

## **European and External Relations Committee**

### **The EU referendum and its implications for Scotland**

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#### **Scotland's future relationship with the European Union**

If the UK withdraws from the EU and Scotland remains a member of the UK, it will not be possible for Scotland to retain or enter into membership of the EU. Only sovereign states can be members of the EU. A range of other possibilities might be considered, however.

1. There are precedents for the situation in which part of a state is a member of the EU, while other parts are not. These include Greenland and the Faroe Islands in Denmark, and Northern Cyprus. Some have suggested that a similar option might be available for Scotland (and Northern Ireland) (see: Brendan O'Leary, *The Dalriada Document: Towards a Multi-National Compromise that Respects Diversity in the United Kingdom*, available at: <http://www.centreonconstitutionalchange.ac.uk/publications/reports/dalriada-document>; Nikos Skoutaris, 'From Britain and Ireland to Cyprus: Accommodating 'Divided Islands' in the EU Political and Legal Order', available at: <http://www.skoutaris.eu/working-papers/>). This scenario would involve the UK *remaining* a member of the EU, while England and Wales withdraw. Arrangements would need to be made to enable the Scottish and Northern Irish Governments to exercise the functions of the UK Government in EU decision-making. This option seems to pose a range of significant difficulties in practice:
  - a. It would require a 'hard' border between Scotland and England at which customs and movement controls would be applied, thus erecting barriers to commercial and social interaction between Scotland and the rest of the UK which do not currently exist. These disadvantages would have to be set against any benefits of remaining in the EU.
  - b. It would raise difficult questions about the distribution of decision-making competences between the UK and Scottish institutions, and the extent to which UK decision-making with effect in Scotland would be bound by EU law.
  - c. It is unlikely to be acceptable to the UK Government, or to those voters across the UK who supported leaving the EU;
  - d. It is unlikely to be acceptable to other Member States. The situations of Denmark and Cyprus are clearly distinguishable from the UK. In the case of Denmark, the non-EU territories are small in population and physically isolated. In the case of Cyprus, the internationally recognised government does not control the northern part of the island; this is controlled by Turkey, which is not a member of the EU.

2. Scotland could enter into an association agreement with the EU, going beyond any post-Brexit agreement entered into by the UK Government. This is open to many of the same objections just outlined. In addition, it would require the devolved institutions to be given the legal competence to enter into binding international agreements. While some sub-state national governments do have such powers (e.g., the German Länder), this would constitute a very significant increase in Scotland's autonomy within the UK.
3. The Scottish institutions could choose to continue to be bound by EU law in areas within devolved competence (e.g. agriculture, environmental policy). This may make sense in certain areas, but it would not be possible to enforce reciprocal obligations against other EU member states (e.g. free movement rights for Scottish citizens or businesses); nor would there be any access to the CJEU to enforce or query the validity/meaning of EU laws or any input into law-making.

While Scotland remains part of the UK, the most straightforward way of protecting Scotland's relationship with the EU and its place in the single market would be to persuade the UK Government to negotiate a close relationship with the EU for the UK after Brexit. However, this may also prove to be challenging (see further below).

### **Alternatives to EU membership**

There are three main models for the UK's future relationship with the EU:

- Membership of the European Economic Area (EEA), often referred to as the Norwegian model;
- Extensive bilateral agreements between the UK and the EU, often referred to as the Swiss model;
- No extensive bilateral agreements, often referred to as the WTO model.

The EEA model implies being fully integrated in the single market with consequential free movement rights for citizens and businesses, and co-operation in other important areas such as research and development, education, competition policy, social policy, the environment, consumer protection, tourism and culture ("flanking and horizontal" policies). It does not include participation in the Common Agriculture and Fisheries Policies (subject to limited exceptions), the Common Trade Policy, the External Customs Union, Justice and Home Affairs, Economic and Monetary Union, or the Common Foreign and Security Policy. EEA members do not participate in EU decision-making, nor are they subject to the jurisdiction of the CJEU. Interpretation and enforcement of EU laws is undertaken by the EFTA court, and EEA members have somewhat greater freedom than EU Member States to determine the effect and primacy to be given to EU law in their own legal orders.

Under the Swiss model, economic and other integration measures would be agreed on a case by case basis. It is therefore similar to the EEA model, but with more scope for the UK to negotiate a bespoke level of integration, as reflects domestic economic and other priorities.

The third model represents the relationship that many countries have with Europe. WTO rules would apply but as the UK would have to renegotiate the terms of its WTO membership after Brexit, we cannot say at this stage precisely what level of access to the single market WTO membership would result in.

