

POLICY PAPER

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# Scotland: What Strategy as Brexit Talks Get Under Way?

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## Introduction

By mid-June, with the general election over, Brexit talks will finally start. What strategy should Scotland's government and political parties adopt to protect Scotland's interests?

With party positions ranging from independence in the EU (SNP, Greens), to soft Brexit and a second UK referendum on the exit deal (Lib Dems) to getting the best Brexit deal possible (Labour, Conservatives), there may appear to be little scope for agreement on defining Scotland's interests either in the talks or in the process of returning EU laws to the UK.

But there are vital questions for all parties and key issues that demand a strategic approach. The Brexit talks and return of powers to the UK and to Scotland will be played out at both Westminster and at Holyrood – and should also require considerable discussion and coordination between the UK government and the three devolved administrations.

These key strategic issues go well beyond areas of devolved competence yet will have major implications for Scotland, Wales and Northern Ireland. Leaving the EU means, amongst other issues, the UK setting up a range of new or beefed-up agencies and regulatory structures (from drugs to environment to nuclear materials and more), returning powers to the devolved administrations, developing its own separate trade policy, and beginning to differentiate UK law from EU law (having first brought it into UK law via the Great Repeal Bill).

It is clear that a comprehensive UK-EU27 trade and security deal cannot be agreed before March 2019. Rather there will be an exit deal covering, as a priority, EU citizens in the UK & UK citizens in the EU, budget liabilities, and Northern Ireland's border with the Republic of Ireland. The aim will also be to have an agreed outline framework for a future comprehensive UK-EU27 trade deal.

This means – to avoid an abrupt, cliff-edge departure in March 2019 – there will also need to be a transition arrangement (perhaps for 3-4 years) as part of the UK-EU27 exit deal. With its aim of holding a second independence referendum, the Scottish government will have a particular interest in the terms of this transition deal and how close it keeps Scotland and the rest of the UK to existing EU laws. Yet there may also be considerable scope for substantial cross-party consensus on the transition approach – even though not for the same reasons.

There will be different routes for attempting to influence the range of issues that Brexit has opened up. The current consultation framework for the Brexit talks via the Joint Ministerial Committee has not worked well and has clearly lacked genuine consultation on strategic issues. Whether that can or will be significantly improved must be in doubt. So how the Scottish government, Scottish MPs and MSPs can best attempt to influence both the negotiations and new UK structures and laws is a central political challenge for all parties – not least given Theresa May's highly centralised approach to her negotiating strategy (with the February White Paper<sup>1</sup> adding very little by way of detail to how she may approach the talks).

## Key Challenges in Seven Strategic Areas

There are seven key areas that need to form part of a strategic approach to Scotland and Brexit after the general election.

### (1) The Exit deal: EU and UK citizens, money and borders

The EU's chief negotiator, Michel Barnier, has made clear that the top three priorities for the first phase of the exit talks are: rights of EU citizens in the UK and UK citizens resident elsewhere in the EU; the UK's budget liabilities; and avoiding the creation of a hard border between the Republic of Ireland and Northern Ireland and not undermining the Good Friday Agreement<sup>2</sup>.

The UK and EU27 agree that they want to resolve the questions of EU & UK citizens rapidly. But there is very tricky detail here that will be hard to resolve. Barnier has argued for EU citizens in the UK to retain all their EU rights throughout their lifetimes, adjudicated by the European Court of Justice (ECJ) – the latter unlikely to be accepted by Theresa May with her red line of ending ECJ jurisdiction in the UK. There are clear Scottish interests in ensuring EU citizens in Scotland rapidly get clarity, certainty and their rights to stay respected. Influencing the talks on this may though prove tough.

Equally, the budget talks are likely to prove one of the hardest political challenges in the talks. Whether the two sides can come to any agreement on how to identify and measure the UK's assets and liabilities will be an issue from the start of the talks. This will be another tough area for Scottish politicians to have any influence – but clear voices may be needed at several points to encourage the UK government to strike a fair deal rather than walk away.

Whether and how a hard border in Northern Ireland is avoided should be closely watched in Scotland. There is already considerable work going on behind-the-scenes on possible options. The retention of the Common Travel Area may make free movement of people across the UK and Ireland, avoiding passport checks, relatively straightforward. It is goods and agriculture that look like posing the hardest challenges. The sequence of Brexit talks may also mean this issue has to be revisited twice. A first deal could aim to ensure a soft border when the UK leaves the EU on or before 29 March 2019. But a second deal, or an amended deal, may be needed once a full UK-EU27 trade deal is agreed, quite likely several years later.

