

A post-Independence Scottish immigration system: how it might be shaped by European Union requirements *

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Abstract: This paper examines how the SNP Government's "double desire" of independence and European Union membership would impact on its ability to design and deliver an effective immigration policy. Most EU legislation is concerned with refugees and asylum seekers and says little about how economic immigrants and family reunification immigrants are selected. As such, the main conclusion is that EU legislation will not impact unduly on an immigration system designed by a post-Independence Scotland. However, the expectation is that Scotland would be obliged to join the Schengen Area - and leave the current Common Travel Area. This view is contrary to that of the Scottish Government whose current stated preference is that an independent Scotland should remain in the Common Travel Area, with the Rest of UK (RUK) and the Republic of Ireland. The positive benefits of Scotland joining the Schengen Area have not been, as yet, fully explored by either the Scottish or UK Government.

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1. Introduction

Scotland's independence referendum will take place on 18 September 2014. If the majority of the population aged 16 and older vote "yes", it is accepted by the Scottish and UK Governments that this would be a mandate for Scotland to leave the UK and become a "new" European Union (EU) member state. If Scotland does achieve independence it will need to construct institutions that it currently does not have. This goes well beyond deciding what currency to use, or how to pay out pensions and welfare benefits, or what tuition fees should be charged to English students wishing to study at Scottish universities. The focus of this paper is how an independent Scotland will deal with immigration. Immigration is currently a "reserved power", which means that immigration policy is decided by the UK Government and the immigration system is managed by the Home Office UK Border Agency. Currently, the Scottish Government plays no significant role in immigration matters. Therefore, an independent Scotland would need to put in place an immigration system and formulate an immigration policy that focuses on Scotland-specific needs and interests.

To a certain extent, Scotland "taking control" of immigration may well be welcomed by a majority of Scots and for a variety of reasons. One reason may be that it will allow Scotland to significantly reduce if not "stop" immigration and in a sense pursue a policy in line with what the Prime Minister David Cameron wants for the UK as a whole. Another view is that it would allow Scotland to use immigration strategically as a source of lower-cost labour to help provide services for the domestic population, without having to grant residence and pay welfare benefits. What would happen in reality will almost certainly be somewhere between these two views, with immigration policy being geared to both economic and humanitarian considerations.

What is clear is that Scotland will not be able to do entirely what it wishes with respect to immigration if it is serious about being a member state of the EU. The EU has clear expectations on what is required of "new" member states with to respect immigration. These rules and regulations are embodied in the so-called *Lisbon Treaty*. This legislation is enforced by Directives and Regulations, which are the most important forms of binding EU Law issued by the European Union Council of Ministers and the European Parliament. The author does not wish to enter into the debate about whether Scotland will be able to make a smooth transition - or will have to re-apply - to be the 29th EU member state. However, the working assumption used here is that either outcome will require an independent Scotland to "toe the line" with respect to current EU legislation.

This paper is organised as follows: Section 2 argues that an independent Scotland could (quite easily) build an effective immigration system based around five general classes of immigrants. Section 3 considers how such an immigration system would be shaped by EU legislation, while Section 4 considers the implications of the *Schengen Agreement*. Conclusions follow in Section 5.

2. Immigrant Classes

There is a large body of research in the field of population economics concerned with designing immigration systems aimed at meeting specific economic and social criteria (see Constant and Zimmermann, 2013). In addition, detailed data has been collected relating to the effectiveness of immigration systems in a variety of countries. This includes countries with “points-based” selection mechanisms that emphasise employability (e.g. Australia, Canada and the UK) as well as countries with selection mechanisms based on other criteria like family reunification (e.g. the United States). It is the author’s view that it would not be a difficult task to design and implement an immigration system in an independent Scotland that is based on Scottish economic and labour market considerations.

In order to focus this discussion, assume that Scotland becomes an independent country *outside* the European Union. If this was the case, then Scotland could put in place an immigration system that builds on the good practices developed in countries that “manage” their immigration. In addition, Scotland would not be required to following the good - or bad -practices prescribed by a dominant and larger political entity, be that the UK or EU.

