

# Competition policy and economic governance in an independent Scotland

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## Abstract

The SNP's Sustainable Growth Commission updated an economic case for Scottish independence, based on strong future economic growth over many years, however without any discussion of the many institutions that would be required for economic governance and oversight to help meet such enhanced growth. An independent Scotland would require a new set of regulatory bodies – plus a system of appeals and sufficient democratic oversight by the Scottish Parliament. The Sustainable Growth Commission report draws heavily on the examples of Denmark, Finland and New Zealand whose models of economic governance and oversight vary considerably. This article reviews the constraints and freedoms that an independent Scotland would face in developing its future competition policy and economic governance.

**Keywords:** Scotland, Independence, Governance, Competition, European Union, Economic Governance.

## I Introduction

The report of the Sustainable Growth Commission (2018) (SGC) to the Scottish National Party (SNP) proposed selecting and adapting economic policies and practices from small advanced nations – principally Denmark, Finland and New Zealand – to deliver a decade of economic growth at 2.5 per cent annually, then fifteen years at 3.5 per cent annually. However, the report does not discuss whether there would be the necessary institutional capacity. One key area is competition policy, encompassing the regulation of markets in general (e.g., abuse of dominance and merger control) and of specific sectors (e.g., energy and telecommunications), plus oversight of state aid. The report is vague on the general governance of the economy, concerning the institutions that would be required to draft, consult upon, refine, and oversee implementation of the various policies, aside from two notable exceptions: the creation of a Scottish Central Bank (SCB) and Scottish Financial Authority (SFA). This paper reviews the constraints and freedoms that an independent Scotland would face in developing its future competition policy and economic governance.

The importance of institutions to economic growth was set out by North (1989), noting the importance of the ability to create institutions and the significance of path dependency. In Africa and Latin America, the lack of experience in the creation and maintenance of institutions hindered growth, in contrast to the successes of governments in the Asian tiger economies and China. The European Union has developed considerable capacity to devise institutions and to link them in governance networks, with regular revisions, arguably with excessive complexity. Whereas in the US, the pendulum swings between institutional development and efforts to roll it back. Current concerns focus on the types of institutions and policies need to regulate competition with two-sided and platform-based markets.

Section II reviews issues around competition policy in an independent Scotland. Section III analyses the economic governance of the SGC's three exemplar countries. Section IV examines the options for economic governance and competition policy in an independent Scotland. In Section V, conclusions are drawn and issues identified for further research.

## **II Competition policy**

The European Commission (EC) explains that:

*Competition policy cannot shape a fairer economy on its own, but it can make an important difference: enforcing competition law ensures that there is a voice for the consumers. Competition policy contributes towards a society that gives people choice, stimulates innovation, prevents abuses by dominant players, and drives companies to make the most of scarce resources thus contributing to addressing global challenges like climate change. (EC, 2017a)*

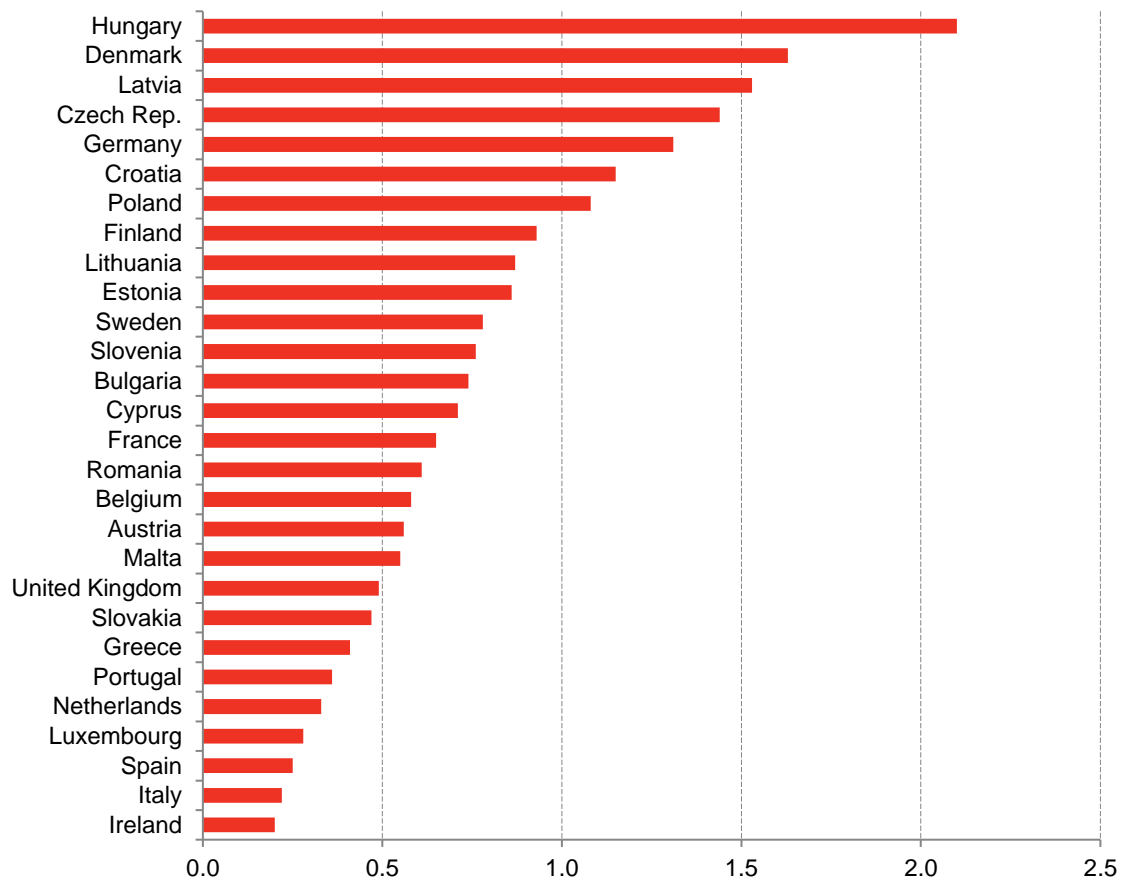
Competition policy has been a feature of the European project from the Treaty of Paris (1951), to the current Treaty on the Functioning of the European Union (TFEU, 2007). The relevant articles address:

