Scotland, Brexit and Differentiation

This note summarises oral evidence given by Kirsty Hughes, Senior Fellow, Friends of Europe to the European Parliament Constitutional Affairs Committee, 9th February 2017

I want to set out some comments on the Scottish Government’s – and Scottish Parliament’s – wish for some differentiation from the UK, in the UK-EU deal, that would allow Scotland (at a maximum approach) to remain in the EU’s single market and in the UK. Scotland voted 62% to 38% to remain in the EU on 23 June 2016.

What would such differentiation look like: is it technically, politically, legally feasible – and if it is, is it anyway a good idea, in particular how would it impact on trade between Scotland and the rest of the UK, might it, for example, require there to be a border between Scotland and England? These are the issues I wish to cover in my presentation – feasibility, and impact.

In December 2016 Scottish Government published ‘Scotland’s Place in Europe’ which sets out, in an in-depth paper, the differentiation approach that I will focus on today

1. Context
   i/ Scottish parliament support to look at differentiation:

There has been wide but changing support in the Scottish Parliament for Scotland asking for a differentiated relationship to the EU in the Brexit context:

- June 27th Motion passed 92-0 Scottish Parliament “to explore options for protecting Scotland’s relationship with the EU [and] Scotland’s place in the single market.” SNP, Labour, LibDems and Greens supported, Conservatives abstained – NB that is a consensus across pro and anti-independence parties so this was an important moment.

- Nov 15th – majority fell to 62 to 32, SNP and Greens in favour, conservatives and LibDems against, Labour abstained.

- Jan 17th – Scottish Parliament voted to continue exploring staying in single market 86 for, 36 against. Labour voted with SNP and Greens, while Conservatives/LibDems were against. (part of motion.. “in the event that the UK opts to leave the single market, alternative approaches within the UK should be sought that would enable Scotland to retain its place within the single market and the devolution of necessary powers to the Scottish Parliament;”)

   ii/ UK government not fully rejected but says wants one UK approach

The UK government White Paper published on 2nd February, states “Our guiding principle will be to ensure that – as we leave the EU – no new barriers
to living and doing business within our own Union are created. We will maintain the necessary common standards and frameworks for our own domestic market.”

But after the Joint Ministerial Committee on 30\textsuperscript{th} January, the UK government said “Consideration of the proposals of the devolved administrations is an ongoing process”. So there has been no official rejection yet though differentiation seems entirely inconsistent with the UK government approach.

\textit{iii/ Scottish Government recognises it is for UK government to request differentiation from EU27}

It is important to note that the Scottish government has fully recognised in its December paper, that its differentiation proposals can only be taken to the EU27-UK negotiations if the UK government agrees to do so – and has indeed asked for that option to be in the UK government’s Article 50 letter.

2. Main proposals in ‘Scotland’s Place in Europe’

\textit{i/ The Scottish government’s first proposal is for the whole UK to stay in the EU’s single market and customs union.} No non-member state has ever been a full member of the entirety of the EU’s customs union – though of course Turkey has a customs union with the EU.

The UK government’s White Paper, and other Brexit statements, make clear that the UK will aim to leave the EU’s single market, will not respect its four freedoms nor the ECJ, nor will it stay in the customs union or be part of the EU’s common commercial policy (though Theresa May has suggested there may be some new form of customs deal).

So this first proposal is no longer relevant.

\textit{ii/ The Scottish government’s proposes that, if the UK is out of the EU’s single market, it wants Scotland to stay in the single market, fully respecting the four freedoms – while also remaining within the UK.}

The Scottish government paper also briefly suggests the possibility of less ambitious differentiation – eg staying in Horizon 2020, Erasmus, or Europol, but they mainly focus – and therefore so do I – on the single market option.

\textit{How could this happen?} According to the Scottish government’s document, in essence:

1/ Scotland would join EFTA and the EEA;

2/ Scotland would also be part of a UK-wide customs union (helping to ensure no border between Scotland and the rest of the UK (rUK));

For this to happen, the Scottish government proposes:
• a very large amount of further devolution of powers (compared to existing devolved competences) – including in immigration, import and export control, competition, energy regulation and more

• procedures for managing potential tariff differences between rUK and Scotland, if rUK faced tariffs with the EU27 and Scotland did not

• procedures for managing non-tariff barriers and regulatory differences between rUK and Scotland

• ways to ensure free movement of people for EU citizens to Scotland and Scottish citizens to the EU (as Norway has).

• for Scotland to make financial contributions to EU operations and programmes as EEA members do today

• the possibility of Scotland being granted independent international legal personality – so it can secure agreements with other countries – or else to do this via an arrangement with the UK government.

3. Is this feasible – and with what impact?

The feasibility issues are difficult – and they mostly relate to the fact that in this differentiation proposal, Scotland would remain a sub-state. It would not be an independent state like Norway or Iceland or Switzerland.

Some of the issues of how differences in tariff or non-tariff barriers would be dealt with are similar or the same whether Scotland is a sub-state or an independent state – but this differentiation proposal is only concerned with what would happen if Scotland stayed inside the UK.

Legal issues:

i/ To join EFTA and the EEA both relevant treaties are clear that membership is open to European states. Without treaty change, this then looks impossible.

The Scottish government argues that the Faroe Islands are exploring becoming part of EFTA, with the argument being that Denmark would sponsor their membership. EFTA has taken no decision on this. Alternatively, it is proposed Scotland could be as associate member – but this does not get round the sub-state problem.

Finally, another proposal here is for the UK government to stay in the EEA (via an EFTA application) even while leaving the EU, and then to territorially exempt all of the UK from the EEA except for Scotland. In the Norwegian case, Svalbard has some exemptions from the EFTA agreement.
These proposals look challenging: would EFTA states agree to the precedent of bringing in a sub-state? And if they did would EEA states accept such an EFTA member as an EEA member? And would they change the two treaties to do this? This would require political will on all sides.

