

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

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BREXIT UPDATE

SPICe weekly update

**THE ARTICLE 50
LEGAL CASE**

**THE FIRST MINISTER
IN IRELAND**

**DEPARTMENT FOR EXITING
THE EU - FAQs**

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The Information Centre
An t-Ionad Fiosrachaidh

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The Scottish Parliament
Pàrlamaid na h-Alba

Contents

The Article 50 legal case	1
Article 127 of the EEA Agreement	2
The First Minister in Ireland	2
British Irish Council Summit	3
Department for Exiting the EU - FAQs	5
Scottish Parliament Committees consideration of Brexit	5
The UK Parliament's response to the decision to leave the European Union	9
Chance of an 'orderly' Brexit within two years is less than 50%	10

About this paper

This regular paper produced by SPICe sets out developments in the UK's negotiations to leave the European Union which are expected to formally begin early in 2017.

Ahead of the UK Government's triggering of Article 50, the updates will provide information on the UK Government's approach to leaving the EU, along with details of the Scottish Government and the other Devolved Administrations positions. The updates will also provide information on developments within the EU with regard to the UK's departure. Finally the update will provide information on the key issues likely to be at play during the negotiations and in developing the UK's future relationship with the European Union.

As was clear during the referendum campaign and since the decision to leave the EU was taken, there is an abundance of information and analysis available, and this SPICe paper will try to cover the key issues by drawing on that information and analysis. This week's update provides more information about the Article 50 legal case, the new debate on Article 127 of the EEA Agreement and the First Minister's attendance at the British Irish Council.

The Article 50 legal case

As noted in last week's update, on 18 November, the Supreme Court [confirmed](#) that applications from the Scottish and Welsh Governments to intervene in the Article 50 legal challenge had been accepted.

On 25 November, the Scottish Government published the [Lord Advocate's Intervention](#) in the Article 50 legal case. The intervention (which runs to 58 pages) proposes that withdrawal from the European Union requires an Act of the UK Parliament and consequently a Legislative Consent Motion of the Scottish Parliament:

“Withdrawal of the UK from the EU would alter the competence of the Scottish Parliament and Government, and the law applicable in Scotland within devolved competence. A Bill to authorise withdrawal from the EU and service of notice under Article 50(2) would accordingly engage the Legislative Consent Convention.

The “constitutional requirements”, according to which a decision to withdraw from the EU must be taken, accordingly include (i) the legal requirement for an Act of the UK Parliament; and (ii) the Legislative Consent Convention.”

The UK Government's appeal against the High Court decision to prevent Article 50 being triggered by use of the Royal Prerogative will be heard from 5-8 December 2016.

Writing on his Devolution Matters blog, Alan Trench addressed the question of [whether triggering Article 50 would require legislative consent from the Scottish Parliament](#). Having set out the different tests for whether legislative consent is required – looking at policy and constitutional reasons – Trench concluded that if the Supreme Court upholds that rights are affected by the decision to leave the EU then Legislative Consent may be required:

“But the reasoning about the connection between EU membership and individual rights changes the position regarding legislative consent for Scotland considerably. That applies even if the Supreme Court were to reach a similar conclusion by a different route, without over-ruling the Divisional Court on this issue. For Scotland at least, ‘rights’ including human rights are not a reserved matter. The Human Rights Act 1998, and the Convention rights it enacts, are provisions protected from alteration by the Scottish Parliament, but rights more widely are not. If Westminster were to interfere with such rights, that does affect a matter within the competence of the Scottish Parliament – which is the test for deciding whether legislative consent is needed under the policy arm of the Sewel convention. As it affects a devolved matter, it is statutory and that also means it is justiciable by the UK Supreme Court. Moreover, as this is a constitutional provision so far as the UK is concerned, the requirement needs to be satisfied for the Article 50 notice to be valid (since that must comply with the notice-giving member state's ‘own constitutional requirements’).

The Supreme Court needs to address this question, as if it is left hanging it will only lead to further legal uncertainty (and litigation, and delay) in the process of Brexit, or yet more political grandstanding with little legal or constitutional foundation. Only if leaving the EU were not to affect ‘rights’ could the requirement for legislative consent be dispensed with. It is yet more evidence, if evidence

were needed, that the path to the UK leaving the EU is a long, complex, twisting and messy one.”