- Antitrust and cartels;
- Merger control; and
- State aid control.

The EC is a competition authority, promoting a competition culture and handling cases that have a European dimension, or relate to state aid (EC, 2018b), supplemented by the work of European regulatory networks (ERNs) (Maggetti & Gilardi, 2011). Competition experts from the member states (MSs) sit on an advisory committee that discusses draft EC decisions and some cases

being decided by national competition authorities (NCAs) (EC, 2003). The EC and the NCAs also cooperate through the European Competition Network (ECN), for example, publishing a report on online hotel bookings (EC, 2017b).

**Figure 1** State aid as a percentage of GDP (excluding railways) (EC, 2017c)



MSs are required to have an independent NCA and a system of appeals, plus regulators for a number of economic sectors, each linked through ERNs, for example, for electricity. There is no standardised model; rather each MS has the freedom to design its own governance structures. For example, in Estonia the *Konkurentsiamet* combines the NCA and the regulation of all economic sectors, whereas a majority of MSs keep at least their competition authority separate. The United Kingdom has combined broadcasting, posts and telecommunications into a single body, the Office of Communications (Ofcom),<sup>1</sup> plus a range of other ‘offices’ (i.e., non-ministerial departments). In 2014, the United Kingdom merged the Office of Fair Trading (OFT) and Competition Commission to create the Competition and Markets Authority (CMA).

<sup>1</sup> Ofcom also has sectoral competition law powers.

State aid involves a company receiving government support that gives it an advantage over its competitors, consequently being prohibited under EU treaties, unless justified for economic development. Such exemptions are controlled by the EC and the ECJ to avoid distortions of the single market, reviewing funds to be provided by any level of government, from municipalities up to the European Investment Bank (EIB). The extent of state aid varies greatly (see Figure 1). Despite claims by the Labour Party that EU membership would constrain a putative UK Labour Government, it could, at least, double the level of state aid and remain within the framework. However, it would be more difficult to nationalise industries or to provide them with special status, given EU limits on golden shares and special rights (Putek, 2004; Werner, 2017).

An independent Scotland would certainly become a member of the Organisation for Economic Cooperation and Development (OECD)<sup>2</sup> observing its various recommendations, including its present economic strategy *Going for growth* (OECD, 2018). It would become a signatory to its various legal instruments, notably the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>3</sup> Implementation of anti-corruption policies and treaties would require creation of a unit comparable to the Serious Fraud Office (SFO).<sup>4</sup> There has been concern about money laundering through limited partnerships registered in Scotland (Leask & Smith, 2018; BBC, 2018a). OECD membership includes participation in its many committees and working parties, effectively governance networks, discussing policy issues and measures to improve outcomes, including peer reviews. A Scottish NCA would be expected to participate in:

- OECD Competition Committee (and its working parties); and
- Global Forum on Competition.

As an independent state, Scotland would have to adopt a framework for competition policy, indicating some level of intervention in the economy and to create institutions covering the role of the current UK regulators:

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<sup>2</sup> There is a complex legal argument over whether an independent Scotland must join or, as a successor state, it acquires some or all of the United Kingdom treaty obligations.

<sup>3</sup> Economic crimes would require the retention of the Bribery Act, with the capacity to enforce it, presently reliant on the Serious Fraud Office (SFO).

<sup>4</sup> Scotland would also be expected to ratify and implement the UN Convention against Corruption (UNCAC) and the Criminal and Civil Conventions on Corruption of the Council of Europe, cooperating in the work of the Group of States against Corruption (GRECO).

