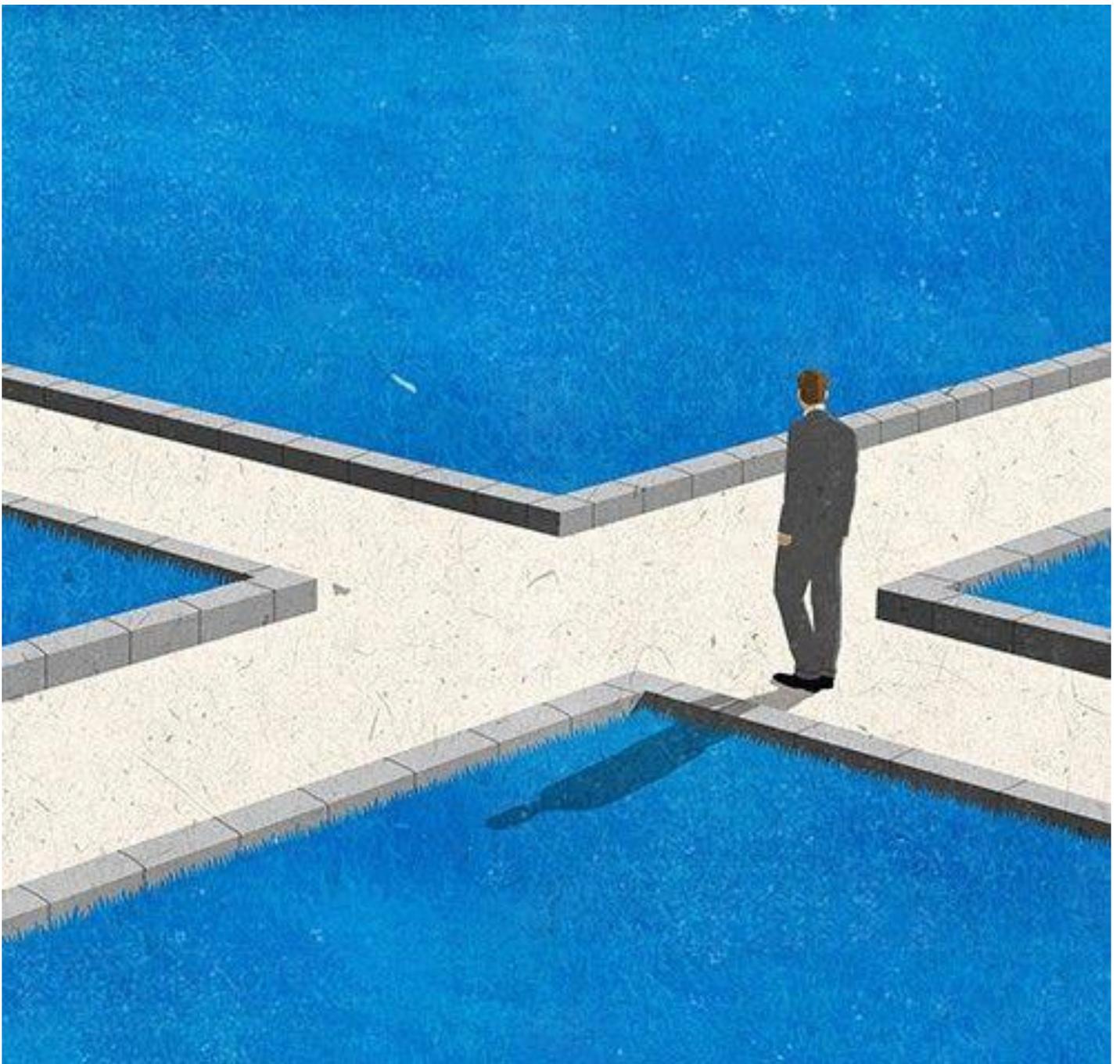


 Burness Paull

**THE TRANSITION TO  
INDEPENDENCE?**

**JUNE 2014**



## *If the Scottish referendum on independence produces a 'yes' vote, what might the transition to independence look like? Can we start to paint the picture?*

From a position of impartiality, we at Burness Paull look at some of the issues that could impact our clients in relation to the potential transition to independence. We ask questions, dissect assumptions, and suggest answers.

### Introduction

With less than 13 weeks until the date of the referendum on 18 September, we have recently crossed into the official campaign period, during which campaigning has to comply with the rules set out in the Scottish Independence Referendum Act 2013.

