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AN EU BORDER ACROSS BRITAIN: SCOTLAND'S BORDERS AFTER INDEPENDENCE

KATY HAYWARD AND NICOLA McEWEN

FOREWORD

For many, Brexit has renewed interest in the issue of Scottish independence. It has also changed the nature of the debate, given the fact that Brexit will necessarily alter the nature of the relationship between an independent Scotland — particularly one in the EU — and the rest of the United Kingdom.

In this fascinating report, Katy Hayward and Nicola McEwen consider one crucial aspect of independence — what Scotland's borders might look like.

I'd like to express my heartfelt gratitude to Katy and Nicola for putting together such a fascinating and thought-provoking piece of work. Thanks too to Jill Rutter for providing numerous comments on earlier drafts, to John-Paul Salter for checking the final copy, and to Tom Mansfield for sorting out publication and design.

I hope you will find the report every bit as informative and interesting as I did.

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Professor Anand Menon
Director, UK in a Changing Europe

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ABOUT THE AUTHORS

Katy Hayward is Professor of Political Sociology at Queen's University Belfast and a Senior Fellow with UK in a Changing Europe

Nicola McEwen is Professor of Territorial Politics at the University of Edinburgh and a Senior Fellow with UK in a Changing Europe

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EXECUTIVE SUMMARY

- Brexit has reenergised the campaign for Scottish independence, but it has made the practicalities of independence more complex. This is exemplified in the question of how Scotland would manage its borders as an independent nation-state and, potentially, as an EU member state too.

- Border management requires knowing what is crossing the border, that it meets the criteria for entry, and that entry can be prevented if it does not. A variety of 'at the border' and some 'behind the border' processes are necessary to regulate the flow of goods, services, people and money entering a country. For the state itself, these entail the use of information, technology, infrastructure and personnel.

- Assuming an independent Scotland joined the European Union, the trading relationship between Scotland and England/Wales would become that between the Britain and the EU, governed by the terms of the UK-EU Trade and Cooperation Agreement (TCA). However, the UK-EU trading relationship at a point at which Scotland transitions to independence within the EU may be very different from the one we see today. The rules governing that relationship would shape the nature of the border between Scotland and the rest of the UK, and the scale of the task required to manage it.

- The TCA permits tariff-free trade in goods, but imposes requirements for customs declarations, checks and controls on that trade. These requirements are particularly acute for agri-foods and other heavily regulated products, such as medicines. Such requirements give rise to logistical and other challenges for moving goods across a border.

- The challenges of a harder border are not just felt 'at' a borderline itself. The terms of the TCA also mean that there could be no automatic retention of free movement of services, capital or (increasingly) digital data between Scotland and the rest of Britain, because these policy arenas are becoming ever more subject to the competence of the EU.

- EU border controls would not be necessary between Scotland and Northern Ireland if the Protocol on Ireland/Northern Ireland was fully operational at the same time as Scotland became a full EU member state because the Protocol enables free movement of goods between Northern Ireland and the EU.

- While an independent Scotland's membership of the EU would pose new challenges for Scotland's trading relationship with its closest neighbour, it would have a 'de-bordering' effect in its relations with Europe, opening up the markets of the 31 countries in the European single market. This could revive opportunities for the free movement of Scottish goods, services, people and finance across Europe, and vice versa.

- We anticipate that an independent Scotland negotiating entry to the European Union would be likely to secure an opt-out from the EU Schengen Agreement on a similar basis to Ireland. This would enable continued participation in the Common Travel Area, which permits British and Irish citizens to move freely and live, work, study and access services across the two isles.

- Any detailed prospectus or white paper intended to instil confidence in a transition to independence should confront the challenges Brexit has presented for managing Scotland's borders. This report outlines some of these challenges, and is intended to contribute to policy development and debate.

INTRODUCTION

The white paper, *Scotland's Future*, which set out a vision for Scottish independence ahead of the 2014 referendum, assumed that Scotland and the rest of the United Kingdom would remain members of the European Union. That assumption underpinned several of its proposals, including the absence of border controls, a shared labour market, and shared governance of some service delivery and public bodies.

But, despite 62% of Scots voting Remain in the 2016 referendum, Scotland has now left the EU along with the rest of the UK. These divergent Brexit preferences, as well as the manner in which Brexit was negotiated, have given further momentum to the case for Scottish independence. In May 2021, the SNP gained a new electoral mandate to hold an independence referendum. The SNP government, supported by its partners, the Scottish Greens, is committed to holding a referendum before the end of 2023.

There may be barriers in the way of a referendum. The current UK government is likely to refuse to transfer authority to the Scottish Parliament to ensure referendum legislation is within its law-making powers and may mount a legal challenge to a referendum bill. We therefore make no predictions about whether a referendum will take place in 2023 or thereafter, nor do we speculate on the outcome of any referendum that might take place. Instead, we examine new challenges that Brexit poses to the prospect of independence, with a focus on the borders Scotland shares with the rest of the UK.

Membership of the European Union remains central to the independence platform of both the Scottish National Party and the Scottish Greens. Some voices within the national movement advocate European Free Trade Association membership as an alternative, but these are dwarfed by EU advocates. Were Scotland to negotiate independence from the UK, it would almost certainly enter into negotiations with the European Union with a view to becoming a new member-state — a process known as accession. This process would involve detailed technical discussions, and Scotland's membership would require the consent of all 27 members, and there are no guarantees that negotiations would lead to a successful outcome. On balance, however, we regard the negotiated entry of Scotland — an advanced, resource-rich, European liberal democracy, with a long history of membership as part of the UK — to be more likely than not.

This report considers the prospect of an independent Scotland within the European Union, not as a prediction, but to illustrate how Brexit has profoundly

changed the context in which independence is contested and could be realised. If an independent Scotland were to join the EU, the Anglo-Scottish border would become not just an international border between Scotland and what remains of the UK, but a new land border between the EU and the UK. Some of the cross-border arrangements for an independent Scotland that had been envisaged in the 2014 referendum would no longer be possible as a result of the UK's departure from the EU. Because we know what is required by the EU at its external borders, it is possible to outline the border-related ramifications for an independent Scotland with EU membership. Such ramifications centre upon the land border with its closest neighbour.

