

## **SPICE BREXIT WEEKLY SPECIAL EDITION**

### **THE SCOTTISH GOVERNMENT'S PROPOSALS FOR SCOTLAND'S PLACE IN EUROPE**

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This special edition of the SPICe Weekly update on Brexit provides more information on the Scottish Government's proposals for Scotland's place in Europe which were published on 20 December 2016. In addition, this update provides information on some of the responses to the Scottish Government's proposals.

#### **Scottish Government's proposals for Scotland's place in Europe**

As reported in the last [Brexit update](#) before Christmas, on 20 December, the Scottish Government published its [proposals](#) for Scotland's place in Europe. The proposals cover why the European Single Market matters to Scotland and the possibility of the UK as a whole remaining in the Single Market through European Economic Area (EEA) membership. The Government's proposal then looks at the options for a differentiated proposal for Scotland retaining EEA membership whilst remaining part of the UK in the event the UK Government chooses to leave the EEA.

Chapter 3 of Scotland's place in Europe sets out how Scotland could maintain membership of the EEA while the remainder of the UK leaves. According to the Scottish Government:

“In the event that the UK Government does not pursue the option of retaining membership of the EEA, the Scottish Government is committed to exploring with the UK Government, in the first instance, the mechanisms whereby Scotland can remain within the EEA and the European Single Market even if the rest of the UK chooses to leave. This is essential if we are to ensure Scotland can continue to realise the substantial economic and social benefits from membership of the European Single Market and the “four freedoms” that lie at its core. However, as we set out later, we also consider that the proposal we put forward in this chapter could have benefits, not just for Scotland, but for the UK as a whole and for our European partners.”

In terms of the proposal for Scotland's place in Europe, the Scottish Government states:

“What we propose in this chapter is an integrated solution for Scotland which ensures continued membership of the European Single Market, and collaboration with EU partners on key aspects of policy and participation in EU programmes such as Horizon 2020. This has been described by some as the “Norway option”, but properly encompasses all of the EFTA countries which are also party to the EEA Agreement, including Iceland and Liechtenstein. Beyond the common aspects of these relationships (which relate to the implementation of the European Single Market), Scotland would also seek the opportunity to collaborate in a wider range of policy

areas such as energy and justice, which would add to our ability to work with European partners beyond a relationship based solely on free trade. Other differentiated options would also be open to Scotland instead of, or in addition to, the one discussed in this chapter, whereby Scotland could seek to remain part of particular EU policies and initiatives (i.e., Horizon 2020, Erasmus, Europol).”

Specifically the Scottish Government proposes that:

“The option we consider here does not require the UK to remain in the EU. In this section of the paper we consider the option of Scotland remaining part of the European Economic Area – in other words, Scotland would continue to participate in the European Single Market and uphold the “four freedoms” as part of its law. It is important to stress that this option does not require concessions either from the UK Government or the governments of the EEA Member States to permit Scotland to join the single market. Rather it requires agreement that Scotland should not be required to leave that market against the clear democratic wishes of a majority of our, and the EU’s, citizens.”

Chapter 4 of the Scottish Government’s proposal sets out how the Government believes the powers of the Scottish Parliament should be increased following Brexit and as part of that approach, the further devolution of powers the Government believes will be necessary to ensure that Scotland can meet the requirements of the differentiated position it has proposed.

The First Minister made a [statement](#) to the Scottish Parliament on the day Scotland’s place in Europe was launched and took questions from MSPs.

### **The Prime Minister’s initial response to the proposals**

Giving evidence to the House of Commons Liaison Committee on 20 December, the Prime Minister was asked about the Scottish Government’s proposals. She [told the Committee](#):

“First of all, the First Minister very courteously called me yesterday to tell me about the paper that was coming out. Obviously, I have not had an opportunity to look at the paper in detail yet, but I welcome the contribution to the debate. We have been encouraging the devolved Administrations to identify their particular concerns and priorities so that we can take that forward as part of the discussions we are having to ensure that we have a full UK view as we go into the negotiations. Obviously, I would expect the Welsh Government and the Northern Ireland Assembly to come forward with the particular concerns that they have, and we will be able to discuss these within the JMC structures that we have.

