

REPORT

An Independent Scotland in the EU: Issues for Accession

Edited by Kirsty Hughes

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About SCER

The Scottish Centre on European Relations (SCER) is an independent and unaligned EU think tank, based in Edinburgh. SCER aims to inform, debate and provide up-to-the-minute, high-quality research and analysis of European Union developments and challenges, with a particular focus on Scotland's EU interests and policies.

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1. Overview: the Politics and Processes of Accession

Kirsty Hughes

Now the UK has left the European Union, the question of how and whether an independent Scotland could re-join the EU, and what the implications of that would be, are gaining renewed attention. Even in the run-up to the June 2016 referendum, how a Brexit vote might change both the levels of support for independence and the implications of independence in the EU were under discussion, and have been more so since the 'leave' vote.ⁱ

This report brings together the views of fifteen experts across fourteen topics to analyse, from different angles, what an independent Scotland's accession process to the EU might look like and what the implications of independence in the EU, while the rest of the UK remained outside the EU, might be (notwithstanding Northern Ireland's special status leaving it effectively in the EU's single market for goods).

In many ways, an independent Scotland would look well positioned to join the EU. It would certainly be eligible to apply as a European state, as Tobias Lock argues (chapter two). And, compared to the range of states that have joined the EU in the last sixty-three years, Scotland does not look like an outlier.

A whole range of states, large and small, have joined the EU since the first enlargement in 1973 which brought in Denmark, Ireland and the UK. In total, twenty-two states have joined and one, the UK, has left. Those states include eleven countries from central and eastern Europe and the western Balkans, (Kirsty Hughes looks, in chapter 15, at the lessons of that enlargement for Scotland) and three of the European Free Trade Area states – Austria, Finland and Sweden (see Saila Heinikoski chapter 14 for a look at lessons from that 1995 EFTA enlargement). They include the still-divided island of Cyprus, and the group that joined in the 1980s – Greece, Portugal and Spain – having emerged from dictatorship in the 1970s. They also include a number of states who had re-gained their independence before joining the EU – including the Baltic three, and the 'velvet divorce' that split the former Czechoslovakia into two states.

In the face of a legally and constitutionally valid independence process, it is hard to argue that an independent Scotland (with 47 years experience as part of the EU, within the UK) would not be likely to succeed in joining. James Ker-Lindsay (chapter 13) argues Scotland would rapidly overtake the western Balkan candidate and potential candidate countries if it were independent in the next few years.

However, there are many questions that need to be addressed to understand how that accession process may play out. If it is not too long after the end of the transition period in December 2020 (until when the UK will continue to be part of the EU's single market and customs union), then Scotland will not have diverged very far, quite probably, from the EU's body of law and regulations – its *acquis*.

The further the UK, and Scotland, have diverged by the time of a potential Scottish application to join the EU, then the longer the accession process may take. And, in addition, Scotland as an independent state will need to establish institutions, regulatory bodies and laws, that previously sat at UK level during the UK's period of EU membership.

Nicola McEwen (chapter three) considers whether in devolved areas, Scotland could, after the end of transition in December 2020 (unless that period is extended), stay aligned to EU laws – as the Scottish government aims to – and what challenges both political and technical that might raise. Whether the UK, in reserved areas, does diverge very much or not will clearly, she argues, impact strongly on how close Scotland stays to EU laws. And in devolved areas, the powers of the Scottish parliament versus those of the Scottish government come into question when looking at how decisions may be taken on alignment with EU laws.

The fastest an independent Scotland might join the EU is about 4-5 years from independenceⁱⁱ. Scotland would have to apply, be accepted as a candidate, participate in negotiations and undertake all the adjustments that would be demanded by the EU during that process, followed by all 27 EU member states ratifying the EU treaty (as Tobias Lock outlines in chapter two). It is hard to see it being much swifter. Scotland, once it joined the EU, would be represented in a whole swathe of EU institutions as Steve Bullock (chapter 5) discusses. It would be in the European Council, the European Parliament, and have a European Commissioner – as well as being in several other bodies. Scotland would have substantial voice and influence, he argues.

