

WRITTEN SUBMISSION FROM BUSINESS FOR SCOTLAND

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Business for Scotland is a pro-independence business network and think-tank with over 1,200 members from across Scotland. Business for Scotland submits the following information to the Scottish Parliament's European and External Relations Committee on proposals for an independent Scotland: membership of the European Union (EU).

The submission will focus on four areas:

- 1) Legal opinion provided by Brandon J Malone, Solicitor Advocate;
- 2) Economic and political reasons for Scotland's continued membership of the EU;
- 3) Benefits of an independent Scotland in the EU;
- 4) Risks to EU membership from Westminster policy.

There is an appendix with a fuller opinion from Brandon J Malone.

EXECUTIVE SUMMARY

The Business for Scotland submission is positive about the benefits of and clear about the position regarding an independent Scotland's continued membership of the EU.

The legal opinion contained states that Scotland will continue its membership of the EU by way of an amendment to treaties.

The economic and political context to continued membership is set out in section 2 and 3. It is clear that an independent Scotland will continue as a member of the EU and that this is in Scotland and the rest of Europe's mutual interests.

Section 4 outlines the risks to Scotland's EU membership as a result of Westminster policy. This is a result of the UK Government's refusal to engage with the European Commission prior to the referendum and the political direction in the rest of the UK.

1) Legal opinion provided by Brandon J Malone, Solicitor Advocate.

Business for Scotland sought and received a legal expert's view on the issue of an independent Scotland's membership of the EU. The key points in Mr Malone's submission are listed here including a response to the UK Government paper entitled "Scotland analysis: Devolution and the implications of Scottish independence".

- It is the UK Government's contention that Scotland will be a new state following a Yes vote.
- There are a number of problems with the position set out in the paper.
- The UK is a unitary state, but this does not fully explain the relationship between Scotland and rUK for internal purposes.
- It is questionable that only rUK will inherit the international benefit of the union between Scotland and rUK, especially in the context of EU membership.

- Even if International Law counted rUK as the sole continuing state it would be inappropriate for rUK to take all benefit of the UK's international relations given Scotland's historical position within the union.
- The UK Government paper gives insufficient consideration to Scotland's position within the EU.
- A stronger analysis of the politico-legal reality of EU membership comes from Sir David Edward QC.
- A Yes vote will not require Scotland to accede as a new state via the full accession route for new applicants; it will be a question of amending treaties to provide continuing membership for both Scotland and rUK. The UK is of course negotiating the terms of its membership at present.
- Although Business for Scotland believes the position to be clear, if there is any uncertainty it can be reduced by the UK Government asking for clarity from the European authorities. It would be beneficial for the UK Government to engage in such discussions now.
- Negotiation with EU institutions will be necessary for both parties - Scotland and rUK.
- In this instance, it would be sensible to discuss and agree a joint approach.
- There have been calls for the UK Government to clarify its position from the Electoral Commission, the House of Lords and the Law Society of Scotland.
- To "deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect" (Electoral Commission advice, para 5.42), the UK Government needs to engage with the Scottish Government, the EU and other international bodies to provide clarity to voters on the consequences of a Yes vote.

2) Economic and political reasons for Scotland's continued membership of the EU

There are a number of reasons why Scotland's continued membership of the EU is mutually beneficial on both an economic and political basis:

- Business and trading links

Scotland's economy has strong links to the European market both in terms of exports and imports. Trading within the EU Common Market benefits the recipients and suppliers of these goods and services. Therefore it would be unwise for any party to be removed from its economic and political structure, especially without any form of political or popular consent.

- The strategic importance of Scotland

Scotland's natural resources, especially its oil and gas, renewables and fishing stocks ensure Scotland is of significant strategic importance to the prosperity of the European Union, not least because energy security is of paramount importance in today's world. EU policy such as the Commission's 2030 framework for climate and energy policy and the EU Common Fisheries Policy (CFP) benefit from Scotland's participation in the EU.

- Freedom of movement for EU nationals and other acquired rights

Tens of thousands of EU nationals live, work and study in Scotland. These EU citizens enjoy freedom of movement within the EU. As part of the EU, citizens in Scotland have acquired such rights. The freedom of movement is a key example of the benefits of a transitional arrangement, whereby the political rights of membership are maintained until Scotland is fully represented within the EU upon independence in March 2016. Across the year 2011-12, 17,000 non-UK EU students enrolled at Scottish Universities.

