

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

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BREXIT UPDATE

SPICe weekly update

**EU CITIZENS
IN THE UK**

**UK GOVERNMENT COMMITMENTS
AT THE WORLD TRADE ORGANISATION**

**SCOTTISH PARLIAMENT COMMITTEES
CONSIDERATION OF BREXIT**

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 which are expected to formally begin early in 2017.

Ahead of the UK Government's triggering of Article 50, the 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 provides more information on the Article 50 case at the Supreme Court, the future of EU citizens in the UK and the Secretary of State for International Trade's confirmation that the UK would issue new World Trade Organisation.

Article 50 legal challenge

On 5 December, the UK Government's appeal against the decision of the High Court to prevent Article 50 being triggered by use of the Royal Prerogative began. The hearing will last four days (through until 8 December 2016) and can be viewed via a [live stream](#) from Court 1 of the Supreme Court. In addition, the Supreme Court is publishing transcripts from each day on its [Twitter page](#).

Ahead of the hearing beginning, the UK Government published two documents providing further details of its case. Firstly it published its [Supplementary Supreme Court Printed Case of the Secretary of State for Exiting the European Union](#). This document outlines the UK Government's response to the Scottish and Welsh Government's submissions to the Supreme Court. With regard to the [Scottish case](#) to be presented by the Lord Advocate, the UK Government [states](#):

- International relations, including relations with the EU, are a reserved matter (these powers remain with the Westminster Parliament and Government).
- For the same reasons as are set out in the Government's main printed case in relation to the European Communities Act 1972, the devolution legislation assumes but does not require the UK to be a member of the EU. The devolution legislation does not, therefore, prevent the Government from triggering Article 50 using the prerogative or require new primary legislation. Use of the prerogative would not alter the essential structure, architecture or permanence of the devolution settlements.
- As to the Sewel Convention (the convention that the Westminster Parliament will not normally legislate with regard to devolved matters without the consent of the relevant devolved legislature):
- The Convention is only relevant when there is a Bill before the Westminster Parliament. It does not arise in relation to use of the prerogative, which is the question before the Supreme Court in the current case.
- In any event, the Convention is subject to a clear internal exception (the Westminster Parliament will not "normally" legislate). Whether circumstances are "normal" is a matter for the Westminster Parliament and not the Court.
- The Convention is not legally enforceable; it is a political convention. That is not altered by a provision of the Scotland Act 1998 referring to the Convention.
- The Convention would not apply here in any event because any legislation authorising Article 50 to be triggered would not be "with regard to devolved matters". Any dispute about the scope of the Convention is not a matter for the Court – it is ultimately for the Westminster Parliament.
- A political convention, which contains an internal exception and does not purport to be a rule, cannot be a constitutional "requirement" as the Lord Advocate suggests.

The UK Government has also published [Supreme Court Printed Case of the Secretary of State for Exiting the European Union and the Secretary of State for Northern Ireland](#). This document outlines the UK Government's response to the challenges made in Northern Ireland with regards to the compatibility of Brexit with the Good Friday Agreement and the need for the Northern Ireland Assembly to give legislative consent to the triggering of Article 50. The UK Government's [case](#) is that:

- For the same reasons as are set out in the Government's main printed case, there is nothing in the Northern Ireland Act 1998 or the Belfast Agreement which requires an Act of Parliament before the Government can trigger Article 50, or which restricts how the Government may exercise that power. Foreign affairs and international relations are not devolved matters.
- As to the Sewel Convention (the convention that the Westminster Parliament will not normally legislate with regard to devolved matters in Northern Ireland without the consent of the Northern Ireland Assembly), this issue has been addressed in full in the Government's separate printed case on devolution issues. This point is, at present, moot.
- The statutory duty under section 75 of the Northern Ireland Act 1998 to have regard to equality considerations is not engaged. Triggering Article 50 is not a function that relates to Northern Ireland within the meaning of that section, and the duty does not, in any event apply to the Secretary of State.
- Neither the Northern Ireland Act 1998 nor the Belfast Agreement require the consent of the people of Northern Ireland before article 50 can be triggered. Under the Belfast Agreement, there may not be a united Ireland without the consent of the people of Northern Ireland, but that does not mean that their consent is required for any change in the constitutional arrangements for Northern Ireland and in particular any change in the United Kingdom's relationship with the European Union.

