

Briefing by Professor Sionaidh Douglas-Scott on EU reform and the EU referendum: implications for Scotland

I. EU REFERENDUM BILL

The EU Referendum Bill was introduced to the House of Commons in May 2015 and makes provision for a referendum on whether the UK should remain a member of the EU, a commitment included in the 2015 Conservative Party manifesto. The Bill provides for a referendum to be held on a date prior to the end of 2017, which must not conflict with other elections and so must not be on 5 May 2016 or 4 May 2017.

The Bill originally excluded the application of section 125 of the Political Parties, Elections and Referendums Act, which restricts what the Government can do during the final 28 day 'purdah' period. Section 125 bans public bodies from publishing material that deals with any issue raised by the referendum question, and the government had argued that its application would make it very difficult to undertake a whole range of routine EU business in the four weeks leading up to the referendum. However, the Government was defeated on an amendment in the House of Commons and purdah provisions will now apply.

At time of writing, this Bill had completed its passage through the House of Commons and Lords, the Lords amendment to include 16/17 year olds in the franchise having been defeated in the Commons, and not having been further insisted on in the Lords. As of 15 December 2015, the Bill awaits Royal Assent, which is likely to be soon.

1. The question put to electorate

There is general agreement that this should be unbiased. The original Bill proposed the referendum should ask, 'Should the UK remain a member of the European Union?' However, the Electoral Commission, which is required to assess all proposed referendum questions, reported on 1 September in favour of the revised question (now Clause 1(4) Referendum Bill): 'Should the UK remain a member of the EU or leave the EU?' The government accepted this recommendation.

This contrasts with the Scottish referendum question – 'Should Scotland be an independent country?' which required a simple Yes/No answer. It also contrasts with the question asked in the UK's 1975 Referendum on EEC membership which asked, 'Do you think that the United Kingdom should stay in the European Community (Common Market)?' The EU Referendum Bill is also a departure from established practice - of 264 referendums in democratic states since 1990, only six have not employed a 'Yes/No' question.¹

2. The Franchise:

Clause 2 of Bill confirms that the referendum will use the parliamentary franchise, although with some additions. In summary, a vote will go to: British citizens living in the UK; Irish

¹ UCL Constitution Unit, [The EU Referendum Bill: Taking stock](#)'.

citizens resident in the UK; citizens of Gibraltar; Commonwealth citizens who meet the residency requirement for registration as an elector in UK; British citizens who are overseas voters using their entitlement to register as overseas voters for up to 15 years after leaving the UK; service voters. Unlike in parliamentary elections, members of the House of Lords are also entitled to vote in this referendum, as are Commonwealth and Irish citizens who would be entitled to vote in European elections in Gibraltar.

On 17 November 2015, the House of Lords voted for an amendment to extend the franchise for the EU referendum to 16 and 17 year olds. This amendment was rejected by the House of Commons on 8 December and not insisted on further by the House of Lords.

Issues that have emerged in relation to the EU referendum Bill

a) Whether the franchise should be extended to 16 and 17 year olds

This House of Lords Amendment was rejected in the Commons.² 16 and 17 year olds make up 2.8-2.9% of the population eligible to vote. The Government has argued that if there is to be a change in the voting age, it should be introduced for General Elections rather than referendums. Opponents argue that General Elections concern the next five years, but the EU referendum affects the situation of a whole generation and, therefore, is of great relevance to 16 and 17 year-olds, who will live with the consequences of the result of the vote longer than other voters. The 16/17 group was able to vote in the Scottish Independence Referendum, and about 75% of them actually voted.³

b) Whether Britons who have been abroad more than 15 years would be able to vote

An amendment to secure this also failed. UK citizens living in other EU countries may worry about the consequences of a possible UK exit from the EU. If the UK left the EU, they might have to apply for work permits, migrant visas, and reciprocal health schemes could be reduced.

At present, a 15-year limit applies, so this group (about 1 million in number⁴) cannot vote if they have been resident abroad more than 15 years. The Votes for Life Bill (a Government Bill announced in the 2015 Queen's Speech) would abolish the 15-year rule, but will not become law in time for those restricted by the rule to be able to vote in the EU referendum.

c) Whether EU citizens resident in the UK would be able to vote

A further amendment to secure this also failed. However, as there is (a small) possibility of legal challenge (see below) it is worthy of a short note.

EU citizens resident in the UK are eligible to vote in local government, devolved legislature and European Parliament elections. However, they may not vote in the EU referendum. In contrast, they were able to vote in the Scottish Independence Referendum if resident in

² The reason being given that 'it would involve a charge on public funds and the Commons do not offer any further Reason, trusting that this Reason may be deemed sufficient.' (EU Referendum Bill, Commons Disagreement and Reason, 8/12/2015).

³ UCL Constitution Unit, [Votes at 16: What effect would it have on the EU referendum?](#)

⁴ 'Expat vote ban lifted, but not in time for EU referendum', The Telegraph, 28 May 2015.

Scotland.

The situation is further complicated by the fact that EU citizens from Cyprus and Malta resident in the UK may vote as Commonwealth citizens in the EU Referendum, although they cannot vote as EU citizens. Additionally, Irish citizens resident in the UK may also vote in the EU referendum.

In 2013, the European Parliament reported that EU member states did not generally permit other EU nationals to vote in their national elections, nor did they usually allow other EU citizens a vote in national referendums.⁵ The UK and Ireland were an exception, allowing nationals to vote in the other country on a reciprocal basis. The UK is also exceptional given that it permits votes for resident citizens of Cyprus and Malta as Commonwealth citizens.

Therefore, as things stand, citizens of some EU countries (namely, Ireland, Cyprus, and Malta) have rights to vote in the EU referendum, while other EU citizens do not. This situation may conceivably infringe EU non-discrimination law, given that Article 18 TFEU states that:

'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'

Many EU nationals, from EU states other than Ireland, Cyprus and Malta, have settled and work in the UK. Given that they could be directly and personally affected by the outcome of the Referendum, they may claim that it is discrimination within the scope of EU law, to permit Irish, Maltese and Cypriot nationals resident in the UK to vote in it, but not EU migrant residents of other nationalities.