UNDERSTANDING BORDERS

WHAT IS A BORDER?

A border is most commonly symbolised by the line on the map that demarcates one state's territory from another. Any border is of concern to the countries on either side of it — and its significance is affected by the degree of similarity and difference between them.

There is already a border between Scotland and England, though the only physical infrastructure to indicate it are the signposts and occasional flags that welcome those crossing it. The border marks the boundaries of political communities and, for many, national identities. It also delineates one jurisdiction as distinct from the other. Those living on either side of the border have a differing set of entitlements to public services, a different set of obligations to the state (including tax rates), and live under distinctive sets of rules and regulations crafted and implemented by different governments and public authorities.

Some of this distinctiveness pre-dates devolution, but the establishment of the Scottish Parliament has reinforced the extent to which public services and public law are different on either side of the border. Recently, Covid-19 has shone a light on the significance of the UK's internal borders, as the UK and devolved governments have sometimes introduced different rules and regulations to confront the pandemic.

In considering the nature of borders, we should also acknowledge the distinctiveness of border regions. Sometimes known as borderlands, these regions span both sides of the border. Those living in border regions may forge their own sense of identity, emerging from cross-border interactions for work, shopping or leisure, as well as shared communication networks sustained by local media. For many in a border region, the proximity of an open or soft border can mean expanded opportunities, experience and a shared border community identity.

The 'hardening' of a border, or a change in its status, tends to be felt most acutely by people living in border regions, who have to navigate the differences on both sides of a border in the most direct ways. A 'harder' or less open border can have social and psychological consequences as well as economic, legal and political ones. Trends in voter preferences suggest that the Scottish Borders may be the area of Scotland that is least likely to back independence in a referendum. This underlines the need for political sensitivity and care in the process of delineating and introducing any new border management measures.

DO BORDERS MATTER?

Globalisation and economic interdependence led to a process of 'debordering'. The global flows of people, money, goods, services and ideas have in some ways diminished the importance of international borders and given rise to the notion of a 'borderless world'. Nowhere has this been more evident than in the European Union, where a process of 'debordering' was actively encouraged by policy decisions.

Regulations designed to strengthen the 'internal market' sought to remove barriers to the free movement of citizens (for study, residence and work), goods, services and capital within the EU. Economic and monetary union and the single currency have promoted the flow of money and trade across the Eurozone countries. The Schengen Agreement (between most EU member states and countries within the European Economic Area and Switzerland) went further in eliminating border controls on people between participating countries by creating a common policy for short-term visas from third countries.

However, even within the EU's single market and the Schengen Zone, the impact of border controls can still be felt in very real ways. For example, police checks in train stations are conducted to check individuals' immigration status, and we have seen temporary imposition of controls on the movement of people across national (and regional) borders in response to security threats, cross-border crime or the spread of disease and viruses such as COVID-19.

Removing internal borders within the EU's single market and the Schengen area has also necessitated common and strict controls at the members' external borders with third countries. This is evident, of course, in controls at airports and sea ports as well as the outer geographical edges of Europe.

Brexit, too, has prompted a new form of rebordering for the UK and the EU. Brexit negotiations resulted in a 'hard' Brexit, which has generated new barriers that disrupt the flow of goods, services, people and capital between the UK and the EU. It can be expected that independence would likewise generate new barriers or frictions on flows between Scotland and remainder of the UK. The scale and scope of these barriers — the softness or hardness of the border — would be shaped by the outcome of independence negotiations. If Scotland rejoins the EU after independence, and thus follows the rules-based system of the EU, this 'bordering' process would be heavily influenced by the evolving relationship between the EU and the UK, and the extent to which the UK's rules and regulations converged with, or diverged from, EU law.

BORDER MANAGEMENT AND BORDER CONTROL

WHY BORDER MANAGEMENT MATTERS

Controlling the borders of a state means, in principle, being able to decide what enters (and what exits) the country. This means that you need to know what is crossing the border, that it meets the criteria for entry, and that entry can be prevented if it does not.

Different things move across borders: people, animals, plants, goods. And they may do so for very different purposes, such as family reunification, horticultural shows, retail, processing into other products. Border controls need to manage and be appropriate for a wide variety of movements, rules and scenarios — as such, they are about much more than immigration and trade.
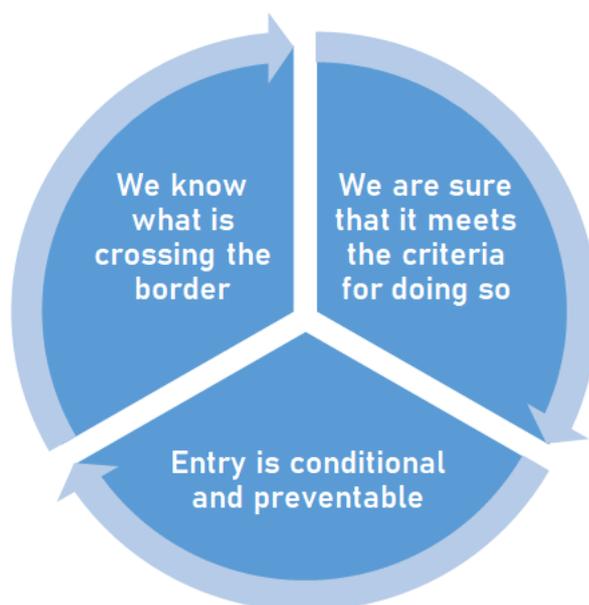
Originally published in Hayward, K. The Irish Border, Sage (2021)

All controls centre on information in the first instance. It is the production and sharing of the relevant data that causes the 'paperwork' burden that adds friction, costs and time to the movement of goods. The greater the regulatory divergence between England and the EU, the greater the challenge for managing the land border of an independent Scotland, because the greater the likelihood that goods crossing south to north won't meet the necessary criteria for entry. Effective border checks and controls would then become all the more important.