In response to a specific question from Pete Wishart MP, about the possibility of differentiated relationships, the Prime Minister said:

“What we will be negotiating is a United Kingdom approach and a United Kingdom relationship with the European Union. I think you have assumed an acceptance of differential relationships that I don’t think it is right to accept. When I became Prime Minister and first met the First Minister, I said that we would look very seriously at any proposals that came forward from the devolved Administrations, but there may be proposals that are impractical.

In terms of Northern Ireland, one of the key issues, obviously, is the question of the border, because it will be the one part of the UK with a land border with a country

remaining in the European Union. A lot of work is being done as to how we can ensure that the arrangement for the movement of goods and people across that border is not a return to the hard borders of the past.”

## **Reaction to the Scottish Government’s proposals**

Following the Scottish Government’s publication of Scotland’s place in Europe, a number of organisations published statements commenting on the proposals. Details of some of these responses are provided below.

The President of the [Law Society of Scotland](#) Eilidh Wiseman said:

“With all the uncertainty that followed the referendum result, the Scottish Government is to be commended for producing a thorough set of options which deserves proper consideration and analysis. Whatever the advantages or disadvantages of the various options, the paper provides an important contribution to the debate on Scotland’s future relationship with our European neighbours.

“The Scottish Government is also right to use this paper to set out how further devolution to the Scottish Parliament may be required. There are particular issues about our legal system and constitutional arrangements which will need careful consideration once EU powers are repatriated. It is clear the Scottish Parliament may need increased devolved powers affecting justice and home affairs, environment law, farming and research.

“It is vital for the UK Government to take the views of all devolved administrations into account. Last summer, the Prime Minister said she was committed to ensuring Scotland is fully engaged in UK Government discussions on its future relationship with the EU. We warmly welcomed that approach and the Scottish Government’s new paper certainly provides a basis for what we hope will be a thorough and constructive dialogue between the two administrations.”

For the [Faculty of Advocates](#), James Mure, QC, Convenor of the Faculty of Advocates’ International Committee, said:

“The Faculty notes with interest today’s detailed paper from the Scottish Government outlining its proposals for Scotland’s place in Europe. The paper calls for a fundamental review of the devolution settlement; seeks to maintain free trade and free movement within the Single Market; and looks for clarity on transitional arrangements. As the First Minister says, much will depend on all parties finding the political will to create practical solutions for Scotland. The Faculty and its members will be following developments closely, and will continue to contribute their expertise to the important debate about Scotland’s place in the UK and in Europe.”

For the [Confederation of British Industry \(CBI\)](#), Hugh Aitken, CBI Scotland Director, said:

“Firms are 100% committed to making a success of Brexit. To achieve this we need a close partnership between business and the Scottish Government, business and the UK Government, and both governments together.

“For many businesses the immediate priority will be understanding how easy it will be for them to trade in the future with the EU.

“The CBI is working closely with the UK and Scottish governments to deliver an outcome that helps to meet the needs of firms across the country, building a post-Brexit economy that spreads prosperity for all.”

For the [Scottish Trade Unions Congress \(STUC\)](#), Grahame Smith STUC General Secretary said:

“The STUC welcomes the publication of this paper by the Scottish Government which is a useful and serious contribution to the debate. It is positive that the Scottish Government has developed such a clear position setting out what they see as the best future relationship both Scotland and the UK could have with the EU. This is in stark contrast to the half-baked and conflicting positions that are emerging from the UK Government on this issue.