By way of further background, as noted in previous Brexit Weekly Updates, on 9 November, the UK Government published its [grounds for appeal](#). Following this, on 18 November, the Department for Exiting the European Union published the [Supreme Court Printed Case of the Secretary of State for Exiting the European Union](#). The 56 page case outlined in details the UK Government's key arguments that Article 50 can be triggered without the consent of the UK Parliament. One aspect of the Government's argument is:

"The surprising consequence of the DC judgment is that, if the outcome of the referendum is to be implemented, Parliament must decide to confer a new legal power on the Government to make that decision pursuant to Article 50(1) TEU and to give notification of that decision pursuant to Article 50 (2) TEU. In other words, if the UK is to withdraw from the EU, Parliament must be asked precisely the same question which was put by Parliament to the electorate and has been answered in the referendum; and must give the same answer in legislative form."

Ahead of the hearing at the Supreme Court, Professor Sionaidh Douglas –Scott from the Queen Mary University of London writing for the Oxford Human Rights hub examined the [Scottish perspective](#) of the Article 50 case. She concludes that whilst Scotland might not be able to block Brexit, the Supreme Court hearing may have constitutional implications for the UK:

"Therefore, even if it is not correct to say that Scotland could 'block Brexit', the Scottish arguments in Miller will be challenging, and the Supreme Court may have to determine the issue of legislative consent. Of course, the Court may heed the term 'normally' in the Convention and declare Westminster's sovereign power to legislate on any matter. In such circumstances, deprived of any meaningful engagement in Article 50 negotiations, and faced with legislative amendments in the absence of legislative consent, devolved governments might lack legal options. This, however, would renew debates about the nature of the union and

could trigger a second Scottish Independence Referendum. In this way, the UK's exit from the EU could lead to the break up of another union – that of the United Kingdom itself.”

EU citizens in the UK

On 29 November 2016, UK newspapers reported that during her visit to Berlin (on 18 November), the Prime Minister had sought to agree with the German Chancellor, Angela Merkel that EU citizens in the UK and UK citizens in other member states would keep their EU acquired rights in full following Brexit. According to [Politico](#):

“British officials had hoped to create some goodwill ahead of exit negotiations, expected to start next year once May triggers the EU's Article 50 divorce clause, by taking the issue of citizens already living in each other's countries off the table. The issue affects some 1.2 million Britons and their families resident in the other 27 EU countries, and as many as 3.3 million EU citizens resident in the U.K., including almost one million Poles.”

According to the [reports](#), the German Chancellor rebuffed the plan insisting negotiations would only begin once Article 50 had been triggered.

Speaking at Prime Minister's Questions on 30 November 2016, the Prime Minister addressed the situation of EU citizens in the UK suggesting that their status would be addressed alongside the status of UK nationals living in other EU member states, the Prime Minister also expressed her wish that the issue could be addressed at an early stage in the negotiations. [Theresa May](#) told the House of Commons:

“I can assure my right hon. Friend that, as I said earlier, I would hope this is an issue we can look at at an early stage in the negotiations, and off course there will be two years of negotiations. I think it is right that we want to give reassurance to British citizens living in the EU and to EU citizens living here in the UK, but I think the reaction that we have seen shows why it was absolutely right for us not to do what the Labour party wanted us to do, which was simply to give away the guarantee for rights of EU citizens here in the UK. As we have seen, that would have left UK citizens in Europe high and dry.”

UK Government Commitments at the World Trade Organisation

On 5 December 2016, Liam Fox, the UK Government's Secretary of State for International Trade made a [written statement](#) to the UK Parliament in which he confirmed that the UK Government would issue new UK schedules for its membership of the World Trade Organisation (WTO) which would closely mirror the current schedules it shares with EU member state colleagues. The statement said:

“The United Kingdom is a founding member of the World Trade Organization (WTO). In addition to the general obligations of membership, all WTO members undertake specific commitments in their goods and services schedules: WTO members' goods schedules set out upper limits for tariffs and detail any tariff rate quotas, and WTO members' services schedules set out commitments and

reservations across all sectors and list specific sectoral commitments and reservations.