**ii/ Flexibility and other routes?** The Scottish government does not suggest any other routes to achieve this. It is noteworthy, that the EU has done the mirror image in terms of flexibility ie brought former East Germany into the EU, as part of German unification even without it meeting the acquis, and similarly in the case of northern Cyprus.

The reverse is what is requested here ie that while the UK will be outside the EU, that Scotland – meeting all the acquis – could remain within its single market. Could there be a ‘special status’ way to do this? It has not been done before, so it looks unlikely but it cannot be ruled out entirely.

**iii/ Free movement of persons**

Is it possible that one part of a state can have a different migration policy to another part – could Scotland maintain free movement of persons, and workers, while rUK did not?

This in principle looks possible. In Canada, there is, to some extent, a devolved migration policy. The UK and Ireland together have a so-called Common Travel Area, and neither are part of the Schengen Area.

If EU citizens could travel freely to Scotland, to live, work and reside, would rUK accept this, since those EU citizens could travel on to England and Wales and northern Ireland? This issue arises for Ireland and the UK in the context of Brexit too.

If – as seems likely – EU citizens, after Brexit can still travel to the UK for tourism and business purposes, then control of those wanting to live and work in the UK will anyway need to be done elsewhere than at the border – especially in terms of checking anyone who stays illegally. So in principle EU citizens could have a right to live and work in Scotland – which if they tried to then do in England, they would no longer have the legal right to do.

For Scottish citizens to keep the right to free movement across the EU 27 and EEA, there would then need to be some way to prove residence in Scotland, so that the EU27 could check only Scottish residents and not other UK citizens availed themselves of this right. This might be done via national insurance numbers or some other proof of residence.

**iv/ Free movement of goods, services and capital**

The Scottish government suggests that if Scotland were in EFTA/EEA it could also be in a UK-wide customs union – quoting as an example the
Liechtenstein/ Switzerland customs union, which functions successfully, even though Liechtenstein is in the single market and Switzerland is not.

However, this looks problematic. In the UK/Scotland case, the UK would not be in EFTA (as Switzerland and Liechtenstein are).

In the EFTA treaty – or convention – article 56/3 is clear: “Any State acceding to this Convention shall apply to become a party to the free trade agreements between the Member States on the one hand and third states, unions of states or international organisations on the other”.

Article 56/3 means that Scotland could not both be party to EFTA trade agreements and be in a UK-wide customs union, where there was a single UK trade policy. So this is a real stumbling block in terms of future UK-Scotland relations but not per se to the proposal for Scotland to stay in the single market. If trade policy was devolved to Scotland (as there is devolution of trade policy in Belgium) then Scotland, if it was in EFTA, could then do a trade deal with the rUK but that starts to raise questions about barriers within the UK to trade.

WTO issues: There could also be WTO issues here – for trade agreements not to fall foul of MFN status, they must apply to substantially all of a territory. So if, in effect, being in the Single Market is a type of trade deal with the EU27 then the territory of Scotland is not ‘substantially all’ of the UK – though if it were designated as its own customs territory then it would resolve the issue.

Equally if EU-UK talks failed and the UK fell back on WTO rules, then Scotland could avoid this for itself if it were in EFTA but then there would be tariffs on goods between England and Scotland.

Non-tariff barriers, regulatory differences, rules of origin differences and potentially tariff differences would all make rUK/Scotland relations more complex. The paper suggests some ways to deal with this and to keep the border to Scotland open. But there would certainly be complex, bureaucratic paper-work for Scotland-rUK trade (as there will be for UK-EU trade – and as there is even for Norway in terms of rules of origin declarations etc).

In the Swiss/Liechtenstein case, a concept is applied, ‘parallel marketability’ that allows goods traded between Switzerland and Liechtenstein to meet EEA and Swiss regulations, as appropriate. Whether rUK and Scotland could use such a concept, so ensuring border-less trade while Scotland also met EEA/single market standards is an open question.

v/ Implications for Scotland, UK, and EU27

For Scotland and the UK considering this proposal, the major issue around impact (leaving aside the big political issues of much more devolution and greater differentiation in the UK) is what sort of frictions would be introduced into intra-UK trade, and how can these be minimised.
That will depend in part on what sort of future UK-EU trade deal is done, how regulatory differences are managed – as well as on what sort of trade deals the UK does in the future with the EEA/EFTA member states. But it is clear that some frictions would be introduced.

For the EU/EEA, apart from the precedent of agreeing such differentiation with a third country – in the unprecedented situation of Brexit negotiations, the question would surely be around the border and intra-UK trade and how and whether the integrity of the EU’s single market would be ensured in Scotland.

The Norway/Sweden border is a partial answer – and on that border, the use of cameras, customs reporting on rules of origin, pullover checks for some lorries is well managed – but this is only a partial example since both are in the EEA/single market (though Norway is not in the Customs Union). In the Scottish approach, neither rUK or Scotland would be in the Customs Union, but the regulatory differences that emerge would need to be controlled, as they will need to be in trade between Ireland and the UK, including Northern Ireland, and between the UK and the EU27.

**Conclusion**
Scotland voted to stay in the EU. The Scottish Parliament voted to explore ways to stay in the EU’s single market. Differentiation looks complex but it boils down to two main questions for the EU27:

1/ Would EFTA and the EEA accept Scotland as a member or associate member (and change their treaties to do so)?

2/ What customs, regulatory and supervisory mechanisms would the EU27 need to see between rUK and Scotland to accept that having a sub-state within the EU’s single market (when the rest of that state is outside it) would not compromise the integrity of the single mar