



IMPACT ON THE UNITY OF THE UNITED KINGDOM

The Scottish First Minister, Nicola Sturgeon, has announced that she wishes to hold a second referendum on Scottish independence from the UK between autumn 2018 and spring 2019 and has the support of the Scottish Parliament. Theresa May has indicated that she is not minded to consent to a second Scottish referendum until after Brexit, at a time when the options for the Scottish people are a lot clearer.

A vote in favour of independence is something that would in any case greatly complicate the process of the UK establishing its position as a trading nation outside of the EU and would also cause difficulties for Scotland establishing a different course from the rest of the UK without any certainty of EU membership.

Following independence, if Scotland wished to form a close relationship with the EU, Scotland would need to either apply for membership of the EU if it wished to re-join or seek to join EFTA and then the EEA. The standard accession process for joining the EU requires a unanimity vote and ratification by all Member States, which can take several years and risks being vetoed by Spain, which for domestic reasons is strongly opposed to accommodating States that have seceded from larger States. Joining EFTA and the EEA requires the approval first of the four EFTA States (Norway, Iceland, Liechtenstein and Switzerland) and then of the EU 27 and the EFTA States (other than Switzerland), again on a unanimous basis.

The position is different for Northern Ireland should it opt for reunification. Under the terms of the Good Friday agreement the UK Government is legally obliged to offer Irish voters a referendum on reunification if polls show sufficient support for this to happen. In that event, Northern Ireland would be in a position of becoming part of an existing EU Member State, rather than seeking to join the EU as a new independent State (similar to the position when East Germany joined the EU in 1990 following German reunification).

The position of Wales in relation to Brexit is relatively uncomplicated. The majority of voters in Wales, like the English, voted to leave the EU. The Welsh Government has however stated that it wishes Wales and the UK as a whole to remain within the Single Market.

WHAT SHOULD BUSINESSES BE DOING NOW?

It is evident that there is a real risk of a “hard Brexit” and this is the base case that many businesses will be examining, together with one or more other options, in order to devise a strategy to mitigate the potential negative effects of Brexit and maximise potential upsides. The focus of any Brexit review will of course depend on the nature of the businesses but will typically include a regulatory analysis (market access issues and deregulation opportunities), a supply chain analysis (impact of tariffs and non-tariff barriers) and a review of contracts (identifying problematical terms and contracting strategy issues).

This type of analysis will allow businesses to determine priorities for further action. This may involve engaging with government, directly or through industry bodies, to influence their approach based on prioritised analysis. At operational level it may mean strategic M&A, devising alternative legal structures, changes to geographical footprint and workforce, re-assessing investment plans, revising compliance frameworks and so on.

Given the evolutionary nature of the Brexit process any such monitoring should be on-going in order to sequence and trigger planned actions but also to continually re-validate adopted strategies.

Herbert Smith Freehills is working with numerous clients on the implications of Brexit for their activities. We have also collaborated extensively with other professional services organisations to provide holistic impact assessments and strategic advice, aligned with individual clients' objectives.

Please contact your usual Herbert Smith Freehills contact or any of the contacts listed here if you would like to discuss further.

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