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Commentary

## If We Cannot Have Both, Then Which Union Do We Choose? Scotland's Options after 'Brexit'

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## Abstract

In the space of two years, the Scottish electorate has been asked on two separate occasions to declare its position with regard the two unions to which it currently belongs – that of the UK and of the EU. This special interest piece aims to take stock of the mood in Scotland towards Brexit and to consider the various options for Scotland going forward. It is starting to look probable that Scotland will have to go to the polls one last time. If the Scots cannot belong to both unions, then ultimately they will probably have to make one final decision as to which union they favour.

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Between 2014 and 2016, the Scottish electorate has been to the polling station no fewer than four times: the 2014 independence referendum, 2015 general election, the 2016 Scottish Parliamentary elections and, of course, the recent referendum on the UK's departure from the EU. With regard to the so-called 'Brexit' referendum, the Scottish Government (SG) did not have any yearning to have the referendum at all. In the lead up to the referendum, the SG argued strongly that there was no popular demand in Scotland to have a referendum, and there was certainly no public demand in Scotland to find itself in a position where it was outside the EU. When the referendum did come, Scotland's statement about wanting to stay in the EU was pretty emphatic. Scotland now finds itself in a position of trying to explain to the UK Government (UKG) that Scotland has given its view and they expect some respect to be given to that view.

This special interest piece aims to take stock of the mood in Scotland towards Brexit and to consider the various options for Scotland going forward. The first section will discuss the results and compare some demographics of the two referendums. The piece will then turn to both the SG's preparations for and reactions to the result of the June 23 vote. Finally, a discussion of how 'Brexit' may affect UK constitutional matters as well as some thoughts on existing options and preferences facing the SG, the other Scottish political parties and the UKG are offered.

### FROM 2014-2016

Comparing the 55 per cent - 45 per cent who voted to Remain part of the union with the United Kingdom (2014) with the 62 per cent - 38 per cent who voted to remain part of the European Union (2016) is an interesting exercise. Anecdotally, there seems to be some correlation between those who voted NO in the independence referendum and those who voted Leave in the EU referendum. For example, the demographic who was most inclined to vote Leave in Scotland (as well as the UK as a whole) were the elderly. They were also the demographic who were the most likely to vote NO with regard to independence in 2014. Conversely, younger people voted for both the EU and Independence.

Economic indicators are also an interesting comparison. The lower income areas were predominantly places that voted YES to independence but they also had some of the strongest support within Scotland for leaving the EU. This seems to track onto voting patterns across the UK as a whole. So in terms of the 55 per cent - 45 per cent and the 62 per cent - 38 per cent, where it is consistent is age and where it is inconsistent is social status. Those with higher incomes were predominantly pro-Union (UK) and pro-Remain (EU). If a second independence referendum

materialises as a consequence of Brexit, this demographic will be particularly interesting to observe should they be asked once again to choose between the two unions. At the moment, they appear to be preferring the UK union over the European Union but that may change as the Brexit process deepens. Current YouGov data indicates that if a second referendum were to be rerun, the result would be almost identical to the last time with 54 per cent of Scots voting against independence and 46 per cent in favour (Smith 2016).

It is also interesting to note that many of the working class and traditional labour communities that came over to the Yes campaign in 2014 - and subsequently voted for the Scottish National Party (SNP) in 2015 and 2016 - were not a hotbed of support for the EU in the June referendum. Economic security during the independence referendum, especially for the elderly, was absolutely crucial. However, and somewhat counterintuitively, this sense of economic security did not seem to count for as much during the Brexit vote, at least for those in Scotland who voted to leave.

Although Scotland returned an overwhelming Remain vote (62 per cent), one could also argue that the leave vote (38 per cent) was actually relatively high given the fact that the Leave campaign did not have any substantial political party representation in Scotland. Although the people of Scotland were as exposed to Boris Johnson and the Leave campaign as anywhere else in the UK, there was no significant voice in Scotland channelling that campaign. The 38 per cent can be partially explained by exposure to the UK-wide campaign but given this lack of party support, it is surprising that the Leave return was so high. In any case, it is not an insignificant number and it could very well be significant if another independence referendum were to be held at some stage in the near future. In this regard, it is also likely that some tactical voting took place as some independence-minded voters may have believed that the UK leaving the EU is good grounds to fight another independence referendum.