Article 127 of the EEA Agreement

In recent days it has been [suggested](#) that Article 50 isn't the only potential legal issue surrounding Brexit as “senior lawyers have said they believe Article 50 does not provide for leaving the EEA, which extends the single market's tariff-free trade in goods to countries like Norway, Iceland and Liechtenstein”.

Article 127 of the European Economic Area (EEA) Agreement governs the way in which a country can leave the EEA. In response the Government have said that as the UK is party to the EEA Agreement only in its capacity as a member of the EU, it would mean that once the UK leaves the EU, it would automatically cease to be a member of the EEA.

According to the Daily Telegraph, British Influence, a pro-EU think tank, has said it will launch a judicial review into No 10's assumption. In the event of a successful legal challenge, it's possible Parliament could be given the final say on EEA membership.

This issue is covered in more detail in the attached [BBC news article](#).

The First Minister in Ireland

During the First Minister's visit to Ireland from 28 to 29 November, Brexit related matters were discussed. Ahead of the visit, the Scottish Government published a [news release](#) in which the First Minister outlined the purpose for her visit:

“The relationship between Scotland and Ireland is more important than ever. I look forward to meeting with political and businesses leaders to discuss how we can work together to protect and strengthen our shared interests.

“I'll be stressing the Scottish Government's commitment to the principle of European solidarity and the benefits Scotland receives from membership of the European Single Market.”

Speaking to Irish Business leaders during her visit, the First Minister stressed the importance of the [Single Market](#):

“A hard Brexit is likely to be the most damaging option for trade, jobs and our universities sector. We share the frustrations of the Irish business community about the lack of information we have, and the possibility of a hard Brexit. This is why we are determined to do all we can to mitigate the impact of Brexit and persuade the UK Government to retain single market membership. It is my firm belief that this position is in the interests, not just of Scotland, but off all the nations on these Islands. On virtually every issue of substance Ireland has a strong ally in Scotland and I look forward to working together to boost economic growth.”

The First Minister also met with the Irish Government's Foreign Minister, Charlie Flanagan during her visit. According to a [press release](#) from the Irish Ministry for Foreign Affairs:

"The Minister and First Minister also discussed the UK's decision to exit from the European Union, which was also discussed in detail at the British Irish Council Summit in Cardiff on Friday.

Minister Flanagan said:

"Building on last week's useful discussions at the British-Irish Council, we discussed the UK's exit from the EU and the ongoing thinking within Scotland and the UK as a whole. In a good exchange, I outlined Ireland's key priorities in terms of preserving our strong Irish-British bilateral relationships and in terms of the vital importance of preserving peace and prosperity in Northern Ireland".

British Irish Council Summit

The First Minister of Wales, the Rt Hon Carwyn Jones AM, hosted the twenty-eighth Summit meeting of the British-Irish Council in Cardiff on Friday 25 November. The meeting was attended by Heads of Administration and Ministers from the eight Council administrations: the Irish and UK Governments; the devolved administrations of the Welsh Government, the Scottish Government and the Northern Ireland Executive; and the Governments of the Isle of Man, Guernsey and Jersey.

The UK's decision to leave the EU was one of the issues discussed at the summit. According to the [summit communiqué](#):

"This was the first meeting of the Council since it convened in Cardiff in July 2016 for an extraordinary Summit to discuss the outcome of the United Kingdom's (UK) referendum on membership of the European Union (EU). Ministers used the discussion today to reflect on developments since that meeting.

Ministers updated the Council on their activity in respect of the UK's exit from the EU, particularly with reference to relations between Member Administrations, and arrangements that have been put in place to facilitate and strengthen engagement.

They also further discussed some of the themes identified in July, including in relation to specific sectors such as the agriculture, agri-food and fisheries industries, economy and trade, free movement of goods and people, the Common Travel Area and relations with the EU.

Ministers noted an update on implications for the Council work sectors of the UK's exit from the EU. They mandated officials to keep this under review and to report back to the Council.

