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Brexit, powers and the Scottish Parliament: The case of agriculture and fisheries



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POLICY BRIEF

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Introduction

The announcement on 13 March 2017 by Nicola Sturgeon, First Minister of Scotland, that she plans to seek approval from Westminster to hold an independence referendum before the UK leaves the EU has placed the issue of Scottish independence and potential EU membership at the centre of public debate. That said, a key issue in the Brexit debate, and a key determinant of the case for remaining in the United Kingdom, will be the extent to which powers returning from Brussels are devolved to the Scottish Parliament, as many Brexit proponents promised before the referendum vote. This policy brief looks at the positions of the different parties and discusses some of the key factors which will determine the way such powers might operate. It focuses on the key policies of agriculture and fisheries, which have been the responsibility of Scottish based Government departments since the establishment of the Scottish Office in the early 20th century.

Different views on powers of Scottish Parliament post Brexit

In her speech to the David Hume Institute on 28 February 2017¹, the First Minister made it clear that she believed that the the post Brexit landscape would demand a fundamental rebalancing of powers across the UK. Her Government, in its policy paper of 20 December 2016 on Scotland's Place in Europe², had proposed the further devolution of a wide range of powers, including the following:

- “Repatriated” competences in devolved areas. Matters no longer subject to EU law should be the responsibility of the Scottish Parliament where they concern devolved areas such as agriculture, fisheries, education, health, justice and environmental protection. In these areas decisions on the replacement of the rights and protections provided by EU law to Scottish citizens should be for the Scottish Parliament.
- “Repatriated” competences in reserved areas. Matters no longer subject to EU law which are not within current devolved competence should be devolved to enable the Scottish Parliament to protect citizens’ rights. These should include areas such as employment law and health and safety legislation.
- Additional powers to protect Scotland’s interests. Beyond repatriated powers, the current division of responsibilities between the Scottish Parliament and Westminster

¹ https://www.snp.org/david_hume_institute

² <http://www.gov.scot/Resource/0051/00512073.pdf>

should be reconsidered to reflect the change that will be effected to the UK's constitutional settlement by leaving the EU.

She made a point, however, of noting that the UK response to these proposals had so far been very negative. In particular, she was concerned that the UK Government wanted to go in the opposite direction, since it was clear from their statements that even elements of farming and fishing policy – which have been wholly devolved competences from day one – now risk being taken back to Westminster.

The following day, in answers to questions in the UK Parliament, Secretary of State for Scotland David Mundell confirmed that all the powers that the Scottish Parliament currently exercises in relation to agriculture, fisheries and all other issues will continue. He said that his Government wished to have a dialogue with the Scottish Government, the other devolved Administrations and stakeholders about what happens to powers that are currently held in Brussels and where they will rightly rest after the United Kingdom leaves the EU. He added that after the United Kingdom leaves the EU, the Scottish Parliament and Scottish Ministers will have more powers than they have today. Later the Prime Minister clarified that her Government was in the process of discussing with the devolved Administrations the whole question of which of the powers that currently reside in Brussels will be returned and will remain at a UK level for decisions, and which powers will be further devolved to the devolved Administrations. In her speech to the Scottish Conservative Party Conference on 3 March 2017 she repeated these points, making it clear that she intended to avoid any unintended consequences for the coherence and integrity of a devolved UK as a result of the decision to leave the EU.

Powers of the Scottish Parliament and the UK White Paper on Exiting the EU

The Scotland Act 1998, which established the Scottish Parliament, is based on the principle that the Scottish Parliament has powers over policy areas which are not explicitly reserved (in schedule V of the Act). The key reservations (there have been some changes in subsequent legislation) cover issues such as constitution and public service, defence, financial and economic matters, home affairs including immigration, trade and industry, energy, transport, social security, media including broadcasting, employment and equal opportunities. International negotiations and representation as well as overseas development assistance are explicitly reserved to the UK Government, although there are provisions for the Scottish administration to be consulted on the international aspects of devolved policy. It also subjects the Scottish Parliament to full respect for the UK's international obligations, especially the provision that the Parliament cannot do any act which is incompatible with EU and ECHR law.

In Scotland, and especially on the part of the current Scottish Government, there is a widely held view that where policy issues such as agriculture, fisheries and the environment are not reserved under the Scotland Act, the Scottish Parliament has powers over the range of policy issues covered by that subject. This is based upon the principle in the Scottish Constitutional

Convention Report of 1995 that Scotland's Parliament would have a defined range of powers and responsibilities which would encompass sole or shared responsibility for all functions except those retained to the United Kingdom Parliament. On this basis there is a clear expectation that where questions of further devolution, or amendments to the current system are discussed, the starting point would be that where powers are not explicitly reserved the expectation would be that Scotland would expect to frame the basis of the way the new powers would be applied.

