

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

Issue 31

17 May

2017

# BREXIT UPDATE

**BREXIT EVIDENCE SESSION:  
MINISTER MICHAEL RUSSELL**

**COURT OF JUSTICE RULING:  
EU-SINGAPORE TRADE DEAL**

**SETTLING THE UK'S  
BREXIT BILL**

**SPICe**

**The Information Centre**  
An t-Ionad Fiosrachaidh

Written by Iain McIver, SPICe Research



The Scottish Parliament  
Pàrlamaid na h-Alba

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### About this paper

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

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

As was clear during the referendum campaign and since the decision to leave the EU was taken, there is an abundance of information and analysis available, and this SPICe paper will try to cover the key issues by drawing on that information and analysis. This week’s update focuses on the Scottish Government’s Minister for UK Negotiations on Scotland’s Place in Europe evidence to the Scottish Parliament’s European Committee and the Court of Justice of the European Union’s ruling on the status of the EU-Singapore Trade deal.

## Scottish Government's Minister for UK Negotiations on Scotland's Place in Europe gives evidence to the European Committee

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On 11 May, Michael Russell, the Scottish Government Minister for UK Negotiations on Scotland's Place in Europe [gave evidence](#) to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee. The Minister updated the Committee on the latest developments following the triggering of Article 50.

The Minister began by summarising the current situation:

*"I am happy to take the opportunity to update members on where the Brexit negotiations are following the triggering of article 50. I was very disappointed, as was the Scottish Government, that article 50 was triggered without any meaningful consultation—indeed, without any consultation at all—with the Scottish Government about the content of the letter and without proper consideration of the compromise proposals that we put forward in the "Scotland's Place in Europe" paper. The formal response, and the pantomime around that with regard to access to information, indicated a lack of serious consideration of what were important and very workable proposals.*

*Nonetheless, we are where we are. We intend to continue to engage as constructively as we can in the joint ministerial committee (EU negotiations) process, although that process will have to return to the intentions that are in the terms of reference."*

On the Brexit negotiations and Scotland's role in those negotiations, the Minister told the Committee that Scottish interests should be represented in the negotiations:

*"We will do all that we can to ensure that Scotland's interests are represented in the process of negotiation. I repeat publicly that we do not believe that a hard and bad Brexit will be good for Scotland. There has to be a better deal than that and we will do everything that we can to assist in getting it. We need to reset the JMC process to achieve that, and we need a great deal more information than is presently forthcoming. When we come on to matters such as the great repeal bill, I will indicate to you where not sharing with us the information that we know exists is already presenting considerable problems."*

The Committee Convener asked the Minister about the UK Government's formal response to the Scottish Government's Scotland's place in Europe paper. In the response David Davis wrote that he believed the Scottish Government and the UK Government "agree on the large majority of subjects". In response Michael Russell told the Committee:

*"I have to say, with the greatest respect to David Davis, that he has been saying that for a considerable period of time, as has the Prime Minister. I have never believed that it was true, and you will note that, in our exchange of letters, I have made that point to him yet again in my response to his letter of 29 March. Indeed, his letter of 29 March said that we were in agreement on the majority of subjects we have discussed, so I went to the bother of looking at the agendas for the four JMC meetings that have been held, and I could find only two items on which there*

*was any measure of agreement at all. On almost all the others we reserved our position and made it clear that we did not agree. Most of the JMC items—in fact, all the substantive items—were simply taken away after discussion for officials to consider, and they have never re-emerged.*

*I therefore do not think that it is true to say that we agree. In fact, you can see that we do not agree on the largest issues, such as membership of the single market. It is not enough for the UK Government to say that it does not want us to be a member of the single market, but that it wants everything that the single market provides and none of the conditions of being in it. That is not an agreement. I can agree with the UK Government on the need for world peace, but I think that we would find our approaches to be very different.”*

On the role of the devolved administrations in the negotiations, the Minister told the Committee he supported the position expressed by the Welsh Government:

*“The position of the Welsh Government has been that the devolved Administrations should be at the table when devolved issues are discussed and in the room when all other matters are discussed. We have not expressed it in that way, but I support that view. Certainly, we need to have a substantive involvement in the process, and we do not know anything about that. The reasoning that we have been given for that is that the UK Government itself did not know how the process would work. That may well be true, but it has far more idea about it than we have. We have still had no indication at all.”*

The Minister later added that the Scottish Government’s role in the negotiations was guaranteed as a result of the terms of reference for the JMC(EN). Item 3 in the terms of reference says:

*“provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations”.*

And Item 4 says:

*“discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government”.*

On the likely financial settlement that the EU27 have suggested the UK Government will need to commit to upon Brexit, the Minister told the Committee that he did not expect the Scottish budget to be diminished as a result of any Brexit settlement:

*“Certainly, we do not believe that Scotland should pay any share of that money. We did not vote for Brexit, so there should be no detriment to the Scottish budget or the economy as a result of the decision. We will share our views on such issues.”*

The Minister was also asked about the current status of the proposals contained in [Scotland’s place in Europe](#), Michael Russell suggested that whilst it seemed unlikely the UK Government would support a differentiated relationship for Scotland, the proposals remain on the table:

*“If a differentiated solution was to re-emerge as an issue, of course that would be our position. However, I do not think that it will re-emerge as an issue. There was*

*a strong attempt by us and by the Welsh to ensure that Wales and Scotland were referred to in the article 50 letter as areas where there should be a differentiated approach, just as Northern Ireland was referred to. There appears to have been some forgetfulness in that Gibraltar was not mentioned in the letter, which we might have been able to help with had we been consulted on it. That was a key issue, and our view was that, had that been in the article 50 letter, it would have been placed on the table and would have been part of the negotiating process. We believe that that was a perfectly feasible thing to happen.*

*We are where we are. A lot of the work in “Scotland’s Place in Europe” is still very valuable—it would not be impossible for the Prime Minister to look at the devolved issues again and say that what is in that document makes a great deal of sense. We have now laid out what we believe should happen. The process of negotiation will continue—we will support that and we will try to assist the UK to get the best possible deal—but it is right that, whatever the outcome is, the people of Scotland should be able to choose independence and the position of Scotland as an independent member of the EU. That is the right choice for the people of Scotland to make, and we will ensure that they are able to make it. That is also the view of the Scottish Parliament, which voted in the majority to support that view.”*

On the operation of the Joint Ministerial Committee for European Negotiations (JMC(EN)), during the Brexit negotiations, the Minister told the Committee:

*“The terms of reference of the JMC refer to “oversight” of the negotiations, in so far as devolved competencies are concerned, so clearly meetings would have to fit in with that. I suppose that the precedent is the JMC(E), which was always meant to meet in advance of the European Council so that the agenda for the European Council meeting could be discussed among the devolved Administrations and the UK Government departments. It developed a very top-heavy structure, because it was a means by which the ministers and Whitehall departments could find out about the European Council. I once went to a meeting of the JMC(E) at which there were 21 UK ministers, myself and Rhodri Morgan, so it did not really work as it should have worked. That would indicate that the agenda for the negotiations each month should be discussed by the JMC(EN) in the first week of the cycle and then, at its next meeting, the committee would have to review that progress and look forward. That would seem to be ideal.”*

The Minister also spoke about the domestic process for implementing Brexit, he summarised three different issues:

*“The Prime Minister talks about EU frameworks returning to the UK, with decisions to be made about where they will then go. David Davis refers to consensus about new frameworks. We need to find out precisely what that means. We oppose EU frameworks returning to the UK in that way—all competencies should be devolved directly. That is the Welsh position, too, and it is substantially what the Northern Irish position would be, were there to be one at this stage. We will work very hard to make sure that that happens.*

*That is the first issue. The second issue is the great repeal bill, which is tremendously complex. It is the biggest legislative task that any of us will ever take on. We have not seen the draft—it exists, and it was meant to have been published at the time of the Queen’s speech, around now, but that has obviously*

