

 Burness Paull

**THE TRANSITION TO
INDEPENDENCE: AN
UPDATE**

SEPTEMBER 2014



From a position of impartiality, we at Burness Paull continue to look at some of the issues that could impact our clients in relation to the potential transition to independence.

Our note on the Transition to Independence in June 2014

In our bulletin in June we looked at some of the issues that could impact clients in relation to the potential transition to independence if there was a 'yes' vote in the coming referendum on Scottish Independence.

A copy of that bulletin is available [here](#).

Part of the focus of that bulletin was on the report of the House of Lords Select Committee on the constitution published in May (the "Report")¹, which explored the constitutional implications of a "Yes" vote for the rest of the UK (the "RUK"), including a number of important issues that would need to be resolved.

We thought these were worth clients being aware of because they helped to paint the Transition Period picture (including the stages and the process of Transition). They also gave a feel for the level of certainty (or uncertainty) that is likely to surround the Transition and the extent to which that could affect business confidence and inform clients' planning for that eventuality.

In our concluding remarks in the bulletin we said it would be interesting to see the Westminster Government's (WG) response to the Report and we would produce further updates on the subject of Transition (and other Referendum topics) as further information becomes available and is the subject of further debate.

That WG's response has now been published and a copy of it can be found [here](#).

The purpose of this brief update is to report on the WG's response to the conclusions and recommendations of the Report. For ease of reference we have repeated the main conclusions of the Report from our bulletin below immediately followed by WG's response.

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¹ Report of the House of Lords Select Committee on the constitution entitled "Scottish Independence: Constitutional Implications of the Referendum" published on 16th May 2014 (HL Paper 188).

Principles governing independence

The UK as the continuator state

In our bulletin we explained that 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 concluded that the evidence demonstrates that would be the case and therefore an independent Scotland would be a new “successor” state.

WG Response: The WG agrees with the Report’s conclusions and cross refers to and summarises the key conclusions of the first paper in WG’s Scotland analysis series, *Devolution and the implications of Scottish Independence*, which addressed the key legal questions about the constitutional status of both the UK and a separate Scottish State in the event of independence.

Assets, institutions and liabilities

Our bulletin also explained that the position on the “continuator”/ “successor” state question would have significant implications for the negotiations that would take place after a ‘yes’ vote. In particular the Report concluded it would mean that UK institutions (including the Bank of England, for example) would remain institutions of the RUK. The RUK would also retain all of the treaty obligations and memberships of international organisations and these memberships would automatically continue. It would also affect how assets and liabilities would be apportioned, with certain assets apportioned in accordance with legal principles and other assets and liabilities subject to political negotiations, based on the principle of equity. The Scottish Government (SG) and WG would need to agree a basis for apportioning assets and liabilities which the Report acknowledges would be complicated.

WG Response:

1. The WG agrees with the Report that in the event of independence, institutions of the UK would become institutions of the continuing RUK.
2. It also agrees that in the event of independence, the division of assets and liabilities would be the subject of negotiations between those representing a separate Scottish state and those representing the interests of the RUK.
3. The division of liabilities and assets would be a significant part of any negotiations to create a new state. The WG says that there are some general principles of international law that could impact upon this matter but there is no clear consensus in international practice as to the precise allocation of national debt in circumstances of state separation or dissolution.
4. For particular fixed assets, such as government buildings, the territory in which they are situated would be a significant factor to be taken into consideration in the discussions. There would also be an expectation that an independent Scottish state would take on an equitable share of RUK’s national debt. The UK Treasury has set out that the continuing RUK Government would in all circumstances honour the contractual terms of the debt issued by the UK in the event of Scottish independence. They say that both the WG and SG have said that an independent Scottish state would become responsible for a fair and proportionate share of the UK’s current liabilities but the arrangements for splitting assets and liabilities would be one of many issues that would need to be discussed by representatives of the two governments in the event of a ‘yes’ vote.

5. However, they also say that both the WG and SG have said that there can be no 'pre-negotiations' in advance of the referendum. The WG acts in the interests of all parts of the United Kingdom and it would therefore not be appropriate to enter into any discussions or negotiations that would require the WG to act in the interests of just England, Wales and Northern Ireland until people in Scotland have had their say in the referendum.

Some of the constitutional implications for the UK state

The UK Government after a 'yes' vote

As mentioned in our bulletin, the Report considered statements by UK Government Ministers that they would cease to represent the interests of Scotland immediately after a 'yes' vote but concluded this did not reflect the law, 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 considered 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.

WG Response:

1. The WG notes the Committee's recommendation that both governments reach agreement on arrangements that would operate between the referendum and independence dates, in the event of a 'yes' vote. Following a recommendation from the Electoral Commission, the WG and SG have prepared a joint statement on what would happen following either a 'yes' or a 'no' vote. The draft leaflet (shortly to be dispatched) - including the statement from the two Governments - can be accessed [here](#).
2. The joint statement text relating to a 'yes' vote covers many of the issues raised in the Report. In particular it sets out that:
 - a) *If more people vote "Yes" than vote "No" in the referendum, Scotland would become an independent country.* This would not happen straight away. There would need to be negotiations between people representing Scotland and people representing the rest of the United Kingdom.
 - b) During the negotiations, Scotland would still be part of the United Kingdom and public services would be delivered as they are now. The Scottish Government would continue to be responsible for health, education, justice, rural affairs, housing and transport in Scotland. The United Kingdom Government would continue to be responsible for defence, security, foreign affairs and constitution, most pensions, benefits and most tax powers up to the date Scotland becomes an independent country.
 - c) Laws which apply in Scotland now would still apply during the negotiations. During the negotiations, the two governments would continue to discuss any policies of either that affect the responsibilities of the other government. The current Scottish Government would carry on until the next general election to the Scottish Parliament, due to take place in May 2016.