The UK's WTO commitments currently form part of the European Union's schedules. When we leave the EU we will need UK-specific schedules. In order to minimise disruption to global trade as we leave the EU, over the coming period the Government will prepare the necessary draft schedules which replicate as far as possible our current obligations. The Government will undertake this process in dialogue with the WTO membership. This work is a necessary part of our leaving the EU. It does not prejudge the outcome of the eventual UK-EU trading arrangements."

More details on WTO membership are available in the SPICe Briefing [Options for the United Kingdom's future trading relationship with the European Union](#)

Ruth Davidson addresses the Institute of Directors

On 5 December, the Leader of the Opposition in the Scottish Parliament, Ruth Davidson delivered the Rhondda lecture at the Institute of Directors. In her speech, she [warned against a divisive Brexit](#).

According to the BBC, Ruth Davidson told her audience:

"Our decision to leave the European Union hasn't determined which path we'll take. That's a decision we'll make as a nation and one indicator is how we carry ourselves as we proceed in the months ahead.

"To ensure we choose the path of openness and engagement, above all, I believe we must do all we can to avoid an unnecessarily divisive Brexit.

"That starts with coming back together and healing the divisions here at home that the referendum campaign has caused..."

...So I'd like to make a plea. Remainers need to accept that Leavers are not racist for having concerns about the EU and our system of immigration.

"And - for Leavers -it's time to follow the lead of people like Dan Hannan who point out that the views of the 48% of people across the UK who backed Remain must be heard.

"Voicing concerns about Brexit isn't "remoaning"; there are genuine issues that need to be discussed. This process of listening is utterly vital."

Scottish Parliament Committees consideration of Brexit

The Scottish Parliament's Culture, Tourism, Europe and External Relations Committee continued its inquiry into [the implications of the EU referendum for Scotland](#) on 1 December when it [took evidence](#) from Keith Brown, the Cabinet Secretary for Economy, Jobs and Fair Work.

The Cabinet Secretary told the Committee:

“The Scottish Government is clear that Scotland’s relationship with the EU and its place in the single market must be protected. Our aim is to get the best deal for Scotland in circumstances that are not of our choosing. Retaining membership of the single market for Scotland to protect our trading relationship with the EU and the rest of the world is extremely important. Any relationship that falls short of that risks increasing barriers to trade, reducing exports and lowering migration, all of which will affect growth rates and reduce productivity. That is not a risk that we are prepared to take.”

On the difference between membership of the single market and access to the single market, the Cabinet secretary said:

“Membership of the single market gives us the position, which I outlined in my statement, of not having barriers to trade, whether they are tariffs or other regulatory barriers. It is true to say, as others have, that virtually anybody can have access to the single market; it is a question of the terms on which they have that access. There is nobody—not even the members of the European Economic Area or the European Free Trade Association—who has access to the single market on the same terms as countries that are members of the single market. It really is about the absence of obstacles to trade.”

In response to further questioning on the issue, Keith Brown set out more detail:

“As I have said, we believe that having membership of the customs union and full membership of the single market is the optimum position and anything that moves us away from that will be to the detriment of the Scottish economy and the UK economy.

It might be an obvious point, but it is important to say that, when people voted on 23 June, even those who voted to leave the EU did not necessarily vote for leaving either the customs union or the single market. It now seems to have become a shorthand for some people that the vote means leaving the single market. It was in the minds of many people—I appreciate that—but some people were explicitly saying that they did not want that when they voted to leave.

That is the optimum position just now, and we want to maintain that optimum position.”

On the impact of leaving the EU in terms of tariffs, the Cabinet Secretary told the Committee:

“A [Scottish Government paper in August](#), which was based on recent studies, summarised the impact that leaving the EU could have on Scotland. The analysis indicates that, if WTO trading relationships are the result, Scottish gross domestic product could be up to £11.2 billion lower by 2030 compared to the forecast GDP in the absence of Brexit. We also applied an analysis by the Treasury on the impact of UK tax revenues on Scotland, which suggested that our tax revenues could reduce by between £1.7 billion and £3.7 billion a year by 2030.”