3. Timing of the Referendum

The Bill requires a referendum to be held before the end of 2017. However, the Prime Minister, in an interview broadcast on the BBC, stated that he would be in favour of the referendum taking place earlier than this, in 2016 if possible.⁶

There is a problem with this referendum timing, however, if David Cameron's desired reforms require EU treaty change. In this case, it will not be possible for treaty ratification to be completed in each of the 28 EU member states before the end of 2017. This means that the only agreement between EU states that could be agreed by the referendum itself would be some sort of inter-governmental agreement for future treaty change, which could still be rejected by some EU national parliaments. Although Clause 6 of the Bill as it currently stands contains a 'Duty to publish information on outcome of negotiations between member States', before the final 10 week period, the absence of legally binding treaty revision at that date could have an impact on the case for remaining in the EU, as it might not reassure voters that desired reforms could actually be achieved.

⁵ European Parliament, *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Union Citizens Residing in Third Countries*, April 2013, p 92.

⁶ Michael Wilkinson, and Rosa Prince, 'When is the EU Referendum?', *Telegraph*, 4 October 2014.

If the referendum date is set closer to the second half of 2017, then the French and Germans will have major elections, and the UK is scheduled to hold the presidency of the Council of Ministers, a far from ideal time to hold a referendum.

4. Outcome of the Referendum

The Bill imposes no obligation on the UK Government to implement its results, nor does it set any time limit by which to implement a vote to leave the EU. It is a consultative referendum, enabling the electorate to express its opinion before legislation is introduced.

There are no constitutional provisions in the UK requiring the results of a referendum to be implemented. This contrasts with e.g. Ireland, where the Irish Constitution states the circumstances in which a binding referendum must be held.

Further, the Bill does not require a threshold of a certain percentage of votes to be cast in order for further action to be taken (unlike the polls in Scotland and Wales in 1978 on the question of devolution).

Nor is there a requirement of a 'double lock' threshold, requiring each constituent part of the UK (England, Scotland, Wales and Northern Ireland) to vote to leave before the UK can withdraw from the EU. In some federal countries there is requirement for certain referendums to secure a majority in the population as a whole and in a majority of the states. This is the case in Australia, where referendums to approve changes to the constitution must achieve a majority of voters as a whole (voting is compulsory), and a majority in a majority of states. While the Referendum Bill was in the House of Commons, the SNP tabled an amendment to require such a double majority threshold, but were unsuccessful.

5. Could there be legal challenges to the referendum?

The Referendum may spark legal challenges. It might be argued that the Referendum Bill itself required a Legislative Consent Motion, given that its consequences may require modification of the powers of devolved institutions, in order to withdraw from the EU. At present, a requirement to comply with EU law is written into the Scotland Act, and this would have to be changed if the UK left the EU. The UK government has stated that it will not normally legislate on devolved matters without the consent of the devolved legislature. However, no such challenge has to my knowledge been brought, and it is in any case unlikely that constitutional conventions could be enforced in law courts. Further examples of where legislative consent motions may be necessary are discussed below, in relevant sections of this briefing.

There could also be challenges brought on the basis that exclusion of some EU citizens resident in the UK but not others (Malta, Ireland, Cyprus) from its franchise constitutes discrimination on grounds of nationality within the scope of EU law.

II. WHAT PROCESS WOULD THE UK FOLLOW TO LEAVE THE EU?

Should the result of the referendum be a vote to leave, the UK could commence proceedings to leave the EU. There are two sides to this process–

1. the procedures required by EU law, and
2. those required by national law.

1. What are the processes within the EU?

Article 50 of the Treaty on European Union (TEU)⁷ sets out the procedure for a state that intends to withdraw from the EU. Under Article 50, the UK would negotiate arrangements for its withdrawal, ‘...taking account of the framework for its future relationship with the Union.’

Although such a mechanism exists, this does not mean negotiations between the EU and UK would be uncomplicated. There is very little information, academic or otherwise, on Article 50 TEU. This is not surprising because it has never been used, and until the UK declared its intention to renegotiate the terms of its membership, the possibility of its use was considered theoretical only. Apart from the case of Greenland in 1985 (which occurred prior to the introduction of Article 50) the EU has no experience in managing the exit of a member state. Further, the Greenland example offers very little guidance because of Greenland’s dependence on Denmark and its great reliance on fish, which dominated negotiations. Nothing of substance had to be changed in the Treaties when Greenland left. Greenland became associated as an Overseas Country and Territory through the Greenland Treaty. This kind of association would not be an option for the UK.

If we look at the wording of Article 50 TEU, we can see it sets out the following stages of a negotiated withdrawal, which must take place within 2 years:

1. *Formal Notice*: The withdrawing member state must send a formal notice to the European Council. This means that the UK would have to inform the President of the European Council, but would not have to give any reasons for why it wished to withdraw.
2. *Negotiating Guidelines*: The European Council then issues guidelines on the basis of which the terms of exit and future relationship between the EU and that member state are negotiated. The Council of the EU would nominate a negotiator for this purpose – presumably, but not necessarily, officials from the European Commission.
3. *Negotiated Withdrawal*: The terms of exit and post-exit relationship are negotiated by the EU on the basis of recommendations by the Commission (Article 218(3) TFEU) and the Council then concludes the agreement (by a qualified majority, after receiving the consent of the European Parliament). During the negotiation, the UK could continue to participate in other EU business, but could not participate in EU discussions or decisions as to its own withdrawal.

Should no agreement be reached, then Article 50 stipulates that membership of the EU will cease two years after notification of intention to withdraw, unless the European Council decides to extend this period, in agreement with the country in question. But it is probably

⁷ Article 50 TEU is set out in the Annexe to this briefing.

unlikely that no agreement would be reached, as it would certainly be in the UK's (and the EU's) interests to come to an arrangement.

In fact, it is possible that three different treaties would be required:

1. A treaty regarding UK withdrawal

Article 50 seems to contemplate a withdrawal agreement between the departing state and the EU itself, rather than a multilateral agreement between all the member states and the UK. However, given the potential comprehensiveness of such an agreement, it is likely to fall within different categories of competence, which might be shared between the EU and its member states. In this case, the EU would not have the competence to conclude the agreement by itself and a withdrawal treaty may have to be concluded as a *mixed agreement*. The significance of this is that it would make the ratification procedure much longer and more complex as it would involve all the member states, some of which could be quite reluctant to negotiate preferential terms of association with the UK. And of course, the UK would be treated as a third country during such negotiations.

2. Another treaty to amend the EU Treaties to remove references to the UK

Alongside an international agreement regulating withdrawal, the remaining member states would have to negotiate between themselves a treaty amending the founding treaties to repeal all provisions touching upon the departing country. This would not involve the UK.