In concluding their discussions, the Council again reiterated their commitment to facilitating harmonious and mutually beneficial relationships among the people of these islands as set out in the 1998 Agreement. Ministers agreed that the

forthcoming developments underline the importance and value of the Council as a unique forum to share views, enhance cooperation and strengthen relationships.”

Ahead of the summit, the Welsh First Minister [called on](#) “the UK Government to secure continued full and unfettered access to the single market and guard against barriers to trade”. According to the Welsh Government:

“At the meeting, First Minister Carwyn Jones will stress the renewed importance of securing full and unfettered access to the single market in light of uncertainty around future trading relationships with America under the incoming administration.”

A Scottish Government [press release](#) published following the summit outlined discussions between the First Ministers of Scotland and Wales about Brexit. Both First Ministers stated that they would work to avoid the UK experiencing a hard Brexit:

“First Minister Nicola Sturgeon said:

“Today’s meeting was another positive and useful opportunity to discuss some of the shared concerns both countries have around the UK’s exit from the European Union.

“Both Scotland and Wales have spoken loud and clear - Single Market status is simply the only way to protect the economy not only of Scotland and Wales respectively, but the UK as a whole. Anything else risks us falling off a hard-Brexit cliff edge, and we are united in our call to ensure the UK Government does all it can to ensure that happens

Welsh First Minister Carwyn Jones added:

“This has been a constructive discussion where we have shared our very strong concerns over the prospect of the UK pursuing a hard Brexit.

“We will continue to work together to build a coalition in favour of the UK having full and unfettered access to the single market.

“We each face different situations in our own countries and it is for each of us to set out our favoured outcomes. Where we can work together to achieve those aims, we will continue to do so.”

According to the Scottish Government, in relation to EU competences which will be repatriated when the UK leaves the EU:

“Both First Ministers also made clear that they will resist any attempts by the UK Government to undermine the devolution settlement. If and when EU regulatory frameworks in devolved policy areas cease to apply then it will be for the Devolved Administrations to decide if and how to develop UK wide frameworks with the UK government.”

Department for Exiting the EU - FAQs

The UK Government's Department for Exiting the EU has published a series of [Frequently Asked Questions](#) to help keep people informed about the Department's work and the process of leaving the EU.

The FAQ's include the following:

Does Parliament need to vote on triggering Article 50?

The Government's position is clear. This is a prerogative power and one that can be exercised by the Government, and we aim to prove that in the Supreme Court. Both Houses of Parliament legislated for the referendum, with cross-party support, and it was clear that it was for the people to decide whether to remain in the EU or leave it.

What model will be pursued in the negotiation?

Our vision for Britain outside the EU is clear: a fully independent, sovereign country. We are not looking for an 'off the shelf' deal for our future relationship – a Norwegian model or a Swiss model – it's going to be an agreement between an independent, sovereign UK and the EU. We want that relationship to reflect the kind of mature, cooperative relationship that close friends and allies enjoy.

I am a EU national living in the UK - what does exiting the EU mean for me?

There has been no change to the rights and status of EU nationals in the UK, or of UK citizens in the EU, as a result of the referendum.

The Prime Minister has been clear that during negotiations she wants to protect the status of EU nationals already living here, and the only circumstances in which that wouldn't be possible is if UK citizens' rights in European member states were not protected in return.

Scottish Parliament Committees consideration of Brexit

The Scottish Parliament's Culture, Tourism, Europe and External Relations Committee continued its inquiry into [the implications of the EU referendum for Scotland](#) on 24 November. The Committee [took evidence](#) from Professor Clive Church from the University of Kent and Professor Matthias Oesch from the University of Zurich on the Switzerland's bilateral relationship with the EU.

Professor Church told the Committee he did not believe the Swiss approach was a good model for the UK's future relationship with the EU:

"When Switzerland comes up in political discourse in the United Kingdom, it is usually offered as a model for the United Kingdom to follow, but I do not believe that it is. Switzerland is engaged in a parallel movement that is not always in the

same direction as the United Kingdom, and negotiators should be aware of that. However, there are a number of reasons why it is not a model.

First, it is not a single clearly designed structure; it is an evolving one, as Professor Oesch has helpfully made clear. It is not a model that is clean cut and easy to copy; it is extraordinarily complicated, as Professor Oesch, again, made clear. Alongside the various legal deals to which he referred, there is an undergoing current of what academics call Europeanisation—that is, the penetration of the social and political fabric by relations with the EU. That is often overlooked, but it is extremely important.