## CONTINGENCY PLANNING

In the lead up to the referendum, the SG actively argued that the UK should remain in the EU. The SG made some general preparations for both a Leave and a Remain vote - it would have been irresponsible of them otherwise - and to some extent the SG was braced for either outcome. However, in the ten to fourteen-day period prior to the vote, a realisation had begun to set in that a Leave vote was possible, if not probable. In reality, the outcome came as much of a surprise to the SG as it did to the UKG. Given that every voting district in Scotland returned a vote for Remain, this only enhanced the sense of shock. What has become clear since the referendum, and somewhat ironically since it was the UKG that actually proposed the referendum, is that only the SG seems to have thought through the ramifications in any detail. In short, and as one interlocutor indicated, there was a plan but the leading figures in Scotland were not really emotionally prepared for the result.

Yet, Nicola Sturgeon reacted swiftly and directly on the morning after the UK voted 52 per cent to 48 per cent to leave the European Union. The First Minister drafted her speech in the early hours with the absolutely fundamental aim of conveying that there was a distinctive and differentiated position in Scotland. Her primary goal was to make it absolutely clear that Scotland had voted differently from the UK-wide vote. The priority was to make it known to both the UKG and to those listening in other European capitals that the SG had very different priorities from the British electorate as a whole.

Discussions with interlocutors in Edinburgh have also revealed that the First Minister's response was deliberately pressing for quite specific reasons.<sup>i</sup> First, she felt it was very important to convey to those nationals from other EU countries living in Scotland, that they were still welcome. From their point of view, this was not the message getting through, neither in the course of the referendum, nor subsequently. Second, there was a pressing requirement to respond to some of the immediate questions thrown up by the vote itself, most notably uncertainties concerning the constitutional and legal implications of leaving the EU.

In essence, although the First Minister was quick off the mark, she spoke more in terms of her perceived mandate than any real strategy. There can be no doubt that the question of independence is never far from the hearts of those in the SNP, but it does not appear to be the case that the SG or the SNP went into the EU referendum thinking that this was an opportunity to exploit. The SG was (and is) genuinely anxious about what leaving the EU will mean in terms of Scotland's own interests. Of course, that does not necessarily carry over to the post-EU referendum landscape. Indeed, the First Minister made clear that, 'as things stand, Scotland faces the prospect of being taken out of the EU against our will' (BBC News Website 2016a).

Since the vote, the First Minister has been very definite about the need for Scotland to retain some kind of connection to the EU, most notably the European Single Market. Officials with the SG have grave concerns regarding the impact that leaving the Single Market would have on the Scottish economy. According to a document released by HM Treasury in 2014, 'almost 270,000 jobs in Scotland, over 10% of total Scottish employment, are linked to the UK's single integrated market' (HM Treasury 2014). A report produced by the Fraser of Allander Institute for the Scottish Parliament concluded that,

over the long-term a reduced level of trade is expected to result in Scottish GDP being between 2% and 5% lower than would otherwise be the case. The range of impacts is driven by the nature of any post-Brexit relationship between the UK and the EU – the stronger the economic integration with the EU, the smaller the negative impact (Fraser of Allander Institute 2016).

Therefore, the position of the SG, which is not an unreasonable one given both the Scottish vote to Remain and the potential economic impact, is a clear desire to remain a member of the EU. And if this is not possible, then access to the Single Market at the very least. In a speech at the Institute for Public Policy Research, the First Minister offered 'five key interests' that she would prioritise in terms of negotiations with the UKG before Article 50 (Article 50 TEU 2008) is triggered. These are: 'democratic interests, economic interests, social protection, solidarity, and having influence' (Sturgeon 2016).

Although this may be a reasonable position to take, it does mask some real complexities. For example, David Mundell, the Secretary of State for Scotland, has also expressed the UK Government's position. Also speaking at the Institute for Public Policy Research, Mundell noted that 'we should remember that almost four in ten of Scottish voters backed Leave, not an insignificant number'. He also outlined three assumptions informing the UKG position. First,

the EU referendum result provides a democratic mandate for the United Kingdom to leave the European Union ... For the United Kingdom Government, part of making a success of Brexit means leaving the EU in one piece and remaining in one piece after that process is complete.