3. Possibly a third treaty to allow the UK to join EFTA and remain in the EEA

If this were the alternative chosen by the UK to EU membership, then it would be necessary for the UK to negotiate a third treaty regulating the terms of accession to EFTA and a fourth to deal with membership of the EEA. This last would require the approval of the EU and its member states, the EEA-EFTA countries and the UK.

The potential contents of a Withdrawal Agreement and how withdrawal might be phased in

Art. 50(2) TEU merely provides guidance in that it requires arrangements for 'withdrawal, taking account of the framework for its future relationship with the Union'. It does not require any specific arrangements. Everything is left to negotiation. However, a comprehensive set of institutional and substantive provisions would be required to turn the UK's EU exit strategy into a legal reality. At this date, we cannot know what would be contained within any negotiated withdrawal agreement, nor indeed what the UK Government's withdrawal strategy might be, nor whether the EU would prove to be a tough bargainer, resulting in negative economic effects for the UK. Although there are no relevant precedents under Article 50, we may note that in 2014, following a vote of the Swiss public to limit the free movement of EEA citizens to Switzerland (a move which violated the bilateral treaties between the EU and Switzerland) a corresponding decision was taken by the EU to exclude Switzerland from the European Research Council, the Erasmus programmes and the EU Horizon 2020 programme. So if, for example, the UK were to insist on exemption from the free movement of labour requirements that come with

EEA membership, it may be unlikely that the EU would permit UK goods and services free access to the Single Market.

2. The withdrawal process in the UK

Art 50 TEU provides that on withdrawal the Treaties 'shall cease to apply to the State in question' – but this is a matter of EU law. As a matter of domestic law, further steps would need to be taken so that EU law could cease to apply in the UK. Given the likelihood of a withdrawal treaty, this will have to be ratified by the UK, according to its constitutional requirements. This means that the UK would follow its usual procedures for treaty ratification, which would require it to lay the withdrawal treaty before Parliament for 21 sitting days before it could be ratified. The withdrawal agreement would have to be implemented by a UK Act of Parliament.

The process of *domestic* disentanglement from EU law would by no means be straightforward, nor would it mean a direct return to the *status quo* existing before the UK joined the then European Economic Community (EEC) in 1973. EU law is part of UK law and its adoption has given UK citizens, companies and public authorities rights and duties – repealing or amending them would be a complex and demanding process.

The European Communities Act (ECA) 1972 is the main legal provision, or gateway, whereby EU law is applied domestically and would need to be repealed or at the very least amended. Other primary legislation implementing or relating to EU law would also have to be repealed if the Government did not want it to form part of national law. For example, section 29 Scotland Act 1998 makes direct reference to EU law and would have to be amended. Again, this raises the issue of a legislative consent motion (see further below under section III advisor briefing).

Overall, the Government would have to deal with the thousands of pieces of EU legislation that are currently part of UK law. It might wish to preserve some of this but to repeal other parts. Some EU law, if directly applicable, could lapse automatically. Given this complexity, it may help to divide up EU law into three relevant categories, which would all need to be dealt with in the event of a UK 'Brexit'.

i) *First, directly applicable EU laws* – these are EU regulations and parts of the EU treaties. As directly applicable EU law, they automatically take effect in the UK without the need for any implementing national law, via the gateway of section 2(1) ECA 1972. These would all *automatically lapse* and cease to be part of UK law on repeal of the ECA. However, in many cases this would leave an undesirable vacuum in domestic law. This would be particularly serious in areas where the EU has an exclusive competence. It would be necessary to introduce new domestic laws very swiftly to cover many of these areas, such as in the licensing of medicines, much of which is currently dealt with by EU Regulations. For practical reasons, the UK is likely to want to keep many laws of EU origin.

ii) *Secondly, there are many Acts of Parliament which implement EU directives or other obligations.* These would not lapse automatically but would need to be repealed, retained or amended on a case by case basis. So for example the Extradition Act 2003, which gives effect to the European Arrest Warrant, if it continued unamended after the EU Treaties stopped applying to UK, would still provide a legal basis for extradition requests

from other member states. Whether requests from the UK would be acted upon in other member states would, however, depend on the state of EU or national law there.

Importantly, some EU directives may relate to devolved matters, and so have fallen within the competence of the Scottish Government to transpose into Scots law under section 53 Scotland Act 1998. In these cases, there will be separate Scottish legislation which will have to be either repealed, amended or left in force.

iii) *Thirdly, numerous UK regulations (i.e. subordinate legislation) have been made under section 2(2) ECA 1972 to implement directives. Secondary legislation whose enabling power was section 2(2) of the ECA would require a new enabling power if it were to remain in force – otherwise, such legislation would no longer have legal effect once section 2(2) ECA had been repealed. Again, this might require speedy action if undesirable gaps were not to emerge in UK law.*

As is evident, overseeing and managing all of this legislation at the time of transition would be highly complex. It has been suggested that one solution would be ‘to press into service the existing regulation-making power under section 2(2) of the 1972 Act and extend it so that it can be used to allow existing Acts and regulations which implement EU obligations to be repealed . . . or replaced as appropriate with or without changes after exit.’⁸ However, this would mean using a ‘Henry VIII’ clause - namely a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny. Such clauses have often been viewed as an undemocratic means to bring about changes in legislation, given that they allow the executive to change or repeal primary legislation. This is a concern, given that EU law has created networks of (often fundamental) rights and obligations, not only between member states, but also for nationals of those states – for example, rights to equal pay and treatment at work for men and women, and a panoply of other non-discrimination rights. Some of these have been implemented by statute, some by secondary legislation. Senior UK judges (see, for example, *ex parte Witham* [1997] 1 WLR) have made it very clear that if a fundamental right is to be removed by the government, then the Rule of Law requires this to be done explicitly and not by implication. It is unclear that repeal by subordinate legislation of a tranche of EU measures would satisfy this requirement.

4. Will EU citizens have ‘acquired rights’ under EU law?

However, further investigation suggests that it would not be so easy to dispense with EU rights – whether by Act of the UK or Scottish Parliament, or statutory instrument. The presence of Article 50 TEU acknowledges that the EU treaties have established vast systems and structures of rights and obligations, and thus the need for an orderly process for state withdrawal from the EU. These rights and obligations exist between member states, but also with regard to the nationals and companies of those states. The European Court of Justice (ECJ) stated as long ago as 1963 in the *van Gend en Loos* case that such rights are part of individuals’ ‘legal heritage.’ Such acquired rights and mutual dependencies cannot be immediately and directly extinguished.