Will a Northern Ireland deal provide a template either for an independent Scotland in the EU to avoid a hard border with England, or a route to show that the Scottish government's differentiated proposal – 'Scotland's Place in Europe'<sup>3</sup> – could work after all (despite its rejection by David Davis and Theresa May)<sup>4</sup>? This will be watched closely in Scotland. But while there may be some lessons to learn, and some compromises that could be carried over, the type of deal finally done may be very specific to Northern Ireland's particular needs (not least in agriculture and cross-border business links).

If Ireland – as a full EU member state – has a soft border with Northern Ireland, perhaps with cameras and other unobtrusive, but still controversial, ways to monitor the border, there will still be many differences in customs and regulatory procedures that will need

to be handled somewhere, even if not at the border itself. Moreover, if Scotland were in the EU's single market (whether independent or not), while the rest of the UK was not then it would be roughly in Ireland's position, and the rest of the UK would be in Northern Ireland's (i.e. outside the single market) with respect to drawing any analogies as to whether a solution to the Ireland/Northern Ireland border could be applied to Scotland/rest of UK.

A solution for Northern Ireland – a small economy and political territory – may well not be one that would work or be acceptable if applied to the rest of the UK (but not Scotland) – either to the UK government or to the EU27. Having said that, as details emerge of the direction of talks for the Ireland/Northern Ireland border, implications for Scotland may be important and will need to be followed closely. The deal may cast light on whether 'Scotland's Place in Europe' could be revived as an idea (or aspects of it) and on the border challenges that could arise if Scotland were independent in the EU.

## **(2) UK-EU27 comprehensive trade and security deal**

Neither the EU27 nor the UK have yet laid out any clear, detailed aims for a future comprehensive deal. The EU27 have made clear they will only start talks on an outline framework (as part of the exit talks) once there has been progress on their three priority issues. In return, David Davis has said this will be the 'row of the summer' with the UK arguing for parallel talks on these issues. Assuming talks do not collapse, there will be a resolution of this stand-off and at some point there may be 4-8 months of talks on the outline framework for a future deal (from December if the EU27's timetable is followed).

Scotland, like the rest of the UK, will be strongly affected by the scope and nature of the future UK-EU27 trade deal. The Scottish government has been clear it would like the UK to remain in the EU's single market and customs union. Theresa May's red lines of an end to ECJ jurisdiction and an end to UK participation in the EU's freedom of movement of people mean, however, this sort of soft Brexit is not the aim.

There have been various estimates of the impact on UK trade of no longer having the sort of access to the EU market that it currently has, or even that of Norway and Switzerland. The National Institute of Economic and Social Research has estimated a fall in goods trade of 35% under a standard free trade deal, and a massive 61% fall in services trade<sup>5</sup>. Others have estimated smaller but still substantial falls. A hard Brexit looks very damaging. These negative impacts come from the impact of reintroducing non-tariff barriers rather than from new tariffs being introduced (tariff-free trade being seen as the relatively easy part of a new trade deal to negotiate). Non-tariff barriers range from rules of origin declarations (that Norway for instance has to make being outside the EU's customs union) to regulatory differences and associated barriers and regulatory checks.

There is surely a common interest in Scotland in aiming at a UK-EU27 trade deal that ensures least damage to Scottish exports and imports with the EU – challenging though that will be. This will depend on the UK's overall approach in a trade deal and on Scotland's particular sectoral concerns.

Whether and which Scottish interests get taken into account is an open question. There may be detailed areas for some sectors that are straightforward for the UK government

to take into its negotiating stance (such as labelling, or protected status for relevant Scottish products) but others – such as a broad area like fisheries – where the UK government will be negotiating across different sectors and may well have different priorities and trade-offs to the Scottish government. These issues will come up both during the exit talks on a trade framework and in the subsequent years of talks to establish a full trade agreement.

There is a major political challenge here both for the Scottish government and for MPs and MSPs as to what say or influence they will have during the negotiations. The final exit deal will come to Westminster – though Theresa May has said if rejected the UK would not stay in the EU, suggesting the UK would crash out of the EU on WTO terms. But whether negotiating priorities and information on the talks in real time will be shared through the Joint Ministerial Committee or with relevant select committees at Westminster and Holyrood is for now at best an open question (though UK positions are likely to leak via the EU27), let alone whether Scottish views will be taken seriously and have any real influence outside some few specific areas.