“The Scottish Government’s focus on social protections is welcome and trade unions are clear that maintaining the rights of workers for the long-term needs to be at the heart of this debate. It is also right, as the paper acknowledges, for the Scottish and UK Governments to consider what further powers need to be devolved to Scotland if workers and wider human rights are to be protected and we must strive to ensure that Scotland upholds international standards in this regard.”

“While a number of economic, diplomatic and legal issues remain, which will require significant work and political will to resolve, it is positive that the Scottish Government is taking a lead on behalf of people in Scotland. It is essential that we begin to consider in earnest what the future of our country will look like and we urge the UK Government to engage constructively in this debate.”

For [Universities Scotland](#), Professor Andrea Nolan, Convener of Universities Scotland and Principal of Edinburgh Napier University said:

“We welcome publication of this document as a clear record of the Scottish Government’s priorities and intentions in regards to the European Union. There are aspects of Scotland’s interests, as identified by the Scottish Government, that we strongly identify with including economic interest, solidarity and influence. We welcome the pragmatism in the Scottish Government’s approach and echo the call for all sides to use ‘imagination and flexibility’ in these unprecedented negotiations.

“The Scottish Government’s paper clearly sets out the importance of Scotland’s higher education sector’s relationships with Europe. Our priorities in the negotiations relate to the continued free movement of student and staff talent, and access to and influence over European research funds and collaborations. It is helpful to see these so clearly identified as one of the many priorities of the Scottish Government in this document. We urge the Scottish and UK Governments to find a way forward that supports universities as a welcoming space and a constructive partner for our European friends.”

For the [National Union of Students \(NUS\)](#) in Scotland, Vonnie Sandlan, President of NUS Scotland, said:

“We welcome the Scottish Government’s paper, which reiterates the importance of protecting the huge benefits that EU membership brings to our students, universities, and colleges – all of which have long prided themselves on being outward looking, collaborative institutions. We know that international students – whether from the EU

or elsewhere – make significant cultural, economic, and educational contributions to our universities and colleges, and to our country as a whole. Membership of the EU and mobility programmes like Erasmus+ bring great opportunities for Scottish students, who can currently study just as easily in Paris as they can in Paisley. But despite the importance of these schemes, the UK Government has failed to outline plans to protect them, creating huge risks for both inward and outward mobility.

“As the paper highlights, there’s now a very real risk that we lose the great benefits these opportunities bring if Brexit creates unnecessary additional barriers for students wanting to travel across Europe to study. Equally, we hope that this process presents an opportunity for Scotland to get new powers to further support international students to remain in Scotland after their studies, as referenced by the Government’s paper. In the shorter term, we’d also echo the Government’s concern that the negotiation process could create high levels of uncertainty for those students considering moving to Scotland on whether their status as a student will change if Brexit happens during their studies.

“Going forward, we look forward to working with the Scottish government and all those who have a desire to ensure that students and our world-class education system aren’t disadvantaged by the risks that Brexit presents – and ensuring a settlement that works. This absolutely must include securing the freedom of students to move through the EU to work and study, and exploring how we can ensure that international students in Scotland have the ability to remain in the country, contributing to society, after their studies. We hope the UK Government uses this as an opportunity to work meaningfully with the Scottish Government and stakeholders on these issues.”

For [Scottish Food and Drink](#), Chief Executive James Withers said:

"Our future relationship with the EU is a critical issue for Scotland's food industry. Nearly a third of our workforce are EU nationals, Europe is the destination for 80% of Scottish food exports and agricultural funding underpins large parts of our industry.

"The options published today, as well as helping to take the debate forward, recognise our industry's key issues. It also recognises the balance between ongoing trade with the rest of the EU and the critical importance of UK market access to Scottish producers.

"There is a long way to go in this debate, it is surrounded by complexity and these options politically are extremely challenging. However, the recognition of the food industry's key issues is welcome and we hope the UK Government's proposals, when they emerge, will do the same."

