

Negotiating with a Dis-United Kingdom

The EU's Options Concerning Scotland and Northern Ireland in the Brexit Talks
Nicolai von Ondarza and Julia Becker

As if the process of withdrawal from the European Union were not already complex enough in itself, the Brexit vote has also reopened constitutional questions for the United Kingdom. Scotland's devolved government is calling for a new independence referendum and seeking a special arrangement with the EU. Northern Ireland has drawn less attention but is politically at least as significant: Brexit endangers its open border with the Republic of Ireland and consequently the stability of the peace process. These factors not only enormously complicate London's negotiations with the European Union. Brussels and Berlin also need a strategy for their dealings with Scotland and Northern Ireland. Especially in order to protect the interests of its member state Ireland, the EU should demonstrate openness for flexible solutions.

The British referendum on EU membership has exposed the regional divisions within the "United Kingdom of Great Britain and Northern Ireland": Although the "leave" camp attracted 51.9 percent of the British electorate as a whole, it only actually gained a majority in England and Wales.

In Scotland 62 percent voted "categorically and decisively to remain within the European Union" (Scotland's First Minister Nicola Sturgeon). And in Northern Ireland the remain vote reached 55.8 percent. Yet with England and Wales together representing almost 90 percent of the UK population, Scotland and Northern Ireland were unable to alter the outcome.

As such, the Brexit vote has stirred up two politically sensitive regions. In Scot-

land, the governing Scottish National Party (SNP) now links the relationship with the EU to its calls for greater autonomy – portraying a hard Brexit against the will of the Scottish population as another manifestation of English dominance. After her calls for a special arrangement with the EU were rebuffed by the UK government, the Scottish First Minister is now calling for a new independence referendum before the UK formally leaves the EU.

A different set of difficulties exists in Northern Ireland, with Brexit coming at a juncture where clouds were already looming. Politically, the open border with the Republic of Ireland is a crucial pillar of the Northern Ireland peace process. Economically too, it is vital for both North and South. A hard Brexit of the kind announced

by Theresa May would place question marks over this arrangement.

Regional Questions in the Withdrawal Process

These regional tensions create additional complications for both sides in the imminent Brexit negotiations (see SWP Comment 35/2016). From the European perspective, the first question is what legal and political role the governments of Scotland and Northern Ireland (and also Wales) should play in the process.

In legal terms a clear answer has already emerged. The British population as a whole voted to leave, and only the British state as a whole can set the withdrawal process in motion “in accordance with its own constitutional requirements” (Article 50 TEU). The United Kingdom has no written constitution, and the legal position is not absolutely clear. A ruling by the UK Supreme Court in January 2017 clarified that an act of parliament is required before triggering Article 50. Although the House of Lords initially proposed some amendments, in particular on the rights of EU citizens and the parliamentary procedure to decide on a final Brexit deal, the British government managed to get this “European Union (Notification of Withdrawal) Bill” approved by both houses of the UK parliament in March 2017 without amendments.

The court case drew enormous public attention. The devolved governments of Scotland, Northern Ireland and Wales intervened to clarify whether the approval of their devolved legislatures was required. The heart of the question here is that the Scotland Act and the Northern Ireland Act both require the Scottish parliament (Holyrood) and the Northern Ireland Assembly (Stormont) to implement EU directives that fall within their competences. At the point when withdrawal actually occurs, therefore, both pieces of legislation will need to be amended. Under the Sewel Convention, this normally requires the consent of the respective devolved parliament, although

the UK parliament retains the power to overrule them. The Supreme Court ruled that the Sewel Convention is purely political in nature and cannot be enforced through the courts. Accordingly there is no requirement for the regional parliaments to approve the initiation or conclusion of the withdrawal process. In short: legally May’s government has a free hand and can completely ignore the devolved governments and parliaments.

Politically, the UK government at first made the cohesion of the Kingdom one of its top political priorities. Immediately after her appointment as prime minister, Theresa May visited Edinburgh, where she promised to consult closely with the Scottish government – and its Welsh and Northern Irish counterparts – on the preparations for withdrawal talks, and not to trigger Article 50 until there was a “UK-wide approach”. In fact, the devolved governments were neither consulted nor did they agree with the Brexit strategy Theresa May laid out in January 2017, under which the United Kingdom will quit the single market and the customs union. After Holyrood voted against triggering Article 50 under these circumstances, the UK government and parliament decided to ignore this position. Thus far, the devolved governments – including the Welsh – have dismissed the regular consultations in the Joint Ministerial Council as purely symbolic.

