

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

Contributors (all legal academics of the School of Law, University of Dundee):

Mr Wisam Abboud, Professor Robin R. Churchill, Dr Jacques Hartmann, Professor Colin T. Reid, and Dr Kirsteen Shields.

This submission is made by us in our personal capacities and should not be attributed to any institution or organization.

Given our legal expertise, and that negotiations between the UK government and the European Union are under way on the terms of the UK's future membership, we believe that we can be of most assistance to the Committee if we concentrate on the legal issues and the implications of a UK withdrawal from the EU. We will, therefore, be addressing the Committee's third question only in this submission.

In Section A, we address the UK constitutional requirements as well as on the future application of existing EU law in the event of 'Brexit'. In Section B, we consider four options for the relationship between the EU and the UK in the event of a UK withdrawal from the EU. The first three options involve the conclusion of different types of co-operation treaties with the EU. In this context it is important to note that the simple view that leaving the EU results in the UK resuming full sovereignty and freedom of action over all areas of policy does not fit with what is needed to establish new (post-'Brexit') relationships with the EU. In particular, the UK does not have a right to prescribe the content of any co-operation treaty it may seek to conclude with the EU. We then examine a fourth option in a 'Brexit' scenario involving a full repatriation of powers from the EU with no co-operation treaty being concluded. We finally offer some conclusions.

Section A. Leaving the EU: The UK Constitutional Requirements & Post -'Brexit' Application of Existing EU Law

How will the UK organize a withdrawal: the future application of future EU law?

The UK constitutional position is relatively straightforward. The UK Parliament would need to repeal the European Communities Act 1972 as amended. This closes down the route by which EU law has been given effect in the UK since its accession.

How will the UK organize a withdrawal: the future application of existing EU Law?

A lot of the law currently in force in Scotland comes from the EU, either directly (via regulations) or indirectly (via directives); we explain the differences below. The status of this law in the event of an exit from the EU will also be considered.

Other than the EU treaties themselves, EU law is of two main types – directives and regulations.

Directives set out an objective or set of objectives to be achieved, often in precise and detailed form, and require Member States to transpose directives into their national law within a certain deadline. Directives tend to be used in one of two situations: 1) in areas of law in which Member States already have a sizeable body of law, and/or 2) where it is preferred that the Member States, rather than an EU institution/agency, is primarily

responsible for carrying out the obligations set forth in the directive. Directives, while addressed to the Member States, allow each Member State to allocate responsibility for carrying out its obligations in accordance with its own constitutional organization. In the UK, therefore, directives are implemented by the UK administration or by the devolved administrations depending on the subject matter of the directive.

In many cases, though, EU rules are contained in regulations. These can be addressed to Member States, individuals/companies, and/or the EU institutions where the aim is for the regulation to *regulate* the behaviour of legal persons, the States and/or the EU institutions. It is contrary to EU law to seek to transpose EU regulations into national law, as this may obscure the terms of the EU legislation. UK legislation may be adopted pursuant to those regulations where the regulation envisages such measures being needed or allowed. For example the rules on the import and export of endangered species are contained in EU Regulations, with the only relevant UK legislation dealing with aspects of enforcement, without containing any of the key provisions on what is prohibited and when permits are needed (Control of Trade in Endangered Species (Enforcement) Regulations 1997 SI 1997/1372).

Continuity: In the event of leaving the EU it seems clear that despite the EU inspiration for their making, any rules which are in the UK/Scottish statute book remain fully in force, unless and until amended or repealed. The status of rules contained only in EU regulations is less certain, but it is submitted that there should be a new statutory provision expressly giving continuing legal effect to all the rules in force on the exit date, even though they are found only in EU legislative texts. The other options are either to ensure that all the rules which the UK would wish to continue in force are individually converted into UK or Scottish statutes or statutory instruments before the date of departure – a vast and complex task which would almost inevitably leave some loopholes - or to accept a legal vacuum on a large number of topics of importance to the UK's economic and social well-being. In the latter case there would also be many loose ends of domestic legislation that would remain formally in force, but be meaningless since the EU rules to which they are linked are no longer valid. The legal vacuum, and hence absence of any rules or standards on a number of issues, may well preclude trade with other countries (within and beyond the EU) and be in breach of treaties which the UK has accepted (e.g. the Convention on Trade in Endangered Species).

Interpretation: Where the law has EU origins, either directly or indirectly, Scottish courts are currently bound, under section 3(1) of the European Communities Act, to interpret it in the light of the EU provisions and the case-law of the Court of Justice of the European Union ('CJEU'). In the event of an exit, this would presumably no longer be the case, so that the question arises of whether after that date all reference to the EU context should be forbidden or whether reference to EU material remains competent. There is also the question of whether existing interpretations based on EU material could be re-visited to take account of the exit, focusing attention on the statutory provisions themselves and their narrower UK context without being influenced by the wider EU background. These are questions that will take time to resolve by the courts, subject to parliamentary guidance.