For example, nationals of other EU member states resident in the UK currently have

⁸ M. Howe QC, ‘Zero Plus: The Principles of EU Renegotiation’ (Politeia, 2014) at 7.

directly enforceable EU law rights in UK courts regarding matters such as free movement of workers, and freedom of establishment. UK nationals possess corresponding rights in other member states. If the UK's EU membership were terminated, it is undesirable that these individuals become illegal immigrants, or that Erasmus students should become 'overseas' students. Withdrawal from the CAP would cause disturbance to UK farmers. Similar issues would be encountered regarding projects, or joint ventures, such as those in the field of research, which are funded by the EU's long-term programmes.

A pragmatic solution suggests that the EU and UK would negotiate a transitional period in order to manage issues such as these – and indeed such arrangements were made in the case of the only (to date) example of withdrawal from the EU – that of Greenland in 1985 (see for example, *Status of Greenland: Commission opinion*, COM (83) 66 final, at 12). On the other hand, it is questionable to what extent the Greenland example sets a precedent, given the very different circumstances and much smaller population of Greenland, and most importantly, the fact that Greenland was not itself a member state, but only part of Denmark, which remains an EU member state. Greenland's interests are still represented via Denmark and Greenland's major concern was to exercise exclusive rights over fisheries. Greenland's exit did not dictate any changes of substance to the EU treaties.

In any event, even in the absence of transitional arrangements, EU law provisions on legality and legal certainty could be relevant and might require EU Institutions, member states and the UK to agree on the protection of acquired rights. Legal certainty has been recognised as a general principle of EU law by the ECJ. Legal certainty imposes various requirements, including that law should not have retroactive effects, that acquired rights be protected and that legitimate expectations should be preserved. Furthermore, more generally, international law demands that acquired rights should be respected (Arts. 65 to 72 Vienna Convention on the Law of Treaties). Sir Gerald Fitzmaurice has written that: 'It is an accepted rule of treaty law that the termination of a treaty ... cannot per se affect or prejudice any right already definitively and finally acquired under it, or undo or reverse anything effected by any clause of an executed character in the treaty.'⁹

A right is 'vested' if not automatically removed once a treaty no longer applies. Therefore, if the UK exited the EU without making transitional arrangements, both EU law and international law more generally might be drawn on in order to protect executed, or acquired, rights that had become vested.

III. SIGNIFICANCE OF AN EU EXIT FOR SCOTLAND

1. What does EU membership mean for Scotland's economy and its people?

An economic and more general social analysis of Scotland's EU membership has been the subject of another briefing.¹⁰ However, in short, an important aspect of Scotland's EU membership involves access to the Single Market. The EU is the main destination for Scotland's international exports, 'accounting for around 46% of Scotland's international exports in 2013, value c. £12.9 billion'.¹¹ Scotland benefits from the Single Market by

⁹ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge University Press, 1986)

¹⁰ See eg SPICe Briefing 'The impact of EU membership in Scotland' 30 October 2015 15/71.

¹¹ HC Briefing 7213, 4/6/15: 'Exiting The EU: Impact In Key UK Policy Areas'.

importing goods and services from other EU member states. The Scottish Government estimated c. 336,000 Scottish jobs directly associated with exports to the EU in 2011.¹² The EU's Free Movement provisions allow Scots to travel to other EU member states and other EU nationals to come and work/study in Scotland.

Furthermore, Scotland currently benefits from European funding programmes such as the Structural Funds and CAP funding, as well as successfully applying for other competitive funding from the EU. For example, in 2014-2020, Scotland's projected CAP funding is €4.3 billion.¹³ Projections by the Scottish Government and Financial Scrutiny Unit SPICe however do suggest that Scotland is a net contributor to the EU budget.¹⁴

The Scottish Government has repeatedly argued that Scottish public opinion is more pro-European than in the rest of the UK. Nicola Sturgeon set out this view in a speech at the EPC in Brussels on 2 June 2015.¹⁵ At the last European Parliament elections in May 2014, UKIP gained the largest percentage of votes in the UK overall, with 27.5%, but in Scotland only 10.46% of the vote.¹⁶ EU regional funding tends to benefit Scotland, Wales and Northern Ireland more than it does England. Furthermore, the Scottish Government's *Agenda for EU Reform* paper¹⁷ disagrees with the proposed renegotiation of Britain's EU membership, does not support the potential subsequent referendum, and believes EU reform can be delivered without major treaty change.

This is relevant if a majority of the population in Scotland vote to remain within the EU, but a majority of the English people vote to leave the EU, because there is no provision in the EU Referendum Bill for a double lock requirement protecting the Scottish people from an EU exit against their will (see Section I, above).

2. Implications for Scotland of the UK leaving the EU

These implications of course depend on the nature of any agreement that the UK makes with the EU as to their future relationship. However, if the UK were to leave the EU, benefits of Single Market membership could be lost if the UK were not to be a member of the EEA, or set up some bilateral trade relationship with the EU. UK membership of the EEA would by no means be certain, even if were deemed desirable by the UK, as other members would have to agree on it. In any case, EU membership extends beyond the Single Market, and the EU's agriculture and fisheries laws do not apply, for example, in the case of the EEA.

Even if the UK were to have some sort of 'free trade' arrangement with the EU - whether within the EEA or by some bilateral arrangement, Scotland could still lack some of the existing benefits of EU membership. EEA countries such as Norway play no effective part in influencing or legislating EU laws and policies, although these EU laws undoubtedly affect their own interests. If the UK exchanged its EU membership for the EEA, it too would have no control over such measures. There may be also be a danger that foreign

¹² But see SPICe Briefing 'The impact of EU membership in Scotland' for a different view.

¹³ HC Briefing 7213, 4/6/15: 'Exiting The EU: Impact In Key UK Policy Areas.'

¹⁴ SPICe Briefing 'The impact of EU membership in Scotland.'

¹⁵ <https://firstminister.gov.scot/a-positive-case-for-europe/>

¹⁶ UK Election results 2014, viewable at <http://www.bbc.co.uk/news/events/vote2014/eu-uk-results>

¹⁷ Available at <http://www.gov.scot/Resource/0045/00458063.pdf>

companies located in Scotland, and Scottish companies with a major EU business interest would relocate to other EU states in order to maintain influence and lobbying capacities in the EU. On the other hand, if the UK were a member of the EEA, it and therefore Scotland, would still have a sizeable (because of the size of the UK's GDP in relation to the EU overall) budgetary liability to the EU.

