



# The U.K.'s Political Commitment to Brexit

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The U.K.'s political commitment to Brexit was confirmed most recently on Thursday 12<sup>th</sup> December when a General Election was held and the Conservative Party which had campaigned on Brexit won a majority in the House of Commons.

Prior to the election, the incumbent Prime Minister Boris Johnson, who went on to lead the Conservatives to victory, had negotiated a series of changes to a Withdrawal Agreement with the European Union, negotiated by Theresa May's government. The changes were described as significant by Boris Johnson and his allies but it is to be doubted that they were sufficiently significant to account for the radical shift in sentiment by several leading Brexiteers from derision to enthusiasm. One concession made by the U.K. to the E.U. in the Withdrawal Agreement is the conferral of a special status on Northern Ireland, which will require mainland British distributors either to prove that there is no onward distribution of those goods into Ireland and the E.U. or that they comply with E.U. regulations.

This Withdrawal Agreement was endorsed by the European Council on Thursday 17<sup>th</sup> October, before the election. [What remains following the passage of the Agreement into law in the British Parliament is the approval of the European Parliament by a simple majority.]

Interestingly all three of the devolved British assemblies, the Welsh assembly, the Scottish Parliament and the Northern Ireland Assembly, voted against the Withdrawal Agreement Bill. The Welsh vote was perhaps the least expected of the three given that Wales as a whole had voted for Brexit in the referendum. The objections of the devolved assemblies, however, will not provide a legal obstacle to Brexit as the matter is presumably governed by the Sewel Convention, which establishes that in exceptional circumstances, but only in such circumstances, the Westminster government will act without devolved permissions.<sup>1</sup>

The U.K.'s eventual departure date on Friday 31<sup>st</sup> January 2020 fell more than 3.5 years after the date of the referendum. What is clear is that those several years have allowed the U.K. private services sector, but not, it seems, the UK government, to make advanced contingency plans in order to maximise economic certainty.

At this point in time, to borrow a much-maligned categorisation by Donald Rumsfeld, there are known knowns, known unknowns and unknown unknowns.

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<sup>1</sup> The Sewel Convention applies when the U.K. Parliament wants to legislate on a matter within the devolved competence of the Scottish Parliament, National Assembly for Wales or Northern Ireland Assembly. Under the terms of the Convention, the U.K. Parliament will "not normally" do so without the relevant devolved institution having passed a legislative consent motion.

Many of the questions which first plagued business in 2016 now fall into the first category. There is a good understanding of how to implement contingency plans including questions about relocating business lines and offices to Ireland and continental Europe and about future relationships with European regulators. There is also a much better understanding of the risks for legacy contracts. Trade associations including ISDA have produced helpful guides on questions ranging from illegality, through choice of law and jurisdiction to force majeure. Thirdly there is a rapidly developing understanding of how the proposed new U.K. regulatory architecture for rulemaking is intended to work, with the Bank and FCA taking on many of the responsibilities of the ESA's and the Commission. Finally the means by which the U.K. will onshore European law by means of standstill legislation and avoid the so-called Swiss cheese phenomenon, by which existing law is lost or rendered incomprehensible during a transition of sovereignty, has been made clear.

But, despite these considerable advances, the size and number of the issues facing the markets in the second category is almost overwhelming. Known unknowns include the thorny question of whether the U.K. will or will not seek to establish regulatory alignment with E.U. standards in financial services or in any trade sector. If not, a related question is whether the U.K. will prioritise a trade relationship with the U.S. or with other E.U. member states. Recently Sajid Javid and Priti Patel have made inconsistent statements on this subject; in the case of Sajid Javid, he appears to have contradicted himself. With or without regulatory alignment it is still unclear whether the U.K. will reach a deal with the E.U. and if so on what terms for financial services and other sectors. Without a deal, there is the question whether the U.K. will look to undercut E.U. regulatory standards or move in a different but lateral direction. Raising our eyes for a moment to the wider panorama of historical and constitutional questions, it is unknown whether the Westminster government will be able to avoid another Scottish referendum, as Boris Johnson has said he intends to do, and what the consequences of the new arrangements will be for the political future of Northern Ireland.

The unknown unknowns are, of course, unknown but we can sketch out the issues which have received less attention than arguably they should. By that criterion, our first unknown unknown is the U.K.'s standing under treaties and other international memoranda concluded between the E.U. and third countries. The question whether the U.K. can enter into a treaty arrangement independently of the E.U. depends on the terms of the Treaty; whether it should do so or not is a question which remains largely unaddressed in the public political sphere. This uncertainty extends all the way down to arrangements with foreign regulators. For example, it is not wholly clear whether U.K. financial markets participants will benefit from “no action” letters which have been awarded to E.U. firms on the basis of reciprocal arrangements between E.U. and U.S. regulators. One such treaty is the Comprehensive Economic Trade (“CETA”) agreement agreed between the E.U. and Canada. One third of the benefits in tariff reduction achieved by the Treaty pertain to the trade in services. As things currently stand, the U.K. is the leading provider in Europe of services to Canadian clients. Whether the U.K. can retain the benefits of CETA under a parallel agreement with Canada must now be wholly uncertain.

The second issue is the impact of Brexit on areas of future thinking such as FinTech and BioTech. Had the U.K. remained in the E.U. it would undoubtedly have looked to take a leadership position in these areas and the EU as a whole would have looked to build consensus on the newly emerging applicable regulation. It seems unlikely now that the U.K. can adopt a position of regional leadership and there is also an increased risk of regulatory fragmentation. No matter what the future holds, it is less clear and less certain than it would have been.

The third unknown unknown is the impact of Brexit on shared and collaborative projects of which the most important to commerce is probably the development of the Universal Patent Court (“UPC”). The U.K. has ratified the UPC agreement but Germany had postponed ratification owing to a constitutional challenge. This means that the agreement had not come into force by the date of Brexit. Although it is likely that the project will move forward and do so without the U.K. on board, there must be a great deal

of uncertainty about whether the efficiencies envisaged when the project was initiated can now be achieved.

The final unknown unknown is the size of the challenge facing the negotiation of a new trade agreement between the U.K. and either the U.S. or the E.U. Taking CETA as an example of a recent E.U. trade negotiation, the prospects for a speedy deal do not look particularly promising. CETA negotiations were agreed in 2007 and undertaken between 2009 and 2014. The Treaty was signed in 2016 and came into provisional but not final application in 2017. Chapter 13 contains provisions on financial services which are covered by the Treaty, largely on terms familiar from the WTO General Agreement on Trade in Services (GATS). But Article 15 contains a so-called prudential carve out which allows for the preservation of regulatory barriers. We should note, as a further aspect of the uncertainty, the possible role of parliamentary and legal challenges in E.U. Member States to the terms of any free trade agreement which covers areas of mixed competence. For example, parliamentary processes in Belgium and the Netherlands were complicating factors in regional agreement on the E.U. deals with Canada and Ukraine.

In conclusion we stand at a watershed on this first working day after Brexit. The three-and-a-half years since the referendum have allowed the private sector to make considerable progress with contingency planning but firms do so against the backdrop of considerable political uncertainty. We have little political, economic, financial or legal clarity about where we are going next but we do have the privilege of living in interesting, historic times and to some extent of being able to shape our own destiny.

And so, having laid bare the vast extent of what I don't know and cannot predict I shall hand you over to Phillip who knows everything...!