Future Changes: There are two dimensions to the impact of future changes made at EU level. The first is the effect of amendments to any provisions of EU legislation which have been continued in force at UK level, where the logic of an exit is that these amendments should be ignored. In effect the EU provisions remaining in force would be fixed as at the

date of exit unless and until changed by domestic legislation, even though this might require an element of legal archaeology to identify the exact state of EU law at that date, especially where a provision in turn makes reference to other EU measures.

The second relates to interpretation and in the event that reference to EU materials remains competent asks whether this is limited to materials prior to the date of exit. The effect of ignoring everything at EU level after exit would be to preclude the use of any CJEU case-law dating from after the exit, even though it might clarify the interpretation of measures dating from before then and continuing in force either because they are embedded in domestic legislation or as EU rules given continued validity. In both cases the effect would be gradual divergence between UK and EU law, with potential difficulties as apparently similar rules evolved (or not) along different paths.

Section B: There are 4 main options for EU-UK relations in the event of 'Brexit'.

Option 1: An EU-UK Exit Treaty

The starting point is that Article 50 of the Treaty on European Union ('**TEU**') governs withdrawal from the EU. This is a new provision inserted in to the EU Treaties by the Lisbon Treaty of 2007. As such it is untested. Article 50(1) provides that a Member State may withdraw from the Union in accordance with its "own constitutional requirements" (which we explored above).

Article 50(2) provides that the departing State inform the European Council of its decision to withdraw and that "[in] light of... guidelines provided by the European Council, the *Union shall negotiate and conclude* an agreement with that State, setting out the arrangements for its withdrawal, taking into account of the framework for its future relationship with the Union..." (emphasis added). An obligation is therefore seemingly placed on the Union to negotiate with the leaving State (i.e. the UK) an exit treaty ('**Exit Treaty**'). The Exit Treaty must be approved by the UK, the Council of Ministers (acting by qualified majority but with the UK not counted) and the European Parliament ('**EP**') by a majority (one also assumes that British MEPs would be barred from the vote in the EP and a revised majority would be required but Article 50 is curiously silent on the matter).

It is important to underline that the UK has no right to demand an Exit Treaty with any particular content (for instance, it cannot, as of right, have continued access to the Single Market minus the free movement of persons).

Non-EU States currently have a number of different types of relationship with the EU, most of which require, to different extents, that they adhere to some aspects of EU law but without having any legal power to influence the laws that will apply to them. This is particularly true of the European Economic Area ('**EEA**'), to which we now turn before discussing other options for EU-UK engagement post-Brexit.

Option 2 – Becoming a member of the EEA by becoming a member of the European Free Trade Agreement (EFTA)

Three States are members of EFTA: Norway, Iceland and Liechtenstein. These states together with the EU and its Member States form the EEA. The EEA covers a number of areas of policy including provisions that are in many cases almost identical to those in the

EU Treaties. This is so in respect of (1) the four freedoms and (2) competition policy. The four freedoms are composed of the free movement of goods, services, people and capital. Therefore free movement of people, a key concern for both Prime Minister Cameron and others, would remain part of the UK's international obligations in the event of leaving the EU but being a member of the EEA. The EEA Agreement also includes provisions related to environmental policy, social policy, consumer protection and company law, narrower in scope than the EU Treaties but modelled on those treaties (essentially covering harmonisation measures required for maintaining a level playing field in the Single Market).

Members of EFTA are not only (1) subject to EU legislation in force at the time of signing up to the EEA agreement in relation to matters covered by the EEA Agreement, but also (2) they are also bound by subsequent EU legislation and have very little input into that legislation.

Important exclusions from the EEA include the Common Agricultural Policy ('**CAP**') and the Common Fisheries Policy ('**CFP**'). Thus, trade in agricultural and fisheries products between EFTA States and EU Member States is subject to tariffs. However, some co-operation is envisaged in agricultural and fisheries goods, and indeed agreements between the EFTA States and the EU have been concluded in the fisheries domain under which tariffs on the exports of fishery products from EFTA States to the EU have been reduced in return for greater access for EU fishing vessels to Icelandic and Norwegian waters.

