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1. Overview: UK Politics Adrift over Brexit

Kirsty Hughes

The Brexit process is moving forward. March saw the publication of the draft withdrawal agreement with substantial areas of agreement but also many tricky areas yet to solve, not least the Irish border and governance of the whole agreement. March also saw a provisional deal done on a transition period to the end of December 2020. And the EU27 finally issued their guidelines for the future relationship covering trade and security.

But the furore in the UK at the Commission’s draft protocol on Northern Ireland which, as a backstop, would keep Northern Ireland in the EU’s customs union and the single market for goods (as Katy Hayward describes), shows how challenging the issues that lie ahead are. The EU has set a goal of agreeing the protocol by its June summit – that will be tough.

Talks are now, finally, moving ahead onto the future relationship – not least trade. The EU guidelines take the UK’s red lines as their basis and so describe a comprehensive free trade agreement as the goal rather than anything more integrated (as Anton Muscatelli outlines). This, as business knows, will be very damaging – outside the single market and customs union, there will be a hard UK-EU border, one that will not allow frictionless trade and supply chains, and one that will hit services especially hard. Lower growth and less UK-EU trade beckons. And in any Brexit model, the UK will have lost its vote and influence over EU laws and regulations, and so be a rule-taker.

But even a comprehensive free trade agreement, from the EU’s point of view, depends on the UK committing to a level-playing field and not heading down a path of deregulation. As Annalisa Savaresi argues, both the potential for deregulation and the challenge of establishing a robust, independent regulatory framework in environmental policy are not to be underestimated – and there are substantial issues to be resolved over devolved powers (ones that could open up the possibility of Scotland having higher environmental standards in some areas than the rest of the UK).

The CBI has called both for the UK to stay in a customs union with the EU and to maintain close regulatory alignment – without quite coming out for staying in the EU’s single market. A House of Commons vote is also due, on an amendment to the trade bill, on whether to stay in the customs union. Such a move would not mean frictionless borders, outside the single market, but it would help. The fact that many business groups and MPs want, in effect, to be as close as possible to the EU membership we have now, but without the voice and vote we have now, would in normal times lead to a major political debate as to why Brexit is going ahead. But in these days of political fearfulness, that question is left to civil society and social media debates and a very small number of politicians.

Yet politically, if the customs union amendment passes, it could be explosive: ‘global Britain’ negotiating its own free trade deals round the world would no longer be possible (at least not for goods). Theresa May would find it almost impossible to get that past the Brexeters in her cabinet. Some argue that May could end up patching together an ‘almost customs union’ – and the EU has form in relabelling where helpful – but the Conservative politics of this look challenging.
Many of those new trade deals will anyway have to take third place behind the UK firstly negotiating its future EU-UK deal (only an outline framework of that is due for this autumn) and, secondly, renegotiating or negotiating the rolling over of the EU’s existing trade deals with over 60 countries (and many more other EU international treaties).

The UK will also be hard-pressed to agree any new EU-UK trade deal by the end of 2020. It's most likely that transition will have to be extended – and the UK will have to pay for that, as Danuta Hübner makes clear. But for that to happen, the possibility of extension needs to be in the withdrawal agreement. As of now, it isn't – though as the EU and UK negotiate down to the wire this autumn, it may go in (in return for what concessions from the UK remains to be seen). But, as Fabian Zuleeg argues, transition is not at all a done deal yet: the backstop deal of keeping Northern Ireland in the single market and customs union must be in the deal for the whole withdrawal agreement to go through, he emphasises.

As the process unfolds, the UK – and particularly England – has remained deeply divided over the question of proceeding with Brexit. Support for ‘Remain’ has moved a little ahead in the polls over the last several months, but not strongly enough for many passive and fearful politicians to come out and argue to halt Brexit or to hold a further EU referendum.

For now, the Lib Dems (and English and Welsh Greens) are the only ones supporting such a referendum on the autumn deal – although a number of polls now suggest such a vote would find favour amongst a majority of the public (some other polls contradict this – but find the majority against a further referendum shrinking). In Scotland, Nicola Sturgeon has declared such a referendum is ‘almost irresistible’ but has nonetheless not supported it, cautious of her ‘Yes/Leave’ supporters – as Iain Macwhirter argues. That caution too, he suggests, makes an early independence referendum also very unlikely.

Labour’s acceptance of Brexit has led to weak opposition to the slow, shambolic and damaging Brexit process, with Jeremy Corbyn mostly preferring to lead on domestic issues at Prime Minister’s questions each week. Labour has now come out in support of staying in a customs union with the EU, but, while it doesn't support staying in the EU’s single market, it is not in a strong position to challenge Theresa May and her government over the economic damage a free trade deal will do. Consequently, the 48% who voted Remain (or the 52% who now support Remain in several polls) have little political voice or representation as the UK heads towards a major and damaging political, constitutional, economic and institutional upheaval that has little precedent.

This is true even in the two parts of the UK that voted Remain – Scotland and Northern Ireland. In Scotland, the Scottish government declares it would prefer the UK to stay in the EU, but focuses its political attention on pushing for a ‘soft’ Brexit of the UK staying in the EU’s customs union and single market (putting to one side the major democratic deficit that would entail). Northern Ireland lacks both an executive and any overarching Brexit policy – with the increased influence of the DUP, propping up the UK government, adding to the lack of proper and balanced representation of Northern Ireland's views in the Brexit process.

Overall, the Scottish government – in its fight, together with the Welsh government, to avoid an undermining of the devolution settlement and a ‘power grab’ by Westminster in devolved areas – has in many ways played the role more of a devolved government
Brexit Roundup: Where Are We Heading?

(that it is) than one concerned with moving Scotland towards independence in the EU. But there have been many stand-offs with the UK government, as Anthony Salamone outlines – in particular through the ‘continuity’ bill but also through the push for a ‘soft’ Brexit. But the UK government has been reluctant to give the devolved administrations any serious role or influence in the Brexit talks – and is struggling anyway to maintain an agreed, sustainable position within the May cabinet.

Under Ruth Davidson, the Scottish Conservatives have found it challenging too to come to terms with the UK heading for the exit door, having backed Remain. But their stronger performance in the 2017 election and their focus on opposing any SNP move to a further independence referendum have helped them, argues David Torrance. Whether that will continue to be the case if the UK heads for a damaging or chaotic hard Brexit though is an open question.

The loss of free movement will be economically damaging across the UK and presents particular challenges to Scotland. As Sarah Kyambi argues, Scotland would benefit from having a differentiated migration policy compared to the rest of the UK. But with the UK’s future migration policy still unclear, though looking restrictive, and Theresa May reluctant to concede any differentiation, especially to Scotland, this looks unlikely.

There has been progress, in the withdrawal agreement, on establishing ‘settled status’ for EU citizens in the UK post-Brexit, as Niamh Nic Shuibhne sets out, and for UK citizens in the EU. But there is, as she argues, a major disconnect between the principles of EU citizenship and of free movement, and the UK moving to a new migration policy as a third country. What will happen, for instance, to the ability of UK citizens already living in the EU to travel freely across the EU remains uncertain.

More broadly, Brexit will affect human rights across the UK, argues Nicole Busby – and whether and how fundamental rights are protected, and whether they will be as well protected as now, after the transition period remains unclear. In this context, the extent of discretionary powers that ministers are awarding themselves is of substantial concern.

And while many have seen negotiating the security and foreign policy dimensions of the future UK-EU relationship as the easier task (compared to trade), many tough issues come into play here, including human rights, data protection regimes, and other issues of standards and information-sharing. Although the UK found some support recently in its stand-off with Russia, it won’t be in the room in future at EU summits or at Council of Ministers discussions to push its own concerns. Whatever consultation mechanisms are set up will not replace the intense partnership of EU membership.

Indeed, as Giles Merritt argues, the EU itself has been distracted by Brexit from some of its own pressing foreign policy challenges – including standing up to the US, China and Russia where needed. But, he argues, Brexit may help as a wake-up call to the rest of the EU on these big issues (even while the EU27 look on with disbelief as the UK goes ahead with such self-imposed damage). Juha Jokela, taking a Finnish perspective, emphasises too how Brexit is already leading to changing political dynamics amongst the EU27 – with Finland working with a group of northern EU member states (‘Hanseatic League 2.0’) to push their concerns on eurozone reform. Brexit remains a concern for Finland and other EU member states, but it’s one concern amongst many.
The UK could still change its mind – Article 50 could be withdrawn. Assuming that this autumn a withdrawal agreement and an accompanying political declaration on a framework for the future UK-EU relationship are agreed (the latter declaration referenced in the withdrawal agreement), the big political question ahead is whether this will be voted through or not in the House of Commons. And if it isn't, there would then be a major political crisis – perhaps a general election, perhaps a further EU referendum (which given the timing might need EU27 agreement to extend the March 2019 deadline for Brexit, as allowed under Article 50).

How, and whether, public opinion moves in the coming month will be crucial too. But, for now, few politicians are willing to try to lead opinion towards halting Brexit – rather than passively watching to see if it changes. So, most probably, the UK is heading towards the exit door, and towards a free trade agreement and hard Brexit that will be damaging indeed. But there is much yet to agree both at home in the UK and between the UK and EU in the next six to nine months. And the politics of this crucial phase will be vital in determining where the UK ends up.
Part I. Key Issues as Brexit Talks Move On

2. The Next Phase of Brexit Negotiations: The Economic Issues

Anton Muscatelli

Last week the House of Commons Exiting the EU Select Committee published its latest report, on the future of the EU-UK relationship. In it the Committee set out fifteen criteria by which it will judge the outcome of the UK-EU negotiations on the future framework, which need to be concluded as a political declaration by October in order for the withdrawal agreement to be ratified by all parties.

The criteria the Select Committee have set are very ambitious. They include an expectation that trade in goods will be frictionless (‘no additional border or rules of origin checks’), and will not add to the costs to businesses that trade in goods or services. In addition, it set out a desire for UK providers of financial and broadcasting services to be able to sell their products into EU markets as at present. The Committee also makes it clear that if a bespoke ‘deep and special partnership’ is not successful, EFTA/EEA membership should remain an option.

The report’s conclusions were contentious, and broadly speaking divided the Committee between those advocating a softer EEA-type Brexit and those advocating a hard Brexit. If one looks at the forthcoming negotiations, what are the key economic issues? There are two: trade integration and people.

