





# Scotland

What are the legal issues for Scotland following a Brexit?

Issue	Impact	Areas of law affected
<p><b>Could the fact that while the UK as a whole voted for BREXIT Scotland voted by a clear margin to remain in the EU lead to further constitutional change?</b></p>	<p>While the UK as a whole voted for Brexit, Scotland voted 62/38 to remain in the EU. As a result there is a broad political will in Scotland to seek to maintain its EU membership and/or access to the Single Market and that this is reflected in any deal the UK Government seeks to agree with the EU on Brexit. The Scottish Government has indicated that one option is for Scotland to continue its membership of the EU as an independent state. This would mean a second referendum on Scottish independence with the possibility of Scotland becoming both independent from the UK and remaining in the EU.</p>	 All
<p><b>A Scottish Veto?</b></p>	<p>The Scotland Act 1998 under which the Scottish Parliament was established provides that the Scottish Parliament cannot contravene EU law. In order for the UK to leave the EU 'cleanly', it will be necessary for legislation to be passed in Westminster to remove that provision.</p> <p>Reflecting the principles of the 'Sewell Convention', the Scotland Act 2016 states that 'normally' the UK Parliament will not legislate on devolved matters without the consent of the Scottish Parliament. This does not, however, amount to a right of veto as the UK Government could either proceed without amending the provision of the Scotland Act, at least in the short term, or legislate without the Scottish Parliament's consent. Either way, however, there would be over-riding political considerations both at a UK and Scottish level.</p>	 All

### The "Greenland Option"

It may be possible for the bulk of the UK to leave the EU but with Scotland (and potentially other parts such as Northern Ireland and Gibraltar) remaining within the EU. The rest of the UK could become 'externally associated' with the EU.



All

This is effectively what happened in 1985 when Greenland seceded from the EEC (as the forerunner of the EU), while Denmark remained within the EEC. The situation of Scotland (even if combined with Gibraltar and/or Northern Ireland) would be quite different, however, given the relative scale of the parts of the UK that would be outside the EU when compared to Greenland, which is geographically separate and has a small population.

If this was the approach taken it is unclear how exactly it could be structured in practice. It would inevitably require a great degree of co-operation both within the UK and with the EU and considerable constitutional change within the UK and further devolution of powers from Westminster.

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### Scottish Independence within the EU

Achieving continuity of EU membership for Scotland, or more correctly Scottish citizens, could involve Scotland seeking membership of the EU as an independent state.



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There are conceptually a number of ways this might be achieved. The two more likely alternatives would be either for Scotland to apply as a new applicant or for Scotland (potentially with other parts of the current UK) continuing as member of the EU (ie where effectively for EU purposes England & Wales etc have withdrawn from the UK).

In either event the constitutional precedent in Scotland would be that independence would require an affirmative vote in a referendum in Scotland along the lines held in September 2014.

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### Scotland within the UK and out of the EU

It is possible that the outcome of negotiations involving Scotland, the UK and the EU could be Scotland remaining part of the UK and outside the EU. This could happen because it is viewed that there is insufficient support in Scotland for a new independence referendum or the second referendum rejects independence.



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There is no visibility on what the ongoing constitutional relationship between the UK and Scotland will be but there is likely to pressure on the UK from the Scottish Government and others for greater autonomy for Scotland, for instance in relation to migration where it has been mooted that Scotland could, within parameters set by the UK, set its own migration policy. There are also areas currently controlled at an EU level such as agriculture and fisheries that could transfer to the Scottish Parliament.

## What action can you take now?

Beyond general Brexit planning, there is nothing substantive that should be done at this stage. It is not inevitable that there will be a second Independence referendum as the Scottish Government has made it clear that it would not promote a referendum unless there was clear evidence that there is majority support for independence.

## How can CMS help?

CMS can assist with planning for Brexit and the impact of any related changes in the constitutional position in Scotland.

## Your contacts



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