After a 'yes' vote in an independence referendum, and after a 'divorce' agreement with the UK, Scotland would be in a transition period – from the UK and towards the EU. Fabian Zuleeg argues (chapter four) that an independent Scotland might need to take a leaf out of the Brexit transition period that the UK is currently in. Scotland, he argues, might be *de jure* independent but *de facto* still part of the UK's economic area for a while before then agreeing an Association Agreement with the EU, and perhaps associate membership of the European Economic Area, ahead of ultimate EU membership.

Brexit has several implications for an independent Scotland being an EU member state, not least the question of the Scotland-rest of UK (rUK) border. Three chapters in this report address this. Imelda Maher (chapter 7) looks at the Common Travel Area between the UK and Ireland, and asks how and whether this might apply to an independent Scotland. She argues Scotland, like Ireland, probably would get an opt-out from the border-free Schengen zone, so allowing free movement across the former UK and Ireland to continue as well as free movement in the EU (once Scotland is a member state). This would also require the UK's and Ireland's agreement to Scotland being part of the Common Travel Area.

Katy Hayward (chapter 6) considers what the Scotland-England land border would look like and the importance, in goods trade, of knowing what is crossing the border, whether it meets the relevant criteria for doing so, and having the means to stop goods if they don't meet those criteria. She emphasises the need for cooperation on both sides of a border for it to function well. An independent Scotland, she argues, should look to the Republic of Ireland's sea border with Britain to understand the likely border issues raised – rather than hope for any special treatment such as the Withdrawal Agreement gave Northern Ireland.

David Bell (in chapter 8) considers the economics of Scotland's border with rUK being an external border of the EU. He underlines that barriers to trade are usually bad for growth and prosperity but the likely impact on an independent Scotland of being in the EU's customs union and single market will not be fully clear until we see what sort of future UK-EU agreement is reached. However, Brexit arguments and analysis about trade frictions between the UK and EU translate across to the Scotland-rUK border. Trade frictions would be bad for Scotland and also for rUK. But there would be scope to negotiate bilaterally around some parts of services trade since the EU's single market for services is not complete. How other dynamics would balance out is also an open question – such as whether an independent Scotland in the EU might attract more foreign direct investment or whether skilled workers might be attracted to rUK jobs.

There are a range of policy areas where Scotland would have to either revert to EU policies having moved away from them or where, as a newly independent state, it would have to start to meet EU criteria that were previously met at UK level. David Gow (chapter 9) looks at the thorny issue of the EU's deficit and debt criteria and the question of currency. He argues that the binary divide in the debate – many arguing accession is either simple or impossible – is not helpful. He looks at the example of Croatia, which joined the EU while not having met its fiscal criteria (though it had been on a downward path) but then had to adjust rapidly once within the EU. But cutting the fiscal deficit, to get on such a downward trajectory, would raise political and economic challenges. And an independent Scotland would need to commit to joining the euro.

Arno van der Zwet and John Connolly (in chapter 10) consider the neuralgic question of re-joining the EU's Common Fisheries Policy (CFP). They see no way around Scotland having to do this, and explore how difficult the relationship between much of the fishing sector and Scottish government might become. They also consider whether there could be concessions or assistance the Scottish government could negotiate with the EU to ease Scotland's return to the CFP.

Scotland would be expected to participate fully in the EU's justice and home affairs field of policy. Kenneth Campbell (chapter 11) looks at some of the key areas for cross-border cooperation including gathering of evidence and recognition of judgements in civil cases, and criminal justice cooperation including the European arrest warrant. He argues that, once the UK has left

the transition period, there will be divergence in many areas so an independent Scotland aiming to re-join the EU would have to take steps to converge back to EU processes, including several possible interim steps prior to membership. Scotland would not, he suggests, have any chance of getting the sort of 'opt-in' to freedom, security and justice measures that the UK had but might perhaps have more of an argument for having a Schengen opt-out.

In the area of common foreign and security policy, joining the EU's various frameworks and processes would seem relatively straightforward for an independent Scotland argues Daniel Kenealy (chapter 12). Having said that, an independent Scotland would need to align with EU foreign policy positions, show it had the laws and structures that gave it sufficient capacity to participate in EU foreign and security policies together with credible forward commitments on its future foreign policies. It would take several years to scale up diplomatic and military capabilities. The path to being a full EU member in this area would be fairly clear but time-consuming and resource-intensive.