- Competition Appeal Tribunal (CAT);
- United Kingdom Regulators Network;
- Civil Aviation Authority (CAA);
- Financial Conduct Authority (FCA);
- Payment Systems Regulator (PSR);
- Office of Communications (OFCOM);
- Office of Gas and Electricity Markets (OFGEM);
- Water Services Regulation Authority (OFWAT);
- Office of Rail and Road (ORR);
- Single Source Regulations Office (SSRO); and
- Financial Reporting Council (FRC).

The Water Industry Commission for Scotland (WICS) is the sole regulatory body that presently serves only Scotland, though some United Kingdom bodies have representative offices. While the Scottish courts can hear competition law cases, there has been remarkably little litigation before the Court of Session, partly because the geographical definition of markets is generally either the United Kingdom or Europe. The success of the CAT would favour the creation of a similar specialist tribunal in Scotland, from where cases could proceed to the Inner House of the Court of Session and, potentially, to a Scottish Supreme Court.

Independence, in the sense of institutions rather than the state, is essential in economic regulation to protect decision-making from political interference, an issue avoided both by the SGC and by the SNP in its 2014 independence referendum campaign. Nonetheless, there are EU *acquis* obligations requiring the institutional independence of a number of agencies and widely accepted evidence that economic performance and the quality of governance are improved thereby (Gilardi, 2002; 2005; 2007; Guidi, 2015; Maggetti, 2009). A challenge faced by the EU has been to convince some accession countries of the benefits of making institutions genuinely distinct and separate from government, freeing their decision-making from ministerial influence, especially media regulators. In smaller countries, institutional independence can be problematic, given that many individuals know each other from school, university, work or socially.

Regulatory capture is an extreme form of influence, in which agencies act for regulated firms rather than for citizens and the economy. To prevent this, measures to typically address include (Laffont & Tirole, 1991; Dal Bó, 2006; Hong & Kim, 2017):

- Clarity of legal powers;
- Appellate systems;
- Collegiate boards with staggered renewal dates for commissioners; and
- Delays on individuals taking up posts in regulated firms.<sup>5</sup>

More challenging than the design of the future competition policy and institutions would be the transition from the current United Kingdom governance to a future Scottish governance. The simplest option would be to roll-over a list of relevant statutes and statutory instruments, adding “Scottish” to the names of the current institutions and legislation to avoid confusion, and to begin recruiting qualified and experienced people for the various agencies. Licences could be split at the border, ‘grandfathering’ the existing conditions and made subject to Scottish regulators and courts. However, this could not wait for independence, but would require agencies, licences, policies and parliamentary oversight arrangements to be operational much earlier. It would be necessary to draft legislation during a referendum campaign, so that in the event of a vote for independence, the Scottish Parliament could immediately be given the powers to scrutinise and enact essential legislation, in order that agencies could be brought into existence in good time. To ensure a smooth transition the agencies could then rent offices, recruit staff, develop computer systems, and begin to consult on their policies and on the adaptation of licences. An area of concern could be Scotland’s small market size, the sometimes challenging geography and low population density, which operators could claim justified higher retail or wholesale tariffs, to compensate for their inability to spread the costs over a larger population.<sup>6</sup> The new agencies would have to create coordination mechanisms with each other and with their counterparts in the rest of the United Kingdom and the EU, notably where market definitions included both Scotland and the rest of the United Kingdom or had a European dimension.

The transition would require input from business users and consumers to the many consultations, activities that are presently concentrated in Brussels and London. This would be

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<sup>5</sup> To avoid the ‘revolving doors’ problem.

<sup>6</sup> Presumably London-based regulators would try to reduce prices and tariffs for the same reason.

likely to require additional funding, training for existing organisations and the creation of new organisations. For example, Scottish Ministers have rarely published regulatory impact assessments (RIAs), which are commonly used by regulators in their consultations, requiring sufficient understanding by parties planning to respond. Good governance relies on informed responses to consultations and periodic appeals to the courts, which require engagement, funding, and skills.

In addition to the headline agencies, there is a wide range of other bodies presently involved in market governance. For example, Table 1 shows the array of bodies in and around the telecommunications sector, the functions of which, if not their structures would have to be replicated.

The issues of competition and regulatory policy in an independent Scotland are unavoidable. They are not especially contentious, since in the first instance they would entail rolling over existing UK institutions and policies, making only essential changes and then organising regular reviews of laws, policies and institutions. The metagovernance priority would be to ensure a smooth transition and parliamentary oversight of institutions.

