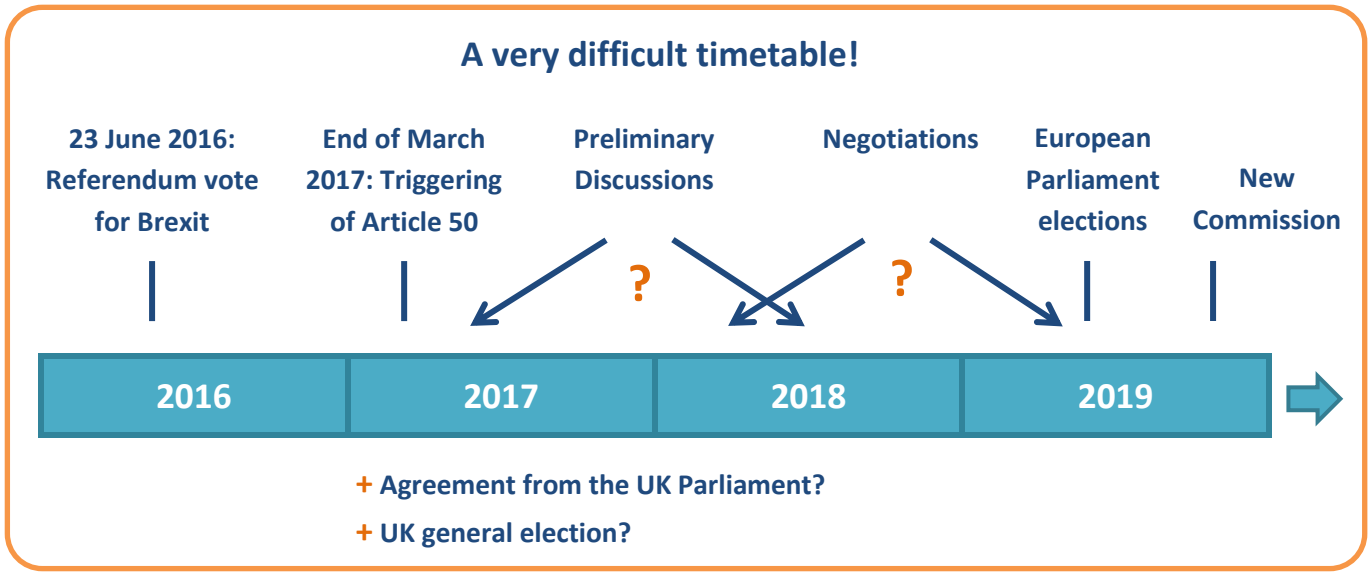
Member States were the first ones out of the block, reflecting their desire to be at the forefront of talks. At the end of June 2016, Donald Tusk appointed **Didier Seeuws**, a young but very experienced Belgian diplomat, to lead the Council's task force on Brexit. More than just a negotiator, Mr Seeuws's duties include mediation, scrutiny and supervision.

In the wake of this appointment – and with an authority we have rarely seen from him – Commission President Jean-Claude Juncker appointed **Michel Barnier** as 'Mr Brexit' within the Commission, propelling him up to the position of Director General. For the moment, Barnier is testing the waters with Member States while he assembles his team, with Sabine Weyand – a German specialised in WTO and international trade – as his number two. This is a clear indication of the technical character of the upcoming negotiations.

Finally, even if only involved at the end of the process when it will need to give a green light, the European Parliament has also chosen its 'Mr Brexit': **Guy Verhofstadt**, President of the Alliance for Liberals and Democrats for Europe (ALDE), and a strong advocate of federalism and free trade.

According to insiders we have interviewed, it is likely – if not certain – that the Commission, which has the experience, will be in charge of the negotiations. However, it is not at all inevitable that Michel Barnier will be appointed Chief Negotiator. We could imagine a troika instead. The Commission has greeted the appointment of Didier Seeuws with displeasure – wrongly, because various insiders agree that the large Member States, and not the Commission, will be real negotiators for Brexit.

THEN COMES THE TIME FOR NEGOTIATION – BUT WHEN?