Relevance for the European Union

Looked at coldly, from the EU’s perspective these regional matters are first and foremost an internal affair of the UK state. Legally, the British government is the EU’s only negotiating partner, and politically London would regard direct talks between Brussels and the devolved governments as a provocation. Nevertheless, there are three reasons why developments in Scotland and Northern Ireland remain relevant for the EU’s negotiating strategy:

Firstly, the EU has a fundamental interest in protecting the interests of its member

Ireland in the Brexit negotiations. The open border with Northern Ireland is of central economic and political importance for the Republic of Ireland. Moreover – driven by its peace narrative – the EU has also invested significant political capital and financial support in the Northern Ireland peace process. The United Kingdom – including Northern Ireland – is also the Republic's most important trading partner. And under the Good Friday Agreement of 1998 the Republic of Ireland is also closely involved in Northern Ireland's institutional architecture (see below, p. 6). More than 20 percent of Northern Ireland's residents possess Irish – and thus EU – citizenship; in theory any British citizen born in Northern Ireland is entitled to an Irish (and thus EU) passport.

Secondly, regional tensions could constrain London's options in the Brexit talks. The British government has no interest in a break-up of the UK or a visible failure of the peace process in Northern Ireland. While Theresa May has to date ignored Scottish calls for a role in the process, a frontal confrontation with Edinburgh would impose an additional burden on her government during the Brexit talks.

Thirdly, a new independence referendum in Scotland would complicate the Brexit process for the EU side too, as the EU-27 would then have to take a stance on (re)accession for Scotland. A second referendum on independence would also boost separatist tendencies in other EU member states such as Spain.

In light of these matters, the EU side should not underestimate the role and interests of the two regions in the Brexit process.

Scottish Demands

The Scottish (minority) government led by First Minister Nicola Sturgeon of the Scottish National Party (SNP) stated its clear position on the Brexit talks directly after the referendum: Given the clear "remain" vote in Scotland, it wishes to retain the

fullest possible ties to the EU. Its positions and demands for the Brexit process are laid out in detail in a white paper published in December 2016, "Scotland's Place in Europe".

Edinburgh's central demand is for the United Kingdom to remain in the single market, complete with its four freedoms. The single market is Scotland's most important (non-UK) market, taking 43 percent of its international exports. Scotland's agriculture and universities, the paper argues, are especially reliant on freedom of movement within the EU. Scotland also calls for support for European solidarity, and for participation in joint counter-terrorism measures, initiatives to curb climate change and exchange programmes such as Erasmus.

With its declared objective of leaving the single market and the customs union London has clearly rejected all of Edinburgh's requests.

A special arrangement with the EU

In the event of a "hard Brexit" involving the loss of full access to the internal market, the Scottish government calls for an arrangement permitting Scotland to remain integrated in the single market and other EU policies on its own. Nicola Sturgeon believes she has a democratic mandate for this demand, as 62 percent of Scottish voters voted to remain in the EU.

Edinburgh proposes that Scotland should remain part of the United Kingdom, but be granted the right to conclude a special arrangement with the EU in order to remain inside the single market and continue to participate in other EU policies (such as research funding). The mechanism proposed is for Scotland to join the European Economic Area as part of EFTA, either in its own right or through British association.

However, the "special arrangement" model presents considerable challenges from both the European and British perspectives. Legally such a construction is not impossible. Depending on a state's constitutional arrangements, individual parts

may possess limited legal personality under international law and be able to enter into international agreements and treaties. Under Article 32 of the German Basic Law, for example, the Länder may conclude treaties within the scope of their powers, subject to the approval of the federal government. The European Union in turn has trade and association agreements with a string of overseas territories that belong constitutionally to four member states (Denmark, France, the Netherlands, United Kingdom) but not to the EU.

But Scotland lacks central prerequisites for such an arrangement. On the one hand, unlike the German Länder, it presently possesses no competence to conclude treaties, nor does it have the breadth of autonomous powers required to implement EU legislation applicable to the single market. So before such a special arrangement could come about, the Scotland Act would have to be greatly expanded with the approval of the UK parliament to enable Scotland to implement the *acquis* in the many areas linked to the single market fully and independently: migration (freedom of movement), competition policy, environment, etc. In other words, the preconditions for a special arrangement would have to be created by London and would require significant constitutional reforms – in parallel to the already complex Brexit process.

