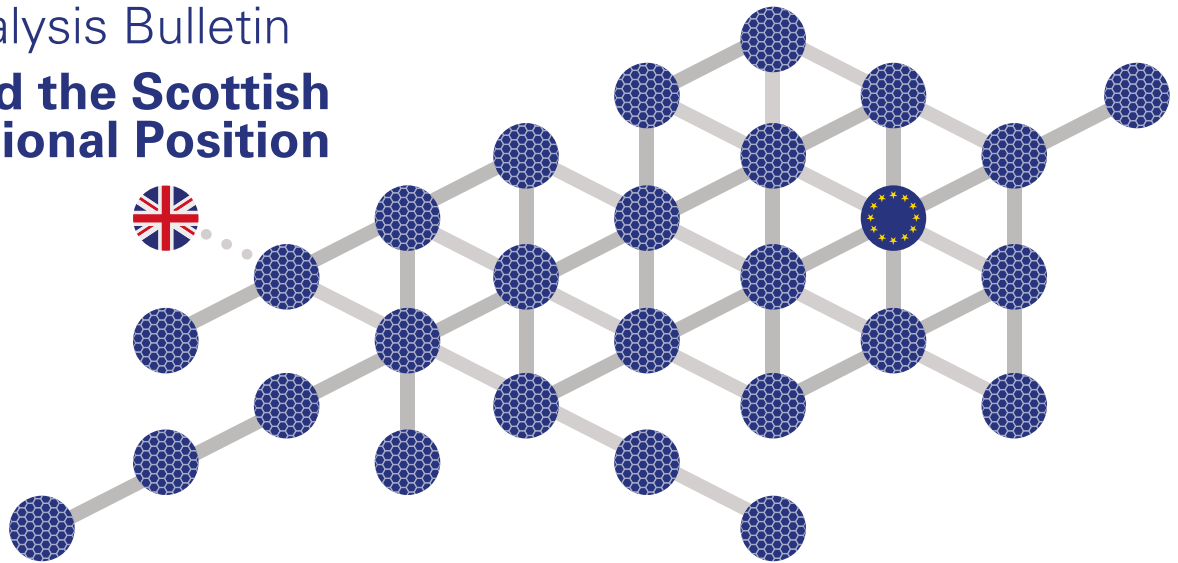


Brexit Analysis Bulletin

Brexit and the Scottish Constitutional Position



When the UK as a whole voted to leave the EU with Scotland voting to remain, the constitutional position of the Scottish Parliament was brought to the centre of the political debate. This debate has thrown up a series of questions regarding the legislative powers, and the limitations, of the Scottish Parliament.

In the latest of our Brexit Bulletins, Shepherd and Wedderburn look past the politics to provide insight on the legal issues which underpin these questions.

Can the Scottish Parliament vote to block Brexit?

It has been suggested that the Scottish Parliament could block the UK's exit from the EU. The basis for this argument is Section 28 (8) of the Scotland Act 1998 (the "1998 Act") as amended by Section 2 of the Scotland Act 2016 (the "2016 Act"). This section states that "it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament".

When Westminster contemplates a Bill which relates to Scotland, and cuts across one or more devolved matters, the Scottish Parliament have the power to either consent, or withhold consent, to the Bill through a Legislative Consent Motion. Legislative Consent Motions are commonly used in the day to day running of the Scottish Parliament.

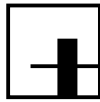
Section 29 of the 1998 Act obliges the Scottish Parliament not to legislate in a way which is "incompatible... with EU law". A large proportion of the devolved matters dealt with by the Scottish Parliament are intrinsically connected to EU law. Therefore, when Westminster legislates to remove the UK from the EU it will have a major impact on many devolved matters.

The implication is that the Scottish Parliament could refuse to consent to Brexit and therefore Westminster would be unable to pass the required legislation.

However, it is highly unlikely that the refusal of the Scottish Parliament to pass a Legislative Consent Motion would prevent the UK from leaving the EU. Despite the constitutional significance of the Scottish Parliament within the UK, Westminster remains the supreme legislative body even on devolved matters.

This position is made clear by the 1998 Act (and was not altered by the 2016 Act). Section 28 (7) states that the ability of the Scottish Parliament to legislate on devolved matters "does not affect the power of the Parliament of the United Kingdom to make laws for Scotland". This is recognised by the use of the word "normally" in Section 28(8) of the 1998 Act. It is highly unusual for such an uncertain term to be used in legislation and clearly anticipates circumstances where Westminster could legislate without the consent of the Scottish Parliament.

Additionally, it is not necessarily the case that Brexit would constitute a breach of EU law. The process for the UK to leave the EU will be governed by Article 50 of the Treaty of the European Union. The UK's exit from the



EU will therefore be carried out under EU law and not in contravention of it.

Can the Scottish Parliament call an Independence Referendum?

The divergence in opinion between Scottish and English voters in the Brexit vote has led to renewed calls for a second referendum on Scottish independence. There is a political pro-independence majority in the Scottish Parliament between the SNP and the Scottish Green Party. The 2014 Scottish Independence Referendum was conducted under the Scottish Independence Referendum Act 2013 (the "2013 Act"). Could the Scottish Parliament use a similar piece of legislation to call a second referendum?