For the [British Medical Association \(BMA\)](#) in Scotland, the Scottish Chair Dr Peter Bennie said:

“Six months on from the referendum, there is still a deeply concerning lack of clarity around the future status of the EU nationals working in the NHS that our health service is heavily dependent on. These are our colleagues and our friends and the ongoing uncertainty they face is deeply damaging.

“It is welcome that the Scottish Government’s paper today seeks to protect the right of EU nationals to continue to work in Scotland, but it remains a real source of

concern that the Westminster Government still refuses to clarify its intentions towards EU nationals who are already working in our health service.

“The last thing that the NHS in Scotland needs is for the recruitment and retention problems it already faces to be made significantly worse through any loss of medical staff caused by this ongoing uncertainty.

“We also welcome the attention paid to the importance of protecting academic research funding. Medical research plays a key role in Scotland’s economy and it is essential that it is not undermined through lost funding opportunities.”

For the [Scottish Wildlife Trust](#), Chief Executive Jonny Hughes said:

“We welcome the statement today from the Scottish Government that ‘Scotland has a moral and legal obligation to protect our country’s magnificent natural resources and we remain committed to maintaining, protecting and enhancing our environment.’

"Regardless of the shape of any future Brexit deal between the UK and the European Union, the Scottish Wildlife Trust believes that, at a minimum, the body of environmental legislation so carefully developed over decades by the EU and transposed into Scottish law must continue to be implemented in Scotland by the Scottish Government. This is vital if we are to safeguard vulnerable wildlife, ensure the health and productivity of our seas, and provide a quality environment which brings economic and well-being benefits for the people of Scotland.

"Today's statement from the Scottish Government is an important and very welcome assurance on long term investment to maintain environmental standards in what are politically uncertain times.”

For the [Royal Society for the Protection of Birds \(RSPB\)](#), Stuart Housden, Director of RSPB Scotland said:

“Over the last 40 years, the European Union has significantly influenced the state of Scotland’s environment – both positively through regulations such as the Nature Directives and negatively through unreformed agricultural subsidies. The outcomes that emerge from the coming negotiations, involving the Scottish and UK governments and the EU, have the potential to affect our environment and our wildlife for decades to come.

“Previously, RSPB Scotland has welcomed the Cabinet Secretary’s stated commitments to continue the full implementation and enforcement of European environmental law. Her welcome proposals, since the referendum, to consult on marine SPAs demonstrated that this commitment was meaningful – but must be maintained across all areas of policy affecting the environment, particularly agriculture and fisheries.

“Today’s paper correctly makes clear that the environment, and its protection, has benefited from European cooperation to date. RSPB Scotland strongly urges that the environment continues to be central to the negotiations, so as to maintain these benefits to the greatest possible extent.

“Like many organisations, we are already engaged in considering the environmental consequences of a range of “Brexit” options – and, as part of that process, will carefully assess the Scottish Government’s proposals. Our Trustees will wish to

consider the results of this analysis and assess the impact of different options on our charitable objectives.”

For [Friends of the Earth Scotland](#), Dr Richard Dixon, Director of Friends of the Earth Scotland, said:

“We welcome these proposals from the Scottish Government, which clearly put protecting our environment and co-operation on reducing climate change emissions at the heart of Scotland’s position on Europe.

“If we really are embarking on the risky adventure of leaving the EU then this is a good set of proposals which safeguard many of the benefits of our current European membership including environmental protections, free movement of people and consumer rules that protect us from harmful chemicals in food and other products.

“The vote to leave the EU is a huge challenge to decades of progress on improving the environment and working together to tackle climate change. The Scottish Government has already made welcome commitments to maintain current environmental protections and to continue to work together on climate change, and these are strongly re-inforced in these proposals and in today’s statements from the First Minister.”

The Scottish Council for Voluntary Organisations (SCVO) [tweeted](#) “We welcome efforts by @scotgov to keep Scotland as part of an outward looking & integrated Europe”.