3. The need for a Legislative Consent motion were the UK to withdraw from the EU

Further, as discussed above, following a UK exit, steps would be taken by the UK Government to ensure that EU law, as it presently stands, ceased to apply within the UK. As well as the issues of repeal of EU law discussed in the last section, another important issue is whether a Legislative Consent motion would be necessary in order for devolution legislation to be amended to take account of a UK 'Brexit'.

EU law is incorporated directly into the devolution statutes in Scotland. For example, section 29(2)(d) of the Scotland Act 1998 provides that Acts of the Scottish Parliament that are incompatible with EU law or with ECHR rights are 'not law.'

Therefore, although the Westminster Parliament may repeal the ECA 1972, this would not bring an end to the impact of EU law in the devolved nations. It would still be necessary to amend the relevant parts of devolution legislation. But this would not necessarily be straightforward. This is because, although, as a sovereign parliament, the UK Parliament retains the power to amend the Scotland Act, the UK government has stated that it will not normally legislate on a devolved matter, or on any change to the powers of the devolved nations, without the consent of the devolved legislature.¹⁸ This requires a Legislative Consent Motion under the Sewel Convention. The question is whether Scotland would be willing to grant assent, especially as the Scotland Bill currently in the Westminster Parliament includes a commitment to strengthen some of the Scottish Parliament's powers, and to enshrine the Sewel Convention in legislation. So the need to amend devolution legislation renders a UK EU exit constitutionally more complicated.

Should the UK Parliament press ahead with legislation in the absence of legislative consent we would enter uncharted constitutional territory. So far, legislative consent has only rarely been refused.¹⁹ However, what would be the consequences of Westminster ignoring the requirements of the Sewel Convention?

Constitutional conventions have been traditionally defined as 'a rule of behaviour accepted as obligatory by those concerned in the working of the constitution.'²⁰ Whether or not they

¹⁸ The Scotland Office paper, *Maintaining and strengthening the Scottish devolution settlement* (updated in 2014) states that the Sewel Convention is triggered not just by substantive Westminster legislation on devolved matters, but also by constitutional change which 'alters the legislative competence of the Scottish Parliament.'

¹⁹ In Scotland, consent was refused for parts of the UK Welfare Reform Bill in 2011. In Wales, consent has been refused, including for the UK Enterprise and Regulatory Reform Bill. The Welsh Assembly passed its own Bill, which was referred to the Supreme Court by the Attorney General on the basis that it might not fall within the Assembly's competence. The Supreme Court unanimously concluded that the Bill fell within the competence of the Welsh Assembly: *Agricultural Sector (Wales) Bill – Reference by the Attorney-General for England and Wales* [2014] UKSC 43. In this way a very interesting 'constitutional' jurisprudence is in the process of being created on the issue of devolved competence.

²⁰ K Wheare, *Modern Constitutions*, (OUP, 1951) 179, quoted in G Marshall, *Constitutional Conventions*, (OUP, 1984) 7.

are legally enforceable is debatable, as they are not embodied in hard law. In the UK, they have not traditionally been enforced by the courts, although courts have acknowledged their existence as aids to judicial interpretation.²¹ So it is unclear whether a challenge mounted to UK legislation adopted in the absence of legislative consent would be justiciable. However, Conventions do trigger soft legal commitments – Sewel is subject to a Memorandum of Understanding and a supplementary agreement between the UK Government and devolved authorities.²² Significantly, in 2011, Michael Moore, then Secretary of State for Scotland, in his speech opening the House of Commons second reading debate on the Scotland Bill, appeared to interpret the Sewel Convention as binding the UK Government to the requirement of consent, stating, ‘... the bill will fundamentally change the powers and responsibilities of the Scottish Parliament. For that reason, the Government will proceed with the Bill only with the formal and explicit consent of the Scottish Parliament.’²³

Furthermore, any attempt to disregard the legislative consent of devolved legislatures in a subsequent UK statute might infringe *H v. Lord Advocate*²⁴ in which the UK Supreme Court held that the Scotland Act 1998, as a ‘constitutional statute’ cannot be impliedly but only expressly repealed. This would imply that a subsequent UK Parliament could legislate for Scotland without consent but only explicitly, in which case it would have to take the political consequences, which could be considerable.

Perhaps the most extreme consequence would be if a UK Brexit were to trigger a second Scottish Independence Referendum. The First Minister suggested a UK vote to leave the EU could pave the way for a second Scottish independence referendum:

‘this could be one scenario producing the kind of material change in circumstances which would precipitate popular demand for a second independence referendum.’²⁵

IV. EU REFORM - THE IMPLICATIONS OF THE UK’S EU REFORM AGENDA ON SCOTLAND

The Queen’s speech on 27th May 2015 contained the commitment to ‘renegotiate the UK’s relationship with the EU and pursue reform of the EU for the benefit of all member states.’ On 9 November 2015, David Cameron set out his objectives on paper for the first time in a letter to Donald Tusk, the President of the European Council.²⁶ They fall under the following four headings:

1. *Immigration*: including a four-year ban on EU migrants claiming in-work and other benefits;

²¹ *Att.-Gen. v Jonathan Cape Ltd* [1976] QB 752 and *Re Amendment of the Constitution of Canada* [1983] AC 394, HL.

²² Cabinet Office, *Devolution: memorandum of understanding and supplementary agreement*, September 2012.

²³ Hansard 27 January 2011, col 477.

²⁴ *H v Lord Advocate* [2012] UKSC 24.

²⁵ <https://firstminister.gov.scot/a-positive-case-for-europe/>

²⁶ See <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2015/11/letter.pdf>; set out in more detail in Prime Minister’s speech on Europe, available at <https://www.gov.uk/government/speeches/prime-ministers-speech-on-europe>

2. *Economic governance*: including greater protections for non-Eurozone countries to ensure they cannot be outvoted by Eurozone countries;
3. *Sovereignty*: including giving Britain an opt-out from the EU's commitment to 'ever-closer union'; enhancing the powers of national powers to take jointly block measures not in their national interest; and 'clear proposals' to achieve subsidiarity;
4. *Competitiveness*: taking steps to reduce the burden of regulation on business, and more measures to increase free trade

David Cameron has also asked for speedy resolution of these matters, although resolution of all matters is unlikely before 2016. This section continues with three questions in mind –

- First, is the reform desired by the UK government possible, and would treaty reform be necessary?
- Second, what are the implications of such EU reform for Scotland?
- Third, what role might Scottish institutions be expected to play in this reform process?