The legislative position is that "the Union of the Kingdoms of Scotland and England" is a reserved matter under Schedule 5 of the 1998 Act.

When the SNP formed a majority government in 2011, the Scottish Government was of the opinion that this wording meant that the ability to hold a referendum was reserved to Westminster. Therefore, the 2014 Referendum was legitimised by the Edinburgh Agreement, a cross governmental agreement signed by David Cameron and Alex Salmond whereby both governments agreed that a referendum on Scottish independence would be held and the result respected. The Edinburgh Agreement led to The Scotland Act 1998 (Modification of Schedule 5) Order 2013, (the 2013 Order); a statutory instrument passed by Westminster.

The effect of the 2013 Order was to explicitly exclude the calling of a referendum on Scottish independence from the list of Reserved Matters under the 1998 Act, provided it was held before 31 December 2014, thus handing that power to the Scottish Parliament. It was under this authority that the Scottish Parliament was able to pass the 2013 Act under which the referendum was held.

However, the 2013 Order only allowed for a single referendum and it had to be held before the above noted

date. It is therefore highly unlikely that the Scottish Parliament could claim the authority to hold a second referendum based on either the Edinburgh Agreement or the 2013 Order.

Could the Scottish Parliament call an unofficial Referendum without the consent of Westminster?

Despite the above, it may be possible for the Scottish Parliament to call a referendum on independence even without the consent of Westminster.

However, should the Scottish Parliament attempt to hold a second referendum without the consent of Westminster then it would be for the Supreme Court to decide if this was within its power. While the ability of the Scottish Parliament to proceed in this way is untested the prevailing view is that it would be beyond the powers of the Scottish Parliament to hold a referendum without the consent of Westminster.

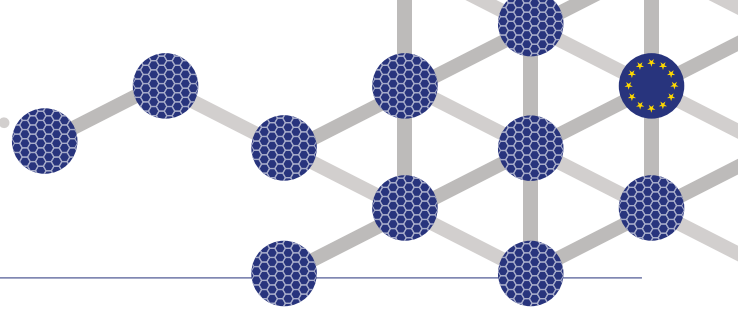
There is some international precedent for such a referendum in the Catalan Self Determination Referendum in 2014. This vote returned a strong vote in favour of Catalonian Independence from Spain however, the result was declared "unconstitutional and void" by the Spanish Constitutional Court.

The effect of such an unofficial Referendum is difficult to predict. It could be simply dismissed as an opinion poll with no political bearing or it could be seen domestically and by EU member states, as a statement of the will of the people of Scotland.

What will happen next?

The UK's constitution is currently in a state of flux and it is difficult to predict exactly what changes will come next. Much will depend on the new political landscape which emerges following the EU Referendum.

As ever, your contacts at Shepherd and Wedderburn will be on hand to provide guidance and advice to protect your interests in the changing climate.



SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS

JOINING THE DOTS OF THE EU REFERENDUM

What next?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

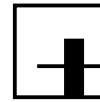
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Bookmark our *Brexit Advisers* page for a comprehensive collection of Brexit updates and guidance

Click here to view our 'Where to from here' Brexit infographic.

BREXIT
Where to from here?

What are the UK's options post Brexit?

Two years' notice

- Section 50 of the UK will be required to give two years' notice and numerous interim and transitional measures would be put in place during this time.
- The complexity of the negotiations may impact on the time taken for Brexit, extending it beyond the two-year notice period.
- The 'Transition' Trade and Investment Partnership (TIP) is a second trade agreement currently being negotiated between the EU and the UK, being an additional consideration to a potential EEA.

Potential options could involve:

- A continuation of free trade agreements with individual EU member states.
- A deeper trade or trading union with the EU or membership of the European Economic Area (EEA) under the European Free Trade Association (EFTA).

EEA

The European Economic Area (EEA) unites the EU Member States and the non-EU EFTA States (Iceland, Liechtenstein, and Norway) into a single market providing the same basic rules. These relate to: product rules, services, capital, and persons to make freely about the EEA in an open and competitive environment.

Adopting the EEA rules would mean that in the main the UK would have to comply with the EU law and regulations.

The Agreement does not cover the Common Agriculture and Fisheries Policies, Customs Union, Common Trade Policy, Common Foreign and Security Policy, justice and home affairs in Member States (JHA).

Click here to read our 'What now' Brexit bulletin.

UK votes 'Leave'
What now?

In the wake of the vote, the British Government should begin to consider what it is going to do in the next few weeks. The Government should also begin to consider what it is going to do in the next few months. The British Government should also begin to consider what it is going to do in the next few years.

What's next?

Changes to the British Government's approach to the EU are needed. The British Government should begin to consider what it is going to do in the next few weeks. The British Government should also begin to consider what it is going to do in the next few months. The British Government should also begin to consider what it is going to do in the next few years.

What are the options?

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