On the other hand, the existing EEA framework provides only for membership of states. Norway, for example, has already made it clear that Scotland could only join as an independent state. Similarly, separate inclusion in the single market would require Scotland to be able to control trade with the rest of the UK. So in the course of the negotiations the EU (and possibly also the EEA states) may have to decide whether and to what extent they are willing to conclude such a far-reaching agreement with an entity whose legal personality and competences are limited by a UK that is pursuing a hard Brexit.

From Brexit to Scottish independence?

In view of these obstacles – and the improbability of the Conservative government granting such sweeping autonomy – the principal function of the “special arrangement” proposal appears to be to prepare the ground for a second independence referendum. Indeed, even before the UK government formally triggered Article 50, Scottish First Minister Nicola Sturgeon announced that she will start the legislative procedure to initiate a new independence referendum to be held between late 2018 and early 2019. Before Scotland becomes an independent country, however, there are three central impediments:

Firstly, the formal preconditions for a new independence referendum must be fulfilled. In Holyrood, the SNP minority government can count on the votes of the Scottish Greens for a majority, while the Scottish wings of the Labour and Conservative parties have already (for the most part) made their opposition clear. To hold a legally binding referendum Holyrood would require the consent of the UK parliament; the Edinburgh Agreement of 2012 granted this on an explicitly one-off basis for the 2014 independence referendum. The UK government has not rejected the idea of a second independence referendum outright, but so far seems very opposed to holding it before Brexit is completed.

Even if the formal conditions are met, there is – secondly – no guarantee that the Scottish electorate would choose independence in a second ballot. Even after the Brexit vote, polls still showed 55 percent for remaining in the United Kingdom, falling to 50 percent after the hard Brexit announcement. While the SNP’s base calls vigorously for another referendum, the leadership will have to weigh the risks of a second defeat within such a short space of time. A new referendum campaign would also raise the same issues as in 2014, such as the currency question and the viability of the Scottish economy. Falling prices have placed the oil industry – as Scotland’s third-largest export sector – in a precarious situation. To date

the UK Treasury has assisted the oil and gas sector with tax breaks and incentives for investment in research. Commercially, Scotland is closely integrated with the rest of the United Kingdom, which receives about two-thirds (63 percent) of all its exports of goods and services. In other words, unimpeded access to the rest of the UK is economically more important for Scotland than participation in the single market.

Not least, a Scottish independence referendum – and the actual separation – would have to be coordinated with an already enormously complex EU withdrawal process. If the referendum takes place as demanded by Sturgeon in late 2018 and the transition period needed for organising the secession is taken into account, Scotland would first need to leave the EU as part of the UK and then apply to rejoin later on. For good reasons the EU treaties contain no arrangements for the eventuality of secession by part of a member state. The prevailing opinion is that an independent Scotland would have to apply for membership under the regular procedure (Article 49 TEU), although perhaps under a “fast track” procedure as Scotland has already implemented the EU *acquis*. While Brexit makes Scotland a special case among European regional entities seeking independence, such a move would create a strong precedent with effects in particular in Spain (Catalonia) and therefore divide not only the United Kingdom but potentially also the EU-27.

The Case of Northern Ireland

Despite superficial parallels with Scotland, Brexit presents a quite separate set of challenges and conflicts of interest for Northern Ireland. Like Scotland, Northern Ireland voted to remain in the EU (although by a smaller majority, 55 percent). But with a population of just 1.8 million (around one-fifth of London’s) this had only a marginal effect on the result. The situation in Northern Ireland presents three specific challenges:

1. Hard Brexit, hard border

The UK’s only land border with the European Union (apart from Gibraltar) is the one between Northern Ireland and the Republic, and the effects of a hard Brexit will be especially severe here. The situation at the border has changed enormously over recent decades: while the British armed forces conducted strict border controls from the 1970s to 1990s, it is now no more than a line on the map. This is significant for Northern Ireland in two senses: Politically, the open border symbolises and reinforces the peace process by enabling citizens to move freely between the two states. Economically, Northern Ireland and the Republic are closely interconnected. For example, trade between them generates about €2,8 billion annually and they run largely integrated electricity and gas grids. About 15,000 commuters cross the border on a daily basis for work. It is hard to see how it can retain that degree of openness after it becomes an external border of the European Union.