(See Chalmers *et al*, *European Union Law* (3<sup>rd</sup> edn, 2014), ch 5A for a detailed analysis.)

It is difficult to predict at this stage what deal will eventually be reached or even what the negotiating position of the UK Government will be, but it is worth noting that the Norwegian model seems incompatible with the reasons many people had for voting to leave the EU and there are formidable political obstacles to its being adopted as the negotiating position of the UK Government. Accordingly, even if the Norwegian model is the preferred outcome, serious consideration needs to be given to the likely consequences of the other options.

### **The withdrawal process**

How the withdrawal process might be managed at the EU and UK level and what steps would be involved in this process

We will begin with the EU level. It is unclear when the UK Government will give the required notice of intention to leave the EU under Article 50, TEU. Whilst, Article 50 sets a deadline for exit of two years from notice, there are two major uncertainties over the timetable. The first is that the two year period may be extended but only with the consent of all the Member States. The second is that there is no statement in Article 50 as to when or in what circumstances the notice must be given. So, the UK Government is under no obligation to give notice within any specific time frame. Thus far, it has given no clear indication of when it will give notice under Article, although the Prime Minister has stated that this will not happen before 2017 at the earliest. In the circumstances, the factors which determine when notice is given and whether or not the two year period will be extended (although many consider this to be infeasibly short) will be as much political as legal.

As for the UK level, we already know the three departments and the three Secretaries of State who are responsible for managing withdrawal. The Prime Minister will inevitably also have a major role. But many aspects remain unclear, including how big a role the Cabinet as a whole will have in deciding important issues, and what level of Parliamentary involvement or oversight there will be.

It has been suggested that the UK Parliament's consent is required before the UK Government may give notice under Article 50 (see, e.g.,

<https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>) and legal challenges have been mounted on that basis. We do not regard the proposition that Parliament's prior consent is legally required as correct and we proceed on the assumption that the UK Government will give notice and will decide when to do so without seeking Parliament's agreement. The UK Parliament will, however, be able to block ratification of any withdrawal agreement that is reached, and legislation will be required to give domestic effect to Brexit.

### The amount of time that might be required to deal with the negotiations

How long it will take depends in part on the future relationship with the EU that is agreed. For instance, if the UK were to seek membership of the EEA after Brexit and the other Member States were to agree in principle that this should happen, that would greatly simplify matters compared to the alternative models. But, for the reasons given above, membership of the EEA seems unlikely. We should assume, therefore, that the 'divorce' and the negotiations around it will be exceedingly complex and time consuming. Here, there are conflicting pressures. If all aspects of the UK's divorce from and future relationship with the EU are to be negotiated before Brexit takes effect, this would suggest that negotiations will go on for many years, certainly far beyond the two years envisaged by Article 50. But there are likely to be countervailing pressures. The UK Government will be under pressure from voters and from many Conservative MPs to deliver Brexit in a swift time frame; they are unlikely to be willing to wait years. Some EU leaders may also wish to make swifter progress to reduce the risk of 'political contagion' spreading to other countries in the EU. Both the UK and the other Member States may also want to reduce the period of uncertainty during which investment decisions may be postponed. More generally, EU leaders may want to get Brexit out of the way as quickly as possible so that the EU can move on to addressing other issues important to its future.

It is, therefore, impossible to predict with any degree of accuracy what the time scale for negotiations will be. It is possible that a Brexit date will be set once some major issues have been resolved but when others have not been. There would then have to be post-Brexit negotiations over these unresolved issues. An analogy might be drawn with the dissolution of Czechoslovakia, where agreement was reached to dissolve the state in just six months, but negotiations continued over the precise terms of separation for a further seven years.

### How the interests of Scotland and the other constituent parts of the United Kingdom can be represented in those negotiations and what role the Scottish Government should have in those negotiations

There is no legal principle that requires the consent of all four nations to an exit from the EU; this is clearly a reserved matter in terms of the devolution legislation. Nor is there an argument based on constitutional convention that each of the four historic nations has a veto, there being no existing custom or practice to which appeal can be made to support the proposition. Moreover, the UK Parliament rejected the argument that Brexit should be subject to parallel majorities (i.e., a UK-wide majority plus majorities in each of the four nations of the UK) in the referendum when amendments to that effect were tabled to the European Union Referendum Bill. The Scottish Parliament's (SP) consent would be required under the Sewel Convention to remove the obligation in the Scotland Act 1998 for the Parliament and the Scottish Ministers to comply with EU law (see further below). However, refusal of consent would not prevent the UK's withdrawal from the EU, and in any case it is possible that the UK Parliament could choose to override the wishes of the SP (see further below).

