

C L I F F O R D

C H A N C E



**THE EFFECT OF
INDEPENDENCE ON
SCOTLAND'S
INTERNATIONAL
STATUS, LAWS, PEOPLE
AND COMPANIES**



— THOUGHT LEADERSHIP

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THE EFFECT OF INDEPENDENCE ON SCOTLAND'S INTERNATIONAL STATUS, LAWS, PEOPLE AND COMPANIES

If Scotland were to vote for independence from the rest of the United Kingdom, Scotland would be a new state, though its laws and legal system would continue. Independence would, however, have a profound effect on people and companies on both sides of the border. Can companies migrate from north of the border to south, or vice versa? Will people be able to travel and work freely in both countries?

In the first of this series of briefings we looked at how and when Scotland might secure a second independence referendum and then move to independence itself. For a valid referendum, Scotland is likely to need Westminster legislation. The SNP would like a referendum by the end of 2023, with independence to follow before the next Scottish Parliamentary elections, in May 2026.

Assuming independence, we now turn to the status of the two countries, Scotland and the rest of the United Kingdom (rUK), what they might have to do to their laws as a result of independence and, critically, the effect of independence on individuals and companies on both sides of the (new) border.

The old and new countries

On Scotland's independence, rUK will be the "continuator" state as a matter of public international law, i.e. it will be the same legal entity as the UK, with all the UK's existing rights and obligations (such as membership of the UN and NATO) but having lost a little over 8% of its population, slightly under 8% of its economic output, as well as 32% of its land mass. The rest of the United Kingdom continued in this way when the Irish Free State was formed out of the (then) United Kingdom of Great Britain and Ireland in 1922 and, similarly, Russia was treated as the continuator on the breakup of the Soviet Union. rUK may need to consider its name, since it will no longer include all of Great Britain – the United Kingdom of England, Northern Ireland and Wales?

In contrast, Scotland will be a wholly new state, probably not even the revival of the

state that existed before the union with England in 1707. As such, Scotland must make its entrance on the international stage.

For many purposes, this debut will be straightforward. Numerous uncontroversial international arrangements (postal services, flights and so on) will require Scotland to do little more than to announce that it will treat itself as bound in the same way as the UK by the previous arrangements or simply to sign up in its own name. But in some cases, accession to existing treaties could prove more difficult. Scotland will have to apply to join some multilateral organisations, such as the UN, NATO and the IMF.

Scotland could, however, face a logical conundrum. Until Scotland is independent, it has no separate personality in public international law and, therefore, no standing to enter into treaties or such like, even with rUK. Scotland and rUK should be able to overcome this issue internally, but to avoid a gap in its induction into the international order, Scotland may, for example, have to rely on foreign states agreeing to enter into agreements with the Scottish Government (which may require a transfer of powers from the UK Parliament for this purpose) to take effect with Scotland on independence or accepting the application to Scotland of existing arrangements immediately on independence.

Laws

Laws applicable in Scotland before independence would presumably continue to apply after independence, but (as with EU law in the UK on Brexit)

Scotland would need to decide what, if any, adaptation to its new circumstances was appropriate (e.g. companies and insolvency legislation), including transitional provisions.

The UK Parliament would need to amend the Scotland Act 1998 to enable the Scottish Parliament to pass laws that will take effect on independence but that currently fall outside the Scottish Parliament's powers.

Scotland would also need to create regulatory bodies to replace existing UK institutions that serve the whole UK (e.g. the Financial Conduct Authority, the Competition and Markets Authority and the industry bodies), which may themselves need to adopt new rules for the entities that they regulate.

The need to change its laws would not be confined to Scotland. rUK would need to pass laws to modify UK statutes which apply throughout the UK to reflect their reduced territorial scope (e.g. the Constitutional Reform Act 2005 alone has over 100 references to Scotland), and its continuing regulators would need to adapt their rules to reflect their reduced remit. rUK regulators may also need to reconsider the scope of ongoing investigations that relate to Scottish businesses.

Both Scotland and rUK would need to decide how to treat matters which are currently wholly internal domestic issues and to address this through appropriate legislation (e.g. enforcement of judgments and insolvency recognition), which may require additional agreements between rUK and Scotland. In some cases, turning internal domestic issues into cross-border issues could have a significant financial impact, such as tax and pensions, discussed in a subsequent briefing.

Businesses would need to track legal changes, in Scotland and rUK, that could affect them, particularly where they result in additional compliance requirements. These may include obligations for a business to inform its customers and counterparties of how the new legal regime affects its relationship with them (e.g. new deposit or investor protection arrangements for financial services firms).

People

The Scottish Government set out wide criteria for Scottish citizenship at the time of the first referendum. So, for example, British citizens habitually resident in Scotland on the day of independence would automatically have become Scottish citizens, as would British citizens born in Scotland but living outside Scotland on the day of independence and children born in Scotland to at least one parent with Scottish citizenship.

rUK would also have to decide upon the national fate of Britons who acquired Scottish citizenship (no one should be left stateless). For example, should everyone habitually resident in Scotland cease to be British (i.e. rUK) citizens on independence or should they be entitled to retain British citizenship if they so wish or if they meet certain criteria, such as birth or parental birth in rUK? What about those living in rUK (or, indeed, elsewhere) but born in Scotland?

