

**CULTURE, TOURISM, EUROPE &
EXTERNAL RELATIONS COMMITTEE**
#SPICeBrexitUpdate

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BREXIT UPDATE

**EC: RECOMMENDATION ON
DRAFT NEGOTIATING DIRECTIVES**

**BARNIER SPEAKS AT 7TH STATE
OF THE UNION CONFERENCE**

**UK GOVT RESPONDS TO SCOTLAND'S
PLACE IN EUROPE PROPOSALS**

SPICe

The Information Centre
An t-Ionad Fiosrachaidh

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The Scottish Parliament
Pàrlamaid na h-Alba

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About this paper

This regular paper produced by SPICe sets out developments in the UK's negotiations to leave the European Union, the process for which has now formally begun following the Prime Minister's triggering of Article 50 on 29 March.

The weekly updates will provide information on the UK Government's approach to leaving the EU, along with details of the Scottish Government and the other Devolved Administrations positions. The updates will also provide information on developments within the EU with regard to the UK's departure. Finally the update will provide information on the key issues likely to be at play during the negotiations and in developing the UK's future relationship with the European Union.

As was clear during the referendum campaign and since the decision to leave the EU was taken, there is an abundance of information and analysis available, and this SPICe paper will try to cover the key issues by drawing on that information and analysis. This week's update focuses on the publication of the Commission's recommendation on draft negotiating directives for Brexit and the election of Emmanuel Macron as France's new President.

European Commission publishes recommendation on draft negotiating directives

Following agreement and publication of the [political guidelines](#) for the Brexit negotiations by the EU27 at the end of April, the European Commission published its [recommendation on draft negotiating directives](#) for the UK's withdrawal from the EU on 3 May.

The European Commission paper is very similar to the non-paper that was leaked last week and which featured in the last [Brexit update](#). Like the non-paper, the draft negotiating directives focus solely on the withdrawal agreement and cover the key issues to be addressed from the EU perspective namely citizens' rights and the agreement of a financial settlement upon Brexit.

One significant change to the negotiating directives compared to the non-paper is the suggestion that the final withdrawal agreement will be an exclusive EU competence so individual member state ratification will not be required. This is outlined in the box below.

II. NATURE AND SCOPE OF THE AGREEMENT

5. The Agreement will be negotiated and concluded by the Union. In this respect, Article 50 of the Treaty on European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union. The exercise by the Union of this specific competence in the Agreement will not affect in any way the distribution of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned.

If the Withdrawal Agreement is deemed to be an exclusive EU competence then it will need to be approved by the European Council, by a super qualified majority and will also require the consent of the European Parliament which is by a simple majority.

The super qualified majority in the European Council is specified in Article 238(3) b of the Treaty on the Functioning of the European Union which states:

“the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States”.

In a withdrawal procedure, the participating Member States include all but the withdrawing Member State. This translates here into a majority of 20 out of 27 Member States.

The Commission recommendation of draft negotiating directives will now be considered by the Council and if agreed will form the Council Decision on the detailed negotiating mandate. The Council is expected to meet on 22 May to discuss the negotiating mandate.

Barnier speaks at 7th State of the Union Conference

Two days after the European Commission published its recommendation for the negotiations, the Commission's Chief Negotiator, Michel Barnier [delivered a speech](#) at the 7th State of the Union Conference at the European University Institute in Florence. In his speech, Michel Barnier spoke about protecting citizens' rights in the negotiations with the UK. On the negotiations, Barnier said:

“The EU is ready to start negotiations based on the clear guidelines of the European Council. Two days ago, the Commission put forward its recommendations for the forthcoming negotiations.

I confidently expect that the Council on the twenty second of May will give me a mandate to start negotiations. It is now clear exactly what the EU intends to place on the negotiation table in June.

The European Council has decided that preserving the rights of EU citizens and their families will be a priority; will be my priority.

I anticipate that protecting these rights will be both easy and complex at the same time.

What do I mean by that? It should be easy to agree on general principles.

But it will not be as easy to formulate all these principles neatly in a legally precise text.

There are a number of questions, in particular, that require close attention.”