WHAT BORDER MANAGEMENT ENTAILS

There are different types of border controls that could conceivably come into play between an independent Scotland within the EU's internal market and customs union and non-EU member states, including England and Wales. If the Protocol on Ireland/Northern Ireland were fully operational at such a point (thus allowing free movement of goods between NI and EU member states), the movement of Scottish goods into Northern Ireland would become easier than at present. And the matter of Northern Ireland goods having unfettered access into Scotland would come automatically as a consequence of the Protocol, rather than, as now, under the UK Internal Market Act (2020). For third country goods, both Scotland and NI would be applying the Union Customs Code, with one notable difference: Scotland would apply the EU's Common External Tariff on third country goods and, because Northern Ireland remains in the UK customs territory under the Protocol, it would continue to apply UK tariffs and quotas on third country imports. The fundamentals of how this is managed would not necessarily change.

The practices used by authorities to regulate the flow of people and goods across a border also often take place away from the actual border line. The impact of borders can therefore be felt at a distance from a border too. For example, travellers confront bordering practices not just at the point they enter a country, but also when they complete online passenger information forms from their computers at home. Workplaces, too, have become sites of border control. Employees are often required to validate their right to work, or students their right to study, with passports, visas and registered attendance. Importers and exporters may be required to complete forms and secure certification to prove eligibility for cross-border trade. In all cases, failing to provide the right information can result in entry/work/study/trade being refused or delayed.

VARIETIES OF BORDER CONTROL

Passport controls are used at points of entry to manage the flow of people across borders. Passport controls verify the right of entry of people into the country. These may also involve officials checking stamps on a passport at exit to see when a person entered the territory to make sure they have not stayed longer than allowed (for example, no more than 90 days in a 180-day period for British citizens in the EU). They may also include checking visas and documents verifying the veracity of statements made earlier in support of visa applications.

In addition, passport controls allow security checks of the type that might capture people wanted by criminal justice organisations. A variety of non-human checks, such as e-passport gates and facial recognition technology, can also

be deployed. Some countries have joint agreements in place to permit passport and visa free travel across their shared borders, though this requires shared commitments to reinforce their external borders. Passport checks and monitoring of foreign nationals away from the border are also commonplace, often at points of access to public services such as health and education.

Safety and security declarations can be considered the baseline type of declaration needed for moving a good from one territory to another, in order to help border authorities assess the level of risk associated with goods crossing the border. These are usually required in advance of arrival at the border, and may apply to movement in both directions — at exit and entry.

Customs procedures are primarily designed to prevent smuggling illegal or counterfeit goods across a customs border, and to ensure that any duties (taxes) liable are paid. What this means in practice is that, unless certain conditions apply (for example, when the economic operator has 'Trusted Trader' status) a good crossing a customs border is accompanied by a declaration as to what it is. Sometimes this can be brief, with a more detailed supplementary one completed at a later point. But the level of detail required for customs processing can be considerable and the data needs to be submitted into the specific IT systems being used by the countries in question, and can apply to imports, exports and goods in transit. Goods subject to import and/or export licencing will need evidence that the licence has been granted. These procedures allow assessments to be made as to duties liable or the risks associated with these goods entering the territory. The process of data submission (including time and training/recruitment of staff to do so) can be where businesses experience the greatest 'friction' and cost of border controls, even where there are zero tariffs and zero quotas. It is a process that must be performed with care; making deliberate false declarations to customs is a serious criminal offence.

Regulatory controls arise when different rules and processes govern product standards and specifications, such that a product that can be legally sold in one jurisdiction cannot automatically be sold in another. There is also the important matter of which regulatory body authorises a product for sale or use. Even if the standards are the same on either side of a border, different regulatory authorities and rules can effectively prohibit sale in the other jurisdiction, unless there is agreement on mutual recognition of regulations. This is why the proper labelling of products is so important. Such non-tariff barriers to trade are often the most complex to navigate. Regulatory controls also apply to services trade, and without mutual recognition provisions in services trade, businesses trading services across borders must satisfy business regulations, licencing and authorisation requirements in each jurisdiction.

Sanitary and phyto-sanitary controls (SPS) are often the most onerous and rigorous. These apply to animals, agri-food and plants, and they are intended to protect public health and keep out diseases, such as may be transmitted in animals, animal products or plant products. Very strict certifications and types of inspection are required for these to cross a border, and inspections require specialised, purpose-built, facilities close to the border (for storing and inspecting livestock or refrigerated products, for example). Under EU rules, live animals and most consignments of animal products must enter the EU through a Border Control Post with specialised facilities and inspectors present. SPS controls also apply to the travel of domesticated animals across a border: the EU has [strict requirements](#) for owners bringing their dogs into the EU from a third country (including Great Britain), such as microchipping, certain vaccinations and vet-issued certificates.

Other goods controls that may come into play for Scotland's external borders will include those to manage prohibited or licensed goods, or those affected by sanctions. These are not likely to diverge considerably from those that the UK will apply nor from the controls already in place at its sea and air ports.

Value Added Tax (VAT) also complicates movements of good across a border. VAT is only due from the final consumer of a product. The movement of a good from one economic operator to another needs to be traceable so that those who are not the final consumer can reclaim VAT they paid. When a good is exported (e.g. between an EU member state and a third country), the VAT owed by the exporter is 0% because the good is to be consumed outside the market. The difficulty here is not about difference in VAT rates, but about the exporter being able to prove that the good was exported and therefore no VAT needs to be paid. Proving this across an external customs border requires a certain amount of paperwork to control the movement of goods and thus minimise tax-evasion or fraud. A similar proof of physical export question arises in relation to cross border movements of excise goods.

The Common Transit Convention, to which the UK remains a signatory, is a means of ensuring that goods can move across borders when in transit, without paying customs duties each time they enter, or leave, a territory during their journey. VAT and customs duties are instead paid at the final destination. So-called transit movements need to be started either at the premises of an authorised consignor, or at an official office of departure. This is how and when the necessary documentation is issued. In the UK's case, this documentation is the Transit Accompanying Document (TAD) and movement reference number (MRN). A pre-departure declaration for customs is also due at this point. When the destination country has been reached, this documentation must be presented

at the authorised consignee or a designated office of destination. This enables the journey to be marked as complete, ending the 0% VAT status so that the good can be sold to the final consumer, and the VAT and/or other appropriate tax or duty paid as per the country of destination's rules.