Such a system might be based around five general immigrant types or classes. The first class is *Economic Migrants*, who migrate almost exclusively for reasons of employment and earnings. Within this class, there are three sub-classes: the (1) “high-skilled”; (2) “low-skilled”; and (3) “entrepreneurs”. A points-based immigration system, not dissimilar to that currently in place in the UK, could be used to “select” low-skilled and high-skilled immigrants (see Mosca and Wright, 2009). With respect to entrepreneurs, a set of relevant thresholds could be set: the amount of money to be invested in the Scottish economy and/or the number of jobs to be created in new enterprises.

The second class of immigrants is *Refugees and Asylum-seekers*. With only three international airports, and sea ports far from the main refugee source countries, it seems unlikely that Scotland would attract a large number of individuals applying (directly) for asylum at its ports of entry. However, as a good global citizen Scotland would likely wish to be a party to the *United Nation’s 1951 Convention and 1967 Protocol on Refugees* (see United Nations, 2011). This would require that Scotland grant asylum to a given number of refugees on an annual basis. Given the experience of other countries that are party to the Convention and respond to the global refugee challenge, it is estimated that this would translate into Scotland accepting about 400 people per annum. This is a very small number of immigrants when compared to Scotland’s population of 5.3 million and net-migration that over the past few years has averaged between 20,000 to 25, 000 per annum.

The third class is *Family Reunification Immigrants*. An example would be a non-Scottish citizen who marries a Scottish citizen. A key question here is what other “relatives” - if any - would be treated as family reunification immigrants: mothers, fathers, sisters, brothers, cousins etc.? In addition, a points-based system could be configured to allow the allocation of points for having a relative or relatives who are citizens living in Scotland (as is done in Australia and Canada). Deciding how far down the family tree family reunification would “count” in terms of points, however, can be a tricky issue.

The fourth class of immigrants is *Students*. Most would be studying at higher education institutions. Whether it is appropriate to refer to international students as “immigrants” *per se* is debatable. Scotland has a large higher education sector compared to England and many other high-income countries and it is, in effect, an important ‘export’ sector of the Scottish economy. International students make a significant contribution both in terms of their tuition fees and costs-of-living expenditure to the Scottish economy (see Bell et al., 2013). It is all too forgotten that most students return to their country of origin on graduation so their migration is “temporary”. However, there does seem to be demand amongst international students to stay in Scotland after graduation to gain practical work experience in an English-speaking environment. This was permitted by the “Fresh Talent Initiative” introduced by the then Scottish Executive and First Minister Jack McConnell in 2004 and the system was later adopted by the UK as a whole. This has now been abolished across the UK by recent UK immigration policy reforms. However, lumping students in with the other classes of immigrants (as is current practice) seems inappropriate since they are very different in nature to other classes of immigrants.

The fifth class of immigrants is immigrants who do not fit into any of the other four classes. This is in a sense a residual category, which can simply be referred to as *Other Immigrants*. It would include temporary workers who come to Scotland to work in a specific job for a specific time period (e.g. in agriculture or fish processing). It would also include foreign nationals who are employed by a foreign-owned company or multi-national. Such immigrants could be dealt with through a system of visas and work permits.

In addition to the criteria that define each of these classes of immigrants, a Scottish immigration process should contain, for obvious reasons, some form of criminal background and medical health checks. The

expenses associated with both could be recouped in an application fee (as is common in most countries). Scotland would need to create an institution similar in function to the *Home Office UK Border Agency* to manage the system. Discussion now turns to how EU requirements would impact on the design and delivery of a Scottish immigration system were Scotland to become an EU member state.

3. Immigration and EU Legislation

There is no precedent for a “region” within an EU member state forming a new country and therefore, there is no precedent of a “region” within an EU member state forming a new country and becoming a new EU member state. Much of law (and practice) is based on precedent, and as a consequence it is to be expected that many EU member states are watching very carefully what is happening in Scotland given their own domestic political circumstances. However, there are many historical examples of countries that have split up and formed new countries - sometimes a large set of new countries (eg the Soviet Union). There are also examples of countries that have split up into new countries and then joined the EU as member states (e.g. Czechoslovakia split into the Czech Republic and Slovakia). There are also former countries (e.g. Yugoslavia) that have split up into several countries, some of which have become EU member-states (e.g. Croatia) and others who have not (e.g. Bosnia and Herzegovina, Macedonia, Montenegro, Slovenia and Serbia).

