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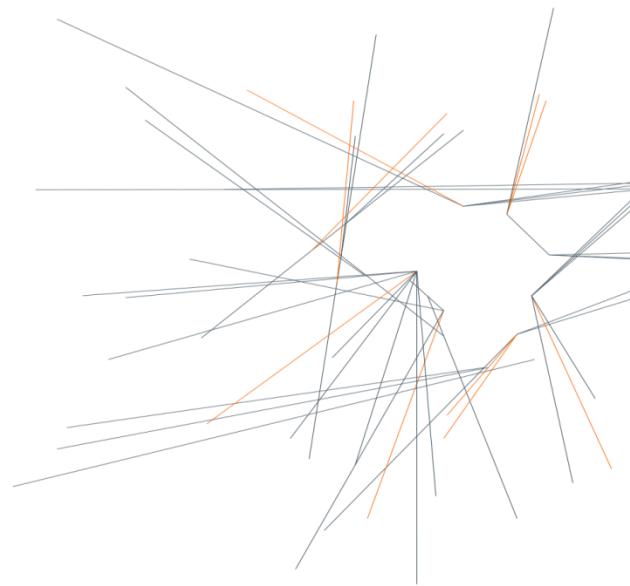
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BREXIT

WTO ISSUES

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14 OCTOBER 2016



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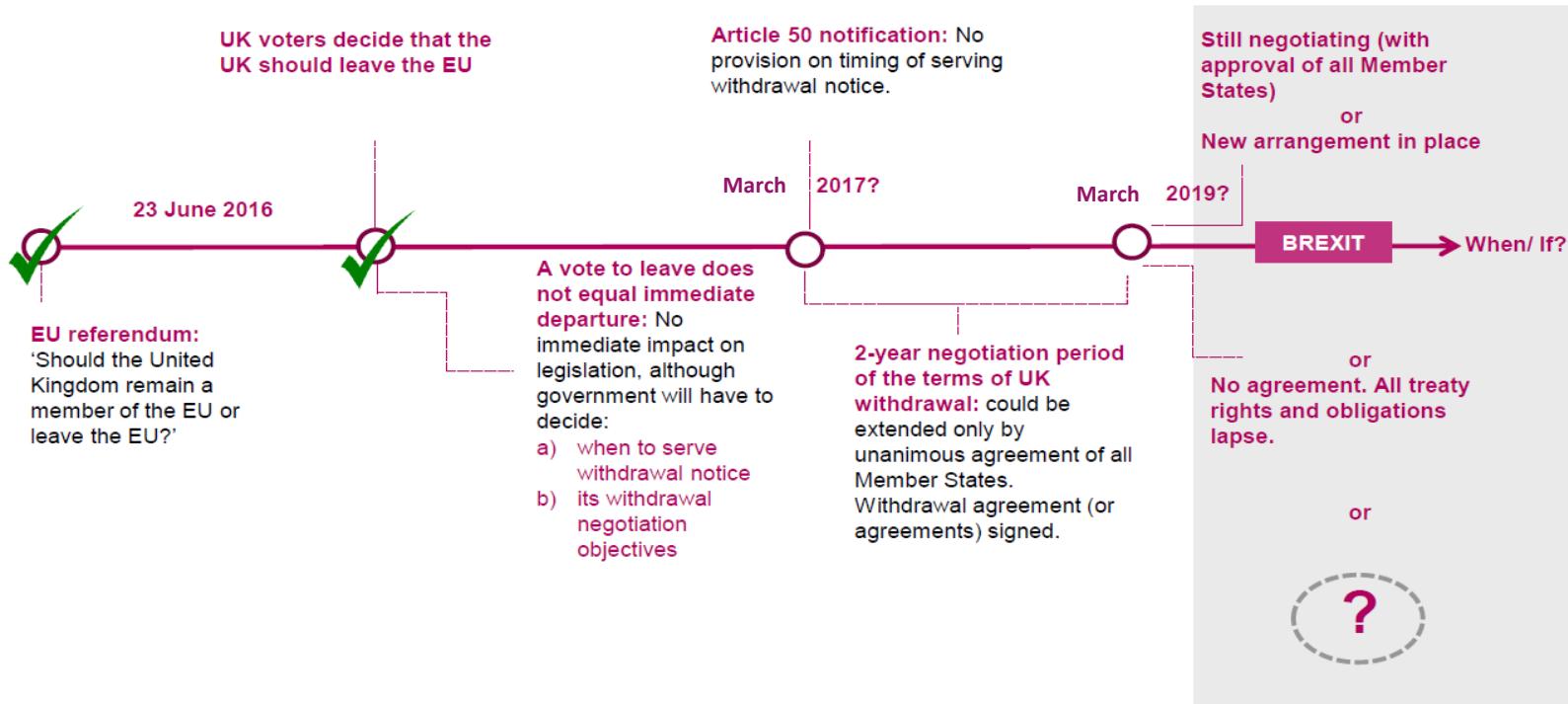


INTRODUCTION

In this presentation, I deal with two issues:

- The UK status in the WTO after BREXIT; and
- The impact of BREXIT on the EU's free trade agreements.