Similarly, there are no express statutory obligations on the UK Government to consult the devolved administrations over the UK negotiating position or the terms of withdrawal from the EU. How to involve the Scottish Government (SG) is for the UK

government to decide. The Prime Minister has said that she would not trigger the formal exit process until she had agreed a “UK approach” with leaders in Scotland, Wales and Northern Ireland and the UK Government’s website states that the responsibilities of the Secretary of State for Exiting the European Union include “working very closely with the UK’s devolved administrations, Parliament, and a wide range of other interested parties on what the approach to those negotiations should be.” However, the UK Government has not issued a detailed statement of principles or process for discussions between it and the devolved administrations, although an extraordinary summit of the British-Irish Council was held on 22 July, at which “Ministers collectively reaffirmed the importance of the Council as ... an important and unique forum to share views, enhance co-operation and strengthen relationships amongst all Member Administrations at this time” (British-Irish Council Communiqué, 22 July 2016, available at: <https://www.britishirishcouncil.org/sites/default/files/communiqu%C3%A9s/Cardiff%20Communique%20FINAL.pdf>).

It is unlikely that the promise to “agree a 'UK approach' with leaders in Scotland” is legally enforceable, so if there is disagreement between the UK Government and the devolved administrations over the negotiating position or the timing of the Article 50 notice we can expect that ultimately the UK Government will impose its view. However, the SP and SG should press for as much consultation as possible with them on these matters.

## **The domestic process for dealing with a withdrawal from the EU**

### The implications for the devolution settlement of withdrawal from the EU

Currently, EU law is an integral part of the devolved settlement for Scotland. According to section 29 of the Scotland Act 1998, an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament, and it will be outside competence if it is incompatible with any of the Convention rights or with EU law. Section 57 places a similar limitation on executive competence. Both limitations are supervised by the courts. See *Scotch Whisky Association v Lord Advocate* [2014] CSIH 38 & Case C-333/14. Similar provisions are found in the other devolution statutes.

On the face of it, removing the competence constraint would require the consent of the SP under the Sewel Convention. The convention is that the UK Parliament will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. The Memorandum of Understanding (October 2013) between the UK Government and the devolved administrations states:

14. The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.

It has become accepted that the convention applies also to legislation altering the competence of the SP or the Scottish Government even although the SP has (with limited exceptions) no power to amend the Scotland Act. Devolution Guidance Note No 10 refers to Bills which:

contains provisions applying to Scotland and which are for devolved purposes, *or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.*” (emphasis added)

The mechanism for indicating approval is a legislative consent motion. These are governed by the SP Standing orders, chapter 9B. Rule 9B.1 states that the consent procedure is to be used for:

“... a Bill under consideration in the UK Parliament which makes provision ... applying to Scotland for any purpose within the legislative competence of the Parliament, *or which alters that legislative competence or the executive competence of the Scottish Ministers.*” (emphasis added)

thus reinforcing the understanding that the convention applies to Bills altering competence.

It is worth noting that the consent of the SP was sought for the Scotland Act 2012 which extended legislative and executive competence in certain respects and also for the Scotland Act 2016. So, the convention appears to apply to measures extending the competence of the Scottish Parliament as well as to those limiting it. It appears clear, therefore, that any attempt to remove or modify the EU law constraint on the SP’s competence would be require the consent of the SP under the Sewel convention.

Section 2 of the Scotland Act 2016 implemented the Smith Commission’s recommendation to put the Sewel Convention on a statutory footing. It inserts a new section 28(8) into the Scotland Act 1998, stating (following the continued affirmation in section 28(7) of the power to the UK Parliament to continue to legislate for Scotland) that “it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.” There is some doubt about whether this includes the obligation to seek the SP’s consent to changes in its competence, and in any case about whether it creates any legally enforceable obligations. The obligation to seek the SP’s consent to amend the Scotland Act to remove the EU competence limitation is therefore probably best regarded as still being essentially a matter of constitutional convention rather than binding legal obligation.

The SP’s consent might not be forthcoming given that the SG and a majority of MSPs support remaining in the EU. What would happen if this were to be the case?

The UK Government and Parliament could in theory decide to respect the will of the SP and leave the competence constraint in place. The EU constraint would only apply to devolved matters. It would probably not seriously undermine attempts to remove EU-inspired laws in reserved areas such as immigration control or employment law. More importantly, it follows from the logic of devolution which is that the Scottish Parliament is generally free to legislate as it chooses on devolved

matters – but that it is also subject to competence constraints. It was never intended that it be a sovereign legislature with unlimited legal power in the manner of the UK Parliament and the constitutionally constrained character of the SP was, of course, endorsed by popular referendum. Indeed these would be good reasons for not trying to remove the constraint in the first place.

