

Inquiry into EU reform and the EU referendum: implications for Scotland

Kirsty Hughes

This note focuses on the questions and issues that may arise for Scotland if the UK votes 'no' to staying in the European Union in the upcoming EU referendum. The note considers four areas:

- (1) Processes for leaving the EU;
- (2) Future relationship of the UK with the EU;
- (3) Implications for Scotland, and
- (4) Issues if Scotland votes for independence after a UK 'no' to the EU.

(1) Processes for Leaving the EU

Article 50 of the EU's Lisbon Treaty allows for a member state to withdraw voluntarily from the EU. So, after a 'no' vote, the UK would be able to put such a request to the European Council which would trigger negotiations on the precise arrangements for its withdrawal "taking account of the framework for its future relationship with the Union".

Article 50 also specifies that the EU treaties will no longer apply to the state that is leaving once the withdrawal agreement comes into force, or "failing that" two years after the state that is leaving has notified the European Council of its intention to withdraw (unless both sides agree to extend this period).

The UK during these negotiations would not be part of European Council deliberations on the matter – otherwise it would be sitting on both sides of the negotiating fence. Scotland would need to ensure it was able to make a full contribution to the UK's position in, and handling of, the processes of negotiation.

As no member state has previously left the EU, further details of how the process might unfold are unknown although it would seem likely the European Council would draw up some advance contingency plans for such a process.

(2) Future Relationship of the UK with the EU – for negotiation

It is likely that David Cameron will achieve some minor agreements on reform as a result of the UK's current – rather behind-closed-doors – negotiations with its EU partners. Cameron can then be expected to argue for a 'yes' vote in the referendum.

Consequently, if the UK were to vote 'no', the UK's Prime Minister and government will not have set out in advance their views on what sort of relationship the UK should have with the EU once it was no longer a member state. Yet negotiations around withdrawal, any transition periods etc, cannot reasonably begin until the UK has drawn up its own negotiating mandate setting out its desired future relationship with Europe; the referendum as such will not have given a clear or full answer to what that should be.

Public Debate on that Future Relationship: There should therefore be a period of open public debate, following a 'no', on what sort of future relationship with the EU, the UK government should attempt to negotiate. Scotland – both government and

public – would want a full part in such a discussion. However, this would not be a one-sided negotiation with the EU, and so, even if and when the UK has its own preferred model for the future, this may not be one the EU is fully – or even partly – willing to agree to.

Possible Models: The two most common models suggested for a state outside of the EU are those represented by Norway and Switzerland. Norway is a full member of the European Economic Area (EEA) and takes on board – with very little input or influence from its side – EU legislation into its own domestic legislation (becoming in the process what some have labelled a 'fax democracy'). The four freedoms of the EU's single market – of goods, services, people and capital – apply to Norway. Switzerland's relationship with the EU is more ad hoc since joining the EEA was rejected by the Swiss. Switzerland is part of the European Free Trade Association, and has signed a large number of bilateral agreements (including free movement of persons) with the EU giving it access to large parts of the Single Market. Both Norway and Switzerland are part of the Schengen area.

A UK-EU specific free trade agreement: Neither of these models are obvious fits for the UK. A 'no' vote, given the current debate in the UK on migration and freedom of movement in the EU, might be taken to indicate the UK no longer wishes to participate in free movement of people. However, the UK would presumably still want access to the Single Market for goods, services and capital, and would want – very difficult to achieve having left the EU – some real influence on decisions on those three areas.

The UK may in the end have to negotiate a specific free trade agreement with the EU – one that excludes free movement of people. The UK would still have to align with most EU standards, and without having a say in them as it does today, if it wanted access to EU markets.

The UK would also need to decide whether, and in what form, it still wanted some specific agreements on movement of people with the EU – for example, for student and educational exchanges, for pensioners, for tourism and travel.

(3) Implications for Scotland

The implications for Scotland of the UK leaving the EU are many, but as outlined above, until the likely future relationship of the UK with the EU is clarified, the precise impact cannot be detailed. However it is clear that there are likely to be significant impacts on Scotland.

