

Scotland knows what it wants with the EU, while London seems still not to know

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On December 20th, the Scottish government published a detailed White Paper on "[Scotland's Place in Europe](#)". Scotland knows what it wants and says so in considerable depth, expressed in terms of a hierarchy of options.

As the Scottish first minister, Nicola Sturgeon, says in her foreword: "On 23 June, the people of Scotland voted categorically and decisively to remain within the European Union (EU)." They did so by a huge margin (62-38), which is about eight times as decisive as the UK's overall majority (52-48) to leave.

The first minister's foreword also states her view that "... the best option is to become a full member of the EU as an independent country. ... The Scottish Government was elected in May on a manifesto which said in relation to independence: *The Scottish Parliament should have the right to hold another referendum [...] if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.*"

The paper goes on to address in detail two options for the Brexit case.

First, Scotland advocates that the whole of the UK should stay in the single market and customs union. This would be a Norway+Turkey option, joining the European Economic Area (EEA) and adding to it continued membership of the EU's customs union.

Second, if the UK opts to pursue a lesser agreement with the EU, Scotland would seek continued access to the single market for itself, with the further devolution of powers necessary to do this.

The first option is easy to specify, since the EEA and customs union both exist and function. Scotland does not have to invent anything here. Instead the paper analyses at length why in its view membership of the single market and customs union is beneficial to the Scottish economy and society. It unambiguously supports continued free movement of people: "We need the inward flow of people not just to support the growth of our businesses and services, but to provide diversity and vibrancy to our communities. Over the next 10 years, 90% of our population growth is projected to come from migration. Any move which limits migration, whether from within or beyond the EU, has the potential to seriously harm Scotland's economy."

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The second option, with Scotland to obtain a ‘differentiated solution’, required much more original and exploratory thinking. It consists essentially of Scotland retaining full membership of the single market through an agreement with EFTA-EEA, while the rest of the UK abandons the EEA. Scotland in this case, however, would not seek to stay in the customs union. The paper acknowledges that this option “raises technical, legal and political complexities and challenges”, which it discusses in detail.

The first standard objection to this proposal is that EFTA-EEA membership is only for ‘states’. To this objection, the paper responds by citing that when in the EU there are special cases or circumstances, solutions can be arranged legally (‘where there’s a will there’s a way’). Indeed the EU and its member states have a considerable number of special arrangements regarding the territorial definition of who is ‘in’ the EU or otherwise covered by EU or EEA law, including Gibraltar, the Channel Islands, Greenland, Svalbard and the Faroe Islands. The Faroe Islands case is given special attention because it is asserted here that Denmark envisages being a ‘sponsor’ for the Faroes to join EFTA as a sub-state entity. More generally the paper calls for a ‘flexible Brexit’, echoing the UK’s advocacy in the pre-referendum debates for a ‘flexible EU’.

The paper next takes a comprehensive look at how continued membership of the single market for Scotland without the rest of the UK might affect the attribution of legislative competences devolved to Scotland, and various requirements for these to be extended. For this purpose, three categories of competences are identified:

1. *EU competences in already devolved areas.* When the UK would, under the Great Repeal Bill, repatriate to UK jurisdiction EU laws that fall in areas of the devolved competences, these would be matters for the Scottish Parliament, failing which there would be an unacceptable ‘re-centralisation’ of powers to London. This concerns agriculture, fisheries, environment, civil law, aspects of criminal law, health and higher education and research.
2. *Other repatriated competences.* This concerns competences being repatriated in which Scotland would want to protect certain citizens’ rights, and in which it does not already have devolved competence. This would concern employment law, equalities, consumer protection and health and safety at work.
3. *Additional powers.* These concern areas that would ensure consistency with the full requirements of the single market. This would concern notably the free movement of people, and therefore for immigration to become a devolved competence. The paper cites the cases of Canada and Australia as examples where the provinces or states have certain competences to detail their own immigration policies. To the argument from London that Scotland could become a transit point for immigrants to defeat the immigration restrictions of the rest of the UK, it is pointed out that the UK Prime Minister has said that controls are likely to be based on checks at places of employment, rather than at the frontier. In addition the paper cites a long list of further single market competences, including energy regulation, financial services, telecommunications, etc.

