

WRITTEN SUBMISSION FROM LAW SOCIETY OF SCOTLAND

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

This response has been prepared on behalf of the Society by members of our Constitutional Law Sub-Committee ('the committee'). The committee is comprised of senior and specialist lawyers (both in-house and private practice). There is no unanimous view on the committee on many of the issues raised in the current debate.

The committee welcomes the opportunity to consider and respond to the call for written evidence on the Inquiry on Scotland in the European Union and has the following comments to make.

General Comments

The Society published its discussion paper "Scotland's Constitutional Future: views, opinions and questions on 5 August 2013.

That paper contained a section on what would independence mean for Scotland's membership of the European Union (EU) and international organisations.

In preparing that paper, the Society held a number of round table events, one of which focussed on Scotland's membership of the EU should it become an independent country.

EU membership in the event of Scotland voting for independence is one of the most vexed topics. It formed a significant part of the opinion by Professors Crawford and Boyle attached to the UK Government's first Scotland Analysis paper: "Devolution and the Implications of Scottish Independence" (February 2013). Since then there have been a number of important contributions to the debate:-

1. The White Paper "*Scotland's Future*" published by the Scottish Government (November 2013).
2. "*Scotland in the European Union*" published by the Scottish Government (November 2013).
3. "*EU and international issues*" published as part of the Scotland Analysis series by the UK Government (January 2014).

There have also been a number of individual contributions which have expressed a variety of views. These include evidence given to the Scottish Parliament's

European and External Relations Committee as part of the committee's "Membership of the European Union" Inquiry and to the House of Commons Scottish Affairs Committee inquiry on "The referendum on separation for Scotland".

Scottish Government's views

The Scottish Government's position is that there is "a legal framework within the EU Treaties by which Scotland can become an independent member state of the EU from the date of membership". The Scottish Government is of the view that following a vote for independence, the Scottish Government would immediately enter into negotiations with the UK Government and all other EU member states to ensure that an independent Scotland achieves "a smooth and timely" transition to independent membership of the EU. This membership would be negotiated "during the period in which Scotland remains part of the UK and by extension part of the EU" (*Scotland in the European Union* Paragraph 3.2) in the 18 month period between the independence vote on 18 September 2014 and final independence being secured by legislation on 24 March 2016.

The Scottish Government believes that the 18 month period between the Referendum and formal independence provides "sufficient time for interlocking discussions setting an independent Scotland's terms of EU membership as well as the revised terms of the remainder of the UK's terms of membership to be satisfactorily concluded" (*Scotland in the European Union* Appendix 5, page 85).

The Scottish Government takes the view that Scotland would not be required to leave the EU and take its place in a queue behind countries presently negotiating entry to the EU. The current candidate countries are Iceland, the former Yugoslavia Republic of Macedonia, Montenegro, Serbia and Turkey. It is true that the pace and progress of accession negotiations are not determined by a fixed timescale but rather depend on the fulfilment of the Copenhagen criteria, the adoption of the acquis, and the political dynamics in the candidate country, the EU, as well as EU Member-States. These processes run parallel to each other and are not (necessarily) dependent on each other, unless there is a political will in the EU or the EU Member-States to link a number of accessions together, as was evident in 2004 and 2007 but not in 2013.

An independent Scotland having to apply for EU Membership would most probably already meet the Copenhagen criteria (depending on the new constitutional arrangements of an independent Scotland) and the acquis (depending on what infringement proceedings are ongoing). The key issues for negotiations will be what to do with the various UK opt-outs and the budgetary issue. It is difficult to predict the actual time frame which these negotiations will take.

In "*Scotland in the European Union*", the Scottish Government acknowledge that the EU treaties make no specific provision for the consequences for EU membership where part of an existing member state becomes an independent country (paragraph 3.5)

The Scottish Government discount Article 49 Treaty on the European Union (TEU) procedure for membership because this applies to new candidate countries

(paragraph 3.6). Instead the Scottish Government considers the alternative procedure under Article 48 as the legal basis to proceed (paragraph 3.7 and 3.8).

