Scotland votes 'no' in independence referendum: What does it mean?

The Scottish electorate has voted 'no' to independence. However, the 'no' vote will still result in constitutional change for Scotland, not least because of the pledge by all main UK political parties to devolve further powers to the Scottish Parliament. Additionally, key provisions of the Scotland Act 2012 will come into force over the next two years giving the Scottish government additional powers and a referendum on the UK's membership of the EU is proposed for 2017.

Our experts have in-depth understanding of the wider implications of constitutional reform and of how the various scenarios are likely to play out in the post-referendum landscape. As a UK firm, Shepherd and Wedderburn is committed to providing UK and international clients with insightful advice on the legal and regulatory implications of the issues relating to further devolution and EU membership. Now is the time to speak to your Shepherd and Wedderburn advisers about what the 'no' vote means for you.

The following commentary provides a brief overview of the short to medium term changes expected in the post referendum environment.

Competition, regulation and consumer protection

As a constituent part of the United Kingdom, there will be no requirement for the competition law, consumer protection and economic regulation agencies proposed in the Scottish government's 2013 White Paper (the White Paper), which outlined their proposals for an independent Scotland. Nonetheless, given the commitment of all of the leading UK political parties to deliver further devolved powers to Scotland, it may well be that some aspects of the Scottish government's proposals (perhaps in the area of consumer protection) will find their way into the 2015 UK general election manifesto commitments.

Construction and infrastructure

Some of the provisions of the Scotland Act 2012, will still come into effect in April 2015. The replacement of Landfill Tax with a Scottish Landfill Tax may well impact on the construction industry: the Scottish government will now propose and the Scottish Parliament agree rates, thresholds and exemptions.

Details of the proposed replacement of the Stamp Duty Land Tax with the Land and Buildings Transaction Tax from April 2015 have still to be finalised, and this has the potential to impact on property development in Scotland.

Additionally, when further powers are devolved to Scotland, the exercise of those powers could have a potential impact upon the Scottish construction industry.

Corporate finance

Changes in the legal and regulatory landscape will not change for Scottish businesses to the same degree that they would have done in in the event of a 'yes' vote. Issues that were on the radar of many Scottish businesses in the lead up to the referendum and were causing some businesses to consider re-domiciling in the event of a 'yes' vote (including perceived uncertainty around currency and currency union, regulation and EU membership) will no longer be in such sharp focus.

Going forward, it is clear is that the increasing political pressure on the UK government will result in increased powers for the Scottish Parliament. This has the potential to cause some movement of UK businesses between Scotland and England (the direction of travel perhaps depending on perceived advantages in terms of inward investment, growth and the tax landscape in one jurisdiction over the other).

Some Scottish businesses had incorporated English companies prior to the referendum with a view to re-domiciling as a hedge against a 'yes' vote. It is worth bearing in mind that it is not possible, as things stand, for a company or limited liability partnership incorporated in Scotland to simply move its registered office to England (or vice versa). Instead, a transfer of ownership or of assets and liabilities to a company incorporated in the desired jurisdiction would be required. This would have both practical and cost implications in respect of which legal advice should be obtained. Examples of issues which would have to be considered include third party consents which might be required for the transfer of contracts, and an analysis of the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in respect of transferring employees.

For certain types of corporate (principally listed public companies) a scheme of arrangement (which requires a court process) is required in order to re-domicile to another jurisdiction. It remains to be seen whether legislation might now be introduced to streamline that process to make it possible for companies to re-domicile from Scotland to England (and vice versa) more quickly and easily, as some Scottish financial institutions were reportedly calling for prior to the referendum.

Corporate taxes

The Land and Buildings Transaction Tax (replacing stamp duty land tax in Scotland) and the Scottish Landfill Tax will come into force next April, with the new tax rates expected to be announced very shortly.

The new Scottish rate of income tax will follow in April 2016, allowing the Scottish government to vary the rate of income tax on employment income and self-employed profits by up to 10% for Scottish taxpayers (although in practice any differential in rates is likely to be much lower). This will affect all employers with staff who are treated as Scottish taxpayers, as changes will be required to PAYE procedures. Employers with tax equalisation policies will also need to seek advice.

It is likely that there will be further devolution of taxes to the Scottish government, with all the main political parties promising new Scottish tax powers. It is to be hoped that all parties will continue to work towards a more effective and simpler Scottish tax system which is better tailored to the specific requirements of Scottish businesses.

Court system

The court system will remain the same, subject to future proposed reforms which are separate from, and not dependent on, the referendum result. The Supreme Court of the UK will continue to hear Scottish civil appeals, and the remaining Scottish courts will continue to hear the same categories of cases.