Barnier then went on to set out those questions:

- Who should be protected, and for how long?
- What are the principles that the EU27 will put forward?
- What material rights should be protected by the withdrawal agreement?

In conclusion, Barnier addressed the question as to why no agreement on citizens' rights had been reached ahead of the negotiations:

“To conclude, some in the UK have tried to blame Member States for the continued uncertainty that citizens have been confronted with for ten months now.

That is wrong.

The only cause of uncertainty is Brexit.

The only way to remove uncertainty and to protect rights properly is through an Article 50 agreement.”

UK Government responds to Scotland's place in Europe proposals

On 29 March, the UK Government sent a letter in response to the Scottish Government's proposals for [Scotland's place in Europe](#) which were published in December 2016.

The Secretary of State for Exiting the European Union's [letter](#) was published on the Scottish Government's website at the end of April along with the Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell's [response](#).

In his letter, the Secretary of State set out the UK Government's view on Scotland's place in Europe:

"Let me turn to your paper on Scotland's Place in Europe. You presented your white paper at the January meeting of JMC(EN) and we have had a number of further conversations on the proposals it contains. We jointly tasked our officials to conduct a programme of intensive discussions to better understand the proposals in the paper, and to report back to us. This has been a substantive programme of work, and has required the investment of a good deal of resource. That was justified: the proposals you set out are complex and unprecedented, and it was right that we prioritised building a better understanding of them before discussing their viability. I am disappointed that the Scottish Government has called for another referendum on independence before we were able to discuss the outcomes of this joint work that was entered into in good faith.

As I have already set out, we share many of the same objectives. However, there are clear barriers to making your proposals a reality. Scotland's accession to EFTA, and then the EEA, would not be deliverable and, importantly, would require the consent of all EFTA and EU member states. Any divergence between EU and UK law - as a result, perhaps, of new EU regulation - could lead to the creation of new barriers to trade within our Union, which could take the form of additional controls and checks on trade within the United Kingdom. Given that trade with the rest of the UK is worth four times trade with the EU, I do not believe that such significant disruption to the internal UK market is in Scotland's - or the UK's - best interests. And Scotland's businesses could face a confusing mix of regulatory regimes."

On intergovernmental relations during the Brexit negotiations, the Secretary of State wrote:

"As we have discussed a number of times, we do not yet know the precise shape of the negotiations. We are committed to continued close engagement with the Scottish Government and other devolved administrations as we move into a new phase of our preparations to leave the EU.

We will achieve a better deal for all if we are united in our approach - and from our wider engagements I believe this is what the Scottish people want too."

Finally, on the issue of repatriation of powers following Brexit, the Secretary of State set out the UK Government's view that an effective functioning UK single market is maintained upon Brexit:

“As powers are repatriated from the EU, we must work together to ensure that stability and certainty are not compromised, and that the effective functioning of the UK single market is maintained. There will be areas where common frameworks may be required, for example where they are necessary to protect the freedom of businesses, including businesses in Scotland, to operate across the UK single market and to enable the UK to strike free trade deals. Our guiding principle will be to ensure that no new barriers to living and doing business within our own Union are created as we leave the EU.”

In deciding where powers best sit, the Secretary of State made clear that it is the UK Government's expectation that “the outcome of this process will be a significant increase in the decision making power of each devolved administration”.

The Scottish Government Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell [replied](#) to the Secretary of State on 12 April. In his letter, Michael Russell addressed the workability of the Scottish Government's proposals in Scotland's place in Europe:

“In relation to the specific points you raise regarding the proposals in Scotland's place in Europe, there is every reason to suggest that with the necessary political will and commitment these issues could have been addressed. Indeed there was no insurmountable issues raised in the engagement between officials that took place over the last two months.

However, looking ahead, there must be adherence to the terms of reference of the JMC(EN) and for the devolved administrations to have the opportunity to meaningfully contribute to the negotiation process.”

Scottish Government response to European Committee report

On 4 May, the Scottish Government [responded](#) to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee report [Determining Scotland's Future Relationship with the EU](#) which was published on 5 March 2017.