Trade integration with the EU

The first issue is whether a ‘deep and special partnership’ in trade is achievable in terms of the criteria set by the Select Committee. A stand-alone Free Trade Agreement (FTA) on the model of Canada or South Korea would cause real economic damage to the UK’s current trade with the EU, which is largely focused on integrated value chains between the UK and the EU, and UK services exports to the EU, which are only covered in limited ways by FTAs.

Meeting the Select Committee’s criteria (indeed, achieving the Prime Minister’s objectives as set out in her Mansion House speech) would imply a partial integration of
the UK into the European Single Market (ESM). The only examples of this are the deals which the EU has done with Switzerland, Ukraine and the Eastern neighbourhood. But the EU has made it clear that these examples are not ones that would be applicable to the UK.

The Ukraine deal is limited in scope and has been designed with a view to convergence over time with the EU. The bilateral treaties with Switzerland are seen as problematic – at least by some EU27 members and by most officials within the European Commission – because they do not reflect the supranational and dynamic nature of the EFTA/EEA arrangements.

The EU has been pushing Switzerland to move to a new set of institutional arrangements to bring the ‘static’ Swiss treaties closer to the EEA framework, which dynamically adapts to changes in the EU *acquis*. But, following the latest Swiss-EU discussions at the end of 2017, there has been no progress on these matters. This has even led the Swiss president to suggest that Switzerland should *consider a referendum* on its future relationship with the EU.

More recently, the Swiss foreign minister has suggested that Switzerland might be willing to allow its laws to adapt more closely to EU laws (using an independent arbitration panel) in exchange for less friction in market access. This is coming closer to the EU vision (following EFTA/EEA) of an independent surveillance authority and indirect jurisdiction by the ECJ via the EFTA Court.

There is little doubt that the (limited, but significant) elements of mutual recognition in the EU-Swiss treaties come closer to the Canada+ territory which the UK wants to explore in these negotiations. But, as I’ve suggested before, even if the EU were to agree to elements of mutual recognition or equivalence in various sectors/tiers in a future trade partnership, there would be an asymmetry of power, with the potential for continuous conflict, between the UK and the EU. As is currently the case with Switzerland, the EU could end up effectively putting pressure on the UK whenever divergences emerge in tiers/sectors which compromise the integrity of the internal market.

If one looks at the 2017 Canada-EU agreement (CETA) or the 2011 EU-Korea FTA, we see just how limited the scope of these deals tends to be. In the EU-South Korea FTA, the focus of the deal in goods trade was in reducing non-tariff barriers in three main sectors – automotive, electronics, and pharmaceuticals and medical devices. In services, there was a limited relaxation of the right of establishment (mainly in shipping and maritime services, and to a lesser extent in legal services), and relaxation around foreign ownership in sectors like telecommunications.

None of this would approximate even slightly the current access enjoyed by UK business and the financial services industry in the EU. Even with CETA, which is a ‘second-generation’ and much deeper FTA, the provisions for financial services don’t go much beyond what is already in the WTO’s General Agreement for Trade in Services (GATS) under different modes of cross-border trade.

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1 For a list of EU mutual agreements in trade relationships, see [this collection](http://example.com) from the European Commission
Migration regime for EU citizens

The second major economic issue facing the UK is that of the post-Brexit immigration regime for EU citizens. As we know, Scotland’s demography has benefited hugely from the inward mobility of talented skilled EU citizens. The same applies to key sectors at UK level, from financial and business services to the NHS, and to specific parts of the UK economy such as London.

As Jonathan Portes notes in his analysis of the economic impacts of immigration to the UK, the consensus is that EU immigration has had little to no effect on wages of existing UK workers. The evidence of EU immigration on UK productivity is also worth noting. Although the evidence base is not large, there are some studies which suggest that immigration has boosted UK productivity. This boost to productivity happens because of the human capital of immigrants, particularly in the key sectors mentioned above where these skills are scarce and are complementary to those of existing UK residents.

It seems inevitable that, in discussing the future UK-EU framework, the issue of labour mobility will not be front and centre of the negotiations. A standalone FTA like CETA only covers limited mobility for business, rather than immigration. But we know from the EU-Swiss relationship that freedom of movement has been intimately linked to the management of the overall relationship. For instance, the EU temporarily suspended Swiss access to Horizon 2020 programmes following Switzerland’s refusal to sign a treaty protocol which would have extended freedom of movement to Croatia, which acceded to the EU in 2013.

If the UK wants partial integration into the ESM and a Canada++ deal (not to mention association agreements in the European research and innovation area and student mobility), it is almost unimaginable that this will not involve a special relationship in terms of future EU-UK labour mobility. It would require the blurring of a key UK red line, but in economic terms it would be beneficial for the UK to accept this as an area for negotiation.

In summary, the two UK red lines around the role of the ECJ and free movement will both need to be actively in play if the UK is to achieve a ‘deep and special relationship’. What many of us have realised, from the beginning, is that both in economic terms and in terms of the governance of the relationship, the EFTA/EEA model offers many advantages compared to any putative bespoke model. The Commons Select Committee (or at least a majority of its members) may have also, privately, reached the same inevitable conclusion by suggesting that the EFTA/EEA solution should be an option in the negotiations.
There is still a large question hanging over future trade talks after the UK leaves the EU – even with the transition period of 20 months. In this time there may still be no real possibility of concluding substantial trade talks with the EU, our biggest trading partner, until an amazing mountain of details are known and dealt with. The optimism of the UK government that trade will automatically fall to the UK by default, or because market economics dictates it, is to say the least somewhat misplaced. Living in a post-Brexit UK may seem like a dream to some Brexiteers, but, for others, to look at the prognosis for post-Brexit trade is to see the writing on the wall.

According to the Senior European Experts report on UK Trade Policy after Brexit, there are three broad categories of trade arrangements which the UK can undertake to secure future trade deals.

Firstly, an option already dismissed, is the current EU customs union where the existing EU arrangements remain in place. This has already been ruled out by the UK government, as it could further destabilise the government, living with such a slim majority and dependent on every vote to survive. This is the crux of the problem, as to quote the report directly:

‘The UK is a major trading country with the sixth largest economy in the world. It exported over £545 billion of goods and services in 2016. (If it stopped there, then all very well and good, but...)

‘The largest market for the UK is the EU, at 43 per cent of our exports. We also import more from the EU (54 per cent) than from any other market.’

Therefore, every credible predicted scenario post-Brexit sees the volume of UK-EU trade decline significantly, leaving a massive hole to be filled by trade with the rest of the world.

The second approach the report suggests is that the UK could replicate the existing EU free trade agreements (FTAs). Actually the UK would have to recreate all international arrangements, including FTAs, covering different economic sectors which are currently in place – all 750 of them. The problem here is more technical than anything else, as the deals that are currently in place are made up of many parts allowing for a spread of opportunity among many member states. Car manufacturing is a key example, whereby car assembly is made up of a spread of parts from among the member states. Ford, for example, produces cars made up of parts from across many EU countries including engines in the UK. This has been politically driven as well as commercially agreed through tough negotiations. Undoing all of this by conferring tariffs on parts from the UK, for example, could cause car companies to rethink where they produce. This applies particularly to Japanese manufacturers, which are looking to see if deals currently agreed on an EU bilateral basis (e.g. Japan FTA, agreed 2017) will be impacted.
Similarly, geographical indicators (GIs) for agricultural products impact most trade texts which include agriculture. These tend to be names and origins of products such as cheese, meats and wines like champagne, to name but a few. Any new arrangements could force the UK to decouple from these heavily technical arrangements, while at the same time jeopardising a future positive EU deal itself.

A third option the report gives is to forge new free trade agreements (FTAs) – which is where the UK government wishes to go. This means conducting trade negotiations virtually from scratch with third countries. A major problem with this option is related to the size of UK market versus the size of the EU market. Simply put, the EU, with its current population of 500 million and average per capita income of €26,000, makes it the biggest economy in the world. It's where everyone wants to do business and as a result has a large amount of clout. The UK, whilst being the sixth biggest economy, is not the biggest marketplace for the rest of the world. Moreover, the biggest trading partners for the UK are in the EU.

Inevitably, the UK would wish to focus on other large economies. These include the USA, China, Australia, Brazil, Argentina and India. But there are significant problems for potential deals there – not least among them is the UK-US proposed deal. Although this seems to have the support of President Trump, the reality from the rhetoric may be quite different – see the steel tariffs.

Moreover, trade in agriculture promises to be a huge hump to overcome. Standards in the UK are currently EU-compliant and the UK agriculture sector will no doubt face stiff competition from less regulated agri-products such as hormone beef, GMO crops and chlorinated chicken, to name but a few ‘hot potatoes’ dominating trade talks under the precautionary principle.

India too: while it looks on paper a good-sized trading partner, it is 130th out of 169 countries which have the highest levels of difficulty to do business with. Protection of Indian markets has been a consistent problem for EU-Indian negotiations, which have been ongoing since 2007. Moreover, in 2016 India unilaterally denounced 58 bilateral trade and investment treaties, including those with the UK. Indian courts are slow and bureaucratic when it comes to resolving disputes, and concerns over this have unravelled these and previous prospective deals. India is therefore a difficult country to do business with. New Zealand and Australia can also offer new trade relationships, but farmers in the UK are on high alert as to the impact this will have on the domestic industry.
Finally, and perhaps most telling a problem, is simply time and expertise. Trade deals are complex and heavily political arrangements, as well as extremely time-consuming. Delays in progress between biannual trade talks can frustrate even the best of intentions and their conclusions. The army of bureaucrats dealing with trade deals in the European Commission are multilingual legal specialists, number in the hundreds and have decades of experience between them. If they find it hard, how does it seem likely that the UK will master its trade negotiations in just 20 months?

