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Scotland analysis: Borders and citizenship

January 2014



Scotland analysis: Borders and citizenship

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Executive summary

In September 2014 people in Scotland will take one of the most important decisions in the history of Scotland and the whole of the United Kingdom (UK) - whether to stay in the UK, or leave it and become a new, separate and independent state. In advance of the referendum, the UK Government will ensure that the debate is properly informed by analysis, and that the facts that are crucial to considering Scotland's future are set out

This paper looks at the implications for borders and citizenship if people in Scotland were to vote for independence. It sets out how the current UK framework benefits the whole of the UK, including Scotland, explores the challenges which an independent Scottish state could face in assuming control of its borders, and considers the difficult choices that the people in Scotland would have to face on issues such as citizenship and nationality. It will be a choice between the continuity and security of being part of the UK, or the uncertainty and risk of leaving it.

Why borders matter

Management of the UK's external border is complex, expensive and relies on a fully integrated system across the UK. International borders define states' geographic boundaries and the limits of their territorial sovereignty. There are large differences around the world in the way that borders are managed. The UK Government manages the UK's single external border for the benefit of the whole of the UK. Scotland has internal land and maritime administrative and legal jurisdiction boundaries within the UK, but these are entirely different to international borders.

In managing the border, the UK Government balances the need to facilitate and promote trade, tourism, asylum and legitimate migration with protecting the economy, businesses and the public from global threats from terrorism, serious and organised crime, illegal immigration and abuse of the excise regime.

In 2011-12 the UK Government spent £2.1 billion¹ and employed more than 20,000 staff across multiple agencies to manage the border:

- In 2012, 2.23 million visas were granted from 2.56 million applications;²
- In 2012 over 105 million people a year entered the UK,³ via 138 entry points; and

¹ A proportion of this amount is recovered through fees.

² *Before entry data tables Immigration Statistics January to March 2013* volume 2, www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

³ *Admissions data tables Immigration Statistics January to March 2013*, www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

In the 2011-12 financial year staff seized over four and a half tonnes of Class A drugs⁴ and 455 million cigarettes⁵. The seizure of the latter protected tax revenue of over £116 million⁶;

All activity to manage, control and secure the UK's border, wherever it is undertaken, and every penny spent, regardless of where it is invested, is of direct benefit to every UK citizen regardless of where they live or work. For example, preventing drugs, firearms and other illegal goods from entering the UK benefits everyone across the UK, irrespective of whether those illegal goods are shipped through the Port of Dover, flown to Glasgow Airport or driven across the border into Northern Ireland. The management of the UK's border, like the protection provided by its defence and security, is a common public good from which everyone benefits.

While the UK's external border is proactively managed and protected, the movement of people and goods between Scotland and other parts of the UK is currently unhindered. Travel around the UK does not require identification documents. There are neither customs inspections nor administration associated with the movement of goods. The UK's internal boundaries are busy. 23 million plus vehicles cross in both directions each year between Scotland and England, 15 million tonnes of freight moves in each direction annually, there are seven million rail passenger journeys between Scotland and the rest of the UK and 800,000 plus air passenger journeys between Scotland and Northern Ireland⁷.

If Scotland becomes an independent state the current boundary between Scotland the rest of the UK, would by definition become an international border between two separate states. The government of an independent Scottish state would be required to take control of its borders and establish the necessary systems and processes for managing these. The government of the continuing UK and its institutions would no longer have responsibility or powers to manage Scotland's borders⁸.

Both a separate Scottish state and the continuing UK would have to make decisions about how to manage the flow of people and goods across that border. It is likely that over time differences in tax, regulatory, administrative and visa regimes would develop as the two different governments pursued different policies to suit their own circumstances and goals.

Movement of people

An independent Scottish state would be faced with some difficult choices about how to manage its borders. Independence means that Scotland should be free to determine its own migration policies. In its recent White Paper on independence, the current Scottish Government indicated that an independent Scottish state would seek to manage its migration and borders policies to meet its own economic, social and demographic priorities and needs.⁹

However, an independent Scottish state's ability to determine both its migration and border policies independently would be affected by what, if any, international groups or borderless travel areas it sought to join, and whether they imposed any obligations as conditions of membership. An independent Scottish state may wish to ensure that its citizens continued to enjoy the benefits of borderless travel through membership of the Common Travel Area (CTA) or Schengen. It is not possible to be a member of both areas simultaneously.

⁴ *Border Force quarterly drug seizures: 2011 to 2012 and Q1 and Q2*, volume one www.gov.uk/government/publications/drug-seizures-made-by-border-force-in-the-uk.

⁵ Annual level of tax revenue that is protected through detecting goods where excise duty has not been declared. www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/annual-level-of-tax/.

⁶ Ibid.

⁷ *UK Airport Statistics 2011 table 12.2*, Civil Aviation Authority.

⁸ *Scotland Analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

⁹ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

Both of these arrangements require some collaboration on immigration policy with other states. It is simply not possible to collaborate with other states in a borderless travel arrangement and at the same time to have an immigration policy that differs significantly from, or undermines the policies of, the other members. It is therefore difficult to see how an independent Scottish state could implement an entirely independent migration policy and, at the same time, be accepted as a member of a borderless travel zone.

Schengen

Membership of the Schengen area has been part of the EU legal framework since 1999 and all new members of the EU since then have been required to commit to joining the Schengen Area. An independent Scottish state may therefore be obliged to join the Schengen Area as a condition of its EU membership. The Schengen area is a borderless travel area in which the participating states have abolished all internal borders in lieu of a single external border. They accept EU competence over their border and visa policies, even where they are not a member of the EU (for example Switzerland).

The UK (along with the Republic of Ireland¹⁰) has an opt-out from the Schengen area. If an independent Scottish state wished to seek a similar opt-out from Schengen this would have to be negotiated and agreed with all the 28 existing EU Member States – it is not in the Scottish Government's gift. Some Member States may be unwilling to grant special opt-outs to Scotland on measures which they have had to adopt. Others have their own independence movements to consider, which will influence how they view Scotland's membership of the EU. It therefore cannot be guaranteed that an independent Scottish state will be able to secure an opt-out from Schengen membership.¹¹

An independent Scottish state that joined the Schengen area would have to control movement across the parts of the Schengen external border for which it was responsible. The clearest illustration of this is that an independent Scottish state would be required to establish a land, sea and air border with the continuing UK, which is not a member of Schengen. This would include crossings at the land border between England and Scotland, ferry crossings between Northern Ireland and Scottish ports and flights between Scotland and other parts of the UK. Controls on the movement of people would add both direct and indirect costs to the economies of both an independent Scottish state and the continuing UK.¹²

The Common Travel Area

As part of the UK, Scotland currently benefits from membership of the Common Travel Area (CTA). In the event of a vote for independence Scotland would leave the UK and therefore leave the CTA.¹³ In order to apply to join the CTA Scotland would have had to negotiate an opt-out from membership of the Schengen Area.

The UK, the Republic of Ireland, the States of Jersey and Guernsey and the Isle of Man collaborate on border policies and practices as part of the CTA. There are no routine immigration checks on passenger travel within the CTA and passengers are not required to carry a passport or national identity document for immigration purposes.

¹⁰ Throughout the document 'Ireland' is referred to as the Republic of Ireland; consistent with the Republic of Ireland Act 1948 S2.

¹¹ This issue was discussed fully in *Scotland analysis: EU and international issues*, HM Government, January 2014.

¹² See *Scotland analysis: Business and microeconomic framework*, HM Government, July 2013 and *Scotland analysis: Macroeconomic and fiscal performance*, HM Government, September 2013.

¹³ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

The current Scottish Government has indicated that it would want an independent Scottish state to join the CTA^{14, 15} Membership however would need to be negotiated with the continuing UK and all existing CTA members.

Migration for employment

An independent Scottish state would need to decide how to manage its migration policy, while taking into account its impact on other states. As a member of the EU it may be bound by EU legal migration legislation. The UK has not opted-in to this.

The current Scottish Government has indicated that an independent Scottish state would manage immigration to meet its own economic, social and demographic priorities¹⁶. It would seek to attract highly-skilled workers as the UK and other countries do, but it would also seek to address potential future economic problems that may result from an ageing population and increase its population through immigration.

There are questions as to whether immigration is an effective tool to address demographic problems and an ageing population. Moreover, the Institute for Fiscal Studies (IFS) suggest that Scotland would face a less challenging long-term fiscal situation as part of the UK than as an independent State, regardless of the assumptions used by the IFS about the levels of migration¹⁷.

More fundamentally however, many countries around the world face difficulty in attracting skilled immigrants. A policy of population increase through immigration therefore suggests a less selective approach to the entry and settlement of immigrants than that currently pursued by the UK. An independent Scottish state seeking to grow its population through immigration may instead seek to attract higher numbers of low or non-skilled migrants. This would be contrary to the immigration policies currently being pursued by both the UK and the Republic of Ireland within the CTA, and could therefore put these arrangements under strain. As such, the success of negotiations for an independent Scottish state to join the CTA would likely depend on it agreeing to align certain visa and immigration policies with those of other members.

The movement of goods

Creating an international border between Scotland and the rest of the UK would impact on the movement of goods across that border. It would result in trade between Scotland and England, Wales or Northern Ireland becoming international trade: import-export. Previous papers in the Scotland analysis series have shown that maintaining a borderless UK is worth £2,000 per year to every Scottish household.¹⁸

States independently determine their own policies for controlling the movement of goods across their borders. They decide which goods they wish to levy a tax or duty on to raise revenue or discourage a particular behaviour: their excise regime. The UK currently has a strong regime to monitor the movement of goods across its borders and, where necessary, impose duties or controls on those goods. This includes inspections of freight as it enters the UK, including freight from the rest of the EU.

¹⁴ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

¹⁵ Deputy First Minister, Nicola Sturgeon's statement to the Scottish Parliament on an independent Scotland's continuing membership of the European Union, in which she indicated that: "Just like Ireland, we would not enter Schengen but would instead look to co-operate with Ireland and the continuing UK in the common travel area." *Meeting of the Parliament 13 December 2012*, Scottish Parliament, www.scottish.parliament.uk/parliamentarybusiness.

¹⁶ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

¹⁷ *Fiscal sustainability of an independent Scotland*, Institute for Fiscal Studies, November 2013.

¹⁸ *Scotland analysis: Macroeconomic and fiscal performance*, HM Government, September 2013.

An independent Scottish state would have to determine its own excise regime. Over time, there may be a divergence between its excise policies and those of the continuing UK (for example in taxes on alcohol or tobacco), which could be exploited by criminals through smuggling. Either state may conclude that it is only through a degree of control and inspection at the border that they can protect their excise regime. Any inspection would create delays and add costs for businesses transporting freight across the border.

The UK has a track record of protecting its borders against smuggling. If Scotland became an independent state, the unified system for protecting the border could not continue. An independent Scottish Government would have responsibility for its own customs policy and for ensuring that it was enforced. The customs officers of the continuing UK would have no power or responsibility to protect the customs regime of an independent Scottish state.¹⁹

Serious criminals exploit the challenges that law enforcement and customs agencies have in working effectively across international borders. When agencies of two states collaborate, it is inherently more formalised and cumbersome than colleagues working together within one organisation in one state. Law enforcement collaboration between sovereign states requires the submission of formal mutual legal assistance requests and applications for extradition. An independent Scottish state and the continuing UK could agree to work closely together but this is unlikely to be as effective as the current arrangements.

Citizenship

If Scotland became an independent state, its government would decide who could become, or would be required to become, a Scottish citizen. This would be a complex and difficult decision with profound implications for individuals and their families; not only those alive at the time of independence but also future generations born in Scotland, in other parts of the UK or overseas. There are no clear precedents to guide an independent Scottish state in this area.

The current Scottish Government has proposed that all British citizens habitually resident in Scotland will be considered Scottish citizens, and that Scottish-born British citizens currently living outside of Scotland will also be considered Scottish citizens.²⁰ This is a very wide model of citizenship. It could lead to people living in Scotland, for example migrants from other parts of the UK, assumed to be Scottish citizens, whether or not they would choose to be.

The UK has historically been tolerant of plural nationalities, and therefore it is likely that it would be possible for an individual to hold both British and Scottish citizenship. However, under current rules British citizens living outside the UK cannot pass their British nationality on more than one generation. So the children of British citizens living in an independent Scottish state would be British citizens, but their children and subsequent generations would not be.

The government of the continuing UK would also need to consider whether all British citizens living in Scotland could retain their British citizenship upon independence. This cannot be guaranteed and could be dependent on any residency requirements or proof of affinity to the continuing UK. It is not possible to predict now what the decision of a future government of the continuing UK might be in this area.²¹

¹⁹ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

²⁰ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

²¹ *What about the neighbours? An independent Scotland's nationality law and immigration control*, Royal Society of Edinburgh, 25 September 2013, Bernard Ryan, School of Law, University of Leicester < http://www.rse.org.uk/cms/files/events/programmes/2012-13/speaker_notes/Bernard%20Ryan.pdf>.

In the event of a vote for independence, the governments of the continuing UK and an independent Scottish state would need to negotiate whether, and if so how, any of the benefits associated with British citizenship would continue to apply to British citizens living in an independent Scottish state. The practical benefits of citizenship include a passport and consular support. An independent Scottish state would need to issue its own passports, and establish the infrastructure to do so. It would also need to determine what consular services its citizens would be entitled to abroad. In addition, an independent Scottish State would not automatically inherit the visa waiver agreements which entitle UK passport holders to travel to many countries without a visa.²² These are bilateral agreements between the UK and other countries and, if an independent Scottish state wished to conclude similar agreements, these would have to be negotiated with the other states.²³

Conclusion

A common UK citizenship and free movement facilitated by a single external border have enabled and supported the integration of families, communities, business and the economy across the UK. This has benefited Scotland and the rest of the UK.

The UK Government manages who and what can come into and out of the UK in order to facilitate trade, tourism and legitimate migration while protecting the economy and the public from terrorism, serious and organised crime, illegal immigration and the abuse of the excise regime. This is a complex and expensive undertaking carried out by the UK Government for the benefit of the whole UK.

If people in Scotland vote in favour of leaving the UK there would be profound changes. An international border would be created where one currently does not exist. This would have implications for individuals, businesses and the economies of both Scotland and the continuing UK.

The analysis in this paper shows that an independent Scottish state's ability to determine its own border and migration policies would be affected by its membership of any borderless travel areas. It is simply not possible to collaborate with other states in a borderless travel arrangement and at the same time to have an immigration policy that differs significantly from, or undermines the policies of, the other members.

Creating an international border between Scotland and the rest of the UK would also impact the movement of goods across that border and could create opportunities for smuggling and organised crime.

A vote for independence would also create a separate Scottish citizenship. Determining who would be entitled to citizenship of an independent Scottish state would be complex and would have profound implications; affecting not only those who vote in the referendum but their children and grandchildren.

²² *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

²³ *Scotland analysis: EU and international*, HM Government, January 2014.

Introduction

For over 300 years, Scotland has been a separate nation within the UK, with a strong identity, whilst at the same time being well integrated economically and socially with the other nations of the UK and enjoying a common UK citizenship. The absence of an international border between Scotland and other parts of the UK has been a key factor in Scotland's integration.

If Scotland became an independent state, its current boundaries with other parts of the UK would become international borders, and people living in Scotland could become Scottish citizens. The government of an independent Scottish state would have to take responsibility for managing its borders, deciding who and what could move in and out of Scotland. It would also have to decide who could become a citizen of an independent Scottish state, and how this citizenship could be obtained. This would be a profound change from the current arrangements where the UK Government manages the borders of the whole UK in an integrated and unified system, and all UK citizens share a common citizenship.

Principles of borders and citizenship

It is one of the most fundamental principles of sovereignty and international law that states have the right to define who their nationals are, and who and what travels into and out of their territory. These questions would be among the most important faced by the government of an independent Scottish state.

International borders define states' geographic boundaries and the limits of their territorial sovereignty. They define the nature of trade between two states and the relationship of the citizens of one state to the citizens of the other.

There is no norm for the delineation of international borders around the world. Borders may be unmarked, they may be signposted or they may be fenced, surveilled and guarded. There may be formal border crossing points to allow a degree of control on the transit of people and goods. It is for states to decide how to manage their borders based on considerations of security, policy and relationships with their neighbours.

The referendum debate

The referendum on independence presents one of the most important decisions in both Scotland's and the rest of the UK's history. It is important that the debate ahead of the referendum is informed by wider analysis, and that the facts that are crucial to considering Scotland's future are set out.

The objective of the UK Government's Scotland analysis programme is to provide comprehensive and detailed analysis of Scotland's place in the UK and how that would be affected by independence. The analysis will provide sources of information and enhance understanding on the key issues relating to the referendum. As such, the programme is a major contribution to the independence debate.

The UK Government believes that Scotland is better off as part of the UK, and the UK is stronger with Scotland as part of it. It is for those who want Scotland to leave the UK to set out their proposals for independence and address some of the key questions relating to its implications. Not all of the answers to these questions can be known in advance of the referendum. This is because, as set out in the UK Government's paper *Scotland analysis: Devolution and the implications of Scottish independence*,¹ some of the details can only be established through negotiations between the representatives of an independent Scottish state, the continuing UK, and other bodies, for example the European Union (EU). These negotiations would have to take place after a vote for Scottish independence.

The scope of this paper

This is the tenth paper in the Scotland analysis series. It analyses the UK's framework for managing its common external border, considers the benefits of an absence of internal borders within the UK, and the implications for both if people in Scotland vote for independence. It also considers the impact that Scottish independence may have on issues of citizenship.

The UK Government's first Scotland analysis paper, *Scotland analysis: Devolution and the implications of Scottish independence*, set out that, in the event of a vote for independence the UK's key national institutions would operate on behalf of the continuing UK as before but they would have no power to act in or on behalf of an independent Scottish state. The government of a new Scottish state would therefore have to set up the institutions for managing its own borders, establish what policies it wanted to pursue in determining who and what travelled into and out of an independent Scottish state, and articulate the principles by which individuals would be entitled to Scottish citizenship. In all these areas there would be difficult choices with profound implications for both an independent Scottish state and the continuing UK.

Other papers in the Scotland analysis series have considered the economic implications of creating an international border between an independent Scottish state and the continuing UK. Specifically, *Scotland analysis: Business and microeconomic framework*² examined the implications for business and the integrated UK domestic market, and *Scotland analysis: Macroeconomic and fiscal performance*³ set out that institutional and policy divergence between Scotland and the continuing UK would be likely to lead to a weakening of economic integration, triggering a "border effect". Elsewhere, *Scotland analysis: Security*⁴ analysed the implications of Scottish independence for the security of both Scotland and the continuing UK, including the challenges posed for cross-border policing. And *Scotland analysis: EU and international*⁵ considered an independent Scottish state's relationships with other states and international organisations including the EU, which would have a profound impact on how it chose to, or was required to, manage its borders.

¹ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

² *Scotland analysis: Business and microeconomic framework*, HM Government, July 2013.

³ *Scotland analysis: Macroeconomic and fiscal performance* HM Government, September 2013.

⁴ *Scotland analysis: Security*, HM Government, October 2013.

⁵ *Scotland analysis: EU and international*, HM Government, January 2014.

This paper builds on that analysis, and considers the practical effects of an international border between an independent Scottish state and the continuing UK, and how that border could be managed.

Structure of this paper

Chapter 1 sets out the importance of borders and the considerations that states around the world must take into account when determining how to manage their borders. It then analyses the UK's internal and external borders, and examines the current framework for managing the UK's external border.

Chapter 2 analyses the UK's policies and systems for managing the movement of people into the UK, both for short term visits and economic migration. It sets out some of the issues that the government of an independent Scottish state may have to consider when determining how to manage the movement of people into and out of an independent Scottish state.

Chapter 3 assesses how the movement of goods, both legal and illegal, between Scotland and the UK could be impacted if Scotland became an independent state, and the challenges this could pose for the governments of both the continuing UK and an independent Scottish state.

Chapter 4 considers the question of citizenship and how an independent Scottish state may define its citizenship. It also analyses the potential impact on the citizenship of the continuing UK if Scotland became an independent state.

Chapter 1:

Why borders matter

If people in Scotland voted for independence in the forthcoming referendum, the current boundary between Scotland and the rest of the UK would become an international border between two separate states: an independent Scottish state and the continuing UK.

International borders define states' geographic boundaries and the limits of their territorial sovereignty. There are wide differences in the way that borders are managed around the world. The UK Government manages the UK's single external border on behalf of the whole UK. Scotland has internal administrative boundaries, both land and maritime, within the UK but these are entirely different to international borders.

In managing the external border, the UK Government balances the need to facilitate and promote trade, tourism and legitimate migration with the imperative to protect the economy, businesses and the public from terrorism, serious and organised crime, illegal immigration and abuse of the excise regime. Management of the UK border is complex, expensive and relies on a fully integrated system across the UK. In 2011-12, the UK Government spent £2.1 billion on managing the border and employed around 20,000 staff across multiple agencies to do so.

To enhance the security of its people and protect its revenue streams, the UK has invested heavily in the upstream protection of its border – intercepting people and goods that could harm the UK before they reach the border.

While the UK's external border is proactively managed and protected, under the current arrangements the movement of people and goods between Scotland and other parts of the UK, across internal boundaries of the UK, is unhindered. Travellers do not need to carry any identification documents; there are no customs inspections or administration associated with exports. The busy nature of the internal boundaries is evidenced by the 23 million plus vehicle crossings in both directions each year between Scotland and England, by the 15 million tonnes of freight that moves in each direction annually and by the 800,000 plus air passenger journeys to and from Scotland and Northern Ireland. It is easy to work in one nation of the UK and live in the other, to produce goods in one nation and sell them in the other.

If Scotland becomes an independent state, the domestic boundary would by definition become an international border. An independent Scottish state would be required to make decisions about how to manage the flow of people and goods across that border. It is likely that over time differences would develop between an independent Scottish state and the continuing UK, in tax, regulatory, administrative and visa regimes as two different governments pursued different policies to suit their own circumstances and goals.

- 1.1 Borders define the geographic boundaries of political or administrative entities. The border between Scotland and the rest of the UK currently defines the extent of the Scottish legal jurisdiction on the one hand and the legal jurisdictions of England and Wales and Northern Ireland on the other. It is also an internal administrative boundary of the UK, marking the boundary between the counties of Cumbria and Northumberland to the south and Scottish Borders and Dumfries and Galloway to the north.
- 1.2 If people in Scotland vote for independence in the forthcoming referendum, the current administrative boundary between Scotland and the rest of the UK would become an international border between two separate states: an independent Scottish state and the continuing UK.¹
- 1.3 Irrespective of how that international border might be delineated there would be an immediate impact. Trade between Scotland and the continuing UK would become, by definition, international trade: import and export. Over time it is likely that differences in tax and welfare policy, and regulatory and administrative regimes would develop. Over the longer-term, some business networks might end as a result of economic, historical and cultural ties being weakened.
- 1.4 Collectively these changes would be expected to trigger a 'border effect': international evidence shows that flows of trade, labour and capital are much larger between two regions of the same country than between two (otherwise similar) regions of two different countries. This effect occurs even when there is no physical border between countries and even where trade agreements and structures, such as the European Single Market, are in place.² The 'border effect' is considered in detail in the UK Government's paper *Scotland analysis: Macroeconomic and fiscal policy*.³

The management of borders around the world

- 1.5 When considering how to manage their borders, states will take account of a number of considerations, some but not all of which could be relevant to an independent Scottish state. The nature of international borders may be determined by defence concerns over territorial integrity if the international border separates potentially adversarial parties. However this is relatively rare and in most situations around the world the nature of international borders is determined by an assessment of the risk posed to various policy considerations: migration, trade, counter-narcotics or counter-terrorism.
- 1.6 Crossing borders may require individuals to present evidence of their entitlement to travel: passports, visas or identity documents. The time taken to cross an international border is determined directly by the nature of the border control and the type and rigour of checks on documentation relating to people, vehicles and goods.
- 1.7 Border controls on the movement of people may be the only mechanism available to a state wishing to control and select which individuals can move into its territory for study, work or other purposes, what is known as a managed migration policy. This is particularly the case if its neighbour has a different policy, for example if it is easier for migrants to enter a neighbouring state and to then cross the common border to gain access to their preferred final destination. In the absence of border controls migration policy would be determined solely by the migrant.