### (3) Transition deal

The crucial talks on the transition arrangements between the UK and the EU27 will come last in the talks (so probably in summer 2018), since there needs to be at least the outline framework of the future trade deal before an appropriate transition can be negotiated. The EU27 – and the European Parliament – are clear this should be time-limited so that a transitional deal does not end up being the final UK-EU27 deal by default.

Transition arrangements are vital. A hard transition – abrupt, inadequately planned and implemented, lacking clarity – would be damaging to all those with links to the EU, from businesses to agriculture to students and more. The transition deal might cover a range of areas that could be dealt with in different ways over different time periods. So, for instance, both the EU27 and UK will need to establish new customs procedures (for checking rules of origin, regulatory compliance and so forth). This might need a year or so to get relevant procedures up and running once an exit deal has been ratified. Establishing new procedures for mutual recognition of EU27 and UK regulatory structures and processes could take much longer.

It has been suggested that the simplest transition process would be for the UK to stay in the EU's single market, probably via staying in the European Economic Area (EEA). The EU27 has already made clear that in this case it would only agree this on its normal terms (i.e. full respect for the four freedoms including free movement of people and the ECJ's role respected). Whether Theresa May, if she gets a larger majority after the election, would go down this route is an open question but it would mean that for 3-4 years her red lines on free movement and on the ECJ would not be respected.

For Scotland, a transition via the EEA would offer a transition route that would be positive, at least in staying in the EU's single market in the short term, though it is unlikely to cover the UK staying in the EU's customs union. This would fit with SNP and Lib Dem policies that emphasise staying in the EU's single market – even though it would only be temporary. Scottish Labour – having supported 'Scotland's Place in

Europe', and so the idea of Scotland staying in the EU's single market, would presumably also be likely to support this, although it could diverge from Labour's EU policies in its general election manifesto (which is though not clear on the transition deal). Whether the Scottish Conservatives would back such a route, if Theresa May prefers a different, sharper transition, is a question they would have to address, but currently there is little indication of the Scottish Conservatives following a separate path on Brexit. In that case, there should at least be political debate around the best Brexit transition path for Scotland.

A transition via the EEA would also mean if there was a second independence referendum after the UK had left the EU – say in 2020 or 2021 – that Scotland would not have diverged far from EU laws and regulations if it did vote 'yes' to independence in the EU. It would though, even in this transition scenario, be outside the EU's justice and home affairs policies and laws and outside agricultural and fisheries policies. Whether this would lead to renewed debate on the SNP's policy of independence in the EU rather than in the EEA is an open question.

#### (4) What policy and regulatory choices?

The Great Repeal Bill is intended to take the very large number of EU laws into UK law so that decisions on actually changing UK laws and diverging from EU ones will happen later (although this divergence presumably will happen or Brexit would have little meaning). However, as the UK government itself has acknowledged, this is not a straightforward process.

Many EU laws depend for their operation and validity on EU institutional, regulatory and judicial structures. The EU has 34 regulatory agencies and how the UK will develop or establish its own agencies or where it might ask to remain associated with EU ones is an entirely open question for now (though the UK has also already signalled its withdrawal from Euratom which regulates the use of nuclear materials – from nuclear waste to radioactive material in hospitals). The UK White Paper on Brexit devotes only one paragraph to this issue saying it will discuss the UK's future relations to the EU's agencies with the EU27. Yet this is a vast and vital area.

The UK government has already made clear it will not stay part of EU freedom of movement so it will need new laws – and structures – to establish its own migration policy. A range of other bills, beyond the Great Repeal bill, will also be needed for the UK to establish its own trade and customs policies, agriculture and fisheries policies, tax, data protection, ability to impose international sanctions and more<sup>6</sup>.

The EU's 34 regulatory agencies range from environment to drugs, chemicals, health and safety at work, food safety, transport safety and more. There are Scottish interests in all these areas, irrespective of whether they are devolved or not.

The Scottish government, MPs and MSPs all need to develop clear policy goals on what sort of regulatory structures would be best for Scotland after Brexit – where should Scotland and the UK stay associated, if possible, with EU agencies, where and what sort of UK agencies are needed, where and what sort of Scottish ones need to be established or developed and broadened?

In the absence of a UK government plan so far, Scottish political actors could jump ahead of the UK government and set out their own plans and proposals on these highly important, very wide-ranging and complex questions. If staying associated with an EU agency is the preferred route, there may also need to be a 'second best' plan of what would be the best UK regulatory structure if the EU agency route is rejected (in some of the 34 areas).

