

WRITTEN SUBMISSION FROM SCOTLAND'S LABOUR MEPS CATHERINE STIHLER AND DAVID MARTIN

Introduction

The European Union is the most successful peace process the world has ever known. After two World Wars and a Cold War, twenty-eight countries of their own free will, bound by shared values and the rule of law, pool sovereignty in order to face together the challenges of today's world.

The EU is the world's largest trading bloc and the largest donor of international aid for poverty-alleviation in developing countries. It plays a leading role in the promotion of democracy and human rights around the world and provides key links to the global marketplace.

Being a member of the EU gives us access to the EU internal market, the world's largest single market, with free movement of goods, services, capital and people. It also allows Scottish residents to live, study or work anywhere in the EU and allows us to engage with EU partners against organised crime, terrorism, trafficking and money laundering. We benefit from social protection under the EU such as paid holiday leave, paid maternity leave and decent working hours.

The European Structural Funds continue to help some of our most disadvantaged communities as well as the financial benefits, which flow to our rural areas through CAP. Our universities are leading the way through Horizon 2020 accessing crucial research funding whilst infrastructure projects are receiving essential funding through the European Investment Bank.

All of these benefits come to Scotland through our relationship with the European Union.

Current Terms of Membership

Scotland currently benefits from EU membership through being part of the United Kingdom of Great Britain and Northern Ireland, which has enjoyed being a Member State of the EU for the past forty-one years.

As Article 9 of the Treaty of the European Union states: "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship." [1]

In Article 20 of the Treaties of the Functioning of the European Union it states: "Every person holding the nationality of a Member State shall be a citizen of the EU. Citizenship of the Union shall be additional to and not replace national citizenship." [2]

Citizenship of an existing Member State is necessary in order to benefit from EU citizenship. If the Scottish people choose for Scotland to become an independent country, Scottish citizens will no longer benefit from EU citizenship until Scotland as a new country has successfully applied for EU membership, negotiated the terms and had the final outcome approved by not just the Scottish Parliament but also the other Member States. Some would even argue with a negotiation of such importance, the outcome of which

cannot be predetermined, there should be a vote of the Scottish people to approve such a deal.

There are clear consequences for Scotland if independence is the path chosen, none more so than an independent Scotland's relationship with the EU when no longer part of an existing Member State.

Article 48 and "the principle of continuity of effect" - A False Promise

In the White Paper the Scottish Government states: "There is no specific provision within the EU Treaties for the situation where, by a consensual and lawful constitutional process, the democratically determined majority view in part of the territory of an existing member state is that it should become an independent country." [3]

This would be unprecedented territory and far from a clear or simple process. It was until recently the position of the Scottish Government that an independent Scotland would receive "automatic membership" of the EU. We now see a very different proposition.

The Scottish Government states that: "The legal basis that the Scottish Government considers is appropriate to the prospective circumstances, is that Scotland's transition to full membership is secured under the general provisions of Article 48. Article 48 provides for a Treaty amendment to be agreed by common accord on the part of the representatives of the governments of the member states." [3]

This argument is re-iterated in the separate paper, 'Scotland in the European Union' which states: "Article 48 is a relevant legal base through which to facilitate the transition process, by allowing the EU Treaties to be amended through Ordinary revision procedure initiated by the United Kingdom Government with assistance from the Scottish Government before Scotland becomes independent to enable it to become a Member State at the point of independence." [4]

The argument that an independent Scotland could join the EU under Article 48 of the Treaty has been dealt a firm blow by several well-respected figures who represent the key institutions which the Scottish Government would have to negotiate with to secure membership of the EU for an independent Scotland: namely the European Commission and European Council.

On 20 December 2013 Jose Manuel Barroso, President of the European Commission, responded to a written question lodged in the Parliament stating: "If part of the territory of a Member State would cease to be part of that state because it was to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU. Under Article 49 of the Treaty on European Union, any European state which respects the principles set out in Article 2 of the Treaty on European Union may apply to become a member of the EU. If the application is accepted by the Council acting unanimously, an agreement is then negotiated between the applicant state and the Member States on the conditions of admission and the adjustments to the Treaties which such admission entails. This agreement is subject to ratification by all Member States and the applicant state." [5]

This also supports the previous speech of the President of the European Council, Herman Van Rompuy on 12 December 2013, who said: "If a part of the territory of a Member State ceases to be a part of that state because that territory becomes a new independent state, the treaties will no longer apply to that territory.