The Committee also [took evidence](#) from Ian Duncan MEP. Specifically on Brexit and the upcoming negotiations, Mr Duncan told the Committee:

“I would argue that the best possible way to go into negotiations is with the have-your-cake-and-eat-it approach. Going in with anything less than the biggest thing you want to have would be a very weak way of beginning a negotiation. That is exactly what the EU is doing now as it begins to examine those elements. For example, there is rightly much in the news on the question of EU citizens’ residence rights within the UK. There is a very strong move to have those rights recognised and taken out of the negotiations. That would be a good thing to have done. However, as the committee will be aware, Chancellor Merkel said a few days ago that it was now to be part of the negotiations.

We cannot expect anything other than a hard negotiation from both sides at the beginning. We should not be in any doubt that both sides will have to negotiate from the hardest possible position. If we are to find a compromise that is good for the EU and good for the UK, we will need to find that common sweet ground in the middle. That is what we are looking for: the sweetest cake possible.”

When pushed further on the negotiations, Mr Duncan told the Committee:

“In some respects, taking our time has been helpful for both sides. I do not believe that the EU was any better prepared for this unexpected convulsion than we were in the UK. Right now the member states too are developing what I believe are very challenging talks, intra 27, and that in itself will be the measure of what comes out.

There are elements in which we hope that common sense will play a part. I thought that the residence question would be one of those. I thought that, with the movement on the British side, there would be a compensatory movement on the European side, but common sense is not being applied there and that disappoints me.”

On the possibility of a differentiated deal for the UK where the different nations get different outcomes, Ian Duncan suggested this was unlikely:

“There was a lot of regret, particularly about the Scots because, for some reason, Scots are just liked more than some other individuals—make of that what you will. However, the reality is that you cannot back regret—that is the bottom line. Much as there was sympathy among a number of member states and their representatives, the negotiation process will be undertaken on the basis not of sympathy but of fighting for national self-interest. That is why I am very keen for each of the home nations in the United Kingdom to link arms to get the strongest possible deal, because it is in the interests of the other side to encourage division and create some sort of gap between Cardiff and London or Edinburgh and London...

...We need to be united—that is the first statement, and a given—and we must also recognise that it is no longer in the EU’s interests to be our friend. Sympathetic though member states may well be, that will cut no mustard out here.”

The Economy, Jobs and Fair Work Committee meanwhile concluded taking evidence for its [Economic Impact of Leaving the European Union inquiry](#) on 29 November. The Committee [took evidence](#) from the Cabinet Secretary for Economy, Jobs and Fair Work and the Minister for UK Negotiations on Scotland's Place in Europe. Michael Russell MSP provided the Committee with an update on the stage of negotiations with regards to Brexit:

“Over the next few weeks, the Scottish Government will publish a paper that will outline the existing options. From the debate that has taken place, it has been clear that they lie broadly in three areas.

At one end there is the undifferentiated option of Scotland leaving the EU in exactly the same way as the UK intends to leave. That is not entirely clear. I suspect that the clearest definition we have of it is from the scribbled notes visible in photographs on the front of today's newspapers. I have to say that those notes accord pretty closely with the information that I have been able to glean—we are not told things as clearly—over the past few months. This is a difficult time, in which the options in the UK are narrowing but the UK Government does not seem prepared to say so. However, I think that it is fairly clear that we are heading for what might be called a hard Brexit in that undifferentiated option.

Clearly, at the other end of the spectrum is the possibility that we will not be able to find any other adequate solution but to move forward with an independence referendum and to give the people of Scotland the choice.

In the middle, there is a range of differentiated options. The success of those will depend upon the willingness of the UK Government to include them in its negotiating position. Quite clearly, it is the UK Government that will negotiate with the other 27 nations. A lot of our work at present is fleshing out, examining, investigating and building evidence on those differentiated solutions. I will not go into great detail on those at the moment, because that is work that is on-going for the paper, but the First Minister has indicated areas in which, clearly, there are possibilities.