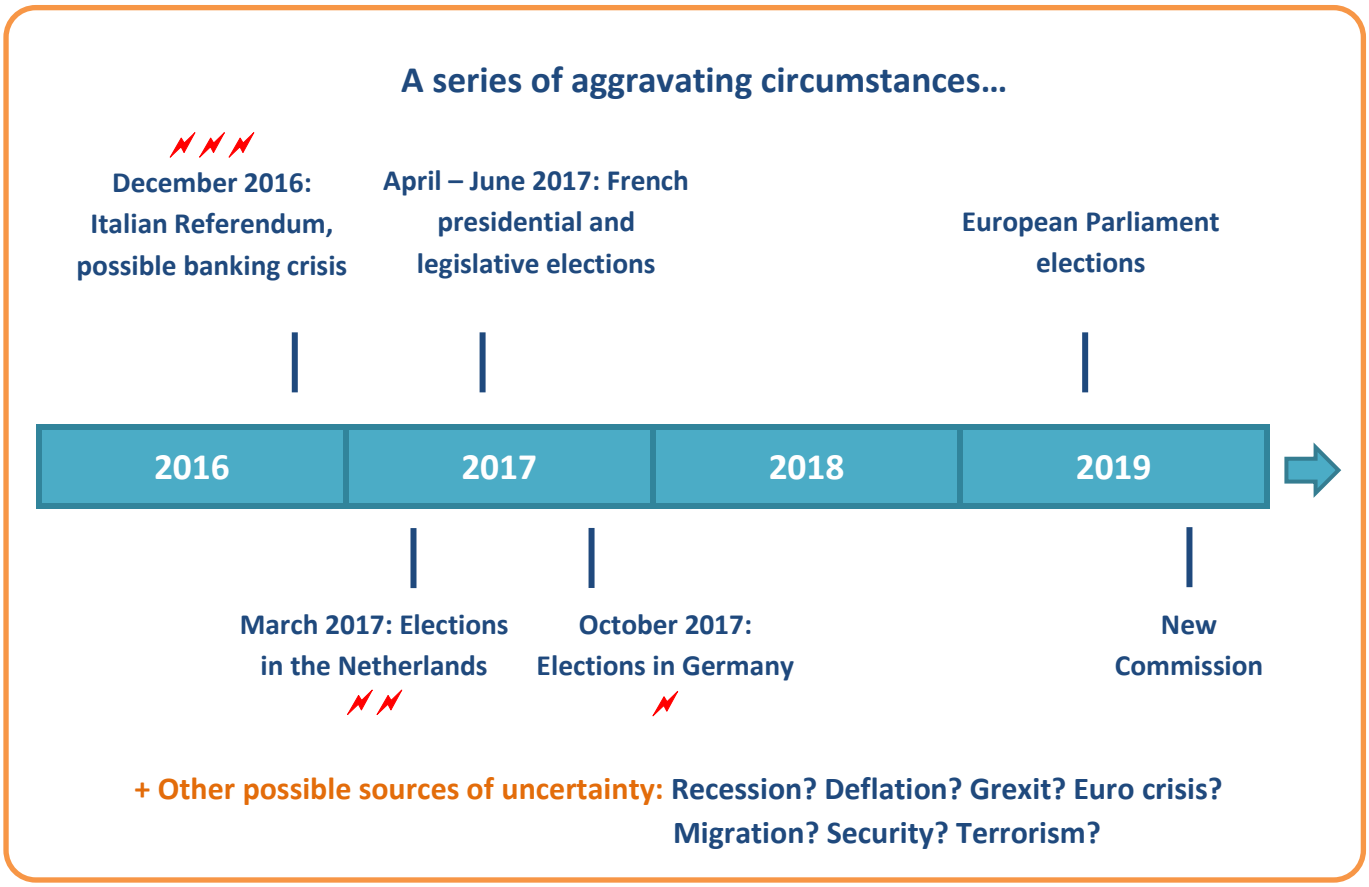
The diagram above recalls the three major stages leading to Brexit:

- The triggering of Article 50 which involves the proposed divorce agreement and the UK's pre-negotiation position, i.e. their requests, concessions, guarantees and red lines;

- The preliminary discussions at EU level, including the specific guidelines of the European Council (adopted via unanimity or via consensus), and the Commission's recommendations with a draft negotiating mandate;

- Finally, the formal launch of negotiations and the appointment of the Chief Negotiator by the "General Affairs Council" via super-qualified majority.

If we add to these lengthy procedures the internal work that the United Kingdom will have to do to obtain the endorsement of regional assemblies (a mere advisory vote or a binding vote?) and of Westminster (possibly preceded by an early election), we see that the objective of completing Brexit by 1 January 2019 is already colliding with reality.