As well as the closeness to EU legislation, there are other reasons why Switzerland is not a model, in particular for those who favour Britain leaving the European Union. There is the very Swiss nature of the agreements, which are designed to fit Switzerland's needs. I echo Professor Oesch's point about geography: the St Gotthard pass, which is seeing remarkable development at the moment, is far more important to Swiss-European relations than the Channel tunnel is to British-European relations.

In addition, the model is not universally accepted inside Switzerland, let alone by the European Union. Of course, there is also the European Free Trade Association dimension, which should not be overlooked. The thing has been further complicated by the rise of the migration question, as Professor Oesch made clear. He rightly referred to what the Swiss call the RASA initiative, which is a German acronym that stands for "Out of the impasse", which calls simply for the removal of the offending provision in article 121 in the constitution from the draft to take Switzerland back to where it was before 2014. The Federal Council recently discussed that and decided that it did not like the initiative, as it was not wholly democratic, but it is going to put up a counter project—as the Swiss call it—although we do not yet know what that will be.

The final reason why Switzerland is not a model to follow is to do with Brexit. A lot of people think that Brexit will automatically favour the Swiss but, in fact, there are a number of problems. Notable ones include the unhelpful impact on the already high level of the Swiss franc and the loss of a useful ally inside the European Union.

For all those reasons, I see Switzerland not as a model but as one of two countries in a parallel situation, who are moving—over a longer period sometimes—in different trajectories, but both are having to seek a new relationship with the EU after a referendum ruled out the obvious option. Both are seeking to make up for the fact that they are in some way outside the single market: they are both searching for deals which aid key national sectors; and they both want bespoke arrangements. They are both bedevilled by a clash between populist pressures and business needs. They are both deeply affected—although they do not always realise it—by Europeanisation. They are both proceeding on the basis of the fact, which I have never wholly accepted, that the EU needs them more than they need the EU. They are both having to face up to the possibility of contradictory referenda. Finally, they both find themselves in the situation of being one state facing not merely 27 others, but the EU institutions as well."

In response to a question about the suitability of EFTA membership for the UK, Professor Oesch told the Committee:

“I add that EFTA might not be an ideal setting for the United Kingdom mainly because of the way in which it has been evolving over time for Switzerland but also because of the institutional question. One has the impression at the moment that the EU does not accept participation within the single market, even partially or sectorally, without having a fully fledged institutional setting to guarantee the good functioning of the arrangement.

Dispute settlement and the adoption of new EU rules—last week, the committee heard about how that is done in the EEA—are the two main controversial issues that need to be tackled somehow. As an outsider, I could not imagine the UK accepting the ECJ or the EFTA Court as the final arbiter on such issues, nor do I think that the UK would be ready to take on new EU regulations and directives periodically without being able to make decisions on those issues. That is a controversial issue in Switzerland at the moment, and it is equally controversial in the three EEA-EFTA member states, whether implicitly or explicitly.”

The Committee also took evidence from a panel of representatives representing different business sectors. The Committee heard from Professor Gordon Masterton, chair of future infrastructure at the University of Edinburgh and former president of the Institution of Civil Engineers; Peter Hardwick, head of exports at the Agriculture and Horticulture Development Board; David Branch, head of business development at Cochran UK; Derek Elder, chair of the engineering policy group Scotland; Ken Sutherland, president of Toshiba Medical Visualization Systems Europe; David Lonsdale, director of the Scottish Retail Consortium; and Tim Reardon, policy director of the UK Chamber of Shipping.

The main points to come out of the evidence session with businesses where:

- The importance of tariff free access to the Single Market
- The removal of non-tariff barriers such as different regulatory regimes once the UK leaves the EU
- The need for certainty for business
- the bureaucratic and logistical challenges of being out-with the Customs Union
- From a workforce perspective, the continued importance of non-UK EU nationals

The Economy, Jobs and Fair Work Committee meanwhile continued taking evidence for its [Economic Impact of Leaving the European Union inquiry](#) on 22 and 29 November.