1. Is reform possible and would treaty change be necessary?

a) Immigration

In particular, David Cameron is requesting a four year ban on EU migrants claiming in-work and other benefits. This is clearly the most controversial and difficult to accommodate of his requests.

First, let us be clear that it is already the case that there can be no free movement just to claim benefits in another EU State. EU law already permits restrictions on access to benefits (in EU parlance 'social assistance') where EU citizens are 'economically inactive', i.e. not in work. Indeed, in its landmark 2014 *Dano* case, the ECJ confirmed that member states can refuse social assistance to economically inactive migrants exercising free movement rights solely to obtain benefits from the host state. The Court defined social assistance as 'all assistance schemes established by the public authorities . . . to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family' (Case C-333/13 *Dano*, para 63).

However, David Cameron appears to require a delay before an EU *worker* or economically active person can claim benefits. In this case a Treaty amendment would be necessary. Equal treatment is an essential feature of EU law's prohibition on discrimination on nationality. An EU Regulation²⁷ also stipulates that workers from other member states 'may not . . . be treated differently from national workers by reason of [nationality] in respect of any conditions of employment and work' and, furthermore, 'shall enjoy the same social and tax advantages as national workers'. Therefore, if an EU State provides benefits for its own national workers, it must also provide them for EU workers. If this obligation were to be changed, it would be necessary to amend the treaties.

²⁷ Article 7 of the EU Regulation on Freedom of Movement for Workers within the Union (Reg 492/2011).

b) Economic Governance

David Cameron is concerned to ensure that steps taken by Eurozone states to secure the long term future of the euro respect the integrity of the Single Market and the legitimate interests of non-euro members.

The crisis of the Eurozone has been a major EU preoccupation in recent years, and has prompted EU reforms, including collectively funded bail-out facilities and steps toward a European banking union. A further move to EU fiscal union to ensure the survival of the euro is also contemplated. Such a union would give the EU control over fiscal policy, and require national governments to cede some sovereignty over domestic taxation and public spending policies. For the most part, the UK has excluded itself from these moves, but is nonetheless concerned that the greater integration of Eurozone states will also affect non-euro members.

Eurozone member states have an in-built qualified majority in the Council. So fears that non-Eurozone states may be outvoted have some rational basis. However, the European Commission is in any case obligated to maintain the integrity of the Single (including financial) Market. The integrity of the Single Market and non-discrimination on grounds of currency are (at least implicitly present) in the Treaty, and could be underlined by a further provisions in a Heads of State and Government Decision. This Decision could also refer to the UK and Denmark's Euro opt-out Protocols, as well as the continuing existence of other national currencies of EU states that have not yet joined the euro.

The UK already has obtained several legal safeguards to protect the interests of non-euro members, but these are messily scattered throughout treaties and secondary legislation so it might be helpful to link them together in one clear amendment. Further steps that could be taken without full treaty change could include changes to Council voting procedures. For example, non-Eurozone states could be allowed to request a delay in discussion of proposals with which they have concerns. A legal commitment to this could be achieved by a Decision of Heads of State and Government not to forward proposals if a dispute cannot be settled – i.e. an explicit commitment to 'self-restraint'.

Beyond this treaty change would be necessary. The treaty could be amended to make provision for the introduction of a 'double majority lock' – whereby a majority of both Eurozone and non-Eurozone countries would be needed to pass legislation – in policy areas likely to be affected by Eurozone integration such as banking and finance. More radical would be to introduce an 'emergency brake', which would permit member states to refer an issue to the European Council (so requiring unanimity) if they perceived it as vital to national interests or as a threat to the functioning of the Single Market. Further, any new intergovernmental Eurozone treaties could be required to state the EU treaties' and EU law's primacy over the Eurozone treaty.

c. Sovereignty

An 'Ever Closer Union'

Cameron wants a clear, legally binding agreement to end Britain's involvement in working toward an 'ever closer union'.

This expression has been present in EU law since the EEC's earliest days. It was contained in the Preamble to the 1957 Treaty of Rome and subsequently the Maastricht Treaty Preamble, and is currently in Article 1 TEU and the TFEU Preamble. Notably, the reference is actually to 'ever closer union of the *peoples*' of Europe, not the governments. These references do not create any specific EU competences, nor require that the EU continuously expand its powers, nor do they entail that power may not be removed from the EU. The expression does not take the form of a precise legally enforceable obligation and imposes no specific obligations on the UK.

The wording 'ever closer union' has not prevented Britain from obtaining a range of opt-outs from EU integration in the past. Further, in June 2014, the European Council noted that *'the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.'*

As the phrase 'ever closer union' is to be found in the EU Treaties themselves, amending or deleting it would require Treaty change. It is unlikely that David Cameron would have support for this. However, the UK might be exempted from it in other ways. For example, again, a Decision of EU Heads of State and Government could be adopted, and could be worded along the lines of the European Council statement above. The Decision could be incorporated into a Protocol attached to the EU Treaties at a future date. However, it should be noted that the entirety of the expression at issue in the Preamble is "RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen in accordance with the principle of subsidiarity". Is it actually possible for the UK to exempt itself from the first part of this phrase without rendering the latter parts nonsensical, or rewriting the whole clause (to which other member states are unlikely to agree)?

In any case, the Treaty clearly obliges the EU to respect the history, culture and traditions of the peoples of Europe (Preamble and Article 3(3)TEU) and to respect the national identities of the member states, their fundamental structures, political and constitutional, as well as their essential State functions (Article 4(2)). These provisions already set up protections for national sovereignty.

National parliaments

It is also David Cameron's stated intention to obtain a new arrangement whereby groups of national parliaments can jointly reject European laws which are not in their national interest. This might seem to be a means of strengthening the legitimacy of EU legislation, and of restoring sovereignty to member state parliaments.

However, if such renegotiation amounted to a new veto power, a 'red card' procedure whereby national parliaments could block legislation, this could undermine the EU legislative process and qualified majority voting in the Council of Ministers. Furthermore, the scope of this proposed power is unclear. Would it only apply to legislative proposals that trigger a subsidiarity issue, as is the case with the current national parliament 'early warning system'? Or is the intention that it extend to all EU legislative proposals? In any case, such a 'red card' proposal would require Treaty amendment, which other member states are unlikely to agree to.