Excise goods are those to which domestic duties apply, such as alcohol, tobacco and fuel. Evasion of excise duty is a common motivation for large-scale smuggling. It is a lucrative source of funding for organised crime and comes at great cost to the state in lost revenue. Under EU legislation, excise duties are paid at the final point of consumption; while in transit to their final destination, these goods are in duty-suspension. Duties are paid on those goods as they enter the destination territory, or as they are withdrawn from bonded warehousing. Making sure such duties are not evaded is an essential function of border management.

Duty-free shopping exploits the personal allowances given to non-commercial travellers to purchase excise goods without paying domestic duties and to avail of VAT-free shopping for personal use. The end of the transition period has seen the reintroduction of duty-free shopping for passengers entering or leaving Britain from/to the EU, including at international train stations. However, the rules around duty-free shopping are made at the discretion of governments. For example, the UK government made an exception for Northern Ireland under the Protocol for its rules on taxed goods for personal use; it also ended tax-free sales on non-excise goods in January 2021. Offering duty-free sales at a busy land border can undercut domestic retailers as well as erode the tax base. For such reasons, the UK and Scottish governments might seek to secure a mutual commitment to avoid duty-free shopping at the Anglo-Scottish border in independence negotiations.

The extent to which these controls are in place, and the form they assume, will depend upon the political relationship and agreements between the territories on either side of the border. As an EU member state, the UK was part of the EU customs union and single market and therefore did not require customs checks, regulatory controls or SPS controls. Outside of the EU, the UK now finds itself having to devise and develop a new border strategy, using technology, innovation and enhanced organisational capability. Working with the wide range of agencies and industries responsible for border management, its ambitious aim is to develop 'the world's most effective border'.

BREXIT AND THE UK'S BORDERS

THE UK BORDER STRATEGY

The UK government 2025 Border Strategy recognises that a border is 'more than a line on a map'; it is 'a combination of policies, processes and systems delivered by both public and private organisations', the operation of which is vital to a country's economy and security (including public health). These borders and border practices have been hardened by both the terms of the Trade and Cooperation Agreement and the reinforcement of UK border controls in domestic legislation, particularly regarding immigration and security.

BORDER MANAGEMENT UNDER THE TRADE AND COOPERATION AGREEMENT

When the UK left the European Union, the lines on the map remained the same, but the policies, processes and systems to manage these borders changed significantly. The UK's departure from the European Union had two stages. The first stage — the Withdrawal Agreement — set out the terms of their separation; the second — the Trade and Cooperation Agreement (TCA) — set out their new relationship. The Withdrawal Agreement included the Ireland/Northern Ireland Protocol, committing both parties to maintaining an open border on the island of Ireland. The terms of the TCA have meant that maintaining an open border in Ireland has necessitated some controls and checks on goods moving between Great Britain (GB) and Northern Ireland (NI).

The TCA means that customs formalities are required on goods crossing the border between Britain and the EU. Under the TCA, there are no tariffs or quotas (i.e. no taxes or limits on the amount of trade in specific goods) on British goods entering the EU, and vice versa. However, declarations need to be made to be sure that enough of the product originated in the UK or the EU to qualify for free trade (as per 'Rules of Origin') and to see appropriate duties are paid if it doesn't.

After Brexit, the UK government has developed a new 'Border Operating Model' which brings together the new rules and procedures required for trading goods between Britain and the EU. It has also been rolling out a new system by which customs declarations are made for goods crossing its borders. This is an immensely complex arena involving dozens of major entry/exit points (including airports as well as ferry ports) and many partner agencies (including, for example, veterinary inspectors, police, laboratory technicians, customs advisors, and border guards). The impact of this is felt away from the ports, too, in the new procedures

(e.g. documentation and online processes) required to move goods between the UK and EU. Such frictions can lead to a reduction in the availability of some goods and an increase in their cost and price.

New sanitary and phytosanitary controls also require the creation of physical as well as IT infrastructure, for example, to allow for inspections of containers, and for queuing lorries. The rollout of the full gamut of UK border controls and checks has been postponed on a few occasions and is not yet fully operational, although a steady ramping up of them is planned over the course of 2022. As such, there are fewer barriers to the inward flow of products to Britain from the EU than the outward flow (which is tempered by border controls in the receiving country), but this is likely to be temporary.

The services sector has been particularly affected by the limited terms of the TCA. The UK economy is predominantly service-based, and relies heavily on services trade with other countries, especially in Europe. Unlike in goods, where imports dwarfed exports, the UK exported much more services to the EU than it imported. In 2019, prior to the pandemic, the UK recorded a services trade surplus with EU countries of £17.5 billion, and £25.3 billion in 2018. Services trade does not require customs checks but is instead affected by non-tariff barriers. Under the TCA, the professional qualifications of many UK service providers are no longer recognised (and vice versa), while restrictions on the free movement of workers also inhibit services trade.

Business trading services within the EU, Switzerland, Norway, Iceland and Lichtenstein must comply with the rules in place in those countries where they are plying their trade, as well as adhering to UK rules. The challenges this presents can be particularly acute when there are divergent rules and regulations surrounding the provision of a particular service, and the credentials of the service provider. There is already some regulatory divergence between the UK and the EU, and this is expected to increase over time. Taken together, this means trade in services between the UK and other European countries is now more difficult and cumbersome, requiring much more bureaucracy and thus more costs, than was the case when the UK was in the EU.

SECURITY, POLICING AND CRIMINAL JUSTICE COOPERATION

The security of any border depends in large part on what happens on either side of it, and it cannot be guaranteed by one sovereign state alone. Similarly, much of the effectiveness of border management depends on cooperation between agencies across the border concerned. This is particularly evident when considering the spheres of policing and criminal justice, not least because criminals often seek to exploit the existence of a hard border, whether to evade duties or evade arrest.