Second, 'that the referendum result applies just as much to those parts of the UK that voted to remain as voted leave'. Third, 'under the devolution settlement, foreign affairs are a reserved matter for the UK Parliament and the responsibility of the UK Government' (Mundell 2016a).

So where does Scotland stand and what are the options going forward? Before turning to the various possibilities and preferences currently being proposed, let us first turn to the constitutional and legal circumstances underpinning this process.

## CONSTITUTIONAL MATTERS

In October, the Prime Minister finally announced that Article 50 would be triggered before the end of March 2017 (Elgot 2016). Once Article 50 is formally invoked, the two-year process of leaving the European Union commences. One would expect the SG and the UKG (plus the other devolved administrations) to negotiate a UK position that accounts for all interests before article 50 is triggered. As Professor Jo Shaw notes, the UK Parliament is the sovereign body within the British system and legally, 'the UK Government holds most of the cards'. However, when it comes to legitimacy, Shaw suggests that the SG has 'a pretty good hand to play' (BBC News Website 2016b).

During a trip to Scotland, Theresa May, the UK Prime Minister, suggested to the Scottish First Minister that she was 'willing to listen to options' on Scotland's future relationship with the European Union (BBC News Website 2016c). In testimony before the Scottish Parliament's European and External Relations Committee, Fiona Hyslop (MSP and Cabinet Secretary for Culture, Tourism and External Affairs) confirmed that 'the legal competence for the negotiation is with the UK government'. However, she also intimated that

UK ministers have not told me what their plans are because I do not think that they have plans yet ... but I have made it clear that they should think carefully about when and how they trigger article 50 and that it is important that we be involved in the negotiations or discussions and the process prior to article 50 being triggered (The Scottish Government 2016).

Ms Sturgeon has since declared that she does 'accept that the Prime Minister has a mandate in England and Wales to leave the EU, but [she does] not accept that she has a mandate to take any part of the UK out of the single market'. She went on to say

the Scottish Government will not be window dressing in a talking shop to allow the UK Government to simply tick a box. We expect to have, along with the other devolved nations, a role in decision-making, we expect our engagement to be meaningful (Gourtsoyannis 2016).

## OPTIONS AND PREFERENCES

### *The Scottish Government's position*

After discussions with interlocutors in Edinburgh, some understanding of the SG's position can be identified. Not unlike arguments put forward during the independence campaign in 2014, Edinburgh

continues to suppose that the EU can be quite a pragmatic body when it wants to be. As already mentioned above, the First Minister has set out certain interests that she is seeking to protect. These interests are being presented to the UKG as well as to other governments in Europe in order to discern if there is any appetite for differentiated arrangements should it come to that. When Theresa May came to Scotland, she talked about wanting to establish a UK approach and UK priorities. Nevertheless, the SG is still trying to ascertain what exactly she meant by that.

The SG is clear that its least bad option is for the UK to remain in the Single Market, which it believes is not only what is best for Scotland but also what is best for the UK. The SG is quick to point out that it is not content to be taken out of the EU just because it may retain access to the Single Market. Again, it only sees this as the least bad option. Essentially, the SG's position is that it is trying to retain its place within the EU. However, it knows full well that this would require a great deal of creativity and imagination on the part of both the UK and the EU if Scotland were to retain its position in the EU while being part of the UK. To paraphrase one interlocutor, Scottish interests are best served within the European Union by some distance, if this can be done pragmatically within the UK, then that option is viable as much as anything else.

### *Other Options*

There now seems very little doubt that the UK will leave the EU, most likely by April 2019. The exact outcome of the negotiation process (or processes) is still in question, but the SNP seems to have come to the conclusion that the UKG prefers to pursue the 'hard' Brexit option. Therefore, Scotland's future is very much in doubt, in terms of its relationship with both the EU and the UK. This can be understood in two separate but not unrelated classifications. First, in terms of the UK's final negotiated settlement in relation to the EU. Second, Scotland's constitutional position in relation to the UK. In the first category, the central dividing line is between the so-called 'hard' and 'soft' Brexit options. The options under the second category range from the status quo, to increased devolved competencies for Scotland, to full independence for Scotland. The table below gives an idea of the range of options and complexities with regard to the various models that have thus far been proposed.