Employee share schemes

The issues for employee share schemes are generally the same whatever part of the UK businesses and employees find themselves in, so we can expect little difference between Scotland and the rest of the UK. Indeed, the UK government has been working its way through a significant reform of the taxation of employee share schemes which is expected to come to a conclusion with the outcome of various HMRC consultations that are currently underway – including on introducing a new concept of "marketable security" to the UK tax system. Other changes, such as to the directors' remuneration reporting regime, are still bedding and employers' should be working to comply with these changes.

Employment

Almost all employment law in Scotland derives from UK-wide legislation, which is itself largely influenced by European law (including discrimination, TUPE and working time). The pre-referendum promise of wider devolutionary powers for Scotland is silent on whether Scotland should have greater control over its employment laws.

The White Paper outlined proposals which an SNP government would look to implement in an independent Scotland, including a more collaborative approach between trade unions, employers and the government; greater employee and female representation on company boards. However, it remains to be seen whether the Scottish government will be given these powers, and whether a non-SNP government would focus on similar policies. Even without devolved powers over employment law, there may be changes to UK employment law following the UK election in 2015 and the referendum on EU membership in 2017. However, in the short term, the UK's existing employment laws are here to stay.

Energy: Downstream

Naturally, to date, the focus of discussion has been on the consequences of independence on the Scottish energy industry. At present it is clear from the White Paper that the Scottish government sees considerable benefits in maintaining the single GB energy markets in gas and electricity (the term GB applies here as Northern Ireland is subject to a separate regulatory system for energy).

At the same time the Scottish government has a position of considerable influence over energy policy, in particular because of its control over material planning matters. This enables the Scottish government to determine the types of new power stations that can be built in Scotland: wind, wave and tidal power are favoured whereas new nuclear power is most certainly excluded.

Since the Scotland Act 1998, the direction of travel on devolution has been two way: separate Scottish electricity trading and transmission arrangements were abolished and replaced with common GB rules based on the preceding England and Wales system. The Scottish government was empowered to play a significant role in connection with the Renewables Obligation subsidy scheme, in particular by setting different levels of subsidy. However there is much less of a role in the context of the new Electricity Market Reform Contracts for Difference scheme.

Be that as it may, Scotland has considerable influence over energy policy, and it is to be expected that this will continue to be the case. However, the real question is whether there will be further powers devolved to Scotland. For the most significant aspects of energy policy this seems unlikely.

The most important issue in this context may well be ahead of us: the UK's position in Europe, in particular given that Conservative Party policy is to hold a referendum on EU membership in 2017. This is of particular importance to the downstream gas and electricity markets, which are now subject to significant regulation at an EU level. EU law also provides significant protections to EU energy undertakings.

Energy: Oil and gas

The UK government intends to move ahead with implementing Sir Ian Wood's report on Maximising Economic Recovery on the UK continental shelf which was published in February this year. One of the main recommendations in that report was for the establishment of a new regulatory authority, the Oil & Gas Authority (OGA), for the UK which will be headquartered in Aberdeen. It is proposed that the OGA will have more extensive powers than are currently available to the Department of Energy and Climate Change to allow it to fulfil a new statutory purpose of maximising economic recovery of the UK's oil and gas resources. The details of those powers have yet to be agreed.

Finance and financial services

Five main issues have been the focus of debate within the financial services industry:

- Currency
- Financial regulation
- European Union membership
- Single UK market for financial services
- Transition

The vote in favour of remaining part of the UK has the following consequences:

- Scotland will retain Sterling as its currency and this will, as a result, remain underpinned by the Bank of England as lender of last resort. Scottish Bank notes will continue to be issued by the three authorised commercial banks in Scotland (Bank of Scotland, Clydesdale Bank and the Royal Bank of Scotland). These bank notes are backed by ring-fenced assets held at the Bank of England and this arrangement will continue.

- The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) will remain as the principal financial conduct and prudential regulators for the funds and financial services industry across the UK.

- Scotland will, as part of the UK, remain within the EU unless and until the UK government seeks to withdraw from the EU. This position will be largely dependent on whether the Conservative Party is elected at the next General Election and follows through on its promise to hold an "in/out" referendum on the EU in 2017.

- The UK will remain a single UK market place for financial services, although it is possible that some financial institutions may nevertheless decide to relocate their registered offices and possibly, over time, operations to England so as to avoid any on-going uncertainty given the possibility of a Quebec-style "neverendum".

- The period of transitional risk which would have accompanied independence negotiations is no longer relevant. Many commentators, however, consider that an on-going period of uncertainty may nevertheless result and the possibility remains of another referendum on Scottish independence being called in the coming years.