While it is not impossible to conduct successful negotiations between the UK and the rest of world and the EU, it is nonetheless, according to the Senior European Experts, near on impossible to get anything as good as the UK has now inside the EU customs union. Whilst it is important to disregard the political rhetoric behind much of the so-called ‘fake news’ and false claims, this report nails down some unpalatable truths for anyone who has anything to do with international trade. Of course, this is not a fact of what’s to come but, just like Ebenezer in Charles Dickens’ A Christmas Carol, a future borne from disregarding the past or the present. That has its own consequences – and those who ignore the warnings bear the responsibility for the future to come.
4. Avoiding a Hard Irish Border: Time to Move from Magical Thinking to Specific Solutions

Katy Hayward

Progress on the issue of Northern Ireland/Ireland must be made before the European Council summit in June 2018. For this to happen, the UK government has to put forward proposals that meet the commitments it made in the Joint Report of December 2017. These included avoiding a hard border on the island of Ireland, protecting North-South cooperation and supporting the all-island economy and the operation of the 1998 Agreement.

Any proposal from the UK government must be more substantive than those ideas offered in its August 2017 position paper and in any of the Prime Minister’s speeches. The EU has criticised those proposals as ‘magical thinking’. UK ministers’ vague but repeated references to as yet untested ‘technological solutions’ fail to reassure the EU, which is concerned that its strict trade rules can be enforced, will be enforced and will be seen to be enforced by post-Brexit UK.

In this way, the Northern Ireland/Ireland issue is a litmus test for the UK’s whole approach to its future relationship with the EU. What it puts forward in terms of avoiding a hard Irish border demonstrates its grasp of the implications of leaving the single market and customs union.

The December Joint Report allows for three broad scenarios in this regard. The first is one in which a UK-EU free trade agreement somehow manages to uphold the UK’s commitments to avoiding a hard border and having no physical checks or controls at the Irish border. The efforts by UK ministers to concentrate on having checks and controls that are not physically at the border represents a very literal interpretation of ‘hard border’ and manages to miss the main point. That is, if the UK is heading for a ‘hard Brexit’ (i.e. withdrawing from the arrangements that serve to make member state borders frictionless), this by definition means a hard Irish border.

If scenario one is in there as a political sop for Brexiteers, the third scenario is a sop for EU integrationists. It is a scenario in which the UK aligns with the rules of the internal market and customs union – thus effectively a ‘Brexit in name only’. Following the rules whilst having so little input into their creation would, it might be said, be a bizarre and pointless outcome for an exercise intended to ‘take back control’.

The most likely outcome is, therefore, one in which ‘specific solutions’ are found for Northern Ireland (NI). These could conceivably entail a situation in which there are slightly different outcomes for the UK and for NI, such as if the UK has a version of ‘association’ status (‘CETA-plus’) whilst NI has a version of ‘EEA-minus’. There will need to be mechanisms to manage diverging trajectories of the EU and UK without Northern Ireland ‘falling in between’. A fully functioning devolved executive and assembly, plus the institutions at Strand 2 (North-South) and Strand 3 (British-Irish), will be the minimal mechanisms of governance needed to manage this effectively.

What is currently on the table – the protocol on Ireland/Northern Ireland in the draft withdrawal agreement – looks most like a version of ‘specific solutions’. This backstop option enabled progress into phase 2 of the talks, but neither the UK nor the EU would
be happy if it ended up being the outcome from the strand of talks dedicated to this issue. Indeed, the backstop option was roundly rejected by the UK government – not because it was so low-ambition for Northern Ireland, but because it would mean different treatment of Northern Ireland, to the extent of it being part of the EU’s customs territory. From a different perspective, the backstop is disappointingly limited – its primary focus is to protect what NI currently enjoys in terms of trade with Ireland, but it does so in restricted terms (i.e. it doesn’t extend to other spheres, such as the movement of services).

Nevertheless, the ‘backstop’ option does demonstrate that the EU has held true to its commitment to be ‘flexible and imaginative’ – for, in this option, the EU offers de facto EEA membership to (a) a sub-national region and (b) to cover just one of the four freedoms (i.e. free movement of goods). In principle, the UK could seek to exploit this flexibility from the EU for the benefit of Northern Ireland, but this would require confirming bespoke arrangements for the region and negotiating a UK-wide customs union with the EU. But we are very far from that possibility as yet.

The ‘colour-coded’ version of the draft protocol indicates that there is little that is currently agreed between the UK and the EU on Ireland/Northern Ireland: the continuation of the Common Travel Area (already accepted by the EU, as seen in the two countries’ exclusion from the Schengen zone), the need to ‘maintain the necessary conditions for continued North-South cooperation’ across several areas (such as education, tourism, justice and security), the freedom of the UK to continue to build on the 1998 Agreement, and the creation of a specialised committee for the implementation of this protocol.

The objectives of protecting Irish citizens' rights in NI, the rules on state aid for NI, and a single electricity market are agreed, but the matter of how these would be achieved is not. In the coming few weeks, the UK and EU therefore have to find agreement on a wide and complex spectrum of issues for Northern Ireland/Ireland, including free movement of goods across the Irish border, agriculture and fisheries, environment, supervision and enforcement, and the application of EU regulations in Northern Ireland.

A strong starting point would be if the UK comes out and clearly states that ‘specific solutions’ are necessary to meet the commitments it has made to Northern Ireland, both in the Joint Report and in the 1998 Agreement.

As things stand, however, there is a real risk that – far from enjoying the ‘best of both worlds’ – Northern Ireland could fall between the rock of the EU’s determination not to bend rules and the hard place of the UK's intransigence on intra-UK differentiation.
5. Brexit, Free Movement and the Limits of EU Citizenship

*Niamh Nic Shuibhne*

Brexit presents a unique challenge for EU citizenship. It does not represent the relatively more straightforward, in legal terms, exclusion of those who never had the status of EU citizenship in the first place but, instead, the taking away of EU citizenship altogether from UK nationals and the shrinking of the territorial scope of associated rights for EU citizens from other member states. This transformation is an unprecedented and legally complex shift. The negotiations completed to date have focused on the implications for free movement and residence rights exercised by the end of the proposed transition period, without yet considering questions flowing from the status of EU citizenship in a more general yet also deeper sense.

On 19 March 2018, the European Commission published a revised version of the draft agreement on the withdrawal of the UK from the EU. Detailed analyses of and responses to the proposed settlement on the rights of EU citizens in the UK and UK nationals in the EU suggest two broad themes. First, overall, the draft agreement outlines a framework very close to that proposed by the EU (as opposed to proposals by the UK) since the beginning of the Article 50 negotiations. However, second, some significant gaps in the protection of rights remain. For example, with few specific exceptions (such as for frontier workers), the rights outlined in the draft agreement concentrate on EU citizens in the UK and UK nationals in EU Member States who will ‘continue to reside there’.

That limitation highlights two further points coming into ever sharper relief as the Brexit negotiations progress. First, EU citizenship, as any citizenship, is a status premised on exclusion. Citizenship exists not just to reflect a civic, emotional or political connection or to define an associated set of rights and obligations, but also to distinguish the privileges and the protection that will be extended to those who hold it compared to those who do not. In that sense, citizenship rights differ markedly from human rights.

Second, EU free movement rights are a legal novelty. The theme of ‘continuity’ pervades the text of the draft agreement, but we see more clearly now that continuity has been focused on security around past choices than opportunities into the future. Perhaps this becomes clearest when we consider what the draft agreement does not contain: the ‘missing’ Article 32, included in the text published on 15 March but deleted from the text published on 19 March. Article 32 had provided: ‘In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States’.

This provision prejudged the outcome of negotiations on the future relationship between the UK and the EU and, from that perspective alone, is better removed. But it

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2 This point can be traced by comparing the evolving positions evident in a series of Joint Technical Notes on citizens’ rights
3 See especially Article 9 of the Draft Agreement (19 March 2018)
also evoked a future that few UK nationals or EU citizens could desire. The practical questions around service provision alone challenge Article 32’s depiction of a quaintly isolated one-member state life, at odds with how mobility is actually experienced by many in practice.

Brexit debates within the United Kingdom often reflect a perception that what the EU internal market provides under the method of free movement can be reproduced or replaced by either domestic regulation (for persons, under normal immigration rules) or international agreements (both with the EU and with third countries).

But that perception fails to appreciate the defining characteristics of free movement: a system based on rights rather than permissions; a system designed for fluidity rather than rigidity; a system that can accommodate both temporary or short-term activity and more permanent or longer-term relocation; a system that works for both natural and legal persons; and a system underpinned by comprehensive flanking frameworks worked out over a considerable period of time and in considerable detail, all underpinned by the trust-based workings of mutual recognition as well as principles and procedures that ensure the enforcement of rights by those affected and not just by those in charge.

Neither domestic nor international mechanisms can replicate what the EU internal market enables, because of a crucial feature of that market: its novel free movement DNA. That novelty has in turn been imprinted onto the free movement and residence rights linked to EU citizenship.

However, while the European Council rightly proclaimed that ‘reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom’s withdrawal from the Union’ was going to be ‘the first priority for the negotiations’, Article 50 TEU does not make any provision for the rights of either of these categories or any reference to EU citizenship more generally. Article 50 itself requires the abrupt cessation of the application of the treaties two years after notification of the intention to withdraw from the Union, which would come about in a situation in which no provision for citizens’ rights had been agreed at all. The only safeguard for UK citizens in the treaty comes through the requirement that a state’s decision to withdraw from the Union must be in accordance with the former’s ‘own constitutional requirements’ (Article 50(1) TEU).
Can the substance of EU citizenship deliver something more than Article 50 in isolation requires? Addressing the future relationship of UK nationals to the EU and EU citizens to the UK as part of the broader future relationship negotiations is perfectly logical. Leaving the EU has consequences, some of which will be severe. It could not be otherwise. And we should not forget that it is the UK’s political, not legal, red lines that impoverish the options available. After all, legislation on the free movement and residence of EU citizens applies in the EEA context too (i.e. the free movement and residence rights associated with EU citizenship can be decoupled from that status).

Nevertheless, the profound implications of the shift from inside to outside seem inherently incongruous with having been inside. Efforts to translate this position to material legal rights are pushing at the edges of law and should be closely watched. For we will end up knowing much more about what EU citizenship does mean – and, conversely, what it does not mean – as all of this unfolds.
6. Transition Cannot Be Taken For Granted

Danuta Hübner

A full text of the draft agreement on the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community can be seen as a success. And it should be welcomed, even if it still comes in colours: green for what is agreed, yellow where there is an agreement on the policy objective but changes are still needed and white where discussions are ongoing. One can say that the EU strategy to publish its draft has indeed facilitated progress. The parts on financial settlement, citizens’ rights and transition are all in green. Governance and the Irish issue remain as the main outstanding issues. But there are many other separation issues that are completely open.