Dual British and Scottish citizenship – if allowed by rUK, as it currently is for other nationalities – could have advantages for British citizens. This would be particularly so if Scotland were to become a member of the EU because a Scottish passport would grant British citizens free movement within the EU. Many British citizens with Irish connections obtained Irish passports after the UK's Brexit referendum for that reason.

At a more practical level, many who would become Scottish citizens will already hold British (i.e. rUK) passports, which could have up to 10 years to run before expiry. It would probably be impracticable to replace all of these with Scottish passports before or at independence, even if that was what the holders wanted. Will British passports held by Scots still be valid, whether as British passports, Scottish passports, or at all?

The SNP said at the first referendum that it would look to agree a common travel area with rUK, like that between the Republic of Ireland and the UK and, as a result, that Scotland would not participate in the Schengen borderless travel area if and when an independent Scotland joined the EU (see a subsequent briefing).



Should everyone habitually resident in Scotland cease to be British?



All new members of the EU since 1997 have been required to commit to join the Schengen area, though Bulgaria, Croatia, Cyprus and Romania have yet in fact to join. Scotland's negotiating position with the EU might also be perceived to be weak since the SNP has such a clear desire – perhaps even need – to join the EU, though Ireland retains a common travel area with the UK and is outside Schengen. Membership of Schengen would typically require checks on all individuals entering Scotland from rUK and passport stamps, as well as restrictions on the ability of rUK citizens to work in Scotland and even to go to Scotland (the normal Schengen maximum is 90 out of any 180 days).

A common travel area between rUK and Scotland would significantly mitigate the business impact of independence on people issues. Employees who are Scottish or rUK citizens would retain the right to reside in either Scotland or rUK and to travel freely between them, although their employment rights may in the future depend on the jurisdiction in which they live and work. However, other nationals, including family members of Scottish or rUK nationals, resident in Scotland or rUK would not necessarily have the same freedom of movement, and this could have adverse impacts on employees even if their existing rights of residence in either Scotland or rUK were preserved. For example, other nationals resident in Scotland may not be able to move their residence or travel to rUK on business or for holidays without work permits or visas (or vice versa for non-UK nationals resident in rUK).

These issues may also affect EU nationals resident in Scotland or rUK and currently benefiting from citizens' rights under the EU-UK Withdrawal Agreement unless Scotland and rUK agree to continue to apply the provisions of the Withdrawal Agreement on citizens' rights as if Scotland remained part of the UK. The risk of disruption to employees is much greater if there is no common travel area as all employees may have to make irrevocable choices as to where they wish to reside or work.

Companies

UK companies can currently have their registered offices in Scotland or in another part of the UK. On independence, companies registered in Scotland would become, as far as rUK is concerned, foreign companies. In principle, that would not cause a problem. Scottish companies would be recognised and accorded legal personality in rUK on the same basis as companies incorporated under the laws of Germany, Delaware or Russia. It may be that Scottish companies that carry on business within rUK would be required to register a branch in the same way that foreign companies must do so, but that is not in itself a heavy burden.

A number of companies registered in Scotland indicated during the first referendum that a vote for independence would lead them to move to rUK their places of registration or the companies through which they carry on some or all of their business. This may have been for regulatory reasons, reasons of public confidence, the uncertainty over Scotland's currency (see the next briefing in this series) or just convenience but, in the financial sector in particular, regulatory considerations are likely to have been, and to continue to be, a key driver. Some companies registered in England and Wales or Northern Ireland may also wish to move their seat of registration to Scotland whether for tax or other reasons.

The most straightforward way to move seat would be for the United Kingdom to pass legislation immediately following an independence vote allowing a move on, say, a company's shareholders passing a resolution to that effect. If there is no legislation to ease the process, companies would need to consider how best to migrate, a matter that would need to be the subject of contingency planning. What is required will vary from company to company and with how each business wants to be structured in the future.

What is done and how it is done will determine the effect of any migration on contracts (e.g. whether it gives a right of termination) and on counterparties. A legislative change of registered office

from Scotland to England may affect, for example, the insolvency regime that governs a company, but in practice the immediate consequences for counterparties of a move are likely to be minimal, except in regulated industries where the place of incorporation may affect whether an entity holds Scottish or rUK licences and its ability to operate in the other jurisdiction.

Conclusion

If Scotland votes for independence, everyone – companies and individuals who engage in what will become cross-border activity – will need to consider their positions. Should companies migrate one way or the other? If Scotland were subsequently to join the EU, how would that affect the ability of people to cross the border?



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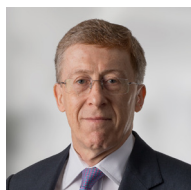
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