¹ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

² *Scotland analysis: Business and microeconomic framework*, HM Government, July 2013.

³ *Scotland analysis: Macroeconomic and fiscal performance*, HM Government, September 2013.

- 1.8 How states manage their borders may also be influenced by international agreements. Membership of the Schengen Area for example, requires that a member contributes to the protection of the external Schengen border, while removing immigration controls between members; effectively agreeing to the partial pooling of sovereignty over border policy. The 'pooled sovereignty' arises from the fact that authority over the Schengen Area and related decision making are shared between the European Union (EU) institutions, on the one hand, and the EU Member States (who are part of the Schengen Area) on the other hand.⁴ Further detail on the Schengen Area can be found in Chapter 2.
- 1.9 A sovereign state can determine its own rates of excise duty, either to raise revenue to fund government expenditure including public services, or to discourage a particular behaviour such as alcohol or tobacco consumption. These rates may differ from those set by its neighbour and it may be necessary for some states to have border controls on the movement of goods to protect the integrity of their excise regimes.
- 1.10 Organised Crime Groups operate across international borders. They exploit the challenges that law enforcement agencies, including customs enforcement, have in ensuring effective joint working across those borders. Criminals will seek to exploit cross-border differences in excise duty, using differences in the regulation of alcohol or tobacco for example, and weakness in cross-border law enforcement cooperation, to smuggle people and illicit commodities such as narcotic drugs.
- 1.11 An illustration of the very different ways borders can be managed can be seen in the example of the United States of America (USA). The USA has lengthy land borders with both Canada and Mexico. The border with Canada is the longest common border between two countries that is neither militarised nor actively patrolled. Several major Canadian cities are close to the USA border but historically these cities and the northern border in general have yielded significantly fewer illegal incursions compared with the southwest border with Mexico, which represents a significant challenge to US border security efforts. Drug and human traffickers exploit that border in both directions.⁵ Part of the response of the USA to that challenge was the Secure Fence Act of 2006 to enable the construction of approximately 1,120 kilometres of secure fencing on the border between the USA and Mexico.⁶

The UK border

- 1.12 The physical border of the UK is essentially a maritime border with just one land border of 448 kilometres⁷ between Northern Ireland and the Republic of Ireland. The UK's approach to border protection however extends beyond the physical border. As many decisions as possible are made upstream in the countries from which people and goods depart to come to the UK. This approach recognises that it is both more effective and more efficient to tackle the risks from illegal migration, smuggling and drug trafficking at source and before they arrive at UK ports and airports.

⁴ *On Neo-medievalism, Migration and the Fuzzy Borders of Europe: A Critical View of the Schengen Convention*, Irina Angelescu, *Europol Journal of Political Analysis and Theory*, Issue 3 July 2008 <http://europol.politicalanalysis.ro/files/issue3/angelescu.pdf>.

⁵ *Secure Borders, Safe Travel, Legal Trade*. US Customs and Border Protection Fiscal Year 2009-2014 Strategic Plan. Accessed at www.cbp.gov/linkhandler/cgov/about/mission/strategic_plans/strategic_plan_09_14.ctt/strategic_plan_09_14.pdf.

⁶ *Secure Fence Act of 2006* accessed at www.gpo.gov/fdsys/pkg/PLAW-109publ367/pdf/PLAW-109publ367.pdf

⁷ *Report of the Irish Boundary Commission 1925*, G Hand (ed). IUP 1969 V1, 143.

The Scottish land boundary

1.13 The land border between Scotland and the rest of the UK extends for circa 154 kilometres from Lamberton on the east coast to the Solway Firth in the west⁸. The border is crossed by 21 roads and two railway lines.⁹ To the north of the border are the local authorities of Dumfries and Galloway and Scottish Borders: to the south, Cumbria and Northumberland.¹⁰ The Scottish coast, including the isles, extends for 18,588 kilometres i.e. 59 per cent of the coastline of Great Britain. The coastline of mainland Scotland extends for 6,718 kilometres.¹¹

1.14 The land border between England and Scotland was legally established in 1237, by the Treaty of York.¹² While some borderlands were disputed during the following two centuries it is one of the oldest extant borders in the world.

1.15 The current land boundary is shown below.



The Scottish maritime boundary

1.16 In the event of Scottish independence it would be necessary to agree the maritime boundaries between an independent Scottish state on the one hand and the continuing UK on the other. Scotland is not an independent state and therefore has no international maritime boundaries as such; the territorial waters off the Scottish coast and the part of the continental shelf generated by Scotland form part of the UK's territorial waters and

⁸ *Phillip's Navigator Scotland*, fourth edition 2012.

⁹ *Ibid.*

¹⁰ *Ordnance Survey 2009.*

¹¹ www.cartography.org.uk.

¹² The Treaty of York was an agreement between Henry III of England and Alexander II of Scotland, signed at York on 25 September 1237.

the UK's continental shelf. This issue is recognised in the Scottish Government's 2007 publication *Scotland's future: Your Guide to an independent Scotland*, which states that:

*The setting of maritime boundaries for an independent Scotland will be guided by international law.*¹³

Should Scotland become an independent state this is an issue that would also be of interest to other states with maritime boundaries in the North Sea.¹⁴

- 1.17 Nevertheless, the extent of the respective jurisdictions of Scotland, Northern Ireland and England and Wales in the various maritime zones around the UK has been defined.
- 1.18 The Continental Shelf Act 1964 made provision for the exploration and exploitation of the continental shelf.¹⁵ The Civil Jurisdiction (Offshore Activities) Order 1987¹⁶ divides the areas of the United Kingdom Continental Shelf into parts to which the civil law of English and Wales, Scottish and Northern Ireland apply. It provides also for installations in an English and Welsh, Scottish or Northern Irish part to be treated, for the purposes of the Wireless Telegraphy Act 1949¹⁷ and the Radioactive Substances Act 1960 as being in England, Scotland or Northern Ireland.¹⁸ With respect to the boundary in the North Sea between England and Scotland, 'the Scottish border' was described as the line of latitude 55° 50' N, that is, the line extending from the coastal terminus of the land boundary.
- 1.19 The Scotland Act 1998 provided for 'the Scottish zone' i.e. the sea within the British fishery limits which is adjacent to Scotland.¹⁹ That zone was defined in the Scottish Adjacent Waters Boundaries Order 1999.²⁰ The Order was introduced in order to implement the devolution settlement for Scotland in relation to certain maritime matters, most notably in relation to sea fisheries. It established a boundary between the waters within the British fishery limits that are adjacent to Scotland and those that are adjacent to other parts of the UK. This created in effect a Scottish zone within British fishery limits.²¹ The boundary set out in the 1999 Order was drawn in accordance with the equidistance principle, that is, a median line between the nearest points of land on either side using the baselines established around the coast of the UK in accordance with international law. This boundary and the boundary established by the Civil Jurisdiction (Offshore Activities) Order 1987 are shown below.

¹³ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

¹⁴ The Netherlands, Denmark, Germany and Norway.

¹⁵ *Continental Shelf Act 1964*.

¹⁶ *The Civil Jurisdiction (Offshore Activities) Order 1987*.

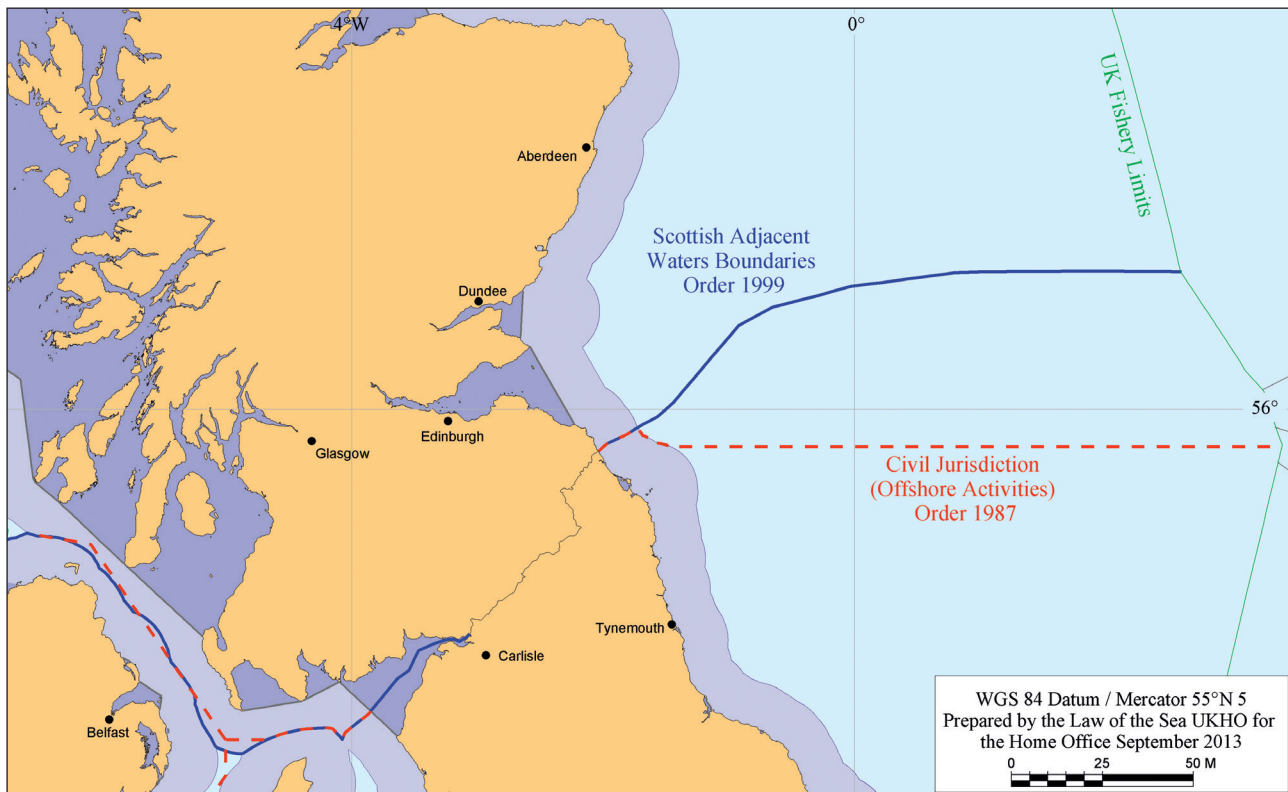
¹⁷ Now replaced by the Wireless Telegraphy Act 2006.

¹⁸ *The Continental Shelf (Jurisdiction) Order 1980*.

¹⁹ *Scotland Act 1998 S126 (1)*.

²⁰ *Scottish Adjacent Water Boundaries Order 1999*.

²¹ *Lord Sewell, House of Lords debate 23 March 1999*, Hansard vol. 598 cc 1263-5.



- 1.20 Both Orders were made for specific purposes. The first to designate areas of the continental shelf in relation to the application of the civil law of the three jurisdictions of the UK; the second largely to define the Scottish fisheries zone.
- 1.21 If Scotland became independent, there would be two options as to how to agree the delimitation of the continental shelf – bilateral negotiation between an independent Scottish state and the continuing UK leading to agreement, or international judicial settlement.
- 1.22 If delimitation were to be based on bilateral negotiation an independent Scottish state and the continuing UK would be free to agree upon any frontiers they wished, without recourse to international law. It is likely however that the starting point for such negotiations would be the same rules of international law as would have to be applied in the absence of an agreement.²²
- 1.23 In the absence of a bilateral agreement it may be necessary to seek international judicial settlement. In a recent case on the delimitation of maritime zones between adjacent states, the International Court of Justice (ICJ) described its approach as follows.²³
- 1.24 First, the Court would establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

²² 'It's Scotland's Oil'? *Hypothetical boundaries in the North Sea – a case study*. E. D. Brown, Marine Policy January 1978.

²³ Described in *Maritime Delimitation in the Black Sea* (Rom. V. Ukr.), I.C.J General List No 132 (Judgment of Feb. 3, 2009), www.icj-cij.org/docket/files/132/14987.pdf.

- 1.25 At the next stage the Court would consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result.
- 1.26 Finally, at a third stage, the Court would verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each state by reference to the delimitation line.
- 1.27 It is possible that, in the event of independence, an independent Scottish state may quickly reach an agreement with the continuing UK. In the absence of a bilateral agreement it may be necessary to seek international judicial settlement. International agreements on maritime borders can often take years or decades.
- 1.28 An example of cases that were resolved relatively quickly²⁴ is the North Sea Continental Shelf cases. These were a series of disputes among Denmark, the Federal Republic of Germany, and the Netherlands regarding the delimitation of areas of the continental shelf in the North Sea. These were submitted to the International Court of Justice in 1967 and took two years to resolve.
- 1.29 There are many examples of long-standing unresolved maritime boundaries. Canada and the USA for example dispute ownership of 21,000 sq kilometres in the Beaufort Sea.²⁵ The dispute, which dates from the 1970s, is preventing the exploitation of the hydrocarbon deposits in that area.²⁶ Closer to home, the Territorial Sea boundary between the UK and the Republic of Ireland is not agreed. This has however not prevented practical co-operation on some maritime boundary issues, including for example the 2011 Memorandum of Understanding on renewable energy. This MoU however notes that it is '*without prejudice to the negotiation of territorial sea boundaries.*'²⁷
- 1.30 In summary therefore, in the event of a vote for independence, an independent Scottish state and the continuing UK would need to agree their international maritime borders. If bilateral negotiations are unsuccessful both parties may seek a judgment from the International Court of Justice or through other judicial settlement mechanisms recognised by international law; these mechanisms would likely be very costly. The implications of the delimitation of the continental shelf boundaries on the energy sector are explored future papers in the Scotland analysis series.

How the UK manages its borders

- 1.31 UK border control is complex, high risk and high profile. The UK is a global centre for business, trade tourism and migration. The protection of its external border balances the need to facilitate and promote these with the imperative to protect the economy, businesses and the public from terrorism, serious and organised crime, illegal immigration and abuse of the excise regime.

²⁴ Albeit that the dispute had run for a number of years before it was submitted to the ICJ.

²⁵ BBC News 2 August 2010.

²⁶ For a full discussion of this issue see *Canada's Unresolved Maritime boundaries*, D H Gray in IBRU Boundary and Security Bulletin Autumn 1997.

²⁷ Memorandum of Understanding accessed at www.gov.uk/government/publications/memorandum-of-understanding-offshore-renewable-energy.

- 1.32 The effectiveness of UK border management has significant implications for public safety; for successful communities and sustainable public services; for revenue-raising and economic growth; and for relationships with foreign governments, companies, universities and voluntary bodies. As described below, it benefits from the extensive investment of people, money and time. It takes place overseas, at the physical border and through follow-up work in the UK itself. It is shaped by domestic law, EU law and international treaty obligations and it is the responsibility of a complex network of government and other organisations, highly dependent on each other for mutual success.
- 1.33 The scale of the challenge cannot be over-estimated. In 2012, 2.23 million visas were granted from 2.56 million applications.²⁸ Over 105 million people a year entered the UK,²⁹ via 138 entry points; 13,529 were refused entry at port and subsequently departed.³⁰ In the 2011-12 financial year staff seized over four and a half tonnes of Class A drugs³¹ and 455 million cigarettes.³² The seizure of the latter protected tax revenue of over £116 million.³³ In 2012 there were asylum claims by 21,785³⁴ people and 28,909³⁵ people spent time in detention. In 2011 Her Majesty's Revenue and Customs (HMRC) facilitated international trade business valued at about £573 billion, collecting over £34 billion from customs and excise duties and import VAT from legitimate trade activities.³⁶ Despite the investment in border protection and the successes mentioned above, combating the smuggling of illicit commodities and illegal immigration is a significant challenge. The present Scottish Government plans that an independent Scottish state would have a Scottish Borders and Migration Management Service which would be responsible for border control at airports and ports. No detail has been provided on the size and scope of this service or how much it would cost.³⁷
- 1.34 A number of people and organisations are responsible for action at the border. They range from civil servants developing policy or working directly at the front line on immigration and customs issues through to the full range of law enforcement organisations providing intelligence and pursuing non-immigration and customs criminality.
- 1.35 In particular the border is protected by the Home Office through:
- the Border Force which facilitates the legitimate entry to the UK of goods and people, prevents or deters individuals and goods that would cause harm from entering the UK, protects revenue and supports economic growth. Border Force officers, working alongside the police and other law enforcement organisations,

²⁸ *Before entry data tables Immigration Statistics January to March 2013*, volume 2 www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

²⁹ *Admissions data tables Immigration Statistics January to March 2013* www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

³⁰ *Removals and voluntary departures data tables Immigration Statistics January to March 2013* volume 2, www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

³¹ *Border Force quarterly drug seizures: 2011 to 2012 and Q1 and Q2*, volume one www.gov.uk/government/publications/drug-seizures-made-by-border-force-in-the-uk.

³² Annual level of tax revenue that is protected through detecting goods where excise duty has not been declared, www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/annual-level-of-tax/.

³³ *Ibid.*

³⁴ *Asylum data tables Immigration Statistics January to March 2013*, volume 1 www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

³⁵ *Detention data tables Immigration Statistics January to March 2013* www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

³⁶ *HMRC Pocket guide 2012*, www.hmrc.gov.uk/menus/pocket-guide-2012.pdf.

³⁷ *Scotland's Future: Your Guide to an Independent Scotland*, page 500, Scottish Government, November 2013.

conduct a range of checks at the border on people and commodities travelling to and from the UK. In addition to its permanent presence at major ports of entry the Border Force monitors thousands of small airfields and sea ports and around 31,000 kilometres of coastline. It has responsibility also for the operation of a number of juxtaposed controls^{38, 39} in France and Belgium. Its National Border Targeting Centre checks Advanced Passenger Information against the UK's 'no fly' list to deny boarding to those bound for the UK. The centre processes 165 million passenger movements a year to identify subjects of interest to the National Crime Agency (NCA), police and immigration. It targets freight (over seven million containers) and post/parcels to ensure that all goods are risk assessed and dealt with appropriately. Border Force has an annual budget of approximately £600 million and employs around 8,200 staff;

- UK Visas and Immigration which is responsible for handling applications for visas to come to the UK, applications to extend a stay in the UK on a temporary or permanent basis, applications for asylum, and appeals. UK Visas and Immigration operates worldwide with staff based across six operational regions,⁴⁰ Sheffield and London; and
- Immigration Enforcement which is responsible for investigating immigration offences, detaining and removing individuals with no right to be in the UK, and preventing abuse of the immigration system. The Immigration Enforcement Command includes the Risk and Liaison Overseas Network (RALON).

Box 1A: The Risk and Liaison Overseas Network (RALON)

RALON is the overseas arm of the Home Office's Immigration Enforcement command. RALON's remit is to reduce and deter abuse of the UK's immigration systems upstream i.e. overseas, from the points at which migrants start or continue their journey to the UK. RALON staff are located in 50 locations worldwide. They:

- support the identification of risk to enhance visa decision quality;
- liaise and work with carriers and host immigration authorities to prevent inadequately documented persons, harmful persons and those excluded from the UK from getting to the UK border; and
- oversee immigration criminality issues and engagement with UK, EU and partners in the Five Country Conference (FCC) (Australia, Canada, New Zealand and the United States of America) and local law enforcement agencies to disrupt upstream organised crime groups engaged in immigration crime.

Other agencies are also responsible for protecting the UK border including:

- the Border Policing Command (BPC) in the new NCA, which is strengthening the co-ordination of intelligence and law enforcement capabilities and resources at the border by bringing together current law enforcement assets to better target serious and organised crime, including those criminals or groups that have major overseas

³⁸ Juxtaposed immigration controls mean that UK immigration officers can exercise immigration control in designated French and Belgian ports / railway stations and that French immigration officers operate reciprocal controls at designated ports / railway stations in the UK.

³⁹ *Nationality, Immigration and Asylum Act 2002* (Juxtaposed Controls) Order 2003.

⁴⁰ Currently: Euro-Med; Americas; Africa; Asia Pacific; Middle East and Pakistan; and Central Asia, South Asia and Turkey.

links. As well as having its own intelligence and investigative capabilities the BPC is able to draw on the wider capabilities of the NCA. Whilst the NCA is a UK-wide Agency, it was created with the consent of the Scottish Parliament and its activities in Scotland are governed by specific statutory arrangements to reflect the devolution of policing. The Scottish Government and Police Scotland were engaged with and consulted on critical decision-making at the UK level in the creation of this new national agency to ensure that its design and response would work as effectively in Scotland as across the whole of the UK. It undertakes a range of activity in Scotland and elsewhere in the UK as well as further afield that supports partners in Scotland and the efforts of Police Scotland, and helps to protect Scottish communities from the impact of organised crime;⁴¹ and

- the Counter Terrorism Command of the Metropolitan Police⁴² and territorial policing.⁴³

- 1.36 In 2011-12 the Government spent £2.1 billion⁴⁴ on border and immigration work (55 per cent of it recouped from fees). More than 20,000 staff⁴⁵ work in the UK Visas and Immigration, Immigration Enforcement, Border Force and the Border Policing Command of the NCA, both abroad and throughout the UK.
- 1.37 The overseas networks of the National Crime Agency and the Home Office's Immigration Enforcement command, for example, are deployed to protect the entire UK.⁴⁶ Independence means that the focus of those networks would be the protection of the continuing UK. The government of an independent Scottish state would need to consider whether to replicate elements of those networks. The present Scottish Government plans that an independent Scottish state would have a Scottish Borders and Migration Management Service which would be responsible for border control at airports and ports. However, no detail has been provided on the size and scope of this service and it is not clear how it plans to maintain the successes that result from the current approach to border protection.⁴⁷
- 1.38 The success of the UK's border controls starts upstream. A significant proportion of the work to prevent people and goods which could harm the UK entering the country is done before these reach the UK. The UK's ability to do this is supported and enabled by its international networks and influence on the world stage. An independent Scottish state would find it challenging to replicate these networks as a new state.⁴⁸ A global network ensures the rigorous and efficient application of the UK visa regime with decision making underpinned by real-time intelligence. In 2011-12 work by a worldwide network of UK law enforcement officers, together with local partners, led to the interception of over four tonnes of heroin and over 60 tonnes of cocaine,⁴⁹ a proportion of which would have entered the UK.

⁴¹ *Scotland analysis: Security*, HM Government, October 2013.

⁴² The Command was formed in October 2006, with the merger of its two predecessor units; the Anti-Terrorist Branch (SO13) and Special Branch (SO12). Source Met Police website.