WHERE ARE WE NOW? WHAT NEXT?



ANNEX: ARTICLE 50



- > Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements
- > 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
- > 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.
- > 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.
- > If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

THE UK STATUS IN THE WTO AFTER BREXIT



- On 1 January 1995, the UK became an original WTO Member pursuant to Article XI:1 of the WTO Agreement. This provision states "*The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO.*"
- This applies to the UK in a straightforward way. The UK was a contracting party to the GATT 1947 and it "accepted" the WTO Agreement and the Multilateral Trade Agreements, in accordance with Article XIV:1 of the WTO Agreement, by ratification on 30 December 1994.
- Further, the EU annexed a Schedule of Concessions to the GATT 1994 'for' the UK, in accordance with its practice since the UK joined the EU in 1974. For the GATS, the situation is a little different, in that the EU and its Member States, including the UK, jointly submitted a Schedule of Specific Commitments. If the UK did not have a Schedule of Commitments and Concessions, it could not, according to Article XI:1 become an original member of the WTO.
- Accordingly, the conditions set out in Article XI:1 have been met for the UK, and the UK will remain a WTO Member unless it withdraws from the WTO Agreement in accordance with Article XV of the WTO Agreement.

THE UK STATUS IN THE WTO AFTER BREXIT CONTD



- Article XI:1 has no effect on the rights and obligations of the EU and its Member States, which remain those of ordinary members insofar as it raises issues of competence or autonomy of the EU and its Member States. There is no suggestion anywhere in the WTO Agreement or in any relevant instruments, that the WTO rights and obligations of the EU Member States, or of the EU, are in any way limited to their areas of autonomy.
- The conclusion that EU Member States have still WTO rights and responsibilities has been endorsed in WTO jurisprudence. In *EC Certain MS Airbus*, the Panel rejected an EU request to remove the five EU Member States as Respondents, which would have left the EU as the sole remaining Respondent. It said that "*each of these five is, in its own right, a Member of the WTO, with all the rights and obligations pertaining to such membership, including the obligation to respond to claims made against it by another WTO member.*" The Panel added that "*whatever responsibility the European Communities bears for the actions of its Member States does not diminish their rights and obligations as WTO Members but is rather an internal matter concerning the relations between the European Communities and its Member States.*"

IDENTIFYING UK'S SEPARATE RIGHTS AND OBLIGATIONS



- As pointed out above, if the UK already possesses all of the rights and obligations of an original WTO Member, it will continue to possess all of those rights and obligations once it leaves the EU. What will change is the EU's role in exercising these rights and assuming responsibility for performing these obligations, a role which will henceforth be exercised by the UK.
- For clarity, the UK's commitments will be transposed into a new exclusive UK schedule. For most cases, this will be an uncontentious exercise, without the necessity of agreement with the EU or any other WTO Member.
- Questions arise in relation to rights and obligations concerning the UK's commitments under Article II of the GATT 1994 and Article XX of the GATS. In particular, when these commitments give the EU, by name rights or obligations that are quantified, for example in the form of tariff quotas and agricultural subsidies where right to subsidise agricultural production is limited to a certain amount.

IDENTIFYING UK'S SEPARATE RIGHTS AND OBLIGATIONS CONTD

- The first question concerns the identification of the UK's share of tariff quotas offered by other WTO Members to the EU on a country – specific basis such as for example the US tariff rate quota for cheese. Another question concerns the identification of the UK's commitment to provide certain country specific tariff rate quotas as listed in the EU's existing schedule.
- The other question concerns the UK's share of the EU's commitment not to subsidise agricultural production beyond a given annual quantum or, to describe this from the other direction, the UK's share of the EU's liberty to subsidise up to that quantum.
- On a practical basis, these issues will have to be agreed with EU before they can be transposed onto a new exclusive UK GATT Schedule.



THE UK'S GATS SCHEDULES

- The UK's commitments under Article XX of the GATS are generic, subject to limitation on an EU Member State basis. These can be easily transposed to a new exclusive UK GATS Schedule.
- There is, however, a technical issue concerning the territorial limitation to the schedule annexed by the EU and the UK to the GATS, according to which "*the specific commitments to the schedule apply only to the territories in which Treaties establishing the European Communities are applied and under the conditions laid down in these Treaties.*"
- However this is unlikely to be a contentious issue.