Article 48 TEU states:-

“1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures. EN 30.3.2010 Official Journal of the European Union C 83/41

Ordinary revision procedure

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.”

Article 48 TEU requires unanimity amongst existing EU Member States. Whether Scotland would remain or become a member of the EU, amendments to the treaties would be needed regarding matters such as the number of MEPs or number of votes

in the Council. If Scotland wanted to take advantage of the current UK arrangements for membership e.g. UK positions regarding the Euro, the Schengen Agreement, the justice and home affairs agenda or the outcomes of budgetary negotiations e.g. the UK budget rebate, these would be matters for negotiation with the EU Commission, the EU Council of Ministers and ultimately within the national governance of member states. The UK as a Member State and one most affected by Scottish independence would have a significant role to play in discussions between Scotland and the EU institutions and other Member States. Negotiation of Scottish “opt-outs” could make the negotiations more protracted.

A number of commentators have written on this issue, some supporting the Scottish Government’s position and some not. Comment has focussed on whether Article 48 procedure or Article 49 procedure is most appropriate and whether the 18 month period between the Referendum and the date identified as independence day is sufficient to achieve all the required negotiations with the UK Government regarding Scotland’s independence from the UK as well as the negotiations to establish Scotland as a member state of the EU. The Society cannot take a view on whether 18 months is enough time to complete all the negotiations, individual members reflect a range of views. Speculation about whether 18 months is sufficient or not is, in one sense, immaterial.

What is essential is that planning has been made within both Scottish and UK Governments to conduct the negotiations and what contingencies are in place to deal with the political issues which both sets of negotiations will uncover.

Notwithstanding that the Scottish Government believes that EU membership would be settled within 18 months, the Government needs to detail what it would propose in the event that negotiations for admission were not concluded in the 18 months window between a ‘yes’ vote and “Independence Day”. Would Independence Day be moved back to allow for conclusion to negotiations or would “Independence Day” be a fixed date requiring Scotland to leave the EU and re-join when the negotiations were concluded? Is there a middle way which would allow discussions on fundamental issues to be concluded prior to “Independence Day” with other less significant matters being left until afterwards?

In relation to currency, the Scottish Government has made its proposed course of action clear which is to adopt the pound sterling within a formal currency union with the UK (Scotland’s Future, Chapter 3, page 110). The terms of such a currency union would be the subject of negotiation with the UK. If those negotiations proved to be unsuccessful, an independent Scotland would be left with a number of currency options such as: unilateral use of the pound sterling outside the scope of a currency union; unilateral use of the Euro outside the scope of monetary union; or adoption of a new Scottish currency. The outcome of the negotiations with the EU would determine whether an independent Scotland would be legally committed to join the Euro – as are all Member States with the exception of the UK and Denmark – or benefit from the same derogations as the latter. An independent Scottish Government may be legally committed to join the Euro but still decide not to meet and sustain the membership criteria over a certain period of time, as is the case with Sweden. It was acknowledged that the European Central Bank requires Member States to nominate financial regulators and to take part in EU wide exchange

system. The Scotland Analysis paper by the United Kingdom Government entitled “Currency and Monetary Policy” (April 2013) considered the issues arising from a formal sterling currency union the use of sterling without formally joining a currency union, the Euro or introducing a new Scottish currency. This paper highlighted a number of issues concerning adoption of a formal sterling currency union including the need for a negotiated set of economic and fiscal constraints.

As Mark Carney, Governor of the Bank of England said in a speech to SCDI on 29 January 2014, “A durable successful currency union requires some ceding of national sovereignty”. It would be a matter of political decision for the Scottish Government as upon what terms it would accept a currency union if one were negotiated. Similarly, it would be a political decision to pursue one of the other currency options e.g. the Euro.