"In other words, a new independent state would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory." [6]

And Spanish Prime Minister, Mariano Rajoy, has publicly stated on 27 November, 2013: "I know for sure that a region that would separate from a member state of the European Union would remain outside the European Union and that should be known by the Scots and the rest of the European citizens." [7]

The institutions responsible for handling any negotiation and application for Scotland to join the EU are clear that Article 49 would be the article through which an independent Scotland could apply for EU membership. As the UK is a constituent member of both of these institutions, the assumption by the Scottish Government that the ordinary revision procedure would be initiated by the UK Government for special treatment never before given would seem to have been given a further blow.

There can be no doubt that if Scotland left the UK by a democratic vote then Scotland, once full independence had been negotiated, would no longer enjoy the benefits stemming from the UK's membership of the EU and be treated as a third country until EU membership had been secured through negotiation.

In both papers the Scottish Government's negotiating position is to argue for the "principle of continuity of effect." This principle means that Scotland as the newest applicant country has the key objectives of retaining the opt outs negotiated by the UK - opt outs which an applicant country would not be guaranteed.

As the Croatian Prime Minister stated in a recent letter: "As a matter of policy, Croatia strictly adheres to the position that all prospective EU members have to undergo a thorough, strict and fair negotiating process, fully adapting to the body of legislation, the rules and procedures of the EU. There can be no short cuts. The negotiations are, on the EU side, a consensus-based process; there needs to be necessary unanimity among the Member-States for all decisions regarding enlargement."

Therefore, the Scottish Government wants to retain all the EU benefits stemming from the UK's membership but no longer want to remain part of the UK where those benefits are presently guaranteed.

The concept of "continuity of effect" may be the position of the Scottish Government, but there is little support from other Member States to allow Scotland to benefit from UK's opt-outs on fundamental policy areas, especially when Scotland would be approaching the negotiating table from a position of relative weakness as an applicant, not an existing Member State.

The Road to Independence

The Scottish Government states it will take eighteen months to negotiate separation of Scotland from the UK, and in the White Paper there is an expectation that at the same time as leaving the UK, Scotland would succeed in being a member of the EU. This is highly improbable as is the quote of eighteen months. This information was taken from a document by James Crawford, Professor of Law at Cambridge University. However, Professor Crawford has asked Alex Salmond not to quote him in this way so the basis for this is now under question. [8]

Firstly, until Scotland is fully independent, its citizens remain UK citizens and thus EU citizens under Article 9 and Article 20. Secondly, Scotland will be recognised as an independent country, not the day after the referendum, but on the day of independence, which is estimated by the Scottish Government as the March 24, 2016. Therefore, on March 25, 2016 the formal application can be lodged with the European Commission who will then consider the application and recommend to the Council to start the negotiations.

However, looking at Iceland's application, it took eleven months from papers being formally lodged with the Commission to the Commission formally recommending to the Council for the process of accession negotiations to start. This would mean a negotiation would start, in the best-case scenario in winter of 2016, if fast tracked. [9]

The Scottish Parliament elections will be in May 2016 which means that it would be more likely that Scotland's formal negotiations would start in early 2017 and later that year will see the start of the UK Presidency of the EU. And, also by the end of that year, an in-out EU referendum will be held if the Conservatives win the 2015 General Election. There is also, under UK law, a commitment to further Treaty changes requiring a referendum. The European Union Act 2011 is an Act of the Parliament of the United Kingdom, requiring a referendum be held on amendments of the Treaty of the European union or the Treaty on the Functioning on the European Union. [10]

If we take the argument forward that an independent Scotland under Article 49 applies soon after independence for EU membership, amongst the many issues to be resolved would be membership of the Single Currency, Schengen membership, the share, if any, of the UK rebate, the number of votes in the Council of Ministers and the number of seats in the European Parliament. Given the complexity of negotiations we cannot assume a speedy or wholly satisfactory outcome to such negotiations.