Free Movement of People: One area that is highly likely to be strongly affected is movement of people between Scotland and the EU in both directions, since it likely the current free movement of people for EU citizens would no longer apply. Depending on the UK's future relations with the EU in this area, no longer being a member state will potentially affect: EU workers currently working in Scotland, and those who would have come in the future, Scottish people working in other EU countries (now and in the future), Scottish pensioners living elsewhere in the EU (and EU pensioners in Scotland), and students (those coming to Scotland to study and those, from Scotland, studying in the EU).

Economy and Business: UK exit will affect the Scottish economy and businesses but in what ways will depend on how much access the UK retains to the Single Market – and the conditions of that access. Even if the UK retains substantial access to the Single Market, it is not conceivable, when it is no longer a member state, that it will retain the say (and vote) it has today on the myriad of issues the Single Market covers. Consequently Scottish interests will not be able to be represented effectively when new or amended EU standards, rules and legislation are agreed.

Foreign direct investment may well also be affected if the UK is no longer seen to be fully integrated in the EU Single Market.

Justice and Home Affairs: There will be implications for other areas too – the UK currently has an 'opt-in' provision for justice and home affairs issues, so that if the UK chooses to be part of EU decisions and actions on, for instance, police cooperation, it can participate, but otherwise can remain outside of justice and home affairs measures. This area would presumably also be covered in the exit negotiations but, as with the Single Market, the UK would not, in the future, be present in relevant Council of Ministers or have a vote or full voice in any negotiations on new legislation or approaches. So Scotland too would be disadvantaged by this in terms of future pan-European cooperation on justice and home affairs.

Foreign Policy: On foreign policy, the current UK government has been reluctant to engage with EU foreign policy – one notable example being the German-French leadership on the Ukraine crisis and the relative absence of the UK. In principle, having left the EU, the UK could still hold foreign policy discussions with its EU counterparts (if both sides chose – or bilaterally with individual member states), and could align itself with EU foreign policy declarations. But it would not have the same influence as it has had in the past in EU foreign policy (and as it could have today if the UK government chose to engage more fully rather than letting the UK's influence and role decline).

Furthermore, the US already sees the UK as a less significant partner than before – and Germany as more important – given the UK's current semi-detached position in the EU and its limited current foreign policy. After an EU exit, the US would be likely to attach even less importance to the UK as a foreign policy player. Overall, after EU exit, Scotland would be part of a UK that had quite likely significantly less foreign policy influence and potential than before.

(4) Issues if Scotland votes for independence after a UK 'no' to the EU

If Scotland were to hold a further independence referendum – triggered by a UK 'no' to the EU – and if this resulted in a 'yes' to independence, the situation would potentially be quite complex.

Scotland could, in theory, stay in the EU – since it already meets all relevant EU criteria and applies all EU laws with the exception of the UK opt-outs on the euro, Schengen, and the opt-in on justice and home affairs. While there were many suggestions during the referendum campaign in 2014 that an independent Scotland would have to go to the back of the queue of candidate countries in a process that could take several years, this seems highly unlikely. From the inclusion of East

Germany into the EU in 1990 (though it didn't meet the EU's *acquis*) to the accession of Cyprus in 2004 (despite its divided state and the non-application of the EU's *acquis* in the northern part of the island), the EU has shown it can exercise political discretion on entry.

It would be unnecessarily complicated to make Scotland leave the EU only to re-join it – with one suggestion for handling this being that there might be a moment where Scotland was in a 'holding pen' i.e. still in the EU but not yet of full member state status.

Managing Three Parallel Sets of Talks: However, if the UK or rest of the UK (rUK) were leaving the EU, this makes the transition for Scotland into becoming an independent EU member state more complex than if the rUK were staying in the EU. If a new independence referendum were held rapidly and secured a 'yes' vote, then there would be three relevant sets of talks going on at the same time:

- (i) UK-EU talks on UK exit,
- (ii) rUK-Scotland talks on dissolving the Union, and
- (iii) Scotland-EU talks on Scotland becoming an individual EU member state.

There are a number of issues that would be interdependent across these three notionally separate sets of talks, and where the outcomes may depend on which talks discuss an issue first. Of the three parties involved – rUK/UK, Scotland and the EU – only two out of three are present in each set of talks, so some sort of cross-talks body or informal consultation would surely be needed.

The question of currency and the question of borders would be of particular importance here.