The management of Scotland's borders after independence would be affected by cross-border cooperation in policing and criminal justice. And this, too, would be largely shaped by the nature of the UK-EU relationship. The TCA contained a dedicated Part on this topic.

Arenas of considerable disruption for UK-EU policing and security cooperation since Brexit have been the loss of the European Arrest Warrant (EAW) (although replaced by a similar fast-track system of extradition), reduced participation in Europol and Eurojust — the EU's agencies for policing and criminal justice cooperation — and loss of access to the Schengen Information System II (SIS II). The latter had allowed real-time sharing of data relating to wanted or missing persons or objects with UK police and border control systems via a fully automated and integrated system across 29 countries. In its place, those wishing to share an SIS notice with the UK for use at, say, border entry points have to manually duplicate and upload them onto the Interpol communication system.

To repeat a point made above: effective border controls depend on cross-border communication and cooperation, and there is uncertainty over the means and scope for this between the UK and EU in the longer term, including with respect to data-sharing. This highlights yet another area of evolution and uncertainty that could have considerable impact on a potential future Scotland-UK relationship after independence and Scotland's EU membership. The Specialised Committee on Law Enforcement and Judicial Cooperation, established by the TCA, is responsible for monitoring this part of the Agreement. Both the UK and the EU hoped that (in contrast to other post-Brexit trends) it would oversee an expansion of cooperation in policing and criminal justice over time from the baseline set in the TCA, but this cannot be guaranteed.

THE MOVEMENT OF PEOPLE

The TCA also brought an end to the free movement of people. This means that EU citizens, with the exception of Irish citizens (see below), are no longer automatically entitled to live and work in the UK, and the same is true for UK citizens in the EU. EU citizens already resident in the UK could apply to the EU settlement scheme. As of September 2021, 5.8 million applications had been concluded, over half of whom had been granted settled status, with a further 2.4 million granted pre-settled status (open to those resident for less than five years).

The UK government is in the process of reforming the rules overseeing asylum and immigration. Free movement rights were replaced by a points-based system, with skill and salary thresholds that make it more difficult for workers from EU countries to migrate to the UK. This change has contributed to labour shortages in the UK, especially in the services sector. In agriculture, a Seasonal Agricultural

Workers Scheme was set up to mitigate labour shortages, although the sector continues to face difficulties meeting labour needs. Other sectors that have depended heavily on EU workers, and where many of the occupations would be unlikely to meet the salary or skill thresholds (such as hospitality and social care), have been given no such exemptions.

The Nationality and Borders Bill, currently making its way through Westminster, is intended to counteract illegal immigration and asylum, deter asylum seeking from those not considered to be in need of asylum, and to strengthen the UK's borders. If passed, it is likely to lead to tighter checks on people crossing the UK's borders, signalling a shift towards strengthening border security over free movement. These developments signal a divergence in the migration policies and priorities of the Scottish and UK governments that could have implications for Scotland's border controls with England, Wales and Northern Ireland in the event of independence.

Ireland and the UK share a Common Travel Area (CTA), which predates their joint accession to the European Union and has survived the UK's departure. The CTA gives special rights and privileges to Irish citizens in the UK and to UK citizens in Ireland. Citizens across CTA territories can move freely, work and study anywhere in the CTA, and access health care, social housing, social security, and education, as well as enjoying the right to vote in local and national elections. These reciprocal rights were reaffirmed in a Memorandum of Understanding in 2019.

THE PROTOCOL ON IRELAND/NORTHERN IRELAND

WHAT THE PROTOCOL MEANS

The Protocol on Ireland/Northern Ireland was designed to recognise the unique circumstances on the island of Ireland and avoid a hard Irish land border. The Irish border is 499km (310 miles) long with some 208 officially-recognised crossing points. Rather than having to apply checks and controls along it to manage what is now, since Brexit, a border between the UK and the EU, the Protocol enabled an open border on the island of Ireland by instead applying the EU's customs and regulatory rules at sea and air entry points to Northern Ireland, including from Britain. Northern Ireland continues to follow EU single market rules on goods, and thus (according to Articles 5-8 of the Protocol) the Irish Sea effectively marks a regulatory border as well as a customs border.

The Protocol on Ireland/Northern Ireland has created a unique situation for Scotland's neighbour across the Irish Sea. As noted above, if it is fully operational (including Articles 5-10, the continuation of which the NI Assembly will vote on in 2024) in the event of Scotland's re-entry to the EU, trade from Scotland to Northern Ireland would be smoother and easier than it currently is. This, too, could open up new trade routes, with Northern Ireland and Scotland both being in the EU's single market for goods and thus enjoying frictionless trade from one to the other.

FLEXIBILITY SHOWN IN THE PROTOCOL

The exceptional arrangement of the Protocol was predicated on the avoidance of a hard Irish land border and the protection of the 1998 Good Friday/Belfast Agreement. Maintaining an open border was a priority for both the UK and the EU, the latter a testament to the influence of Ireland as a member state shaping the EU's negotiating mandate. In the case of an independent Scotland, there should be no expectations of similar commitments to avoiding a hard Anglo-Scottish border. There is no history of recent political conflict centred upon the Anglo-Scottish border to focus minds on the desirability of avoiding a hard border. And, as noted below, the practical challenges of managing this border would be easier to confront than those associated with land border management on the island of Ireland.

Flexibility from the EU towards the application of its border rules on GB-NI movement of goods has principally been justified in recognition of the unique circumstances on the island of Ireland (including the 1998 Agreement), and not on the grounds of the burden or complexity of the controls themselves. The flexibility it has shown to date has been primarily in the existence of 'grace periods' (which will expire at some point), in accepting the role of UK authorities as enforcers of the rules, and in accepting (after negotiation, and, so far, in the specific case of medicines) that a British regulatory authority can approve goods for sale in NI. All further offers of flexibility from the EU (as per its 'non-papers' of October 2021 which sought to address practical concerns raised by businesses in Northern Ireland) have been largely conditional on what the UK was willing to offer. For example, the possibility of an 80% reduction in checks on agri-food products entering NI gained headline coverage, but this was explicitly dependent on some strict conditions being met by GB.