- The EU favours enlargement and integration

The political direction of the EU has long been in favour of enlargement and integration. The European Coal and Steel Community began with 6 nations. Since 1952, there have been 7 processes of enlargement, so that the EU now has 28 members (the latest being Croatia in July 2013). 5 states currently are official candidates for membership.

In contrast, there is no EU process for removing a state or nation from the EU, as no state has ever left. Even in the case of Greenland - as an autonomous region of Denmark - the process of leaving the EU from popular consent to completion occurred over 6 years. It is therefore politically inconceivable that Scotland will not continue as a member of the EU.

3) Benefits of an independent Scotland in the EU

Benefits of EU membership for Scotland's national and commercial interests include:

- Representation in the Council of Ministers

Independent nations are represented within the Council of Ministers of the EU. This would increase the opportunities to directly promote Scotland's economic, political and business interests. Where there is a mutual benefit for Scotland and rUK to cooperate, there will be two voices at the top table rather than one.

- A greater number of MEPs to represent Scotland's interests in the European Parliament

Independent nations receive a greater sum of MEPs than areas classified as 'regions'. Scotland currently has the same number of MEPs as Luxembourg, which has a population around 10 times less than Scotland. Ireland currently has double Scotland's representation in the EU Parliament.

This would also increase the opportunities to promote and increase the voice for Scotland's economic, political and business interests in Europe.

- Direct engagement in negotiations on issues such as fishing quota allocation

Scotland's fishing community has been poorly represented by the UK during the development of the EU Common Fisheries Policy. The majority of the UK catch sits within Scottish waters. Business for Scotland believes that an independent Scotland will be represent these economic interests far more effectively than UK Governments which tend to sacrifice Scottish interests for priorities elsewhere in the UK.

- A rise in agricultural support funding

An independent Scotland can also propose a fairer funding settlement. In the latest Common Agricultural Policy (CAP) budget, an independent Scotland would have received a cumulative uplift of €1 billion from 2013 to 2020. An independent Scotland's membership of the EU will therefore benefit agriculture and farming in Scotland.

4) Risks to EU membership from Westminster policy

- Refusal to approach the European Commission

The current Westminster Government has refused to approach the European Commission for a judgment on an independent Scotland's continued membership of the EU. This places electoral self-interest ahead of the best interests of the Scottish electorate, who deserve access to appropriate information in regards to this year's referendum. Uncooperative behaviour with political motives is a risk to Scotland's political and economic interests and goes against the spirit of the Edinburgh Agreement.

- Proposal of an in/out EU referendum from Prime Minister David Cameron

In January 2013 the UK Prime Minister, David Cameron, promised an in-out referendum on UK EU membership. It is a very real possibility that the UK will vote to leave the EU during the next Westminster parliamentary session. Several UK Cabinet Ministers have stated they are currently in favour of leaving the EU. This is a cause of deep economic uncertainty for business across the UK and is therefore damaging to Scotland's economic interests.

Examples of this include Nissan and Aggreko. The Chief Executive of Nissan, Carlos Ghosn, said that the UK existing the EU would lead the company to "reconsider our strategy and our investments for the future." Rupert Soames OBE, Group Chief Executive of Aggreko, said "I don't see why somebody wanting to build a factory that had the EU as a major trading partner would put it in the UK, given that the terms of trade would be completely unknown."

- Public polling data on EU membership

Current polling on EU membership finds that there is a majority in favour of the UK leaving the EU. This is not the case in Scotland. This evidence raises the prospect that the majority of the UK electorate could vote to leave the EU, while a majority in Scotland vote to remain EU members. Scotland would then be removed from the EU against the will of its political representatives and the Scottish public. (See sources)

- Party political direction

Recent political trends illustrate a growing political divergence on European issues between Scotland and the rest of the UK. Polling and by-election results in England have demonstrated a rapid growth of the euro-sceptic UKIP party. UKIP are challenging to win the May 2014 European elections. In Scotland, UKIP has failed to save a single deposit (by crossing a 5% threshold) in any by-election in Scotland.

These diverging ideals and outlooks highlight the growing risk that Scotland's policy in regards to the EU will be set by a UK consensus that is against Scotland's economic and political interests.

Sources

'Singular Status' Brandon J Malone, Journal of the Law Society of Scotland. Can be accessed here: <http://www.journalonline.co.uk/Magazine/58-11/1013301.aspx#.UuKLjJU4nwc>

Scottish & rUK EU membership polling:

The vast majority of UK-wide polling placed 'leaving the EU' firmly ahead of staying in the EU.