## (5) Repatriation of EU powers and devolved competences

Debate has already started over the repatriation of EU powers in the devolved areas of agriculture, fisheries and environment in particular. The UK government has made it clear, in the Brexit White Paper, that it will not devolve all these powers – rather, it will keep some at UK level, creating UK structures, and devolve some (with the detail on this so far unclear). In turn, the Scottish government has been clear it considers that all powers should be returned.

If powers are to be fully returned to Holyrood, then there would certainly need to be coordinating arrangements across the UK on many aspects of these policies. Significantly, if powers were fully devolved then Scotland, and the other devolved administrations, would also need to acquire new powers with respect to contributing to the UK's international trade policies and negotiations in these areas. Equally, while trade powers rest with the UK government, then key decisions in these areas would be taken at UK level in trade negotiations, including in the UK-EU27 talks which could pre-empt many decisions that otherwise might be taken by Holyrood and the Scottish government.

How this plays out politically is an open but crucial question. Where and on what Holyrood will be consulted as the Great Repeal Bill and other bills go through Westminster is unclear although David Mundell, Secretary of State for Scotland, has said he foresees a legislative consent process for the Great Repeal Bill. What the UK government will do if legislative consent is not granted at various points in the Brexit process is another crunch question.

Beyond this major political battle, there are also a range of options for both the substance of agriculture, fisheries and environment policies after Brexit and how they could be structured and coordinated across the UK and devolved administrations<sup>7</sup>. All of these will require major engagement by Scottish politicians as well as by business, union, NGO and other interests.

While the Scottish government's aim is for independence in the EU, it will also presumably want to keep all policies that lie within Holyrood's competence as closely aligned to EU policies as possible. But there may be strong political pressures to do otherwise.

## (6) Migration policy

Theresa May has insisted that the UK will control its own borders and no longer be part of the EU's free movement of people. She has also insisted she still wants net migration

to come down to the ‘tens of thousands’ – something that would have a major impact, if achieved, on many areas and sectors of the UK, including in Scotland.

Under the ‘Scotland’s Place in Europe’ proposals, Scotland would have had, in part, its own migration policy by remaining part of EU freedom of movement. So far, Theresa May has appeared determined to set a UK-wide policy for migration. What has received almost no attention so far is what sort of EU27 migration policy, UK citizens may face in the future if they want to work in EU27 policies – nor is it clear how migration issues may figure in the UK-EU27 trade talks and whether a more open migration policy could help achieve a better trade deal.

Scotland has a smaller share of EU citizens than the UK as a whole does (3.45 to 4.9%), yet half the net increase in Scotland’s population from 2000-2015 came from people born in EU countries<sup>8</sup>. Scotland clearly has major interests in what sort of future migration policy the UK adopts, and whether there is any flexibility for Scotland to adopt a more open policy. There are also, of course, Scottish interests in the details of migration policy – how skills criteria are set, policy towards students and so on. It also shares those interests in many ways with a number of other parts of the UK.

So far, the outlook though is less than promising – Theresa May’s migration targets suggest lowering immigration is being prioritised ahead of economic and wider interests. Whether in arguing for at least a partial devolution of migration policy (as for instance happens in Canada) or in making common cause with others across the UK in pushing for a more open and flexible migration policy, there remains many political arguments to be had.

## (7) Scotland-EU relations

The Scottish government has undertaken extensive political and diplomatic contacts across the EU since the Brexit vote. It is also clear that the mood music in the EU27, towards Scotland re-joining the EU as an independent member state, if it chose independence, is much more positive than in 2014 (not towards independence as such, simply towards eventual EU membership if Scotland chose that route)<sup>9</sup>.

As Brexit talks get under way, the question for the Scottish government is how to influence the UK’s negotiating stance, and whether and how, with what purpose, to continue its EU diplomacy. Is the aim of continuing Scottish-EU diplomacy mainly aimed at keeping that current positive mood music towards Scotland, or can it in any way assist Scotland’s interests as the Brexit talks unfold? The latter seems very hard to achieve. The EU27 are negotiating with the UK government – and they will defend and promote their own interests in those talks. The EU27 will not engage in informal talks with the Scottish government.

Nicola Sturgeon has recently said she wants a seat for Scotland at the talks. Theresa May is unlikely to agree to this – or if she did she would insist that the negotiating team acts as one team, not promoting proposals for Scotland that do not have a UK mandate. In the latter case, the Scottish government would then be partly responsible for the UK-EU27 exit deal, and later the trade deal, which would make it hard to then argue against it or to disown that responsibility. This looks like remaining a theoretical argument.