The three phases of Brexit will be affected by a series of negative factors that could slow down or disrupt its progress:

- The first disruptive element is the series of upcoming votes and elections in several major EU countries: the Italian referendum in early December 2016, then the elections in the Netherlands (March 2017), France (April-June 2017) and Germany (October 2017).

- The second crucial factor is the geopolitical environment in Europe and worldwide, dangerous on an economic level (recession? deflation? a new euro crisis?) and even more so in terms of security (terrorism, immigration, etc.). And as former British Prime Minister Harold Macmillan once said, events are crucial.

- The third factor brings us back to European affairs, because 2019 will see the next election of the Members of the European Parliament in May (with British MEPs?) as well as the appointment of the new Commission at the end of the year (with a British commissioner?).

It was therefore unsurprising when the European Council President Donald Tusk recently expressed his scepticism about the timeframe. Responding to European Policy Centre's John Palmer, Mr Tusk said: *"Two years? I believe you are way too optimistic. I think the process will be much longer than two years."*

Speaking of which, and just to complicate the story even more, will Mr Tusk be re-appointed European Council President at the end of his current term (1 December 2014 – 31 May 2017)? Nothing could be less certain, since he is not supported by the leaders of his own country.

TAKING THE UNITED KINGDOM OUT THE CAP MAY APPEAR SIMPLE...

Even though we are witnessing the progressive dismantling of its measures related to market management, the Common Agricultural Policy is the most integrated policy of the European Union. It is based on four Regulations adopted by the Council and the European Parliament, and supplemented by several hundred delegated and implementing acts (since the Treaty of Lisbon, these complex procedures having replaced the well-known 'Management Committees').

These four basic Regulations, all published on 17 December 2013, are the following:

- Regulation 1308/2013 establishing a common organisation of the markets in agricultural products;

- Regulation 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the CAP;

- Regulation 1306/2013 on the financing, management and monitoring of the CAP (EAGF);

- Regulation 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).

Also to be noted is Regulation 1303/2013 laying down common provisions of the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund.

Every provision of these Regulations is applicable in all 28 Member States. After careful reading and verification, we noted that there is no special derogation for the UK that would oblige the European Union to modify the content of these regulations. After Brexit, they could remain exactly the same and it is up to the United Kingdom to copy them or not, entirely or partially.

If it wishes to do so, the United Kingdom could maintain all or part of the CAP regulations once Brexit is done. However, it seems unlikely that London will maintain the current CAP in its entirety, considering how unpopular it is across the Channel.

But this means that for all or part of the former agricultural *acquis communautaire* that will not be incorporated by London, the United Kingdom will have to draw up its own legislation.

This has yet to be discussed: for every EU provision the UK decides not to maintain in its own rules, it will have to draft, adopt and implement a new legislative corpus. One can only imagine the scale of the task and the time needed to achieve this.

This is not without consequences for the EU 27 and especially for operators in the agricultural and food sectors who will need to know very quickly what will happen with future British agricultural policy.

... BUT IN REALITY IT IS VERY COMPLICATED!

Even if the separation appears easy as we have seen, the withdrawal of the UK from the CAP – whatever policy it will implement in the future – will have implications for the current functioning and management of the CAP.

Our view is that the EU 27 will have to revise some of its mechanisms, especially because the EU budget (revenue and expenditure) will be affected. The same applies to trade in agricultural and food products that are very significant between Member States and the United Kingdom.

Amendments to Regulation 1308/2013 will be necessary, in particular Part III on trade with non-EU countries (Article 176 onwards).

Furthermore, the EU will not be able to remain indifferent to the national agricultural policy the UK chooses to implement post-Brexit. If certain measures adopted by London increase the protection of its agriculture, or modify certain aspects of this protection, the EU might have to take action at the World Trade Organisation.

The twin issues of trade and financing of the CAP will be developed substantially in the following pages. However, it should be noted henceforth that since a customs union already exists at EU level, trade between members, including between the EU 27 and the UK, have been free from all restrictions to this point. Any future development, which will be between a non-EU country and the Union, cannot contradict Article XXIV paragraph 6 of the GATT (General Agreement on Tariffs and Trade).

SUMMARY OF ARTICLE XXIV PARAGRAPH 6 OF THE GATT

If a State leaves a customs union or a free-trade area, all imposition of safeguards at its borders, whether customs duties or non-tariff barriers, must give rise to compensation through concessions negotiated with the other States of the union or area.