⁴³ The role of these agencies is described in detail in *Scotland analysis: Security*, HM Government, October 2013.

⁴⁴ *The UK Border Agency and Border Force: Progress in cutting costs and improving performance*, National Audit Office, July 2012.

⁴⁵ *Ibid.*

⁴⁶ Details of the overseas networks is given in Chapter 3 of *Scotland analysis: Security*, HM Government, October 2013.

⁴⁷ *Scotland's Future: Your Guide to an Independent Scotland*, page 500, Scottish Government, November 2013.

⁴⁸ *Scotland analysis: EU and international*, HM Government, January 2014.

⁴⁹ *Annual Report and Accounts 2011-12*, Serious Organised Crime Agency.

1.39 An example is given in Box 1B below.

Box 1B: Working upstream to protect the UK Border

In September 2012 Border Force officers in West Africa helped seize cocaine worth an estimated £200,000 which had been hidden in lollipops. The drugs, which were en route to Europe, were detected at an airport by the local authorities, working with a UK Border Force team and the Serious Organised Crime Agency.

The cocaine was being transported in a suitcase, and found inside professionally made and packaged lollipops. Officers cut through two layers to reveal the drugs inside. The total weight of the seizure was four kilos, of which around half is believed to have been high-purity cocaine. It is estimated the drugs could have had a potential value of approximately £200,000 if cut and sold on the street in the UK.

A 29-year-old man was arrested by the local police suspected of being a drugs courier.

This operation is a Border Force counter-narcotics programme set up in 2006 to help stop cocaine smuggling from West Africa by air.

Since it began the operation's officers, working alongside local law enforcement agencies, have been involved in the seizure of over 860 kilos of cocaine and 323 kilos of heroin, much of which was destined for the UK and wider European markets. In addition around 170 suspected couriers have been arrested.

- 1.40 Intelligence provided from the upstream UK border supports effective at-port and in-country border enforcement. The agencies at the UK border are able to draw on common intelligence, some of it provided by officers overseas, to protect the UK and its residents from illegal migration and from the trade in illicit goods. These include narcotic drugs, firearms and counterfeit goods which are often substandard and potentially hazardous. Common training and equipment together with pan-UK law enforcement powers allows them to deploy effectively anywhere in the UK, including in Scotland, in response to a threat.
- 1.41 At the physical border, controls on the movement of people and goods are exercised at ports and airports by customs and immigration officials within the UK Border Force. All activity to manage, control and secure the UK's border, wherever it is undertaken, and every penny spent, regardless of where it is invested, is of direct benefit to every UK citizen regardless of where they live or work. For example, preventing drugs, firearms and other illegal goods from entering the UK benefits everyone across the UK, irrespective of whether those illegal goods are shipped through the Port of Dover, flown to Glasgow Airport or driven across the border into Northern Ireland. The management of the UK's border, like the protection provided by its defence and security, is a common public good from which everyone benefits.
- 1.42 In UK territorial waters controls are exercised through the deployment of a fleet of customs cutters.⁵⁰

⁵⁰ The cutters are deployed to Border Force priorities, which include the delivery of the revenue targets set jointly by Border Force and HMRC.

Box 1C: The cutter fleet

A fleet of five fast, 42 metre patrol boats, known as cutters, enables UK Border Force officers to operate off-shore, patrolling UK waters and if necessary intercepting shipping. They protect the coastline of the UK 24 hours a day, 365 days a year and are the only national, non-military, maritime vessels for enforcement, surveillance, and stop-and-board activity that do this. In 2010/11 the cutters patrolled over 63,000 miles and their crews searched more than 2,000 vessels. Their deployment is based on an intelligence-led assessment of risk and on operational priorities. This makes them a highly flexible resource which can move rapidly to meet any challenge.

In one operation, for example, two cutters were dispatched from Falmouth and Dartmouth to support a third cutter operating on the River Forth. Together they successfully tracked and then stopped a vessel, the *Ocean Jubilee*, which was believed to be carrying over £10 million worth of cannabis resin. Although the criminals set fire to the evidence there were nine arrests and subsequent convictions.

- 1.43 The cutter fleet of an independent Scottish state and that of the continuing UK could agree to collaborate closely. The cutters of one state however would have no automatic jurisdiction in the territorial waters of the other. UK Customs officials' powers to stop, search and, if necessary, detain suspects derive from legislation passed by the UK Parliament which would no longer apply in an independent Scottish state.⁵¹ Collaboration between customs officials of the two separate states would therefore be unlikely to be as effective as that of the current arrangement. The challenges to law enforcement of working across international borders are discussed further in Chapter 3 of this paper and in the UK Government's recent paper *Scotland analysis: Security*.⁵²
- 1.44 In the event of a vote for independence, a separate Scottish state would need to consider the number of vessels and the resources required to ensure the continued protection of the Scottish coastline.
- 1.45 The single UK external border supports the implementation of a single UK policy of migration for employment. This ensures that employers, wherever they are in the UK, can mitigate local skill shortages by recruiting individuals from outside the EU or European Economic Area (EEA).⁵³ This is discussed in more detail in Chapter 2.
- 1.46 The single external border allows all parts of the UK to benefit from a single, fully integrated, market for goods. The nature and importance of this integration is described in detail in the UK Government's paper *Scotland analysis: Macroeconomic and fiscal performance*.⁵⁴ By contrast, the EU single market is still a work-in-progress. There is a single tariff regime, a common regulatory framework including the rules governing haulage companies, and no insurance premium differential for vehicles. Across the UK there are no obligatory administration procedures in relation to trade within the UK, although it is good practice to accompany shipments with a commercial invoice and packing list, if appropriate. This is discussed in detail in the UK Government's paper *Scotland analysis: Business and microeconomic framework*.⁵⁵

⁵¹ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

⁵² *Scotland analysis: Security*, HM Government, October 2013.

⁵³ The EEA includes the members of the EU plus Iceland, Liechtenstein and Norway.

⁵⁴ *Scotland analysis: Macroeconomic and fiscal performance*, HM Government, September 2013.

⁵⁵ *Scotland analysis: Business and microeconomic framework*, HM Government: July 2013.

1.47 The current arrangement at the border facilitates legitimate travel, trade and migration while ensuring that the entire UK, its economy and its citizens, is protected from terrorism, serious and organised crime, illegal immigration and abuse of the excise regime.⁵⁶ The scale of the operation, the interoperability of the agencies involved and ability to direct resources to meet the threats that have been identified from reliable intelligence, gathered both in the UK and overseas, are among the critical success factors. Independence means that an independent Scottish state would need to consider the arrangements for the protection of its border. This would include both the physical presence at ports and the intelligence sources that would inform focused action.

Movement within the UK

1.48 The entire UK currently benefits from unhindered movement between Scotland and England, Wales and Northern Ireland. Scotland's borders with other parts of the UK are busy; both in terms of people and freight movement. Travel and the movement of freight between Scotland and other parts of the UK are no more difficult than travel within Scotland; there is no requirement to carry a passport and there are no customs inspections or other administrative requirements.

1.49 In 2012, there were an estimated 23 million vehicle crossings per year, in both directions, between England and Scotland.⁵⁷ In 2010-11 there were over seven million rail passenger journeys to and from Scotland and the rest of the UK.⁵⁸ In 2011 there were scheduled passenger flights from 17 airports⁵⁹ in Scotland with around 10 million passenger journeys to/from other parts of the UK representing 45 per cent over all of passenger journeys to/from those airports.⁶⁰ In 2011 there were 825,874 air passenger journeys to/from Scotland and Northern Ireland.⁶¹

1.50 In 2012, 3.6 million⁶² Scottish residents travelled abroad. Of these, 20 per cent (and 21 per cent of business travellers) travelled from a non-Scottish airport. In that same year, 63,000 Scottish residents travelled abroad through the Channel Tunnel and 146,000 travelled from English ports.⁶³ Significant numbers of Scottish residents also travel to airports in the north of England to begin their overseas holidays (e.g. Newcastle and Manchester) and significant numbers of people from the north of England begin their holidays from Scottish airports (e.g. Glasgow, Edinburgh and Prestwick). They do so to take advantage of the wider choice of destinations available from some of the busier airports, to take advantage of any cheaper fare options, and because it is easy to do so.

1.51 The number of countries served by direct flights from Scottish airports is currently limited because Scottish airports do not have the physical capacity to serve all parts of the globe. Edinburgh airport, for example, is currently operating at over two thirds of its maximum capacity, and this is forecast to increase to nearly 80 per cent by 2020.⁶⁴ Its ability to add flights to additional destinations without affecting its current services therefore limited. Increasing the capacity of airports is expensive and can take years if

⁵⁶ *Scotland Analysis: Security*, HM Government, October 2013.

⁵⁷ Road traffic flows at www.dft.gov.uk/traffic-counts. 2012 data. These and other statistics quoted in this section are the most up to date available as at 11 January 2014.

⁵⁸ Scottish Transport Statistics No31 2012 Ed. Table 7.6a.

⁵⁹ *Ibid.* Table 8.7.

⁶⁰ *Ibid.* Table 8.6.

⁶¹ Civil Aviation Authority *UK Airport Statistics 2011* table 12.2.

⁶² *ONS Travel Trends 2012*, www.ons.gov.uk/ons/publications/.

⁶³ *Ibid.* – quoting the International Passenger Survey.

⁶⁴ *Transport statistics Great Britain*, Department for Transport, December 2013 and *UK aviation forecasts*, Department for Transport, January 2013.

new infrastructure has to be built. There are for example currently no direct flights from Scotland to China. Many travellers from Scotland therefore currently use airports in the rest of the UK or continental Europe to connect with global destinations, with the most common hub being London's Heathrow airport.

- 1.52 With respect to freight, in 2010 nearly 17.7 million tonnes of freight were moved by UK HGVs from England and Wales to Scotland and 14.7 million tonnes were moved in the opposite direction.⁶⁵ In the financial year 2010-11 2.26 million tonnes of freight left Scotland by rail and 1.62 million tonnes of freight entered Scotland by rail.⁶⁶
- 1.53 Of the 985 ports in the UK, 586⁶⁷ are in Scotland. In 2012, nearly 14 million tonnes of freight were moved by sea from Scottish ports to other parts of the UK. In the same year nearly six million tonnes of freight were discharged at Scottish ports from other parts of the UK.⁶⁸ In 2012 ferries between Scotland and Northern Ireland carried 410,000 cars and 1.809 million passengers.⁶⁹ There is only one ferry route between Scotland and mainland Europe (Rosyth – Zeebrugge); a route that has operated intermittently.⁷⁰ In 2012, 706 passengers, 500 goods vehicles, 6,000 unaccompanied trailers and 11,000 import -export vehicles were carried on this route.⁶⁸
- 1.54 If Scotland became an independent state, its domestic boundaries would become an international border. An independent Scottish state would be required to make decisions about how to manage the flow of people and goods across that border.
- 1.55 It is likely that over time differences between an independent Scottish state and the continuing UK would lead to divergences in tax, regulatory, administrative and visa regimes and policy. These differences could lead to a level of border inspection by either state, albeit on an intelligence-led and targeted basis, as currently happens between the UK and France for example. The greater the policy divergence between an independent Scottish state and the continuing UK, in VAT and other duties for example, the greater the likely volume and intrusiveness of those inspections, and the more likely that journeys would be delayed. This is discussed further in Chapter 3.

Conclusion

- 1.56 Borders matter. They define states' geographic boundaries and the limits of their territorial sovereignty. If the people in Scotland voted for independence then the current, busy, boundary between Scotland the rest of the UK would become an international border.
- 1.57 Under current arrangements, the UK Government manages the external border of the whole of the UK, investing heavily in upstream protection in order to intercept people or goods that might pose a threat. Management of such a border is complex and expensive and requires a balance to be struck between facilitating trade, tourism, and legitimate asylum seekers and migrants with the need to protect the economy and the people in the UK. An independent Scottish state would have to develop its own policies for protecting the border and extensive coastline in Scotland, without benefiting from the fully integrated system that currently operates across the UK.

⁶⁵ *Scottish Transport Statistics No31 2012 Ed.* Table 3.1.

⁶⁶ *Ibid.* Table 7.12.

⁶⁷ www.ports.org.uk. Commercial – 77, Fishing – 301, Leisure – 270 and Ferry – 127.

⁶⁸ UK Port Freight Statistics, 2012 Final Figures.

⁶⁹ UK Sea Passengers, 2012.

⁷⁰ The service started in May 2002. There was a reduction in the frequency of the service with effect from November 2005 which led to a drop in passenger numbers. There was no service in the fourth quarter of 2008. This is currently a freight only service.

1.58 The lack of an international land border between Scotland and the rest of the UK also allows for free movement of people and goods throughout the UK, within a common regulatory framework and with no controls. If people in Scotland vote for independence, any changes to tax, regulatory, administrative and visa regimes which developed over time would lead to difficult decisions needing to be taken about how the flow of people and goods might be controlled. This would inevitably increase cost and complexity and may make both an independent Scottish state and the continuing UK less attractive to those who might want to set up businesses.

Chapter 2:

The movement of people

If Scotland were to become independent the government of an independent Scottish state would be required to take control of its borders. It would have to make decisions about how to manage the flow of people and goods across those borders, and establish systems and processes to implement those decisions. The continuing UK government and its institutions would no longer have responsibilities or powers to manage Scotland's borders.

The current Scottish Government has indicated that an independent Scottish state would seek to manage its migration and borders policies to meet its own economic, social and demographic priorities and needs. However, its ability to determine both its migration and border policies would be affected by what, if any, international groups or borderless travel areas an independent Scottish state joined.

An independent Scottish state would have to enter into negotiations on the terms of its membership of the EU. As a new Member State, unless it could negotiate an opt-out, it would be required to join the Schengen Area and therefore to establish border controls with the continuing UK and the other members of the Common Travel Area.

If an independent Scottish state was able to negotiate an opt-out from Schengen it could choose to negotiate membership of the CTA. However, membership of the CTA as a separate independent state would not automatically mean that people would benefit from free movement between an independent Scottish state and the continuing UK in the way they currently do between Scotland and other parts of the UK.

The UK Government actively manages the UK border to control who can enter and remain in the UK. It balances the need to facilitate trade, tourism and legitimate migration with the imperative to protect the economy, business and the public and in the context of the CTA. The UK's single migration policy ensures all employers across the UK can recruit skilled workers to mitigate local skills shortages. Within this, Scotland's particular circumstances are specifically accounted for.

The Scottish Government has indicated that an independent Scottish state would seek to attract highly skilled workers as the UK and other countries do, but it would also seek to address potential future economic problems that may result from an ageing population and increase its population through immigration.

Given the scarcity of skilled immigrants and the difficulty of attracting them, a policy of population increase through immigration suggests a less selective approach to which immigrants are allowed to enter and settle. An independent Scottish state seeking to grow its population through immigration would instead seek to attract higher numbers of low- or non-skilled migrants to achieve this aim. This would be contrary to the immigration policies currently being pursued by both the UK and the Republic of Ireland within the CTA and could therefore put these arrangements under strain.

- 2.1 Maintaining an external border and having the ability to regulate who travels across that border are key attributes of a nation-state.
- 2.2 There are many reasons why people may choose or wish to travel to the UK; including tourism, study, employment and family. As set out in the previous chapter, the UK Government is responsible for managing the whole of the UK's external border, controlling who can enter the UK and how long they can stay. In doing so, the UK Government balances the need to facilitate trade, tourism and legitimate migration with the imperative to protect the economy, business and the public. It does so in the context of the borderless travel arrangement of which the UK is a member: the Common Travel Area (CTA).
- 2.3 Should a majority of people in Scotland vote for independence, Scotland would leave the UK and become a new separate state.¹ This means that an independent Scottish state would be required to take control of its borders. It would have to make decisions about how to manage the flow of people and goods across those borders; and establish systems and processes to implement those decisions. The government of the continuing UK and its institutions would no longer have responsibility or powers to manage Scotland's borders.²
- 2.4 The current Scottish Government has indicated that from independence, an independent Scottish state will be responsible for its own immigration policy and will develop a system which will enable it to meet the needs of Scottish society with greater flexibility.³ Those needs relate broadly to addressing potential future economic problems that may result from an ageing population and ensuring that the demand of the 'new economy' for highly skilled workers can be met, and are discussed in more detail below at paragraph 2.56–2.59.

Borderless travel areas

- 2.5 An independent Scottish state's ability to determine both its migration and border policies would however be affected by what, if any, international groups or borderless travel areas it chose to join, and whether these imposed any obligations as conditions of membership.
- 2.6 Most European countries are part of a borderless travel arrangement, including countries that have chosen not to join the EU. Borderless travel areas imply a degree of cooperation between their members on aspects of borders and immigration policy. Most European countries are members of the Schengen Area.

¹ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

² *Ibid.*

³ *Scotland's Future: Your Guide to an Independent Scotland*, page 270, Scottish Government, November 2013.

The Schengen Area

- 2.7 Whereas the present Scottish Government has said that an independent Scottish state would not be required to join the Schengen Area,⁴ it may be required to do so as a condition of EU membership.⁵ Membership of the Schengen area would require the removal of border controls between an independent Scottish state and other members of that area. Membership would also require an independent Scottish state to establish border control at the Schengen Area external border. This would include the establishment of a land, sea and air border between Scotland and the continuing UK.
- 2.8 Membership of the Schengen Area has been part of the EU legal framework since 1999 and all new members of the EU since then have been required to commit to joining the Schengen Area.⁶ The Schengen Area is founded upon the Schengen Agreement of 1985, which along with its related *acquis* was integrated into the EU Treaties in 1999 (see Annexes A-C). The principal purpose of the Schengen Area is to facilitate the free movement of persons through the removal of internal border controls between participating countries. The EU regards this as a fundamental goal for new Member States. This means that movement across internal Schengen borders is generally free from checks. Common rules and procedures are applied across Schengen countries with regard to visas for short stays, asylum requests and external border controls.
- 2.9 At present, 22 EU Member States⁷ are full members of the Schengen Area, along with four non-EU European countries.⁸ Four other EU Member States are working to join Schengen.⁹ If an independent Scottish state was to join Schengen, it would need to complete a separate Schengen membership process. This includes implementation of all EU Schengen *Acquis* measures into national law and extensive work to build command centres and IT systems, supported by flexible border force and policing resourcing and provision of high level technical equipment. An evaluation process would assess whether they had met the criteria before a decision to allow Scotland to join fully was taken.
- 2.10 Only the UK and the Republic of Ireland have a permanent opt-out from joining the border aspects of Schengen and are therefore able to maintain their own border control systems. However both the UK and Ireland participate in the police cooperation aspects of the Schengen system which are discussed in more detail in Annex A.
- 2.11 As the UK Government's paper *Scotland analysis: Devolution and the implications of Scottish Independence* made clear, the remainder of the UK (England, Wales and Northern Ireland) would continue as before, retaining the rights and obligations of the UK as it currently stands. Crucially, its EU membership would continue on existing terms, including all the UK's current opt-outs (particularly, in this case, the border and immigration parts of the Schengen Agreement). This is discussed in more detail in the UK Government's paper *Scotland analysis: EU and international*¹⁰ More detail on the Schengen Area and the UK's opt outs can be found in Annex B.

⁴ *Scotland's Future: Your Guide to an Independent Scotland*, page 490, Scottish Government, November 2013.

⁵ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013. *Scotland analysis: EU and international*, HM Government, January 2014.

⁶ http://ec.europa.eu/economy_finance/euro/adoption/who_can_join/index_en.htm.

⁷ Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden.

⁸ Iceland, Liechtenstein, Norway and Switzerland.

⁹ Bulgaria, Croatia, Cyprus and Romania.

¹⁰ *Scotland analysis: EU and international*, HM Government, January 2014.

- 2.12 It is by no means certain that an independent Scottish state would be able to negotiate similar opt-outs from Schengen membership to those enjoyed by the UK and the Republic of Ireland.¹¹ As part of its negotiations to become a member of the EU, an independent Scottish state may therefore have to join the Schengen Area.
- 2.13 Membership of the Schengen Area would mean that an independent Scottish state would have to accept EU competence over border controls and visa policy as well as recognising short-stay visas issued by other Schengen Area states.
- 2.14 Membership of the Schengen Area would oblige an independent Scottish state to control cross-border movement at those parts of the Schengen external border falling within its jurisdiction. This would include crossings at the land border between England and Scotland, ferry crossings between Northern Ireland and Scottish ports and flights between Scotland and other parts of the UK. This obligation is set out in Article 6 of the Schengen acquis (see Annex C).
- 2.15 It is possible that an independent Scottish state could negotiate its own 'opt-out' protocol to the Schengen Acquis when negotiating the terms of its membership of the EU. There is however no automatic right to, or guarantee of, an opt-out protocol. This would have to be agreed by all 28¹² EU Member States. An independent Scottish state would not automatically 'inherit' the UK's opt-outs. This is explained further in the UK Government's paper *Scotland analysis: Devolution and the implications of Scottish independence*.¹³
- 2.16 There are no immigration controls at the international borders within the Schengen area. An individual can travel from Finland to Portugal without being required to show their passport when crossing the borders of the states within the Schengen area. This means that, alongside the legitimate traveller, individuals who have entered one country within the Schengen area illegally can move easily to another country within the Schengen area.
- 2.17 If an independent Scottish state chose or was obliged to join the Schengen area it is possible that this could result in increased levels of illegal migration into Scotland via the Schengen area. There have been a number of instances where countries within the Schengen area have voiced concern about the ability of illegal migrants to move freely once they have negotiated Schengen's external border.^{14, 15} It has been proposed both that the Schengen external border should be strengthened and that it should be possible temporarily to restore internal (Schengen) border controls in the event of exceptional difficulties in managing the common external border.¹⁶

¹¹ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

¹² Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom.

¹³ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

¹⁴ BBC News Report: 22 April 2011.

¹⁵ Bruno Waterfield, *The Telegraph* 22 April 2011.

¹⁶ Franco-Italian summit – Joint letter from Nicolas Sarkozy, President of the Republic, and Silvio Berlusconi, Prime Minister of Italy, to Herman Van Rompuy, President of the European Council, and José Manuel Barroso, President of the European Commission.

- 2.18 It should be noted also that whereas the Schengen Agreement has resulted in the abolition of border controls on the movement of persons across national borders within the Schengen Area; a number of states has taken compensatory measures. In the Netherlands in May 1994 the Royal Netherlands Marechaussee¹⁷ was given responsibility for the Mobile Monitoring of Aliens. The Mobile Monitoring of Aliens concentrates on travellers entering the Netherlands from other countries within the Schengen Area. The inspection of travel documents takes place in the area immediately behind the border and is carried out at random on the road, on trains, on the water and at airports. Although border controls between the Schengen countries no longer exist, one must be able to produce a valid travel document within the Schengen Area.¹⁸ Individuals travelling from an independent Scottish state which was a member of the Schengen Area would still need therefore to carry a valid travel document when travelling to another member of the Schengen Area although there would not be a check on that document when crossing the internal Schengen borders.
- 2.19 Schengen is often conflated with the right of free movement within the EU; but the two are not synonymous. The UK has decided not to join the Schengen Area and thus continues to maintain checks at its borders but this does not interfere with free movement rights.
- 2.20 EU citizens and their family members have the right to move freely within the territory of the Member States. Those rights are described in the Treaty of the Functioning of the EU (TFEU)¹⁹ to which the continuing UK and an independent Scottish state which was a member of the EU would be bound. Further detail is given at Annex D. UK citizens, including those from Scotland, benefit from the Free Movement Directive in a number of ways, including:
- being able to travel to another EU Member State using their passport or identity card without needing a visa or other permission to enter;
 - being able to live and work in another Member State without the need for any work permit;
 - being able to set up a new business or seek work self-employed in another Member State;
 - being able to study in another Member State;
 - being able to live in retirement in another Member State; and
 - being able vote in local and European Parliament elections in another Member State where they live.