Crucially, the EEA excludes the common tariff policy (i.e. it is not a customs union) and the Common Commercial Policy ('**CCP**') more generally. Broadly, a cardinal feature of the CCP is the EU's exclusive power to set tariffs for all Member States in respect of their imports from non-EU States. This in turn allows the EU to negotiate mutual tariff reductions with non-EU states. Also excluded from the EEA are the Common Foreign and Security Policy ('**CFSP**') and Justice and Home Affairs.

A number of things come out of the above brief description of the EEA:

1. As stated above, the EEA Agreement covers free movement of person provisions almost identical to those in the EU Treaties. As such, membership of the EEA brings no significant change to the UK's legal obligations towards EU migrants.
2. The idea that the EEA just covers the four freedoms is incorrect; the Single Market is much broader. There is a very practical reason for this. If the EU were to allow access to EFTA goods while not imposing certain environmental, social and other legislative obligations on the EFTA States (which EU States are obliged to abide by), the EU would be at a competitive disadvantage.
3. EFTA States have no legal power to take part in the adoption of EU legislation which affects the EEA and which the EEA usually adopts without amendment. It therefore seems inconsistent that anyone making a sovereignty argument should also push for EEA membership.
4. The debate on the EU referendum has not, so far as we are aware, commented on areas of policy excluded by the EEA, such as the CAP (as contentious as that policy generally has been), the CFP, the CCP, and the CFSP. It is in these areas that there is a significant difference between being a member of the EU and the EEA.
5. The fact that there is no customs union between the EU and EFTA is particularly unfortunate if the UK were to become a member of EFTA. Being in a customs union allows its members to negotiate trade deals as a bloc thereby being better able to

obtain tariff concessions from other larger trade blocs (in most cases large states such as the US).

Option 3: Conclude an agreement with the EU similar to the Swiss-EU Agreements or some other kind of preferential trade agreement

From the perspective of national legal sovereignty, the Swiss-EU Agreements or some other kind of preferential trade agreement may be more appealing models for the post-‘Brexit’ UK-EU relationship. Dealing briefly with each in turn:

The Swiss-EU Agreements (**‘Swiss Agreements’**) incorporate a significant amount of EU law and, similar to the EEA, are essentially enhanced free trade agreements. They also include provisions extending the application of the case-law of the CJEU on matters covered in the Agreements as at the date of signature. Some of the Swiss Agreements, however, depart from the EEA Agreement by making the incorporation of future CJEU case-law and EU legislation dependent on the approval of joint EU-Swiss committees.

As to preferential trade agreements, there are many models ranging from Association Agreements entered into with neighbouring states (essentially liberalizing trade in industrial and agricultural products) to more far reaching agreements, such as the EU-Canada agreement (**‘CETA’**). There is no guarantee that the UK will be able to convince its current EU partners of its preferred model, especially if this seeks access to the single market without the free movement of persons. In this regard, the EU’s response to the Swiss referendum on 9 February 2014, which backed an initiative to introduce annual quotas on EU immigration, is instructive. The Council adopted the following conclusion in response:

“The Council has taken note of the outcome of the vote in Switzerland on a popular initiative ‘Against Mass Immigration’... While fully respecting the internal democratic procedures of Switzerland, the Council reconfirms the negative reply in July 2014 to the Swiss request to renegotiate the Agreement. It considers that the free movement of persons is a fundamental pillar of EU policy and that the internal market and its four freedoms are indivisible...”[the terms “internal market” and “single market” are used inter-changeably by the EU institutions].

Option 4 – Full Repatriation of Powers

What would happen if the UK did not have any agreement with the EU post-‘Brexit’ i.e. in the event there was simply a repatriation of powers? Under this position, the legal landscape in overview would be as follows:

- First and foremost, the UK would have to develop its own position and if necessary regulatory regimes to deal with policy areas no longer covered by EU law. We discussed above (under the process for withdrawal) the related issue of the status of existing UK law that has resulted from abiding by and implementing existing EU law.
- Following on from the previous bullet point, the exact impact of losing EU legislation and the consequent legislative burden placed on the UK would differ from one policy area to the next and a very substantial amount of time and effort would need to be taken to consult and agree on what, if anything, should replace EU rules.