What is worth emphasising is that, if there is no progress on those remaining issues, there will be no transition phase. Transition will only take place if the agreement is settled: and, as of today, that cannot be taken for granted.

Having some mechanisms to ensure its implementation already agreed, in particular regarding citizens, is good news – for example, regarding direct effect of the provisions on citizens’ rights in the withdrawal agreement, and on governance. But these mechanisms have not been yet agreed with regard to other areas of the withdrawal deal.

There are examples of commitments valid for the entire agreement, like the good faith clause commonly used in international agreements. Also, it is rather clear that the UK is to be considered as a member state during the transition period (except for its participation in the institutions and bodies of the EU), and that the powers of the European Commission and the Court of Justice will continue to apply.

But if one reads the part of the draft agreement on institutional provisions (Title II of Part Six), only the issue of the Joint Committee has been discussed so far. Nothing else on governance of the agreement as a whole has been agreed.

For the European Parliament, the internal composition of the Joint Committee will be important. This, however, is an internal EU issue to be agreed by the EU at a later stage. The question is whether it can be based on Article 218 TFEU, as the UK will be a third country as of 30 March 2019.

For the Parliament, the agreement reached (Article 152) concerning relations with the UK independent authority responsible for monitoring the implementation of the citizens’ rights obligations in the withdrawal agreement is very important. Equally important is Article 155, giving the European Commission the option to intervene in cases before UK courts and tribunals regarding the interpretation of the withdrawal agreement.

The possibility of a dialogue (envisioned in Article 156) also matters significantly. Even if, during the transition, the entire architecture of the EU will remain in place, a special platform for dialogue between the EU and the UK is needed like in any international agreement.
It is also a good solution to provide for the possibility of having not only a centralised Joint Committee, but also specialised subcommittees competent for specific chapters of the agreement, allowing the UK and EU to deal with potential conflicts where technical issues are at stake.

Of course, there is the thorny issue of possible situations where the UK might not respect Court of Justice rulings during transition. The transition will be a very short period, and thus a special sanction mechanism is needed in order to ensure enforcement. This reasoning is behind the proposals in Article 165, according to which there would also be a warning to the UK on potential sanctions, as well as a possibility of appealing to the ECJ. These provisions are, however, not yet agreed.

We have seen that the UK government has accepted the length of the transition period. Any extension running into the new multi-annual financial framework would require a reopening of the financial settlement deal.

A positive development is Article 122(2), which has an enabling clause in case an agreement on the Common Foreign and Security Policy is reached earlier than the overall future relationship deal. Its application during the transition could be possible, of course under the condition of unanimity. Any member state could veto such an agreement.

The EU has also taken a more open approach with the wording of Article 122(5), under which the Union may invite the UK as a third country to cooperate on new measures adopted by the EU under Title V of Part III of the treaty (Area of Freedom, Security and Justice). Of course, the relevant future EU law would have to allow for this.

A somewhat surprising provision, in the context of the future limitations on the institutional participation of the UK in the EU (see Article 123), is Article 125(3), which allows the UK to participate in the Union's international delegations during the transition to facilitate its future international involvement in the field of fisheries. This is indeed as if the UK were a member state.

The draft deal, however, does not leave any doubt about excluding any participation of the UK during the transition in new enhanced cooperation mechanisms. Concerning Permanent Structured Cooperation on security and defence (PESCO), the UK can be invited to participate as a third country in individual projects.
What must be noted is the absence of financial services in the draft text. This is justified. The Union has the power to introduce, unilaterally if needed, any grandfathering solution. And it is working on strengthening its equivalence regime. What is, however, fundamental today for industry is contingency planning and preparation. For business, the transition should already be in full swing. You cannot build the future of your company on a political agreement. Preparedness is key.

Overall, there is much yet to do if the EU and UK are to ensure a full withdrawal agreement is reached, including on the terms of transition.
7. Over the Transition Hurdle?

Fabian Zuleeg

Finally, there has been progress on transition. The general agreement on the nature of the transition between the UK and the EU27, led by the negotiation team under Michel Barnier, has finally put a withdrawal agreement in sight. The transition period until the end of 2020 is expected to be a standstill period, meaning that the UK will have all the obligations of membership but without the political rights of an EU member state. In return, the UK will, for the time being, continue to be inside the EU single market and customs union after Brexit in March 2019, providing business with the greater certainty that business organisations have been calling for ever more stridently.

Some of the implications of such a transition have been hard to swallow for the UK political system, especially the Brexiters in the Conservative Party: no control over fisheries, continuing jurisdiction of the European Court of Justice, the UK as a rule-taker, no independent commercial policy and so on. But, for now, the Brexiters have accepted this (temporary) ‘vassal state’ status for the sake of a definitive exit in March 2019. And the chance of an exit from Brexit is highly unlikely unless there is a political earthquake in the UK – and change would have to happen very quickly.

But British media, business and politicians might be a little overconfident. Nothing is signed and sealed yet, and some major hurdles remain. Westminster will have to vote on the withdrawal agreement at some point, with little indication of a majority for any specific version of Brexit – and with the leadership of both major parties seeing Brexit as inevitable, given the result of the referendum. But as well as the UK, the EU27 and the European Parliament will need to ratify the withdrawal agreement. While the EU negotiation team is keeping a close eye on the views of the member states, any specific issue could potentially derail the process.

This is already the case when it comes to the Irish question. The UK’s commitment to keep the border with the republic frictionless and without any physical infrastructure led to the December agreement, in which the UK accepted a ‘backstop’: if all other options fail (for the UK as a whole to have frictionless borders with the EU or an open border guaranteed through technological means), the UK accepts that Northern Ireland remains aligned with EU rules, which was read as meaning the NI stays inside the
customs union and single market, implying a customs border in the Irish Sea. This will now have to be written into legal text. Given that Ireland has the backing of the other member states and the institutions, without it there will not be a withdrawal agreement. Theresa May thus needs to face down the DUP or transition will not happen.

There are still some further outstanding issues, both technical and substantive. The nature of the political declaration on the future of the UK-EU relationship is still unclear: how much detail will be required, and how specific will it be on the future model, including exit from the customs union and single market? There is also the question of whether there will be the possibility of extending the transition period. Unless the withdrawal agreement specifies a process and potentially the length of any extension, there will not be an option to continue the standstill period beyond 2020.

Thus, much uncertainty still remains at this stage of the negotiations. At worst, there might be no consensus on the terms of the withdrawal agreement, specifically on the Irish question, which could lead to a cliff edge by the end of the year at the latest. But even reaching a deal and the full ratification of the withdrawal agreement just signal the start of even more difficult trade negotiations.

When trade negotiations start, the process is likely to change. On the EU27 side, there will be a trade team in charge that derives its mandate from the individual mandates of 27 member states. Divisions on the EU27 side will make things more difficult at that stage. There will be no holds barred – all economic, sectoral and political interests will be on the table – and the EU is rather good at negotiating trade deals. But even assuming the best will in the world, this might be a difficult one to negotiate: essentially, this will be about distributing costs of disintegration. There are no gains from trade in a market that is already fully integrated and will become less so.

So, once again, the cliff edge looms. Whether it is now or by the end of 2020, the basic dilemma is unresolved: choosing between economic harm and crossing the Brexiter’s red lines. Only if there is significant political change in the UK, resulting in a solution like staying in the customs union and the European Economic Area, can the long-term cliff edge be avoided. But this is not acceptable to the Brexiter, as it clearly raises a number of uncomfortable questions, first-and-foremost: what was the point of Brexit if the best the UK can achieve is to minimise economic harm, but lose political power in the process?
8. Human Rights and the Draft Withdrawal Agreement

Nicole Busby

19 March 2018 marked an important milestone in the negotiations between the EU and the UK, with the reaching of consensus regarding the terms of the draft withdrawal agreement (‘the draft agreement’). As well as the terms of the financial settlement, the issues on which provisional agreement was reached include the implementation period and the rights of EU citizens residing in the UK and UK nationals living in the EU. What, if anything, does the draft agreement tell us about the future protection of human rights in a post-Brexit UK?

Citizens’ rights

Although it would appear that consensus has been reached in relation to citizens’ rights during the transition period, there is still a lack of clarity on whether the fundamental right to free movement will continue to apply in the longer term. The draft agreement published by the UK government is colour-coded and we are told that, ‘text in green is agreed at negotiators’ level and will only be subject to technical legal revisions in the coming weeks.’

The section on citizens’ rights is marked in green. It states that the agreement is to cover all EU and British citizens who exercised their right to reside in Britain or the EU in accordance with the freedom of movement under EU law before the end of the transition period, and that it will continue beyond that if they have exercised that right. EU citizens who have resided in the UK lawfully for a period of five years before 31 December 2020 will be entitled to a ‘settled status’ as a means of securing their continued right to reside in the UK, which will require the submission of an application to the Home Office.

Those who have not been living in the UK for the minimum period of five years will be allowed to apply for temporary status, followed by a settled status application once they have acquired five years of residence. Family members will be able to apply for a status document if they were legally residing in the UK on 31 December 2020, with those wishing to join an EU citizen in the UK after that date allowed to so as long as evidence can be provided of an ongoing relationship.

Whilst this may sound as if some certainty has been established, what the draft agreement doesn’t tell us is whether free movement rights will continue after Brexit. It is therefore unclear whether those who have already exercised those rights, particularly UK citizens in the EU27, will be effectively stranded in one EU country as a result of the loss of the freedom of movement beyond Brexit.

Fundamental rights

Whilst the protection of fundamental rights beyond Brexit in areas currently underscored by EU law, such as equality and employment, will be a matter for the UK government, the draft agreement does appear to protect them during the transition period, which will begin on 29 March 2019 and end on 31 December 2020. During this time, EU law will have the same effect in the UK as in EU member states, which means the continued protection of all rights, including those covered by the EU Charter of Fundamental Rights.
However, in order to ensure such protection, specific UK legislation will be required by way of the Withdrawal Agreement and Implementation bill, which will simply transpose those rights protected by the final withdrawal agreement into UK law. As always, the devil is likely to be in the detail and there is a danger that, as with certain provisions of the EU Withdrawal bill currently being considered by the House of Lords, the UK government will seek to use the repatriated powers to amend or even repeal human rights and equality laws with little or no parliamentary scrutiny.