The Common Travel Area

- 2.21 The UK is not part of the Schengen Area, but it co-operates with the Republic of Ireland, the Isle of Man and the States of Jersey and Guernsey as part of the Common Travel Area (CTA). It is not possible to be both a member of the Schengen Area and a

¹⁷ The Royal Netherlands Marechaussee is a police organisation with a military status, under the jurisdiction of the Ministry of Defence, but working mostly for the Ministry of Justice and the Ministry of the Interior and Kingdom Relations. Amongst its many tasks it is responsible for the policing of airports and for the enforcement of aliens' legislation.

¹⁸ Royal Netherlands Marechaussee brochure October 2006.

¹⁹ Article 20 and Articles 45-55. Further detail is given in the Directive 2004/38/EC ('the Citizens or Free Movement Directive'). See Annex D.

member of the CTA. In the event of a vote for independence Scotland would leave the UK and therefore leave the CTA. The current Scottish Government has indicated that it would want an independent Scottish state to join the CTA.²⁰

- 2.22 Ordinarily there are no routine immigration checks on passenger travel within the CTA, and passengers are not required to carry a passport or national identity document for immigration purposes. The CTA arrangements work because its members collaborate on border policies and practices. Scotland, as part of the UK, benefits from membership of the CTA. The current free travel arrangements between Scotland and other parts of the UK however are because Scotland is part of the UK, and not because of the CTA.
- 2.23 An independent Scottish state's membership of the CTA would need to be negotiated with all existing CTA members and would depend on the Government of an independent Scottish state agreeing to co-operate with other members of the CTA on certain aspects of visa and immigration policies. The CTA, like all borderless travel arrangements, is only effective as long as members do not pursue policies that differ significantly from, or undermine, the policies of other members.

The operation of the Common Travel Area

Box 2A: The Common Travel Area²¹

Paragraph 15 of the Immigration Rules states that the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland collectively form a common travel area. A person who has been examined for the purpose of immigration control at the point at which s/he entered the area does not normally require leave to enter any other part of it. However certain persons subject to the Immigration (Control of Entry through the Republic of Ireland) Order 1972 (as amended) who enter the United Kingdom through the Republic of Ireland do require leave to enter. This includes:

1. those who merely passed through the Republic of Ireland;
2. persons requiring visas;
3. persons who entered the Republic of Ireland unlawfully;
4. persons who are subject to directions given by the Secretary of State for their exclusion from the United Kingdom on the ground that their exclusion is conducive to the public good; and
5. persons who entered the Republic from the United Kingdom and Islands after entering there unlawfully or overstaying their leave.

- 2.24 The CTA is an immigration arrangement. It does not regulate the movement of goods.²² The CTA is a less formalised arrangement than the Schengen Area. It is not founded on a treaty agreement between its members. Instead it relies on agreement and cooperation between its members, who coordinate certain aspects of their visa and visitor policies.

²⁰ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

²¹ www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/.

²² Customs restrictions apply on all CTA routes except those between the Isle of Man and the UK and not within the UK. (For customs purposes, the Isle of Man is part of the UK).

- 2.25 The UK does not make routine immigration checks on passenger travel within the CTA, and passengers are not required to carry a passport or national identity document for immigration purposes. There is mutual recognition of leave to enter in the sense that a visitor (both those who require visas – visa nationals – and those who do not because their states have reached visa waiver agreements with members of the CTA – non-visa nationals) who has been allowed to enter one part of the CTA will not normally require permission to enter another part of it while that permission is still valid (provided they do not leave the CTA). There are a few exceptions to this due to slight differences between the current UK and Irish visa requirements.²³ These arrangements do not apply to economic migrants, their family members and students.
- 2.26 The general absence of immigration border control between members of the CTA does not mean that all visas issued by one CTA member are automatically recognised by other members. For example, if an individual with a valid visa for the Republic of Ireland has a nationality that requires a UK visa they would still need to acquire such a visa to enter the UK. It may be practically possible for them to cross the border between the Republic of Ireland and the UK without immigration checks, but they would be in the UK illegally. If detected by in-country immigration enforcement in the UK, they would be subject to deportation.
- 2.27 Neither is the CTA completely without some immigration border control. For example passengers arriving into Dublin airport from another part of the CTA are required to provide evidence of their entitlement to reside or travel within the CTA, either by showing their passport or another form of valid identification. This is not the case for passengers arriving in the UK on flights from Dublin.
- 2.28 In December 2011, the Irish and UK Governments signed a joint statement committing both countries to a joint programme of work on measures to increase the security of the external CTA border. This included, among other things, co-operation to align the list of countries whose nationals do not require a visa to travel to both the UK and the Republic of Ireland, and exploration of a possible joint UK-Ireland CTA short stay visit visa.²⁴
- 2.29 The current Scottish Government has indicated that it would want an independent Scottish state to join the CTA.^{25, 26} Membership however would need to be negotiated with all existing CTA members, and would depend on the Government of an independent Scottish state agreeing to co-operate and align with other members of the CTA on certain visa and immigration policies. As discussed in more detail below, a significant divergence of Scottish policy on short-term visas or immigration policies could strain the current cooperative arrangements of the CTA.
- 2.30 If an independent Scottish state were a member of the CTA however, it cannot be assumed that there would be no change to the current travel arrangements between Scotland and other members of the CTA, including the continuing UK. As discussed above, passengers travelling by air to the Republic of Ireland from other parts of the

²³ www.ukba.homeoffice.gov.uk/customs-travel/Enteringtheuk/arrivingatukborder/travellingtocommontravelarea/.

²⁴ Joint statement by Damian Green and Alan Shatter regarding co-operation on measures to secure the external common travel area border. 20 December 2011.

²⁵ Deputy First Minister, Nicola Sturgeon's statement to the Scottish Parliament on an independent Scotland's continuing membership of the European Union, in which she indicated that: "Just like Ireland, we would not enter Schengen but would instead look to co-operate with Ireland and the continuing UK in the common travel area." *Meeting of the Parliament 13 December 2012*, Scottish Parliament, www.scottish.parliament.uk/parliamentarybusiness.

²⁶ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

CTA are required to provide identification. Similar requirements could be placed on those travelling from an independent Scottish state to other parts of the CTA. An independent Scottish state would be a separate country within the CTA. This is not the same as Scotland being in the CTA as part of the UK. The current free travel arrangements between Scotland and other parts of the UK are due to Scotland being part of the UK. They are not required by, or the result of, the CTA.

- 2.31 If Scotland became an independent state within the CTA, there could also be an impact on visitors who transit ports and airports in the continuing UK en-route to Scotland. There are currently 114 countries whose nationals require a visa (costing £78)²⁷ to visit any part of the UK. This allows visitors to arrive at a London airport and transfer onto a domestic flight to Scotland, or to arrive at Manchester airport and then to travel by rail to Scotland. If these same visitors are travelling to an independent state within the CTA such as the Republic of Ireland via Heathrow they may, depending on their nationality, require a UK visa in addition to an Irish visa in order to pass from international arrivals to domestic/CTA departures.²⁸ Under the current arrangements therefore some visitors transiting through the continuing UK en-route to an independent Scottish state could, depending on their nationality, require a visa for the continuing UK in addition to any visa required by the independent Scottish state. This could either increase the travel costs for individual travellers or discourage opportunistic visits between the two states.
- 2.32 The visa policy of the continuing UK would be based on an assessment of risk and the need to maintain the integrity of its migration policies. Likewise, the visa policy of an independent Scottish state would be based on its needs and not those of the continuing UK. If an independent Scottish state was a member of the CTA, a visitor to Scotland travelling via Heathrow would need to be granted leave to enter the continuing UK and this could require a visa obtained in advance. It would be for the government of an independent Scottish state to decide whether to admit travellers on the basis of a continuing UK visa or whether they should also be required to purchase a Scottish visa.
- 2.33 If an independent Scottish state was a member of the Schengen Area, and therefore not part of the CTA, transit through Heathrow en-route to Scotland could be airside. Passengers would not need to 'enter' the continuing UK in order to travel to Scotland. A number of nationalities however would likely require a Direct Airside Transit Visa. Currently this costs £52. Should passengers wish to transit by rail they would need a full visit visa or a visitor in transit visa (£78 and £52 respectively).²⁹

²⁷ Immigration Fees, including visa fees, are set annually by regulations. There are two sets of regulations depending on whether the fee is above cost recovery. The Immigration and Nationality (Fees) Regulations 2013 are at: <http://www.legislation.gov.uk/ukxi/2013/749/regulation/4/made>.

The Immigration and Nationality (Cost Recovery) Fees 2013 (for those fees at or below cost recovery) are at: <http://www.legislation.gov.uk/ukxi/2013/617/contents/made>.

²⁸ The rules are complex. Sixty-one visa nationalities can transit the UK without a visa (TWOV) to Ireland if they are in possession of a valid Irish visa. Some, such as China, require a UK visa to transit the UK but the Republic of Ireland have introduced a visa waiver for 17 nationalities where they will grant entry on the basis of that UK visa; there is no additional requirement to purchase an Irish visa. Others, such as South Africa, if not eligible for TWOV (e.g. in possession of an EEA category 'D' visa), require both a UK visa to transit Heathrow and a visit visa for the Republic of Ireland.

²⁹ Immigration Fees, Op. cit.

Visas

- 2.34 Individuals who wish to visit the UK benefit from a UK visa operation with global reach. Those wishing to visit the UK can apply for a visa in 137 countries. In 2012, UK Visas and Immigration issued 2,229,357 visas.³⁰ The majority, 77 per cent, were visitor and transit visas.³¹ For the tourist, that visitor visa allows them to visit any number of locations in the UK and, in an increasing number of cases, the Republic of Ireland through the cooperation arrangements discussed above. For businesses, with multiple sites across the UK, the work visa allows them to deploy skilled migrant labour wherever they are needed and to move people across the UK without applying for additional visas. Two regimes, in the continuing UK and an independent Scottish state, would entail two sets of migration requirements and costs for both visitors and businesses.
- 2.35 The Visitor Economy, both inbound and domestic, is important to the UK. Visitors to the UK spent £19.4 billion in 2011 and contributed an estimated £24 billion to GDP.³² The entire visitor economy in 2009 accounted for £115 billion of GDP (8.9 per cent of the total economy) and 2.64 million jobs.³³ The visitor economy makes up a greater share of Scotland's GDP than England's. In 2009 the Visitor Economy accounted for 8.6 per cent of England's GDP and 8.3 per cent of total employment. For Scotland the figures were 10.4 per cent and 10 per cent respectively.³⁴
- 2.36 An analysis of visits to London, the rest of England, Scotland and Wales showed that in 2009 around 2.5 million visitors (9 per cent) stayed in more than one of those areas. Visitors who stay in more than one area spend an average of £300 more over their entire stay in Britain.³⁵ There is evidence also that London is often included in a visitor's first trip to Britain, but visitors are more likely to take a look beyond London on subsequent visits. 33 per cent of visitors to Scotland in 2009 were visiting Britain for the first time.³⁶ The current arrangements in the UK provide the opportunity for visitors to stay in more than one area; this can be built on, both to increase the benefit to the UK economy as a whole and to spread that benefit across a wider geographical area.
- 2.37 The same report notes³⁷ that 30 per cent of visitors to Scotland in 2009 (767,400 people) also stayed elsewhere in the UK. Data from the 2011 International Passenger Survey³⁸ shows that 35 per cent of visitors on holiday to Scotland visited other parts of the UK. Barriers to movement between an independent Scottish state and the continuing UK, whether real or perceived, could impact on those numbers. The benefits to Scotland's tourist industry of being part of the UK have been discussed in previous papers in the Scotland analysis series.³⁹

³⁰ *Before entry data tables Immigration Statistics January to March 2013* volume 2, table be_04 accessed at www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

³¹ Excluding student visas.

³² The economic contribution of the Visitor Economy, Deloitte & Oxford Economics June 2010: Table 5.3b. Overseas visitor spend is 21.24 per cent of total visitor spend. Total contribution of visitor economy to GDP is £115 bn. Estimate of overseas visitor contribution to the £115 billion is 21.24 of that figure.

³³ Includes supply chain, capital investment and government expenditure.

³⁴ *Ibid*, page 45.

³⁵ *Visit Britain: Foresight Issue 80* – June 2010.

³⁶ Visit Britain sponsored question on International Passenger Survey 2009 (ONS).

³⁷ *Ibid*.

³⁸ IPS 2011 unpublished data.

³⁹ *Scotland analysis: EU and international*, HM Government, January 2014

2.38 An independent Scottish state may want to recognise, as does the Republic of Ireland for 17 nationalities, UK visas for visa waiver. A requirement for separate visas for an independent Scottish state and for the continuing UK would involve additional cost and effort for visitors and may discourage visitors from visiting both countries. This could reduce the average length of stay and therefore expenditure by each visitor in either an independent Scottish state or the continuing UK. This assumption is reflected on the island of Ireland where authorities north and south of the border believe two separate visa regimes restrict tourism across the island as a whole. However, any mutual recognition of visas between an independent Scottish state and the continuing UK would have to be negotiated and agreed.

Migration for employment in the UK

2.39 Under the current system Scotland has the best of both worlds. Businesses and employers in Scotland can influence the UK-wide list of shortage occupations, and the system provides for a Scotland specific list.

2.40 The UK has a single policy of migration for employment which ensures that employers, wherever they are in the UK, can mitigate local skill shortages by recruiting from outside the European Economic Area (EEA). It is implemented through a complex and extensive visa system designed to ensure only those with the skills the economy needs are allowed to migrate to the UK. Within this unified system Scotland's particular circumstances and need for skilled labour are accounted for through the Scotland-specific shortage list which allows immigration to address the gaps in Scotland's labour market.

2.41 Broadly, the UK immigration system caters for visitors, temporary migrants coming to work or study, and migrants coming to join a partner with the intention of settling here. There are no controls on those visiting or moving to the UK from within the EEA. All visitors from outside the EEA are subject to immigration control but only those who are 'visa nationals' need to obtain a visa before they travel. Visitors must intend to leave the UK at the end of their stay and generally may not work, study (except 'student visitors'), extend their stay or switch category of visa.

2.42 The UK's immigration policy aims to ensure effective control of immigration so as to manage its impact on social cohesion, infrastructure and public services and on jobs and wages.

2.43 All non-EEA migrants coming to work or study need to obtain a visa under the Points-Based System (PBS) before they travel. There are four tiers⁴⁰ within the Points-Based System:

- Tier 1 – High Value Migrants, specifically the exceptionally talented, entrepreneurs, graduate entrepreneurs and investors;
- Tier 2 – Skilled Workers, with an offer of a graduate level job anywhere in the UK;
- Tier 4 – Students; and
- Tier 5 – Temporary work routes including sportspersons and individuals working in the creative arts, as well as the UK's Youth Mobility Schemes.

⁴⁰ The initial plans for the PBS included a Tier 3 route from non-skilled labour. This was never implemented.

2.44 In 2012 the number of visas issued for each tier⁴¹, excluding dependents was:

Tier 1	6,272
Tier 2	39,172
Tier 4	193,083
Tier 5	36,926

2.45 Tier 2 General applies to two categories of skilled workers: those coming to fill jobs that have been advertised under the Resident Labour Market Test (RLMT) and those coming to take up jobs on the UK Government's shortage occupation list. Tier 2 requires that a migrant worker be sponsored by an employer.

2.46 The RLMT route enables an employer to bring in a worker from outside the EEA if they have advertised the job and found that there is no suitably qualified worker within the UK or the EEA available.

2.47 Employers can also apply to bring in workers from the outside of the EEA if the vacancy to be filled is in an occupation on the Tier 2 shortage occupation list. This details the jobs experiencing a labour shortage that would be sensibly filled using non-EEA labour either across the UK as a whole or in Scotland only. The content of the list is reviewed periodically by the Migration Advisory Committee (see Box 2B). The shortage occupation list confers advantages for an employer. First, there is no need to advertise the job vacancy in the resident labour market. Second, should the migration limit under Tier 2 be hit, priority is given to those migrants coming via the shortage occupation list.

2.48 For an occupation or job title to be included on the shortage occupation list it must be:

- skilled to graduate level;
- experiencing a national shortage of labour; and
- demonstrably sensible to fill this shortage using migrant labour.

2.49 The UK's work migration system (under Tier 2 of the Points Based System) is constructed to protect the resident labour force at the same time as ensuring the UK can recruit the migrants it needs. Most other major Western economies operate similar sorts of work permit system, which allow them to control foreign nationals' access to their labour market. For example, Australia and Canada operate points-based systems for skilled workers and the US H1-B visa for skilled workers requires the US employer to obtain approval from the Department of Labor before appointing a migrant worker.

2.50 The Migration Advisory Committee (MAC) advises the UK Government on skills shortages (see Box 2B). It is recognised that there are some differences between the Scottish labour market and that of the UK as a whole. Scottish employers submit their own evidence for consideration by the MAC for inclusion on a separate list for Scotland. Since the first review of shortages in September 2008 the number of skills on the Scotland-only list but not on the overall UK list has never exceeded four,^{42, 43} which shows that the skills shortages in Scotland are broadly the same as within the UK as a whole. In the next review in April 2009 one of these was recognised as a UK-

⁴¹ Throughout the document 'Ireland' is referred to as the Republic of Ireland; consistent with the Republic of Ireland Act 1948 S2.

⁴² In September 2008 these were Food process operatives (fish production), nurses (band 5+) and speech and language specialists.

⁴³ In February 2013 these were three categories of medical practitioners and physical scientists (diagnostic radiology).

wide shortage, one was retained as Scotland only and, in the absence of evidence of a continued shortage, one was removed. The pattern has been repeated at each review. Occupations or specific job titles are removed and others added, evidence that the system is both responsive to and meeting the needs of Scotland. The most recent review of the shortage occupation list (published in February 2013)⁴⁴ resulted in a number of occupations and job titles within the health sector being removed from the shortage occupation list for the UK. However, in recognition of the fact that Scotland continued to experience shortage, some of those occupations and job-titles were added to the shortage occupation list for Scotland. The 2013 report noted that while there was some evidence of skill shortages, these accounted for a small proportion of total vacancies and total employment. As such, Scotland has been a relatively low user of the Tier 2 (skilled workers) migration route.

- 2.51 An example of the influence Scotland has over the UK-wide list of shortage occupations is detailed in the February 2013 report of the MAC. The Convention of Scottish Local Authorities reported shortages in relation to secondary education teaching, with difficulties in recruiting physics and chemistry teachers. This evidence, together with evidence from other parts of the UK led the MAC to recommend the secondary teaching professionals in the subjects of maths, chemistry and physics be retained on the UK shortage occupation list.⁴⁵
- 2.52 That same report includes a Scotland specific shortage occupation list. An example of how the flexibility of the current system takes account of the needs of Scotland is that of consultant paediatrician training posts. The Royal College of Paediatrics and Child Health (RCPCH) forecast an oversupply of trainees for the estimated future number of consultants and the report therefore recommended the removal of higher specialty training posts (ST4) in paediatrics from the UK wide shortage occupation list. In Scotland however, the Scottish Government Health and Social Care Directorate reported a general shortage of paediatric specialists and, in the light of the continuing shortage in Scotland, and the importance of the services provided by paediatric medical professionals the MAC recommended, and the UK Government agreed, that middle grade paediatric doctors should be retained on the shortage occupation list in Scotland and that the higher specialty training post (ST4) in paediatrics should be added to that list.
- 2.53 Tier 2 also includes the intra-company transfer route. This is for employees of multi-national companies being transferred to a UK-based branch of the same organisation either on a long-term or short-term basis. Additionally, organisations may use the intra-company transfer route for third-party contracting, bringing in labour from their own company to deliver a business outcome to a third party often in the form of a one-off project. The transferees may work at the third party's premises providing the multi-national organisation remains responsible for their work.
- 2.54 The intra-company transfer route is the largest component of Tier 2. In the four years between 2009 and 2012, 110,162⁴⁶ main applicants⁴⁷ entered the UK through this route. 72 per cent of main applicants entering the UK through Tier 2 routes in that

⁴⁴ Full review of the recommended shortage occupation lists for the UK and Scotland, a sunset clause and the creative occupations, Migration Advisory Committee, www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/34mac-sixth-review/.

⁴⁵ Ibid.

⁴⁶ *Before entry data tables Immigration Statistics January to March 2013* volume 2, table be_04 www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

⁴⁷ I.e. excluding dependents.

period. As at April 2013 there were 6,039⁴⁸ businesses and organisations throughout the UK registered as sponsors of intra-company transfers. If Scotland was an independent state with its own immigration policy and laws, a multinational company wishing to move staff who were third country nationals from an office in Scotland to one in the continuing UK, or vice versa, may be obliged to act as sponsors in both countries. This would be an additional barrier to business.

Box 2B: The Migration Advisory Committee

The Migration Advisory Committee (MAC) was set up in 2007. It is a non-departmental, non-time limited public body comprised of economists and migration experts to provide transparent, independent and evidence-based advice to the government on migration issues. The MAC is sponsored and funded by the Home Office. The questions that the MAC consider are determined by the UK Government and the MAC's advice is published.

The MAC is chaired by Professor Sir David Metcalf CBE and is supported by four academic economists.

The MAC provides advice to the government on a range of issues in relation to migration policy and has published over 20 reports since 2008. The MAC's advice also informs the compilation of the shortage occupation list for Tier 2, which the MAC regularly reviews in part or full at the request of the government. A shortage occupation list is determined both for the UK as a whole as well as separately for Scotland.

The MAC's approach is to combine the consistency and comprehensive labour market coverage of 'top-down' national data with more granulated 'bottom-up' evidence submitted by partners. The MAC will usually publish a call for evidence and arranges a number of partner events and visits. The MAC will always consult with partners when considering any commission via a public call for evidence. This call for evidence is published on the MAC website and forwarded to partners on the MAC's partner database – a comprehensive list of some 2000 partners with whom the MAC has engaged previously. This includes, but is not restricted to, government departments (UK and devolved), employers, representative bodies, trades unions, and academics. Over seven per cent of these partners are based in Scotland while others are large companies that work throughout the UK, including in Scotland.

In terms of recent activity, for the financial year 2012-13 the MAC was commissioned to complete three reports. The MAC visited Scotland with respect to these reports on three occasions as outlined below:

- Review of the Tier 2 Codes of Practice: The MAC met with representatives from the Scottish Government, Universities, Local Authorities, NHS Scotland, the Scottish Trades Union Congress and a number of private firms;
- Review of the Shortage Occupation Lists: Two visits to Scotland during which the MAC met with representatives of the Scottish Government, Local Authorities, the oil and gas sector, and representatives of the creative-arts sector; and
- Migrant Seasonal Workers: One visit to Scotland: The MAC met representatives of the Scottish Government, the National Farmers Union, and Scottish growers (horticultural farmers).

⁴⁸ Before entry data tables Immigration Statistics January to March 2013 volume 1, table cs_02_q accessed at www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013.