**Table 1** UK regulatory institutions in the ICT sector (Sutherland, 2017)

<i>Name</i>	<i>Status</i>	<i>Functions</i>
Advertising Standards Authority (ASA)	Independent	Regulator of advertising across all media, including marketing on websites
Competition and Markets Authority	Non-ministerial department	The CMA is the UK national competition authority (e.g., merger control). Handles some appeals from OFCOM
Office of Communications (OFCOM)	Non-ministerial department‡	OFCOM is sector and competition law regulator for broadcasting, posts, and telecommunications
Communications and Internet Services Adjudication Scheme	Independent*	CISAS provides customers of communications companies (e.g., telephone and broadband) with free, independent dispute resolution
Ombudsman Services – Communications	Independent*	Resolves complaints from consumers about phone and broadband companies
Telephone Preference Service (TPS)	Independent*	An opt-out service for customers wishing not receive to unsolicited sales or marketing calls
Office of Telecommunication Adjudicator (OTA <sup>2</sup> )	Independent*	Oversees co-operation between communications providers and enables a competitive environment
Broadband Stakeholder Group	Independent‡	UK government’s advisory forum for telecommunications
Network Interoperability (NICC)	Independent	Technical forum that develops interoperability standards for public communications networks and services
Competition Appeal Tribunal (CAT)	Judicial	Specialist judicial body with expertise in law, economics, business and accountancy, that hears and decides cases involving competition or economic regulatory issues
General Communications Headquarters (GCHQ)	Government department	Works with other intelligence agencies, other departments, law enforcement and industry to defend government systems from cyber threats and strives to keep the public safe, in real life and online.
National Cyber Security Centre (NCSC)	Part of GCHQ	Helps protect critical services, managing major incidents and improving the security of the UK Internet through technology and advice to citizens and organisations
Interception of Communications Commissioner’s Office (IOCCO)	Non-ministerial department	Reviews the interception of communications and the acquisition and disclosure of communications data by intelligence agencies, police forces and other public authorities
Investigatory Powers Tribunal (IPT)	Judicial	Investigates & determines complaints alleging that public authorities or law enforcement agencies have unlawfully used covert techniques and infringed our right to privacy
Gambling Commission	Non-departmental public body‡	Regulates commercial gambling and the National Lottery
Information Commissioner’s Office (ICO)	Independent	Upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals
Internet Watch Foundation (IWF)	Independent	Maintains UK hotline for reporting criminal online content
UK Council for Child Internet Safety (UKCCIS)	Government led body	A group of more than 200 organisations including government, industry, law, academia and charity sectors that works to help keep children safe online
UK Safer Internet Centre	Partnership	SWGfL, Childnet International and IWF - promoting the safe and responsible use of technology for young people
Child Exploitation and Online Protection Centre (CEOP)	Police	Dedicated to eradicating the sexual abuse of children

\* Approved by OFCOM

‡ sponsored by the Department for Digital, Culture, Media and Sport (DCMS).



### III Regulatory landscapes in three small nations

The SGC drew on experiences from three advanced small states:

- Denmark;
- Finland; and
- New Zealand

The first two are EU member states which helped produce and are in full compliance with the EU *acquis*, and are deeply embedded in EU institutions. While Finland is in the Eurozone, the Danish Krona is only pegged to the Euro. Both follow the ‘Nordic model’, being small, open economies delivering stable and sustainable growth, with ambitious welfare systems and comprehensive public sectors financed by high taxes. New Zealand is quite different being a group of rather remote Pacific islands that was formerly in the British Empire.

**Table 2** Denmark, Finland, New Zealand and the UK compared

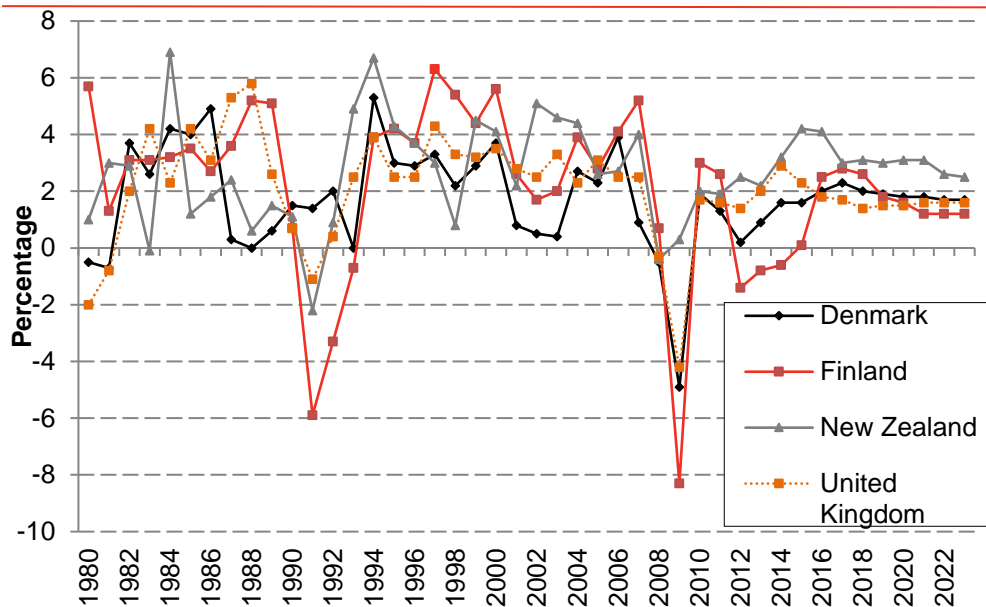
<i>Indicator</i>	<i>Units</i>	<i>Denmark</i>	<i>Finland</i>	<i>New Zealand</i>	<i>United Kingdom</i>
Population	millions	5.8	5.5	4.8	66.6
Population density	per km <sup>2</sup>	136	16	18	276
Life expectancy	years	79.5	81.0	81.3	81.8
GDP per capita (current prices)	USD	53,730	43,339	40,233	40,249
Real GDP growth	% pa	2.0	2.6	3.1	1.4
Government revenue	% of GDP	53.1	54.4	39.2	38.0
GINI co-efficient	score	28.2	27.1	-	33.2
Doing Business	rank	3	11	1	7
FDI – Net inflows	USD millions	-2,266	10,851	3,237	64,685
FDI – Net outflows	USD millions	13,309	11,155	486	147,078
Human Development Index	score	0.929	0.920	0.917	0.922
	rank	11 <sup>th</sup>	15 <sup>th</sup>	16 <sup>th</sup>	14 <sup>th</sup>