- d) The negotiations would include discussion about the allocation of assets and liabilities.
- e) After the date of independence, the Scottish Government would become responsible for all aspects of government in Scotland.
- f) After the date of independence, the Scottish Parliament would be able to amend or retain the laws that apply in Scotland now to reflect the new circumstances of an independent Scotland.

Effect on House of Commons

In our bulletin we referred to the fact that 59 MPs represent Scottish constituencies in the House of Commons and that the Report considered 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 considered 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. The Report concluded 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.

WG Response:

1. The WG emphasise that laws passed by the UK Parliament set out the arrangements for elections in the UK. Both Governments have made clear that there would need to be a process of negotiation between those representing Scotland and those representing the RUK, if there is a 'yes' vote. WG says it is clear that the current constitutional arrangements would remain in place during the negotiation process. This means that until Scotland left the UK formally, it would continue to be represented in UK institutions, including the UK Parliament but from the date of independence that would no longer be the case.
2. Laws passed by the UK Parliament set out the arrangements for elections to it and it would be a matter for it to change those arrangements and the timing of any changes would have to be settled in the event of a 'yes' vote for Scottish independence.

Negotiations

Legislation required for negotiations

Our bulletin referred to the fact that the Report considered it important for any independence negotiations to have a clear legal basis and that there were 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. The Report recommended 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.

WG Response: This emphasises that throughout the referendum debate, the WG has recognised and highlighted the importance of ensuring a legal, fair and decisive process. It says that in the event of a 'yes' vote it would be important to ensure that the process of

negotiations were legally robust. It says that both the WG and SG agree there would need to be negotiations in advance of a separate Scottish state being established; however consideration of the negotiation process - including any changes that would be required to existing legal arrangements – must not take place unless and until a majority of people in Scotland vote in favour of leaving the UK.

Issues around the RUK negotiating team

In this context our bulletin referred to the Report's consideration of the issues surrounding who should be on the negotiating team for the RUK. In particular, it considered the biggest risk, to using an RUK Government alone approach, as being a change of government at the UK general election in May 2015. The Report raised a range of issues for the Transition 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 considered 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 the Westminster Parliament. It considered 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.

WG Response:

1. In its response the WG notes the Committee's comments in relation to the negotiating teams that would be required in the event of a 'yes' vote. It says that a negotiating team would be required to negotiate in the interests of a separate Scotland and a separate team would be required to negotiate in the interests of RUK. The WG says that the constitution of the respective teams is not a matter that can be considered in advance of the referendum. To do so would require those on the UK side to begin to act in the interests of RUK. The WG says that both they and the SG have made the point that there can be no 'pre-negotiations' in advance of the referendum.
2. In relation to the Report's comments on the 2015 General Election, the WG says that the timings of UK General Elections are now set out in the Fixed Term Parliaments Act 2011. The WG says the SG chose the referendum date after the Royal Assent of that Act and were therefore aware of the timescales between the referendum and the May 2015 General Election; including the possible impact this might have on the negotiations in the event of a 'yes' vote.

Legislation to deliver independence

Our bulletin highlighted the Report's conclusion that following the Transition negotiations, legislation of the Westminster Parliament would be needed to end its jurisdiction over Scotland (but that legislation may not need to be extensive) and to enact the results of the negotiations between the two governments from the UK and RUK perspective (which would be extensive).

WG Response: The WG confirm that in the event of a 'yes' vote, legislation would be required for Scotland to leave the UK. However, the WG say the extent of the legislation

required cannot be judged in advance and would depend on the conclusions of negotiations between those representing an independent Scotland and those representing RUK.

Accountability and ratification

We also highlighted the Report's recommendation that MPs representing Scottish constituencies should not negotiate for the RUK, hold the RUK negotiators to account nor ratify the outcome of the negotiations.

WG Response: The WG's response is that the constitution of the respective negotiating teams would need to be determined after the referendum. However, the WG is clear that the teams would need to negotiate in the interests of those they represent. In the case of the team representing RUK that means negotiating in the best interests of those from England, Wales and Northern Ireland.

Timetable for negotiations

Our bulletin highlighted the Report's conclusion that there was no constitutional or legal necessity (including under the Edinburgh Agreement) to adhere to the SG's proposed target date for Scottish independence of 26 March 2016. It said 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.

WG Response: The WG agrees with the Committee's conclusion that negotiations should take as long as is required, rather than focussing on an artificial deadline.

Our Concluding Remarks

The WG's response on most of the Report's conclusions are helpful in confirming the positions (at least from the WG's perspective) and in a way which largely one would have expected. They reinforce the Report's conclusions but also emphasise that there are elements surrounding the Transition where there will be significant uncertainties which will remain on issues which would require decisions and action by the governments, their Parliaments and others.

It looks unlikely that any further clarity will emerge on any of these issues ahead of the referendum but in the event of a 'yes' vote a number of them will need to be resolved very quickly. The pace with which this can be achieved is likely to be a good initial indication of how things might proceed more generally in the rest of the transition.

We will be keeping a watchful eye on the rest of the debate and will produce further updates if we feel they would be helpful to clients.



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