September 2013: 36% Stay, 44% Leave (YouGov)
https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/oqhuuatt8g/YG-Archive-September-Eurotrack-results-270913.pdf

August 2013: 32% Stay, 53% Leave (Opinium)
http://news.opinium.co.uk/sites/news.opinium.co.uk/files/VI_06_08_2013.pdf

May 2013: 24% Stay, 46% Leave (ComRes)
http://www.comres.co.uk/polls/loS_SM_Political_Poll_May_2013.pdf

Scotland polling samples have found a majority in favour of continued EU membership.

February 2013: 53% Stay, 34% Leave (Ipsos-MORI)
<http://www.ipsos-mori.com/researchpublications/researcharchive/3131/Scots-want-EU-referendum-but-would-vote-to-stay-in.aspx>

This Ipsos-MORI poll contrasted with similar research by the polling agency in England which found a result of 42% Stay, 48% Leave in England.

<http://www.ipsos-mori.com/researchpublications/researcharchive/3075/Ipsos-MORI-Political-Monitor-November-2012.aspx>

March 2012: Scotland 0% difference between 'Stay and Leave'; Wales 38% Stay, 46% Leave; England 35% Stay, 51% Leave.

Page 29:
[http://cdn.yougov.com/cumulus_uploads/document/w3436dvzzd/Democracy%20Results%20120124%20GB%20sample%20\(2\).pdf](http://cdn.yougov.com/cumulus_uploads/document/w3436dvzzd/Democracy%20Results%20120124%20GB%20sample%20(2).pdf)

Appendix

22 January 2014

The road to membership and Scotland's representation in the EU

Earlier this year, the UK Government issued a paper entitled "Scotland analysis: Devolution and the implications of Scottish independence"..

The paper was the first in the Government's "Scotland Analysis" series, which according to the Scotland Office website "will set out the <facts> about a range of constitutional, economic and policy issues that are critical to considering Scotland's future".

The Government's contention, based on the legal opinion annexed to the paper, is that in the event of a Yes vote, Scotland will be a new state, inheriting none of the treaty privileges and obligations of the current UK, and that accordingly, Scotland will have to apply for membership of the EU and other treaty-based organisations, whilst the rump of the UK ("rUK") will continue to enjoy all such privileges automatically.

The paper also asserts that the UK Government cannot "pre-negotiate" the terms of independence with the Scottish Government.

There are a number of problems with the paper. In the first place, in the context of an argument about competing legal principles (particularly concerning public international law), opinions are plentiful; "facts" are more difficult to come by. To the extent that the paper presents legal opinion as "fact", it is therefore misleading.

Regarding the refusal to "pre-negotiate", no one expects a binding agreement, given that neither Government has a mandate to do that at the moment. There is, however, nothing to prevent the UK Government from setting out its position on the constitution (and other matters) in the event of a Yes vote, so that Scottish voters can make an informed choice. The Electoral Commission, in its published advice on the proposed referendum question, has called on both Governments to set out a joint explanation to voters on the consequences of a Yes and a No vote.

There are two main sections to the paper: a legal opinion by Professors James Crawford of Cambridge University and Alan Boyle of Edinburgh University, forming the appendix, and an analysis by the UK Government. The latter is a political document, putting a gloss on the legal opinion. It is logical to look at the legal opinion first.

At 108 pages, the opinion is quite detailed and wide ranging, but not as wide in scope as the analysis paper suggests. It is restricted to an analysis of how international law would treat the two new state entities following Scottish independence. The analysis goes further and purports to set out the implications of independence for Scotland in a factual way.

The conclusions of the opinion are set out in the executive summary. Paragraph 1 is worth quoting: "If Scotland were to become independent after the referendum..., it would be with the UK's agreement rather than by unilateral secession. In practice, its status in international law and that of the remainder of the UK (rUK) would depend on what arrangements the two governments made between themselves before and after the referendum, and on whether other states accepted their positions on such matters as continuity and succession. But there are a number of legal considerations."

There are four distinct propositions here. The first (agreement rather than secession) entails that Scottish independence comes about by a mechanism provided for within the UK constitution (albeit one that unpicks elements of that constitution). That is a very important point, particularly in the context of Scotland's membership of the EU.

Secondly, in practice, Scotland's status, and that of rUK, in international law will depend on what arrangements the two Governments make between themselves "before the

referendum and after". This aspect of para 1 does not receive much attention in the opinion, and is more or less ignored in the analysis document.