Sources: CIA, IMF, OECD, UNDP and World Bank

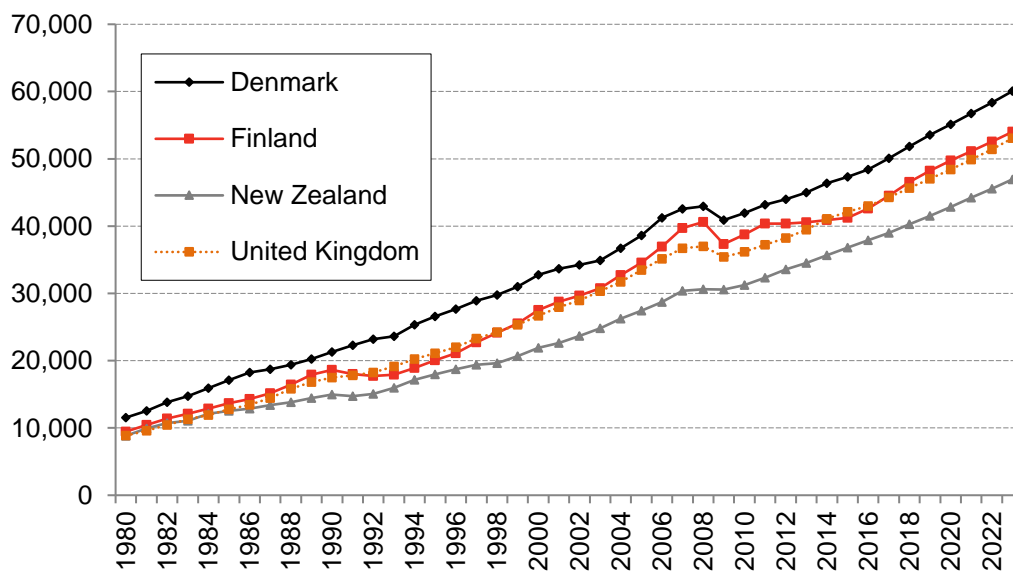
The three differ greatly in their economic, physical and political geographies (see Table 2); Denmark has a much higher population density, while New Zealand has markedly lower government revenues and taxes. Picking elements of their competition, economic and regulatory policies would require very detailed analysis, identifying particular circumstances and path

dependencies, then judicious adaptation. Figure 2 shows the GDP growth of the three, together with that of the United Kingdom, while Figure 3 shows GDP per capita, neither of which suggests that the three smaller nations have outperformed the United Kingdom to any significant extent.

**Figure 2** Real GDP annual growth (IMF, 2018a)



**Figure 3** GDP per capita, current prices PPP USD (IMF, 2018b)



(i) Denmark

Denmark is a member of networks of competition authorities in the Nordic region, EU and OECD. It is also a member of the International Monetary Fund (IMF), which analyses its policies annually, observing that: “Competition in the services sector could be improved further by enhancing the powers of the Competition Council in relation to companies breaching regulations and exploiting their dominant market position” (IMF, 2018c). Its competition policy has been peer reviewed by OECD countries (OECD, 2015). Its government established a Productivity Commission (Produktivitetskommissionen, 2014) that identified steps to be taken to improve productivity that had been lagging other economies, especially larger economies.