On 22 November the Committee [took evidence](#) on the impact of non-UK EU migration in the Scottish workforce. The Committee took evidence on the possible impact of Brexit for the health sector, the care sector and the soft fruits sector. The Committee also heard from Stephen Boyd, assistant secretary at the Scottish Trades Union Congress; Gordon McGuinness, director of industry and enterprise networks at Skills Development Scotland; Patrick McGuire, solicitor advocate at Thompsons Solicitors; and Professor Robert Wright, from the University of Strathclyde.

On immigration policy and EU nationals working in the UK, Professor Wright told the Committee:

“Another thing to remember is that it is right to say that there are a lot of A8 migrants who are in low-skilled jobs but who have relatively high skill levels, which is a big mismatch. That is a problem because it leads to labour market turnover, which is a clear cost. That is not an ideal match or an ideal policy; the position has just evolved because of the free movement of people.

The current UK system is very flexible in a way. It has the tier 3 visa, which was focused originally on low-skilled migrants but was not put into operation. That visa could easily be put into operation, which would attract low-skilled people. That would be a policy for the UK as a whole and, as far as I can see, there would be no input from Scotland specifically. Such a visa would work quite well; it is part of the immigration policy that is used by most countries that have a shortage of low-skilled workers. They do not attract high-skilled workers to take low-skilled jobs; they attract low-skilled workers. I do not think that we need to create a new system or a complicated set of visas. There is a tier that could be used, although it would have to be reactivated and people would have to think about that.

The next issue is what Scotland does. We know that Scotland’s demography is different. The workers of the future have never been born. It will not be possible to retrain or provide skills for people who leave school with no basic qualifications or people who have been long-term unemployed—the evidence is out there that it is difficult to get those people back into work and keep them there. That is not speculation; it is known from research by universities and the Parliament.

We have done work on numbers over the years, and the number of people that has been mentioned is relatively small. Hiring our own people who do not work will not fix the problem. We can argue about or discuss why those people do not work, but basically they do not have the skills to work. What they have on offer is not in demand.

For the Scottish situation, we do not have to recreate the wheel. We can learn from experiences such as those of Canada and Australia. If we want more control over immigration, we have to adopt a system that is similar to those in Australia and Canada, in which we would have more say. In such a system, we would have to issue visas that were conditional on people working and staying in Scotland for the minimum time before they can apply for UK citizenship. That will not change with Brexit.

Such a system works well. It gets people who are a better match, rather than highly skilled Polish people who come here, stay one year then return.

I do not see a big change in UK immigration policy before or after Brexit. I do not see any serious problem in attracting low-skilled or middle-skilled workers to the UK, but the question is how we deflect those workers and convince them to come to Scotland, where they are needed. That is the big unknown, but it was unknown 10 years ago, it was unknown yesterday and it will probably be unknown after Brexit.

The discussion will have to be about Scotland's demographic situation. Labour growth is much slower here; relatively speaking, we need more people in the lower-skilled and middle-skilled group than the UK as a whole does, which in effect is England, because it has 90 or 88 per cent of the population. That is my point."

On the in-migration of EU workers to Scotland, Stephen Boyd told the Committee:

"There is no serious evidence that in-migration to Scotland has led to higher unemployment levels or lower wages among the indigenous Scottish workforce. We have good evidence to show that that has happened in the UK as a whole, but I have seen no evidence in Scotland that leads me to be particularly concerned about that."

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

The House of Commons Exiting the EU Committee will continue its inquiry into the [UK's negotiating objectives for withdrawal from EU](#) on 30 November when it hears from business experts on the UK's negotiating objectives for withdrawal from the EU. The Committee will take evidence from Gary Campkin, Director for Policy and Strategy, TheCityUK; Dr Virginia Acha, Executive Director for Research, Medical & Innovation, ABPI and Fergus McReynolds, Director of EU Affairs, EEF, The Manufacturers Organisation.

The [aim of the session](#) will be to explore a number of themes including

- The risks and opportunities of a quick exit from the UK or a transitional arrangement
- The impact of regulatory divergence from the EU
- What the Government could do to make the UK outside the EU an attractive place for business
- How to ensure businesses can recruit the skills they need once the UK leaves the EU

The evidence session will be broadcast on [Parliament TV](#).