In the event of a “yes” vote, the UK Government’s view is that an independent Scotland would be considered a “successor state” (see HM Government, 2013). This is consistent with international law and based largely on the fact that London would remain the capital of the rest-of-the-UK (RUK). As a successor state, an independent Scotland would need to create a new set of international relationships while already established UK international relationships would remain with what remains of the UK (RUK). The President of European Commission, Jose Manuel Barroso has made his position clear about what an independent Scotland would need to do: “The UK would continue to exist as before, with only Scotland as a new state. Any new independent country would have to apply to join the EU”. The bottom-line is that an independent Scotland is not guaranteed “automatic” EU membership.

It is the author’s view that Scotland’s scope to negotiate with the EU would be negligible and the interpretation of Barroso’s position is that Scotland would need to agree to and adopt fully current EU legislation as embodied in the *Lisbon Treaty*. That is, were Scotland to wish to make a smooth transition from being a part of an “old” EU member state to being a “new” member state, at minimum, Scotland would have to adopt ALL the provisions of the *Lisbon Treaty*, including those relating to immigration. The *Lisbon Treaty* is an agreement that represents the set of rules and requirements that both specify and determine EU membership. These rules are enforced by Directives and Regulations, which are the most important forms of binding EU Law issued by the EU Council of Ministers and the European Parliament. Put slightly differently, a country wishing to join the EU must agree to these requirements and once a member state it must follow these requirements as rules of law and hence practice. It is not possible to view such requirements as a list of “recommended” principles from which a country wishing EU membership can simply “pick and choose”.

Historically, some EU member states have been able to “opt-out” from EU legislation. Likewise some EU member states have been allowed to “opt-in” to only certain aspects of EU legislation. This effectively means that such member states do not have to follow policies agreed by the other EU member states. It should therefore not be surprising that opt-outs are in fact rare: Denmark and the UK have four opt-outs each; Ireland has two opt-outs; and Sweden has one “de facto” opt-out (relating to the use of the euro currency as it did not participate in the so-called “ERMII” currency arrangement, which fixes the exchange rate between the domestic currency and Euro for two years prior to adoption, so “technically” Sweden did not meet a key requirement). Since 2004, thirteen countries have joined the EU, almost doubling its total membership. In the same period, of these 13 countries, only one has been allowed one opt-out: Poland. (The Czech Republic had reached agreement with the European Commission about a future opt-out, however, this was recently voted down by the European Parliament).

In order to better understand what the EU would require of Scotland to follow with respect to immigration attention turns to three specific areas of the *Lisbon Treaty* as included primarily in:

- *Articles 26, 77, 78 and 79 of the Treaty on the Functioning of the European Union;*
- *Title V: Area of Freedom, Security and Justice, Chapter II: Policies on Border Checks, Asylum and Immigration.*

More specifications are provided for by the *Protocols Additional to the Treaty*:

- *Protocol No. 19 on the Schengen acquis integrated into the framework of the European Union. This is the former Protocol No. 2 integrating the Schengen acquis into the framework of the European Union;*

- *Protocol No. 20* on the application of certain aspects of Article 26 of the *Treaty on the Functioning of the European Union* to the United Kingdom and to Ireland;
- *Protocol No. 21* on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

Table 1 presents a summary what the author believes are the main EU regulations relating to immigration. The table also shows whether the UK has opted into or opted-out of these regulations.

