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jl.soulier@soulier-avocats.com

Tel.: +33 (0)1 40 54 29 29, + 33 (0)4 72 82 20 80

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Brexit: Issues at stake in troubled negotiations

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It seems that no one was prepared for the results of the June 23, 2016 referendum in which UK voters made the choice to quit the European Union by a slim majority. The previous referendums were, however, often uncertain and the results sometimes unexpected.

The United Kingdom joined the European Economic Community (“EEC”) under Conservative Prime Minister Edward Heath on January 1, 1973. Faced with the hostility of part of the British people, the subsequent Labour Prime Minister, Harold Wilson, organized a first referendum on June 5, 1975, with 67.23% of votes cast in favour of the UK remaining within the EEC.

In 1992, the Danish voted against the Maastricht treaty. Only 51% of the French voted in favor of such treaty, giving it a *petit oui* (“small yes”). In 2005, France and The Netherlands rejected with a larger margin the draft European constitution prepared by a commission chaired by Valéry Giscard d’Estaing: 54.67% of voters in France and 61.54% of voters in the Netherlands voted “No”.

The Lisbon Treaty, adopted in 2009, substantially altered the functioning of the European Union. Since then, it has been criticized by the eurosceptics for whom it merely showed disregard for the will of the people expressed in 2005.

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In practice, either the withdrawal agreement is concluded with the European Union within the two-year time-frame set by Article 50, or the European Council unanimously decides to extend this period to continue the negotiations. In the absence of any such agreement or extension decision, British membership will automatically end upon expiry of this two-year period.

This period began to run on March 29, 2017, date on which British Prime Minister Theresa May officially notified the European Union of the withdrawal decision. The possibility of an automatic withdrawal cannot be excluded. Theresa May has indeed repeatedly stated that *“no deal for Britain is better than a bad deal”*.

For UK, this would mean that entire sections of regulations would vanish overnight. In particular those derived from European Regulations that, contrary to European Directives, are directly applicable and have not, therefore, been transposed into national law.

In order to avoid the chaos that would result therefrom, Theresa May has announced that a “Great Repeal Bill” would be adopted in the coming months. The Great Repeal Bill will not only instantly annul the 1972 European Communities Act. It should also transpose into national law all of the European provisions that are directly applicable, with the objective to subsequently sort out the rules that will be maintained and those that will be changed or scrapped after the UK’s exit from the European Union. More than 2,000 European Directives, Regulations or decisions were adopted in 2016 only. Most of these texts, that address a wide range of matters, are directly applicable.

The United Kingdom will no longer be part of the 40 European agencies, including the European Medicines Agency and the European Banking Authority currently headquartered in London and that will have to relocate. And the United Kingdom will automatically withdraw from the 53 free trade agreements entered into by the European Union, and will have to renegotiate one by one more than 1,700 bilateral and multilateral agreements to which it is currently a party simply because it is a member of the EU.

What spirit the United Kingdom and the other 27 EU Members States are going to be working in during the forthcoming negotiations on the terms and conditions of the withdrawal agreement?

Theresa May has outlined “red lines” during the keynote speech she delivered on January 17, 2017: The United Kingdom wants to regain control of its borders and to regulate immigration from other EU countries, including in particular Poland; it intends to leave the jurisdiction of the European Court of Justice; it no longer wants to pay contributions to the EU budget outside its participation in specific programs in the context of specific agreements; it wants a free trade zone for products and services (in particular financial ones) closest to what currently exists in the EU.

The EU Member States have access to a single market, the key features of which are: No customs tariffs and quotas, a common customs tariff for goods imported from outside the EU and uniform rules on product specifications. After Brexit, the UK will become a “third country”. All trade or other agreements to which it is a party as a Member of the EU will cease to apply to it. In particular the agreements concluded in the framework of the World Trade Organization (WTO) for which the European Union has exclusive competence.

If negotiations on a free trade agreement fell through the new commercial relationships between the European Union and the United Kingdom would be based exclusively on WTO rules, resulting in the application of the Common External Tariff and the most-favored-nation clause which does not allow for a differentiated treatment compared to other third countries who are members of the WTO.

During the Bratislava summit held on September 16, 2017, the leaders of the “EU 27” showed their unity and recalled that the European Union has been built on the indivisibility of 4 fundamental freedoms: The free movement of goods, persons, services and capital. They have thus pointed out that it is inconceivable to open up, even partially, the internal market without the free movement of persons between the European Union and the United Kingdom, considering it as the necessary corollary to the free movements of goods, services and capital.

Still according to the leaders of the “EU 27”, access to the internal market requires compliance at all times with EU trade regulations. It also requires an adequate contribution to the EU budget, as is the case for Norway, Island and Lichtenstein, countries associated with the European Economic Area (“EEA”), and Switzerland, member of the European Free Trade Area (“EFTA”) to which the United Kingdom belonged before joining the EEC in 1972. Lastly, control and dispute settlement mechanisms should be put in place, as is the case for countries that are members of the EEA and EFTA, which implies acceptance to be bound by the case-law of the European Court of Justice.

In her January 17, 2017 speech, Theresa May summed up what the United Kingdom does not want: *“Not partial membership of the European Union, associate membership of the European Union, or anything that leaves us half-in, half-out. We do not seek to adopt a model already enjoyed by other countries. We do not seek to hold on to bits of membership as we leave.”*

Martin Schultz, former Chair of the European Parliament, succinctly summed up the common position of the 27 Members States as follows: *“Brexit could not be a better deal than remaining in the EU”*.

Given these statements, it is inconceivable that the United Kingdom would become a member of the EEA or EFTA. The scope of the Customs Union between Turkey and the European Union is too narrow to serve as a model. The same applies to the free trade agreements concluded with Ukraine and Canada. And the United Kingdom cannot simply rely on WTO rules that would make it a third country without any benefits and prerogatives other than those enjoyed by any other member of the WTO.

Pursuant to the Treaty on European Union, the European Commission may adopt so-called third-country “equivalence decision”. In this case, the European Commission acknowledges that the regulations of a third country offer a level of protection that is equivalent to that in the European Union in specific areas such as, for instance, personal data. However, such equivalence decisions generally have a limited scope and the European Union must ensure that the rights remain equivalent over time, which means that efficient monitoring and follow-up systems must be implemented.

The negotiations will start after the snap general election called for by Theresa May and scheduled on June 8,



2017. If the negotiation period is not extended, the withdrawal should become effective upon expiry of a two-year period following the notification of the withdrawal decision, i.e. on March 29, 2019, irrespective of whether an agreement had been reached or not. The United Kingdom wants that an agreement on the future UK-EU relationships be negotiated in parallel with the withdrawal agreement and that the former enters into force on the same day as the latter. This is an unlikely scenario. If only for procedural reasons: While the withdrawal agreement does not need to be ratified by the EU Member States, an agreement on the future UK-EU relationships that would be binding both on the EU and on each of the Member States, will have to be unanimously approved by the 27 EU Member States. A considerable challenge!

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