The withdrawal agreement also covers areas in which the UK and EU wish to continue formal cooperation, including justice, security and data transfers. Standalone treaties in these areas are being negotiated separately and there are concerns regarding the possible content of these agreements and their potential impact on fundamental rights. In the area of justice and security, the UK had opted out of a range of rights protections relating to cross-border extraditions and investigations.

While the UK remained a member of the EU, such gaps in protection posed less of a threat, as the overall EU framework including the Charter of Fundamental Rights plugged the potential gaps. However, as we know from the EU Withdrawal bill, the Charter’s future application in the UK is extremely unlikely and so the effect of such opt-outs will need to be carefully considered in relation to rights protections offered under future treaties.

Of course, Brexit is a negotiated process which is still ongoing and the text of the final agreement between the EU and the UK will not be known until later on in the process – as we have been constantly reminded, ‘nothing is agreed until everything is agreed’. However, the draft agreement does offer some food for thought and, at the very least, demonstrates what both sides would be willing to accept in certain respects. It also highlights how much will be left to domestic law beyond Brexit and there are some worrying developments taking place in this context.

In the last Queen’s Speech, a number of specific legislative proposals were announced to deal with particular issues related to UK law's disentanglement from EU law. One of these initiatives, the Trade bill, is currently making its way through the parliamentary process. This bill, which forms the basis for the UK’s future trading relationships post-Brexit, provides that a minister ‘may by regulations make such provision as the authority considers appropriate for the purpose of implementing an international trade agreement to which the United Kingdom is a signatory’, including by ‘modifying primary legislation that is retained EU law’.

This raises serious concerns that UK ministers may use these broad discretionary powers to amend primary legislation containing rights, including the Equality Act 2010. With no constitutional guarantee of equality within the UK’s domestic framework and no savings clause protecting existing rights beyond Brexit in the EU Withdrawal bill, such concerns appear to be very well founded.

Overall, the Brexit process highlights a number of fundamental human rights concerns. The outcome of the process, including the UK-EU negotiations concerning the future relationship and the UK government’s approach to domestic legislation, suggest that we will need to be vigilant in ensuring that the cost of Brexit isn’t the protection of human rights.
Brexit Roundup: Where Are We Heading?

Part II. Brexit, the UK and Scotland – Political and Policy Challenges

9. Brexit and the Environment: Challenges Lying Ahead

Annalisa Savaresi

Brexit’s implications for environmental law-making and enforcement in the UK are symptomatic of the challenges associated with breaking away from the EU. As I have already argued elsewhere, while nobody suggests that after Brexit the UK will turn into a lawless land, the loss of the EU’s comparatively stable regulatory, enforcement and governance frameworks requires that these be somehow replaced, within a relatively short time frame. The same applies to EU funding and cooperation programmes that, for good or ill, presently provide the lifeblood of several UK conservation and research initiatives.

If these challenges were not daunting enough, the allocation of environmental law-making and enforcement powers between UK and devolved administrations after Brexit raises sensitive constitutional questions. The spat over the European Union Withdrawal bill indicates that the UK, Welsh and Scottish governments hold diverging views on who should assume the competences presently exercised by the EU after Brexit. Furthermore, when the unifying frame of EU law is removed, the ensuing fragmentation may well threaten the maintenance of present levels of environmental protection across the UK.

Whoever is in charge of environmental affairs after Brexit, departure from the EU requires a careful rethinking of the very mechanics of environmental law-making, implementation and enforcement. There is precious little time to attend to this complex task, and to secure the continuation of present levels of environmental protection on matters as diverse as habitat and species protection, water and air quality, waste, agriculture and fisheries, and climate change. Space precludes a detailed discussion of specific challenges emerging in all of these areas. This article instead offers some general reflections on the implications of Brexit for environmental protection, as well as recommendations for solutions that may be adopted to address these.

Brexit challenges

Scottish and UK lawmakers presently are largely norm-takers and implementers of EU environmental law and policy in several areas. Furthermore, the UK’s obligations under EU and international law on environmental matters often intertwine. The impact of Brexit will therefore depend on three main variables, namely: the UK’s international environmental law obligations, and the extent to which these obligations are presently implemented by EU law; the degree of environmental governance presently embedded in the EU; and the degree of devolution within the UK on each of these matters.

The EU is party to numerous international environmental treaties alongside, and sometimes in lieu of, its member states. After Brexit, the latter international environmental agreements will no longer be formally binding on the UK. The situation is more complex for so called ‘mixed agreements’ which have been ratified by both the EU and the UK. Here the question is not so much whether obligations enshrined in these
instruments will continue to apply to the UK after Brexit, but how. EU law typically implements obligations enshrined in international treaties, covering matters such as product standards, as well as the monitoring and reporting of pollution levels. EU law is however often more ambitious and more stringently enforced than the corresponding international obligations. Ensuring that the repatriation of powers and competences from the EU does not lead to a lowering of environmental protection standards is therefore of the essence. The large-scale recruitment of new staff in environmental agencies has already demonstrated that replacing the regulatory and monitoring functions performed by EU institutions requires considerable investment, as well as capacity-building.

This is especially the case in relation to environmental law enforcement. The EU supranational enforcement machinery – through the work of the European Commission and the Court of Justice of the European Union (CJEU) – has greatly contributed to the enhancement of environmental protection standards across the EU. As recent air pollution litigation has shown, UK authorities are simply accustomed to being under the European Commission’s and the CJEU’s scrutiny, and the threat of financial penalties associated with these. In order to address concerns expressed by civil society, Secretary of State Michael Gove announced a consultation on a new independent statutory body that would hold government to account for upholding environmental standards in England. However, much depends on what powers will be attributed to this body, and its remit of action. The new body is not expected to cover devolved administrations, which will have to find their own solutions for addressing concerns over the enforcement of environmental law after Brexit.

Finally, the question of the allocation between the UK and devolved administrations of repatriated powers presently exercised by the EU is the most sensitive. This allocation requires a strategic decision on who will be doing what after Brexit, and pursuant to which rules. The Joint Ministerial Committee communiqué of October 2017 does not provide a definitive answer to this question. After the spat over the EU Withdrawal bill, in March 2018 the Scottish parliament passed the so-called legal continuity bill. The bill reasserts the competence of the Scottish parliament on environmental matters, making specific reference to the principles of EU environmental law (part 5A). In spite of proposed amendments to this effect, these principles are not mentioned in the EU Withdrawal bill. This may be but the first of potentially many future differences between environmental law and policy passed by Westminster and Holyrood after Brexit.
Presently, EU environmental law principles do not have practical legal force, unless they are transposed into secondary law. The reference to principles in the continuity bill is therefore likely to have only a modest impact on Scottish environmental law and policy after Brexit. Yet, in the coming years, national decision- and policy-makers and regulators will enjoy more discretion over environmental matters than they currently have. This enhanced discretion will be coupled with greater lobbying from vested interests and stakeholders than is the case at the moment. Anchoring EU principles in Scottish law therefore potentially has some importance. Ultimately, much depends on the Scottish courts' willingness to give environmental principles sufficient legal weight to determine the outcome of judicial decisions over the adequacy of environmental law and policy, and of its implementation by public authorities.

**Tackling the Brexit challenges**

Brexit confronts environmental protection with a set of complex challenges which need to be tackled within a short time frame.

Firstly, Brexit necessitates a constitutional reflection on which institutions are best positioned to do what, and how. Given environmental law's composite nature, no one-size-fits-all solution for all areas is likely to be feasible, or even desirable. Instead, present environmental governance arrangements should be looked at lucidly, establishing how they will be affected by Brexit, and what would be the most effective and sensible way to reform the ones which need replacing. In some areas, where transboundary issues are at stake, the need for some UK-wide coordination seems obvious. For example, Secretary of State Michael Gove has said that there is potential for a discussion about whether air quality should be maintained by common UK-wide rules. Brexit, however, also provides an opportunity to go beyond the status quo and its discontents. The Scottish government could, for example, request greater devolved powers to effectively exercise its competences after Brexit. As already discussed elsewhere, these powers may include some legal capacity to enter into international agreements addressing specific Scottish interests, such as fisheries.

Secondly, the UK and Scotland should try to remain involved in regional bodies dealing with cooperation and capacity-building on environmental matters, such as the European Chemicals Agency. Indeed, the UK parliament's Exiting the EU Committee has already indicated that continued UK membership of selected EU agencies will be one of the criteria by which it will judge the political declaration on the future relationship between the EU and the UK.

Lastly, new avenues to maintain high levels of supervision on the implementation and enforcement of environmental laws should be explored, giving consideration to proposals coming from civil society – which include, for example, the establishment of a specialised environmental court, or an ombudsman. Devolved administrations could furthermore be empowered to keep the UK government under scrutiny, in the context of the exercise of the sweeping ministerial powers envisioned in the EU Withdrawal bill. These actions would assist in ensuring that the UK lives up to its promise to deliver a green Brexit.

This piece draws on an article in the Edinburgh Law Review, which itself builds on the author's contribution to the 2016 SULNE report on Brexit, Scotland and environmental law. The views expressed here are this author's alone.
10. Brexit Creates Uncertain Future for Scotland and Devolution

Anthony Salamone

The consequences of Brexit will be innumerable, though undoubtedly one of its most significant legacies will be the reshaping of the constitution of the UK. Although not often thought of as such, the European Union has over time become one of the constitutive pillars of the unwritten UK constitution. From the primacy of EU law (nominally enabled by the UK parliament) and the EU acquis integrated into the UK's legal systems, to the role of EU policy making in UK political culture and the inclusion of the EU in devolution, four and a half decades of EU membership have seen the Union become a core component of political and legal life.

Leaving the EU will evidently change all of these dynamics profoundly. In particular, it will have substantial ramifications for the UK's internal constitutional arrangements. Scotland's devolved settlement, along with those of Wales and Northern Ireland, will seemingly inevitably be recast in a post-Brexit light. Two principal issues have arisen in this context in the nearly two years since the EU referendum. One is the role of current and future EU law which relates to areas devolved to the Scottish parliament. The other is the nature of the parliament's powers and responsibilities after Brexit.