Overall, as the various analyses and perspectives in this report show, the process of joining the EU is a multi-faceted one and would take substantial and detailed political and technical resources and considerable work over some time. In the end, as the experience of other EU enlargements show, accession is a manageable if major process. In this report, the aim is to bring together a range of expertise and differing points of view to cast light on what that major process would look like and the questions it would raise.

Part One: Joining the EU: Processes and Adjustment on the Way

2. Negotiating EU Accession: Lessons for an Independent Scotland

Tobias Lock

The Brexit vote in 2016, and the UK's eventual departure from the European Union in January 2020, have intensified calls for another Scottish independence referendum. It is, therefore, most likely that any campaign for independence would envisage an independent Scotland as a member state of the EU.

It is thus important to be clear about the process by which an independent Scotland could become a member state and what this would entail in legal terms.

There is little doubt that an independent Scotland would qualify to apply for EU membership. Article 49 of the Treaty on European Union (TEU) says that “any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”. The values referred to in Article 2 TEU are “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, all of which an independent Scotland would surely want to embrace.

Accession to the EU happens via an accession treaty negotiated between the candidate country and the EU represented by the Commission. The treaty requires unanimous approval by the Council – i.e. each member state has a veto – and support from a majority of members of the European Parliament.

The EU requires that candidate countries comply with the three so-called Copenhagen criteria:

- political criteria relating to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- economic criteria, i.e. a functioning market economy and the capacity to cope with competition and market forces;
- and adoption of the entire EU acquis.

Additionally, the EU must consider itself to have the capacity to absorb new member states. For instance, in 2014 the Juncker Commission announced that there would be no further enlargement of the EU during its five year term.

Procedurally, when a country submits its membership application, the Council asks the Commission for an opinion on whether the country is prepared to enter the accession negotiations. If the opinion is favourable, the European

Council decides on whether a country is given 'candidate status'. As, for example, the [latest Council conclusions](#) on the application by Bosnia and Herzegovina show, the crucial aspects in the Commission's opinion relate to the political and economic criteria, but the Commission will also assess in how far the country is aligned with the *acquis*.

Once candidate status is granted, negotiations can commence though this does not always happen immediately. Negotiations take place in the framework of an intergovernmental conference, yet in practice it is the EU Commission that leads on the negotiations. The negotiations are generally divided up into 35 chapters; once all of these are closed, an accession treaty will be drafted, which is then put before the European Parliament and the Council for approval.

While the political and economic criteria would in all likelihood not pose major difficulties for an independent Scotland, the requirement of adopting the entire EU *acquis* might be more problematic. Adoption of the EU *acquis* – divided into 35 different 'chapters' – would require Scotland to sign up to and implement all EU law in all policy areas. It would also require Scotland to comply with the EU's agreements with third countries (trade deals and so on).

Of course, Scotland is currently largely in tune with the EU *acquis*, but the UK enjoyed various opt-outs, which it would find difficult to maintain. Additionally, by the time it came to EU accession negotiations, Scotland may have spent several years outside the EU and may therefore have deviated from the *acquis* in several areas, in particular where matters reserved to Westminster are concerned. Finally, an independent Scotland would need to set up various regulatory bodies and other institutions – e.g. a central bank, a competition authority, etc. – which would enable it to fully function as an independent state.

The key question is in how far Scotland might be able to negotiate concessions in regard of any of the major opt-outs hitherto enjoyed by the UK. These were opt-outs from economic and monetary union (the euro); the Schengen zone, which abolishes checks on persons at the internal borders of the EU; an opt-in to the so-called Area of Freedom, Security and Justice; and the UK's budget rebate negotiated in the 1980s.

From the perspective of an independent Scotland, securing the former two opt-outs would probably be most important for the following reasons: first, the currency question featured large in the last independence campaign and the Scottish government at the time campaigned on the basis that an independent Scotland would continue to use pound sterling; the current position of the SNP is that Scotland should introduce its own currency, i.e. not the euro. Second, full membership of Schengen would make Scottish participation in the UK-Irish common travel area impossible as it would require border checks at the Scottish-English border and at Irish Sea ports. Hence an opt-out would probably be considered desirable.