## Conclusion

The Brexit talks will be under way in mid-June. Theresa May is so far keeping close control of the UK's Brexit strategy and negotiations. Yet Scotland has major interests and concerns in those talks and in the repatriation of powers to the UK and Scotland, and in the various, wide-ranging impacts of Brexit. This paper has outlined key areas of strategic interest and has also argued that it will be hard for Scottish politicians – of all parties, not only the Scottish government – to have a major or direct influence on the talks.

Yet the process of Brexit runs across almost all areas of the UK's political, economic and social structures and policies. The Scottish government, MPs and MSPs all need to have clear, well-thought-out strategies for how to attempt to influence both the exit deal – including the vital transition arrangements – and the eventual UK-EU27 trade deal. There will also be major debates and votes at Westminster and Holyrood on future policies ranging from migration to agriculture to environment.

Politics in many ways may dominate policy in these Brexit debates, since it is likely that, repeatedly, decisions will be taken at UK level not at Holyrood or by the Scottish government. But serious political argument and contesting of the UK's Brexit strategy will also need serious alternative strategies.

This paper has outlined a number of key areas, in particular:

- **Money, EU & UK citizens and borders:** The eventual deal to ensure a soft border between Ireland and Northern Ireland may have many implications for Scotland and needs closely watching, but it may only be relevant in part to Scotland.
- **UK-EU comprehensive trade deal:** The UK is currently heading towards a relatively hard Brexit, outside the single market and customs union, with negative implications for Scotland's trade with the EU as there will be new non-tariff barriers. Scottish politicians will find it hard to influence these talks.
- **Transition deal:** The best transition arrangements for the UK – after it leaves the EU in March 2019 and before a full UK-EU27 deal is agreed some years later – would be to transition via the European Economic Area. Most of Scotland's political parties – those which support staying in the EU's single market – should back this. If May rejects this route, it will be vital to avoid a hard transition – one that is abrupt, inadequately planned and that creates uncertainty.
- **Policy and regulatory choices:** In the absence of clarity from the UK government, Scottish politicians and parties should set out their desired regulatory structures and which of the EU's 34 regulatory agencies the UK should aim to stay associated with. They should also set out clear proposals for new UK and Scottish regulatory structures.
- **Repatriation of EU powers and devolved competences:** Political battles are already under way over repatriation of agriculture, fisheries and environmental policies. Full return of these powers to Scotland would require Scotland to have significant powers with respect to future UK trade policy. A partial return of powers will also require rapid choices to be made between different policy options in these areas – both at UK level and in Scotland – in particular whether the Scottish government would aim to keep policies closely aligned to EU ones.

- **Migration policy:** The UK looks likely to establish a more restrictive migration policy under Theresa May. Scottish interests in a more open migration policy will need to continue to be argued for – whether through flexibility in UK-level migration policy or through devolution of some aspects of migration policy. The latter currently looks unlikely.
- **Scotland EU relations:** The Scottish government’s diplomatic efforts across the EU in the last year have been well received. But the EU27 are unlikely to take Scotland’s interests into account when negotiating with the UK. Nicola Sturgeon’s push for Scotland to be represented at the table is unlikely to happen.

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<sup>1</sup> ‘The United Kingdom’s exit from and new partnership with the European Union White Paper’ (2017) White Paper, Department for Exiting the EU

<sup>2</sup> ‘Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union’ (2017) Annex to the Recommendation for a Council Decision, Brussels, 3 May 2017 COM(2017) 218 final

<sup>3</sup> ‘Scotland’s Place in Europe’ (2016) Scottish Government, 20 December

<sup>4</sup> See also ‘Scotland’s EU Single Market Options: Some challenges from the trade side’ (2017) Kirsty Hughes, Constitutional Change Centre Blog

<sup>5</sup> ‘Hard Brexit, Hard Landing?’ (2016) Monique Ebel, National Institute of Economic and Social Research

<sup>6</sup> ‘Legislating Brexit – The Great Repeal Bill and the wider legislative challenge’ (2017) Hannah White and Jill Rutter, Institute for Government

<sup>7</sup> See, for example, ‘Brexit, Devolution and Agriculture: A Case Study in Complexity’ (2017) David Bell, March, Scottish Centre on European Relations Comment

<sup>8</sup> ‘EU nationals living in Scotland’ (2016) Nicola Hudson and Andrew Aiton, Financial Scrutiny Unit Briefing, SPICE, Scottish Parliament, November

<sup>9</sup> ‘Scotland’s choice: Brexit with the UK, independence, or a special deal?’ (2016) Kirsty Hughes, Friends of Europe Policy Paper, November