Thirdly, even if Scotland and rUK did agree on status, there would still be a question whether other states accept the position agreed - an obvious function of the loose nature of international law and the sovereignty of states.

Finally, having accepted the practical position that negotiation and agreement are the most important mechanisms for determining status, the professors observe that a number of legal considerations, i.e. international law on state continuity and succession, may have a part to play.

Taken as a whole, this is the one of the most sensible summaries of the reality of a Yes vote for Scotland's constitutional position that we have seen to date.

It is clear that there is no exact precedent for Scottish independence, and that Scotland's relationship with the EU and the world will depend on a series of negotiations with rUK, other states and supra-national organisations.

However, the professors then proceed to consider the possible outcomes in international law, concluding that the most likely is that Scotland will be regarded as a new state, with rUK seen as the continuing state for all purposes including EU membership. There are a number of issues with this conclusion.

Scotland's Status within the United Kingdom

The first is that having correctly observed that the actual outcome will depend on negotiation agreement, the advice then analyses the position as one where Scotland and rUK are contesting the right to continuator status. No proper account is taken of Scotland's position within the Union. In fairness, the professors were not asked to consider the "rights" of Scotland and rUK inter se following a Yes vote, but given that the analysis paper purports to set out the "implications of Scottish independence" in a "factual" way, they should have been.

This lack of discussion gives the impression, and has allowed the UK Government to claim, that it is clear (factual even) that rUK will be the continuator state, and Scotland will have to apply as a new state to various international bodies including, most importantly, the EU.

Now, there is little doubt that viewed from the outside, the UK is a unitary state. Whilst Scotland has a separate status in some international organisations (sport, for example) and is a separate jurisdiction for certain legal purposes, Scotland has no independent legal personality, and cannot enter into treaties on its own behalf. Scotland is not an international person in that sense.

But to leave matters there is to ignore the relationship between Scotland and rUK for internal purposes. Within the UK, Scotland does have a legal personality of sorts, and a clear constitutional status. The Acts of Union have some continuing force. This is impliedly acknowledged at various points of the opinion (para 38, for example).

Having conceded that Scotland's international status post-independence would depend in large part on negotiations between Scotland and rUK, the professors, or in any event the

analysis authors, should have focused more on the present relationship between Scotland and rUK, and the principles that would apply to any negotiations between them, before presenting the "facts" on the implications of Scottish independence.

Whatever the position in international law, such negotiations, whether before or after the referendum, would be influenced greatly by the history and development of the Union.

Absent agreement to the contrary, there is little doubt that most states would view rUK as the continuator state and Scotland as a new state, but is the UK Government's position really that Scotland has no entitlement to any of the accrued international benefits of membership of the Union? Scotland is no rebel breakaway enclave that has never enjoyed nation status. What is proposed is the democratic, negotiated dissolution of what is, in the grand sweep of history, a comparatively short-lived Union.

Is it at all credible for the Westminster Government to say that in the event of a Yes vote, rUK will inherit the UK's treaty benefits, including in particular EU membership, and Scotland will not? Is there a difference in principle between the division of that asset, and the division of, say, Foreign Office property abroad, or the national debt? Should it be acceptable to anyone in Scotland, however they vote, that the UK Government should hold such a view of Scotland's position within the UK?

Scotland's position in relation to the European Union

The paper gives insufficient consideration to Scotland's position in relation to the EU. This, after all, is the main practical issue in this context. Having to reapply to most international organisations as a new member would not be particularly traumatic, and in some cases (the UN, for example) entry is more or less automatic. That cannot be said of the EU. Failure to secure EU membership would have huge implications.

Whilst the professors acknowledge that the EU is a "new legal order of international law" (cf <Van Gend en Loos> [1963] CMLR 105), their suggestion that "whether a state is a member of the EU has hitherto been treated as a matter of international law" is weak, citing as authority a statement by Mr Barroso on behalf of the Commission.

A better analysis of the politico-legal reality comes from Sir David Edward QC in his recent blog "Scotland and the European Union": in the event of a Yes vote, it will not be necessary for Scotland to accede to the EU as a new state via the full accession route for new applicants; it will be a question of negotiating an amendment to the treaties to provide for the basis of continuing membership for both Scotland and rUK.

Given the culture, history and politics of the EU, and the rights that EU citizens from other member states enjoy in relation to its territory (fishing rights, for example) and institutions (student funding, for example), it is inconceivable that Scotland would be expelled from the EU even on an interim basis.