In the Scottish Government's response, Michael Russell, the Minister for UK Negotiations on Scotland's Place in Europe broadly welcomed the Committee's report. On future access to the single market, the Minister suggested that the UK Government should be investigating a solution for Scotland alongside its consideration of the positions of Northern Ireland and Gibraltar:

“As the UK Government is considering arrangements to take account of the particular circumstances of Northern Ireland and Gibraltar, then they should also do so for Scotland. The Scottish Government has embraced the so called four freedoms and believes that, short of EU membership, full membership of the

European Single Market and remaining as part of the customs union is the best outcome not just for Scotland but for the whole of the UK.”

On the UK Government’s negotiations for a future agreement with the EU and for future bilateral trade agreements, the Minister wrote:

“The Scottish Government expects to be fully involved in UK negotiations with the EU and between the UK and others on trade and investment agreements to ensure Scottish priorities and interests are taken on board. We believe that it is important that any such agreements deliver maximum benefit for the Scottish economy and especially the sectors where we have strengths. These include areas such as financial services, energy, life sciences and food and drink, especially whisky given its export value.”

The Minister also stated the Scottish Government was concerned about the period between the UK leaving the EU and negotiating new trade deals during which time the UK will be trading under World Trade Organisation (WTO) rules.

On the changes to the devolution settlement as a result of Brexit, the Minister echoed the Committee’s concerns about repatriated EU competencies and continuity of support currently provided by EU competitive funding. On the repatriated powers, the Minister wrote:

“On subjects where Holyrood already holds responsibility, such as environment, justice and agriculture, when EU law ceases to apply on withdrawal, the Scottish Parliament and Government will continue to have full responsibility. It is mistaken to characterise this as “new” powers coming to the Scottish Parliament; they do not signify a change in devolved competence, but to the wider framework provided by EU law within which this competence is exercised.

Powers in these areas cannot go to Westminster unless the UK Government attempts through legislation to reserve them. The Scottish Government would not expect the Scottish Parliament to consent to such a proposal.”

The Minister also reiterated the Scottish Government’s belief that the Scottish Parliament should be given new powers in two areas;

Firstly, in areas currently protected by EU law such as protecting rights and social protections; this position has previously been outlined in Scotland’s Place in Europe.

Secondly in areas such as trade and migration to pursue Scotland’s different needs:

“The Parliament also needs powers in areas such as trade, migration and international engagement to protect our relationship with Europe as best we can, and address Scotland’s distinctive economic and demographic needs in a constitutionally changed UK.”

On EU funding and its replacement, the Minister wrote:

“On leaving the EU, Scotland stands to lose EU funding towards CAP direct payments, market measures, the rural development programme and new research proposals beyond Horizon 2020. While the UK Government has offered some

assurances for funding commitments in the short term, which the Scottish Government has agreed to pass on in full, there are still more questions than answers regarding longer term funding.”

Finally, on intergovernmental relations and the future of the joint ministerial committees, the Scottish Government welcomed the Committee’s view that the mechanisms for intergovernmental relations need to be effective. The Minister also expressed disappointment that “the Joint Ministerial Committee on EU Negotiations (JMC (EN)) failed to agree a UK approach and objectives for the Article 50 negotiations prior to the triggering of those negotiations, as per its terms of reference”.

Despite this, the Scottish Government committed to working within the intergovernmental structures during the Brexit negotiations:

“Despite our disappointment at the conduct of discussions to date, the Scottish Government remains committed to working with the UK Government and other devolved administrations to further Scotland’s interests within the negotiations with the European Union. The JMC (EN) must be placed on a more meaningful footing, so there is a genuine opportunity for us to influence the UK’s detailed negotiating positions.”

President Macron

On 7 May, Emmanuel Macron the centrist pro-EU independent candidate was elected President of France defeating the far-right Front National candidate Marine Le Pen in the election run-off. Macron won just over 66% of the vote compared to just under 34% support for Le Pen. In France, the President is responsible for foreign policy and following Macron’s victory there has been speculation about what his election will mean for the Brexit negotiations.