In 2010, the Danish Competition Authority and the Danish Consumer Agency (itself the result of a previous merger of the Danish Consumer Complaints Board and the Danish Consumer Ombudsman) were merged to become the Danish Competition and Consumer Authority (DCCA), activities which the government argued were closely related. Unusually, the DCCA lies within the Ministry of Business and Growth, rather than being an independent executive agency. In matters of the enforcement of the Competition Act, the Competition Council and the DCCA are independent of the minister. However, enforcement of the Competition Act is split between the DCCA and the public prosecutor, only the latter can initiate prosecutions for the imposition of fines. Legislative amendments from 2015 provided greater independence from the Ministry and a more streamlined and expert Competition Council, its decision-making body.

(ii) Finland

Finland is also a member of the networks of the IMF, EU, OECD, and Nordic countries, with the corresponding analyses, reports and statistics. Its economy is presently considered to be performing well:

*Robust output growth is projected on the back of a rebound in exports and continued strength in domestic demand. Private consumption will keep growing steadily in 2018, thanks to a rise in earnings and employment. (OECD, 2018, p. 139)*

In the second half of the 20<sup>th</sup> century, economic and social development of Finland was a success, the result of continuous investment in education, research and innovation, enabling the transition from a largely resource-based to a knowledge-based economy, adopting high-technology manufacturing and knowledge-based services. However, it was hit hard by the 2007 global financial crisis and by technological disruptions that almost destroyed the mobile handset business of Nokia (Doz & Wilson, 2017), leading to a sharp drop in ICT exports and

business enterprise R&D (BERD). It also lost ground in terms of productivity and competitiveness. Nonetheless, Finland retains substantial innovation capabilities and is considered able to diversify from the relatively narrow range of industries in which it has enjoyed comparative advantage. A review of innovation policy suggested strengthening the focus and level of spending both on established industries and on building new export strengths (OECD, 2017).

In 2013, the Finnish Competition Authority and Finnish Consumer Agency were merged to form the *Kilpailu- ja kuluttajavirastosta* (KKV, 2018) or Finnish Competition and Consumer Authority. The EC noted it had increased competition in services, in response to its country-specific recommendation (EC, 2018c). A peer review found regulatory agencies had limited independence, reporting to and being closely tied to parent ministries, unlike many other EU countries (OECD, 2010). Reforms to the constitution had strengthened the role of parliament in public governance and enhanced the role of the courts. A previous review noted the need to continue to improve the regulatory framework and reduce the administrative burden to increase competition in services and to promote investment (OECD, 2003).

### (iii) New Zealand

Geographically, New Zealand is remote. Entry into its market is more difficult than is the case in Denmark or Finland, since it is not part of a larger single market and there are few ways for businesses to share costs with operations in its neighbours, such as Australia, Chile, Hawaii or the Pacific island states. Politically, it has undergone major policy innovations, enabled by first-past-the-post rather than proportional voting system combined with its unicameral parliament that allows governments an unusually free hand to effect change. In 1984 New Zealand:

*...embarked on what evolved into one of the most comprehensive programs of economic reform of any OECD country in recent decades (Evans, Grimes, Wilkinson, & Teece, 1996, p. 1860).*

Government departments that provided services were converted into state-owned enterprises (SOEs), many were privatised, stripped of any provision of policy advice and the administration of government programmes. Industry and competition policies focused on developing a competitive environment, with markets determining commercial outcomes, without support for any economic sector (Bridgman & Barry, 2002). What had been one of the most interventionist of the OECD economies became one of the most open and market-based. Under the Commerce

Act of 1986, competition policy aimed to minimise governmental and regulatory interventions, relying instead on actual and potential competition to regulate prices and monopoly behaviour.

New Zealand has a productivity problem, partly attributed to firms not learning from global leaders in their sectors, the weak diffusion of technology and the survival of poorer performing firms in the absence of market entry due to geographic isolation (Conway, 2018). Firms generally have weak international connections and do not participate in global value chains (GVCs), while there is limited inward and low outward FDI. As much as 40 per cent of the productivity gap compared with the OECD average reflected weak investment in knowledge-based assets (Serres, Yashiro, & Boulhol, 2014). Its economic growth has been achieved by increased participation in the workforce.

(iv) All three country examples considered

The three examples highlight the complexities of path dependencies, institutional histories, and political constraints that influence regulatory design and practice. At one extreme lies New Zealand, with its low taxation and avoidance of state aid, made possible by its unicameral majoritarianism, while Denmark and Finland are tied into multi-level governance networks of the Nordic states and the EU. While these limit their freedom to innovate or differentiate in policies, they also provide reinforcement for the advocacy of pro-competitive policies and practices. It is likely that an independent Scotland would lie somewhat closer to that of Denmark and Finland than to New Zealand though if it remained a unicameral parliament it would have the potential for quite rapid change.