### **Blog posts and newspaper articles**

A number of blog posts and newspaper articles were also published analysing the Scottish Government’s proposals.

European Futures - an academic blog from the University of Edinburgh and the Edinburgh Europa Institute published [four short blogs](#) in response to the Scottish Government’s proposals. The examined the proposals from the following perspectives:

- Challenges of Single Market Membership by Tobias Lock
- Free Movement of Goods and Services by Arianna Andreangeli
- Priorities for Scottish Business by Owen Kelly
- Shape of Proposed EFTA Relationship by Anthony Salamone

The Daily Telegraph [reported](#) comments by Charles Grant – a member of the Scottish Government’s Standing Council on Europe – made in an interview with the newspaper. According to the Telegraph:

“Charles Grant, who sits on the First Minister’s Standing Council on Europe, said it was “extremely difficult” to see how her plans were legally, politically or technically feasible.

In an interview with the Telegraph, he said Scotland staying in the single market without the rest of the UK would require the complete devolution of business regulation and that “clearly isn’t going to be on the cards in the foreseeable future.”

He said proposals for Scotland to stay in the EU's customs union, a more limited type of free trade area than the single market, without the rest of the UK would also mean customs checks at the border with England.

Among the other flaws he listed were Spain blocking any special deal and Theresa May being unwilling to sign up to a package of powers that would give Scotland "something like dominion status."

Daniel Kenealy from the University of Edinburgh writing on the London School of Economics blog suggested that the Scottish Government's proposals are [politically savvy and all-but-impossible](#). He wrote:

"It would be wrong to categorically label the proposal for Scotland to join the EEA via EFTA, whilst remaining part of a UK that is neither a member of EFTA nor a party to the EEA, as impossible...

...But the proposal is all-but-impossible and the legal, political, and technical barriers standing in the way of it are high, and almost certainly insurmountable."

The Centre on Constitutional Change published three blogs following the publication of the Scottish Government's proposals. Kirsty Hughes from Friends of Europe asked whether the purpose of the Scottish Government's paper was [a springboard for an indyref2, a holding strategy while May's Brexit approach becomes clearer or a genuine goal of maximal differentiation](#). On the politics of the proposal, Kirsty Hughes wrote:

"The ball is in Theresa May's court for now. The Prime Minister has said she will consider the Scottish government's proposals. May could say 'no' very bluntly, as she effectively did in her October party conference speech – which would put Sturgeon on the spot in terms of her response and whether to call an indyref2 or not. Or May could, at least, wait until February, when the UK government may finally take an outline of its plans to Westminster before triggering Article 50 in March.

At that point, May could quite likely say, that she is aiming for maximum access to the single market, and might say she will ask for the UK to stay in the EU's customs union. She may also say she will look at some particular Scottish interests. Nicola Sturgeon then would have a choice – to wait and see how Brexit talks develop, and how the opinion polls shift once Article 50 is triggered – or to say May has not met Sturgeon's demands, and so call an indyref2.

Sturgeon is going to get little help from Scotland's opposition parties apart from the Greens. The LibDems in November, despite their position of wanting the UK to stay in the single market, have voted, with the Tories, against proposals for Scotland to have a differentiated deal. Labour abstained in November, but Labour's Brexit minister Keir Starmer – and leader Jeremy Corbyn – have made it clear Labour is aiming for access to not membership of the single market. So Labour support looks unlikely too.

Sturgeon's paper is a serious in-depth piece of analysis. It respects the original Scottish Parliament vote by 92-0 a week after the Brexit vote to explore options to stay in the EU or its single market. The Scottish Government has followed up and respected that vote – but the politics has moved on. A differentiated deal for Scotland looks highly unlikely. And while the ball is now in Theresa May's court – it is likely to be back in Sturgeon's very soon."