The EU has almost 30 arrangements with a variety of sub-states throughout Europe and elsewhere. Some of those include, for example, membership of the European Economic Area, although there is now some dispute as to whether or not the UK will exit EEA membership automatically. Of the options—membership of the EEA; membership of the European Free Trade Association; and membership of the customs union but without access to the single market—none is as good as remaining within the EU, and that is a very important piece of information.

We should look at the options in a hierarchy. The top of the hierarchy says that we should stay where we are, because that is the best possible arrangement that we could have.

The second level of the hierarchy says, quite clearly, that what the UK should do is to remain within the EEA and thus have full access to the single market, although not with the decision-making powers that it presently has.

The third level of the hierarchy says that, if we cannot do that, Scotland should find a way to remain within that sort of structure in order to move forward. The priority is to remain in the single market, for economic reasons but also for many other reasons. Although it is an economic driver in many key parts of the Scottish economy, free movement of labour is not simply an economic driver. Free movement of labour also expresses something about how we see ourselves, how we see our relationships with others and how we want our society to look and feel.

We are working on those differentiated options. If you will bear with us and have the patience to wait a few more weeks, they will be even clearer and we will lay them out in much more detail. Then, of course, the Scottish Parliament will have to look at them closely, as indeed will the people of Scotland, who will have to decide what they can have.”

When asked whether a “special deal” for Scotland was impossible as suggested by the former Irish Prime Minister John Bruton, Mr Russell told the Committee:

“The difficulty with John Bruton’s point, and with other points on that matter, is that it deals with a past view of what the EU does and how it operates, and not with the present realities. There has never been a withdrawal from the EU—with the exception of Greenland, which was in a very different set of circumstances.

In the current circumstances, nothing is off the table—that is absolutely clear, because the table has not yet been set. The UK has not defined its negotiating position and will do so only, to a greater or lesser extent, in the article 50 letter, which is likely to be at the end of March, although we are still not entirely sure.

I would say that John Bruton is probably correct given a retrospective look but not correct given a prospective look, because the type of Europe that we are entering, how it is organised and the relationships in it are entirely new and different.

There is another agenda that it is important for us to understand. Brexit is not the only thing that is happening in the European Union. Many other things are happening to its shape and dynamics, so we cannot say with any confidence or certainty what is or is not possible. I said in response to Mr Leonard—it is a point that needs to be made—that there are a lot of big difficulties ahead. Nothing that we are talking about here is simple or easy, but I do not think that we should use the term “impossible” in these circumstances, just as we should not use the terms “red line” or “non-negotiable”, because in a sense everything is up for grabs.”

Scottish Parliament debate on Culture, the Creative Industries and Tourism

On 29 November, the Scottish Parliament [debated](#) Culture, Creative Industries and Tourism (European Union Referendum). Following the debate, the Parliament passed the following motion by 84 votes to 29:

That the Parliament believes that the interests of Scotland’s culture, creative and tourism sectors are best served by protecting the country’s existing relationship with Europe, and in particular maintaining freedom of movement and access to EU funding and collaboration mechanisms; believes that, with the approach of the

70th anniversary of the Edinburgh International Festival in 2017, it is more important than ever to promote the inclusive and outward-looking character of Scotland's culture and its welcome to the world; recognises the potentially severe negative impact that any hard Brexit proposed by the UK Government could have on the sectors' ability to compete in terms of cultural exports, staffing, skills and talent recruitment and retention, research and knowledge exchange, ability to influence key cultural policy, such as copyright law, and access to key EU markets; acknowledges the importance of EU-funded projects to the culture, creative industries and tourism sectors for networking and developing partnerships, including over €11.5 million of Creative Europe grants to projects involving Scottish partners since 2014, and supports the Scottish Government's position that the UK Government needs to find ways to maintain its influence as proposals develop for the digital single market.

SPICe Briefing on Brexit and the environment

On 5 December, the latest SPICe Briefing in relation to Brexit was published. The briefing on [Implications of Leaving the EU – Environment](#) highlights the EU framework that relates to environment policy and explores the implications that leaving the EU may have on Scotland's approaches to the environment.