One particular financial devolved power to be aware of is a recent amendment to the Scotland Act 2012 by which the Treasury has given increased borrowing powers to the Scottish government to borrow up to £2.2 billion, for capital expenditure purposes. The provision is not yet in force but if it does come onto the statute book, one means by which this could be achieved is by the issue of bonds in the capital markets. This raises the intriguing prospect of so-called Scottish "Braveheart" bonds being issued in the future, even though Scotland remains part of the UK, with an implicit UK guarantee.

Food and drink

The Scottish government has strongly supported the food and drink industry in Scotland in past years, and industry bodies such as Scotland Food and Drink have assisted in significantly raising the profile of Scottish produce and Scottish food companies both in domestic and export markets. There is no reason to think that the sustained growth of the last 5 years would be diminished in any way. New statutory bodies such as Food Standards Scotland were in gestation prior to the vote, and will have a clear mandate to promote healthy eating and regulatory control over the Scottish food and drink industry in a manner broadly similar to, but distinct from, the Food Standards Agency at a UK level.

Insolvency

There are, as yet, no firm published plans for further devolution of powers in relation to corporate insolvency. Personal insolvency is already devolved to the Scottish government.

IP and data protection/ freedom of information

There has been no indication that anything in relation to intellectual property, data protection or freedom of information will change. Intellectual property and data protection are not devolved to Scotland but freedom of information in Scotland is the subject of a separate Act and is dealt with by the Scottish Information Commissioner in St Andrews.

Pensions

The issue of pensions is likely to remain high on the political agenda for the foreseeable future and so UK-wide change can be expected. Already on the agenda are the changes to the pensions tax regime applying from April 2015, which will dramatically alter the defined contribution (DC) landscape, and also the abolition of contracting-out and the UK government's proposals for defined ambition and collective DC. The new Scottish rate of income tax effective from April 2016 will require administrative changes for schemes with both Scottish and rest of the UK taxpayer members if the Scottish government exercises its tax-varying powers.

Private client

Private individuals, families and trustees in Scotland will have to monitor and plan for further devolution of powers to Holyrood that, significantly, will include further powers in relation to raising personal taxation in Scotland. The introduction of the Scottish rate of income tax in April 2016 will in any event give the Scottish Parliament the power to vary the rate of income tax by up to 10%. The details of these further powers in relation to taxation are not clear not least because expectations have evolved during the campaign. Equally unclear is the appetite of the Scottish government to use its powers to change tax rates in Scotland. This is an area to watch closely and plan accordingly.

Following reviews on the current law of succession and trusts by the Scottish Law Commission, the Scottish government is consulting on proposed amendments to the law of succession. These consultations cover areas such as a new scheme for intestate succession and extended rights for cohabitants. Legislative changes are likely to follow these consultations.

The Scottish Law Commission has also been reviewing the law of trusts. While the Scottish Parliament has yet to consult on this area, legislative changes are again likely.

The significant change in these core areas of law affecting all families is expected and inevitable. The challenge will be to consider those changes and plan accordingly.

Property

Despite the pre-referendum uncertainty, commercial property activity in Scotland has been stronger than pessimistic predictions indicated. While in some sectors the market has slowed somewhat in the last three months, with evidence that some investors are playing a waiting game, activity in the office sector, particularly in Edinburgh, Glasgow and Aberdeen is reported to have been strong in the first half of 2014, with transactions outstripping the same period last year, and high levels of demand. The retail sector has become more stable, but remains subdued.

Average house prices have continued to show a steady, if modest compared to the rest of the UK, rise with numbers of sales up significantly compared to last year, shorter selling times, and seller confidence returning with an increase in properties coming to market, borne out by a return to popularity of the "offers over" asking price.

The 'no' outcome is likely to have a settling effect on any market nervousness, as certainty returns to all property sectors. The market is likely to benefit from a release of the restrictions of uncertainty, while investors are expected to emerge from their reticence, especially in prime markets.

Public sector

Significant changes to the public sector landscape in the short term are unlikely; however, there will be change: specific details of the additional devolved powers pledged by the UK coalition government and the Labour Party are likely to be developed over the coming weeks - the initial timetable suggests a draft bill will be ready in January 2015. The Scottish government and the rest of the UK are likely to focus on this in the short term. It is unclear at present exactly what the full list of additional powers will look like but it is likely to reinforce the continuation of the Barnett Formula for funding and sharing of resources within the UK. Clarity around the parameters and regulatory framework behind any additional powers will be required as soon as possible.

Health is already a devolved function and as such we do not envisage significant changes to the NHS. It is also likely that local government in Scotland will remain largely unchanged for now. However, there will be continued focus on implementing the Christie reforms and the recommendations of the COSLA Commission on Local Democracy which both focus on changing delivery of public services at a local level. Defence is likely to remain within the remit of the UK Government.

For further information and advice on any of the issues discussed above, please get in touch with your usual Shepherd and Wedderburn contact.

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