*Table 1 (BBC News Website 2016d)*

	EU Membership	Norway	Switzerland	Canada	Turkey	World Trade Organisation
<b>Single Market Member?</b>	Full	Full	Partial	No	No	No
<b>Tariffs?</b>	None	None	None	Reduced Tariffs through free trade deal	None on industrial goods	Yes
<b>Accept free movement?</b>	Yes	Yes	Yes	No	No	No
<b>In the customs union</b>	Yes	No	No	No	Yes	No
<b>Makes EU budget contributions</b>	Yes	Yes	Yes (but smaller than Norway)	No	No	No

One additional option that has been proposed is the so-called ‘reverse Greenland’ possibility. This proposal fits into the category whereby some of the constituent parts of the UK, namely those that voted to Remain (Scotland, Northern Ireland and potentially Gibraltar) would retain some variation of EU membership. The rest of the UK (rUK) would, however, leave the EU under the terms of a separate negotiated agreement. This option would leave Scotland with access to the Single Market while abiding by the Four Freedoms of the Union. Furthermore, Scotland would be a contributor to the EU budget and assume some form of shared (with Northern Ireland) decision making powers, replacing those formally held by the UK. This option would require a tremendous amount of creative thinking and most experts dismiss it as highly unlikely. The proposal is problematic for two significant reasons. First, this would create a new type of membership classification for the EU. Second, if the rUK were to remain outside the Single Market, presumably accompanied by a rejection of the Four Freedoms, then this may necessitate a hard border between Scotland and England. That is not likely to be something desired by either Scotland or the rUK. The range of possibilities open to Scotland would, therefore, seem generally to correspond to the following: (1) a ‘hard’ Brexit for the UK and by extension for a Scotland remaining a part of the UK; (2) the UK stays in the Single Market (so-called ‘soft’ Brexit) and by extension so does Scotland; (3) some form of differentiated solution for Scotland relating to either a ‘soft’ or ‘hard’ Brexit for rUK; (4) independence for Scotland potentially in the EU but a ‘soft’ UK Brexit; (5) independence with Scotland potentially in the EU but a ‘hard’ UK Brexit.

### *The Parties*

The primary interests of the SNP, as things stand, are outlined above. However, a few further comments are warranted. The First Minister visited Brussels this summer where she met with the President of the European Commission, Jean-Claude Juncker, the President of the European Parliament, Martin Schulz, as well as some leaders of the political groupings within the European Parliament. According to the Scottish Government, the First Minister ‘stressed that Scotland chose to remain part of the European Union, and her determination to ensure all options are considered to enable Scotland to remain in the EU’. The Scottish First Minister also declared that she had

deep concerns about the impact of the referendum not just on Scotland, the UK and the European institutions, but on people in all our countries and on the EU itself. If there is a way for Scotland to stay, I am determined to find it (Scottish Parliament Information Centre 2016).

The First Minister has also organised a council of experts to advise on protecting Scotland’s relationship with Europe. ‘The Council draws on a breadth and wealth of knowledge and experience, comprising specialists with backgrounds in business, finance, economics, European and diplomatic matters, and it will encompass a range of political and constitutional opinions’ (The Scottish Government 2016). There are three SNP ministers who are directly involved with the negotiations on behalf of the SG, all of whom answer to the First Minister: Alasdair Allan (Minister for International Development & Europe), Michael Russell (Minister for UK Negotiations on Scotland’s Place in Europe), and Fiona Hyslop (Cabinet Secretary for Culture, Tourism and External Affairs). Finally, the cross-party European and External Relations Committee within the Scottish Parliament has been taking evidence on the EU referendum result and its implications for Scotland (The Scottish Government 2016).