The briefing also sets out some views on how alternatives to EU membership may impact on Scotland's approaches to environmental protection and some of the challenges associated with untangling EU, UK and Scottish environmental law.

Clarity needed for EU students studying in Scotland

During a visit to Queen Margaret University in Edinburgh, the Scottish Government's Minister for UK Negotiations on Scotland's Place in Europe Michael Russell called for more clarity for EU students studying in Scotland. According to the Scottish Government's [news release](#):

“Mr Russell said higher education institutions have thrived as a result of the contribution made by EU and non-EU nationals undertaking courses and carrying out research in Scotland.

He said the UK Government must not be allowed to undermine Scotland's world-class university sector and should listen to academic leaders who are sounding the alarm over the damaging rhetoric and policy on overseas students and immigration.”

On the issue of EU students studying in Scotland, the Minister said:

“The Scottish Government has taken action to guarantee the fee status of all current EU students and those beginning an undergraduate course in 2017. These students will pay no tuition fees.

“Understandably, EU students require the reassurance from the UK Government that the immigration status and rights of EU nationals living in Scotland will not change after Brexit.

“However, the continued refusal by the UK Government to give these assurances is deeply concerning.

“The Scottish Government will do everything we can to protect Scotland’s place in Europe, retain free movement of people and stay in the single market.”

Liam Fox speech at the World Trade Organisation

On 1 December, the Secretary of State for International Trade spoke to trade envoys at the World Trade Organisation in Geneva. Liam Fox [told his audience](#):

“The UK may have voted to leave the European Union, but we are not withdrawing from the world.

International trade is the lifeblood of the British economy, the driver of our prosperity. Commerce is part of our national DNA.

Inside the EU, the UK is one of the Union’s strongest advocates for free trade, unwavering in our support for the Union’s trade agreements.

Outside the EU, we will continue to champion this cause.

Britain will be one of the strongest voices worldwide for free and open trade...

... As the UK leaves the EU we must ensure that our watchwords are continuity and consistency, and every effort will be made to minimise disruption to the trading relationships that have served us and our partners so well, ensuring that our free and open commercial relationships continue to drive our mutual prosperity.

We pledge to work closely and cooperatively with the EU and all our WTO partners to ensure a smooth transition.

The era of globalisation is also one of economic co-operation.

The UK has, for example, long been supportive of further trade liberalisation, including in services. We hope that all free trade negotiations currently in motion – but stalled - will resume soon and we look forward to a positive outcome.

Britain is open for business as never before. It is our ambition to be the beating heart of global trade; the world’s natural business partner.”

The UK Parliament’s response to the decision to leave the European Union

On Wednesday 7 December, the Official Opposition has decided to use its debating time to debate the Government’s plan for Brexit. The proposed motion [states](#):

“That this House recognises that leaving the EU is the defining issue facing the UK; notes the resolution on parliamentary scrutiny of the UK leaving the EU agreed by the House on 12 October 2016; recognises that it is Parliament’s

responsibility to properly scrutinise the Government while respecting the decision of the British people to leave the European Union; confirms that there should be no disclosure of material that could be reasonably judged to damage the UK in any negotiations to depart from the European Union after Article 50 has been triggered; and calls on the Prime Minister to commit to publishing the Government's plan for leaving the EU before Article 50 is invoked."

The House of Commons Exiting the EU Committee will continue its inquiry into the [UK's negotiating objectives for withdrawal from EU](#) on 7 December when it hears from Carolyn Fairbairn, Director-general of the Confederation of British Industry, Frances O'Grady, General Secretary of the British Trades Union Congress and John Longworth formerly director general of the British Chambers of Commerce (BCC). The aim of the evidence session will be

The House of Lords has [published a summary](#) of the European Union Committee and its six sub-committees on-going work in relation to Brexit.

Article 127 of the EEA Agreement

Last week's update provided details of a potential [legal challenge](#) to ensure that the UK stays within the European Economic Area (EEA) as leaving the EU would not automatically mean leaving the EEA.