UK Government’s views

The UK Government takes the view that an independent Scottish state “could not automatically become a new member of the EU upon independence” (Scotland Analysis: EU and international issues Paragraph 3.11). This rules out the possibility that membership could be negotiated while Scotland remains part of the UK and is therefore diametrically opposed to the Scottish Government’s opinion that it could be negotiated during the 18 month period after the referendum and has various consequences.

It follows that the UK Government takes the view that Scotland would have to apply for membership as any other State not a member of the EU by using Article 49. This Article requires such states to apply for membership, obtain the unanimous support of the European Council and have membership approved through an Accession Treaty which would need to be ratified in accordance with the constitutional requirements of each Member State. Until this was done, Scotland would not be a member of the EU. (Para 3.14 et seq of Scotland’s Analysis: EU and International Issues)

The UK Government takes the view that, as a new State, it would be very difficult for Scotland to negotiate similar opt-outs, such as from the euro or Schengen, as the UK currently enjoys (para 3.24)

The UK Government has not indicated:-

- whether it would attempt to negotiate the terms of Scotland’s membership under Article 48 before Scotland becomes an independent state and during the 18 month period;
- whether it would support any application by Scotland, after it has become a new state, for membership of the EU and for Scotland to have similar opt-outs as the UK currently enjoys.

Law Society’s views

A number of general themes raised in the Society’s 2013 paper continue to be relevant:-

- a) The issue of Scottish independence presents the EU with completely unchartered and unlegislated territory.
- b) Politics in this matter will be more important than the formal legal position. The EU treaties have no provision for cases of secession; the rules which exist apply to accession to or withdrawal from the EU or amendment of the treaties.
- c) There are different schools of thought about Scottish membership of the EU. According to some, after independence, the EU treaties will not apply to Scotland (Article 52 TEU) and Scotland will need to apply for membership of the EU. According to others, Scotland will negotiate its membership of the EU from within the EU as part of an existing member state employing Article 48 or Article 49 TEU. The UK Government in its paper "Scotland Analysis: EU and international issues" states that the ordinary revision procedure is "the mechanism by which the Treaties can be amended and has never been used to expand the membership" (Paragraph 3.1.5, Page 63).
- d) Individuals matter in the EU as much as institutions. The dissolution of the UK single market operating as a single entity within the wider EU single market will be a significant change for individuals. The impact of such a change including new rules governing relations with rUK as a separate member state requires further explanation by the respective campaigns and the respective Governments.
- e) The issues around citizenship of Scotland, citizenship of the UK and EU citizenship need to be clarified. Individuals need reassurance about their nationality status and how that impacts on what rights they have and the obligations to which they are subject.

The EU membership conditions for new candidate member states are set out in Article 49 TEU to which the Copenhagen criteria should be added. However, the Scottish Government has concluded that Article 49 provides for conventional enlargement and does not consider this as the appropriate route to independent membership.

On the other hand, the EU membership issue has been commented on by the Rt. Hon. Sir David Edward QC a former judge of the European Court of Justice and one of the foremost European lawyers in Scotland as follows:-

"Since the situation would be unprecedented, and there is no express provision in the Treaties to deal with it, one must look to the spirit and general scheme of the Treaties".

Sir David's opinion repeated recently in evidence to the European and External Relations Committee is that, in accordance with "their obligations of good faith, sincere cooperation and solidarity, the EU institutions and all the Member States (including the UK as existing), would be obliged to enter into negotiations, before

separation took effect, to determine the future relationship within the EU of the separate parts of the former UK and the other Member States.”

This is true but the outcome of such negotiations would only be known after their conclusion which may or may not coincide with the Scottish Government’s 18 month window for negotiation.

Clarity on the route towards EU membership is a necessity in the context of Scotland’s constitutional future and both the UK and Scottish Governments need to provide clear answers to the questions raised by the range of opinion on these issues. It may be that legal opinion currently being sought from the European Parliament may shed light on these issues.

Specific questions

What is the value of membership of the European Union for Scotland?