PROCEDURES FOR RECTIFYING AND MODIFYING SCHEDULES OF CONCESSIONS



- The procedures for making changes to GATT 1994 Schedule is set out in the 1980 Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions which is binding as part of the GATT 1994 (see para 1(b)(iv) of GATT 1994).
- The equivalent provision for GATS is the Decision on Procedures for Modification and Rectification or Improvements to the Schedule of Specific Commitments adopted by the Council for Trade and Services on 14 April 2000.
- The GATT 1994 Decision allows changes to the GATT 1994 Schedule which are "*amendments or re-arrangements which do not alter the scope of a concession*" and "*other rectifications of a purely formal character*", to be made by means of Certifications.

PROCEDURES FOR RECTIFYING AND MODIFYING SCHEDULES OF CONCESSIONS CONTD

- Similarly, the GATS Decision allows "*modifications ... which consists of new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments*" to be effected by means of certifications. A positive alteration of the scope, but not a negative one, will be allowed.
- It is likely that the UK will seek to introduce its new GATT 1994 and GATS Schedules by certification as there are time limits laid down in both decisions for objections to be made. In the case of the GATT 1994 Decision the other members of the WTO have 3 months within which to object and in the case of the GATS Decision, 45 days within which to object. In addition, the grounds upon which an objection can be made are limited, particularly in the case of the GATT 1994 Decision. If objections are made and not resolved, then the party seeking the change may exercise its rights to withdraw or modify its commitments in terms of GATT or GATS.
- GATT 1994 and GATS provides a procedure for the modification of or withdrawal of agreed tariff concession to which the GATT 1994 Decision and the GATS Decision do not apply.
- Article XXVIII:1 of the GATT 1994 states, in pertinent part, "*a [M]ember ... may, by negotiation and agreement ... modify or withdraw a concession included in the appropriate schedule annexed to this agreement*".

PROCEDURES FOR RECTIFYING AND MODIFYING SCHEDULES OF CONCESSIONS CONTD



- If the negotiations fail to lead an agreement, Article XXVIII:3(a) provides in relevant part, that "*the [M]ember which proposes to modify or withdraw the concession shall, nevertheless be free to do so.*"

In that case any Member which has a substantial interest and certain other members shall be free to withdraw substantially equivalent concessions.

- The GATS contains similar provisions (Article XXI:4(b)). However, Article XXI provides for arbitration and in case the modifying member does not comply with the findings of the arbitration, any affected member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with the findings.
- It is unlikely that most of the UK's GATT and GATS schedules will be contentious if the UK does not seek to alter them.

WTO GOVERNMENT PROCUREMENT AGREEMENT 2014



- A final point concerns the UK's status under the revised WTO Government Procurement Agreement. Article XX2:1 states that "*this agreement shall enter into force on the 1st of January 1996 for those governments¹ whose agreed coverage is contained in the Annexes of Appendix 1 of this Agreement, and which have, by signature, accepted the Agreement on 15 April 1994, or have, by that date, signed the agreement subject to ratification and have subsequently ratified the agreement before 1 January 1995*".

¹ *For the purposes of this agreement, the term "government" is deemed to include the competent authorities of the European Union.*"

- It is the EU alone and not the UK, that is the relevant party to this agreement. Accordingly, it is at present the EU that is solely responsible for its obligations under the agreement, including in respect of the actions of government authorities that are organs of its member states.
- It is submitted, that the UK will have to accede to that agreement.

FREE TRADE AGREEMENTS



- I wish to deal briefly with free trade agreements. Most if not all free trade agreements entered into by the EU are entered into between the EU and its members (including the UK) with the other party or parties.
- In order to determine whether a free trade agreement will apply to the UK on the UK ceasing to be a member of the EU, one need look no further than the territory to which these arrangements apply.
- Consistent with Article XXIV of GATT 1994 these arrangements have territorial application, for example the new EPA agreement provides as follows:

"1. This agreement shall apply, on the one hand to the territories in which the TEU and TFEU are applied and under the conditions laid down in those Treaties, and, on the other hand to the territories of the SADC EPA States.

FREE TRADE AGREEMENTS CONTD



- 2. *References in this agreement to "territory" shall be understood in this sense."*
- As pointed out above in terms of article 50 of the TEU, the Treaties shall cease to apply to the UK from the date of entry of force of the withdrawal agreement or failing that 2 years after the UK notifies the European Council of its intention to withdraw unless extended by agreement.
- On such free trade agreements ceasing to apply to the UK, MFN duties will apply to exports to the UK unless new free trade agreements are entered into.



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