

# SCOTTISH INDEPENDENCE: THE CONSEQUENCES FOR TRADE

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Legal Briefings - By **Eric White and Lode Van Den Hende**

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The prospect of an independent Scotland raises questions on international trade for politicians and business. We assess the key issues.

As with the prospects for and then the reality of Brexit, the [prospect of an independent Scotland](#) raises the profile of questions on international trade for both politicians and business. In this briefing we take an initial look at some of the key trade issues.

## BREXIT IS NOT A GOOD MODEL

In light of the recent withdrawal of the UK from the EU it is tempting to suppose that Scottish independence would create similar problems to Brexit and that the solutions to realise Brexit could be applied *mutatis mutandis* in the case of Scottish independence. This would be an oversimplification and by way of introduction to our further discussion it is worth considering the differences between the two situations:

- **Scotland is not an internationally recognised State.** As discussed in our [Scottish independence: the international law implications](#) briefing, under international law, Scottish independence will constitute the creation of a new State by secession from an existing State. Brexit however involved the withdrawal of an internationally recognised State from an international (or supranational) organisation. As we will discuss in Section 3 below this has consequences for succession to international agreements including trade agreements.
- **The EU is created by international treaty and contains a withdrawal mechanism.** Most obviously there is no equivalent in UK law of Article 50 the Treaty on European Union and therefore no pre-agreed consequences of independence and no mechanism for settling them. The existence of Article 50 had a profound effect on the balance of advantage in the Brexit negotiations. First, both parties agreed (at least

initially) that Article 50 only allowed the negotiation of the terms of the separation and not of continuing relationship. Second, the separation had to be negotiated under time pressure; the UK negotiated the withdrawal agreement knowing that it risked being cut adrift from the EU after two years with no mitigating arrangements unless the remaining EU Member States all agreed to prolong the period.

## **THE CONSEQUENCES FOR TRADE BETWEEN SCOTLAND AND THE CONTINUING UK**

An independent Scotland would have gained sovereignty over its internal affairs but be entirely dependent on what it can agree with the UK as regards the maintenance of its most important trade relations. Unlike the UK outside of the EU, Scotland will not even have WTO-terms to fall back on. Everything will be up for negotiation and it is therefore difficult to predict how it will turn out.

It is difficult to imagine that independence would be implemented without some form of agreement with the continuing UK on the future relationship.

As the larger partner, the continuing UK will have many advantages in these negotiations. [In 2017](#), nearly two thirds of Scottish trade was with the continuing UK whereas only about 10% of continuing UK trade is with Scotland. In addition, Scotland will be the *demandeur*, politically bound to renegotiate the relationship, while the continuing UK would presumably be happy for the process to drag on or even be abandoned completely. This will influence the manner in which compromises are struck - whether on assets and liabilities, monetary arrangements, the movement of goods, services, capital and persons and all the level-playing field issues - including the degree to which Scottish law and regulation will be able to diverge from that of the UK without adverse consequences being imposed.

The outcome will, as always, depend not only on negotiating leverage but also on the balance of interests. For example, the EU had a strong interest in avoiding extensive cooperation with the UK in the field of financial services since it hoped to gain much of this activity for itself as a consequence. The UK will have very different priorities in the negotiations with Scotland and that will be reflected in the final outcome.

## **THE CONSEQUENCES FOR TRADE BETWEEN SCOTLAND AND THE REST OF THE WORLD**

As noted above, an independent Scotland will be a new State in international law. While it may remain bound as a successor State to some of the obligations of the UK and may be entitled to declare itself a continuing party to some international agreements (and therefore rights and obligations) of the former UK, this would not apply to agreements creating international or inter-governmental organisations or for other multi-lateral treaties with particular entry criteria (see our [Scottish independence: the international law implications](#) briefing). Most of the UK's trade agreements are however in this latter category with joint committees and other bodies able to take decisions. This is first and foremost the case of the UK's agreements with the EU and the WTO but is also the case with all the "roll-over" or "continuity" agreements that the [UK has negotiated](#) on leaving the EU.

Third countries may not attach much priority to the negotiation of trade agreements with a relatively small country like Scotland. In addition, the exception in the WTO Agreement for free trade agreements only applies to agreements with WTO Members and it is therefore to be expected that third countries will first ask an independent Scotland to negotiate its accession to the WTO. Unlike the UK when leaving the EU, Scotland will not be a Member of the WTO “in its own right”.

Negotiations for accession to the WTO typically take many years. Although this ought not to be too complicated if Scotland is prepared to take over the same obligations as the UK, there will be complications when it comes to the fine details of its schedules of commitments. For example tariff rate quotas and agricultural subsidy commitments need to be negotiated for goods and certain services commitments that refer to service suppliers in certain territories will need careful attention. Settling these matters is taking time in the case of the UK, and Scotland will have even more difficulty since it will have to conduct these negotiations as an applicant for membership rather than as a Member.

As a consequence, it may well take many years for an independent Scotland to renegotiate its trade relationship with the rest of the world.

## **TRADE BETWEEN SCOTLAND AND THE EU**

One motivation for Scottish independence has been the greater degree of opposition in Scotland to Brexit. There is likely to be a strong desire in Scotland to re-join the EU as quickly as possible. This would also, at a stroke, solve Scotland’s problem of restoring trade relations with the rest of the world since Scotland would, on acceding to the EU, automatically become part of the EU customs union and benefit from all of the EU’s trade relations with third countries.

In the past it has been said that the EU would be reluctant to allow an independent Scotland to rapidly accede to the EU for fear that this would encourage separatist movements within EU Member States, in Belgium and Spain for example. This is an eminently political consideration and may not apply any longer in the case of Scotland since it will not be seceding from a Member State while expecting to remain in the EU but rather demonstrating that leaving the EU is an undesirable course of action.

One issue that will arise if an independent Scotland were to apply to join the EU is that the EU has declared that all acceding States must commit to adopting the Euro and becoming part of the Schengen area. Scotland may therefore have to choose between maintaining its ties with the UK and restoring those with the EU. Knowing the problems that special border arrangements have caused in Ireland, the EU would also be reluctant to allow any special arrangements between an independent Scotland and the continuing UK.

Also see our briefing on [Scottish independence and EU membership: process and implications](#).

## **CONCLUSION**

The difficulties that independence will cause to Scotland's trade relations arguably demonstrate that these need to be agreed, at least in principle, before independence is implemented. Issues around trade are likely to be a key feature of economic and political debate, and concern for business, during any build up to a second Scottish independence referendum, so we may revisit some of these issues in greater detail depending on how events develop.

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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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