[The Guardian](#) quoted Macron’s chief economic adviser, Jean Pisani-Ferry who said the UK and Europe shared “mutual interest” in maintaining economic prosperity. According to the Guardian, when asked by BBC Radio 4’s Today programme whether Macron favoured a hard Brexit, Pisani-Ferry said:

“I don’t think anybody has an interest in a hard Brexit. I think we need to build a new relationship. There is a mutual interest in keeping prosperity that exists and has built over the years.”

The Daily Telegraph’s Europe editor Peter Foster has suggested that [Macron will give little comfort to Theresa May in Brexit negotiations](#) (paywall). According to Foster:

“As an ardent pro-European who espouses the supranational politics of the EU so recently rejected by Britain, Mr Macron can be expected to continue with France’s already tough stance on Brexit.”

Writing before Macron’s run-off victory, Tom McTague writing for Politico suggested [a Macron win boosts Theresa May](#). According to McTague:

“At first sight, a Macron presidency looks problematic for British Prime Minister Theresa May. The runaway front-runner to succeed François Hollande is an outspoken Brexit critic who has openly courted the City of London.

And yet, it's not so much what he thinks, but what he doesn't.

Macron is not Le Pen. He is the sensible, continuity candidate. Someone Number 10 can deal with. Someone who will not re-toxify Brexit all over again for a government desperately hoping to take the poison out of it.”

Alongside this promise of stability with Macron and links between the President –elect and the Prime Minister (George Freeman, the chairman of Theresa May's Downing Street policy unit is a friend of Macron), whilst Euroskeptics in the UK are likely to treat Macron with suspicion, McTague sees a positive future relationship between Macron and the UK:

“Some Euroskeptics in the U.K. certainly see Macron as the embodiment of everything that is wrong with the European Union — an arch “citizen of nowhere” of the type the prime minister has vowed to stand up against on behalf of ordinary British families.

His rhetoric on Europe certainly suggests future confrontation between Britain and France over Brexit.

But, again, the reality of a Macron presidency might be far closer May's Brexit vision than first meets the eye. On his visit to London earlier this year, he grabbed headlines after telling reporters that “Brexit cannot lead to a kind of optimisation of Britain's relationship with the rest of Europe,” outside Number 10 after meeting May.

But inside Westminster Central Hall that same day, speaking to thousands of expat French voters, he said his “strategy” would be to “really defend the special relationship between Great Britain and Europe and in particular between Great Britain and France.”

That's not a million miles — or kilometers — from the “deep and special partnership” May has called for.

Macron went on: “I think it will be a profound error for Great Britain, as well as for Europe, to in some way go far into the shore, to go into self exile, to separate from Europe in a single blow to abandon the common project because Brexit was voted. Nothing will be the same, but I think we can defend mutual interests.”

European Parliament Policy Department briefings

The European Parliament's policy department has published two briefings analysing differing aspects of Brexit. Both briefings were requested by the European Parliament's Committee on Constitutional Affairs.

[The Impact of the United Kingdom's withdrawal from the European Union on Scotland, Wales and Gibraltar](#) is an in-depth analysis on the impact of Brexit on the devolved

territories of Scotland and Wales as well as the Overseas Territory of Gibraltar. It examines the economic and political implications of Brexit on these territories, the consequences of the possible return to devolved administrations of formerly 'Europeanised' competencies and looks at how Brexit might affect their future status within the UK as well as their relations with the EU.

[The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27](#) examines the concept of acquired (or 'vested') rights in public international law, analyses the gradual establishment and evolution of these rights and draws from case law as well as other precedents in order to establish the validity and force of acquired rights in customary and conventional international law. It also analyses the protection of such rights within the EU legal order, and examines the citizenship rights that will have to be taken into account during the UK withdrawal negotiations as well as their potential permanence in the EU and UK legal orders after Brexit. It concludes with an assessment on the legal force of acquired rights after Brexit and recommendations for their treatment during and after the withdrawal negotiations.

These reports feed into the Constitutional Affairs Committee's on-going [Brexit work](#).