## **IV Good governance in an independent Scotland**

The SGC had little to say about governance or the design of institutions and systems. Insofar as it described policy-making and implementation in its hypothetical independent Scotland it was as a collective process, in which many parties would be subject to Gramscian co-optation to arrive at a broad consensus (Cox, 1983). While there would be yet more non-departmental public bodies (NDPBs) to advise government, there was no discussion of the scrutiny of their creation, appointment of officials, processes or outputs, or the roles that might be played by citizen juries, media, or town hall meetings. Nor was the issue of judicial review in the Court of Session addressed nor a possible supreme court, though this would surely become more frequent, requiring the applicable criteria to be weighed carefully (Auburn, Moffett, & Sharland, 2013; Knight, 2018). The emphasis was on answers, rather than on discussing the creation of high

quality institutions and processes that would ensure the long-term decision-making needed to maintain rapid growth.

### *The Scottish Parliament*

Perhaps the most critical issue of all is the role of the Scottish Parliament, which would undoubtedly have a major role in the negotiations for and transition to independence, then a continuing role to ensure accountability and transparency of government and agencies, with its members in turn being held accountable in elections. Independence would greatly increase the powers of Scottish Ministers and, presumably, their numbers, requiring a comparable increase in the range of committees and the time for questioning ministers in the Scottish Parliament. The present arrangements for committees reflect an ever-changing and ephemeral composition of ministerial portfolios, which limits the capacity of committee members to develop subject expertise and thus reduces their effectiveness (Arter, 2004; Cairney, 2006; Halpin, MacLeod, & McLaverty, 2012). Minimally, there would need to be more committees to oversee additional ministers and agencies, ideally with portfolios decided by the Scottish Parliament – rather than the First Minister – and with elected rather than appointed convenors. The committees need to be reinforced with more staff and the hiring of more experts to support specific studies. In addition, the issue of conflicts of interest would have to be explicitly addressed.

### *A second chamber?*

An argument could be made for a second or deliberative chamber, representing the diverse geography of Scotland, comparable to the German Bundesrat or the US Senate. (Diermeier & Myerson, 1999; Rogers, 2003; Benz, 2018). However, the three small countries referenced in the SGC report all have unicameral legislatures. The challenges would be decide if and how to create a second chamber or senate, a body better able to deliberate and to take a longer term and wider geographic view of legislation and policies. It would be vastly smaller and more democratic than the House of Lords, but perform similar functions.

### *Think Tanks*

A further gap is in the capacity of think tanks and similar organisations, which have typically been located in London and in Brussels. While these have grown over the years of devolution, they would need to be boosted in capacity, geographic coverage and numbers, while ensuring they remained independent. The value of critical voices should not be understated.

### *Mergers*

At present, the acquisition of companies listed on the London Stock Exchange (LSE) is handled by The Takeover Panel using its code, an arrangement that would presumably continue.<sup>7</sup> These arrangements would seem likely to remain in place. A somewhat similar arrangement applies with the Advertising Standards Authority (ASA) with its codes, though logically this should be replicated. It could be argued that such governance activities ought to be brought under a statutory agency directly responsible to the Scottish Parliament.

### *Press regulation*

A contentious area of regulation would be the press, where there are no easy solutions and regulation is presently asymmetric with broadcasting and the Internet. By Royal Charter, HMG created a meta-regulator, the Press Recognition Panel (PRP), to determine whether press regulators meet the criteria recommended by the Leveson Inquiry. There are two regulators, the Independent Press Standards Organisation (IPSO) covering most national newspapers, and IMPRESS for a smaller number of outlets, only the latter has been recognised by the PRP. In addition to questions about the form of media regulation, a question arises about the Privy Council, which approves Royal Charters, not only for the PRP but also for universities and many other bodies. The Scottish Privy Council has apparently not met since 1706 and its revival could be considered anachronistic, opening the question of more modern processes and organisations.

### *Infrastructure: housing and transport*

The high levels of economic growth call for continuous work on building houses and infrastructure. This would need to avoid unnecessary blockages of NIMBY-ism, such as opposition to the construction of new housing, railways and roads. Clearly, there are lessons to be learned from careful analysis of the failures of the Edinburgh tram scheme, the delays in the Network Rail electrification of the Edinburgh-Glasgow rail link and the interminable discussions of a rail link to Glasgow Airport.

### *The digital economy and data protection*

Given the importance assigned to digitalisation of the economy in the SGC report and talk of a 'Fourth industrial evolution' (4IR), data protection would be critical. The present framework is

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<sup>7</sup> <http://www.thetakeoverpanel.org.uk/>

the General Data Protection Regulation (GDPR) 2016/679,<sup>8</sup> transposed as the Data Protection Act 2018,<sup>9</sup> enforced by the Information Commissioner's Office (ICO) in the United Kingdom, with coordination through the European Data Protection Board (EDPB).<sup>10</sup> Brexit takes the ICO out of the EDPB and removes from citizens the unique protection of Article 8 of the European Union Charter of Fundamental Rights, a unique right to data protection.<sup>11</sup> The EU combination of laws and institutions represents the highest level of data protection. Independence would require Scotland to replicate the ICO, the Data Protection Act 2018, and, if an EU MS, to sign up to the Charter of Fundamental Rights. A Scottish ICO would have to ensure organisations complied with the GDPR.