*been put off for a month. It would be enormously helpful if UK civil servants were to share that with their counterparts here. That would give us an opportunity to prepare. Whatever happens, unless another Government decides not to leave the EU, we will have to go through the process. We need a good start on it. We have only seen the white paper, which raises huge dubieties and issues that we do not fully understand.*

*Following that, we need to know about—this cannot be an ex-cathedra pronouncement from London—and work out the legislative consent and other processes. It is inconceivable to me that there would not be a legislative consent process, given that the bill will cover areas in which we legislate. We must have a legislative consent process, but it is not clear that that will be the case, because the UK Government has not said whether it will be.*

*There will be a big burden of secondary legislation. There will also be other legislation, because the great repeal bill is only the first of several bills—there might be 10 or 12 bills altogether. We are considering how that will work its way in and where to put our resource allocations—you are right to say that a lot of work is being done on resource allocation. I suspect that, when it confronts the great repeal bill, this committee will be concerned about its workload. There are issues for the Parliament in there, too.*

*The third and wider issue is one of influence and making sure that our position is understood. My colleague Fiona Hyslop is very active in that area. I, too, am involved in certain places, making sure that people understand what our position is. We will have to continue to do that.”*

In response to whether no deal with the EU was worse than a bad deal, the Minister told the Committee it would be considerably worse:

*“There should not be any dubiety about no deal being considerably worse than any other option; it is a really, really bad option. There should also be no dubiety about the naivety with which the UK Government has entered into the process without a full understanding of what the complexities are from the European perspective—many people think that. It is important to read as widely as you can on some of the European views of that, as the view taken is very different and there is some astonishment that things are where they are.”*

On the Brexit process, the Minister added:

*“I hope that there will be a process that produces a successful outcome. However, I think—not unlike one of the summary pieces in the committee’s publication—that, if the UK comes out of the EU, in 20 years’ time, the UK will be in the process of trying to get back in and it will have lost 20 years of influence, 20 years of progress and 20 years of prosperity. Coming out of the EU is that foolish.”*

The summary pieces the Minister referenced was [an article](#) by Simon Tilford of the Centre for European Reform which was linked to in the previous [weekly update](#).

## Court of Justice rules on the EU-Singapore Trade deal

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On 16 May, the Court of Justice of the European Union published its ruling on whether the trade and investment deal between the EU and Singapore could be concluded by the EU alone without member state ratification. The Court of Justice [ruled that](#) “the free trade agreement with Singapore cannot, in its current form, be concluded by the European Union alone”. In essence the Court decided that whilst much of the Singapore Trade agreement covered EU competences, the “provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the European Union”. As a result, the trade agreement also requires Member State ratification to allow it to come into effect in its current form.

The Court concluded that the European Union has exclusive competence in the following matters relating to the trade deal:

- access to the EU market and the Singapore market so far as concerns goods and services (including all transport services) and in the fields of public procurement and of energy generation from sustainable non-fossil sources;
- the provisions concerning protection of direct foreign investments of Singapore nationals in the European Union (and vice versa);
- the provisions concerning intellectual property rights;
- the provisions designed to combat anti-competitive activity and to lay down a framework for concentrations, monopolies and subsidies;
- the provisions concerning sustainable development (the Court finds that the objective of sustainable development now forms an integral part of the common commercial policy of the European Union and that the envisaged agreement is intended to make liberalisation of trade between the European Union and Singapore subject to the condition that the parties comply with their international obligations concerning social protection of workers and environmental protection);
- the rules relating to exchange of information and to obligations governing notification, verification, cooperation, mediation, transparency and dispute settlement between the parties, unless those rules relate to the field of non-direct foreign investment (see below).

However, the Court found that commitments in the trade deal in the areas of non-direct foreign investment and dispute settlement between investors and states require the joint ratification by both the EU and the Member States.

The Court’s ruling will be of interest to the UK Government ahead of its negotiation of a new trading arrangement with the EU following Brexit. [According to](#) Professor Steve Peers from the University of Essex, the Court’s judgement is good news for the UK because it should make trade deals easier in the future and specifically in relation to Brexit should make a future trade deal between the EU and the UK an exclusive

competence of the EU as there is no intention on either side to include investment provisions in any deal.