EU Legislation	Opt-In	Opt-Out
1. Directive 2004/38/EC on The Free Movement	Not fully implemented	
2. Directive 2004/58/EC on Citizenship	X	
3. Directive 2003/9/EC on Asylum Reception Conditions	X	
4. Council Regulation (EC) No 343/2003 (Dublin II System)	X	
5. Directive 2004/83 on Refugee Qualification	X	
6. Directive 2005/85/EC on Asylum Procedures	X	
7. Directive 2001/51/EC on Carriers Sanctions	X	
8. Directive 2001/55/EC on Temporary Protection	X	
9. Directive 2003/86/EC on the right to family reunification		X
10. Directive 2003/109/EC on a long-term resident status for non-member nationals		X
11. Directive 2004/114/EC on the admission of students		X
12. Directive 2005/71/EC for the facilitation of the admission of researchers into the EU		X
13. Directive 2008/115/EC for returning illegally staying third-country nationals		X
14. Directive 2009/50/EC concerning the admission of highly skilled migrants		X

With respect to the five immigrant classes discussed above, there is little in EU law that restricts the way “economic immigrants” are selected. For example, the author can find nothing that, for example, is contrary to the UK’s current points-based system. There is a Directive relating to international students that refers mainly to conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service. However, these requirements are not inconsistent with current UK and Scotland practice since the *Bologna Accords* have been adopted. These two immigrant classes will most certainly be important economically and culturally in an independent Scotland and EU legislation will not impose on how such individuals are selected (see Coldwell, Lisenkova and Wright, 2011). There appears to be no EU requirements concerning family reunification immigrants. Finally, EU member states have the right to have a national system of visa, residence permits and work permits as long as such holders do not have the right to reside (and hence work) in other EU member states. However, a clause in Article 77 states that the EU should pursue a “... policy on visas and other short-stay residence permits”. There is considerable legislation surrounding Refugees and Asylum-seekers and in the longer-term their aim is to move forward in a step-by-step manner to create a European Asylum System, something much in the news given recent tragic events in Lampedusa, Italy. The UK has opted-out of several of these requirements while opting-in to others. As mentioned above, EU requirements for refugees and asylum-seekers would not likely impinge much on Scotland, mainly because the expected numbers would be very small. Much of this legislation is concerned with establishing the minimum standards in the ways in which those seeking asylum should be treated. These requirements are very specific and detailed. It is the author’s view, however, that current UK practice is above these minimum standards.

An independent Scotland would be expected to join the *Blue Card*. This is a system to attract highly-qualified immigrants by supporting member states and EU companies' efforts to fill gaps in their labour markets that cannot be filled by their own citizens, other EU citizens or legally-resident non-EU citizens. Once a member state grants a *Blue Card* to an immigrant, after two years that person can move to a job in another member state in an unrestricted manner (i.e. before obtaining EU citizenship). It is clear that the *Blue Card* system will result in an independent Scotland ceding some control over this class of immigration. However, it is the author's view that the flow of *Blue Card* immigrants to Scotland would be small, especially relative to the numbers of EU citizens moving from other member states to Scotland. In addition, Scotland would likely lose immigrants to other member states but not to what remains of the UK since the UK is not a member of the *Blue Card* system. It is unclear whether Scotland would be a net-loser or net-gainer in the two-way flow of *Blue Card* holders.

4. The Schengen Agreement

A controversial EU requirement relates to the so-called *Schengen Agreement*. The "Schengen Agreement" led to the establishment of the "Schengen Area". The Schengen Area is a group of countries where there are no internal borders between them. One outcome of this is that individuals are able to travel between countries without a passport and border controls. Individuals do have to carry some form of *bona fide* identification and are not exempt from border checks. Citizens from outside the Schengen Area need to apply for only one visa when visiting several countries in the Schengen Area, instead of applying for one for each of the countries they will visit. Non-EU countries can also apply to be a member of the Schengen Area. Membership in the Schengen Area requires that border forces and police agencies across the Schengen Area be more integrated and work more closely together.

The *Schengen Agreement* has been incorporated into the European Union's legal framework by the *Treaty of Amsterdam* (1997), and is consequently part of the *Lisbon Treaty*. A Protocol attached to the *Treaty of Amsterdam* incorporates the developments brought about by the *Schengen Agreement* into the EU framework. The Schengen Area is now within the legal and institutional framework of the EU and is now, and has been for some time, a key feature of EU membership.