2.55 The current UK immigration arrangements address the specific needs of Scotland.⁴⁹ The size of the Scottish population is at an historic high and while Scotland is a relatively low user of Tier 2 (skilled workers)⁵⁰ route there is a mechanism (the Scotland Shortage list) whereby the specific needs of Scotland are addressed. In its White Paper on independence the present Scottish Government has proposed that an independent Scottish state should have a points-based system.⁵¹ It is not clear how this would differ in intent or practice from the current UK points-based system.

Scotland and immigration

2.56 The current Scottish Government has indicated that an independent Scottish state would manage immigration effectively to meet its own economic, social and demographic priorities and needs.^{52, 53} Those needs relate broadly to addressing potential future economic problems that may result from an ageing population and ensuring that the demands of the 'new economy' for highly skilled workers can be met. In other words, the Scottish Government has suggested that an independent Scottish state would seek to attract skilled immigrants as the UK (as discussed above) and many other developed countries do. However, it would also seek to address its demographic challenges and increase its population through immigration.

2.57 Given the scarcity of skilled immigrants and the difficulty of attracting them (discussed in further detail below), a policy of population increase through immigration suggests a less selective approach to which immigrants are allowed to enter and settle. An independent Scottish state seeking to grow its population through immigration would instead seek to attract higher numbers of low or non-skilled migrants to achieve this aim. This would be contrary to the immigration policies currently being pursued by both the UK and the Republic of Ireland within the CTA and could therefore put these arrangements under strain. As such, the success of negotiations for an independent Scottish state to join the CTA would likely depend on it agreeing to align certain visa immigration policies with those of other members. Moreover, the Institute for Fiscal Studies (IFS) suggest that Scotland would face a less challenging long-term fiscal situation as part of the UK than as an independent State, regardless of the assumptions used by the IFS about the levels of migration.⁵⁴

2.58 As discussed above (paragraphs 2.24 – 2.30) the current Scottish Government has indicated that an independent Scottish state would wish to join the CTA. The CTA does not require that the members adopt a unitary policy for labour migration. Within the CTA both the Republic of Ireland and the UK pursue their own strategies to attract highly skilled immigrants. The focus however is on attracting those with scarce skills. It

⁴⁹ *Your Scotland Your Voice: A National Conversation*, Scottish Government, 2009.

⁵⁰ Migration Advisory Committee sixth review of the recommended shortage occupation lists for the UK and Scotland, February 2013.

⁵¹ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

⁵² *Europe and Foreign Affairs: Taking forward our National Conversation*, Scottish Government, 2009.

⁵³ *Scotland's future, Your Guide to an Independent Scotland*, Scottish Government, November 2013.

⁵⁴ *Fiscal sustainability of an independent Scotland*, Institute for Fiscal Studies, November 2013. The Institute for Fiscal studies has published long-term fiscal projections for an independent Scotland and the UK. In these projections, under all the assumptions they consider regarding the levels of migration, they show an independent Scotland with greater long-term fiscal challenges than the UK as a whole. Using the Office for National Statistics' projection for Scottish population with 'low' migration (which assumes net inward migration to Scotland of 9,000 people per year), the IFS's basic model shows that Scottish debt reaches over 230 per cent of GDP by 2062-63, compared with 77 per cent of GDP for the UK as a whole. When the IFS instead use the ONS' 'high' migration assumption (which assumes net inward migration to Scotland of 26,000 people per year) the model still projects Scottish debt to reach 172 per cent of GDP by 2062-63.

is not on seeking to grow the population through immigration. The Republic of Ireland, historically a country of net emigration until 1996, has acted to slow the rising number of asylum applications and has moved away from its more liberal work permit system, seeking to meet most of its low-skilled labour needs from within the enlarged EU.⁵⁵ The broadly similar approach of the Republic of Ireland and the UK has ensured that the arrangements within the CTA are not jeopardised; as would be the case if there was significant movement of non-EEA economic migrants from one state to the other.

- 2.59 Similarly, in the Schengen Area the policy with regards to admission of third country nationals⁵⁶ for the purposes of employment varies between Member States and is governed by their domestic legislation, designed to satisfy labour market requirements whilst also protecting the interests of the national workforce. In the absence of border controls however it has proved challenging for Member States to regulate the intra-Schengen movement of migrants; both legal and illegal.

Demography and immigration

- 2.60 The current Scottish Government is keen to attract both highly skilled and low skilled workers from outside the EEA to help address the demographic challenges it is facing. The recent White Paper on independence said:

“Scotland has a different need for immigration than other parts of the UK. Healthy population growth is important for Scotland’s economy. One of the main contributors to Scotland’s population growth is migrants who chose to make Scotland their home.”⁵⁷

The Scottish Government’s position is informed by the example of Ireland and Iceland. Both of those countries achieved strong population growth through both natural increase and net inward migration (mainly from the so-called A8⁵⁸ countries of the EU).

- 2.61 The demographic challenges are described in the Scottish Government’s White Paper on independence⁵⁹ and are discussed also in a recent report by the House of Lords Select Committee on Economic Affairs.⁶⁰ Scotland however is not unique in terms of a potential demographic challenge. In many developed countries persistently low fertility rates, increasing life expectancy and the associated ageing of the population, have given rise to fears about fiscal sustainability and the pressure of pensions and social welfare provision. Existing projections suggest that Germany, Italy, Spain and others will experience a substantial reduction in their working-age population in the next 50 years.⁶¹ By contrast, the UK is expected to experience only a moderate decline in working-age population. The projection for Scotland however suggests that the old age dependency ratio will start to diverge from that of the rest of the UK in the middle of this decade and, by 2035 could be significantly higher.⁶² Currently the cost burden is shared across the UK and thus effects in Scotland of any divergence, on social welfare etc., is diluted.

⁵⁵ *Ireland: From Rapid Immigration to recession*, Martin Ruhs, Centre on Migration, Policy and Society Oxford University, September 2009.

⁵⁶ Third country nationals are individuals who are neither from the EEA country in which they are currently living or staying, nor from other member states of the EEA.

⁵⁷ *Scotland’s Future: Your Guide to an Independent Scotland*, page 267, Scottish Government, November 2013.

⁵⁸ The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

⁵⁹ *Scotland’s Future: Your Guide to an Independent Scotland*, pages 267 – 269, Scottish Government, November 2013.

⁶⁰ *The economic implications for the United Kingdom of Scottish Independence*, House of Lords Select Committee on Economic Affairs: Second Report of Session 2012-13, April 2013.

⁶¹ *International Labour Migration, Economic Growth and Labour Markets: The Current State of Affairs*, Bauer et al, 2004.

⁶² Office for National Statistic, 2010 Projections.

- 2.62 In terms of the need for population growth, the Scottish Government's recent White Paper on independence refers back to the Scottish Government Economic Strategy 2007.⁶³ That strategy notes that Scotland is projected to experience a significant demographic shift leading to an increase in the average age and, it argues that Scotland requires a more ambitious target for population growth.⁶⁴ It should be noted however that the latest population statistics issued by the General Register Office for Scotland (GROS) shows that Scotland now has its highest ever population fuelled largely by inward migration mainly from the EU-A8.⁶⁵
- 2.63 The Scottish Government strategy notes that Scotland's population grew by less than one per cent annually between 1997 and 2006. This is contrasted with the Republic of Ireland and Iceland, which for example, witnessed population growth of roughly 15 per cent and 11 per cent respectively between 1997 and 2006. The evidence however suggests that the population growth in Ireland and Iceland was due to factors other than the immigration of non-EEA workers. In Ireland nearly six and a half percentage points of the population growth between 1996 and 2006 was due to natural increase.⁶⁶ The balance came primarily from EU-A8 immigration. In Iceland eight and a half percent of the population growth between 1997 and 2006 was due to natural increase.⁶⁷ Between 1996 and 2008 no more than 33 per cent of the annual population growth due to net inward migration was attributable to immigration from outwith the EEA.⁶⁸
- 2.64 In the event of a vote for independence, it would be for a future Scottish government to determine its immigration policy, including whether that policy should be more liberal than the current UK policy. It should be noted however that no European government, with the possible exception of Spain, has been able to sustain a more explicitly liberal approach to labour migration since the 1970s. As stated by Professor Boswell of the University of Edinburgh, both the UK and Germany were thwarted in efforts to do this. Other governments have adopted a more cautious approach, instead admitting immigrants through the back door (e.g. irregular immigration to Italy), or through complex and opaque exemptions for certain types of sectors, skills or employers.⁶⁹
- 2.65 Increased immigration, as a potential solution to the demographic challenge, has limitations; if the migrants settle then they too become older in time, thus merely postponing, rather than solving, the demographic challenge.
- 2.66 The benefits of migration are often measured by the increase in overall GDP or GDP per capita. Recently this has been challenged by the MAC⁷⁰ who argued a distinction should be made between benefits accruing to the resident population and those accruing to the migrants themselves.

⁶³ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

⁶⁴ *Ibid.*

⁶⁵ www.gro-scotland.gov.uk/files2/stats/high-level-summary/j11198/j1119801.htm.

⁶⁶ *This is Ireland: Highlights from Census 2011*, Part 1.

⁶⁷ Calculated from Table 6 in *Fólksfjöldapróun og erlendir ríkisborgarar 1996–2006* (Population 1996–2006 with a focus on foreign nationals) ISSN 1670-4487.

⁶⁸ Calculated from table 8 in *Innflytjendur og einstaklingar með erlendan bakgrunn 1996–2008* (Immigrants and persons with foreign background 1996–2008).

⁶⁹ *Immigration Policy in an Independent Scotland: Opportunities and Constraints*, Professor Christina Boswell, University of Edinburgh www.rse.org.uk/cms/files/events/programmes/2012-13/speaker_notes/ChristinaBoswell.pdf.

⁷⁰ *Analysis of the impacts of migration*, Migration Advisory Committee, January 2012.

- 2.67 Economic theory is equivocal on the impact of migration but empirical studies have produced mixed conclusions. Professor Borjas of Harvard University suggests that there is evidence that immigration can have negative economic impacts on groups such as low-skilled workers.⁷¹ Much of the evidence from the UK suggests the impact is spread unevenly across groups. While immigration of highly-paid individuals may boost average wages, immigration has been found to slow wage growth among the lower skilled.⁷² A study by the MAC (2012)⁷³ found some evidence of displacement of British-born workers by non-EEA migrants for the period 1995-2010.
- 2.68 It is also unclear to what extent the age profile of the immigrant population can be influenced or controlled. If family reunification is not precluded, a migrant who meets all the demographic requirements (where a points based system includes a consideration of age) may eventually apply to bring his/her parents or grandparents reducing or nullifying the initial positive demographic impact.⁷⁴
- 2.69 Migration as a tool to address demographic challenge was considered at a conference to explore the nature and impact of migration across the EU. The conference was organised by the then Scottish Executive and the European Economic and Social Committee and was held in Dunblane in September 2005. The conference summary report⁷⁵ noted that ‘replacement migration’ has limitations, in particular:
- the amount of replacement migration required is often more than a Member State could feasibly absorb. For example, each year Germany would need an additional one million migrant workers, without dependent family members, to stop the decline in its population;
 - although migrant families often have higher birth rates than the host population, the second generation are likely to have similar birth rates; and
 - in the longer-term, migrants will age. Thus for replacement migration to work, a continuous stream of migrants is required. Europe would need to compete for migrants with countries such as the USA, Canada and Australia, which may offer more generous settlement terms and conditions.

Skilled labour migration

- 2.70 The UK, in common with many developed countries, recognises the need to attract highly-skilled migrants to work in the ‘new economy’ as well as addressing demographic challenges. This need was reaffirmed by the Prime Minister in a speech in March 2012:

‘Now that means ensuring that those who do come here are the brightest and the best, the people we really need, with the skills and entrepreneurial talent to create British jobs and growth that will help us to win the global race.’⁷⁶

⁷¹ *Increasing the Supply of Labour Through Immigration: Measuring the Impact on Native-born Workers*, G. Borjas, Centre for Immigration Studies, May 2004.

⁷² *The Effect of Immigration along the Distribution of Wages*, Dustmann, 2008.

⁷³ Op cit.

⁷⁴ *International Labour Migration, Economic Growth and Labour Markets: The Current State of Affairs*, Bauer et al, 2004.

⁷⁵ *Exploring the Impact of Migration within the European Union (EU): How can we harness our talents*, Scottish Government, 2006.

⁷⁶ Immigration Speech by the Rt. Hon. David Cameron MP, 25 March 2013, www.gov.uk.

This need is echoed in the Scottish Government Economic Strategy (2007),⁷⁷ and is in line with the Scottish Government's White paper on independence.⁷⁸

- 2.71 It could be argued that high volume, low-skilled, migration is a 'buyer's market', with countries able to easily attract labour by facilitating access. By contrast, highly skilled migration is increasingly a 'seller's market' and there is a growing trend of a 'battle for talent', in which countries compete for highly skilled labour and in which migrants 'shop around'.⁷⁹ The highly skilled migrant's decision will be based on expected salary, living conditions, the projected future earnings through opportunities for career progression and other considerations.
- 2.72 The UK is currently an attractive destination for highly skilled workers. The UK policy of migration for employment is designed to ensure that employers, wherever they are in the UK, can mitigate local skills shortages by recruiting from outside the EU/EEA. The UK offers opportunity, both for immediate employment but also, because of the size and diversity of its economy, for career progression and advancement. It provides an attractive system of welfare support and medical care and it offers a wide range of amenities, from the national parks to the cultural attractions of major cities. These are important factors in the supply-side consideration of migration.
- 2.73 Currently there are limited regional differences in wages, particularly for highly-skilled posts, and there is an integrated income-tax system across the UK. If there is competition between the nations or regions of the UK for highly-skilled migrants it is likely that this is based on broader lifestyle choices by the potential migrant. The evidence from the work of the MAC⁸⁰ suggests that the current arrangements deliver for all parts of the UK.
- 2.74 The current Scottish Government has suggested that an independent Scottish state would introduce its own points based system and lower the current financial maintenance thresholds and minimum salary levels for entry⁸¹. By itself this may not deliver an independent Scottish state competitive advantage in attracting skilled migrants and it may be necessary to identify other ways of increasing the utility of migration to Scotland, including through competing with the continuing UK and other members of the EU on wages and taxes. In common with other states, an independent Scottish state would need to manage the balance between terms and conditions that might attract highly skilled workers with terms and conditions that may be a disincentive to business.
- 2.75 An independent Scottish state which had negotiated its membership of the EU is likely to be bound by EU legal migration legislation such as the Council Directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment.⁸² This describes the 'EU Blue-card' which, inter alia, allows migrants admitted for the purpose of employment in one Member State to seek employment in another after a two-year qualifying period. The UK has not opted-in to this Directive.

⁷⁷ Op Cit.

⁷⁸ *Scotland's Future: Your Guide to an Independent Scotland*, pages 267 – 269, Scottish Government, November 2013.

⁷⁹ *The Role of the State in Attracting Highly-skilled Migrants: The Case of the Netherlands*, Metka Hercog, EIPASCOPE 2008/3.

⁸⁰ Migration Advisory Committee sixth review of the recommended shortage occupation lists for the UK and Scotland, February 2013.

⁸¹ *Scotland's Future: Your Guide to an Independent Scotland*, page 491, Scottish Government, November 2013.

⁸² *Council Directive 2009/50/EC*: 25 May 2009.

2.76 An independent Scottish state that sought to address its demographic challenges through immigration would therefore struggle to do so purely through attracting skilled migrants. It would be likely instead to have to increase its levels of low- or non-skilled immigration if it wished to pursue a policy of population growth.

The UK's border with the Republic of Ireland

2.77 The absence of immigration controls on the land border between the Republic of Ireland and Northern Ireland may suggest that controls on the English-Scottish land border would be unlikely. However, as discussed above (paragraph 2.58) the UK and the Republic of Ireland pursue complementary immigration policies, and cooperate on visitor and short-stay visa policies. Thus, there is no need for either state to implement border controls to protect their shared border. In addition, the lack of border controls on the land border between the Republic of Ireland and Northern Ireland reflect unique political circumstances which would not necessarily apply in the case of Scotland. Geography is also an important factor. The border, some 448 kilometres long,⁸³ cutting across some 180 roads and not delineated by natural boundaries contrasts with the 154 kilometres land border between England and Scotland crossed by 21 roads and which is marked by the river Tweed in the east and the river Esk in the west.

2.78 The impracticality of immigration controls at the border with the Republic of Ireland is evidenced by the controls on movement imposed during World War Two. Ireland's neutrality led both states to favour controls on movement: the UK primarily to prevent espionage and subversion;⁸⁴ and Ireland primarily to prevent an influx of refugees.⁸⁵ Controls were imposed not between the UK and the Irish Free State but between Great Britain and the island of Ireland, thereby imposing controls on travel from one part of the UK (Northern Ireland) to other parts of the UK.

2.79 The impracticality of immigration controls was one of the main reasons advanced in support of the Common Travel Area. That argument also lay at the heart of the refusal to abolish wartime controls on travel between Northern Ireland and Great Britain until the Republic of Ireland had agreed to the resumption of co-operation on immigration control. The alternative, to attempt to make immigration control effective at the border with the Republic of Ireland would have required "an army of immigration officers".^{86, 87} These challenges are less likely to apply to the border between England and Scotland; which is significantly shorter and with far fewer road crossings.

2.80 More recently, the unique context of the political settlement in Northern Ireland has also been an important consideration. Free movement between Northern Ireland and the Republic of Ireland is an essential underpinning of the settlement embodied in the Belfast (Good Friday) Agreement 1998. The CTA is also of significance in encouraging tourism and re-balancing the economy of Northern Ireland.

⁸³ *Report of the Irish Boundary Commission 1925*, G Hand (ed). IUP 1969 V1, 143.

⁸⁴ *Anglo-Irish Security Liaison in the Second World War*, E. O'Halpin, in B. Girvin and G. Roberts (eds), *Ireland and the Second World War: Politics, Society and Remembrance* (Dublin: Four Courts Press, 2000) Cited in *The Common Travel Area between Britain and Ireland*, B Ryan, *The Modern Law Review* 2001.

⁸⁵ 'Memorandum relating to the Control of Aliens and Control of Influx of People from Great Britain' 7 October 1939 (NAI, DT 11512A). Cited in 'The Common Travel Area between Britain and Ireland', B Ryan, *The Modern Law Review* 2001.

⁸⁶ *The Common Travel Area between Britain and Ireland*, B Ryan, *The Modern Law Review* 2001.

⁸⁷ Under-Secretary of State for the Home Department, Geoffrey de Freitas, HC Deb V478 col 848, 28 July 1950 cited in *The Common Travel Area between Britain and Ireland*, B Ryan, *The Modern Law Review* 2001.

Other scenarios for an independent Scottish state's borders

- 2.81 An independent Scottish state may look to the example of the Nordic Passport Union which allows citizens of Denmark, Sweden, Norway, Finland and Iceland to travel and reside in other Nordic countries without a passport or residence permits. Unlike the CTA, however, these countries are all within the Schengen area so the comparison is not applicable to the UK, which is outside the Schengen area.
- 2.82 It is possible that an independent Scottish state could choose or may temporarily remain outside European Union free-movement arrangements and or free-trade agreements, particularly if there were a transition period from the current arrangements to Scotland's eventual membership of the EU. In these circumstances the continuing UK may be obliged to take the necessary measures to protect the CTA or the EU free market.

Conclusion

- 2.83 An independent Scottish state would be faced with some difficult choices. Independence implies that Scotland should be free to determine its own migration policies. It may however also wish to ensure that its citizens enjoy the benefits of borderless travel through membership of the CTA or Schengen. Both of these arrangements imply a degree of collaboration on immigration policy with other states. It is difficult to see how an independent Scottish state could implement an entirely independent migration policy and, at the same time, be accepted as a member of a borderless travel zone.
- 2.84 An independent Scottish state would not be able to join both the Schengen Area and the Common Travel Area. As part of the conditions of EU membership an independent Scottish state would be required to establish border controls with the continuing UK and the other members of the CTA unless it could negotiate an opt-out from the Schengen Area.
- 2.85 An independent Scottish state may seek to compete with the UK and other countries to attract highly skilled migrants. However, the current Scottish Government has stated that it would wish an independent Scottish state to pursue a more open migration policy in order to increase the Scottish population. This would suggest that an independent Scottish state may pursue a different policy of seeking to attract lower or non-skilled migrants. If an independent Scottish state sought to pursue such a policy while maintaining open borders with its neighbours (the UK and the Republic of Ireland) who were pursuing quite different policies within the CTA this could put those arrangements under strain.
- 2.86 A divergence between the immigration policy of an independent Scottish state and the continuing UK, could lead to immigrants seeking to exploit legitimate means of entry to one state as a means of gaining access to the other. This could lead to either state having to take action to protect the integrity of its immigration policy and, ultimately, could potentially result in the establishment of border controls by one state or the other.
- 2.87 It is not possible, given the numerous considerations described above, to say with any certainty how Scottish independence might affect the movement of people between an independent Scottish state and the continuing UK. It is possible however to envisage circumstances in which travel between major Scottish centres such as Glasgow and Edinburgh and English cities such as Newcastle, Birmingham, Manchester and London might require people to carry passports or some other agreed form of identification.

Chapter 3:

Movement of goods

Creating an international border between Scotland and the rest of the UK would impact on the movement of goods across that border. It would result in trade between Scotland and England, Wales or Northern Ireland becoming international trade: import-export. Previous papers in the Scotland analysis series have discussed the reduction in trade flows that can result from the creation of international borders and the additional burdens faced by business operating across borders. These would be felt in the event of an international border between Scotland and the continuing UK.

States independently determine their own policies for controlling the movement of goods across their borders. They can also decide which goods they wish to levy a tax or duty on to raise revenue or discourage a particular behaviour: their excise regime. The UK currently has a strong regime to monitor the movement of goods across its borders and, where necessary, impose duties or controls on those goods. This includes inspections of freight as it enters the UK including freight from the rest of the EU.

An independent Scottish state would have to determine its own excise regime. Any divergence between its regime and that of the continuing UK could be exploited by criminals through smuggling. Either state may conclude that it is only through a degree of control and inspection at the border that they can protect their excise regime, this would create delays and add costs for businesses transporting freight across the border.

The UK has a track record of protecting its borders against smuggling, both of people and illegal goods, and disrupting the ability of organised criminals to work across those borders. Customs officials have law enforcement powers to carry out criminal investigations into custom offences in all parts of the country. If Scotland became an independent state the unified system for protecting the border could not continue. An independent Scottish government would have responsibility for its own customs policy and for ensuring that it was enforced. Organised Crime Groups exploit the challenges that law enforcement and customs agencies have in effectively working across international borders. Even when agencies of two states collaborate, this is inherently more formalised than working within one state. An independent Scottish state and the continuing UK could agree to work closely together but this is unlikely to be as effective as the current arrangements.