The Scottish parliament does not have competence on foreign affairs or relations with the European Union. However, a number of devolved remits do have a notable EU law dimension – including environment, law and order, agriculture and fisheries. The parliament transposes relevant EU law into devolved Scots law and has a cardinal obligation in the Scotland Act 1998 not to legislate contrary to EU law. Accordingly, EU membership has its own significant, if indirect, impact on Scotland's laws and politics.

Debate on the role of EU law and the Scottish parliament's powers has crystallised around the EU Withdrawal bill, which will create the new legal category of 'retained EU law'. The key question for devolved institutions has been how powers latterly under EU competence and in devolved areas should transfer to them after Brexit. Disagreement between the UK government and devolved governments (for Scotland and Wales – Northern Ireland continuing not to have an executive) over whether certain powers should be centralised in London first before eventually being redistributed in some
measure, or whether they should return directly to the devolved legislatures, has led to protracted negotiations which have yet to yield a definitive conclusion – though a compromise could well be reached in the near future.

As a consequence of the impasse, the Scottish and Welsh governments introduced EU ‘continuity' bills to mirror the withdrawal bill in devolved law, both of which were passed by their respective legislatures. The Scottish continuity bill incorporates relevant EU law into devolved Scots law and explicitly retains domestic legislation related to EU membership. It also preserves the general principles of EU law, the EU Charter of Fundamental Rights and EU law rights in devolved areas, and creates the additional category of ‘retained (devolved) EU law'. This incorporation is complemented by ministerial powers to amend this legislation to correct deficiencies resulting from EU withdrawal and to update it in line with new developments in EU law for a limited period.

The continuity bill was passed by a degree of cross-party support, with the SNP, Labour, Greens and Liberal Democrats (except one) all voting for the measure. The Conservatives and one Lib Dem voted against. Combined with the Welsh assembly's backing of its own similar bill, this response to the lack of agreement with the UK government cannot simply be dismissed as an independence-driven tactic. Among the pro-union parties in the Scottish parliament, the Conservatives opted for outright, principled opposition to the bill – while Labour and the Liberal Democrats focused criticism on specific aspects, such as the rushed nature of the debate and the controversial amending powers given to ministers by the bill, though nevertheless ultimately supported it.

The legislative competence of the Scottish parliament to pass the bill at this time was also called into question, with the Presiding Officer judging that the parliament did not have competence, while the Scottish government and the Lord Advocate concluded that it did. The central question in both analyses was whether the parliament has the power to legislate now for future changes to how EU law operates in devolved law after Brexit, in the anticipation that its EU law obligations will end upon EU withdrawal, before that is actually the case. It was unprecedented in the history of the reconvened parliament that the Scottish government should introduce a bill without certification from the Presiding Officer, and indeed that such a bill should be voted through – such are the extraordinary circumstances which Brexit has generated.

With the bill having been passed on 21 March, the option for a legal referral by UK law officers on competence opened in the period before royal assent. Recent reports suggest that the UK government is prepared to exercise the option to refer the bill to the Supreme Court for a ruling. If the continuity bill is found to be partially or wholly ultra vires, such a development would move the situation even further into uncharted constitutional territory. In parallel, negotiations are continuing to achieve agreement on the EU Withdrawal bill, so that the Scottish government recommends that the parliament give its legislative consent. An agreed outcome remains the stated preference of all sides, and the continuity bill contains provisions for its own repeal, should a solution be found.

At its heart, the bill is a means of political pressure in the current Brexit and powers debate – one in which the devolved institutions have a limited role. Although legislative consent for the EU Withdrawal bill is being sought by the UK government, it is not legally
required, according to the Supreme Court’s ruling in the Miller case. Accordingly, although the Scottish and Welsh legislatures have a relatively restricted, consultative role in the internal UK legislative process to implement Brexit, the continuity bills have effectively raised the political stakes.

The apparent price for a resolution is a satisfactory understanding on arrangements for the around 24 post-Brexit policy areas with devolved relevance which remain subject to dispute. These discussions have focused on the means by which ‘common UK frameworks’ in areas like agriculture and fisheries will operate – and whether the devolved governments will have an active role in agreeing them or will simply be consulted on them. Despite the clear differences, the political reality points in the direction of an eventual deal.

The UK government is consumed by all aspects of Brexit – particularly the ongoing negotiations and the shape of future relations with the EU – and the chance to resolve this devolution dispute could prove attractive. For Edinburgh and Cardiff, the worst possible outcome would be an EU Withdrawal act which did not adequately address their concerns on devolution and for the continuity bills to be partially or wholly invalidated by the Supreme Court. Moreover, all of the other political and legal complexities around Brexit mean a deal in which all sides can claim victory would likely be welcomed.

It seems then that the preferred scenario for the UK and Scottish governments is that a consensus is reached and the continuity bill is repealed. However, even if agreement is found, Brexit will undoubtedly have wider consequences for devolution. The asymmetry of devolution across the nations and regions, piecemeal nature of constitutional reform and absence of a clearly codified constitution collectively contribute to a higher degree of uncertainty around the powers and place of the devolved institutions than might otherwise be the case. A more federal structure or written constitution for the UK would give greater confidence, in this time of profound change, that the rights of the devolved nations will be maintained.

Broadly speaking, devolution and European integration were both considered to be one-way tracks – respectively, powers would flow from the centre outwards and states would progressively integrate. Brexit will end the EU track (in the UK) and, as a consequence, threaten the devolution track. Establishing the political principle, even if relatively subtly, that devolution can in fact reverse could undermine confidence in the governance structures of the UK. With all the fissures which Brexit is exposing, it seems markedly less likely that the UK’s constitutional arrangements and intergovernmental relations can simply continue as they did before Brexit.
11. Migration Policy Unclear as Brexit Nears

Sarah Kyambi

The prospect of exiting the EU is sharpening the divergence between Westminster and Holyrood on immigration policy. This mirrors the way in which many aspects of the constitutional settlement have come under strain as a result of the vote. Regardless of whether one sees the Brexit referendum as motivated by a desire to reduce immigration, the fact is that both the Conservative and Labour parties currently interpret it as requiring an end to the free movement of people.

In relation to immigration, this raises two main sets of issues: the rights of EEA nationals living in the UK after Brexit and the rules governing future inflows from the EEA. While some progress has been made on the former, on the latter any official clarity is woefully absent. What is becoming abundantly clear, however, is that within this space the policy goals sought by the First Minister of Scotland are vastly different from the aims pursued by Prime Minister.

Turning first to EU citizens' rights: the draft agreement provided a degree of clarity last month. Although 'nothing is agreed until everything is agreed', under the deal as it stands EU citizens retain their right to reside in the UK – they will need to apply for status, but the requirements for comprehensive sickness insurance have been dropped. The settlement application procedures are to be simple and seek only to verify the pre-existing right to reside under EU law, with European Court of Justice as the final arbiter of that law. EU nationals arriving in the transition period get the same rights.

These final positions have more in common with the stance Nicola Sturgeon outlined back in July 2017 than the UK government's initial position in June of that year, mainly because her position shared several elements with the EU. Many observers may comment that this clarity should have come much sooner, given the assurances both Leave campaigns made on EU citizens' rights. In which case, the meandering path taken towards this outcome presents a puzzling seeding of mistrust among EEA nationals living in the UK who were angered by the UK government's presentation of their rights as 'bargaining chips'. The Home Office mistakenly issuing up to 100 'prepare to leave' letters to EU citizens living in the UK only added fuel to the fire.

Clarity on the shape of the UK's post-Brexit immigration system has seen nothing but postponement, with an Immigration bill now delayed until the autumn at the earliest. Securing a transition arrangement covering EEA nationals provides more time, until 2021, before a new system must be put in place. If the draft white paper leaked in September 2017 is any guide, we should expect a restrictive and selective UK immigration system with a focus on driving down net migration. Within this system, low-skilled immigration is expected to be strictly temporary and migrants' rights few and far between.

This is a long way from the freedom and flexibility that characterised migration from the EU, where migrants could come and go as they chose, work without restrictions, bring family members and access certain benefits if needed. To a degree, these changes will matter more in Scotland, where EEA migration makes up a slightly larger proportion of overall migration and includes a greater share of migrants from the new EU member
states – migrants from these countries are more likely to be working in the lower-skilled, lower-paid occupations set to face greater controls.

Ostensibly, delays to the Immigration bill are due to the need for government to take in the conclusions of Migration Advisory Commission’s (MAC) consultation into the role of EEA workers in the UK labour market, before determining a direction. However, straightforward acceptance of the MAC’s conclusions on the evidence of the need for immigration is problematised by the fact that such needs depend on the goals pursued by governments. In this sense, how much immigration the UK, or parts of the UK, ‘need’ is a policy choice. And it is one on which the UK and Scottish governments differ substantially.

The divergence in approaches to immigration precedes the SNP government – it found its earliest expression in post-study work visas through the Fresh Talent initiative in 2004, under a Scottish Labour government. Since the Brexit referendum, the gap has become more evident, with the Scottish government’s programme for government and its evidence to the MAC clearly underpinned by the call to continue a more open immigration policy for economic, and demographic, reasons.

Models and mechanisms for creating an immigration system that allows for regional differences have been discussed in numerous papers over the last 18 months – including one which I wrote with colleagues at Edinburgh University. The prospects for a differentiated immigration system allowing regions and nations like Scotland to have more room to pursue different immigration goals may look quite slim at the moment. The MAC’s interim report last month seemed to give fairly short shrift to an exceptionalist case for Scotland, on the basis that the differences that mark out Scotland exist elsewhere in the UK as well.

The continued insistence on a low net migration target seems to make a more restrictive immigration system likely, even if its exact shape remains unclear. The impact of reductions in immigration is expected to be damaging for the UK economy. Worryingly, business remains unprepared to accommodate such a decrease in the availability of foreign workers. Whether the planned reduction in net migration to the ‘tens of thousands’ is practically achievable is questionable. Much depends on the outcomes of negotiations, not only with the EU, but also with other countries on trade deals yet to come. Many countries, like India, will seek access to UK labour markets in return for trade.

