

# MOFO BREXIT BRIEFING

## President-Elect Trump, Brexit, and U.S./UK Trade



Sir Paul Jenkins\*



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The election of a new president of the United States is always an event of major world significance. As with every new president, the election of Donald Trump as the 45th president of the United States is of importance to every country on every continent; and, as with every new president, his election gives rise to many more questions than the American people have just answered.

In Europe, the principal questions will be about future cooperation on defense, security, and trade, as well as the impact, if any, of his election on the global economy. For the United Kingdom, as it prepares to end its 43 year membership of the European Union (EU), and for those entities operating in the U.S./UK markets, there will be myriad additional questions about how the new administration will approach Brexit.

Every new president takes time to establish their administration, with hundreds of key appointments, many of which require Senate confirmation. President-elect Trump will need to build a relationship with Congress. It will take time to understand how he will turn the substance of his campaign into policies, and the timeline.

But this is not necessarily a problem for those looking for signs about his administration's approach to the UK; it will be some time before the UK is in any position to engage seriously with third countries about its future relationships. Why so?

By the time President-elect Trump is inaugurated on 20 January 2017, the UK Supreme Court should have decided whether the UK government needs legislation to give formal

notice of withdrawal under Article 50 of the treaty at the core of the EU, the Lisbon Treaty, or whether it can go ahead without further parliamentary process.

Whatever the decision, at some point in the first half of 2017, negotiations will begin between the UK and the 27 remaining members of the EU. This will be the start of the UK's journey to its new place in the world order; a journey which is likely to take at least 10 years to complete. For those doing business with or in the UK, this will be a period of uncertainty.

Under Article 50, unless everyone agrees an extension, there are two years in which to reach an initial deal between the UK and the remaining 27 members of the EU. That initial deal will set out "the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union" (Article 50.2). Those arrangements and that framework will not be a detailed trade deal.

If no deal is reached in time, the UK leaves automatically and immediately. All treaty rights and obligations fall away overnight. For example, the 2007 EU-U.S. Open Skies Agreement would cease to apply to the UK; there would be no legal basis for flights between the UK and the U.S. unless and until a bilateral deal was agreed. The single, open market for EU members would be shut to UK businesses; financial services companies based in the UK would lose their passporting rights; trade and other agreements between the EU and third countries would immediately cease to apply to the UK. If the Transatlantic Trade and Investment Partnership (TTIP) is agreed by then, it will cease to apply to the UK. There would be considerable uncertainty about the UK's World Trade Organization (WTO) status.

Even assuming a calmer Brexit, all of these things will happen unless replicated in the Article 50 and other deals.

Most likely, after the two year period under Article 50, there will be a subsequent transition period of maybe another two to five years to agree EU/UK trade and start on UK/third-country negotiations; no third country will want to agree anything much until they see the EU/UK arrangements. The realistic best-case scenario is that the inevitable vacuum caused by the necessary sequencing will be filled by falling back on the WTO.

So some delay in forming a fully-functioning new administration will not be critical from the perspective of Brexit. Nevertheless, from the start of President-elect Trump's time in office, the UK government will be looking for signals about the new relationship ahead of that point, midway through the first term, when they will be seeking to agree the details of a new trading relationship with an increasingly inward-looking, protectionist U.S. What should those operating in U.S./UK markets be looking for?

Even though Donald Trump called himself Mr. Brexit and has praised the UK's decision to leave the EU, any useful mood music on the U.S./UK relationship in the early months will most likely be in the context of national security; if he follows through on his more controversial ideas, there's a risk it will taint other issues.

Other critical risks to watch regarding the future of U.S./UK trading must be viewed first in the context of the WTO. Will, for example, the anti-WTO rhetoric during the election campaign get in the way of effective support for the UK during its Brexit transitional stages? On TTIP, will Mr. Trump's campaign antipathy turn out to be aimed at getting a better TTIP, or exploiting the UK's weak negotiating position rather than anything more benevolent? Is there a risk that the champion of small government will only offer the UK overly light non-tariff barriers incompatible with the regulatory regimes needed for the greatest possible continued access to EU markets? More generally, will the relationships that he develops with France and Germany help or hinder the UK's Brexit aims? Will he have the influence to steer them in a helpful direction for the UK?

In terms of short to medium-term planning, President-elect Trump offers no bankable assurances about the future of U.S./UK trading or, indeed, other post-Brexit relationships. But the two years needed to deal with Article 50 allow time to see beyond the Trump campaign and into the substance of what might be possible. Clarity and certainty on these issues are a long way off, and risk analysis and appetite are critical. Donald Trump's election has added some further uncertainty to the Brexit picture, but also the possibility of a better outcome for those who can wait and see.

## MOFO CONTACTS

Please do not hesitate to call with any questions or concerns you may have. We're here to help.

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### **\*About Sir Paul Jenkins:**

From 2006 to 2014, Sir Paul Jenkins QC was the United Kingdom Government's most senior legal official, advising the governments of Prime Ministers Blair, Brown and Cameron. He is an acute observer of Brexit developments.