Let us take as an example that the United Kingdom is the fifth-largest commercial outlet for French agriculture and that it would not be acceptable for French wine or wheat to remain free from all restrictions, as it currently is (pre-Brexit). Naturally, the United Kingdom would be able to claim the same treatment for its own exports of agricultural and food products (feed wheat, chocolate bars, etc.).

A CLOSE EXAMINATION OF SECONDARY LEGISLATION

A methodical analysis reveals that, as a consequence of the Treaty of Lisbon, which modified EU decision-making procedures, the latest 2013 CAP reform saw the proliferation of a considerable number of delegated acts (39) and implementing acts (767).

Delegated acts, almost exclusively in the hands of the European Commission which proposes and adopts them, are crucial measures because they are 'quasi-legislative'. **Implementing acts** are technical measures that were previously dealt with by the management committees, now replaced by complex procedures involving examination and appeal committees.

In any event, a large number of these acts will be jeopardised by Brexit. This will be particularly true for Part III of Regulation 1308/2013 regarding trade with non-EU countries.

For information, let us recall the following measures:

- General rules on import and export certificates;
- Import duties;
- Tariff quotas;
- Special conditions for certain products (e.g. sugar, wine, hops);
- Safeguard measures;
- Export refunds.

THE TRICKY ISSUE OF TRADE AGREEMENTS

The biggest challenge faced by EU and UK negotiators during Brexit talks will certainly be CAP and trade relations with non-EU countries.

First, let us have a recap of the framework of relations between the EU, its Member States and the WTO.

We must remember that **before the WTO, there was the GATT** in which every EEC country was a member in its own right. Following the ratification of the Treaty of Rome (1957), trade policy gradually became an exclusive competence of the EEC. Thus, at the Uruguay Round talks – the last great round of multilateral negotiations that succeeded in 1993 – only the European Commission negotiated on behalf of all the EEC Member States. Concessions were integrated in the EEC List as obligations for both the EEC and Member States.

The creation of the WTO did not change anything. Today EU Member States are still members of the WTO (as many WTO areas still come under national competence), as well as the EU itself. For all trade policy matters, the European Commission is the only EU negotiator at the WTO, and acts on the basis of a mandate adopted by the Council.

This situation raises a considerable problem for a UK currently suffering from a shortage of international trade experts, who all fled to the European Commission's headquarters in Brussels during the past few decades. This shortage also affects the UK's trade specialists in agriculture. It is claimed that 3,000 experts are needed, but London has only recruited 200 of them so far!

EU RELATIONS WITH NON-EU COUNTRIES

Whatever the content of the new EU-UK agreement may be, the UK will necessarily be considered a non-EU country. Thus, all relations between the EU and UK will be governed by EU rules on the treatment of 'third countries'. These rules are set out in Article 21 (TEU) of the Treaty of Lisbon:

EXTRACT OF ARTICLE 21 (TEU) OF THE TREATY OF LISBON

"1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph (…)"

"3. The Union shall respect the principles [aforementioned] in the development and implementation of its external action (…)"

This objective was already part of the old EC/EU treaties. Its effect was to ensure all EC/EU policies, including trade policy with non-EU countries, are guided by the interests of European citizens as a priority.

As one can imagine, agriculture is affected by these trade deals with non-EU countries. And those who believe that we could simply 'copy and paste' past EU trade deals into the future UK trade agreement clearly do not realise the legal and practical obstacles that would make such a simplistic approach impossible.

EU/NON-EU RELATIONS ARE BASED ON WTO COMMITMENTS

As explained earlier, the UK is a regular member of the WTO, and therefore it is not legally obliged to submit a new membership application to the WTO after Brexit. However, considering that it will no longer be bound by the EU's common trade policy and subsequent EU international trade commitments, will the UK have to submit a sort of 'pseudo-WTO application' to all other WTO members (including the EU)? We shall leave this open question to international trade law specialists more eminent than us. But it is vital to decide eventually what the UK will have to do if its intention is to remain within the WTO.

A CUSTOMS UNION OR A FREE-TRADE AREA?

As a 'foreign' territory in the eyes of the UK (and vice versa), it will be absolutely necessary for the EU to define the conditions of its future trade links with the UK in the intergovernmental treaty that will determine the relationship between them.