Once again, external voices echo the Scottish government’s position. Reports are that the SNP’s upcoming economic strategy in the Growth Commission will include population growth as key – implying its commitment to a more open immigration policy. Despite it looking unlikely that the MAC will recommend a differentiated immigration system, it does seem that, with actors on all sides pushing against the UK government’s restrictive urge, solutions will be needed that can give more parties what they want.
12. Scottish Independence: Sturgeon Is Between a Rock and a Hard Brexit

Iain Macwhirter

Amid the snows of March, a frisson of excitement gripped the independence movement, and the Scottish press, when it was revealed that the Scottish National Party had registered a new website, ‘organise.scot’. Opposition politicians accused the SNP leader, Nicola Sturgeon, of sneakily renewing her plans for an early repeat referendum on Scottish independence. But as so often with ‘indyref2’, as many SNP supporters still call it, this referendum signal turned out to be a false one. In fact, the website had been registered last year, not long after Sturgeon called off the last referendum.

Independence supporters get annoyed when you say that the First Minister ‘called off’ the independence ballot, and insist that she only ‘reset’ the timetable. But this is largely semantics. The referendum, prematurely announced in March 2017, was postponed in June following the general election. Ms Sturgeon said she would return to parliament in the autumn of 2018 to give a new timetable for independence. Some optimistic Scottish nationalists believe she might still call a referendum then and there, on the grounds that she’d always said that indyref2 had to come before the UK left the EU in March 2019.

The SNP leader had indeed originally argued that it was necessary for the people of Scotland to be offered the ‘democratic option’ to revisit their 2014 decision to remain in the UK before Scotland was dragged out of Europe. After all, she argued, a key plank of the unionist Better Together campaign in 2014 had been the claim that only by staying in the UK could Scotland be sure of remaining in the European Union. Now Scots were being taken out of the EU against their will, since they had voted by 62% – 38% to remain in the 2016 Brexit referendum. There had, said the FM, been a ‘material change in circumstances’ that rendered the 2014 independence result unsafe. This was an impeccable argument. Unfortunately, it didn’t appear that Scottish voters shared it.

Conflicting views within the SNP on referendum timing

The loss of a third of the SNP’s MPs in the June 2017 snap election convinced Nicola Sturgeon that Brexit had not, after all, provoked a thirst for an early independence referendum. Scottish voters had had two momentous constitutional upheavals in little over two years and were, to use a good Scots word, ‘scunnered’ by referendums. One year on from the ‘reset’, there is little evidence that the First Minister has changed her mind and is about to call an early ballot, and anyway there is strong opposition to the idea among her own MPs.

In a recent article in iScot magazine, the senior SNP MP for Perth, Pete Wishart, appealed to the SNP leader to stay her hand. His majority collapsed from 10,000 to 21 in the 2017 general election and he is convinced from his own canvassing that it was the threat of another referendum that nearly lost him his seat. He concedes that support for independence has not collapsed since 2014, but says that this cannot be translated into demand for another referendum now. He warns against following the example of Quebec, where two lost referendums killed the independence movement stone dead in
the 1990s. ‘Holding a second referendum only to lose it because the people weren’t ready’, he wrote, ‘would be the worst possible national tragedy.’

Not everyone in the independence movement agrees with Wishart, and he has been taken to task on social media for defeatism. What might be called the Mandate Tendency in the SNP insist that Ms Sturgeon is under a moral and political obligation to call a referendum sooner rather than later. She won a historic vote in the Scottish parliament last March for a referendum and that mandate is time-limited. The SNP then campaigned in the 2017 general election for a ‘triple lock’ mandate, and secured that, despite losses, by winning more seats than all the unionist parties combined. The influential SNP blogger James Kelly says Sturgeon should be holding another referendum ‘as a matter of honour in politics’.

Kelly disputes Pete Wishart’s canvas findings and insists that victory is only a handful of percentage points away. Yet delay, he believes, could be fatal. All governments lose popularity, and the SNP government has been in power now for nearly 11 years. Optimum conditions may never arise, and the mandate may evaporate in 2021. The SNP cannot assume that it will be in a position to win another Section 30 vote after the next Scottish parliamentary elections in 2021.

**Focus on protecting devolution over independence**

This is an immensely difficult question for the First Minister to resolve. Anecdotally, there certainly seems very little demand for another independence vote simply as a result of Scotland being taken out of the EU. In March, an *Ipsos Mori poll* suggested that only 22% of Scots thought that there should be a second referendum because of Brexit. A *Panelbase poll* for *Scotland on Sunday* indicated something similar. However, these polls are difficult to interpret. They also found support for independence remaining remarkably stable. Ipsos recorded that 46% of those intending to vote would support Yes and that 41% of Scots want another independence referendum at some stage. This is surprisingly high, given that independence has slipped far down the day-to-day political agenda in Scotland.

Nicola Sturgeon has been spending most of the year campaigning, not for independence, but for devolution. Her considerable energies have been going into opposing the ‘Westminster power grab’ of responsibilities repatriated from Brussels under the EU Withdrawal bill, currently grinding its way through the UK parliament. Some nationalists are uncomfortable with this. The SNP traditionally regarded devolution as, at best, a poor second to independence, and at worse as a unionist-inspired diversion from it.

She could just have said: ‘told you so: power devolved is power retained – the only way to entrench the powers of the Scottish parliament is through independence’. Instead she joined with Labour’s Welsh First Minister, Carwyn Jones, to argue for an amendment to Clause 11 of the EU Withdrawal bill such that Scotland would retain a veto over powers repatriated from Brussels to Westminster, such as on agriculture, fisheries and the environment.

This constitutional issue is important but has little voter appeal. Few Scots fully understand the significance of the 1998 Scotland Act, and its founding principle that responsibilities not specifically reserved to Westminster should automatically become powers of Holyrood. The First Minister is right that the EU Withdrawal bill does
undermine the devolution settlement by insisting that 24 responsibilities go first to Westminster. But this means that, for the time being, the Scottish National Party has largely stopped focusing on the case for independence. At any rate, if Nicola Sturgeon is minded to announce a referendum in the autumn, this hardly seems the ground on which to prepare for it.

**Sturgeon's cautious approach to a second referendum**

It seems inconceivable, anyway, that another referendum could be staged before 2019, not least because it would require a Section 30 order from Westminster and Theresa May has already said she won't agree to one. The constitution is a reserved power. Holding one without Westminster consent would be futile, because the unionist side would boycott it, and undermine its legitimacy – as happened in the illegal Catalan referendum last October. Nicola Sturgeon does not hold with civil disobedience or extra-legal action. She refrained from intervening in the extradition to Spain of the former Catalan education minister, Clara Ponsatí, to the dismay of some SNP supporters.

So we can rule out any referendum before Britain leaves the EU, even if it were possible to organise one in time. This leaves the option of announcing a referendum before 2021. But I suspect the First Minister will avoid making any firm promises in September. She is under pressure from some in the SNP to consider another referendum entirely: a second UK-wide referendum on the EU – the ‘exit from Brexit’, as the Liberal Democrats call it. She has not explicitly endorsed this second EU referendum, not least because her own party is divided over it. A number of the newer, more left-wing SNP members favour the Norway option of joining the European Economic Area rather than returning to the EU. Supporters of the pro-independence Rise group, like the columnist Carolyn Leckie, have even proposed a three-question referendum containing the EU, EEA and Brexit.

It seems likely the First Minster will reject all of these options for fear of creating yet more confusion amongst Scottish voters. She hasn't entirely given up on the possibility that Scotland might be able to remain in some form of regulatory alignment with Europe, as envisaged by her 2016 white paper *Scotland's Place in Europe*. After all, the UK government has apparently agreed to Northern Ireland remaining in regulatory alignment with the customs union and single market. Could Scotland not therefore demand parity? The problem for everyone in Scottish politics – and indeed in UK politics – is that Brexit has become so fluid and uncertain that no one is quite clear yet what it is going to mean in practice. It is hard to formulate a coherent proposal for leaving the UK when it is not clear yet just how the UK is to leave the EU.

And assuming that the UK does leave the EU as arranged next year, that alters the independence equation fundamentally. It was one thing leaving the UK when it was assumed to be remaining part of the EU. It is quite another proposing that Scotland should leave the UK when it is out of the European Union. In such an event, the hard border question moves from Ireland to Scotland. If England is out of the European Union, it seems inevitable that there would have to be a hard border at Carlisle, if and when Scotland leaves the UK and rejoins the European Union. In the 2014 Scottish referendum campaign, there was no border issue because both Scotland and England were assumed to be remaining in the customs union and single market.
My suspicion is that this ultra-cautious First Minister will play a dead bat. She’ll say there can be no decision on a Scottish independence referendum until the fog of Brexit clears and voters know where they stand. That means no independence referendum before 2021, because Brexit will still be lost in the mist of the transition period. Only if there is a sudden and dramatic shift in Scottish opinion in favour of holding an early referendum will that change. It may even be some years after 2021 before Scots are ready to revisit the Scottish question. Only then will the full reality dawn that they have lost their citizenship of the EU, are out of the single market and that Scotland has become a marginal region of a new Brexit Britain.
13. The Scottish Conservatives and the Brexit Challenge

David Torrance

Two years ago, everything was going rather well for Scottish Conservative leader Ruth Davidson: not only had her party become Scotland's principal opposition after the May 2016 Holyrood elections, but in the weeks that followed she enjoyed a UK-wide profile as a prominent voice in the campaign to 'Remain' in the European Union. At Wembley Stadium, she even took on Boris Johnson and won.

Her face the morning after referendum day, however, told a different story. At Glasgow's Science Centre, where journalists like me were gathered to do the usual round of punditry, Davidson sat in a corner with her adviser Eddie Barnes looking rather miserable. The reason was obvious: her whole strategy to 'revive' the Scottish Conservatives (and advance herself in the process) appeared to be in tatters.

But when Davidson and Barnes sat down to watch Nicola Sturgeon's Bute House statement, their mood lightened. Her 'highly likely' phrase and intimation that referendum legislation would be prepared suddenly handed them a strategy. Another independence referendum, Davidson responded later, was 'not in the best interests of Scotland'. 'The 1.6 million votes cast in this referendum in favour of Remain,' she added, 'do not wipe away the two million votes that we cast less than two years ago.'

All this explains why Brexit hasn't caused the Scottish Conservatives the problems they (and many others) expected it would. Following the 2017 general election, meanwhile, Davidson took advantage of 12 MP gains north of the border to launch another strategy, that of portraying herself and her rejuvenated party as a moderating 'brake' on a hard Brexit.