Any uncertainty could be removed by the UK Government asking the European Commission for a formal view and/or taking a more proactive approach now, but of course the UK Government won't pre-negotiate.

Pre-negotiations

The analysis paper asserts that both the UK and Scottish Governments have acknowledged the need for negotiations, and accept that these can only take place after a referendum.

This is misleading. The Scottish Government has called on the UK Government to enter into open discussions on matters that would need to be settled following a Yes vote.

Whilst formal negotiations leading to a binding agreement will have to wait, it would be beneficial to have discussions now, so that so far as possible the UK Government has set out its position, or at least its approach to negotiations, and voters can make an informed choice in the referendum.

For present purposes, the important question is how the UK Government will behave in relation to EU membership. A sensible approach, consistent with Scotland's position within the UK, would be to agree a joint approach to the EU asking it to treat Scotland and rUK as joint successors (in the broad sense) to the UK, and to renegotiate the treaties on the basis of a division of the current benefits of EU membership.

The state continuity doctrine is very interesting, but it is naïve to suppose that other EU members will allow rUK to inherit the current UK representation rights in the EU Parliament, the rebate, and all other benefits, correlating as they do to the UK's size and population. Negotiation will therefore be necessary for both new states, as Sir David has made clear. It would be sensible to discuss and agree a joint approach, in advance of the referendum.

The question of sovereignty

An interesting point which the paper does not really address, and which should inform the debate, is the issue of sovereignty and the impact of the Edinburgh Agreement and a Yes vote.

English constitutional theory holds that the Crown in Parliament is sovereign, and Westminster could, if it desired, repeal the Acts of Union and the guarantees they contain. (For a very interesting discussion of the Treaty and Acts of Union, and whether they constitute "fundamental law", see <Lord Gray's Motion> 2000 SC (HL) 46, Lord Hope in particular.) Parliament has in fact altered the Acts on a number of occasions.

It has been observed (<MacCormick v Lord Advocate> 1953 SC 000) that the sovereignty doctrine is not part of Scots law, but it is a little far fetched to suggest that Scotland had popular sovereignty prior to the Union.

This is in any event a stale argument. In reality there is no recognition of "fundamental law" (as some would call parts of the Acts of Union) in the UK. It is realpolitik that keeps the preserved Scottish institutions, and the Scottish Parliament for that matter, safe from repeal, not any lack of power in the legislature.

A more interesting question is how and whether the Scottish electorate can exercise sovereignty. The UK is a unitary state (albeit the union has never been fully perfected), and devolution does not alter that. However, it is clear that the Scottish Government has a mandate to hold a referendum, and by virtue of the Edinburgh Agreement, that the UK Government has consented to such a referendum taking place. Whether consent was necessary is a moot point.

The live point is that a Yes vote would be an expression of the will of the Scottish electorate. Would it be the exercise of sovereign will? Is the Edinburgh Agreement a concession of sovereignty to that electorate?

If there is a Yes vote, what would be the constitutional position of the Scottish Government pending independence? Would it be an independent government within a UK where there has been a fracturing of sovereignty?

What would be the position of the UK Government? Scottish MPs are rarely crucial to its majority, but what would their role be? In UK constitutional theory, strictly speaking, a Yes vote changes nothing, and yet it changes everything. We would find ourselves in a black hole, a legal singularity, where the normal rules break down.

These are very interesting questions. They have not been addressed, but have an impact on the paper under discussion, in particular the UK Government's refusal to take a position on matters prior to the referendum.

The UK could and should state its position in the event of a Yes vote. It could easily state its position on Scotland's membership of the EU; whether it would wish to see Scotland subject to the accession requirements for new states; whether it is for (or against) a currency union; and take a stance on a range of other issues.

There have been calls for the UK Government to clarify its position from the Electoral Commission, the House of Lords, and most recently the Law Society of Scotland, which, in its recent discussion paper called on both Governments to provide clarity on the issues raised in this context.

There is only one short term beneficiary of the uncertainty caused by the UK Government's refusal to take a clear stance on these questions, and that is the No campaign. It may suit the Government to continue the uncertainty, but if that does lead to a No vote, that result will do nothing to settle the independence question for any length of time.

If the referendum is to "deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect" (Electoral Commission advice, para 5.42), the UK Government needs to engage with the Scottish Government, the EU and other international bodies to provide clarity to voters on the consequences of a Yes vote. Its paper on the implications of independence raises more questions than it answers and does nothing to set out the real choice facing Scottish voters.

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