The current customs union (with a common external tariff) or the creation of a new free trade area between them (without a common external tariff) are the two only possible options if Member States wish to maintain the 'preferences' and advantages they have conceded to their exporters.

Needless to say, from a purely agricultural point of view, the first option (i.e. a customs union) would be the best one. The UK being a net importer, its post-Brexit trade preferences may threaten European producers' interests. It is therefore in the interest of Europeans to keep the UK within the EU customs union.

One must also recall that WTO law would not allow the scope of the post-Brexit UK-EU customs union to be limited only to agricultural products: Article XXIV of the GATT (still in force today) stipulates that customs unions or free-trade areas must apply to a broad range of products.

The previous point also implies that for either of the two envisaged options (customs union or free-trade area), the EU and the UK cannot do whatever they want. As they are both members of the WTO, they will have to initiate official WTO talks and negotiations in accordance with Article XXIV of the GATT **before** the entry into force of the 'trade' part of any future EU-UK agreement (bearing in mind that the WTO may accept temporary application if the 'ante' situation is maintained).

Even with all the will in the world, both internal (EU-UK agreement) and external (WTO) negotiations will require a lot of time. Let us remember that Russian accession to the WTO took 8 years!

THE URGENT NEED FOR A WTO 'PANEL'!

It would be surprising if WTO members did not ask very promptly to engage in informal discussions with the UK about the future of their trade relations. Indeed, Brexit would mean that the UK is no longer – or would no longer be – bound by its trade obligations adopted on its behalf by the EEC and later the EU.

UK trade with non-EU countries – accounting for 55% of its exports and 47% of its imports – are too important to remain in such uncertainty. Non-EU countries will understandably want to know what precise form their trade relations with the UK will take.

It goes without saying that other WTO members will also want to initiate discussions with the EU, within the framework of the WTO. These discussions could happen either before those with the UK, or after.

We believe that the EU (i.e. the Commission) should **immediately** ask the WTO to set up a dedicated group (or 'panel') of trade lawyers as an offshoot of the Dispute Settlement Body, with or without the approval of the UK.

The task of this 'panel' would be to assess the implications arising from the departure of a Member State from a customs union from the WTO's perspective. It would also focus on the consequences of Brexit for the UK's membership status within the WTO.

Their report, which should also include recommendations, could be delivered within three to six months.

To put it simply, WTO perfectly understands how to create (or enlarge) customs unions, but it has no experience in dealing with the opposite scenario: the exit of a country (and in this case, a big country) from an existing customs union. Two minor precedents that occurred in 1962 (Algeria's independence and withdrawal from the EEC) and 1982 (Greenland's withdrawal from the EEC) cannot serve as valid precedents. This is why it is so urgent to set up the aforementioned WTO panel.

In short, given their membership of the WTO, future EU-UK trade relations will be scrutinised with very close attention.

THE PROBLEM OF BILATERAL AND MULTILATERAL AGREEMENTS

The EEC, and later the EU, concluded (or is concluding) more than a hundred trade agreements with non-EU countries or groups of non-EU countries. Every one of these agreements includes rights and obligations for all parties, and will have to be re-negotiated because in exchange for each concession granted to the UK, there was a compensation for the other party (or parties).

These agreements take various forms that the Commission recently tried to categorise in 4 different groups (in its publication *The State of EU Trade*, September 2016):

- Free-Trade Agreements (FTA);
- Partnership and Co-operation Agreements (PCA);
- European Neighbourhood Policy (ENP);
- Economic Partnership Agreements (EPA).

Almost all of these agreements cover agriculture: see for instance the importance of Mercosur for the CAP and European agriculture.

Agriculture also plays a major role in EU external assistance instruments: no less than €5.3 billion is allocated to agricultural issues under humanitarian aid programmes in the 2014-2020 period. What will happen to these instruments?

THE SPECIFIC CASE OF AGRICULTURAL AGREEMENTS WITH THE COMMONWEALTH

During its negotiations with the EEC, the United Kingdom had requested favourable concessions for certain Commonwealth countries: most notably New Zealand (for milk and sheep meat), Mauritius and the ACP countries (for sugar, other similar concessions were

negotiated in 1992 for bananas). Added to this are various other concessions granted to developing countries since 2001 under the 'Everything But Arms' initiative.

Will these agreements – still in force – have to be revoked or upheld by the European Union following the withdrawal of the United Kingdom? To this simple question, there is no answer right now, but we are beginning to hear justified concerns from sheep farmers on the continent who, if the EU maintains its agreements with New Zealand (included in the EU's WTO commitments), will see their competitiveness seriously compromised.