This presentation is rather complicated and not that easy for most readers to follow. An alternative approach to achieving the same objective could be described as follows:

- a. When the Great Repeal Bill transfers all EU law into UK jurisprudence, one could propose that all matters relating to the single market would then be transferred to Scottish jurisdiction.

- b. In order to make that transfer, Scotland would adopt the exact list of EU laws in full that the EEA member countries apply.
- c. More broadly and going forward in time, Scotland would declare its intention to implement the entire body of EEA legislation unilaterally, if an agreement had not (yet) been reached to accede formally.
- d. This would then mean that Scotland would follow the EEA practice of adopting all new 'EEA-relevant' legislation to keep its compliance up-to-date with EU single market law.
- e. The foregoing four steps would pose constitutional issues with the UK, the handling of which could be split into two stages; i.e. to transfer single market law to Scotland under a. and b. above would be an internal matter for the UK, whereas for Scotland to accede to the EEA under c. would be an act of international law (and difficult legally and politically for both the UK and EU).

Scotland already has many attributes of a state within a federation. The above scenario is one in which many further powers would be attributed to it. Voices in London may decry this as a 'power grab'. But none of this would have needed to be pursued without Brexit.

Assessment

Six months after the June 24th referendum, London still cannot say what it wants, and indeed does not yet seem to know what it wants in any operationally defined terms. London's silence is itself understandable, since it becomes increasingly clear that there is no good Brexit option – only alternative menus of disadvantages.

Scotland, on the other hand, says what it wants. In the event of Brexit, its first preference is for the whole UK to remain both in the single market (EEA) and customs union. This is a coherent statement by a government that regrets Brexit but seeks damage minimisation. The proposition is clear and operationally feasible. If London decides that it does not want that, it takes this position in disregard for Scotland's wishes.

In this case, as a second-best Brexit option, Scotland advocates a complex legal arrangement allowing it to remain in the single market, while also remaining in the UK, with the rest of the UK leaving the single market. The legal feasibility and economic practicality of this arrangement will doubtless be subject to much controversy and argument in London and Brussels. However, the clearest and most politically sensitive proposition, namely that competence for immigration would be devolved to Scotland to allow continued free movement of people on its territory is a serious proposition that cannot be rejected out of hand on objective grounds.

Both options present serious political or technical complications, to say the least. However, London must judge its response with a fuller awareness of the consequences than has characterised much of the current debate. If London's reply were to be simply 'no and no', it would risk adding a fresh momentum in favour of Scotland's independence and thus towards the disintegration of the UK itself and to whatever other calamities Brexit seems destined to deliver. As a first reaction, Theresa May is reported¹ to reject the idea of 'differential relationships' and to consider that the proposals may be 'impractical'.

¹See "British PM rebukes Scottish single market plans", *EU Observer*, 21 December 2016.

The British Prime Minister, however, is under pressure in any case to end the uncertainty not only over her government's opening position upon triggering Article 50, but also more fundamentally to end quickly the 'state of limbo' in which the UK will find itself after triggering Article 50.² The negotiation process and possible transitional arrangements that are set in motion may damagingly last for many years, even up to a decade.

Yet there is one formula for implementing Brexit that would cut short the state of limbo, which would consist of the UK announcing its intention to remain in both the EEA and the customs union. This would enable the country to complete its withdrawal in a quick and orderly manner within the two-year limit of invoking Article 50, while meeting Scotland's priority demand, and also resolve the serious problems that will otherwise arise from restoring controls at the frontier between Ireland and Northern Ireland. As is constantly being pointed out, while the referendum produced a small majority for leaving, there was no majority for a hard Brexit, or a decade-long state of limbo. Those who value the continuation and stability of the UK, and those worried by the prospect of nightmare negotiations over a complex 'bespoke model' can see the advantages of the EEA+customs union formula.³

² Opinion poll by the *Daily Express*, 24 December 2016 (<http://www.express.co.uk/news/politics/746589/Brexit-poll-majority-voters-want-Britain-out-EU-ASAP>).

³ The 'EEA + customs union' formula may be compared with the statement of Brexit minister David Davis to City interests on 5 November 2016, indicating that what he had in mind aimed "somewhere in the middle of Turkey, Switzerland and Norway". The minister's formulation is of course not clear at all, presumably because he and/or the government have not yet made up their mind. However it could be consistent with saying "Norway + Turkey + an ingredient from Switzerland (namely, its 1999 safeguard agreement with the EU regarding free movement of people)".