As the date gets closer, inevitably some thoughts turn to what would actually happen if there was a 'yes' vote. Until recently, there has been comparatively little focus or debate on exactly what would happen in that immediate aftermath and during the transition period up to the date on which formal independence would take effect for Scotland<sup>1</sup> (the **"Transition Period"**).

The focus on the Transition Period has been heightened by the Scottish Government's (**"SG"**) publication on 16 June of its consultation on The Scottish Independence Bill: an interim constitution for Scotland<sup>2</sup> (the **"Consultation"**). This contains a draft of SG's proposed Scottish Independence Bill, an explanation of its terms and consults on this and some further detail (which builds on what was said in its White Paper on Independence<sup>3</sup>) in relation to the amendments to the current Scottish devolution legislation which SG has said will form the legal basis for the transition (the **"Transition"**).

Also, a recent report by the House of Lords Select Committee on the constitution (the **"Report"**)<sup>4</sup>, which received fairly scant attention in the media, explores the constitutional implications of a 'yes' vote for the rest of the UK (the **"RUK"**) and is intended to enhance public understanding of what would happen during the Transition Period. It also starts to identify and explore a number of important issues that would need to be resolved. In this bulletin, we look at aspects of the Consultation, the Report and some of these issues in a bit more detail. In our view, these are worth firms being aware of because they help to start to paint the Transition Period picture (including the stages and the process of Transition). They also give a feel for the level of certainty (or uncertainty) that is likely to surround the Transition and the extent to which this could affect business confidence and inform firms' planning for this eventuality.

### What has the Scottish Government said so far about the 'Transition'?

Before looking more closely at the Report and to help set the scene, it is worth recapping on what the Scottish Government has said on Transition in its White Paper on Independence and how what is said in the Consultation helps to add to this.

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<sup>1</sup> The Scottish Government's objective is that this should be 24 March 2016 ahead of the Scottish Parliamentary elections currently scheduled for May 2016.

<sup>2</sup> The Scottish Independence Bill: A consultation on an interim constitution for Scotland

<sup>3</sup> Entitled "Scotland's Future" Guide to an independent Scotland published in November 2013 and often referred to as the Scottish government's 'White Paper on Independence'.

<sup>4</sup> Report of the House of Lords Select Committee on the constitution entitled "Scottish Independence: Constitutional Implications of the Referendum" published on 16 May 2014 (HL Paper 188).

Not surprisingly, the SG does not suffer from the same reluctance as its Westminster counterpart in discussing its vision of how the Transition would operate.

In its White Paper, the SG sets out<sup>5</sup> its priorities for action and other views of what it wants to see happen during the Transition.

### *Timetable for the Transition*

The SG views the Transition Period as running from immediately after the referendum date to its target date for full Scottish independence, 26 March 2016 (the “**Target Date**”). This is sufficiently far ahead of the next election for the Scottish Parliament (scheduled for May 2016) to enable them to campaign, on the basis of having successfully delivered independence, to seek a mandate to be the first government of an independent Scotland. The importance to the current SG of achieving that timetable is therefore not difficult to appreciate and worth bearing in mind when considering the Report’s comments on the timetable.

In the Transition Period, the SG envisages agreements being reached with the RUK, represented by the Westminster Government (“**WG**”), and with the EU and other international partners and organisations. The SG is planning for independence on the Target Date to allow what it has stated to be a realistic timeframe for preparations and for it to take on the necessary new powers.

### *Principles governing the Transition*

The SG sees the Edinburgh Agreement as a lynch pin of the transition process, in so far as it committed the SG and WG to work together constructively in light of the outcome of the referendum in the best interests of the people of Scotland and the RUK.

The SG has stated that it will enter into this process in a spirit of constructive cooperation and friendship and will look to these agreements between the governments to provide the basis for a continuing close and fruitful relationship between Scotland and the RUK, and to ensure the continued provision of services to the people of Scotland and the RUK. In general terms, the reality would appear likely to be that an independent Scotland would be heavily dependent post-independence on the provision of outsourced services from the RUK in a range of areas. This would be the case particularly in the initial years of independence, although potentially for the longer term as well.

### *Legislative steps towards independence*

The SG envisages that the existing constitutional arrangements for Scotland (by which they mean the basis of the existing devolved powers under the Scotland Act 1998) will provide the basis for the transition to independent statehood, with the additional (currently undeveloped) powers being transferred under that Act as soon as possible after the referendum (if there is a ‘Yes’ vote). The SG’s objective is that this early transfer will also enable the Scottish Parliament to extend its devolved competencies into all policy areas, including those currently reserved to the WG, for the purpose of making preparations for independence (and logically to also enable it to negotiate in this area something which as set out below has echoes in the Report).