Movement of goods

Trade and business

- 3.1 If Scotland became an independent state trade between Scotland and the continuing UK would be classed as import-export. This would create additional administrative burdens for businesses and could lead to restrictions on haulage operations.
- 3.2 In the event of a vote for independence, an international border would be created between an independent Scottish state and the continuing UK. Trade across that border, classed currently as domestic, will become international trade: import–export. This, together with the likely divergence over time of tax, excise duty, regulatory and administrative regimes would be expected to trigger a 'border effect': international evidence shows that flows of trade, labour and capital are much larger between two regions of the same country than between two (otherwise similar) regions of two different countries. This effect occurs even when there is no physical border between countries and even where trade agreements and structures, such as the European Single Market, are in place. While historical and cultural ties between Scotland and the continuing UK would prevent an immediate fall off in trade flows, evidence of previous separations points to the erosion of these ties as time passes. Combined with regulatory divergence, Scottish independence would lead to barriers to trade and obstacles to labour and capital mobility.
- 3.3 The border effect is described in detail in the UK Government's paper *Scotland analysis: Macroeconomic and fiscal performance*.¹ That paper explains that as an impediment to trade flows, the border is likely to reduce the level of real income in the Scottish economy by four per cent after 30 years. While Scotland can look to new markets to offset this drag on growth, it is not clear whether this would compensate for the decline in trade with the continuing UK.
- 3.4 The most well known example of the border effect is trade between the US and Canada. After controlling for the effects of differences in regional incomes and distance between the various regions in the two countries, McCallum (1995)² concluded that Canadian provinces traded around 20 times more with each other than with US states of a similar size and proximity. The size of this result prompted further studies, which reduced the size of the estimated effect, but one of the most widely cited studies concludes that the border between the US and Canada reduces trade by 44 per cent.³ This is the border effect; the clear tendency to trade more within countries rather than across borders. This effect would be expected to be felt between an independent Scottish state and the continuing UK.
- 3.5 All parts of the UK benefit from a single market for goods. There is a single tariff regime, a common regulatory framework including the rules governing haulage companies, and no insurance premium differential for vehicles. Within the UK there are no restrictions on the movement of goods for customs and excise purposes. Where restrictions exist, on the movement of hazardous substances for example, the rules are harmonised across the UK. There are no obligatory administration procedures; although it is good practice to accompany shipments with a commercial invoice and packing list, if appropriate.
- 3.6 The current Scottish Government has indicated that an independent Scottish state would wish to join the EU. Within the EU most goods are in free circulation. They can move between EU Member States without customs controls or charges. It is

¹ *Scotland analysis: Macroeconomic and fiscal performance*, HM Government, September 2013.

² *National borders matter: Canada-US regional trade patterns*, McCallum, 1995.

³ *Gravitas: A solution to the Border Puzzle*, Anderson and van Wincoop, 2003.

incumbent on all Member States to ensure that there are no abuses of free movement, particularly in respect of excises goods and illicit and prohibited goods. There are also administrative requirements, specifically compliance with Intrastat requirements (see below).

- 3.7 The free movement of goods within the EU does not preclude however the possibility of a Member State establishing controls so as to prevent crime. In July 2011, for example, Denmark deployed customs officers at crossings on the German and Swedish borders in an attempt to curb cross-border crime and illegal immigration.
- 3.8 All VAT registered businesses must complete two boxes (8 and 9) on their VAT Return showing the total value of any goods supplied to other EU Member States (known as dispatches) and the total value of any goods acquired from other EU Member States (known as arrivals). They must also send in EC Sales lists, either monthly or quarterly, detailing the total values of any supplies to individual VAT registered businesses in other Member State. In addition to this, larger VAT registered businesses must supply further information each month on their trade in goods with other EU Member States. This is known as Intrastat and is the system for collecting statistics on the trade in goods between EU Member States. This is discussed in more detail in the UK Government's paper *Scotland analysis: Business and macroeconomic framework*.⁴
- 3.9 Goods dispatched to, or received from, other EU Member States with a value exceeding a legally set threshold require the submission of an Intrastat Supplementary Declaration (SD), which is submitted electronically. The thresholds, which currently differ for arrivals and dispatches, are reviewed annually, with any change normally announced towards the end of the preceding year. Changes only apply from the beginning of a calendar year. The threshold for Arrivals is currently £600,000 and the threshold for Dispatches is currently £250,000.
- 3.10 Neither of the above requires the payment of additional fees. Companies and sole traders engaged already in import-export, to and from the UK, will be familiar with the requirements. The incorporation of details of trade between an independent Scottish state and the continuing UK for those businesses would represent only a marginal increase in the administrative burden on those businesses.
- 3.11 There are however companies and sole traders who are not engaged in import-export but whose trade depends on the movement of goods from Scotland to the rest of the UK and vice versa. For these firms, the administration of international trade will be unfamiliar. For those who choose to continue that trade there will be both set-up costs (including training) and ongoing costs relating to staff time.
- 3.12 Currently, the absence of an international border between Scotland and the rest of the UK allows businesses, wherever they are based in the UK, to bid easily for sub-contract work in another part of the UK. If these were to become international transactions there could be an increased burden on small and medium sized businesses seeking to bid for cross-border sub-contracting work.
- 3.13 The creation of an international border between Scotland and the continuing UK could impact on hauliers, particularly those that are only operating in the domestic market currently. Cabotage is the haulage of goods between two points in the same country by a vehicle registered in another country. EU rules on cabotage restrict the number of permitted cabotage jobs to three in seven days, subsequent to a loaded international

⁴ *Scotland analysis: Business and microeconomic framework*, HM Government, July 2013.

journey.⁵ The current EU rules^{6, 7, 8} however suggest that there may be limitations on hauliers from the continuing UK to ply their trade in Scotland, and vice versa. No EU member state has negotiated an opt-out from these regulations.

3.14 From the above it can be seen that the creation of an international border between Scotland and the continuing UK could create burdens on and costs to business where these do not exist currently. These are discussed in more detail in the UK Government's paper *Scotland analysis: Microeconomic and business framework* and *Scotland analysis: Macroeconomic and fiscal performance*.⁹

Excise goods

3.15 States are able to determine their own tax policies to pursue their own objectives and, as part of this, establish their own excise regimes. There is currently a common excise regime throughout the UK. Any divergence in excise policy between an independent Scottish state and the continuing UK may be exploited by criminals through smuggling. Either state may conclude that it is only through a degree of control and inspection at the border that they can protect their excise regime.

3.16 Excise goods are those goods on which a country levies a tax or duty, either to raise revenue or to discourage a particular behaviour. Within the UK these include fuel, alcohol and tobacco.

3.17 Borders and excise regimes create particular circumstances which can be exploited by criminals and which do not exist in the absence of international borders. International criminal gangs in particular, many with records of violence, exploit the opportunity to make profits. They will seek to obtain items on one side of a border if they are not taxed or taxed a relatively low level and then transport them across the border and sell them at a price between the two tax regimes (i.e. more than they paid for them on one side of the border, but less than the market price on the other side of the border) to generate a profit. They also look to find loopholes, which may exist through importing from different countries, before then exporting to the destination country.

3.18 There is currently a common excise regime across the UK. This is maintained by the robust protection of the external border, supplemented by in-country inspection and control. Despite this effort it is estimated that smuggling contributed to losses of tax revenue (excise duty) on alcohol, tobacco and diesel of around £3.8 billion in 2008-09.¹⁰

3.19 The ability to determine excise duty rates is an attribute of a nation-state. An independent Scottish state or the continuing UK could alter their excise duty regime, either to raise revenue, promote trade, or to discourage a particular behaviour. Separate governments considering the circumstances and needs of different states are likely over time to pursue different policies. This could create an excise differential between the two states. That differential could be exploited by smugglers as discussed above. This

⁵ International authorisations and permits for road haulage, www.gov.uk

⁶ *Regulation (EC) No 1071/2009 of the European Parliament and of the Council*, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:300:0051:0071:EN:PDF, retrieved 25 November 2013.

⁷ *Regulation (EC) No 1072/2009 of the European Parliament and of the Council*, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:300:0072:0087:EN:PDF, retrieved 25 November 2013.

⁸ *Regulation (EC) No 1073/2009 of the European Parliament and of the Council*, eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:300:0088:0105:EN:PDF, retrieved 25 November 2013.

⁹ *Scotland analysis: Business and microeconomic framework*, HM Government, July 2013 and *Scotland analysis: Macroeconomic and fiscal performance*, HM Government, September 2013.

¹⁰ *Measuring Tax Gaps*, HM Revenue and Customs, 2010.

would have the effect of denying legitimate revenue to both states and undermining public protection policy. The danger is particularly acute when the excise goods in question are counterfeit.

- 3.20 A divergence of excise policy may develop over time. In the event of a vote for independence, a separate Scottish state and the continuing UK would attempt to tackle this by increasing in-country inspections. There may come a point however where either state, or both, might conclude that enforcement was possible only through checking goods as they cross the border. This arrangement is in place already between the UK and France. The free movement of goods within the EU notwithstanding, around 5 per cent of freight vehicles at Calais are subject to checks. A document check typically lasts 15 minutes. Vehicle searches could take an hour or more. This creates delays for freight transport at the UK-French border and adds to costs for those firms transporting goods across that border. If Scotland were an independent state with a different excise policy and the government of either the continuing UK or an independent Scottish state decided that they needed to implement freight inspections at the border, this could create similar delays and costs.
- 3.21 The UK has only one land border currently, between Northern Ireland and the Republic of Ireland. Although there are no routine customs inspections at this border there is a significant law enforcement effort to detect and limit cross-border smuggling. Organised Crime Groups exploit the absence of border controls to smuggle goods across that border and evade UK taxes. It is likely that both an independent Scottish state and the continuing UK would seek to learn from the experience of the land border between Northern Ireland and the Republic of Ireland and work to prevent the issues that have arisen at that border.
- 3.22 Criminal activity involving fuel fraud, for example, is a major problem in Northern Ireland and is proportionately three times larger than similar fuel crime in Great Britain. In 2009-10 it is estimated that Northern Ireland alone lost £70 million to this fraud.¹¹ It deprives the Exchequer of millions of pounds in lost excise duty, it takes business away from legitimate organisations, and leaves environmental waste to pollute and scar the countryside. It funds organised crime in Northern Ireland.
- 3.23 Other commodities are also smuggled across the land border between Northern Ireland and the Republic of Ireland. Tobacco smuggling in Northern Ireland, for example, is estimated to cost the taxpayer £42 million in lost revenue, and is as high as £3 billion for the UK as a whole. Tobacco smugglers can make up to £1.5 million profit per container lorry coming into the UK. A similar level of crime also affects the Republic of Ireland. In the event of Scottish independence it would be in the interests of both an independent Scottish state and the continuing UK to ensure that measures were in place to protect their excise regimes and to prevent the exploitation of the border by organised crime.
- 3.24 It is clear from the above that the creation of an international border can lead to types of criminality that derive solely from the creation of the border. Combating this criminality is likely to be resource intensive, both for an independent Scottish state and the continuing UK.

¹¹ *Fuel laundering and smuggling in Northern Ireland*, House of Commons Northern Ireland Affairs Committee, 27 March 2012.

Illicit goods

- 3.25 Borders are also relevant to the trade in illicit goods, including drugs and firearms. Organised Crime Groups operate across and exploits both international borders and the challenges that law enforcement agencies have in effectively working across those borders. The UK benefits currently from a single customs investigation and enforcement capability that works effectively with its policing counterparts, including Police Scotland. Customs officials have law enforcement powers to carry out criminal investigations into custom offences across the whole of the UK.¹²
- 3.26 An independent Scottish state would have its own customs organisation. Its officers would have no law enforcement powers beyond Scotland and the customs officials of the continuing UK would have no law enforcement powers in Scotland. The current Scottish Government has stated that it would be in the mutual interests of an independent Scottish state and the continuing UK to ensure close collaboration;¹³ but collaboration governed by international agreements is not the same as the fully integrated approach of the current arrangements. Any collaboration in the event of independence, would be between two separate states and two separate customs organisations and customs regimes; and between the National Crime Agency and police forces of the continuing UK and its equivalent in an independent Scottish state.
- 3.27 The UK currently enjoys close customs collaboration with a number of neighbouring states, France and the Republic of Ireland for example. No matter how close that collaboration, it can never be as effective as the current arrangements within the UK because the customs officers of one state do not have jurisdiction in another state. Between October 2011 and November 2012, for example, customs officials managed over 60 controlled deliveries of drugs,¹⁴ detected in England and bound for Scotland. The consignments of cannabis, cocaine and synthetic drugs had been consigned from South Asia, Asia, America and Europe. They were detected at sites in London and the Midlands and their onward delivery to Scotland was tracked. This ensured the arrest of the consignee(s) in Scotland and the interdiction of the drugs and action elsewhere in the UK against the criminals responsible for the importation. In these fast moving operations, UK customs officials, working as a single team were able to pass on the necessary information (directly to each other) and take the appropriate action without recourse to international agreements or the use of official channels for the exchange of information. Their common training, single set of operating procedures and shared equipment meant that there were no barriers to interoperability.
- 3.28 There are many examples of successful controlled deliveries across international borders, but these are international controlled deliveries subject to formal mutual assistance procedures (see Box 3A below). They can never be as effective or as rapid as a phone-call made by a customs official in Manchester to his/her colleague, in the same organisation, in Glasgow. That effectiveness would be diminished by the absence

¹² Under Section 307 Criminal Procedures (Scotland) Act 1995 for example UK customs officers can carry out investigations into customs offences in Scotland irrespective of whether the offence was detected first in Scotland or elsewhere in the UK.

¹³ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013

¹⁴ Defined by Article 1 g) of the 1988 UN Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances as: "(...) the technique of allowing illicit or suspect consignments of (...) drugs (...) or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences (...)" (and repeated by Article 2 i) of the 2000 UN Convention against Transnational Organised Crime and article 2 (i) of the 2003 UN Convention against Corruption with a view to investigating offences, the technique of controlled delivery has been used in some countries for a long time already.

of a single command and control system and difficulties in managing the competing priorities of the customs service of an independent Scottish state and the customs service of the continuing UK.

- 3.29 The question of speed and effectiveness applies also to the aftermath of a controlled delivery. An investigating officer in London, having interdicted a consignment of drugs may ask colleagues in Scotland to arrest the dispatcher in Glasgow and to gather forensic evidence. This is currently a straightforward request and the individual and the evidence might be sent from Glasgow to London the same day. If this were to be resolved between two sovereign states, an application for extradition and Mutual Legal Assistance requests would be necessary. It is not possible to say how many days each would take to process; but it would take significantly longer than the current arrangements. This is discussed further in the UK Government's recent paper *Scotland analysis: Security*.¹⁵

Box 3A

Mutual Legal Assistance (MLA)

MLA is the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country – for example banking records, witness statements and other documentary evidence. It is also used to serve legal documents on individuals ('service of process').

Extradition

Extradition is the process by which persons suspected, or convicted, of criminal offences can be transferred from one country to another in order to face criminal proceedings or to enforce a sentence already imposed.

- 3.30 Organised criminals are adept at exploiting the opportunities proved by the sub-optimal collaboration between law enforcement agencies obliged to work across international borders. Combating the traffic in illegal commodities (narcotic drugs, people etc) in and between an independent Scottish state and the continuing UK is likely to be even more challenging than at present.

Livestock and non-commercial movement of pets

- 3.31 Under the current arrangements there are neither restrictions nor formalities for individuals in the UK who wish to travel to other parts of the UK with their pets (dogs, cats or ferrets). The creation of an international border between an independent Scottish state and the continuing UK would impact on the movement of pets. If that independent Scottish state was a member of the EU, EU regulations on animal health requirements applicable to the non-commercial movement of pet animals would apply.¹⁶ All dogs, cats and ferrets entering the continuing UK from Scotland (and vice versa) would have to be microchipped; vaccinated against rabies; wait 21 days post vaccination before travelling; and be accompanied by a pet passport. (If an independent Scottish state was not a member of the EU then more stringent rules might apply.) In the UK pet passports are issued by the Department for Environment, Food and Rural Affairs (Defra) to authorised veterinarians who then charge pet owners for their issue and completion.

¹⁵ *Scotland Analysis: Security*, HM Government, October 2013.

¹⁶ *Regulation (EC) No 998/2003*, 26 May 2003, < eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0998:en:NOT>, retrieved 7 January 2014.

3.32 In terms of the movement of livestock, notwithstanding the rules governing the free movement of goods within the EU, the creation of an international border between the continuing UK and an independent Scottish state that was successful in its application to join the EU would mean that the movement of livestock between the two states would be subject to EU regulations on animal health. Consignments would have to be accompanied by an intra-community trade health certificate signed by a government-approved official veterinarian and the relevant documentation on the EU's TRACES¹⁷ system completed.

Conclusion

- 3.33 If Scotland became an independent state, trade between it and the continuing UK would be international trade and would be classed as imports and exports. It would create additional administrative burdens for businesses and could lead to restrictions on haulage operations.
- 3.34 A divergence in excise policy between an independent Scottish state and the continuing UK could be exploited by smugglers. Either state may conclude that it is only through a degree of control and inspection at the border that they can protect their excise regime.
- 3.35 Organised Crime Groups operate across, and exploit, both international borders and the challenges that law enforcement agencies, including customs enforcement, have in ensuring effective joint working across those borders. No matter how close the collaboration between customs organisations in an independent Scottish state and the continuing UK it is unlikely to be as effective as the current arrangements within the UK.

¹⁷ The Trade Control and Expert System, a web-based system run by the European Commission's Directorate-General for Health and Consumer protection.

Chapter 4: Citizenship and passports

The right of states to determine who their nationals are is a principle of public international law. If Scotland became an independent state the Scottish Government would have to decide who could become, or would be required to become, a Scottish citizen. They would have to determine whether individuals living in Scotland, born in Scotland or who had a connection to Scotland would be able to apply for Scottish citizenship, whether there would be a requirement to become a Scottish citizen and whether citizenship of an independent Scottish state would be imposed. This would be a difficult decision with profound implications for individuals and their families; not only those alive at the time of independence but also future generations. There are no clear precedents to guide an independent Scottish state in this area.

The current Scottish Government has proposed that all British citizens habitually resident in Scotland will be considered Scottish citizens, and that Scottish-born British citizens currently living outside of Scotland will also be considered Scottish citizens. This is a very wide model of citizenship. It could lead to people living in Scotland, for example migrants from other parts of the UK, being assumed to be Scottish citizens, whether or not they would choose to be.

There would also be questions for British citizens living in an independent Scottish state. The UK has historically been tolerant of plural nationalities, and therefore it is likely that it would be possible for an individual to hold both British and independent Scottish citizenships. However, under current rules, any British citizens living outside the UK cannot pass their British nationality on more than one generation. In other words, the children of British citizens living in an independent Scottish state would, under current rules, be British citizens but their children and subsequent generations would not be. This could raise complex and difficult issues for individuals and families.

The government of the continuing UK would also need to consider whether all British citizens living in Scotland could retain their British citizenship upon independence. This cannot be guaranteed and could be dependent on any residence requirements or proof of affinity to the continuing UK. It is not possible to predict now what the decision of a future government of the continuing UK might be in this area.

In the event of a vote for independence, the governments of the continuing UK and an independent Scottish state would need to negotiate whether, and if so how, any of the benefits associated with British citizenship would continue to apply to British citizens living in an independent Scottish state. The practical benefits of citizenship include a passport and consular support. An independent Scottish state would need to issue its own passports, and establish the infrastructure to do so. It would also need to determine what consular services its citizens would be entitled to abroad. In addition, an independent Scottish state would not automatically inherit the visa waiver agreements which entitle UK passport holders to travel to many countries without a visa. These are bilateral agreements between the UK and other countries and, if an independent Scottish state wished to conclude similar agreements, these would have to be negotiated with the other states.

Citizenship and passports

Citizenship

- 4.1 The right of states to determine their own jurisdiction and who its nationals are can be considered a generally recognised principle of public international law.¹ The basis for entitlement to Scottish citizenship on the one hand and continuing UK citizenship on the other will be for the respective governments to decide. Those decisions will affect not only those alive at that time of independence but generations to come. In parallel with the decisions taken by the respective governments on entitlement many people may be faced with an individual choice; one that is based on both a sense of belonging but also on the opportunity afforded by the respective citizenship and wider family considerations.
- 4.2 The current Scottish Government has proposed that in the event of a vote for independence, British citizens resident in Scotland and those resident elsewhere but who had been born in Scotland would be deemed *ex lege* Scottish citizens.² This is a very wide model of citizenship that could lead to individuals, for example migrants from other parts of the UK, having Scottish citizenship conferred on them, whether or not they would chose to be Scottish citizens.
- 4.3 There would also be questions for British citizens living in an independent Scottish state. The UK has historically been tolerant of plural nationalities, and therefore it is likely that it would be possible for an individual to be both a British and Scottish citizen. However any British citizens living outside the UK cannot pass their British nationality on more than one generation. So the children of British citizens living in an independent Scottish state would, under current rules, be British citizens, but their children and subsequent generations would not be.
- 4.4 Although it may be possible to be a dual British-Scottish national in the event of Scottish independence, this cannot be guaranteed. The government of the continuing UK would need to consider whether all British citizens living in Scotland could retain their British citizenship upon independence. This could be dependent on any residence requirements or proof of affinity to the continuing UK. It is not possible to predict now what the decision of a future government of the continuing UK might be in this area. Likewise an independent Scottish state would need to consider whether its citizenship would be based on any residency requirements or proof of affinity to Scotland.

¹ *Nationality in Public International Law and European Law*, Kay Hailbronner, www2.law.ed.ac.uk/citmodes

² *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, November 2013.

Therefore it cannot be guaranteed that dual nationality would be available to everyone who was a British citizen before independence, and who then became a Scottish citizen.

- 4.5 The people of the United Kingdom have shared a common citizenship since 1707. There was no precursor law on Scottish citizenship (or English or Welsh citizenship). Over 300 years, common, unitary citizenship has been at the heart of the partnership that was formed by the Acts of Union.³ This means that there is no historic point of reference or baseline for Scottish citizenship from which legislation on the citizenship of an independent Scottish state could derive.
- 4.6 In deciding on issues of entitlement, the governments of an independent Scottish state and the continuing UK are likely to have regard to:
- current UK policy;
 - current practice within the EU;
 - the likely views of the European Court of Justice;
 - the likely views of the European Court of Human Rights;
 - the 1961 UN Convention on the Reduction of Statelessness;
 - Article 9 of the 1979 Convention on the Elimination of Discrimination Against Women;⁴
 - The European Convention on Nationality; and
 - The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

British citizenship in an independent Scottish state

- 4.7 The UK has a history of tolerance towards plural nationalities. Individuals can hold a British and a French Passport, a British and an Indian passport or any other number of combinations. The only restriction would be if the other state did not permit plural nationalities. That would however be an issue for the individual and would have no bearing on their status as a British citizen.
- 4.8 In the event of a vote for independence, it is possible that the approach of the continuing UK will be guided by the principles of the UN Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. It would also likely be mindful of the history of nationality law as applied to citizens of the Irish Free State, and consistent with the approach taken to the former citizens of the Irish Free State and the Republic of Ireland set out in the British Nationality Act (1981).⁵
- 4.9 Individuals who had, or were entitled to, British citizenship on the date of independence may therefore have that right protected. It is not possible to say however whether this right would be dependent on any residence requirements or proof of affinity to

³ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government, February 2013.

⁴ States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

⁵ *British Nationality Act (1981) S31.*

the continuing UK. It cannot be guaranteed that dual nationality would be available to all persons who were British citizens prior to independence, and who then became Scottish citizens.⁶

- 4.10 It would also be for the government of the continuing UK to decide whether that right could be inherited. Currently, under the British Nationality Act (1981), British citizenship may descend to one generation born abroad. A child born to a British parent in an independent Scottish state would not be able to pass on their British citizenship to their own child(ren) or to subsequent generations.