Alternatively, the UK Parliament could press on with legislation. Given the sovereignty of Parliament, the UK Parliament could simply ignore the absence of consent and legislate anyway, but this might provoke a constitutional crisis. The UK Government has never avowedly legislated in breach of the convention and the new provision which puts the Sewel convention on a statutory footing would add to the enormity of such a step. Were the UK Parliament to proceed in this way, it is likely that not just the SNP, but at least some of the other Scottish parties would object strenuously.

Repeal of the European Communities Act 1972 (ECA) would not automatically remove the competence limitation relating to EU law in the devolution legislation as this is a free-standing limitation expressed in the Scotland Act and it does not depend on the 1972 Act for its effectiveness. If all that happened was that the ECA were repealed, there would still be a legal basis in the Scotland Act for the competence limitation. However, it would mean that EU-derived rights could not be enforced in the Scottish courts against public bodies other than the Scottish Ministers or against private parties (except insofar as incorporated into domestic legislation (see further below)).

It is not clear at this stage what the UK Government's attitude would be to the retention of the competence limitation in the Scotland Act if the UK were to leave the EU. It might decide that it has no interest in what happens in areas of devolved competence in which case the competence limitation would stay. Alternatively, it might wish to purge the statute book of references to EU law for symbolic reasons, or in order to ensure consistency throughout the UK. Prediction is complicated by the evident split within the Conservative party on the EU question.

The implications for UK and Scots law of a withdrawal from the EU, particularly the need to repeal legislation and prepare new legislation to fill the gaps left by EU legislation

EU law is a substantial source of law for Scotland. The precise implications of withdrawal for areas currently governed by EU law depend on precisely how EU rights and obligations have taken effect in Scots law. Some EU law is directly effective (treaties and regulations) without any specific domestic implementing legislation. Provision would have to be made in any legislation repealing the European Communities Act 1972 for continuity of such laws pending any domestic legislation amending or repealing them. In other cases, EU legislation requires domestic implementation. This may be done either through primary legislation (of either the UK or Scottish Parliament, as appropriate), in which case it has an autonomous legal basis in domestic law which would be unaffected by EU withdrawal. Other EU obligations are implemented by secondary legislation under section 2(2) of the ECA. Again, some saving provision would have to be made when repealing the ECA.



As already noted, withdrawal from the EU would have implications for the future competence of the SP and SG. In areas otherwise within devolved competence, it would be for the SP and SG to decide what, if anything, should be done to repeal or amend existing EU-derived laws. The most pressing issues would arise in areas currently *administered* and not merely *regulated* at EU level, such as some research funding, where decisions would have to be made about how to replace or replicate those functions. Areas where there are currently reciprocal obligations between Member States, which would cease on withdrawal (subject to the terms of the withdrawal negotiations), would also require immediate attention. These would include, for instance, fishing rights and student exchange programmes.

It is not inconceivable, in areas which are in principle devolved, but where EU law currently ensures uniformity throughout the UK, that the UK Government may wish to maintain a common approach in future. Subject to the caveats above, new UK-wide legislation would require the consent of the SP under the Sewel Convention.

Alternatively, the SP and SG may wish to argue for further devolution of competencies which are currently reserved. For instance, if VAT policy were no longer to be subject to EU law, this would remove the major objection to it being devolved to the SP.

#### The scale of the task and the implications for the Scottish Government and Scottish Parliament

The scale of the task will depend on the precise terms of the UK's withdrawal from the EU, and any decisions made by the UK Government and Parliament on the future regulation of policy areas currently governed by EU law. It would be desirable for the SG (with the input of the SP) to conduct an audit of areas of devolved competence currently subject to EU law with a view to identifying priority areas. It has been reported (*The Herald*, 29 August 2016) that the SG's new Brexit minister has already embarked on such a task. This could usefully draw upon the Balance of Competencies Review conducted by the Conservative-Liberal Democrat coalition government (see <https://www.gov.uk/guidance/review-of-the-balance-of-competences>).

#### **The position of EU citizens in Scotland**

Immigration is a reserved matter under the devolution settlement. It will therefore be for the UK government to determine the future position of EU citizens in Scotland in the event of withdrawal from the EU, subject to the terms of the withdrawal agreement. However, certain matters pertaining to EU citizens resident in Scotland are within the competence of the SP. For instance, EU citizens have the right to vote in SP and local government elections, both of which are now matters within devolved competence. Accordingly, the SP could choose to maintain the voting rights of resident EU citizens. Similarly, the SP could choose to maintain the privileged status of EU citizens in relation to higher education.