



## Debunking Myths and Exploring Scenarios



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On September 27, 2016, Skadden's European partners hosted a panel discussion exploring topics relating to the U.K. electorate's vote to leave the European Union (Brexit), with an emphasis on the withdrawal procedure pursuant to Article 50 (the formal exit provision under the Treaty of the European Union), common myths and worst-case scenarios. This discussion took place prior to Prime Minister Theresa May's keynote speech at the Conservative Party conference on October 2, 2016, from which some commentators inferred that a "hard Brexit" — or a more radical "clean break" from the EU — may be more likely than previously thought.

The panel comprised Sir Philip Lowe, former Director General of Energy (and before that, Competition) for the European Commission and former Non-Executive Director of the U.K.'s Competition and Markets Authority board; Luis González García, a specialist in international law, international trade and dispute resolution at Matrix Chambers and a former World Trade Organization (WTO) trade negotiator; João Marques de Almeida of Hakluyt & Company, former political adviser to former European Commission President José Manuel Barroso and former head of the foreign policy unit of the Bureau of European Policy Advisers; and Suella Fernandes, former barrister at No5 Chambers and the Conservative party Member of Parliament for Fareham, Hampshire, who campaigned to leave the EU. Skadden partner Pranav Trivedi moderated the panel.

While the observations reflect the speakers' own views and this summary is not intended to be a comprehensive review of, or conclusion with respect to, the many issues related to Brexit, it may provide an interesting perspective on some of the key issues.

### Keynote Remarks

Drawing on his in-depth knowledge and first-hand experience of EU institutions and their respective legislative and executive powers, Sir Philip's opening remarks placed the Brexit vote in a wider political context. He covered a diverse range of topics, from challenges to the legality of invoking Article 50 without specific parliamentary approval to potential trading models and opposing views on the potential economic impact of Brexit.

Sir Philip outlined the procedure for withdrawal from the EU pursuant to Article 50 and how this is likely to play out in practice. As soon as the U.K. government serves notice, a two-year time limit for agreeing to the terms of withdrawal will be triggered, unless the remaining 27 EU member states (EU-27) unanimously agree to extend this period.



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Given that the next general election in the U.K. is in 2020, the British government will be eager to serve notice in 2017 with a view to reaching an agreement on the terms of the withdrawal prior to the election. The mandate to negotiate with the U.K. on the withdrawal has to be approved by the EU-27 and is vested in the European Commission, although the EU Council of Ministers will follow the negotiations closely and have already appointed a senior Belgian diplomat, Didier Seeuws, as its representative in the negotiations. Any draft agreement with the U.K. must be approved by a qualified majority of EU member states (72 percent of the EU-27 representing 65 percent of the population) and is subject to the consent of the European Parliament. Sir Philip also noted that if the withdrawal agreement is categorized as a “mixed agreement” (*i.e.*, an agreement that contains competences that are exclusive to the EU as well as competences that are exclusive to member states), it would require ratification by national parliaments in addition to approval from the European Parliament by simple majority vote.

Sir Philip speculated that the withdrawal agreement, although likely to be relatively brief, would (i) state that the U.K. will leave the EU, (ii) specify certain areas where there would be future cooperation between the U.K. and the EU, *e.g.*, security and defense, (iii) specify other areas that will be subject to sectoral negotiations (*e.g.*, trade, air transport and energy), the majority of which will be completed only after the withdrawal agreement becomes effective, and (iv) detail which transitional arrangements apply between the moment the U.K. withdraws and the time new agreements are reached in various sectors.

Turning to the topic of trade, Sir Philip said a tailor-made solution is the most likely result, as none of the existing models are likely to be a perfect fit for the U.K.’s requirements and expectations. Sir Philip also touched on the unresolved question of whether the U.K. will have access to the single market after withdrawal and the improbability of independently negotiating a trade deal with the EU while remaining part of the customs union. In practice, it remains to be seen whether Brexit will lead to an increase in trade volumes as a result of a relaxing of legislation or greater reticence to trade with the U.K. in the medium to long term. Sir Philip concluded: “While the widespread Anglo-Saxon view emphasizes the continuing fragility of the EU, and in particular of the euro, it would be wrong to underestimate the determina-

tion of the remaining 27 member states to make the union and the euro a success, in particular post-Brexit. The counterfactual against which countries, including Germany, measure the costs of not supporting the euro is the recreation of a world of multiple European currencies, each even more volatile to international trends, and a fragmentation of the single market itself.”

### Debunking Brexit Myths

Mr. Trivedi moderated the panel and invited the panelists to comment on prevalent myths regarding Brexit. Ms. Fernandes sought to dispel the myth that all those who voted to leave the EU conform to a particular stereotype and discussed the sovereignty arguments that have been widely reported following the announcement of the results of the June 23, 2016, referendum. Ms. Fernandes also shared her views on the robustness of the U.K. economy. Sir Philip reflected on the myth that the economic outcome of Brexit can be predicted with any degree of certainty.

Mr. Marques de Almeida considered whether the U.K. will remain part of the single market — an outcome that he considered to be a myth. He noted that access would require the U.K. to (i) accept EU legislation without having a role in the legislative process, and (ii) contribute to the EU budget despite no longer being a member of the EU. Mr. Marques de Almeida therefore doubted that retaining access to the single market would be possible.

Mr. González García continued the theme of trade, noting that negotiations are predominantly influenced by geography, rather than politics, and disputed the myth that a trade agreement modeled on the EU-Canada agreement or reverting to WTO rules would be positive outcomes for the U.K. In addition, Mr. González García suggested that Brexit will not necessarily prevent the U.K. from continuing to participate in certain EU initiatives, such as the Erasmus student exchange program.

Sir Philip addressed common misconceptions regarding the role of certain EU institutions and their powers, noting that commissioners are held accountable by the European Parliament and (as happened in 1999) can be dismissed at short notice; executive power, with the exception of competition and state aid, lies with the Council of Ministers, not with the Commission, he said.



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## Exploring Scenarios

Mr. Trivedi asked the panelists to share their views on possible worst-case outcomes of Brexit. There was consensus among the panelists that a continued period of uncertainty could be damaging to the U.K. and remaining 27 EU member states alike. Sir Philip focused on the risks of confrontational rhetoric and emotional concerns leading to polarized attitudes and, potentially, a regression from progressive policies, citing a return to an intent-based rather than effects-based competition regime as a possible worst-case outcome. For Ms. Fernandes, it was a dismantling of the union of the United Kingdom, as a result of Scottish independence, for example. Mr. González García highlighted the risk that 2017 presidential elections in France may stall negotiations, with Mr. Marques de Almeida adding that elections in Germany also have potential to cause delay, given the pivotal role that both countries will play in the withdrawal negotiations.

The panelists then turned their attention to the Article 50 procedure and content of the withdrawal agreement. Whereas some panelists hoped that the withdrawal agreement would include a framework for U.K.-EU trade post-withdrawal, which would likely require an extension to the two-year time limit, others thought that the withdrawal agreement should merely state an intention to work toward reaching a trade agreement in due course. Panelists agreed that the withdrawal procedure will involve multiple stages, including the formation of working groups to determine negotiation guidelines, agreeing to the terms of a negotiation mandate that the Commission will recommend to the council, and a negotiation of substantive issues followed by the procedure to approve the final agreement.