She was pilloried, of course, by Sturgeon for changing her position: not only had Davidson campaigned to remain part of the EU, but in the aftermath of Brexit suggested keeping Scotland in the single market (if not the EU) was her preferred outcome, much as it became the 'compromise' position of the SNP. Subsequently, Davidson finessed her position, speaking of an 'open Brexit' in which the UK retained the 'largest amount of access' to the single market after 29 March 2019.

Ironically, Brexit ended up causing Nicola Sturgeon rather more problems than Ruth Davidson, not least because it revealed a split in the Nationalist ranks between Remainers and Leavers. That said, it hasn't all been plain sailing for the Scottish Tories, as a recent row over the Common Fisheries Policy (CFP) demonstrates.

Now even though the Scottish fishing industry does not loom large in economic or employment terms, it does occupy a symbolic space in Scottish political discourse and therefore requires careful handling. In this context, Davidson fell short, appearing to suggest (alongside, interestingly, Environment Secretary Michael Gove) that Scottish fishermen wouldn't be subject to the CFP for a day longer than necessary.

Despite the SNP's own position being a bit muddled (it wants to stay in the EU but either opt out of, or reform, the CFP – a quixotic goal), Sturgeon et al went to town, accusing Davidson of 'betraying' the industry just as Edward Heath had while negotiating entry back in the early 1970s. The Scottish Tories attempted to limit the damage, including a rather empty threat to vote against any final deal, but it wasn't their finest hour.
Therein lies the obvious danger for the Scottish Tories over the next year – that further unpalatable compromises regarding Brexit will blow up in Ruth Davidson's face, weakening her soft-nationalist claim to ‘stand up for Scotland’ within the United Kingdom and reducing the likelihood of further gains at the 2021 Holyrood elections.

There is, however, another scenario. Frustratingly for the SNP, Brexit is a slow-burner with no decisive ‘moment’ which allows them to push the case for a second independence referendum. In terms of public opinion, meanwhile, Ruth Davidson seems more aligned with the majority view in Scotland, which voted Remain but seems unwilling to man the barricades to stop Brexit happening.

Many Scottish Tories I’ve spoken to are not complacent about the Brexit dimension, realising it's key to their political fortunes over the next few years. If it’s a constitutional and economic disaster, then Ruth Davidson could be dragged down along with Theresa May, but if it trundles along and the final deal isn't radically different from the status quo, then the Scottish Conservative leader could end up in a rather better position than her Nationalist counterpart.
Part III. EU Priorities beyond Brexit

14. Brexit Is Distracting the EU – and UK – from Its Bigger Problems

Giles Merritt

Europe is watching the spectacle of Brexit with horrified fascination. ‘How is it,’ ask friends and colleagues in Brussels, ‘that a nation of pragmatists can tear itself apart over ideologies?’

They also ask why the British, with their centuries-old history of worldwide influence and adventure, now focus so intently on the pettifogging details of intra-European trade and regulation, and ignore the fact that it is the geopolitical picture that counts most of all.

Good questions. Brexit is dazzling the whole of Europe, not just the British, so they no longer see the woods for the trees. But even if the EU’s detractors think it’s about red tape, the European project is really about the big picture. With the 21st century now getting fully into its stride, it is clearer than ever that the EU’s continued economic and political integration is crucial to defending its member countries’ interests in a globalising world.

Brexit’s focus on minutiae is an unnecessary distraction from the more pressing challenges Europe, including the UK, must meet. No single European nation has the resources and the clout to stand up on its own to China, America or Russia, so unity is crucial to Europe’s security and well-being.

The dangerously unpredictable initiatives of the Trump administration call for solid and unambiguous responses from the EU. Whether it’s Trump’s trade war with China or his threatened torpedoing of the Iran nuclear deal, the EU27 will be forced to define its position vis-à-vis these major issues.

Brexit should therefore be seen as a useful wake-up call. Most EU countries had grown used to slipstreaming behind London, Paris and latterly Berlin on foreign policy issues.
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Now, circumstances in the shapes of Trump, Putin and Xi, are bringing big geopolitical issues to the fore, and the EU can no longer fudge its stance.

When the UK voted to leave the EU, some Brexiteers believed Britain's departure would prompt other countries to follow. Instead, it led to a mood of renewed solidarity among member governments for, in spite of Eurosceptic populism in a number of countries, the value of EU membership is highlighted by Brexit. There is also a sense that now the EU is to be freed of British foot-dragging, it can move ahead to confront its biggest problems. That is, though, easier said than done.

Conflict and growing instability in the Middle East, Russian assertiveness that is increasingly combative, and the multiplying uncertainties of US policymaking are not the EU's only pressing difficulties. It is urgent to move eurozone governance ahead with new political underpinnings but wider debt obligations, although there's still little sign that French President Emmanuel Macron and German Chancellor Angela Merkel can reconcile their countries' differences.

The pressures for splitting the EU into a two-tier arrangement of committed federalist countries and the others are still strong, made stronger still by the refusal of the four Visegrad countries – Poland, Hungary, Slovakia and the Czech Republic – to toe the EU line on issues ranging from civil rights to migrant burden-sharing.

On top of these divisive questions, there's that of the EU's future. Should its top jobs be handed out in the present untransparent manner, or has the time come to transform the EU's ramshackle structure into a coherent democratic institution – even though that could undermine the authority of its member states?

All these challenges should be reducing the issues surrounding Brexit to small print in the Brussels agenda. Instead of trading arrangements, it's how the British government, with its precarious parliamentary position, will be able to cooperate with the EU on geopolitical issues that is far more important.

So far, these questions haven't been crystallised into a clear-cut political narrative on the EU side, and certainly not on the part of the British government. It's time they were.

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15. Finland Focuses on Its Northern Partners as Brexit Takes the UK out of ‘Northern Lights’ Grouping

Juha Jokela

One year on from the activation of Article 50 by the United Kingdom, the number one priority for Finland continues to be the unity and consolidation of the European Union. Relatedly, Helsinki is also adapting to the changing political dynamics of EU decision-making in the context of Brexit.

The initial Brexit agreement on the so-called divorce issues and the transition arrangements with the UK has been welcomed in Finland. Even though the remaining open questions such as the border issue between Ireland and Northern Ireland are taken seriously – not least due to political difficulties in London – Finland’s focus is now shifting to the future economic and political relations with the UK.

The closest possible economic relations between the EU and the UK after its withdrawal are still seen as an important objective for Helsinki. At the same time, the awareness of the negative economic implications of Brexit for the UK and the EU has risen. The challenges facing the UK economy due to Brexit have become clearer, and the populist arguments downplaying these have faded away. The UK’s aspiration for a clean Brexit is largely understood to mean a hard Brexit, and the ramifications of the UK leaving the single market and customs union are taken increasingly seriously.

Against this backdrop, Finns have understood that economic relations will not remain as frictionless as they are now, despite the goal of striking a deep and comprehensive free trade agreement. Finnish customs has recently published an assessment of the potential extra costs for Finnish businesses stemming from new administrative procedures after Brexit. At a minimum, the costs are estimated to be in the range of €12-23 million and, at maximum, between €60-115 million annually.

Smoothly-functioning trade flows with the UK are seen as important in Helsinki, however. In 2016, 5% of Finnish exports went to the UK, while the UK’s share of Finnish imports was 4%. The government has also flagged up the aviation sector as a special Finnish interest, and the EU’s chief negotiator Michel Barnier met the executive officers of the national carrier, Finnair, during his recent trip to Helsinki. International transfer traffic, to and from the UK, is crucial for state-owned Finnair and Helsinki airport. In recent years, the airline has considerably expanded its operations to Asia, and it is a member of the One World alliance led by British Airways.

In light of the worsening European security environment, Finland has called for deeper EU cooperation in the field of security and defence, not least because the country is not a member of NATO. In this regard, Brexit is seen as one of the background drivers for recent EU developments such as the launch of Permanent Structured Cooperation as part of EU security and defence policy. At the same time, Brexit has also been seen to enable the recent progress made in this field, due to the irrelevance of well-known UK reservations towards deeper EU defence cooperation. However, within the broader frame of security, Finland has sincerely welcomed the continuing UK commitment to European security, and also developed its bilateral defence ties with the UK. Finland,
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together with Sweden, joined the UK-led high-readiness force in summer 2017, for instance.

Helsinki sees continuing collaboration in the field of foreign, security and defence policy as an important feature of future EU-UK relations. Cooperation in internal security is also emphasised, given the increase in cross-border risks and threats, including terrorism and hybrid threats.

Yet, overall, the consolidation of the EU in light of the previous crisis and new challenges continues to be the number one priority for Finland. Recently, the focus of the national EU debate has shifted to eurozone reform and to the negotiations concerning the next multi-annual financial framework. The EU's external trade policy is also seen as a crucial matter for Helsinki, due to the range of current, worrying global developments.

In terms of addressing the EU agenda, and as the UK’s departure date is closing in, Helsinki has increasingly shifted its attention towards other like-minded EU members. While Germany has remained a key interlocutor for Helsinki, somewhat novel developments have also followed.

Finland was one of the eight northern EU member states whose finance ministers’ published a joint paper on euro area reform in early March. The paper reflected their known opposition to proposals calling for a deeper fiscal union, and instead underlined market discipline and national responsibility. The inclusion of non-euro members such as Denmark and Sweden in this joint paper suggests that the interests of the non-euro members count in the north. Yet this move might also speak to a more general concern related to the relative power of the midsize and small northern members in the post-Brexit EU.

Already in late 2017, finance ministers from the Nordic and Baltic EU member states and Ireland met over dinner in Brussels to discuss eurozone reform, EU funding and high-level EU strategic positions related to the EU’s next institutional cycle. Interestingly, their Dutch and German colleagues were invited to join in for coffee. In the past, the UK often played a key role in informal meetings of the northerners known as the ‘Northern Lights’ gatherings. As the liberal free-traders in the north are about to lose a powerful ally in EU decision-making, more attention has been paid to intra-EU coalition building, as the prominence of the southern members and Franco-German cooperation are seen to be on the rise.

Against this backdrop, the emergence of the so-called Hanseatic League 2.0, including many of the northern capitals, has been embraced in Helsinki. And the negotiations concerning the future relations between the EU and the UK are predominately seen as one item among many on the EU's extensive agenda.
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