The Scottish Labour Party maintain that the impact of leaving the EU will have a tremendous detrimental impact on Scotland and the Scottish economy. They see no real plan or strategy emanating from the UKG and the Party believe that, at this point, it is unclear exactly what the UKG aspires to on the back of leaving the EU. There is also a feeling that we are where we are to a large extent by accident. From their point of view, Theresa May lacks a formulated strategy, much less one that is agreed at the Cabinet level. The bottom line is that without knowing if the UKG is ultimately seeking to retain the UK's position within the Single Market, then it is very difficult for any party to influence any consequences for Scotland. The Scottish Labour Party support the SG's endeavour to explore the various options available to Scotland and they too are anxious to know what weight the SG will have in terms of the wider Brexit negotiations.

The Scottish Conservatives essentially believe that the result was one taken by the UK as a whole. Although most Conservatives in Scotland did not campaign for Leave, they see no option other than carrying out the will of the UK electorate expressed last June. They believe that the UK (and Scotland) will simply adjust pragmatically to this new reality and that they will, ultimately, make a success of Brexit. Assuming a rational approach, they believe that the people of the UK have no real interest in torpedoing their own national interest. Once the disappointment felt by 'Remainers' has passed, level heads will prevail. Of course, the other component that motivates them is keeping Scotland in the UK. In this regard, they believe the arguments for Scotland retaining its position in the UK are even stronger now than they were in 2014. As Mundell puts it,

[t]he arguments in support of Scotland's place in the UK have got stronger, not weaker, since September 2014. And I do not think that the UK's vote to leave the European Union does anything substantial to weaken the argument for the UK (Mundell 2016b).

So their position is this, when the UK leaves the EU, no matter the form that Brexit takes, Scotland will leave the EU as part of the UK. They are much more concerned with the deal the UK can negotiate with the EU than any 'differentiated' arrangements for the devolved administrations. However, they do claim that Scotland will have and should have a central role in those negotiations.

Like the SNP, the Scottish Green Party are open to 'differentiated' options. Nevertheless, their primary position is that an independent Scotland with membership in the EU is the best overall result. As such, they believe this process will come down to a choice between two unions for the Scottish people. The Scottish Liberal Democrats have also made it clear that they think the UKG is without a strategy and are gambling with the UK's national interest as a consequence. They share in the belief that Brexit - and especially a 'hard' Brexit - will be detrimental to the Scottish economy but they are not inclined towards Scottish independence.

## CONCLUSION

With the UKG seemingly pursuing a 'hard' Brexit and the SNP positioning itself towards linking this attitude to a second Scottish independence referendum, the Prime Minister and the First Minister are both engaging in a hefty gamble. If Theresa May is determined to leave the EU and the Single Market, her strategy will be underpinned by an assumption that the Scottish electorate will be resigned to choosing the UK union over the EU. She will put faith in the economic centre of gravity being in the UK and not the EU. However, she would do well to remember that the UK electorate very recently ignored what appeared to be an overwhelming economic argument against leaving the EU. If the Scottish public feel aggrieved enough by the Brexit negotiation process, they too may



choose some nebulous desire for self-governance over arguments around economic security. In other words, taking back control could trump fears of economic detriment just as it did in June. The UKG should be nervous that any future independence referendum could be unaffected by the economic argument if the UKG is not perceived to represent the Scottish voice in the Brexit negotiations with the other 27 EU member states.

As for Nicola Sturgeon and the SNP, calling a second independence referendum is the gamble. On October 13, she indeed confirmed that a new draft independence bill would be published for consultation. Currently, there are two unknowns for the First Minister. The first is comprehending exactly what post-EU membership status the UKG will seek to attain as part of the Brexit negotiations; not to mention the final negotiated settlement. In this regard, and after a meeting of the Joint Ministerial Committee on October 24, the SG remain 'frustrated' and feel they do not have 'any greater insight into the thinking of the UK government' (BBC News Website 2016e). The second big unknown for the First Minister is to what extent Brexit negotiations move the needle in terms of YES voters for independence. The First Minister has no desire to have another referendum on independence unless she is very confident that the SNP would win. Currently, the polls suggest this would not be the case. If you add the potential of a hard border between England and Scotland into the debate, a preference for the UK over the EU is highly likely.

## ENDNOTES

<sup>1</sup> In preparation for writing this article, a series of interviews were conducted between August and September 2016. These interviews involved discussions with a small set of sources in or connected to the Scottish Government as well as academics.

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