The newly established International Trade Committee began its first inquiry; (into the [UK's trade options beyond 2019](#) on 29 November. The inquiry sets out to examine the various trade models that might be available to the UK after Brexit, and to consider their strengths and weaknesses.

The Committee began by hearing from Department for International Development officials, and experts in the field. Witnesses giving evidence included:

- Professor Patrick Minford, Professor of Applied Economics, Cardiff University/Co-chair of Economists for Brexit
- Martin Howe QC, Economists for Brexit/Lawyers for Britain
- Dr Swati Dhingra, Centre for Economic Performance, London School of Economics

- Professor Jim Rollo, UK Trade Policy Observatory, University of Sussex

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

The follow inquiries have been concluded, and the reports will be published before Christmas:

- [Brexit: UK-Irish relations](#)
Oral evidence concluded: Report in preparation
- [Brexit: financial services](#)
Oral evidence concluded: Report in preparation
- [Brexit: future trade between the UK and the EU](#)
Oral evidence concluded: Report in preparation
- [Brexit: fisheries](#)
Oral evidence concluded: Report in preparation
- [Brexit: acquired rights](#)
Oral evidence concluded: Report in preparation
- [Brexit: future UK-EU security and policing co-operation](#)
Oral evidence concluded: Report in preparation

The following inquiries are underway or are approaching completion, and reports will be published in early 2017:

- [Brexit: future trade between the UK and the EU in goods](#)
Oral evidence ongoing
- [Brexit: future trade between the UK and the EU in services](#)
Oral evidence ongoing
- [Brexit: environment and climate change](#)
Oral evidence ongoing
- [Brexit: UK-EU movement of people](#)
Oral evidence ongoing

The House of Lords has also [published details](#) of its forthcoming meetings, including topics and witnesses.

Chance of an 'orderly' Brexit within two years is less than 50%

An [article in the Observer](#) newspaper published on 27 November, reported on a speech at the London School of Economics by former UK diplomat Lord Kerr. In his speech Lord Kerr suggested that:

“The government has a less than 50% chance of securing an orderly exit from the European Union within two years and will potentially have to accept a phased departure lasting much longer, prompting “a decade of uncertainty”

The article which describes Lord Kerr as “Britain’s most experienced EU negotiator” includes a number of quotes from the cross-bench peer.

According to Lord Kerr, if the UK left the EU without securing a new negotiated settlement:

“the result would be a disaster, a bonanza time for lawyers, emergency session of parliament, a huge amount of the British statute book collapses if the 1972 European Communities Act agreement that took us in and our adherence to the EU treaties is abrogated. It means massive uncertainty for economic operators.”

Lord Kerr suggested there was a growing chance of no deal being reached.

Post-Brexit Immigration

Writing on her blog, Christina Boswell from the University of Edinburgh has attempted to set out what [a post-Brexit immigration policy might look like](#). The starting point is that the UK negotiates a deal involving withdrawing from provisions on free movement.

Christina Boswell suggests that post-Brexit we are unlikely to see much change in the current patterns of inward EU migration:

“Neither should we expect a significant change in the composition of flows. There will be good reasons to sustain current EU flows. Businesses will have adapted to recruiting and employing workers from particular countries or places. They may rely on employees with particular linguistic skills, knowledge of local markets or contacts. And not least, the UK government may want to create channels for EU immigration as part of reciprocal agreements. So there may be a case for sustaining current patterns of inflow to ensure similar outflows of UK nationals to particular EU countries can continue.”

The blog suggests the flow of skilled migrants is likely to continue whilst it is possible unskilled EU migration may be more limited. Christina Boswell concludes that:

“In short, I think we can expect a post-Brexit immigration policy to largely replicate current inflows of EU nationals, in terms of both volume and composition. But it will do so in a way that is far more cumbersome and bureaucratically burdensome. And, especially for those employed in low-skilled and temporary work, it will imply a far less attractive bundle of entitlements and labour standards. This, in turn, may even contribute to a higher risk of EU workers undercutting UK nationals, through accepting lower salaries and more precarious conditions. This may be good news for businesses employing EU workers. But it’s hardly good news for EU nationals, and is surely not what was intended by ‘taking back control’.”

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