Judging by the terms applied for other association and accession agreements made by the EU, flexibility from the EU for Scotland is most likely to be found in the length of the transition period to the application of the rules at the EU's external border (as well as in relation to the Schengen rules discussed below), than in relaxing the requirement that the rest of the rules be strictly applied. A longer adjustment period would allow more time for the authorities on both sides of the border to set up new processes, build new (IT and physical) infrastructure, and raise awareness of new rules and procedures required. This would go some way to minimising the impact of the disruption caused.

EXAMPLES OF MITIGATING THE IMPACT OF BORDER CONTROLS

There are ways to reduce some of the frictions and costs associated with border controls across a customs and regulatory border. Several of these are being operationalised under the Protocol, e.g. the Trader Support Service assists businesses in completing the documentation for moving goods from GB into NI; the UK Trader Scheme permits all registered members to move goods into NI on the assumption that EU duties are not payable, thus reducing their paperwork burden; and the Movement Assistance Scheme covers some certification costs for the movement of agri-food. These show what is required for movement of goods across an external EU border, and the limits of what can be done, too. These schemes are all funded by the UK government and they currently all have end dates for their operation. Ongoing communication and cooperation between UK and EU border agencies and systems could also ease trade barriers. For example, the EU's non-paper on SPS issues suggested that an interface between EU/UK databases could enable e-certification and a swift handling of entry/exit data and thereby speed up documentary checks.

EXAMPLES OF THE COMPLEXITY OF BORDER CONTROLS

The movement of goods from GB to NI under the Protocol has given rise to some highly complex problems (some of which were not anticipated, such as around the ending of the [VAT margin scheme for second-hand car sales in NI)](). We should expect similar for the movement of goods from England and Wales into an independent Scotland in the EU. The difficulty for supermarkets, whose lorries contain mixed loads that include some products that require inspection and detailed certifications, is a particular example of the challenges of applying new trade rules to what were previously domestic sales. On the other hand, the UK is having to establish from scratch new systems to check and manage trade flows across its borders, including the internal sea border with Northern Ireland. We can expect that IT systems would be well-established by the time that the Scottish-English border became an EU-UK border. Although the Scottish government would have to equip itself and its agencies with the tools of border management, it would be implementing rules and systems already well-established within the EU.

But the consequences are not just felt by large corporations. The cost of traversing a customs border for small businesses, new rules for [the movement of pets]() across a border, the ban on entry of certain products (e.g. chilled meats), and the adjustment of supply chains that might occur to follow the path of least resistance — all are part and parcel of managing an EU border. And doing so along a new international land border across a closely-integrated economy brings particular difficulties.

SCOTLAND'S BORDERS AFTER INDEPENDENCE

FROM INDEPENDENCE TO ACCESSION

If Scots vote for independence, the country's status would not change overnight. As happened following the 2016 Brexit referendum, negotiations would begin on ending the political union between Scotland and the rest of the UK, and reaching agreement on, among other things, the division of assets and liabilities, currency, and citizens' rights. A transition period would allow time for Scotland to prepare for independence, including setting up new regulatory bodies, a central bank, and other institutions necessary for an independent state to function, as well as giving space for negotiations on the future Scotland-UK relationship. Scotland's status vis-à-vis the UK-EU Trade and Cooperation Agreement would also have to be determined.

A transition to independence would take time and require a substantial legislative programme. The UK Parliament may transfer powers to the Scottish Parliament to empower it to prepare for and negotiate independence. In addition, it would have to repeal the 1707 Act of Union, pass a law to implement the independence settlement, as well as a law to underpin the new relationship between the (remaining) UK and Scotland. The ease or difficulty in delivering this legislative programme — as well as corresponding legislation in the Scottish Parliament — would be affected by the wider political context and balance of power between parties.

Scotland could not formally apply for membership of the European Union until it had negotiated independence from the UK. These negotiations, too, would take time: upon application, Scotland would have to be accepted as a candidate for membership; enter into negotiations with the European Commission on the details and requirements for membership, usually split into 35 separate chapters; implement any adjustments necessary as a result of these negotiations; and secure the agreement of the 27 member states and the European Parliament to the Treaty on Scotland's accession. This process could potentially commence during a transition period, not least because Scotland's status vis-à-vis the European Union would heavily influence, and be influenced by, its relationship with the UK. Both sets of negotiations throw up many issues that are beyond the scope of this report. We focus here on considering what Scotland's membership of the European Union would mean for its borders.

TRADE TO AND FROM SCOTLAND AS AN EU MEMBER-STATE

An independent Scotland applying to join the European Union would be obliged to adopt the whole body of EU law — the *acquis communautaire* — as a condition of membership, unless it could negotiate to opt out of some aspects. Nearly 50 years of EU membership meant Scots law already conformed to the EU acquis. The [UK Withdrawal from the European Union (Continuity) (Scotland) Act,](#) passed by the Scottish Parliament in 2021, gives Scottish ministers the power (but not the obligation) to keep devolved laws aligned with EU laws. The purpose, in part at least, was to smooth the process of re-joining the European Union after independence.

EU membership would mean that an independent Scotland would be part of the EU single market and customs union. This would open up Scottish goods, services and capital to the EU market, creating opportunities for new supply chains, new business opportunities, increased trade, and new pools of workers. The free movement of workers and students across the countries of the European Union would also expand employment and study opportunities for Scotland's citizens.

Independent membership of the EU would also bring responsibility to ensure that all goods and services entering the Scottish (and therefore the EU) market met EU standards, to protect the integrity of the European single market. This would require setting up a system of border management for Scotland's land and sea borders. This could create new challenges for the land border between Scotland and England, while easing trade with Northern Ireland (under the conditions created by the Protocol on Ireland/Northern Ireland).

OPERATING AN EU BORDER AT SCOTLAND'S BORDERS

If the Parliament of an independent Scotland wanted its rules and standards to apply to all goods sold within Scotland, there would have to be checks and controls at its land and sea borders, irrespective of whether it joined the EU. As an EU member state, Scotland would have to follow and apply EU customs and regulatory rules on goods circulating within it. This would change the status of the Scottish land border — all 154 km (96 miles) of it — and the experience of crossing it.