THE INEVITABLE ADJUSTMENT OF THESE AGREEMENTS

The need to adjust these agreements seems unavoidable. Mutual concessions – preferences derogating from the 'Most Favoured Nation' (or MFN) clause of the GATT – have been granted. Some of them might no longer be relevant if the product in question (e.g. whisky or cheddar) is of interest only to the United Kingdom and to no other Member States.

The same would be the case if the concession by the EU to a non-EU country was only made following a strong request from the UK at the time of its entry into the EEC, as indicated previously regarding Commonwealth agreements.

It must be noted that the necessary changes to these agreements will have to be submitted to the WTO in accordance with the procedures of Article XXIV mentioned above and Article XXVIII (re-negotiation of rights, compensations, etc.).

THE VIENNA CONVENTION AND THE LAW OF TREATIES

There remains a final question of principle for which the answer could only be given by eminent legal experts. It concerns the question of whether or not all the agreements referred to above (WTO and bilateral) fall under the 1969 Vienna Convention on the law of treaties.

Article 54 of this Convention enshrines a fundamental principle: the withdrawal of a member can only take place with the **unanimous consent of its peers**, unless the treaty (or trade agreement, as the case may be) provides otherwise.

Once again, it must be recalled how difficult and protracted the discussions will be for every one of the issues set out here.

BREXIT AND THE FINANCING OF THE COMMON AGRICULTURAL POLICY

It is almost pointless to highlight (as it is so obvious) that the EU budget takes on huge significance, since it is the lever on which the definition and implementation of common European policies turns. This is particularly the case for the CAP which consumes 39% of the EU budget and even more than 50% if you include the Structural Funds benefiting rural areas.

For this reason, we believe that the budget – as much as the trade issues set out above – has to constitute the crux of the negotiations, all the more because the budgetary question has always been of vital importance to the British.

A BRIEF RECAP OF EU BUDGET RULES

- The budget, which includes every forecast of revenue and expenditure for each budgetary exercise (the principle of annuality), is determined every year by the **European Parliament** and the **Council of Ministers**, following a proposal from the **Commission**.

- The annual budget must be adopted in accordance with the Multiannual Financial Framework (MFF) which, with the aim of strengthening budget discipline, sets down "*the amounts of the annual ceilings on commitment appropriations by category of expenditure and of the annual ceiling on payment appropriations*" (Article 312 TFEU). The current MFF covers the period 2014-2020.

- The EAGF (formerly the EAGGF) and the EAFRD now come under the heading "*Preservation and management of natural resources*". The unique and somewhat independent EAGF ('EAGF Guarantees' and 'EAGF Guidance'), of which Michel Jacquot was in charge, has survived. Today, CAP expenditure is treated just like other expenditure.

- In recent years, British contributions to the EU budget have come to between €11-12 billion, making the United Kingdom the fourth-largest net contributor behind Germany, France and Italy. Benefiting from around €7 billion in EU funds, of which

about €4 billion is devoted to the two CAP pillars, the United Kingdom is therefore a **net contributor** of €4-5 billion to the EU budget. Clearly, this point is crucial.

- The significant balance resulting from the British contribution would have been even greater, if not for the refund granted to the UK every year since 1984. **The famous British rebate** has its origins in the vigorous campaign of Margaret Thatcher who considered her country's contribution to be excessive due to the lesser role of agriculture in the UK economy and the importance of its agricultural imports from other countries, a source of levies counted as Community 'own resources'.

IMPORTANT IMPLICATIONS FOR THE CAP

We estimate that the withdrawal of the United Kingdom from the EU will generate a gap of €5 billion that will have to be compensated:

- **Either by requesting the other contributors to cover the UK's share** – an option we consider unrealistic, as it would require Germany to pick up most of the bill, with a significant part of the rest coming from a cash-strapped France…

- **…or by reducing the overall EU budget** – the easy solution, involving taking the money out of the still-predominant agricultural budget, even though the latter has decreased considerably in recent years.

- **A question also arises with respect to the British rebate, which will no longer have to be paid.** This saving should benefit the largest contributors (most notably France, by €1.6 billion per year), who would be able to re-inject the sum into the EU budget in order to compensate (at least in part) for the loss of the UK contribution. However, at this stage, this is all pure speculation.