- UK goods exported to the EU would now be subject to a tariff at any entry point into the remaining 27 Member States and those goods would be subject to customs checks and other administrative verification measures (to the extent allowed by World Trade Organisation ('WTO') rules). In order to be sold within the EU those goods would need to be manufactured in conformity the relevant EU rules on product specifications and safety, which would clearly not be problematic in the short-term (as UK goods follow such standards at present) but should those standards change, then anyone hoping to export to the EU would need to follow those new rules.
- The UK would be free to set its own tariffs for imports from both the EU and from non-EU Member States (subject to the rules of the WTO), previously an area of **exclusive EU competence** (i.e. areas in which only the EU, and not the Member States, may legislate).
- The UK would not be able impose higher or lower tariffs on EU products than on non-EU products (again due to WTO law) unless there is a 'preferential trade agreement' with the EU and under this full repatriation of powers scenario there would no such agreement. The EU is under the same obligation as regards UK goods.
- British workers and British companies could only establish a presence in the EU in accordance with the rules of the particular EU Member State in question (or perhaps addressed in bilateral agreements). They would no longer benefit from EU rules on free movement and the right of establishment.
- By the same token, the UK would be free to determine its own immigration policy for would-be EU migrants. The status of those already in the UK would be determined in accordance with UK public law principles.
- There are a significant number of British citizens living outside the UK as retirees or workers in other EU Member States. Neither the EU Treaties nor the main EU legislation in the area, deal with the issue of their status in the 'host' state in the event that their country of origin chooses to leave the Union. There is much uncertainty here and it may be an issue that is left to each EU Member State to decide on, again in line with its domestic legislation.
- The main support scheme to UK farmers is currently that organized by the EU, the CAP. The UK would have full powers to address agriculture in the future.
- The UK would become responsible, in place of the EU, for adopting fishery conservation and management measures for UK waters, i.e. out to the maritime boundaries with other States and to 200 nautical miles west of Scotland. A decision would have to be made as to whether to admit any fishing vessels from EU Member States to fish in UK waters and whether to seek access for British fishing vessels to EU waters. The UK would need to seek agreement with non-EU Member States, particularly the Faroe Islands and Norway, for continued access to their waters for British vessels. This is a matter that is currently governed by agreements between the EU (exercising its exclusive competence) and those States.

- The EU is a party to hundreds of treaties with non-EU States. In some cases these treaties have been entered into by the EU on the basis of its exclusive competence. In other words, only the EU, and not its Member States, is a party to the treaty concerned. This is the position, for example, with some trade agreements and with agreements providing for the access of EU fishing vessels to the waters of third States such as Norway. More commonly, treaties are entered into not only by the EU but also together with its Member States because the subject matter of the treaty includes matters falling under shared competence (i.e. areas in which both the EU and the Member States may legislate) or some matters falling outside the EU's competence altogether. Treaties of this type are known as mixed treaties. In the case of exclusive treaties, were the UK to leave the EU, the default position would be that the UK would no longer enjoy rights under such treaties (e.g. for Scottish vessels to fish in Norwegian waters). In some such cases the UK would no doubt want to conclude its own treaties with the third States concerned. In the case of mixed treaties, the UK would continue to be a party to such treaties after withdrawal. However, for a mixed treaty whose object is a relationship with the EU, such as a preferential trade agreement, it would not make sense for the UK to continue as a party to the treaty following its withdrawal from the EU, and it would therefore no doubt seek to withdraw from the treaty. It might, however, wish to seek to establish its own trade relations with the third State(s) concerned by concluding a separate treaty with it.
- The same principles apply to membership of international organizations, which are normally established by treaty. In some cases the EU is a member of an organization to the exclusion of its Member States (e.g. regional fisheries management fisheries organizations), in other cases it is a member together with its Member States. What was said about treaties following UK withdrawal from the EU would apply, *mutatis mutandis*, to membership of international organizations.

Conclusion

We have set out (immediately above) some of the implications of repatriating all powers from the EU where no agreement is reached as to future co-operation following UK withdrawal from the EU. There is a good case to be made for having a formalized relationship with the EU, not least in order to have access to the Single Market for our people, goods, services and capital. While the EEA may not be the most palatable option due to the continued application of free movement of persons provisions, a free trade agreement in industrial goods and services is something that could be done only with the agreement of the remaining EU Member States. Equally, the terms of any Article 50 Exit Treaty also need to be agreed, in this case with both the European Parliament and the Council (i.e. the ministerial representatives of the Member States).

In choosing an option post-'Brexit', consideration should also be given to the UK's ability to solve a number of problems common to the EU Member States that are currently addressed by the EU Treaties, including energy security, agriculture, fisheries, climate change, the environment more generally and security. The EU provides a very advanced forum for the discussion and potential resolution of these issues; indeed the EU is the most advanced regional integration organization in the world and model for many other regional organizations. If a UK-EU agreement offers very close co-operation on important common matters, it would raise the question as to the point of having the left the organization.

Conversely, if a very loose system of co-operation is put in place post-'Brexit' it would call into question the UK's ability to address such issues and the influence it would have both regionally and globally in tackling them.

There are far-reaching choices that need to be made if the population of the UK votes to leave the EU. It is very much hoped discussion of these options (and others) will become a key part of any referendum debate.

August 2015