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<sup>5</sup> Chapter 10 of Part 4 on “building a modern democracy” at page 337.

As a next step, the SG envisages that the key legislative steps towards independence would be taken by the Scottish Parliament with parallel legislation, dealing with matters relating to the RUK being taken forward at Westminster. In addition, the SG envisages the Transitional Period seeing the necessary foundations being laid for Scotland's engagement with the international community. This would include the transition from membership of the EU as part of the UK to independent membership. It would also enable Scotland to move to a position of full participation in the international community. The arrangements would provide for the continuing application to Scotland of multilateral and bilateral international agreements and treaties with other countries and international organisations and enable Scotland to negotiate membership of international organisations. This would include giving the Scottish Parliament powers to ratify international treaties. There is however no detail on the process for achieving this, which would involve close interaction with the WG (although it is likely that the SG would regard this as being covered by the principles of the Edinburgh Agreement).

As well as being the legislative vehicle for the Transition, the SG sees The Scotland Act 1998 also being updated to apply in the context of independence. These updates would be designed to ensure that the correct legal framework is in place for the SG and Parliament to enable it to govern an independent Scotland from the Target Date.

Interestingly, the Consultation also mentions in this context the secondary legislation powers that The Scotland Act contains which proved useful when making the transition to devolution. It envisages that some of these could be adjusted and added to as appropriate to operate in the context of the Transition. The example it gives is that "in some areas the continuity of laws principle in section 34 of the Scottish Independence Bill would need to be supplemented by making amendments to currently reserved legislation such as tax law or employment legislation so that they could function effectively for independence. Powers to make these changes by secondary legislation would be taken in legislation to transfer competence from Westminster to enable independence, or in a revised Scotland Act." This is an area that would require careful scrutiny during the Transition to be clear what might be capable of being done by the SG through easier to use secondary legislation.

The Consultation supplements what SG says in the White Paper with the draft text<sup>6</sup> of what they propose as The Scottish Independence Bill which, if enacted by the Scottish Parliament, would be the constitutional platform for Scottish Independence. The Bill has three key purposes: to provide for Scotland to become an independent State; to provide an interim constitution for Scotland from the Target Date; and to provide for the establishment of a Constitutional Convention to draw up a permanent written constitution for an independent Scotland.

That constitutional platform in what would become The Scottish Independence Act, along with the refreshed Scotland Act, would therefore be the founding legislation of an independent Scotland pending the preparation of a permanent constitution by the constitutional convention that the SG is also proposing (and which the Consultation provides some further detail on).

One particular provision of the Bill of interest in terms of the legal aspects of the Transition is section 34 of the Bill on Continuity of Laws. For the first time this shows the proposed provision which, although brief in terms of its words, is likely to be the most significant provision in the Transition legislation for the laws of an independent Scotland. This reads as follows:

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<sup>6</sup> Together with explanatory notes containing a description and background to the proposals.

## “34 Continuity of laws

- (1) The laws that are in effect in Scotland immediately before Independence Day are to continue to have effect on and after Independence Day unless and until they are:
  - (a) repealed or modified by Act of the Scottish Parliament or subordinate legislation, or
  - (b) otherwise modified by operation of law.
- (2) That is subject to the constitution.
- (3) The laws referred to include any law, whether contained in a rule of law, an Act of the Scottish Parliament, an Act of the Parliament of the United Kingdom, an Act of the Parliaments of Scotland passed before or in 1707, subordinate legislation, a prerogative instrument or any other instrument or document having the effect of law.”

Although this follows the approach that has been taken in other cases (not least when what is now Ireland became independent in the early 1920s) it does confirm the wording that SG proposes will be used in this important transitional provision.

### *Agreements and negotiations with RUK and others*

The agreements and negotiations with the RUK that the SG envisages in the White Paper would cover a range of issues. These include the arrangements for the Sterling area, the role and governance arrangements with the Bank of England (including those in relation to both the prudential and conduct aspects of financial services regulation), a fiscal stability pact and Scotland’s share of UK assets and the UK liabilities.

The SG stated intention is that at the beginning of the negotiation process on these various crucial matters, it will make sense to agree a process for resolving any disputes in a way that both governments see as fair and equitable (but unfortunately there is no further detail around this very interesting point and this is not a point considered in the Report). The SG also envisages that some matters will continue to require to be discussed following independence (and it refers in that context to the position that applied in the dissolution of Czechoslovakia in 1992<sup>7</sup>, which is something that we will see is touched on in the Report).