Citizenship of an independent Scottish state

- 4.11 If Scotland became an independent state, its government would have to determine who could become, or would be required to become, a citizen of that state. The government of an independent Scottish state would have to decide on the policies, criteria and process for becoming a Scottish citizen.
- 4.12 In its recent White Paper the current Scottish Government has proposed that British citizens habitually resident on Scotland on independence will be considered Scottish citizens and the Scottish born British citizens currently living outside of Scotland will also be considered Scottish citizens.⁷ This is a very wide model of citizenship and assumes that everyone living or born in Scotland would want to be a Scottish citizen. This may not be the case.
- 4.13 The current Scottish Government has not set out the rights and responsibilities of prospective Scottish citizens. The government of an independent Scottish state would need to decide whether there would be any contingent benefits of citizenship, the right to vote on amendments to the Scottish Constitution (as is the case for Irish citizens in the Republic of Ireland) or employment restricted to Scottish citizens only. If it were a member of the EU it is unlikely that other contingent benefits, such as the restriction of land purchase to Scottish citizens, could apply. An independent Scottish state outwith the EU, and thus not bound by EU Treaty obligations to ensure that EU citizens are treated no differently to the citizens of the Member State, might however be able to attach such benefits to citizenship.
- 4.14 The right to vote in a particular country derives generally from citizenship. The interplay of political rights and citizenship are especially pertinent to the inception of a new state.⁸ The referendum on Scottish independence will use the local government and thus the Scottish parliament franchise, giving the vote to resident EU citizens but denying it to any person previously resident in Scotland, whatever their citizenship, who is no longer on the electoral register.⁹ In the event of a vote for independence, the Scottish government would need to decide whether that same electorate would participate in the formulation of any written Scottish Constitution and in elections to the first parliament of an independent Scottish state. It could decide instead that only those with demonstrable affinity to Scotland, a mixture of residency and consanguinity, would play a role in determining the constitution, including defining citizenship and voting rights going forward.

⁶ *What about the neighbours? An independent Scotland's nationality law and immigration control*, Royal Society of Edinburgh, 25 September 2013, Bernard Ryan, School of Law, University of Leicester www.rse.org.uk/cms/files/events/programmes/2012-13/speaker_notes/Bernard%20Ryan.pdf

⁷ *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government, page 273, November 2013.

⁸ Jo Shaw Op. Cit.

⁹ *Scottish Independence Referendum (Franchise) Act*, www.legislation.gov.uk/asp/2013/13/contents.

- 4.15 Newly independent states need to determine whether their citizenship will be organic in nature i.e. those who meet the criteria in law being *de jure* citizens or whether there would be a degree of choice i.e. persons meeting the criteria would have to assert their right if they wished to be citizens. They need also to determine whether the right to choose applies equally to both persons alive at the time of independence and those born after independence or solely to the former.
- 4.16 Clearly an independent Scottish state would be faced with a number of choices in respect of citizenship and nationality. It could decide initially to base entitlement on the principle of *jus connectionis*, or the right of attachment, as proposed by the current Scottish Government. Manley Hudson¹⁰ suggests that this could be considered in some sense superior to *jus soli* or *jus sanguinis*, for it advocates the nationality of the state to which the individual is proved to be most closely attached in conditions of life.¹¹
- 4.17 Applying the principle of attachment could mean that all individuals who were residing permanently on the territory of Scotland on the date of independence could claim entitlement to Scottish citizenship. Entitlement after that date might be determined by a mixture of *jus soli* and *jus sanguinis*. These concepts are discussed in more detail below at paragraph 4.18.

British citizenship

- 4.18 Historically, European nation-states can be divided between those, such as the UK, that granted nationality on the grounds of *jus soli* i.e. place of birth and those, such as Germany, that granted nationality on the grounds of *jus sanguinis* i.e. by having one or both parents who were citizens of that nation. In recent years, the distinction between the two approaches has blurred. Concern about immigration and birth tourism in particular has led to many countries, the UK and the Republic of Ireland included, to restrict *jus soli* through the imposition of parental residence requirements.
- 4.19 British citizenship law is complicated, the product of colonial and commonwealth history. There are six different forms of British nationality:
- British citizenship;
 - British overseas citizenship;
 - British overseas territories citizenship;
 - British national (overseas);
 - British protected person; and
 - British subject.
- 4.20 Only British citizens, and certain British subjects with right of abode through qualifying connections under the Immigration Act 1971, have the right to live and work in the UK. People holding one of the other forms of nationality may live and work in the UK if their immigration status allows it. British citizenship can be acquired by:
- birth in the UK to a parent who is a British citizen at the time of the birth, or to a parent who is settled legally in the UK (*jus soli*);

¹⁰ Special Rapporteur for the study of nationality including statelessness at the International Law Commission and Judge at the Permanent Court of International Justice.

¹¹ *Report on Nationality, including Statelessness*, Manley O Hudson, International Law Commission, 4th session, A/AC. 4/50, 21 February 1952, pp 40 – 41 as cited in Batchelor C, UNHCR and Issues related to Nationality, Refugee Survey Quarterly, Vol. 14, No 3, 1995.

- birth abroad if one of the parents is a British citizen otherwise than by descent (*jus sanguinis*);¹²
- naturalisation;
- registration; and
- adoption.

4.21 The rules on acquisition and loss of nationality applying to a change of territorial sovereignty are probably amongst the most controversial issues of nationality-related international law.¹³ The issues are covered in the Council of Europe Convention on Nationality which entered into force on 1 March 2000 and the Convention on the Avoidance of Statelessness in relation to State Succession which entered into force on 1 May 2009. The UK is not a signatory to either Convention but it may be reasonable to assume¹⁴ that the continuing UK and an independent Scottish state would be guided by their principles in determining issues of citizenship in the event of Scottish independence.

4.22 A footnote to the Convention on the Avoidance of Statelessness in relation to State Succession states that for the purposes of that Convention the terms ‘nationality’ and ‘citizenship’ should be considered as synonymous. Under current UK law however, ‘nationality’ indicates the formal relationship between a person and the UK, while ‘British citizenship’ is used to describe a more privileged status, similar to nationality in other EU Member States.

Citizenship and independence

4.23 From the perspective of international law, the definition of the citizenry is essential for a new state as it delivers a stable population.¹⁵ The Convention on Rights and Duties of States, agreed in 1933 at the Seventh International Conference of American States, defines a state as possessing the following qualifications:

- a permanent population;
- a defined territory;
- government; and
- capacity to enter into relations with the other states.¹⁶

4.24 The European Convention on Nationality is extremely cautious in prescribing principles for conferring nationality in a situation of state succession. Following the overwhelming practice, the basic rule is that the state parties concerned shall endeavour to regulate matters amongst themselves by agreement and, where applicable, in their relationships

¹² The British Nationality Act 1981 describes the different ways of acquiring British citizenship. Acquisition by descent refers to citizenship gained in a person’s own right and not through their parents or grandparents. This type of citizenship can be passed on to that person’s own children. This means that an individual born overseas who claimed British citizenship through one of their parents cannot automatically pass on their citizenship to that child if that child is also born overseas.

¹³ *Nationality in Public International Law and European Law*, Kay Hailbronner, www2.law.ed.ac.uk/citmodes.

¹⁴ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government February 2013.

¹⁵ *Citizenship in an independent Scotland: legal status and political implications*, Jo Shaw, CITSEE Working Paper 2013/34, www.citsee.ed.ac.uk/working_papers/files/CITSEE_WORKING_PAPER_2013-34.pdf, retrieved 25 November 2013.

¹⁶ *Article 1 of the Convention on Right and Duties of States (inter-American)*; avalon.law.yale.edu/20th_century/intam03.asp; retrieved 25 November 2013.

with the other states concerned. Beyond the general reference to the rule of law and human rights in article 18, paragraph 1,¹⁷ the principles laid down in article 18, paragraph 2¹⁸ in particular provide some guidance on the regulation of nationality matters by the states concerned. The criteria to be taken into account include:

- the genuine and effective link between the person concerned and the state;
- the habitual residence of the person concerned at the time of state succession;
- the will of the person concerned; and
- the territorial origin of the person concerned.

None of these criteria is considered exclusive. Each of the factors has to be weighed up in the light of the particular circumstances of the case.¹⁹

4.25 The Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession is arguably more prescriptive, setting out obligations for both the successor state and the predecessor state:

Box 4A: Council of Europe Convention on the avoidance of statelessness in relation to State succession

Article 5 – Responsibility of the successor State

- 1) A successor State shall grant its nationality to persons who, at the time of the State succession, had the nationality of the predecessor State, and who have or would become stateless as a result of the State succession if at that time:
 - a) they were habitually resident in the territory which has become territory of the successor State; or
 - b) they were not habitually resident in any State concerned but had an appropriate connection with the successor State.
- 2) For the purpose of paragraph 1, sub-paragraph b, an appropriate connection includes inter alia:
 - a) a legal bond to a territorial unit of a predecessor State which has become territory of the successor State;
 - b) birth on the territory which has become territory of the successor State;
 - c) last habitual residence on the territory of the predecessor State which has become territory of the successor State.

Article 6 – Responsibility of the predecessor State

A predecessor State shall not withdraw its nationality from its nationals who have not acquired the nationality of a successor State and who would otherwise become stateless as a result of the State succession.

¹⁷ *European Convention on Nationality*, Council of Europe 1997.

¹⁸ *Ibid.*

¹⁹ *Nationality in Public International Law and European Law*, Kay Hailbronner.

Historic examples

- 4.26 There are many examples of ‘new’ states that have acquired or reacquired independence in recent years, and that have subsequently enacted laws on citizenship and nationality. These include the Czech Republic, Slovakia, Croatia, Latvia, Lithuania, Estonia and Ukraine. The experience of these states is however of limited relevance to Scotland. For some, they had been part of a federal state. Others considered themselves to be an occupied state reasserting its independence. With the exception of Ukraine, they were able to refer back to citizenship laws that preceded their loss of independence.
- 4.27 It is sometimes suggested that the example of the ‘Velvet Divorce’ of the Czech and the Slovak Republics is relevant to a discussion of future Scottish and continuing UK citizenship. From 1968 until its dissolution in 1992 however Czechoslovakia was a federal republic. Individuals could choose to be either a Czech citizen or a Slovak citizen of Czechoslovakia.²⁰ At dissolution therefore, while there were residual issues to be decided particularly with respect to minority groups, the broad approach to the question of citizenship was not at issue.
- 4.28 Croatian citizenship laws have their origins in the second half of the nineteenth century and the 1879 Law on Hungarian Citizenship. In 1918, following the founding of the Kingdom of Serbs, Croats and Slovenes (renamed the Kingdom of Yugoslavia in 1929) the citizenship issues were settled largely by the post-First World War peace treaties. Yugoslavia passed its own law on citizenship in 1928 establishing a single Yugoslav citizenship.²¹ In 1945 the new Democratic Federal Yugoslavia enacted a new law on citizenship. This provided that everyone who had been a Yugoslav citizen on 28 August 1945 under the 1928 Citizen Act would become a citizen in the new state. Yugoslav citizens could also claim citizenship of one of the constitutive republics of Yugoslavia and hence citizens of Yugoslavia could be indentified as and identify themselves also as citizens of Croatia. Croatian Republican citizenship allowed its citizens to participate in elections to the Croatian Parliament but outside of the Democratic Federal Yugoslavia, Croatian citizenship was of no practical relevance. When Croatia became independent in 1991 however, republican citizenship was the basis for citizenship of the new Croatian state.
- 4.29 In the case of the three Baltic republics, Estonia, Latvia and Lithuania, which regained their independence in 1991, the issue of citizenship was resolved on the basis of the retroactive application of the principles embodied in nationality laws in force prior to 1940. Thus, the Law on Citizenship of Estonia of 1938, and the Law on Citizenship of Latvia of 1919 have been re-enacted in order to determine the aggregate body of citizens of these republics.²² Similarly, articles 17 and 18 of the Law on Citizenship of Lithuania of 5 December 1991 provide for the retention or restoration of the rights to citizenship of Lithuania with reference to the law in force before 15 June 1940.²³

²⁰ *The Slovak question and the Slovak answer: Citizenship during the quest for national self-determination and after*, Dagmar Kusá in *Citizen Policies in the New Europe*, www.law.ed.ac.uk/citmodes

²¹ *Croatian citizenship: From ethnic engineering to inclusiveness*, Franseco Ragazzi and Igor Štiks www.law.ed.ac.uk/citmodes

²² See the *Resolution of the Supreme Council of the Republic of Estonia* of 26 February 1992, reintroducing, with retroactive effect, the 1938 Law on Citizenship; and the *Resolution on the Renewal of Republic of Latvia Citizens' Rights and Fundamental Principles of Naturalization*, of 15 October 1991, *Central and Eastern European Legal Materials*, V. Pechota, ed.

²³ *Ibid.*

4.30 When Ukraine became independent, after the disintegration of the Union of Soviet Socialist Republics, the acquisition of its citizenship by persons affected by the succession was regulated by the Law on Ukrainian Citizenship of 8 October 1991, article 2 of which reads:

The citizens of Ukraine are:

(1) The persons who at the moment of enactment of this Law reside in Ukraine, irrespective of their origin, social and property status, racial and national belonging, sex, education, language, political views, religious confession, sort and nature of activities, if they are not citizens of other States and if they do not decline to acquire the citizenship of Ukraine;

(2) The persons who are civil servants, who are conscripted to a military service, who study abroad or who lawfully left for abroad and are permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine.²⁴

4.31 From the above it can be seen that there are many examples of state succession and subsequent creation on ‘new nationalities’. There are no examples of state succession after over 300 years of a single multi-national state. The examples can contribute to the identification of the issues that may need to be considered. They do not necessarily provide the answers. An independent Scottish state would be unable to settle the issue of citizenship by the retrospective application of earlier legislation; as this does not exist.

Irish citizenship

4.32 It could be suggested that the example of the creation of the Irish Free State (1922) and the Irish Republic (1948) may have some relevance to the consideration of nationality issues in the event of Scottish independence. The relevance however is limited by the very different circumstance which led to the birth of the Irish Free State and British and Irish disagreements as to the relationship between their two nationalities in the decades after 1922.²⁵

4.33 Prior to the establishment of the Irish Free State, there existed a common citizenship of the United Kingdom of Great Britain and Ireland. Article 3 of The Constitution on the Irish Free State,²⁶ which entered into force on 6 December 1922 set out the (initial) basis of Irish Citizenship. The UK did not at that time revise its own nationality laws. Given that Article 17 of that Act referred to the ‘common citizenship of Ireland with Great Britain’, this may have been deemed as unnecessary. The Irish authorities rejected the notion that its citizens had the additional status of ‘British subject’.²⁷ The UK’s interpretation however, facilitated the free movement of people from the Free State to the UK and the British Dominions and may have provided the basis subsequently for many to acquire British passports. Irish Citizens continued to be recognised as British subjects until the enactment of the Ireland Act 1949 (paragraph 5).

²⁴ Published in Pravda Ukrainy, 14 November 1991 as cited in the *Second report on State Succession and its impact on the nationality of natural and legal persons*, Vaclav Mikulka, Special Rapporteur, 1996.

²⁵ *The Common Travel Area between Britain and Ireland*, B Ryan, *The Modern Law Review* 2001.

²⁶ *Constitution of the Irish Free State (Saorstát Éireann) Act 1922*.

²⁷ *Citizenship and Borders: Irish Nationality Law and Northern Ireland* Brian Ó Caoimdealbháin, Centre for International Borders Research, Queen’s University of Belfast and Institute for British-Irish Studies, University College Dublin, 2006.

4.34 Before the Second World War most citizens, Irish and British, were unlikely to have had passports. International travel was the exception not the norm. Citizenship could however confer other rights, such as the right to purchase farmland. This was set out in the Irish Land Act 1923 and again in Irish Land Act 1965 (definition of a 'qualified person' in paragraph 45(i)). Emotional and political considerations aside this, taken together with the perception of restrictions on dual nationality,²⁸ may have made Irish rather than British citizenship more attractive to some people entitled to both, but resident in the Irish Free State and subsequently in the Republic of Ireland.

4.35 The UK and the Republic of Ireland however accord a special status to each other's nationals, primarily as a result of the Common Travel Area.²⁹ Whereas people on one side of an international border are, ordinarily, foreigners on the other an exception is provided by the Ireland Act 1949. Section 2 (1) states:

It is hereby declared that, notwithstanding that the Republic of Ireland is not part of His Majesty's dominions, the Republic of Ireland is not a foreign country for the purposes of any law in force in any part of the United Kingdom ... and references in any Act of Parliament, other enactment or instrument whatsoever, whether passed or made before or after the passing of this Act, to foreigners, aliens, foreign countries, and foreign or foreign-built ships or aircraft shall be construed accordingly.

4.36 This provision is not mirrored however in Irish nationality law; in theory citizens of the UK are 'aliens' in the Republic of Ireland. In practice however citizens of the UK are exempt from Irish immigration (and deportation) law. The Aliens (Exemption) order 1999³⁰ states:

Every person who is a citizen of the United Kingdom of Great Britain and Northern Ireland is hereby exempted from the application of the provisions of the Aliens Act, 1935 (No. 14 of 1935), and from the application of the provisions of every aliens order made under section 5 of that Act before the making of this order.

4.37 The right to vote in a particular country derives generally from citizenship. Suffrage is reserved to individuals who are citizens of the country in question. There are exceptions. The 1992 Treaty of Maastricht provided for reciprocity within the EU with respect to voting rights in local elections. Some members of the Commonwealth, including the UK, allow residents who are Commonwealth citizens voting rights at all levels, local and national.

4.38 The status of citizens of the Republic of Ireland is laid down in the Ireland Act 1949, which declares that citizens of the Republic of Ireland are not to be treated as foreigners. They have voting rights therefore in both local and parliamentary election. This arrangement is reciprocated by the Irish Electoral Act 1992, section 8 2(a) (ii) (l); British citizens having the right to vote in elections to Dáil Éireann.

4.39 The special status of citizens of the Republic of Ireland has a bearing also on their naturalisation as a British citizen. One of the requirements for naturalisation is that the applicant should be free of immigration time restrictions on the date of application. Those who are applying on the basis of five years residence have also to be free of immigration time restrictions for 12 months before applying. Given that citizens of the Republic of Ireland are not normally subject to immigration control on arrival in the UK they are regarded as having met this requirement.

²⁸ *Irish Nationality and Citizenship Act 1935*: paragraphs 21 & 33(3).

²⁹ *The Common Travel Area between Britain and Ireland*, B Ryan, *The Modern Law Review* 2001.

³⁰ www.irishstatutebook.ie/1999/en/si/0097.html

Naturalisation

- 4.40 The naturalisation route to UK citizenship is likely to be affected most by the creation of an independent Scottish state. Settlement i.e. the acquisition of permanent permission to stay in the UK is a necessary prerequisite to naturalisation. It is not known what requirements an independent Scottish state might place on those seeking settlement and thence naturalisation. It is possible to identify a number of issues that it and the continuing UK will need to consider in regulating the entry and leave to remain of non-EEA nationals who are not the family members of EEA nationals exercising EU Treaty rights.
- 4.41 It would be necessary to determine which non-EEA nationals should have a route to settlement: indefinite leave to remain (ILR). Currently, the UK provides such a route for the partner, dependent child and adult dependent relative of a British citizen, a person settled in the UK (with ILR) or a person in the UK with refugee leave or humanitarian protection. It also provides such a route for some skilled workers working in the UK and for persons of UK ancestry, including in both cases for dependants of the migrant. It does not provide such a route for other workers or for students. In addition, the UK currently allows some categories of migrant, but not others and not visitors, to switch into a route to settlement in the UK, or between such routes; others have to leave the UK and apply from overseas for entry clearance on a route to settlement. And the UK currently provides a route to settlement for lawful migrants, whether or not they have been on a route to settlement, who have been continuously resident in the UK for at least 10 years.
- 4.42 Currently, the UK sets requirements in respect of lack of serious criminality, knowledge of the English or Welsh language or Scottish Gaelic and, for settlement, also knowledge of life in the UK, maintenance and accommodation and the length of any probationary period before an application for settlement can be made. Currently, some categories of dependent child and adult dependent relative can qualify for immediate settlement on entry to the UK, without serving any probationary period. An independent Scottish state will need to determine the requirements which should apply to entry and leave to remain on a route to settlement, including the requirements for a settlement application.
- 4.43 An independent Scottish state would need to determine the benefits which should accrue to the migrant if they qualify for settlement (ILR). Currently, the UK does not generally permit the migrant to access welfare benefits or tax credits (except contributory benefits after paying two years National Insurance contributions) or social housing before they qualify for settlement. The UK currently limits the length of time a migrant on a route to settlement can spend outside the UK and still expect to qualify for settlement.
- 4.44 An independent Scottish state would need to clarify its settlement policy as it affects illegal migrants, for example those who have overstayed a visit visa or who entered the country illegally. The current policy of the UK is governed by the Immigration Act 1971, the Human Rights Act 1998 and the European Convention on Human Rights (ECHR). It permits certain categories of illegal migrant, who meet stringent criteria under the Immigration Rules, to remain in the UK on the basis of their family or private life on a longer route to settlement (10 years rather than the usual 5 years). It is assumed that an independent Scottish state would have its own ECHR-compatible legislation setting out the basis on which illegal migrants would be removed from the country or granted leave to remain on human rights grounds.

- 4.45 An independent Scottish state and/or the continuing UK may wish however to differentiate their settlement policies for non-EEA nationals, in order to attract a greater number of skilled workers in shortage occupations and the most talented students. In other words, an independent Scottish state may want to make it easier for non-EEA nationals to gain Scottish citizenship as a way of persuading skilled migrants to opt for Scottish rather than the continuing UK citizenship.
- 4.46 An independent Scottish state would need to determine the rights of individuals who currently hold Indefinite Leave to Remain within the UK, some of whom may aspire to citizenship of the continuing UK rather than an independent Scottish state. It is estimated that, as at December 2012, there were 1.5 million non-EU nationals long term resident in the UK (5 years or more), based on England and Wales Census data scaled up to UK. Of these, a number will be resident in Scotland.³¹ The government of an independent Scottish state would need to decide whether a Scottish equivalent to ILR would be extended to all non-EEA nationals with Indefinite Leave to Remain in the UK who are resident in Scotland.
- 4.47 The UK currently limits the length of time a migrant, on a route to settlement, can spend outside the UK and still expect to qualify for settlement and thence naturalisation. To demonstrate the residential requirements for naturalisation an applicant for citizenship must have been resident in the UK for at least five years, not spent more than 450 days outside the UK during the five years and not spent more than 90 days outside the UK in the last 12 months of that five-year period. It is not possible at present to say whether individuals with UK ILR, resident in Scotland for 90 days after independence, would lose their qualifying residential requirements for citizenship of the continuing UK. Similarly it is not known whether non-EEA nationals with UK ILR who aspire to citizenship of an independent Scottish state, but are resident elsewhere in the UK, would be required to take up residence in Scotland within 90 days or another duration determined by the government of an independent Scottish state.
- 4.48 If the criteria for Scottish citizenship were wider than those for British citizenship, that practice, combined with EU rules on free movement, could lead to migration of former third-country nationals to the continuing UK or elsewhere within the EU after having obtained Scottish citizenship. Examples of where this has occurred include the 10,000 former Somali refugees who, after having acquired citizenship of the Netherlands, migrated to the UK in the years 2001 – 2005.³² Another example of persons that used their EU citizenship to move to another EU country are Argentineans who, having benefited from relaxed naturalisation requirements due to the bilateral treaty between Italy and Argentina, moved to Spain to take up residence there.³³
- 4.49 There may be concern also that if the criteria for Scottish citizenship were wider than those for British citizenship there could be an increase in the number of ‘sham marriages’ and the subsequent exploitation of the EU rules on free movement. One of the ways in which this could manifest itself is where third country nationals marry Scottish citizens with the sole purpose of acquiring Scottish citizenship and with the possibility of exercising Treaty Rights in another EU member state thereafter.