Currency: If an independent Scotland were to agree with rUK to keep using the pound sterling, Scotland would want this agreed before discussing with the EU an opt-out from the euro. Scotland would be more likely to get this opt-out if it were using the pound since it would be part of ensuring close and good cooperation with its neighbour, England, to the South through sharing a common currency, something Brussels may well want to encourage. If Scotland did not use the pound, it would need to introduce its own new currency (since it would not immediately qualify for joining the euro even if there were political and public will to do that) – but at that point Scotland would probably at best have to settle for a Swedish-style 'soft' opt-out from the euro, since Brussels would be very reluctant to let a new member state have a full euro opt-out.

Borders: The question of borders will be highly complex and affect Scotland, rUK and Ireland in particular (though also affecting other EU member states given free movement of people between all EU members). Depending on how much or how little movement of people the rUK wants and negotiates with the EU, this might then affect the land borders between Scotland and England, and Ireland and northern Ireland. Both these borders would become the EU's external borders (with rUK no

longer in the EU) so this would impact on what Brussels might want to see as well as what Scotland, rUK and Ireland each wanted. Agreement could be difficult.

Both Ireland and Scotland, as full EU member states, would be bound to a commitment to free movement of people, and rUK might be concerned that EU citizens in Ireland and Scotland would continue to move freely into rUK. Scotland could, if it chose, attempt to negotiate an opt-out to Schengen (as Ireland has). If rUK were willing to maintain open land borders with Scotland (despite no longer being part of EU free movement of people), it might at the least demand Scotland has a Schengen opt-out as part of a price for keeping the Scotland-England land border open. If at any point, the EU's rules for its external borders were stricter in some dimensions than those of rUK for its external borders, more problems could arise in keeping the Scotland-England and the Ireland-northern Ireland land borders open.

Not only would there in principle need to be careful coordination across the three sets of talks on the borders issue, there would also need to be a fourth, related set of talks with Ireland on border issues given UK or rUK exit.

Sequencing: There is a critical question of sequencing around these talks. The UK, as the current EU member state, will have to leave the European Union before Scotland can formally join the EU. But a process whereby first the UK left in its entirety, then the rUK and Scotland formalised their separation, and finally Scotland negotiated to re-join the EU, would penalise Scotland – both time-wise but also as it would mean that issues such as borders were not considered in terms of the final status of those involved (i.e. Scotland anticipating being in the EU, rUK out).

So there is an important question here as to whether the EU would agree to negotiate with the UK, on its exit from the EU, on the understanding that in fact it would only be rUK leaving and that Scotland would negotiate in parallel its own membership status, or whether the EU would insist on the UK talks happening in their entirety first.

If the EU-UK exit talks happened first, in their entirety, one irony would be that Ireland, as an independent EU member state, would be heavily engaged in the talks from the EU side to ensure the best outcome in terms of the Ireland-northern Ireland land border and free movement of people, while Scotland would not have a separate voice.

However, such a sequencing, after a Scottish independence referendum 'yes', would not be facing up to the new political realities – and the Scottish government would have a very strong case to argue both in London and in Brussels for parallel talks.

If the three sets of talks did happen in parallel, that might point towards a goal of a common date for the UK to leave the EU, Scotland and rUK to separate, and Scotland to stay in/join the EU. However, that would be difficult in legal and political terms, since EU member states would need to ratify Scotland's EU accession treaty, and that couldn't begin until Scotland was independent, and could take up to two years to go through the 27 other EU parliaments. Consequently, the idea of Scotland remaining in the EU for a transition period without actually having full member state status is one approach worthy of more in-depth consideration.

At the same time, if the UK were to be dissolved before EU-UK negotiations had concluded, that might in many ways make it easier to ensure Scotland did not have to leave then re-join the EU. In other words, the sequencing could be: firstly, dissolution of the UK, rapidly followed by rUK leaving the EU and Scotland staying in, followed, after ratification of Scotland's accession treaty, by Scotland having full member state status.

There would clearly be several complex, but not insurmountable, political and legal issues that would need to be resolved if these three interdependent processes were to happen in the most effective way possible. Planning for this potential scenario should happen in advance of the UK's EU referendum to ensure there is sufficient time to consider all issues and options.

Kirsty Hughes is a UK-based expert on European affairs, and Associate Fellow, Friends of Europe, Brussels