The UK Government, on the other hand, takes the view that the powers of the Scottish Parliament, in the context of the reservations set out above, are those as currently exercised – they are not absolute across all aspects of the subject matter. In the UK White Paper on exiting the EU the UK Government explains this point by stating in 3.4³

“This has meant that, even in areas where the devolved legislatures and administrations currently have some competence, such as agriculture, environment and some transport issues, most rules are set through common EU legal and regulatory frameworks, devised and agreed in Brussels. When the UK leaves the EU, these rules will be set here in the UK by democratically elected representatives.” It then goes on to add, in 3.5

“As the powers to make these rules are repatriated to the UK from the EU, we have an opportunity to determine the level best placed to make new laws and policies on these issues, ensuring power sits closer to the people of the UK than ever before. We have already committed that no decisions currently taken by the devolved administrations will be removed from them and we will use the opportunity of bringing decision making back to the UK to ensure that more decisions are devolved.”

It then explains, in the context of strengthening the United Kingdom in s 3.5-6, that the UK Government acts in the interests of the whole UK and is responsible for the UK's international relations, including negotiations with the EU. “The guiding principle will be to ensure that – as we leave the EU – no new barriers to living and doing business within our own Union are created. The UK Government will maintain the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world and protecting our common resources.”

Current Agriculture and Fisheries policies

At present, under the current devolution settlement, the Scottish Government is responsible for the implementation of the EU's **Common Agricultural Policy (CAP)** in Scotland. The key element is the Single Farm Payment (SFP). Farmers who receive the SFP have the flexibility

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf

to produce any commodity on their land except fruit, vegetables and table potatoes. They also have the obligation to keep their land in good agricultural and environmental condition (cross-compliance). They must respect environmental, food safety, phytosanitary and animal welfare standards. This is a penalty measure: and if farmers do not respect these standards, their payment will be reduced. A key feature of the CAP and its accompanying public health measures is that it is much simpler to trade with other EU countries than with countries outside the EU, because the goods are in free circulation. Since the EU is a single market and the UK is in a Customs Union, British food producers can currently trade with other EU countries without restriction. The direct aids and market related expenditure made up 31% of the total EU budget in 2010. Together with 11% for Rural Development, the total CAP budget took 42% of the total EU budget. Because of the size of its agricultural sector, Scotland currently receives some 16% of the total of EU CAP expenditure in the UK, much higher than the Barnett formula percentage for Scotland of 8% which roughly represents Scotland's population share of the UK.

The Scottish Government is also responsible for the implementation of the **Common Fisheries Policy (CFP)** in Scotland and Scottish waters (some 470,000 km², the biggest section in Europe of the UK Economic Zone). The CFP is very different from the CAP in that it is largely focused on resource management by setting quotas for fishing within the EU's zone, subject to agreed rules about sharing the allocation between the fishing fleets of the different countries. The CFP also focuses on the following issues: regulation of production, quality, grading, packaging and labelling; encouraging producer organisations intended to protect fishermen from sudden market changes; setting minimum fish prices and financing buying up of unsold fish; and setting rules for trade with non-EU countries. As for agriculture, accompanying public health measures make it possible for Scottish seafood producers to trade within the EU without restriction.

The Scottish Government makes a significant input to the UK position in the EU on the intergovernmental North-East Atlantic Fisheries Convention, set up to manage fish stocks in the region, while others are managed through agreements between the coastal states. These agreements are extremely important to a large section of the EU fleet, especially the agreement with Norway, which covers quotas worth over €2bn.

The food and drink industry in Scotland is a key growth sector. Driven by a culture of collaboration and having forged a new national identity and reputation for its produce, the industry has experienced unprecedented growth in recent years, focusing on capitalising on Scotland's image as a natural producer of quality food and drink. The industry turnover has reached £14.3bn (2013) from £10bn in 2007 and is aiming towards a growth target of £16.5bn by 2017. The key issues arising from the UK decision to leave the EU include concerns about the high proportion of EU nationals in the sector's workforce (some 39,000, one third of the total workforce in Scotland were born outwith the UK);

Since the referendum the **Scottish Fishing Industry** has made clear its support for taking Scotland outwith the scope of the Common Fisheries Policy⁴. The key argument put forward is the opportunity Brexit provides to strengthen control over the fisheries resource to maximise benefits for Scottish fishermen. Other factors to be taken into account will be the interests of the processing sector which often do not coincide with those of producers; and the fact that while the main market for white fish tends to be the rest of the UK, the specialist seafood sector (crustaceans and shellfish) is closely tied into high value markets in the European Union.

UK discussions with devolved authorities on agriculture and fisheries.