If the suggestion is not for a 'red card' veto proposition, then what is probably sought is to enhance existing treaty provisions, such as the 'early warning system' in the Lisbon Treaty Protocol.²⁸ However, the problem with present arrangements is that it is difficult to coordinate the actions of national parliaments, which probably explains why these procedures have so far achieved little. Further, any changes are likely to require amendment of Protocol 2, which has Treaty status, and so would need unanimity. However, it would be possible to agree to apply such rules informally, without giving a cast-iron guarantee. For instance, the Commission could agree that it would make a practice of withdrawing a proposal to which one third of national parliaments were opposed.

Some benefits of increasing the EU legislative role of national parliaments could also be achieved by enhancing existing national scrutiny and accountability procedures. That is a matter for national constitutional law and does not need renegotiation of any EU obligations. For example, national parliaments could mandate government Ministers to vote against specific EU proposals in Council if there were concerns. Some EU States, e.g. Denmark, already give their parliaments a greater role in holding their government to account on EU matters. A greater role could also be given to sub-state parliaments, such as the Scottish Parliament, but such moves are not mentioned in Cameron's request. Moreover, an increased role for national and sub-state parliaments could also be desirable in the context of the EU renegotiations themselves.

'Clear proposals to achieve Subsidiarity'

It is rather unclear what reforms are sought here. There is already a Treaty provision and a Protocol on subsidiarity but amending them would require the full Treaty amendment procedure. Any changes to the more specific measures regarding national parliaments and subsidiarity would also require an amendment to the relevant Protocols.

However, rules on Council voting could be altered, without Treaty amendment, to give greater legal effect to the principle of subsidiarity, and to strengthen the role of national parliaments. This could delay the vote in Council on grounds of subsidiarity and national parliament objections. It could be coupled with a legal commitment by Member States, in the form of a legally binding Decision of Member States' Heads of State and Government, not to press ahead with a vote in Council if there were no agreement on the proposal after the period of discussion.

Confirmation that the EU institutions will fully respect the purpose behind the UK's opt-out from Justice and Home Affairs (JHA) matters. Also recognition that national security is a sole competence of Member States.

²⁸ This is the so-called 'yellow card' procedure, whereby a minimum of one third of national of parliaments may require a legislative proposal to be reviewed by the EU institutions, and also the 'orange card' procedure - if one half of national parliaments object, the Commission must review the proposal but, in addition, there are then specific votes in both the European Parliament and the Council, either one of which can veto the proposal in question

These requests had not been previously made by Cameron. The national security request appears redundant as Article 4(2) TEU already states that ‘national security remains the sole responsibility of each Member State’.

Regarding JHA, it is somewhat unclear what Cameron would wish. The UK already has an opt-out on individual JHA proposals as well as a block opt-out from all pre-Lisbon measures (other than those the UK Government decided to opt back into).

d. Competitiveness

Cameron states that ‘the burden from existing regulation is ‘still too high’ so ‘the UK would like to see a target to cut the total burden on business’ and ‘The EU should also do more to fulfil its commitment to the free flow of capital, goods and services’.

The UK is by no means the only EU state to have ambitions for EU regulatory reform and completion of the EU Single Market, and these ambitions can be achieved without treaty reform. The EU is already engaged in a programme to cut red tape, and has pursued a simplification and reform agenda regarding EU legislation for some time, and pre-legislative impact assessment and subsidiarity procedures designed to ensure EU regulations are not excessively burdensome have also been strengthened – see more generally, the EU Juncker Commission’s ‘Better Regulation’ package adopted in May 2015.²⁹ The Commission’s REFIT programme was introduced to reduce regulatory compliance costs and makes it possible to withdraw and repeal EU regulatory proposals shown to be overly burdensome. The EU is also currently negotiating a number of free trade agreements.

However, if Cameron were to require an opt-out from EU employment law perceived to burden business in the UK, this would require Treaty amendment.

Mechanisms for EU reform generally

It is clear that some UK government demands for reform can only be achieved by treaty change, and such treaty change is unlikely to be achieved and formally ratified before the Referendum is held.

Precedents, however, do exist for alternative forms of commitment to future treaty reform in such circumstances. For example, Denmark in 1993 and Ireland in 2009 were able to obtain Decisions, adopted by the EU Heads of State and Government, addressing their issues of concern before completion of the formal ratification process. These commitments were translated into specific Protocols and subsequently ratified by other member states when the treaties were formally amended. Such an option might be open for some of the reforms desired by the UK and might satisfy the UK Government’s desire that such commitments be legally binding and ‘irreversible’ – given that a Decision of EU Heads of State and Government could only be amended by a further unanimous Decision of the Heads of State and Government. Where appropriate, I have referred to them as possibilities in the text above.

²⁹ see http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm for further details.

However, it is worth bearing in mind that neither Denmark nor Ireland in those cases sought changes which directly impacted on other EU states. On the other hand, some of the UK Government's reform proposals (such as those aiming to cut migrant in work benefits) would have a substantive impact on the EU treaties, thus rendering it difficult to guarantee future ratification of a subsequent Protocol by all member state parliaments.

Furthermore, this option (i.e. Decision + later ratification of Protocol) would probably be unavailable if the reform process were deemed to require a full treaty revision using the Convention procedure under Article 48(3) TEU, which takes longer to complete. This Convention procedure must be used if any treaty revisions are deemed sufficiently important to require a Convention or cannot be accomplished under the simplified treaty revision procedure. An amendment, or exception for Britain, to foundational treaty provisions on non-discrimination in work benefits for migrants is unlikely to be seen as a simple revision and, notably, the European Parliament must give its consent to use of the simplified procedure.

2. What are the implications of EU reform for Scotland both in relation to devolved and reserved policy areas?

The first point to note is that it has been the Scottish Government's policy that EU reforms can be made 'within the existing Treaty framework, rather than Treaty change.'³⁰ In August 2014, the Scottish Government published its *Agenda for EU Reform* which set out ways to reform the EU without the need for Treaty renegotiation.

Migration

Migration is probably the most contentious of the reform issues and worth separate consideration here. Also, Scotland may well be of a different mind from the rest of the UK on this issue, as EU immigration has generally been perceived as beneficial to Scotland, meaning there is no great desire for reforming EU migration law. In the run-up to the independence referendum, Alex Salmond stated that he wished to attract 24,000 migrants to Scotland every year until 2030. Indeed, we may note that the UK Government's own *Balance of EU Competences Review* also concluded that EU immigration was generally beneficial for the UK economy. However, David Cameron has set out a position intended to reduce immigration and restrict EU migrants' access to public services and benefits.