Significantly, the open Irish border predates EU membership. Freedom of movement of persons is regulated under the Common Travel Area (CTA), which was established in 1923 between the then Irish Free State and the United Kingdom following Irish secession. The Republic of Ireland and the United Kingdom also grant their citizens full reciprocal voting rights (independently of EU citizenship) and those born in Northern Ireland have the right to both British and Irish citizenship. It was in order to preserve the CTA that Ireland remained outside Schengen along with the United Kingdom. Ireland’s Schengen opt-out remains in force after the UK leaves, and would thus permit the CTA to be preserved. But if the UK were to tighten immigration controls it would also have to do so in particular at the Irish border.

At the same time, a hard Brexit would definitely make it necessary to control the movement of goods and services. If the United Kingdom also leaves the single market and the customs union as Theresa May

has announced, Ireland at least would have to introduce customs controls. Even if the EU concludes a far-reaching free trade agreement with the United Kingdom, the origin of goods will still have to be verified. Services supplied across the Irish border are especially liable to face restrictions. But movement of livestock and transport of agricultural products – as the largest sector of trade between North and South – would certainly also require either a deep free trade agreement with mutual recognition or additional permits. And if Brussels and London fail to reach even a basic free trade agreement, tariffs will apply as well. In this case, the Irish Department of Finance forecasts a fall in exports to the UK of up to 30 percent. The political danger here is that the London could publicly declare its wish to keep the border open, and place the entire blame for closure on the EU's inflexibility.

2. Threat to the peace process

As well as the open border, political co-operation between Northern Ireland and the Republic in the framework of the Northern Ireland peace process is closely tied to both sides being members of the EU.

The Brexit vote reveals the continuing divisions within Northern Ireland. While Northern Ireland as a whole voted with 55.8 percent to remain in the EU, exit polls showed almost 90 percent of the Nationalist side voting to keep EU membership while two-thirds of Unionists voted leave. Unlike in Scotland, where all voting areas had a remain majority, some largely Unionist constituencies supported Brexit. Of the main two power-sharing parties (until recently), the Democratic Unionist Party (DUP) sees Brexit as a shared British project, while Sinn Fein demands a referendum on Irish unification.

The Good Friday Agreement of 1998 does indeed provide for a “border poll”. The power-sharing arrangement reached between the United Kingdom, the Republic of Ireland and the main political parties in

Northern Ireland not only ended the thirty-year armed conflict; all the parties also agreed to hold a referendum on Irish unification (a border poll) if there are indications of a majority. To date surveys suggest otherwise, but after the Brexit referendum the Irish Taoiseach Enda Kenny called for the option of unification – and thus bringing Northern Ireland back into the EU – at least to be included in any withdrawal agreement between Brussels and London.

Brexit will also weaken the cross-border bodies established in 1998. As well as investing more than €13 billion of structural funds in Northern Ireland since 1994, the EU funds civil society cooperation to strengthen the peace process through the PEACE programme. The Special EU Programmes Body, which administers the EU's structural and cohesion funding jointly for both parts of the island is such a cross-border body. The future of this form of funding and cooperation is questionable, especially after a hard Brexit. At the same time the DUP has to date refused to discuss the effects of Brexit in the most important joint political body, the North-South Ministerial Council.

3. Political fragility in Northern Ireland

The Brexit process finds Northern Ireland in an already fragile political state. Since the Good Friday Agreement and the transfer of powers from London to its Executive and Assembly, Northern Ireland has been governed under a power-sharing arrangement by coalitions comprising both Unionists and Nationalists. In 2016 three of the five hitherto governing parties quit the coalition, leaving just the DUP (pro-Brexit) and Sinn Fein (anti-Brexit) to run the Executive. This residual coalition itself collapsed in January 2017 after Sinn Fein withdrew in protest at wastage of government funds in a renewable energy scheme; First Minister Arlene Foster of the DUP is implicated in the scandal.