Three other concrete consequences for the budget:

1. As long as the intergovernmental treaty determining the new relationship between the EU and the United Kingdom is not adopted, the current rules must continue to apply. We believe especially that the rebate paid every year to the UK cannot be repealed unilaterally by the EU 27 and without the agreement of the United Kingdom. Of course, it would be totally different if London did agree to this, but let us stay in reality!

2. The intergovernmental treaty will certainly contain a budgetary chapter, including the end of any reimbursement or payment of EU expenditure by the United Kingdom, the latter having become a non-EU country.

3. The Multiannual Financial Framework is valid up until and including 2020, so it has been determined that nothing will change before this date. We do not share this view at all. The adoption of the 2014-2020 MFF, with an amount for payment appropriations and an amount for expenditure regarding each of these years, does not at all mean that these amounts are binding on the EU. The MFF is merely a code of good conduct and good financial management for the EU Institutions. Nobody, whether a Member State or private person, can rely upon it.

As a result, if Brexit enters into force in 2019 or 2020, the MFF negotiated in 2013 will have to be adjusted, as its rules permit.

The Structural Funds affected by Brexit

The loss of the UK contribution will likely justify a re-assessment of the Structural Funds and the cutbacks necessary in some (if not all) of them. The Funds are a highly important tool for the development of less-advanced regions of the EU.

Article 175 TFEU lists these Funds:

- **The European Development Fund (EDF)** finances infrastructure, development of SMEs and activities relating to education, health and research in the most disadvantaged regions as well as regions in industrial decline;

- **The European Social Fund (ESF)** concerns vocational training and support for employment and social integration;

- **The European Agricultural Guidance and Guarantee Fund** (EAGGF) Guidance section, now the **EAGF** and **EAFRD**;

- **The Financial Instrument for Fisheries Guidance**, aimed at modernisation of fisheries;

- **The Cohesion Fund** finances projects with the goal of improving the environment and transport infrastructure.

The sums dedicated to these Funds came to €308 billion for the 2007-2013 period and €454 billion for the 2014-2020 period.

In the worst-case scenario, the allocation devoted to the Structural Funds in the post-Brexit phase will decrease by more or less 10% per year, which is not good news.

THE AGRI-FOOD SECTORS AFFECTED BY BREXIT

As we have mentioned, the British have never liked the CAP, for the system they had in place before they joined the EEC was the very opposite of the CAP at the time. Previously benefiting from a scheme based on very low agricultural prices (made possible by 'deficiency payments' and massive imports from the Commonwealth), the UK had to accept a system of high and largely subsidised prices. They battled against this system consistently until 1992 when it was dismantled in the first major CAP reform.

However, if the British have never liked the CAP, neither have they ever appreciated (particularly in recent years) the accumulation of technical regulations known generically as 'food laws'.

The list of food laws disliked by the UK is impressive, and can be classed in four categories:

- The first category, a very important one, concerns the **precautionary principle** and the division of food regulation between EFSA (the European Food Safety Agency based in Parma and in principle independent) which assesses risk, and the Commission which manages risk. Seeing this imperfect coupling as too vulnerable to interpretation and conflicts of interest, the UK always preferred the US system where the Food and Drug Administration is responsible for both the assessment and management of risk. The FDA takes consensus decisions based on science, unlike the European Union.

- The second category generally covers **the core of food laws**, considered by London as too complex, too technical and overly protective due to the extreme application of the precautionary principle. Among these disputed texts, let us give as examples the Regulations on general food law, official controls, health claims, food labelling for consumers and novel foods. This short list is not exhaustive.

- The third category concerns **a series of sensitive topics** that are almost taboo for a majority of EU Member States. In particular, there is genetically modified organisms (GMOs), which the UK would liberalise, and plant protection products (e.g. glyphosate, neonicotinoids) on which it has recommended a more modern approach, or in any case less conservative.

- The final category relates to EU legislation on **the environment and agricultural techniques** (Directive on nitrates, Water Framework Directive, Directives on animal breeding, etc.).

To sum up, the UK position on all of these subjects is in line with legislation currently in force in the United States.

WHAT ARE THE UNITED KINGDOM'S OPTIONS?