There are 22 EU member-states that take *full part* in the Schengen Agreement: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain and Sweden. There are 4 non-EU countries that take *full part* in the Schengen Agreement: Iceland, Liechtenstein, Norway and Switzerland. There are 4 EU member-states are *bounded* to be part of the Schengen Agreement but not yet entitled to accede to the Agreement: Bulgaria, Croatia, Cyprus and Romania. There are only 2 EU member-states who are *not full members*: the United Kingdom and the Republic of Ireland.

The cases of Bulgaria, Croatia, Cyprus and Romania are informative. These countries have agreed to join the Schengen Area but currently must follow border practices similar to those EU member-states that border on non-EU countries. This decision was made by the European Commission and not by the individual countries applying for membership, so it is ABSOLUTELY NOT an example of these countries somehow "opting-out of Schengen". The Commission's decision was based on its assessment as to whether a country is ready at the time of entry to fulfil the practical obligations and requirements of the legislation and not by any means a "choice" made by the country seeking entry. The main reason these countries failed to comply is that they have "leaky borders" with non-EU countries. More specifically: Bulgaria with Macedonia, Serbia with Turkey; Croatia with Bosnia and Herzegovina and Serbia; Cyprus with Turkey (or more correctly the Turkish Cypriot-administered area); and Romania with Moldova and the Ukraine.

In addition, the EU was concerned that the border forces in these countries were not developed enough to effectively carry out the required responsibilities due it said to: too few border guards and officials, inadequately trained border guards and officials; poor management practises and corruption. However, there has been heavy investment by these countries and the EU aimed at bringing these countries up to the required standard. Timetables for each of these countries have been set indicating when these member states will become full members of the Schengen Area. The current UK Government has stated categorically that it has no intention of joining the Schengen Area in the foreseeable future.

The UK along with the Republic of Ireland forms the *Common Travel Area* (CTA). This agreement dates back to the creation of the Irish Free State (1923), when the UK Government was removed as Ireland's colonial power. In practice, it works in a similar manner as Schengen Area, allowing unrestricted movement of residents between mainland UK, Northern Ireland, the Republic of Ireland, Isle of Man and Channel Islands.

The SNP Government has stated that it will opt-out of the *Schengen Agreement*, since its preference is to remain part of the CTA. It is difficult to think of a set of circumstances that would allow Scotland to opt-out and not be part of the Schengen Area as this is now the norm in the EU with only two outliers (i.e. the UK

and Republic of Ireland). One view is that Scotland will be required by the EU to leave the CTA and join Schengen Area in order to be admitted as an EU member state. The UK is isolated in its opinion that membership of the Schengen Area is both problematic and undesirable. Evidence in support of this claim is simply that Liechtenstein, Iceland, Norway and Switzerland are members of Schengen but not members of the EU. In addition, there have been no opt-outs of Schengen since Ireland and the UK in 1997. It is now a given that new member states will (eventually) become members of the Schengen Area, although the length of time that this might take could be considerable. It is the author's view that the European Commission will stand firm on this matter.

Even if one were to accept the view that joining the EU is a "process of negotiation", one must ask what would give Scotland a strong negotiating position. Scotland represents about 1.5 per cent of the total EU population and it generates slightly less than 1.5 per cent of the total EU output (GDP). Furthermore, it is by no means guaranteed that even were agreement reached between Scotland and the European Commission (to opt-out or not of Schengen) it is a fact that membership into the EU can still be vetoed by another EU member state. An independent Scotland may very well set a dangerous precedent for other member states that have regions with strong secessionist aspirations. Such member states may not be enthusiastic about Scotland becoming a new EU member. Though one may ask how likely this is, it is too often forgotten that France, under De Gaulle, vetoed the UK's application to join the then European Economic Community in 1963; so, nothing is guaranteed.

Were an independent Scotland to decide to join the Schengen Area, then what remained of the UK (RUK) would continue to be part of the CTA along with Ireland. The UK has an opt-out and is not the succeeding state. As such, Scottish independence by definition would mean that what is currently an "internal border" between Scotland and England would become an "international border". This scenario would result in an EU member state in the Schengen Area having a border with an EU member state not in the Schengen Area. Another current example of this is Slovenia and Croatia. The *Schengen Border Code* stipulates what is required when a Schengen country borders a non-Schengen country. A strict interpretation of this Code is that there would need to be some form of "hard border" between Scotland and England. The Code stipulates in considerable detail what is required based on geography (e.g. water or land border) and other factors. However, the usual minimum requirements are: the operation of checkpoints and border guards, the patrolling of the border, the use of documents (usually a passport) for border crossing and potentially the construction of a fence or some other physical barrier.