There may be more than policy differences at stake. This is because any move to exit the EU, or reform EU immigration law, could run contrary to devolved powers or new powers relating to migrant rights to be given to Holyrood under the new Scotland Bill (see Part III Scotland Bill: Welfare Benefits and Employment Support). Scotland now has devolved powers over certain areas on which the UK Government wishes to renegotiate EU membership, such as migrant access to housing and healthcare, and proposed control of housing benefits, social care benefits, and disability benefits. While the Scotland Bill is still underway in Westminster, it is difficult to say with precision what the position is, but it may well be difficult for David Cameron to negotiate restrictions on migrant access to benefits in Scotland, as the UK Government may not legislate on Scottish matters without Scotland's consent.

³⁰ Nicola Sturgeon's speech to EPC June 2015.

Additionally, reform could also have implications for Scots living in other EU/EEA countries, since other member states would then be free to impose corresponding restrictions on their benefits. The implications for Scots resident overseas would depend on the attitude of the EU state in which they resided, but nevertheless restrictions on entitlement to benefits, and other restrictions on rights of residence and changes to immigration status, could result in some of them seeking repatriation.

More general implications

A renegotiated settlement between the UK and EU would require a Legislative Consent Motion from the Scottish Parliament (and the other devolved administrations) if it related to devolved powers. So the key question is whether any amendments resulting from a renegotiation of the UK's EU membership would result in the UK Parliament either legislating on a devolved power or attempting to vary the powers of the Scottish Parliament.

Whereas the renegotiations themselves, including proposed reforms, would seem to fall within the 'foreign affairs' section of reserved powers in Schedule 5, paragraph 7, Scotland Act, on the other hand, any legislation introduced to implement negotiated reforms at Westminster which relate to devolved powers (such as certain migrant in work benefits) would trigger the Sewel Convention.

Aside from this, amendments to fundamental aspects (such as the EU's aims or objectives) of the EU Treaties might also trigger the Sewel convention.³¹ This is because relevant provisions in the Scotland Act, read in conjunction with s2(2) ECA, permit the Scottish Government to 'have regard to the objects of the EU' when exercising powers conferred on it by the Scottish Parliament. If renegotiations resulted in a fundamental change to EU objects, this could be interpreted as affecting the devolved power of the Scottish government to act pursuant to the provisions of ASPs. For example, the removal of the commitment to an 'ever closer union' could be interpreted as such a fundamental change to the EU's 'objects', given that it has been a fundamental objective of the EU since its earliest days. Therefore restrictions could be placed on the ability of the UK government to fulfil its ambitions regarding renegotiation of the UK's EU membership.

3. Could Scotland have a formal role in negotiating the reforms at EU level?

What role could Scotland play in the renegotiation process? UK membership of the EU is a reserved matter, so the UK Government is responsible for managing relations with the EU, including leading on all policy and legislative negotiations. However, devolved territories have competence where EU obligations relate to devolved matters – for example, the Scotland Act 1998 gives the Scottish Government and Scottish Parliament responsibility for implementing European obligations relating to devolved matters. Devolved nations may also be represented in UK Delegations to the Council of Ministers where devolved issues are at stake. The Joint Ministerial Committee (JMC) also provides an example of

³¹ The relevant provisions are the implementing powers of the Scottish government pursuant to an Act of the Scottish Parliament under, para. 15, Schedule 8 SA read in conjunction with s. 2(2) ECA.

institutional machinery available for engagement of the devolved administrations, as it meets to discuss and agree a UK position on EU matters.

However, EU renegotiation takes place under the general aegis of the European Council (Heads of State and Government) rather than the Council of Ministers, so the devolved administrations are not represented there. In response to the Smith Commission, the Scottish Government proposed new powers for Scotland, which in the context of the EU, included a formal role for Scotland in determining the UK's policies on agreements relating to reserved matters that affect Scottish interests. If this power were in place, which it is not, the Scottish Government might have had a greater role in contributing to the UK Government's position on re-negotiations at EU level.

In contrast, in some EU member states, regions have obtained constitutional guarantees that ensure their ability to participate in the EU decision-making process if their exclusive powers are affected. For example, the participation of Germany's 16 Länder in EU affairs is explicitly guaranteed by Article 23 of the German Constitution. Where the legislative or administrative competences of the Länder are at issue, they may participate in EU affairs through the Bundesrat, the second chamber of the German federal parliament in which the Länder governments are represented, whose view is binding on the federal government. In Austria, although the Bundesrat has a weaker role than its German equivalent, the Austrian Länder nonetheless were able to stipulate that their consent to EU membership in January 1995 was conditional on a guaranteed legal status for their participatory role in EU matters.

Federacies (such as the Åland islands in Finland) have a formal veto in the accession or secession process. Because joining the European Union would have had a profound impact on the competences of the Åland Islands – which enjoys federacy status in Finland – Åland had a legal right to halt Finnish EU membership if it did not agree with the terms. In fact, Åland held a referendum on EU membership, which succeeded, and accession went ahead. However, if the referendum had failed in Åland, and the federacy had objected to joining the EU, Åland might have blocked Finland's EU membership. Another useful example is that of Greenland, a federacy in Denmark. In 1973 Denmark joined the European Community. Later that decade, Greenland was granted a federacy status through the Greenland Home Rule Act (1978), which gave it extensive autonomy and a permanent legal basis. Upon achieving home rule, Greenland held a referendum to leave the EEC due to popular concerns about European fishing regulations and their harmful impact on Greenland fishing rights, and the EEC ban on seal skin products. The referendum passed and Greenland withdrew from the EEC while the rest of Denmark retained membership.³²

In the UK, in the absence of federal constitutional provisions securing the position of sub-state governments at EU level, it would be necessary to adopt legislation and tighten the existing concordats and memoranda of understanding between the UK and Scottish Government in order to protect the Scottish competences affected by EU law and to detail

³² See further on this, E Hepburn & S. Douglas-Scott, 'The "Permanence" Issue: A Question of Symbolism or Power?' written evidence submitted to the Scottish Parliament Devolution (Further Powers) Committee, March 2015.

the working practicalities for EU policy making. Existing arrangements fail to do this sufficiently adequately.

However, it is nonetheless the case that, if the UK proposed to radically alter its relationship with the EU then the Scottish Parliament could potentially veto any changes proposed by the UK Parliament that had a profound impact on its competences. These could include any changes resulting from the withdrawal of EU membership, which would have a significant impact on the competences of the Scottish Parliament.

8 December 2015

Annexe - Article 50 Treaty on the European Union

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.