This turn of events has immediate repercussions for Northern Ireland's role in the

Brexit process. Firstly, the new elections in early March 2017 significantly shifted the balance of power. The Unionists lost their Stormont majority for the first time, while Sinn Fein came within one seat of the DUP. Secondly, Northern Ireland finds itself entering the Brexit process without political representation. If the parties fail to find a power-sharing agreement within three weeks, there will either have to be another election or Northern Ireland will be temporarily governed from London, with all the symbolic consequences entailed.

Here Brexit drives an additional wedge between the power-sharing parties. The DUP was the only major party in Northern Ireland to explicitly support Brexit, for which it campaigned aggressively both in Northern Ireland and in London. The Ulster Unionist Party (UUP) was divided, the Nationalist parties supported remain. Despite the majority for remain in Northern Ireland as a whole, First Minister Foster (DUP) welcomed the Brexit result. After the March Assembly elections, parties that opposed Brexit now hold more than 65 percent of the seats. The more concrete the impact on Northern Ireland becomes, the greater the stresses and strains placed on Stormont.

A special status for Northern Ireland?

In view of these challenges, the possibility of a special status for Northern Ireland is being floated in both Northern Ireland and the Republic. The main objective would be to keep the border open. There are two aspects to this:

Firstly, to preserve freedom of movement of people. The minimal objective from the Republic's perspective is to keep the CTA. Although the CTA existed long before Ireland and the United Kingdom joined the European Union, the juxtaposition of EU freedom of movement against (a harder) British migration policy after Brexit would create an open door for illegal immigration. In order to preserve the CTA, the United Kingdom would either have to voluntarily refrain from immigration con-

trols on its border with the Republic, or conduct them on the air and sea routes between Northern Ireland and the British mainland.

The second question relates to maintaining free movement of goods and services. Customs controls at the Irish border become almost inevitable as soon as the UK leaves the customs union and the single market. The possibility of Northern Ireland remaining within the EU's customs union with a special status has therefore been floated in Ireland. Customs controls (and duties) would then be located not at the Irish border, but between Northern Ireland and the rest of the United Kingdom. As in the Scottish case, this would require greatly expanded autonomy and willingness on the part of the EU to grant such far-reaching rights to a region of a third state. For Northern Ireland, however, this step would inevitably increase its distance from the rest of the UK and therefore be strongly opposed by the Unionists.

EU Should Show Flexibility

From the European perspective, the UK's regional concerns are one among many issues in the complex web of Brexit problems. But analysis of the dynamics in Scotland and Northern Ireland clearly reveals that the hard Brexit emerging in the interactions between the EU-27 and the May government will exacerbate these tensions. The recommendations to the European Union are quite different for Scotland and Northern Ireland:

Despite its European ambitions, Scotland represents a principally domestic British challenge. Legally and politically, London negotiates withdrawal from the EU, which will then also apply to Scotland. Similarly, the questions of greater autonomy for Scotland (as required for a special arrangement with the EU), permission to hold a second independence referendum or implementation of the new Brexit realities are all matters for London and Edinburgh alone to negotiate. However, the EU should take the

outcome of these internal negotiations into account in its positioning vis-à-vis the UK.

In the unlikely event of London agreeing to vastly increase Scottish autonomy, it would also be in the EU's interest to conclude a special arrangement with Scotland. Given the political dynamics in the UK, however, this can only be considered a remote possibility. First and foremost, the EU needs to prepare for the scenario of a second Scottish independence referendum towards the end of the exit negotiations. In this connection it will be crucial for Brussels to draw a clear distinction between the independence movement in Scotland and other regional independence movements, for example in Catalonia, by declaring it a special case on the basis of its entanglement with Brexit. While still maintaining that an independent Scotland would need to reapply to the EU, this would hold the door to Scottish EU membership open.

The interests of the EU-27 are affected more directly in the case of Northern Ireland. Here too, the European Union will negotiate only with the United Kingdom as a whole, and any special status would require London's consent. But especially in the Brexit talks, the EU should make it clear that it is guarding the interests of each and all of its members. In that connection it should also work very much more proactively for an acceptable solution for the Irish border – and prepare to support Ireland to cushion negative impacts associated with a hardening.

© Stiftung Wissenschaft und Politik, 2017
All rights reserved

These Comments reflect the authors' views.

SWP
Stiftung Wissenschaft und Politik
German Institute for International and Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

ISSN 1861-1761

Translation by Meredith Dale

(Updated English version of SWP-Aktuell 11/2017)