The SG plans for the outcome of all of those negotiations to be reflected in an overall agreement between the WG and SG, ratified by both Parliaments. They also envisage agreements being reached on the terms of Scotland’s continuing membership of the EU, and membership of other international bodies, including the United Nations, NATO, the Organisation for Security and Co-operation in Europe, the International Monetary Fund, the World Bank Group and the World Trade Organisation. It is planned by the SG that both it and WG will be involved in these negotiations with the international partners.

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<sup>7</sup> Although there is no mention that the discussions following independence in that case continued for some 9 years.

## What are the main conclusions and recommendations of the Report<sup>8</sup> in relation to the Transition?

### Principles governing independence

#### *The UK as the continuator state*

A key principle surrounding the process of Scotland becoming independent, and the negotiations that would be involved, is whether the RUK would be the “continuator” state, retaining its current international status and institutions. The Report concludes that the evidence demonstrates that would be the case and therefore an independent Scotland would be a new “successor” state<sup>9</sup>.

#### *Assets, institutions and liabilities*

The position on the “continuator”/ “successor” state would have significant implications for the negotiations that would take place after a ‘Yes’ vote.

The Report concludes it would mean that UK institutions (including the Westminster Parliament and the Bank of England, for example) would remain institutions of the RUK. The UK would also retain all of the treaty obligations and memberships of international organisations and these memberships would automatically continue (although that does not mean there would be no consequences that would flow from Scottish Independence, and clearly there would be). It would also affect how assets and liabilities would be apportioned, with certain assets apportioned in accordance with legal principles<sup>10</sup> and other assets and liabilities subject to political negotiations, based on the principle of equity.

Given the close integration of Scotland and RUK, the negotiation of an equitable apportionment of all the relevant assets is unlikely to be an easy or quick process. Apportioning liabilities is likely to be equally complex, not least because there seems to be no clear consensus on the allocation of liabilities but just the equitable options of a “historic share”, using gross domestic product (“GDP”) or population. The Report concludes that population would be easiest and GDP would be harder but it offers no view on which would be best.

Clearly, the SG and WG will need to agree a basis for apportioning assets and liabilities which the Report acknowledges would be complicated, and even one of the prerequisites to that of compiling a full inventory is likely to be a significant task.

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<sup>8</sup> It should be noted that the Report pre-dates the Consultation and so makes no comment on the additional information contained in it.

<sup>9</sup> The Report notes in particular that while the Scottish Government has made some statements which appear to go against this conclusion, it has not produced any serious contrary arguments and the Report proceeds on the basis that its conclusion on the “continuator” state question is correct.

<sup>10</sup> Fixed or immovable assets (such as government or military buildings) would automatically become assets of the state in which they are located. Other, moveable assets (wherever they are situated) would be subject to apportionment through negotiations (with the only legal principle being that the apportionment should be equitable). Liabilities would also be subject to apportionment through negotiation. While there seems to be reasonable agreement between the governments on these principles, the Scottish Government considers it should have continued use (or the apportionment) of overseas property, while the Westminster Government considers this would remain the property of the RUK.

## Some of the constitutional implications for the UK state

### *The UK Government after a 'yes' vote*

The Report considered statements by UK Government Ministers that they would cease to represent the interests of Scotland immediately after a 'yes' vote. However, it concludes that this does not reflect the law<sup>11</sup>, would create constitutional difficulties and while the political dynamic would have changed the UK Government would continue to have responsibility for Scotland during the Transition Period.

In particular, on domestic matters reserved to the UK Parliament, the Report considers that the WG and SG should agree how any transfer of powers prior to independence day should take place. In addition, an arrangement should operate during the Transition Period whereby the SG should be consulted on long-term decisions primarily or solely affecting Scotland, especially in cases where the WG policy diverges from that of the SG.

As an aside, it is interesting to consider this recommendation in the context of the potential that has been raised of elements of Scottish industry lobbying the WG after a 'yes' vote to change the UK Companies Act to make it possible to change the country of incorporation and registered office of private or public limited companies from Scotland to England (which is not currently possible). One can imagine that, if consulted on such a proposal (which is not currently within its devolved powers), the SG would strongly oppose it as being prejudicial to the interests of Scotland. The Report does not discuss what the WG would envisage happening in that scenario, but it could make such a proposal very difficult to navigate successfully from the political perspective during the Transition Period.