An EU-UK trade deal without any investment provisions should mean that the deal will only require approval by the EU institutions and not need individual Member State ratification. This should make ratification of any future agreement quicker.

## **Settling the UK's Brexit Bill**

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In a blog for the London School of Economics Brexit page, Andre Sapir a Senior Fellow at Bruegel and a Research Fellow of the London-based Centre for Economic Policy Research [argues](#) that reaching agreement on the size of the UK's Brexit Bill may require arbitration. According to Sapir, the Brexit Bill is not crucially important – compared to the future of EU and UK citizens - but it is a cause of tension between the EU and the UK:

*“What matters much less, but seems to be one of the main sources of the current tension between the two sides, is the UK's Brexit bill. The EU and the UK will have to agree on a financial settlement of assets and liabilities linked to the UK's EU membership at some point before the country leaves the EU.*

*Agreeing on the scale of the UK's divorce bill will not be easy. One reason is that estimates of the bill vary a great deal depending on various assumptions. According to my Bruegel colleague Zolt Darvas and his co-authors the upfront gross payment that Britain will have to make upon exit could range between €54bn and €109bn. This would translate into a net payment ranging between €25bn and €65bn once the UK receives its share of EU spending, assets and repaid EU loans.”*

Given reaching agreement on the settlement will be difficult given both sides do not want to look like they've lost out; Sapir suggests independent mediation could be used to reach a settlement:

*“Asking a judge or an arbitrator to resolve the size of the Brexit bill would free negotiators from a thorny issue and allow them to concentrate their political capital on what really matters to citizens and business: the future EU-UK relationship. And it's not just a question of political capital. Time is also of the essence. Michel Barnier, the EU's chief Brexit negotiator, has rightly underlined that getting a deal done and ratified within the two-year deadline imposed by Article 50 means that negotiations need to be concluded by autumn next year.”*

Sapir concludes that the best arbitrator would be the Permanent Court of Arbitration which is based in The Hague. Both the EU and UK would be responsible for selecting one or two arbitrators each with those selected then choosing a final member of the panel to consider the case.

According to Sapir, the Permanent Court of Arbitration has previously adjudicated in cases between EU member states before - in 2003 the PCA handled the Iron Rhine Arbitration between Belgium and the Netherlands whilst in 2001 it handled a case between the UK and Ireland on the OSPAR Convention. .

## **Brexit Negotiations – the key documents**

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With the negotiations for the UK's withdrawal set to begin following the UK General Election, attached are links to all the key negotiating documents at this stage:

### **UK Government**

[The United Kingdom's exit from and new partnership with the European Union White Paper](#) published 2 February 2017

[Prime Minister's letter to Donald Tusk triggering Article 50](#) published on 29 March 2017

### **EU Institutions**

[European Council \(Art. 50\) guidelines for Brexit negotiations](#) published 29 April 2017

[Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union](#) published 3 May 2017

[Recommendation for a Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union ANNEX](#) published 3 May 2017

[European Parliament Resolution: Negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union](#) published on 5 April 2017

### **Scottish Government**

[Scotland's Place in Europe](#) published on 20 December 2016

[Letter from David Davis, UK Government Secretary of State for Exiting the EU to Michael Russell MSP, Scottish Government Minister for UK Negotiations on Scotland's Place in Europe](#) on 29 March 2017

[Letter from Michael Russell MSP, Scottish Government Minister for UK Negotiations on Scotland's Place in Europe to David Davis MP UK Government Secretary of State for Exiting the EU](#) on 12 April; 2017

### **Scottish Parliament**

[SPICe Infographic – Timeline for the United Kingdom's withdrawal from the European Union](#) published on 19 April 2017

[SPICe Infographic - The UK's withdrawal from the EU – who's who](#) published on 25 April 2017

Iain McIver  
SPICe Research

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Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH 99 1SP.

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This paper was written by Iain McIver, SPICe Research.

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