The previous sections have shown how complex this issue is and how difficult it will be to provide solutions. In summary, **London has three options:**

1. Negotiate a Brexit that guarantees the UK **full access** to the Internal Market, on condition that it **completely respects** the EU legislation in force;

2. Overhaul the EU-derived legislation and replace it with **a national US-style system**, thus losing full access to the EU market;

3. **A 'pick-and-choose' approach**, amending certain rules not strictly market-related (for example, breeding or agricultural techniques) while respecting the legislation necessary to remain in the Internal Market. This solution is legally complex and uncertain, and will depend on the goodwill of the EU negotiators as well as the persuasive powers of the UK negotiators.

In our view, there are in reality only two possibilities:

- **Option 1 and 3** are partially cumulative. It appears possible for the United Kingdom to maintain full access to the EU market while amending its legislation on a limited number of issues, provided that this does not affect Internal Market law. But this approach comes up against a considerable barrier, because the EU 27 have set down **AN ABSOLUTE RED LINE**: no free access to the EU market will be granted to the UK unless it respects the four fundamental freedoms, which includes freedom of movement for European workers.

- **Option 2** remains technically possible, but it will come up against reality. It would involve the UK re-creating – in other words, re-writing and adopting – a huge mass of technical regulations drafted by the EU (rightly or wrongly) over many decades. It will be a mammoth task, almost impossible to complete within a realistic timeframe.

WHAT AN IMPASSE!

The question of food laws and their future in the United Kingdom will obviously be a major issue for food sectors and businesses throughout the European Union.

The final section of this memo will examine the ways you can prepare for it.

BREXIT: A PRIORITY FOR THE AGRICULTURAL SECTOR AND AGRI-FOOD INDUSTRIES

Brexit is out of the blocks. Whether it reaches the finishing line is another question. But as the old Roman saying goes: if we want peace, prepare for war. It is therefore vital for every player in the agri-food domain to ensure Brexit is in his or her list of EU priorities.

Making Brexit a priority requires asking yourself what you need to do – protecting yourself, anticipating events or counteracting, depending on the situation you are in.

A 4-PART ACTION PLAN FOR AGRI-FOOD STAKEHOLDERS

1. Get trained immediately about the post-Lisbon EU decision-making procedures

There used to be a happy time when European lobbying was simple. It was enough to know the file and meet the easily identifiable decision-makers. This era is over. **Lobbying has become a profession requiring a combination of technical and procedure expertise** – in the same spirit, Michel Jacquot and Daniel Guéguen teamed up to ensure all the angles were covered in this memo; Jacquot is more oriented towards the 'what' (the CAP), while Guéguen is more focussed on the 'how to' (the decision-making procedures).

In fact, everything changed with the Treaty of Lisbon. The agricultural world of management committees no longer exists. The agro-industrial sectors have had great difficulty in mastering the subtleties (and the opacity) of delegated and implementing acts.

Brexit relies on a process that is completely unique and very complex, requiring the participation of all the Institutions, involving special procedures and super-qualified majorities.

It is impossible to navigate the labyrinth of the Brexit negotiations without a genuine understanding of the post-Lisbon regulatory mechanisms. In our opinion, receiving trainings adapted to the various issues is indispensable, yet this is barely happening at all right now.

2. Put in place a monitoring system dedicated to Brexit

If possible, this should be organised by **pooling** the monitoring systems of several sectors or players, because the task will not be easy.

Carrying out a Brexit monitoring requires:

- Following simultaneously what is happening in London, Brussels and the other 27 capitals;
- The ability to identify the real 'decision-makers';
- Entering into the details of the negotiations;
- Having sufficient vision to analyse and conceive strategic action.

3. Anticipating the consequences of Brexit for your activity

This **forecasting** is vital and it must start immediately:

- What will be the economic impact on my sector?
- What will be the regulatory impact?
- What will be the impact on trade?
- What will be the impact on subsidies and support measures?

4. Taking action

Lobbying is **action**, and the time for action will arrive very quickly once the three previous stages are completed. The classic blueprint for action applies, requiring:

- The formulation of your position, with a defensive ("*I oppose*") as well as offensive ("*I propose*") dimension;
- Joint action (coalitions) on transversal problems, targeted action for specific issues;
- Meetings with decision-makers, identified beforehand;
- A communication and media strategy – a vital dimension of your activities.

On all of this and any action linked to awareness-raising or information, we are ready to assist you.

It has been our pleasure to carry out this study on the agricultural dimension of Brexit. We see it as a useful way of providing a concrete and pragmatic vision of what awaits you – in terms of threats and opportunities – in the months and years ahead.

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