It isn't the length of a land border that is the issue when assessing the challenge for managing a customs border, but rather the number of crossing points. The main trunk road connecting Scotland with the rest of Great Britain is the M74/M6 Glasgow - Carlisle route. Three other crossings are also designated as [trunk roads](#) (A1 Edinburgh - Berwick upon Tweed; A68 Edinburgh - Carter Bar; A6091/A7 Melrose - Galashiels - Carlisle). A further two non-trunk A roads cross

the border (the A6105 near Berwick and the A697 at Coldstream), and there are just over 20 cross-border minor roads. But much of the borderline follows rivers (including the River Tweed in the east and River Sark in the west) and a considerable stretch between east and west runs alongside nature reserves and forest parks (between the Cheviot Hills and Northumberland National Park, for example). The lack of crossing points in these wilder cross-border areas means that the risk of smuggling is quite low. The difficulty could come in places like the Kershope Burn. This is a narrow river/stream that runs along the border, with minor roads running each side, creating a potential opportunity for easier cross-border access for smugglers. But for the most part, it can be expected that the main trunk roads would be designated for customs movements, including with some form of border control and inspection facilities, whilst the minor routes could be monitored by other means, including cameras. It is most likely that major designated crossing points would utilise a Green (for those with 'nothing to declare' or pre-declared goods) and Red (those with goods to declare) channel system, to minimise disruption or delay in the flow of traffic.

TRADE IMPLICATIONS OF A NEW EU BORDER IN SCOTLAND

Scotland has a very open economy. In 2019, the value of exports was over £87 billion, an estimated 60% of which was trade with the rest of the UK — over three times the value of exports to the EU. The majority (56%) of this cross-border trade is in services, led by financial and insurance activities and utilities. Information on interregional trade is difficult to estimate, especially for imports, but however these estimates are calculated, the Scottish economy would clearly be exposed to any trade disruption with the rest of the UK. One study by the LSE's Centre for Economic Performance estimated that the effects of independence, even if Scotland were to rejoin the European Union, could see a reduction in Scottish income per capita of between 6.3% and 7.6%.

Scotland's Exports in 2019

Export Destination	Value of Exports in 2019	Change since 2018	% Change since 2018
International	£35.1 billion	£1.1 billion	+3.4%
...of which EU	£16.4 billion	£0.4 billion	+2.6%
...of which Non-EU	£18.7 billion	£0.7 billion	+4.1%
Rest of the UK	£52.0 billion	£2.5 billion	+5.0%
Total (Int + RUK)	£87.1 billion	£3.6 billion	+4.3%

Source: Export Statistics Scotland 2019

EU membership would open up new trading opportunities with the rest of the European Union that could reduce dependence on GB trade and offset some of these costs, but this may take time. When [Ireland](#) joined the European Community along with the UK in 1973, 55% of its exports were destined for the UK. By 2020, this had fallen to just 9%.

We might also expect more sourcing of products locally in Scotland and from the EU by large chains and manufacturers, and less from England/Wales. This is in part because harder borders — as a new GB/EU border across Britain would be under the terms of the current Trade and Cooperation Agreement — have consequences. Frictions bring costs and delays, and we would expect trade to follow the path of least resistance. The picture would be a complicated one, not least given the geographical position of Scotland. If Scotland were to join the EU as a member state in its own right, it would not share a land border with any other European member, and would have a large non-member state territory between it and much of the rest of the EU. This suggests that 'frictionless' trade between Scotland and the rest of the EU could be more complicated than when the UK was in the EU. England would represent a sizeable 'land-bridge' to get to the main EU markets.

In theory, loads destined from/to Scotland from/to the EU could be sealed as they cross the 'land-bridge' and thus not have to go through the type of paperwork, checks and controls required for goods going to/from England and Wales. This would require a change to current practice. Generally, lorry loads tend not only to be distributed at a single end point, but goods can be taken or added at different points of the journey. We can also expect particular difficulties for trade involving mixed lorry loads, particularly those carrying food products. Supermarkets are at the forefront of such difficulties.

Further complications would arise if anything were to happen to an EU good (e.g. if it were to be repackaged) whilst in the territory of a non-member state, as this could result in it losing its EU origin status. Tariffs would then be due on entry back into the EU territory. As such, accessing the European market via the land-bridge could pose difficulties for Scotland unless there are adjustments to distribution routes, processing and supply chains.

The case of trade into Northern Ireland via Britain, after the Protocol, and of Ireland's trade within the EU internal market, give good indications of what might happen in the event of Scottish independence leading to Scotland's EU membership. These cases suggest that we can expect increased use of direct routes between Scotland and the EU, for example, from the Forth ports at Grangemouth and Rosyth to the Netherlands, Belgium and France, expanding their existing capacities.

The post-Brexit case study of Ireland makes for an interesting comparator. According to the Irish Maritime Development Office's *Unitised Traffic Report* (October 2021), during the third quarter of 2021, whilst overall volumes of freight traffic remained the same as in 2019, there had been a rapid, significant reduction in traffic to Britain — reduced to two-thirds of all Irish freight volumes within six months of Brexit, compared to 84% in 2019. A third of all Roll-On-Roll-Off traffic from the Republic of Ireland now operates via direct routes to the EU — double the rate two years previously — with seven new direct EU RoRo services available to Irish traders.

Even before the end of the transition period, new freight shipping services were opened between Scotland and the EU (e.g. Samskip's Grangemouth - Amsterdam service, via Hull). If the Protocol is still operational, goods could trade from Scotland via the island of Ireland, which could conceivably become an alternative, convenient, 'land-bridge' from Scotland to the EU, exploiting additional capacity in direct freight services from Ireland to 'mainland' Europe.

THE MOVEMENT OF PEOPLE ACROSS SCOTLAND'S BORDERS

A key aspect of border control concerns the movement of people. Joining the European Union would mean joining the European internal market. This would open up the Scottish economy to EU workers once again, as well as renewing opportunities to Scots to work anywhere in the EU.