The UK Secretary of State for Environment, Food and Rural Affairs, Andrea Leadsom, is leading a process of consultation with the devolved authorities, including Scottish Rural Affairs Cabinet Secretary Fergus Ewing, on how agriculture and fisheries would be managed after Brexit. Discussions are moving at best slowly – devolved Ministers were very disappointed that no details were given at a meeting in mid-February of plans for the consultation papers DEFRA is preparing on how to run agriculture and fisheries policy post Brexit. National Farmers Union of Scotland President Andrew McCormick has recently expressed concerns that there is a real fear among Scottish farmers that they may be destroyed by imports of cheap, poor quality food or by being denied access to Scotland's main trading area outside the UK which is Europe. The thorny issue of Common Agricultural Policy support payments for farmers is causing grave concern. The support payments are needed, said McCormick, because if they were not there then there would be no cheap food produced in this country. Some sectors are more dependent on CAP payments than others, especially hill sheep farmers in the more challenging areas of the country, but they are just as important for other sectors in other parts. He made it clear that the negotiations with the EU were absolutely crucial to gaining a trade deal that allows Scottish farmers to export into Europe without crippling tariffs.

How extensive are new Scottish powers likely to be?

At this stage, in the absence of any UK proposals on how to implement Brexit and the implications for devolved authorities, we do not have any clarity on what the extent of any new powers for the Scottish Parliament might be. We do know from comments from the Prime Minister, Home Secretary and Secretary of State for Scotland that the ambitious plans of the Scottish Government are unlikely to be met, with strong hints being dropped for example that immigration powers will not be devolved, although the official line remains that these issues remain under consideration.

What we do know, however, is that the UK Government wants to maintain the existing powers of the Scottish Parliament and that it is looking at areas which might be strengthened, including

⁴ http://www.parliament.scot/General%20Documents/SFF_-_Brexit_and_the_Fishing_Industry_2016.07.22.pdf

in the area of agriculture and fisheries. This does not mean, however, that the UK Government will be happy to see all aspects of these policy areas devolved. In practice it seems likely that the main role of the Scottish Parliament, similar to at present, will be to manage payments schemes and implement agreed schemes, policies, regulations and quotas in a way which meets as far as possible Scottish needs but is subject to constraints set at UK level. The key constraints are likely to be as follows.

Single UK market and international trade

In line with s3.5-6 of the UK White Paper on Exiting the EU (see above), a key aim of the UK will be to ensure the maintenance of the necessary common standards and frameworks for the UK domestic market, and to ensure the UK is able to strike ambitious trade deals around the world. To do so will require the setting of public health and other regulatory standards which will allow such trade to take place. Given the importance of EU trade to both the agriculture and seafood sectors in Scotland, a key priority will be to ensure that the EU-UK arrangements which are put in place, including any transitional arrangements, are able to secure as far as possible existing markets and to allow new markets to be developed. In the longer term as trade deals are sought with e.g. the US, questions will begin to be asked about areas where Scotland currently has exceptions to rules applying across the UK, such its ability to invoke the EU directive which allows part of Member States to opt out of GMO crop planting on a case by case basis⁵.

From the perspective of the Scottish Government there will be a strong wish to see as much continuity and flexibility as possible to allow the Scottish Parliament and Government to tailor agricultural and fisheries policy as far as possible to the needs of the Scottish industry. This will involve looking in particular at areas where Scottish produce trades on quality or other traceability requirements such as geographical indications and ensuring these can be reflected in what is agreed at UK level. It will also include seeking to protect as far as possible key demands of Scottish producers and processors such as maintaining markets in the EU for sectors such as seafood and sheep meat.

The key challenge here will be to find a mechanism which allows effective bargaining and negotiation to take place between Edinburgh and London in a way which allows both sides the opportunity to feel that their respective issues are taken seriously. At present the system which applies for dispute resolution is informal and generally weak, with the UK Government holding most of the cards (e.g. funding) but often unwilling to push its position for fear of electoral or other political kickback, as well as a sometimes shared but often conflictual interest in making sure that the claims of the different interest and lobby groups are properly pursued.⁶ For as long

⁵ <http://www.politico.eu/article/scotland-gmo-ban-monsanto-crops-agriculture-europe/>

⁶ See e.g. Swenden, W & McEwen, N 2014, 'UK Devolution in the Shadow of Hierarchy: Intergovernmental Relations and Party Politics' Comparative European Politics, vol 12, no. 4-

as the UK is part of the EU where key trade discussions are taken, the UK can depend on its control of the UK voice in EU negotiations to get its way. Where the UK is negotiating on its own behalf in this context it will be important when considering the balance of powers between Edinburgh and London to see to what extent dispute resolution procedures should be strengthened to give both sides confidence that respective interests will be given full weight, assuming the UK means what it says in relation to respecting the existing powers of the Scottish Parliament.