A recent report by the UK Government (HM Government, 2013b) concluded that the transformation of the Scotland-England border from an internal to an international border would generate significant negative "border effects". A border effect is the welfare loss caused when a border is built (or a current border in place is strengthened) as it reduces the trade in goods and services. There is very little disagreement amongst economists that border effects do exist in theory, however, there is no agreement on how important they are since the empirical evidence testing for their size and relative importance is very mixed. Even if one were to believe the UK Government's conclusion that "negative" border effects would make an independent Scotland a poorer place, it does not discuss - far less assess - any "positive" border effects generated by Scotland being a member of the (much larger) Schengen Area. Joining the Schengen Area implies a "weakening the borders between the current 26 EU member states and Scotland. The benefit to Scotland of being in the Schengen Area - and out of the CTA - is thus a trade-off for Scotland between making *one* border less transparent and *twenty six* other borders more transparent.

One final point. There are reasons to believe that Ireland could very well benefit from leaving the CTA and joining the Schengen Area. Ireland is more "pro-Europe" than the UK: it is in the Eurozone and it is unclear whether Ireland is committed to the *CTA ad infinitum*. The author's view is that much of Ireland's commitment is historic and has little to do with current economic cost-benefits and rather more with the politics of being seen to keep the border between the Republic and Northern Ireland "open at all costs". Ireland certainly does not have security concerns, which seem to be the main reason the UK Government offers for opting out of the Schengen Area. However, an independent Scotland in the Schengen Area might cause Ireland to rethink its position. Were Ireland to join the Schengen Area then what remains of the UK (RUK) would be the *only* EU member state which has not adopted the *Schengen Agreement*. What would remain of the CTA would be what remains of the UK, including the Isle of Man and the Channel Islands. This would make the UK even more isolated with respect to EU practice. In the opinion of the author, such isolation could create considerable pressure for the UK to join the Schengen Area.

5. Conclusions

This paper has examined how the SNP Government's "double desire" of independence and EU membership would impact on its ability to design and deliver an effective immigration policy. Its main conclusion is that the EU would not unduly restrict the ability of an independent Scotland to do so as most EU legislation is concerned with refugees and asylum seekers, which are not likely to be numerically important in an independent Scotland. Likewise, EU legislation says little about how economic migrants

and students should be selected; two groups that will be extremely important both numerically and economically to an independent Scotland.

There is broad consensus amongst political parties in Scotland that the current UK-wide immigration system (and recent UK-wide immigration policy) is not serving Scottish interests. It is the author's view that these interests would be better served were Scotland to be an EU member state. However, this opinion does NOT mean that these interests could not be served just as well (and perhaps even better) were Scotland to remain part of the UK. The author is convinced that the UK immigration system could be adapted to better serve Scottish interests (see Mosca and Wright, 2009). There is no need to go over old ground about how this might be achieved, suffice to say that it would require the Scottish and UK governments to work more closely on matters relating to immigration. In other words, independence is NOT the ONLY way for Scotland to deliver an effective immigration policy that meets its needs.

The *Schengen Agreement*, however, complicates matters considerably with respect to immigration. Membership in the Schengen Area is a key feature of EU legislation and policy and hence there is an expectation that all new EU member states will (eventually) join. It seems unlikely that Scotland will be given an opt-out to stay in the CTA and not join the Schengen Area. The author's view is that Scotland would benefit from being a member of the Schengen Area, even if what remains of the UK stays in the CTA. The author finds it surprising that there has been no discussion to date of the benefits of an independent Scotland joining the Schengen Area. The SNP Government has decided - even though it is not in its gift - that an independent Scotland will stay in the CTA. As noted above, the ultimate decision about an independent Scotland's membership of the EU will be made by the European Union Parliament and not by the Parliaments of Scotland or the UK.

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