³¹ <http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database>

³² Van Den Reek and Hussein 2003 quoted in *European trends in nationality law*, de Haart and van Oers.

³³ *European trends in nationality law*, de Haart and van Oers.

The diaspora³⁴

4.50 The Government of an independent Scottish state may need also to consider the eligibility of the Scottish diaspora to citizenship. The Scottish Government has been keen to engage with the diaspora. Announcing new funding for the Scottish Centre for Diaspora Studies Fiona Hyslop, the Scottish Government External Affairs Minister has said that:

“There is a sound economic basis for engaging with the diaspora and indeed Scotland has been recognised as being particularly well-placed to take advantage of the opportunities of engaging with its global family.”³⁵

4.51 The Scottish lived diaspora, persons born in Scotland but whom now live outside Scotland was estimated in 2001 at 1,151,467,³⁶ i.e. 20.7 per cent of the total Scottish born population. The majority of the lived diaspora, 794,580, were living in England, 16,772 were living in Northern Ireland and 24,389 were living in Wales. The remainder were living primarily in Australia (130,204), the United States of America (73,625), and New Zealand (29,016).³⁷ If Scottish nationality law was based on UK legislation the majority of the lived diaspora would be entitled to Scottish citizenship by the process known as ‘otherwise than by descent’.³⁸

4.52 The table below provides an overview of the reverse and the ‘born’ diaspora.³⁹ The figures suggest a complex situation with significant numbers of Scottish-born individuals living elsewhere and significant numbers of individuals who were born elsewhere in the UK choosing to live and work in Scotland. Around 80 per cent of people born in Scotland currently live in Scotland, whilst 20 per cent live elsewhere. Scotland differs from the UK as a whole, where the data show that over 94 per cent of the UK population was resident in their country of birth (i.e. the UK) in 2001 and just over 5.5 per cent of those born in the UK, as a whole, were living outside the UK.⁴⁰

4.53 Although people born in Scotland migrate to live elsewhere, people born elsewhere also move to Scotland: the ‘reverse diaspora’. In 2001, 87.1 per cent (4,410,400) of people living in Scotland were born in Scotland, whilst 8.1 per cent (408,498) were born in England.⁴¹

³⁴ There is no precise definition of the term diaspora. William Safran, Professor Emeritus of Political Science at the University of Colorado, suggested that diasporas could be distinguished from migrant communities by the fact that: the group maintains a myth or collective memory of their homeland; they regard their ancestral homeland as their true home, to which they will eventually return; being committed to the restoration or maintenance of that homeland; and they relate ‘personally or vicariously’ to the homeland to a point where it shapes their identity. See Safran W 1991, *Diasporas in modern society: Myths of homeland and return*, Diaspora, vol 1, no 1, pp 83 – 99.

³⁵ *The global family of Scots*, The Scottish Government, January 2011, www.scotland.gov.uk/news/releases/2010/12/29082710

³⁶ *Scotland’s Diaspora and Overseas-Born Population*, Carr and Cavanagh Scottish Government Social Research, 2009. Statistics from the 2011 census are not available.

³⁷ *Ibid.*

³⁸ The British Nationality Act 1981 describes the different ways of acquiring British citizenship. Acquisition by descent applies to a person born outside the United Kingdom (and other qualifying territories) whose father or mother is a British citizen other than by descent, i.e. their father or mother must have acquired British citizenship through one of the other routes. This means that an individual born overseas who claimed British citizenship through one of their parents cannot automatically pass on their citizenship to that child if that child is also born overseas.

³⁹ General Register Office for Scotland, *Scotland’s Census 2001*.

⁴⁰ *Scotland’s Diaspora and Overseas-Born Population*, Carr and Cavanagh Scottish Government Social Research, 2009.

⁴¹ *Ibid.*

Table 4A⁴²

	Born in Scotland		Living in Scotland
Living in		Born In	
Scotland	4,410,400	Scotland	4,410,400
England	794,577	England	408,948
Australia	130,204	Northern Ireland	33,528
United States	73625	Wales	16,623
Canada	50,942	UK not specified	941
New Zealand	29,016		
Wales	24,389	Rep. of Ireland	21,774
Republic of Ireland	16,863	Ireland not specified	35
Northern Ireland	16,772	Channel Islands	1,620
South Africa	11,160		
Hong Kong	1,459	EU member states	41,836
Norway	1,343	Non EU	126,306
Denmark	1,117		
Total	5,561,867		5,062,011
Lived diaspora	1,151,467		

- 4.54 The population movements between Scotland and other parts of the UK are currently not subject to any form of control or regulation. Jobs reserved for UK Nationals are, for example, open to all citizens of the UK. It is unclear as to how Scottish independence would affect the Scottish diaspora in the continuing UK or the reverse diaspora in Scotland. It is possible however both groups may be affected by the uncertainty about future entitlement to citizenship and the benefits of that citizenship.
- 4.55 It is possible that, in the interests of national security, both an independent Scottish state and the continuing UK may reserve some posts in their respective public sectors to their own citizens. In other words, it is possible that some posts within the continuing UK civil service would be restricted to citizens of that state and similarly an independent Scottish state may restrict some posts to its own citizens.
- 4.56 The wider Scottish diaspora, individuals who have some connection or link to Scotland, is estimated at between 28 million and 40 million people.⁴³ This figure will include people with Scottish roots and interests, who have never lived in Scotland, and the lived diaspora.
- 4.57 The present Scottish Government has indicated that it would want descendants of the Scottish diaspora to have the maximum entitlement to citizenship, similar to the citizenship model in the Republic of Ireland.⁴⁴ Anyone who has an Irish grandparent is entitled to become an Irish citizen.⁴⁵ Reliable estimates are not available for the number of persons within the wider Scottish diaspora who would, in the event of Scottish independence, wish to apply for Scottish citizenship. It is possible that the numbers could equal or exceed the current population of Scotland. If an independent Scottish state was a member of the EU, those expatriate Scottish citizens would be citizens

⁴² *Scotland's Diaspora and Overseas-Born Population*, Carr and Cavanagh Scottish Government Social Research, 2009.

⁴³ *Scottish Diaspora and Diaspora Strategy: Insights and Lessons from Ireland*, Scottish Government, 2009.

⁴⁴ *Scotland's Future: Your Guide to an Independent Scotland*, page 272, Scottish Government, November 2013.

⁴⁵ Comments made to the New Zealand TV channel TVNZ as reported in the Herald Scotland, 17 January 2013.

of the EU also. This could provide a route to settlement in the EU that is not available currently to those individuals.

- 4.58 It has been suggested⁴⁶ that long distance nationalism binds immigrants, their descendants and the people that remained in their homeland. However, if citizenship is acquired easily, with no contingent obligations on the diaspora citizen such as tax liability, it may not in itself evidence a strong tie.

Passports and consular assistance

- 4.59 A passport is one of the benefits closely associated with citizenship. The UK passport is considered to be one of the most trusted and secure documents in the world.⁴⁷ The security of the UK passport is key to border security and to combating fraud.
- 4.60 The passport of the UK is issued by Her Majesty's Passport Office (HMPO), an executive agency of the Home Office. It is an institution of the current UK and as such would continue, after Scottish independence, to undertake its functions on behalf of the continuing UK.⁴⁸ HMPO operates from 34 offices across the UK and is in the process of repatriating work from overseas. Of these offices 3 are located in Scotland, and there are 22 video facilities which operate out of local authority premises.⁴⁹ The HMPO business model allows for the allocation of the workload across the UK to ensure that demand and supply are matched efficiently. In 2011-12 86 per cent of passports issued to Scottish addresses were processed elsewhere in the UK. The cost of a passport is determined on the basis of full cost recovery. In September 2012, the price of a standard application was reduced by £5 to £72.50. This price applies throughout the UK.
- 4.61 An independent Scottish state would have to create its own passport infrastructure which would be separate from the passport infrastructure of the UK and may require a larger operation in Scotland than at present in order to maintain service levels.⁵⁰ The current Scottish Government has announced its intention that passports in an independent Scottish state should cost no more than the respective UK passport at that time.⁵¹
- 4.62 EU Council Regulation (EC) No 2252/2004 of 13 December 2004 details the standards for security features and biometrics in passports and travel documents issued by Member States. The regulation constitutes a provision of the Schengen acquis to which neither the UK⁵² nor the Republic of Ireland⁵³ are party. Article 1 (2) requires the inclusion of biometric data, including fingerprint data. It states:

Passports and travel documents shall include a storage medium which shall contain a facial image. Member States shall also include fingerprints in interoperable formats. The data shall be secured and the storage medium shall have sufficient capacity and capability to guarantee the integrity, the authenticity and the confidentiality of the data.

⁴⁶ Georges Fouron and Nina Glick-Schiller 2002:173, cited in *Citizenship and the Diaspora: A State Home for Transnational Politics*, P Spiro 2011.

⁴⁷ *IPS Business Plan 2012-13*, pg 10.

⁴⁸ *Scotland analysis: Devolution and the implications of Scottish independence*, HM Government February 2013.

⁴⁹ *Ibid.*

⁵⁰ Currently the cost of a UK passport is the same irrespective of where in the UK an application is made. It does not take account of the additional costs associated with the provision of peripatetic services in the remoter parts of the UK.

⁵¹ *Scotland's Future: Your Guide to an Independent Scotland*, page 499, Scottish Government, November 2013.

⁵² *Council Decision 2000/365/EC* of 29 May 2000.

⁵³ *Council Decision 2002/192/EG* of 28 February 2002.

- 4.63 While the UK is not bound by the regulation, initial planning for the UK ePassport included fingerprint data. Concerned for the privacy of individuals, and the cost, the UK Government decided against the inclusion of fingerprint data on the biometric chip in UK passports. An independent Scottish state that opted to join the Schengen area, or which was unable to secure an opt-out similar to that of the UK and the Republic of Ireland, would be required to include fingerprint data in its passports. This is likely to have an impact on the cost of those passports, both with respect to the production costs and whether it was decided that the data should be held on a national database.
- 4.64 The current Scottish Government has proposed that, for a transitional period, the passport of a newly independent Scottish state should be issued by HMPO under a shared service agreement. Such an agreement would have to be subject to negotiation with the continuing UK. The current Scottish Government has stated also that the passport of an independent Scottish state would meet the standard requirements for EU passports. As noted above, the standard EU requirement includes fingerprint data on the biometric chip. The UK has an opt-out from that requirement and HMPO does not therefore have the infrastructure necessary to collect fingerprint biometrics. It may therefore be impossible technically, for HMPO to issue Scottish passports under a shared service agreement.
- 4.65 The holders of the UK passport enjoy visa free travel to 173⁵⁴ other countries. It can not be assumed that an independent Scottish state would inherit the visa waiver agreements negotiated by the UK. These are bilateral agreements between the UK and other countries. If an independent Scottish state wished to conclude similar agreements these would have to be negotiated with other states directly.⁵⁵
- 4.66 The security of the UK passport may also be a factor in securing visa free arrangements with other countries. The Henley & Partners Visa Restrictions Index 2013,⁵⁶ a global ranking of countries according to the travel freedom their citizens enjoy, ranks the UK in joint first position alongside Finland and Sweden. Other factors may also influence decisions about visa-free travel, including inter alia, security considerations or an assessment of the risk that third country nationals might use/abuse the passport of one country in order to gain access to another, circumventing that country's immigration controls.
- 4.67 Visa waiver agreements are not automatic. The benefits provided by the UK passport are the result of negotiations, sometimes protracted, between sovereign states. It would be for an independent Scottish state to negotiate its own visa waiver arrangements. If an independent Scottish state joined the Schengen Area it would be required to align its visa waiver policy with the other Schengen states.
- 4.68 Visa waiver agreements benefit individual travellers, reducing the cost and the hassle of making an international trip. They are also important economically; particularly when the number of travellers to a country is significant. In 2009 there were 459,656 passenger journeys from Scotland's main airports to the USA.⁵⁷ This would equate to 229,828 US visas (non-immigrant) if these were return trips made on a Scottish passport and there was no visa waiver agreement between an independent Scottish state and the USA. At

⁵⁴ *Visa Restrictions Index 2013*, www.henleyglobal.com/

⁵⁵ *Devolution and the implications of Scottish independence*, HM Government, February 2013

⁵⁶ *Ibid.*

⁵⁷ *Scottish Transport Statistics 2009*, table 8.4.

a cost of \$160⁵⁸ each (£106.35) this would mean the loss to the Scottish economy and transfer to the USA of £24.4 million a year.

- 4.69 Citizens of the UK can access consular support in over 170 countries.⁵⁹ That support can range from the provision of lost or stolen travel documents to assistance during major crises with the tsunami in Japan and the unrest in Egypt. During 2010-11 there were over 55 million trips overseas by British nationals.⁶⁰ They benefited from the significant UK footprint overseas. The protection of UK citizens overseas and the possible impact of the creation of an independent Scottish state have been discussed in detail in previous papers in the Scotland analysis series.⁶¹

Conclusion

- 4.70 If Scotland became an independent state its government would have to decide who could become, or would be required to become, a Scottish citizen. They would have to determine whether individuals living in Scotland, born in Scotland or who had a connection to Scotland would be able to apply for Scottish citizenship, whether there would be a requirement to become a Scottish citizen and whether citizenship of an independent Scottish state would be imposed in order to ensure a functioning democracy. This would be a difficult decision with profound implications for individuals and their families; not only those alive at the time of independence but also future generations. There are no clear precedents to guide an independent Scottish state in this area
- 4.71 There would also be questions for British citizens living in an independent Scottish state. The UK has historically been tolerant of plural nationalities, and therefore it is likely that there would be no barriers to holding both British and independent Scottish citizenships. However under current rules any British citizens living outside the UK cannot pass their British nationality on more than one generation. In other words the children of British citizens living in an independent Scottish state would, under current rules, be British citizens but their children and subsequent generations would not be. This could raise complex and difficult issues for individuals and families.
- 4.72 The basis for entitlement to Scottish nationality is unknown. There are no clear precedents. This is an important issue, one that will affect not only those alive at the time of independence but also future generations.
- 4.73 A passport is one of the benefits closely associated with citizenship. An independent Scottish state would need to establish its own passport infrastructure.
- 4.74 The holders of the UK passport enjoy visa free travel to many other countries. It can not be assumed that an independent Scottish state would inherit the visa waiver agreements negotiated by the UK.
- 4.75 UK nationals travelling overseas can access consular support in over 170 countries. It would be for an independent Scottish state to determine what consular services their citizens abroad would be entitled to, and then provide that service or to enter into agreement with other states to provide it. In its recent White Paper the present Scottish Government has said that Scotland would be willing to co-locate diplomatic missions

⁵⁸ USA Embassy website March 2013.

⁵⁹ www.gov.uk/government/policies/supporting-british-nationals-overseas

⁶⁰ The Foreign and Commonwealth Office January 2012.

⁶¹ *Scotland analysis: Security*, HM Government, October 2013, and *Scotland analysis: EU and international*, HM Government, January 2014.

with other nations, including, and in particular, with the continuing UK in current premises.⁶² Such arrangement would be dependent on the availability of suitable space in those missions and would be subject to negotiation.

⁶² *Scotland's Future: Your Guide to an Independent Scotland*, page 230, Scottish Government, November 2013.

Annex A

The Schengen Area and co-operation are founded on the Schengen Agreement of 1985. The signatory states to the agreement have abolished all internal borders in lieu of a single external border. This means that common rules and procedures are applied with regard to visas for short stays, asylum requests and border controls. Schengen cooperation was incorporated into the European Union (EU) legal framework by the Treaty of Amsterdam of 1997. However, not all countries cooperating in Schengen are parties to the Schengen area. This is either because they do not wish to eliminate border controls or because they do not yet fulfil the required conditions for the application of the Schengen Acquis.

The Schengen Area includes nearly every Member State and four non-EU member states. Bulgaria, Cyprus, Croatia and Romania are not yet fully-fledged members of the Schengen Area; border controls between them and the Schengen area will be maintained until the EU Council decides that the conditions for abolishing internal border controls have been met. Although Denmark has signed the Schengen Agreement, it can choose whether or not to apply any new measures taken under Title V of the Treaty on the Functioning of the European Union. However, Denmark is bound by certain measures under the common visa policy.

In accordance with a protocol to the Treaty of Amsterdam, the Republic of Ireland and the United Kingdom can take part in some or all of the Schengen arrangements, if the Schengen Member States and the government representative of the country in question vote unanimously in favour within the Council. The United Kingdom and the Republic of Ireland cooperate in some aspects of Schengen, namely police and judicial cooperation in criminal matters, the fight against drugs and the Schengen Information System (SIS). They do not participate in the common visa and border control policies. These opt-outs had to be negotiated and agreed with all EU Member States. This means that an independent Scottish state that wished to retain the same arrangements as the continuing UK and the Republic of Ireland would have to attempt to negotiate an 'opt-out'. It is not possible to say whether those negotiations would be successful.

The gradual expansion of the Schengen area has led third countries that have particular relations with the EU to take part in Schengen cooperation. The precondition for association with the Schengen Acquis by non-EU countries is an agreement on free movement of persons between those states and the EU. This is provided for by the Agreement on the European Economic Area in the cases of Iceland, Norway and Liechtenstein and by the Agreement on the free movement of persons in the case of Switzerland.

Annex B

Justice and Home Affairs (JHA) opt-in and Schengen opt-out

In the area of JHA, which covers matters such as police and judicial cooperation in criminal matters, civil law, family law, asylum, migration, and visas, the UK (and separately the Republic of Ireland) has the right to decide whether or not to take part in new EU legislation. These rights are known as the JHA opt-in and Schengen opt-out and they are enshrined in Protocols (or Annexes) to the EU Treaties. They are annexes to the Treaties because they apply only to the UK and to the Republic of Ireland – the other Member States do not have recourse to these Protocols.

Schengen opt-out Protocol 19: Article 4 to Protocol (No 19) to the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), on the Schengen Acquis integrated into the Framework of the European Union, provides that the UK (and Ireland respectively) may request to take part in some or all provisions of the Schengen Acquis. The Schengen Acquis is the body of law which governs the lifting of internal border controls between those countries that form the Schengen Area: this includes all EU States (except Ireland and the UK) plus Norway, Iceland, Switzerland and Lichtenstein. The UK does participate in some parts of Schengen, as recorded in Council Decision 2000/365/EC (OJ L 131, 1.6.2000, p.43–47), i.e. the police and judicial cooperation elements of Schengen. The UK does not however participate in the border control elements. Article 5 of the Protocol provides that the UK is deemed to be participating in any measures which build on those parts of the Schengen Acquis in which it already takes part unless, within three months of the publication of the proposal or initiative, it notifies the Council that it does not wish to take part in the measure – “an opt-out”. If the UK does not opt-out within that three-month period, it is automatically bound. If the UK opts-out, the Commission and Council can decide to eject the UK from all or part of the rest of Schengen to the extent considered necessary if such non-participation seriously affects the practical operability of the system, but the Protocol states explicitly that it must seek to retain the UK’s widest possible participation.

Annex C

Article 6 of the Schengen Acquis

1. Cross-border movement at external borders shall be subject to checks by the competent authorities. Checks shall be carried out for the Contracting Parties' territories, in accordance with uniform principles, within the scope of national powers and national law and taking account of the interests of all Contracting Parties.
2. The uniform principles referred to in paragraph 1 shall be as follows:
 - (a) Checks on persons shall include not only the verification of travel documents and the other conditions governing entry, residence, work and exit but also checks to detect and prevent threats to the national security and public policy of the Contracting Parties. Such checks shall also be carried out on vehicles and objects in the possession of persons crossing the border. They shall be carried out by each Contracting Party in accordance with its national law, in particular where searches are involved.
 - (b) All persons shall undergo at least one such check in order to establish their identities on the basis of the production or presentation of their travel documents.
 - (c) On entry, aliens shall be subject to a thorough check, as defined in (a).
 - (d) On exit, the checks shall be carried out as required in the interest of all Contracting Parties under the law on aliens in order to detect and prevent threats to the national security and public policy of the Contracting Parties. Such checks shall always be carried out on aliens.
 - (e) If in certain circumstances such checks cannot be carried out, priorities must be set. In that case, entry checks shall as a rule take priority over exit checks.
3. The competent authorities shall use mobile units to carry out external border surveillance between crossing points; the same shall apply to border crossing points outside normal opening hours. This surveillance shall be carried out in such a way as to discourage people from circumventing the checks at crossing points. The surveillance procedures shall, where appropriate, be established by the Executive Committee.
4. The Contracting Parties undertake to deploy enough suitably qualified officers to carry out checks and surveillance along external borders.

5. An equal degree of control shall be exercised at external borders.

Article 1 of the acquis defines external borders. They shall mean the Contracting Parties' land and sea borders and their airports and sea ports, provided that they are not internal borders.

Annex D

Directive 2004/38/EC of the European Parliament and of the Council

This Directive merged into a single instrument much of the previous legislation on the rights of entry and residence for EU citizens. Key provisions include:

Right to move and the initial right of residence for up to three months

All Union citizens have the right to enter another Member State by virtue of having a valid identity card or passport. Under no circumstances can an entry or exit visa be required.

Family members who do not have the nationality of a Member State enjoy similar rights as the citizen who they have accompanied, though can in some circumstances, be subject to entry requirements.

EU nationals and their family members enjoy an initial unconditional right of residence in other Member States for up to three months.

Right of residence for more than three months

The right of residence for more than three months is subject to certain conditions. Applicants must:

- either be engaged in economic activity (as jobseekers or on an employed or self-employed basis);
- or have sufficient resources and sickness insurance to ensure that they do not become a burden on the social assistance system of the host Member State during their stay;
- or be enrolled as a student and have sufficient resources and sickness insurance to ensure that they do not become a burden on the social assistance system of the host Member State during their stay; or
- be a family member of a Union citizen who falls into one of the above categories.

Right of permanent residence

Union citizens acquire the right of permanent residence in the host Member State after a five-year period of continuous residence in compliance with the Directive, provided that an expulsion decision has not been enforced against them. This right of permanent residence

is no longer subject to any conditions. The same rule applies to family members who are not nationals of a Member State and who have lived with a Union citizen for five years. The right of permanent residence is lost only in the event of more than two successive years' absence from the host Member State.

Common provisions on the right of residence and right of permanent residence

Union citizens who enjoy a right of residence or right of permanent residence and the members of their family may also benefit from equal treatment with host-country nationals in the areas covered by the Treaty. Equally, host Member States are not required, prior to the acquisition of the permanent right of residence, to grant maintenance aid for studies, including for vocational training, in the form of grants or loans to these same persons. Family members, irrespective of their nationality, will be entitled to engage in economic activity on an employed or self-employed basis.

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