Professor Michael Keating echoed Kirsty Hughes' suggestion that the [ball was for now in Westminster's court](#) following the Scottish Government's publication. On the Scottish Government's proposals, Professor Keating wrote:

"In 70 closely argued pages, they represent the first attempt by any government in the UK to state exactly how it proposes to respond to the surprise vote in June. For its part, the UK Government has not even told us whether it wants to be inside the single market or the customs union, let alone how any deal might work out in detail.

Therein lies the main problem. The closer the UK remains to the European market, with its free movement of goods, services, capital and labour, the easier it will be for Scotland. If the UK goes for a hard Brexit, it becomes more difficult for Scotland to keep in both markets. The Scottish Government proposes to keep borders open in both directions but, whatever happens, there will be borders. This is the inevitable result of Brexit."

On the issue of new powers for Scotland that might be necessary in the event of a differentiated relationship with the EEA. Professor Keating wrote:

"A second set of proposals concerns the extra powers that Scotland might require. These cover devolved competences subject to European law, plus wide powers to meet single market regulations in economic and social matters. Scotland might also need power to negotiate agreements with the European Economic Area and other governments.

None of this is technically impossible but it would represent a radical transformation of the United Kingdom and require the agreement of Westminster. The Scottish Government accepts that it would need the UK Government to negotiate the deal on its behalf. With the Tories already deeply divided over its approach to Brexit, it is unlikely to welcome an additional complication unless it really thinks that the UK is in peril. The ball is now in Westminster's side of the court."

Professor Charlie Jeffery from the University of Edinburgh suggested the Scottish Government's proposals are [fairly mainstream in reflecting Scottish public opinion](#). Professor Jeffrey wrote:

"So now we have it. The Scottish Government document Scotland's Place in Europe sets out how the country might remain in the EU Single Market in the event of a hard Brexit.

We can expect some howls of outrage, assertions that what the Scottish Government proposes is legally impossible and, in any case, it's all a trick to move us to independence by the back door.

But what has been proposed is actually pretty mainstream opinion in Scotland. It is shared by many of those who see themselves as unionists and are committed to remaining part of the UK."

On whether the Scottish Government's proposals will gain traction, Professor Jeffrey wrote:

"Can these proposals fly? That's a matter less of law than political will. The UK has unusually malleable constitutional arrangements, with the sovereign UK parliament

able to do much as it will. The EU too has shown an ability to accommodate all manner of distinctive territorial arrangements.

Is the political will there? The UK Government has not sounded very accommodating towards special deals (except, perhaps, to Nissan).

But that may be a question of whether, amid the complexities of Brexit, which have clearly been much underestimated, the UK government has the bandwidth to negotiate special arrangements for Scotland alongside all else it has to do. I suspect it doesn't.

But there may be a solution to that. Give Scotland some set of additional powers, including the power to negotiate in external matters – more or less like those suggested in Scotland's Place in Europe – and leave it to the Scottish Government to negotiate the details of a deal with the EU itself. That way there's no need for a political bust-up, and Nicola Sturgeon, not Theresa May, would be responsible for the success, or otherwise, of the outcome."

Writing for EU Law Analysis, Steve Peers, a Professor of EU and Human Rights Law at the University of Essex provided some [comments on the Scottish Government's new proposals](#). On the Scottish Government's assessment of either UK remaining as a whole within the EEA or Scotland having a differentiated relationship, Professor Peers writes:

"The prospect of the UK staying in the EEA (or a comparable system) is legally much easier to arrange and negotiate than any Scotland-only approach to Brexit. However, as the report notes, EEA membership seems unlikely for political reasons, since the UK government seems unenthusiastic about any obligations regarding the free movement of people. On this point the report could have done more to address these concerns by discussing the possible use of the EEA safeguard clause. It could also at least have advocated participation in the EEA as an interim measure, given that the UK government in recent weeks has appeared increasingly open to the idea of some interim arrangement following Brexit in principle.

Equally – although the report does not discuss this – a Scotland-only approach has political problems, as neither the UK government nor the remaining EU seem willing to discuss the idea."