Writing on the [EU Law Analysis](#) blog, Professor Steve Peers examines this proposal in more detail and questions whether upon leaving the EU, the UK would automatically also leave the EEA:

"So does the UK implicitly lose EEA membership if it leaves the EU? The answer isn't clear, because the drafters of the EEA treaty never considered this possibility. On the one hand, the presence of an explicit clause on leaving presumes that states cannot implicitly cease to be EEA members. On the other hand, the substantive provisions and the clauses on territorial scope imply that leaving the EU is incompatible with being part of the EEA – unless the country concerned joins EFTA. That raises the question of how this would work: arguably there would be a 'fundamental change of circumstances' under Article 62 of the Vienna Convention on the Law of Treaties. (Note that the latter clause can't be used as a quick route to leave the EU, since it only applies where a change was 'not foreseen' by the parties; but the prospect of a state deciding to leave the EU clearly was foreseen by the parties to the EU Treaties, since Article 50 TEU refers to it). Or the other parties to the EEA could argue that the UK had committed a 'material breach' of the EEA by ceasing to be an EU Member State (if the UK does not join EFTA), and terminating application to the UK under Article 60 of the Vienna Convention."

On the question of what domestic arrangements the UK Government might have to respect to ensure departure from the EEA, Peers states:

"If the government is legally obliged (as a matter of international law) to give notice of leaving the EEA separately from the Brexit process, then the case is arguably analogous with the Miller case recently decided by the High Court, and now on appeal to the UK Supreme Court. That case raises the question of whether the

UK government's royal prerogative extends to the termination of the UK's EU membership, or whether Parliament must approve such use of the prerogative because leaving the EU would terminate rights conferred by an Act of Parliament. Since EEA membership is referred to in the European Communities Act, and extends many (though not all) of the same rights conferred by the EU Treaties, the answer to this question which the Supreme Court ultimately gives in the Miller judgment should logically apply by analogy to the EEA.

Therefore, in this scenario, if Parliament is obliged to approve withdrawal from the EU, it is also obliged to approve withdrawal from the EEA. And since EEA membership was not on the referendum ballot paper, the force of the political argument that Parliament ought to follow the view of the majority of those voting that the UK should leave the EU is not as strong. There will undoubtedly be a political argument that the referendum vote should apply by analogy – since to some extent the issues raised often by the Leave side as regards EU membership (migration of EU citizens, contribution to the EU, control over law-making) apply also to the EEA. But, as noted already, there are possible counter-arguments: the free movement safeguard clause in the EEA, the different nature of budget contributions, and the more limited scope of the EEA compared to EU law. Participation in the EEA could also, as some Leavers have suggested, be limited in time: an interim status pending negotiation of a longer-term framework for UK/EU relations.

On the other hand, if there is no distinct legal obligation to notify departure from the EEA, because its application to the UK will necessarily cease when the UK leaves the EU, then any Parliamentary vote to approve invoking Article 50 should logically encompass also the end of EEA membership, and the legal challenge relating to the EEA may find it harder to succeed. Or if the UK government succeeds in its appeal in Miller, it would be hard to convince a court that leaving the EEA raises distinct questions from leaving the EU.”

“Remain means Remain”

Writing for the [London School of Economics blog](#) , Andrew Scott Crines, a lecturer in British Politics at the University of Liverpool has suggested that whilst Brexit means Brexit for England and Wales, the opposite is true for Scotland and Northern Ireland.

Andrew Scott Crines suggests that when the Prime Minister stated that there would be one UK wide approach to Brexit she risked political consequences as a result. According to Crines:

“In the case of Scotland such consequences are well advertised. First Minister Nicola Sturgeon wants to at least keep Scotland in the single market and, really, her ultimate goal is to stay in the EU. The Scottish people voted to remain, which Sturgeon is interpreting as a solid mandate to oppose moves in London to take Scotland out. Similarly, Northern Ireland voted to remain. The deputy first minister, Martin McGuinness, warned of dire consequences if it is also taken out of the EU, both economically and constitutionally. Only Wales and England voted to leave, which was enough to deliver a Brexit vote.”