Resource management and international negotiations

This point about effective dispute resolution if existing powers are to be respected will be crucial in the key area of resource management. This is particularly true in the case of fisheries. Marine Scotland, a directorate of the Scottish Government, is currently responsible, with exclusive devolved competence, for controlling the activities of all fishing vessels operating within the Scottish zone, covering the North Sea and West of Scotland out to 200 nautical miles. It is also responsible for managing and controlling the activities of Scottish vessels wherever they may fish – including fishing effort and quota. Marine Scotland also manages all inshore fisheries within the 12 nautical mile territorial water limit. Marine Scotland is also responsible for providing scientific advice on quota allocations to fisheries interests based on fisheries stocks, taking into account wider policy objectives, public attitudes, socio-economic implications and the precautionary approach. Post Brexit we can expect that managing UK stocks will be primarily for the responsible body such as Marine Scotland and its English (UK), Welsh and Northern Irish equivalents. But it will not be able to act in isolation. Rounds of negotiations with EU and non-EU countries must also take place in relation to fish stocks that straddle international boundaries and are therefore jointly-managed. These external negotiations include:

- EU/Norway (complex talks which deal with key North Sea stocks such as cod, haddock, whiting, saithe and plaice and quota swaps between the parties [the so-called ‘balance’])
- Coastal States (a suite of talks involving the EU, Norway, Iceland, the Faroe Islands and Russia, and dealing with mackerel, Atlanto-Scandian herring and blue whiting)
- EU/Faroes (a bilateral agreement providing Scottish fishing vessels access to predominantly whitefish opportunities in Faroese waters)

At present intergovernmental processes allows Scottish interests to influence positions taken by the UK in EU led negotiations. When the UK leaves the EU Scottish based interests will

5, pp. 488–509. DOI: 10.1057/cep.2014.14
http://www.research.ed.ac.uk/portal/files/17479441/CEP_Special_Issue_Swenden_and_McEwen.pdf

want to be sure that the mechanisms for reflecting Scottish scientific advice and agreed positions is properly given weight when the UK negotiates directly with EU and non EU states. Again, as for international trade, if the UK Government want to be sure that existing powers of the Scottish Parliament and Government are reflected, having an effective dispute resolution mechanism which places Scotland on a roughly equal basis with the UK when direct Scottish interests are at stake will be required.

The future financial framework?

At present, EU funding of CAP and CFP expenditure in Scotland comes directly from UK receipts from the EU. In future, given the UK Government's commitment to fund such expenditure directly from the UK taxpayer, the UK and Scottish Governments will have to agree how to fund such expenditure, including whether it forms an integral part of the Scottish budget or whether there is a separate UK budget based on common payments across the United Kingdom. The challenge for Scotland is that currently some 16% of UK agricultural spending is spent in Scotland (and a much higher proportion of CFP expenditure). Will Scotland insist that it is funded under the new Scottish taxation arrangements, where one third of Scottish tax revenue is now raised by the Scottish Parliament, supplemented by direct payments by the UK Government, in line with the agreement reached between the UK and Scottish Governments in February 2016 on the fiscal framework which preserves for now the Barnett formula for supporting UK expenditure in Scotland⁷? Or would it be more financially prudent to leave such expenditure to a UK controlled pot without Scotland having to contribute directly? If the first approach is chosen Scotland will be able to control the way spending policy is made, but it will have to face the possibility of making hard decisions between different priorities, with agriculture and fisheries having to compete with other policy priorities. If on the other hand a UK pot is created, Scotland will face the prospect of very limited room for manoeuvre if, as seems likely, there are different priorities between the UK as a whole and Scotland.

Conclusion

As the Scottish Government's decision to seek an independence referendum before the UK leaves the EU shows, there is a wide gulf at present between the position of the Scottish Government and the UK Government on the implications of leaving the UK for the powers of the Scottish Government and Parliament. On the one hand, the Scottish Government is looking for further devolution in a broad range of areas, especially in areas which are currently devolved to Scotland. On the other hand the Prime Minister and her Ministers have made it clear in recent weeks that they see a case for a review of the Scotland Act to make sure that the integrity of the UK's single market and its international trade and resource management negotiation position is properly respected, even if they are committed to maintaining and possibly extending

⁷ <http://www.gov.scot/Resource/0049/00494765.pdf>

current powers. It seems likely that the issues concerned with the Scotland Act will not be addressed directly before Article 50 is triggered, but instead are more likely to be addressed over time as the UK Government publishes its plans for the “Great Repeal Bill”. In this context, we can expect the key issues to need to be addressed to include the need for a revised dispute resolution mechanism in areas such as quota and resource management in international negotiations and careful consideration of the way financial support for agriculture and fisheries are managed. It will be interesting to see whether in the context of the proposed independence referendum whether intergovernmental negotiations on such sensitive points have any substance or whether, as seems more likely, the issues are simply left to declaratory statements by the different parties without any serious attempt at reconciliation, as was the case in the immediate run up to the 2014 Scottish independence referendum.

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