### *Effect on House of Commons*

Fifty-nine MPs represent Scottish constituencies in the House of Commons and the Report considers three aspects of the Transition in relation to them: their status during the Transition Period, when they would leave and their position in the negotiations. These raise a number of constitutional issues which the Report considers in detail, including the effect on the balance of power in the House of Commons and whether their departure should be made to coincide with an early RUK general election.<sup>12</sup>

The Report concludes that the Scottish MPs should remain until Scotland becomes independent and should leave at that point. Any changes in their status after a 'yes' vote and the timing of their departure would require legislation and should be settled quickly after that vote, so the effect of their departure and its consequences are clear ahead of the 2015 UK general election and can be taken into account by the electorate.

## Negotiations

### *Legislation required for negotiations*

The Report considers it would be important for any independence negotiations to have a clear legal basis and there are two elements to the question of whether legislation would be needed to enable negotiations to begin: whether legislation would be necessary to enable the Scottish negotiating team to be established; and whether it would be necessary for the RUK negotiating team.

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<sup>11</sup> As a matter of law, Scotland will remain part of the UK unless and until it becomes an independent country.

<sup>12</sup> Which if the Target Date was achieved would only be a year after the 2015 UK general election and would require changes to the Fixed-term Parliaments Act 2011.

It recommends that, to avoid any risk of legal challenge, a bill should be introduced soon after a 'yes' vote to establish a negotiating team for the RUK and to devolve to the SG the power to do the same for Scotland.

### *Issues around the RUK negotiating team*

The Report considers the issues surrounding who should be on the negotiating team for the RUK and whether this should be representatives of the RUK Government alone or some form of cross-party group of negotiators.

In particular, it considers the biggest risk to the former approach as being a change of government at the UK general election in May 2015<sup>13</sup>. There are a range of issues for the Transition that the Report raises in this context, including the risk of reluctance to negotiate ahead of that election, the re-opening of issues after it (if the government changes) and different political parties negotiating positions becoming an issue at the general election itself. There is also the possible spectre of sensitivities around a new UK government which depended for its majority on Scottish MPs having a bearing in a number of possible ways. Despite these potential issues, the Report considers that the best approach would be for a small team representing the RUK Government to negotiate for the RUK, in consultation with the official opposition and the Welsh and Northern Irish executives and for it to be held fully to account by Parliament. It considers that it would be desirable for there to be broad agreement on the scope and aims of the negotiations with the official opposition at Westminster and for them to be fully consulted during the negotiations, so that any change of government in 2015 would cause as little disruption as possible.

### *Legislation to deliver independence*

Following the Transition negotiations, legislation of the Westminster Parliament would be needed to end that Parliament's jurisdiction over Scotland and to enact the results of the negotiations from the UK and RUK perspective. The Report concludes that legislation may not need to be extensive. Its primary purpose would be to recognise the independence of Scotland and the end of the UK Parliament's legislative competence over Scotland. However, it also concludes that extensive consequential legislation and legislation to implement the agreement reached between the two governments would be necessary.

### *Accountability and ratification*

The Report recommends that MPs representing Scottish constituencies should not negotiate for the RUK, hold the RUK negotiators to account nor ratify the outcome of the negotiations.

### *Timetable for negotiations*

The Report considers that there is no constitutional or legal necessity (including under the Edinburgh Agreement) to adhere to the SG's proposed Target Date. It says that the WG should not put the interests of the RUK at risk by attempting to stick to that timetable and any negotiations should take as long as necessary (although it does not address some of the obvious negatives of doing so, not least the effect of the uncertainty).

If it were possible for independence to take place without all issues being resolved, then there would need to be agreement on what could be left to negotiations post-independence, which itself could be difficult to agree.

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<sup>13</sup> Or conceivably at some other point as well, if for example the government that is elected was weak.

The factors that the Report considers could most likely extend the time require for negotiations are the setting up of the negotiating teams (including any enabling legislation required as mentioned above, the processes around deciding their mandate and the measures to hold them to account) and the 2015 UK general election and the issues already mentioned that could flow from that.

### **Concluding Remarks**

The Report concludes that there are clear answers on many of the issues which it considered. Even where there is uncertainty, there are legal principles and precedents on which actions could and should be based. While the Report is helpful in reducing some of the elements of uncertainty that would surround the Transition, it is clear that significant uncertainties would remain on issues which it recognises would require decisions and action by the governments and the input of their Parliaments, negotiation between the governments and others, around the effect of the UK general election and the key timings not least the achievability of the Target Date.

It will be interesting to see the WG's response to the Report (which is expected within two months of its publication) and we will produce further updates on the subject of Transition (and other Referendum topics) as further information becomes available and is the subject of further debate.

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