The writer acknowledges that as Westminster is sovereign, “there is no legal recourse for the devolved institutions to stand up to the UK government in the manner that they are doing but they do equally have a mandate to speak up for Scotland and Northern Ireland”.

Given the suggested political consequences, Andrew Scott Crines suggests a number of ways in which the Prime Minister can demonstrate that she is listening to those who voted remain:

“She can first acknowledge that the referendum result was a slim victory for Leave. It is not a huge endorsement for a hard Brexit. Indeed, it is a slim endorsement for something which no one appears to understand. By acknowledging the slimness of the vote it will give her room to manoeuvre which she desperately needs.

May also needs to acknowledge that for Scotland and Northern Ireland “remain means remain”. They want to remain a member of the European Union and the single market. Regardless of it being a United Kingdom vote, it would be constitutionally and politically bold to ignore that. Should May attempt to do so, it is highly probable that a second independence referendum in Scotland could occur. Whatever the result of that, the symbolism would be very negative.”

Brexit and Intergovernmental Relations

Professor Nicola McEwen writing on the [Centre on Constitutional Change blog](#) discusses the likely dynamics of Brexit negotiations between the UK’s four governments. She argues that if the intergovernmental process fails to give a meaningful voice to the devolved governments this could have serious and long-lasting repercussions for territorial politics across the UK.

Professor McEwen cites the development of the Joint Ministerial Committee on European negotiations as being a success for the devolved administrations:

“The devolved governments have already exerted some influence in shaping the new Joint Ministerial Committee (European Negotiations). Chaired by the Secretary of State for Exiting the European Union, it was established in November to provide a forum for the devolved governments to engage with the negotiations process. Its remit is much more specific and task oriented than the other JMCs. It will ‘seek to agree a UK approach to, and objectives for, Article 50 negotiations’ and provide oversight of negotiations as they get underway ‘to ensure, as far as possible, that outcomes agreed by all four governments are secured’. If David Davis didn’t appreciate that this meant rather more than information-sharing, he would have been left in no doubt after the JMC (EN)’s first meeting.”

Through the JMC(EN) the devolved administrations are determined to exert influence on the UK Government’s Brexit negotiations, according to Professor McEwen:

“The devolved governments are united in their determination to have a voice, and to exert influence over the Brexit negotiations before and after Article 50 is triggered. They are also united in their desire to see a ‘soft’ Brexit which embeds the UK within the EU single market, and in their desire to ensure that the repatriation of powers from Brussels doesn’t lead to a recentralisation of powers

within the UK. Beyond this, however, they approach these negotiations from different perspectives.”

Professor McEwen concludes that with Scotland, Northern Ireland and Wales all having different interests and aims to be sought from the negotiations this leaves the UK Government in a difficult position which could have both political and constitutional consequences:

“These distinctive and potentially competing interests are being pursued in a series of bilateral negotiations between the UK government and each of the devolved governments. The prospect of all of the devolved governments being satisfied at the end of the process is minimal. The prospect of any of them being satisfied may not be much better. That the remit of the JMC (EN) requires only that the governments ‘seek to agree’ a UK approach leaves some wiggle room for the UK government if agreement proves impossible.

But the threat of a second Scottish independence referendum looms large over these processes. The risks to stability and the peace process in Northern Ireland are also uppermost in the minds of negotiators. If this intergovernmental process fails, it could have serious and long-lasting repercussions for politics and relationships on these islands.”

Non-British views of Brexit

Writing for [UK in a Changing Europe](#), Dr Tim Oliver, a Dahrendorf Fellow at the London School of Economics and a Visiting Scholar at New York University has set out some thoughts on Brexit in his blog piece [Understanding non-British views of Brexit](#).

Dr Oliver suggests eight different things to consider and look out for in relation to Brexit and the EU-UK negotiations:

- Don't think the European Union is united
- Don't focus on the big players or only Germany
- Brexit is not just about relations with Britain, it is about the future of the EU
- Don't overlook the EU institutions
- Don't forget non-EU Europe
- Europe's three hegemony will shape the context of Brexit
- Avoid trying to understand Brexit without a theoretical framework
- Don't assume all will turn out well for the rEU

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