Rather than try to answer questions definitively, it would have been useful had the SGC recognised the importance of the systems that would be used to govern the economy of its independent Scotland. Delivery of high levels of growth and of improved productivity would require the development of institutions fitted to the communities of interest in Scotland.

## **V Conclusions**

The report by the Sustainable Growth Commission gives insufficient weight to the importance of metagovernance for a democratic society. The very high targets for growth necessitate careful formulation of economic policies, detailed planning, thoughtful implementation and scrupulous oversight, rather than calling for everyone to put their shoulders to the wheel in some kind of Stakhanovite endeavour. The design of institutions and processes, must aim for systems that achieve and maintain high levels of growth, and ensure equally high levels of accountability and transparency. It would be necessary to avoid problems of economic overheating, by preemptively addressing bottlenecks, such as in the supply of skilled labour, housing and transport, requiring coordination across a wide range of government directorates and agencies, some of them newly created, at a time of considerable disruption. Overheating could increase inflation, putting pressure on a future Scottish Central Bank, which itself would be constrained by the SGC's choice of sterlingisation.

A key omission is any discussion of the role the Scottish Parliament, creating massive gaps in oversight and a potentially large democratic deficit, at a time when Scotland would need to

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<sup>8</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679>

<sup>9</sup> <http://www.legislation.gov.uk/ukpga/2018/12/contents>

<sup>10</sup> Formerly the Article 29 Working Party.

<sup>11</sup> Other treaties are limited to privacy, from which data protection has to be inferred.



overcome deep divisions. Parliamentary scrutiny would require a substantially strengthened set of committees with functional specialisations to hold ministers, officials and the burgeoning agencies to account. This would be true in the medium term, but also in the short term, especially in overseeing the transition to independence and scrutinising the voluminous legislation. Independence necessitates new structures, new processes and, potentially, a second chamber to reflect Scotland's geographical diversity and to enhance deliberation and scrutiny. Equally, a new constitutional or supreme court might be needed.

Aside from banking, there is a need to discuss the institutions that would be required in a putatively independent Scotland. One answer is to simply replicate or roll over existing UK laws and institutions – and this could be a short term response to not scare the horses. However, further consideration is needed of how such institutions would be created, and (crucially) be made independent of Scottish Ministers. It raises the medium term question of how coalitions of interest might wish to shape those institutions in ways different from today – towards a coordinated market economy (CME) or a liberal market economy (LME) and, more importantly, how is that to be decided?

If nothing else has been learned from Brexit, it is the importance of customs agreements in a globalised economy. Given centuries of integration in a customs union with England, Wales and Northern Ireland, the negotiation of a replacement agreement between an independent Scotland and rUK would seem likely to be difficult, especially if Brexit had gone wrong. The omission of the difficulties of negotiations and the likely economic costs of the different scenarios needs to be remedied.

Having lived through Brexit, it is unsustainable to now simply ignore the potentially difficult transition from the present day institutions and policies of the United Kingdom to those of an independent Scotland. Unsuccessful management of any transition could result in the loss of firms and the consolidation of markets in ways that would diminish growth, hurt consumers, constrain wages and limit future options. Companies presently engage with and understand the rules of the United Kingdom, admittedly confused by the very significant uncertainties of various “hardnesses” of Brexit. They would have to learn about the new institutions and policies of an independent Scotland, and create new capacity for lobbying and litigation. Some firms might view this as unwelcome, with additional costs and the need to coordinate with their United Kingdom activities, consequently preferring to sell to a local firm or individuals with greater expertise in and knowledge of Scotland's courts, politics, public administration and regulations.

None of the institutional requirements is especially difficult, given sufficient planning, nor need they be contentious. It would be possible to expand some existing institutions, while replicating United Kingdom models for others, in some cases building on their limited operations in Scotland. In time, it would be appropriate to conduct reviews and to revise the structures, requiring formal mechanisms, perhaps aided by the proposed Productivity Commission. It would also be necessary to be ready to take part in - and learn from - international governance networks such as the OECD and, perhaps, the EU. In the area of competition policy, it would be essential to establish relationships with the pre-existing bodies in the United Kingdom, in order to be able to consider jointly mergers and cross-border issues, such as physical distribution and transport. Denying the administrative challenges in creating institutions and cross-border arrangements would be to repeat the grave errors of the Brexiteers.

None of the issues are insurmountable, indeed many may not be. However, in any future prospectus for an independent Scotland – especially given the painful UK and Scottish experience of Brexit – it is vital that issues of economic governance, including competition policy, are addressed to ensure a smooth and successful transition to a high growth independent Scotland.

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