The Power of Small States

The Scottish Government's publications argue that: "As an independent Member State, Scotland could also expect to increase - possibly double - its representation in the European Parliament. Presently the UK Government assigns six European parliamentary seats to Scotland. This compares unfavorably to Member States of comparable size to Scotland."

And Alex Salmond stated in a speech in Hawick in August 2013 that small EU states: "often wield great influence".

However, size is a relative concept and in the EU size is determined based on GDP, votes in the council and the number of MEPs, population and territory size.

Scotland's current share of UK seats in the European Parliament is determined by the UK Electoral Commission. An independent Scotland is likely to have a below average number of votes in the Council, quite different to the situation for the UK.

Dr Diana Panke, a lecturer in European Politics at the University of Freiburg, has stated: "Small states lack the political power to shape EU law in the same manner as bigger counterparts.

"In fact, smaller states face structural disadvantages in uploading national policies to EU level due to less bargaining power and less of the financial and administrative resources necessary for building up policy expertise. This can hamper argumentative power." [11]

There is also nothing to say other Member States would back treaty changes to increase the number of MEPs in an independent Scotland. The European Parliament now has a cap on its overall membership so other countries would have to accept losing members to accommodate any Scottish increase. [12]

Conclusion

If the Scottish Government want to retain the UK opt-outs from the euro and Schengen and enjoy the UK rebate, then the arguments to remain part of the UK which holds existing EU membership which all Scots benefit from would appear stronger than trying to negotiate treaty changes in the current political climate and to jeopardise our basic membership of an organisation we would appear to all support.

The Scottish Government may have preferred options, but in an organisation where the unanimous backing of twenty-eight countries is required, preferred options are not the same as the *realpolitik*, which seems to be missing in both papers with reference to an independent Scotland and EU membership. It is clear that Scotland were it to choose to become independent would begin the negotiation process from outside of the EU and it is unclear how long and on what terms we would be accepted as the twenty-ninth member state of the EU.

It has been suggested by Government Ministers that it is not independence but the proposed UK referendum on EU membership in 2017 that puts our EU membership at risk. We reject this argument. A 2017 referendum is far from certain and its outcome far from clear.

However, two things are clear. Firstly, a negative vote is more likely if Scotland is out of the UK, and, secondly an independent Scotland would find life extremely difficult if its biggest neighbour and biggest market was outside the EU. It is not the case that saying 'No' to independence is saying 'Yes' to a UK outside of the EU. By saying 'No' to independence the Scottish people are keeping their influence over the UK government and its strong position in the EU, with all of the benefits highlighted above.

In conclusion, the best way to guarantee Scottish people maintain and enjoy the benefits of EU citizenship is through our continued membership of the United Kingdom and the UK's continued membership of the EU.

External Links

[1] Article 9 - Treaty of the Union - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF>

[2] Article 20 - Treaty of the Functioning of the European Union - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>

[3] White Paper - <http://www.scotland.gov.uk/Publications/2013/11/9348>

[4] Scotland EU paper - <http://www.scotland.gov.uk/Resource/0043/00439166.pdf>

[5] Remarks by Jose Manuel Barroso, President of the European Commission - <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2013-013409&language=EN>

[6] Remarks by President of the European Council Herman Van Rompuy, on Catalonia - http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/140072.pdf

[7] Spain: Independent Scotland 'will stay outside EU' - <http://www.itv.com/news/update/2013-11-27/spain-independent-scotland-would-stay-outside-eu/>

[8] Professor James Crawford on 18-month timescale - <http://www.independent.co.uk/news/uk/politics/exclusive-alex-salmond-hid-legal-reality-of-an-independent-scotlands-eu-status-9026325.html>

[9] Iceland accession timescale - http://europa.eu/rapid/press-release_IP-10-759_en.htm?locale=en

[10] European Union Act 2011 - <http://www.publications.parliament.uk/pa/cm201011/cmbills/106/2011106.pdf>

[11] Dr Diana Panke – The Influence of Small States in the EU - http://www.ucd.ie/t4cms/wp_08-3_diana_panke.pdf

[12] Article 14 of the Treaty of European Union - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:EN:PDF>