Brexit from the EU's point of view

On 29 April, the UK in a Changing Europe blog published a blog by Pierre Vimont, senior fellow at Carnegie Europe examining the Brexit negotiations from the [EU's perspective](#). Vimont argues that the EU's position on Brexit and what it wishes to achieve from the negotiations is less clear than the UK Government position:

"A fair deal has already been argued extensively by the British. A balanced compromise would imply specific access for UK firms to the relevant sectors of the EU single market, control on the free movement of persons, reciprocity arrangements for citizens of both sides living abroad and tailor-made provisions for security and defense cooperation. If far from easy to deliver, this result looks nonetheless like the kind of outcome which in the end could fulfil the interests of the British people.

Surprisingly this setting out of a rough starting point is missing for the other side. EU 27 remains an odd entity whose interests so far in these future talks have been loosely identified. Risk of possible dissent among the EU member states is often mentioned as an excuse for sticking to a restrictive approach. So is the need to avoid any concession to Britain which might benefit the narrative of populist movements around Europe."

Vimont points out that in reality the EU has much to lose if there is no deal, the UK contributions to the EU budget being an obvious example. In addition, he suggests that the agreement reached with the UK will be scrutinised by all 27 Member States from the perspective of its domestic impact:

"For the EU 27, in spite of what will be said about fire walling the Brexit divorce from the internal matters of the Union, these domestic implications will become an intricate part of the Article 50 talks. EU member states will be scrutinizing any

possible concession to the British camp according to the impact it could have on their own interests.

They will ponder the financial consequences according to their position as a net beneficiary or contributor to the EU budget. And they will also strive to pre-empt to their advantage any potential change in EU common policies, be it the common agricultural policy, the structural funds, research programs or Erasmus.”

Vimont suggests that the domestic considerations for both the EU and UK side mean negotiations will be difficult and he proposes a number of ways in which the challenges could be addressed:

“If this scenario is to be avoided, a few guidelines need to apply in order to give the two sides a firm grip on the negotiation. First, each party should be well advised to better observe and listen to the internal debate inside the other’s camp. At the same time, they should avoid any boast of arrogance and accept to be less tactical and more honest to each other.

This means that the EU 27 should resist the temptation to penalize Britain, in one way or another, for its decision. On its side, UK should leave out some of its rhetoric on the promising deals it is about to strike with the outside world.

Additionally Britain and the EU 27 should not completely disregard the time factor. If Article 50 negotiations are highly unpredictable, one can guess at least that the two year deadline will not hold. An extension of the discussions therefore may be unavoidable. It is naturally far too early to publicly bring up this question. But time will quickly run out of these talks.”

A perspective on Brexit

In a blog for the Centre for European Reform, Simon Tilford, the organisation’s Deputy Director wrote about [Britain’s sense of exceptionalism](#) in relation to the Brexit decision and concluded:

“Few countries have allowed their sense of exceptionalism to damage their interests in the way Britain is doing. British overconfidence is unjustified and will come at a heavy price.”

According to Tilford, the UK’s attitude to the EU and the sense that the UK can thrive out with the EU may be misplaced:

“What makes so many British politicians, business leaders and newspaper editors so confident that Britain will flourish unencumbered by the EU? Why do so much of the British elite see the EU as a constraint on British influence in the world? Both France and Germany sometimes bridle at the EU but neither seriously thinks that the EU diminishes their ability to pursue their interests. Even now, when it is clear that Brexit will do profound damage to British political and economic interests, few powerful figures in British business, politics or the media feel it necessary to speak out. There is no justification for British overconfidence or sangfroid. The UK needs the EU as much as the Germans or French.”

Tilford concludes that the decision to leave the EU will be a mistake in the long term for the UK:

“What will happen now? Britain is heading for humiliation. It can back down, accept continued freedom of movement and jurisdiction of the ECJ in return for access to the single market but little influence within the EU or internationally. Or it can stick to its red lines, and end up with little more than a minimum free trade agreement in goods at some point in the future. Under this scenario, the British economy will take a hammering, with the poor suffering most; populism usually hits hardest those it claims to help. Under this scenario, Britain will be alienated from its closest allies – the rest of the EU – and have little international influence. Reality will eventually kick in and that reality will be that Britain needs to rejoin the EU. In all likelihood, it eventually will, though on inevitably worse terms. And it will then have to spend the next 20 years painstakingly rebuilding the influence that it so casually threw away.”

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