Annex 3 of the paper “Scotland in the European Union” sets out the Scottish Government’s view of the value of EU membership for Scotland by analysing the European Single Market, trade flows, competition, EU regulation, benefits of EU membership for consumers, foreign direct investment flows, fiscal flows, access to networks – research and development maximising the economic potential of the EU.

The Society is of the view that Scotland’s membership of the EU currently as a constituent part of the UK brings a number of benefits to people in Scotland, particularly in terms of free movement of people, goods, services and capital. These are crucial to trade, provision of services, establishment across the EU and the resolution of cross-border disputes. An Independent Scotland as a Member State of the EU would benefit in a similar way from membership.

What are the potential alternatives to European Union membership for Scotland for example the European Free Trade Association?

Annex 4 of the paper “Scotland in the European Union” sets out the Scottish Government’s views on why the alternatives to EU membership are not attractive by examining EEA membership or the “Norwegian way”, the benefits and costs of EEA membership, FTA or the “Swiss way”, staying as part of the UK and concludes on the view that EU membership is the best alternative.

The Society notes that there are alternatives to EU membership:-

1. The European Free Trade Association (EFTA)

EFTA (Norway, Iceland, Switzerland and Liechtenstein) is another organisation that Scotland may wish to join if EU membership is delayed. The EFTA convention regulates free trade among EFTA member states.

2. European Economic Area (EEA)

The EEA is a separate and distinct organisation from EFTA.

Member states of the European Union are also contracting parties to the European Economic Area Agreement individually and as EU member states. The provisions of the EEA Agreement relative to persons, services capital and establishment are the same as those of the Treaty on the Functioning of the European Union. The detailed single market laws set out in EU legislation (including in relation to procurement and state aid) are extended (sometimes in adapted form) to non-EU EEA states by EU EEA Joint Committee Decisions and enforced in those states by the EFTA Surveillance Authority and the EFTA Court (which despite their names are institutions of the EEA not of EFTA).

Switzerland is a party to the Convention that established the European Free Trade Area (EFTA), an organisation that is international but not supranational. Following a national referendum in 1992, it did not become a party to the Agreement on the European Economic Area (EEA). It is the only EFTA member that is not also an EEA state.

The EU and Switzerland have entered into a series of bilateral agreements and there is a framework for the interpretation and application of the agreements with the corresponding provisions of EU law.

The real key issue (apart from no CAP re agriculture or CFP re fishing) is that non-EU EEA members have no standing on whether the EU will adopt rules and this may make it harder for them to influence their content, furthermore they are bound by much of the EU legislation as a condition of market access but are not involved in the EU legislative process. However it is for the non-EU EEA states to decide by consensus whether or not to adopt any given single market law as part of the EEA legal order.

What are the factors that determine the role that small states can take in the international sphere?

The Society has no comment to make.

Conclusions

The Society takes the view that:-

1. Scotland would, in the event of a 'yes' vote, and after the necessary legislation in the UK Parliament creating the constitutional platform have the capacity to be recognised as an independent state.
2. Scotland, as part of the United Kingdom complies with the European Union Treaties and the EU Acquis. Scotland's current position as part of the UK might assist an independent Scotland's acceptance as an EU Member State because certain requirements are already satisfied but negotiations would still have to be concluded with the EU regarding the terms of Scotland's membership. This would particularly concern opt-outs from the treaty requirements and the UK's budgetary rebate.

3. What process adopted to ensure EU membership is a political matter. Whether the Scottish Government's preferred option of Article 48 procedure or the UK Government's view that this is inappropriate will prevail will be a matter involving the Scottish Government, the UK Government and other European Member States. An agreed position between these bodies is unlikely to emerge before the referendum. Voters will therefore make their choice on the basis of the information provided by the campaigns and commentators.
4. It is also a political matter as to what might be the terms of Scotland's membership of the EU which would be supported by the UK and Scottish Governments in any negotiation with other Member States. An agreed position between those Governments on such matters is also unlikely to emerge before the referendum and voters will have to make their choice in the absence of such agreement.
5. Scotland would as an independent state be qualified to join other Treaty organisations.

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