According to the Treaties of the European Union (Protocol 19), countries applying to become member states are required to accept 'in full' the body of law relating to the Schengen Agreement. This would mean removing border controls between Scotland and the 26 participating countries. But this would be matched by the obligation to maintain tight controls on the movement of people across Scotland's section of the EU's external borders. Thus, if Scotland joined the Schengen area, it would imply the need for passport controls between Scotland and its nearest neighbour.

However, given its unique geographic and historic circumstances, most specifically the existence of the Common Travel Area (CTA), most experts assume that Scotland would most likely seek and be granted an opt-out from the border control elements of the Schengen Agreement during membership negotiations with the European Union. This would not only preserve free movement of people between Scotland and the rest of the UK but, importantly, would ensure free movement between Scotland and Ireland, its closest EU neighbour (including the automatic right to reside and work in the other jurisdiction). The CTA includes the UK, Ireland, the Channel Islands, and the Isle of Man, and it already has legal recognition in the EU Treaties and was protected

in the UK-EU Withdrawal Agreement. In 2014, the plans for independence included remaining within the Common Travel Area (CTA), and it is expected that this would be part of any new independence prospectus, and the top priority for the Scottish team in EU accession negotiations.

But the CTA is a largely informal set of arrangements rather than an international treaty, and it is important to recognise its limitations. The first is that, while the CTA retains the right of citizens from its member countries to live, work and access services, and to travel across borders for business purposes, it does not extend to the free movement of services. The relationship with Ireland in services trade is as set out in the UK-EU Trade and Cooperation Agreement. Under the TCA, there is no mutual recognition of services regulations or professional qualifications; a UK business providing services in Ireland must therefore follow Irish regulations. Assuming a similar relationship was in place after Scottish independence, the right to establish a business or to provide a service would not be automatically enabled for those crossing into the UK from Scotland, or vice versa. It may, however, be possible to reach bilateral agreements. The UK and Ireland are committed to agreeing arrangements for recognising professional qualifications, recognising this as an 'essential facilitator' of the right to work anywhere within the CTA.

Secondly, although immigration controls may not be manifest at a border, they can still have consequences for those crossing it. The Nationality and Borders Bill foresees the requirement for an Electronic Travel Authorisation (ETA) to permit entry to the UK to non-Irish EU citizens and third country nationals who do not require a visa. EU citizens crossing into UK territory from an EU territory (potentially including the land border between an independent Scotland and the remaining UK) may find themselves in breach of the law for not having completed an ETA in advance.

This further illustrates that a hardened border has wide implications that go far beyond matters of trade. Keeping a harder border as open and 'invisible' as possible would have to be balanced against the need for people to be aware of its existence. An important part of border management is making sure that everyone is aware of what might be required from them to do what they want to do in the jurisdiction on the other side of the border, be they tourists, commuters, shoppers, traders or service-providers.

CONCLUSION

There is nothing especially radical about an independent nation-state assuming responsibility for managing its own borders. Indeed, border management is a responsibility that all sovereign countries must consider. The scale and nature of the border challenges for Scotland would be quite different to those resulting from the Protocol. Unlike Northern Ireland, Scotland would be outside of the UK and thus not have to manage membership — as Northern Ireland does — of two diverging regulatory markets and customs regimes.

Using discretionary powers provided by the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, the Scottish government appears committed to remaining in alignment with EU rules where these apply to areas that are within the law-making powers of the Scottish Parliament (e.g. on food production standards). This could put Scotland in a stronger place for transitioning to independence in the EU, but the task (and costs) of 'keeping pace' will become more difficult as the time after Brexit lengthens. On the other hand, regulatory standards set in policy areas where the UK Parliament makes laws for the whole of the UK, and those where it sets standards for England alone, may have diverged considerably from EU standards by the time that an independent Scotland seeks EU membership. It is also likely that the UK will have secured more trade deals with countries that diverge from the standards set by the EU. The risks to the integrity of the EU internal market could therefore be heightened without a secure system of border management. Conversely, Scotland's geographic position at the northern edge of the EU, with only sea and air borders to its European partners, suggests there may be less risk of it becoming a 'back door' to the EU single market for sub-standard goods and services compared to Northern Ireland.

There is continued political wrangling over the Withdrawal Agreement (specifically the Protocol on Ireland/Northern Ireland) and the Trade and Cooperation Agreement (especially over fisheries), and some uncertainty as to whether either will remain in its current form. In any case, over time, we can expect the UK-EU relationship to continue to evolve, in light of experience and political change. Its trading relationship at some future point at which Scotland might transition to independence within the EU may be very different from the one we see today. If the UK and the EU were to reach agreements to align SPS rules, for example with a New Zealand-style Veterinary Agreement, it is estimated that this could dramatically reduce the need for physical checks down to 2% and for documentary checks to 10%. The rules governing the UK-EU

relationship at the time of accession will shape the nature of the border between Scotland and the rest of the UK, and the tasks required to manage it. But, as we have outlined above and as has been seen in the Brexit process, 'hardening' any state border brings costs, disruption and myriad complex challenges, and it is important that these are anticipated and planned for as much as possible. Assuming responsibility for managing an EU border across Britain need not preclude cross-border cooperation, including in areas like policing, criminal justice and security, where EU competence is more limited. Indeed, effective management of the border would be supported considerably by cooperation between authorities on either side of it.

This report is our first step in raising some of the issues that might arise if Scottish independence was to result in an EU border across Britain. It has identified what we believe to be critical issues, but it is not intended to be a comprehensive report. Other issues, challenges and opportunities will emerge, and these may increase or diminish over time in response to political, economic and technological developments. Nonetheless, to ensure debate on independence and its implications is informed, and that Scotland and its neighbours be prepared should that debate result in an independence process being initiated, it is vital that any detailed prospectus or white paper confronts the challenges that Brexit has presented, including the management of Scotland's future borders.

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T 020 7848 2630
E info@UKandEU.ac.uk
   UKinaChangingEurope
   @UKandEU

www.UKandEU.ac.uk