There is no precedent, however, of any prospective member state achieving opt-outs from major EU policy areas. The existing opt-outs from economic and monetary union – enjoyed by Denmark and until recently the UK – had to be granted as these were already existing member states. The same goes for existing opt-outs from the area of freedom, security and justice for Denmark and Ireland.

That said, there is evidence that accession negotiations provide some wiggle room but on smaller, more specific issues. Famously, Denmark's ban on the acquisition of second homes by non-residents – constituting an exception to the free movement of capital – remains protected by Protocol No 32 to the Treaties. In a similar vein, Norway had managed to negotiate nationality restrictions concerning the ownership of forests and the breeding of reindeer in the 1972 accession treaty, which Norway then did not ratify. Sweden managed to preserve the legality of the sale of 'snus' tobacco.

Additionally, there are various examples of EU law accepting the peculiarities of a member state's constitutional set-up: Ireland's, until recently, strict constitutional prohibition on abortion was protected by a protocol to the Treaties. Furthermore, EU law accommodates complex (post-)colonial relations between member states and their overseas territories.

Yet there is no precedent of a new member states opting-out of entire policy areas that must be considered a core part of EU law. It would be important for Scotland to focus on what matters most. For a cash-strapped EU any budget rebate will be anathema. Equally, there will be little incentive for the EU to let an independent Scotland off the hook regarding EMU (more on this later though). And for an independent Scotland an opt-out of the area of freedom, security and justice measures – requested by the UK for mainly ideological reasons – would probably not be desirable.

Thus for Scotland the most realistic opt-out concerns Schengen. Not only would it be politically important to keep the borders with the rest of the UK as open as possible, but the vehicle with which this would be achieved – the Common Travel Area – has already been expressly recognised by the EU. Article 3 of the Ireland/Northern Ireland Protocol states that the "United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the 'Common Travel Area'), while fully respecting the rights of natural persons conferred by Union law".

Granted, an independent Scotland would not automatically benefit from this provision as it would not automatically succeed as a party to the UK's international treaties. But it could make a reasonable argument why – like Ireland – it should be allowed to continue to be part of the Common Travel Area. The reasons the EU agreed to Article 3 of the Protocol were twofold: first, it thereby confirmed Ireland's existing opt-out of Schengen – which would have continued despite Brexit – and secondly, it keeps the border on the island of Ireland free from checks on persons. This second objective might

serve Scotland's position if it argued that the border needs to be kept open both North-South but also East-West.

What about the euro then? While express opt-outs are very rare, new member states are not required to comply with the entirety of the *acquis* from day one. The accession treaties usually contain transitional provisions; and membership of the Schengen zone – concerning the abolition of border checks – and of the eurozone require further action on part of the EU and the member state. For instance, Romania, Bulgaria, Cyprus and Croatia have not yet been admitted to the Schengen zone, which requires a Council decision to that effect.

More importantly, only 19 countries are currently part of the eurozone with a further 7 obliged to join even though a number of these have no concrete plans of doing so – Sweden being the longest abstainer in this regard. In order to qualify for eurozone membership, states must not only have met the economic convergence criteria, but must have also been a member of the EU's exchange rate mechanism for at least two years. The latter cannot happen without the member state's consent, so that the legal obligation to adopt the euro arising from the accession agreement is practically impossible to enforce.

An independent Scotland could, therefore, avoid having to take this step in practice. Yet it would not be possible for it to avoid having to commit to the adoption of the euro; and if politicians were too vocal about their non-commitment to taking such a step, there is a danger that the EU might in the end not agree to Scottish membership.

That said, the EU retains enlargement as a strategic objective and an independent Scotland, committed to European integration, would certainly be welcome.

3. Devolution and Alignment with EU Laws

Nicola McEwen

In a recent [speech](#) at the European Policy Centre in Brussels, First Minister Nicola Sturgeon underlined her commitment to ensuring that policy in Scotland remained closely aligned with EU law. She gave three reasons for doing so: to protect the health and wellbeing of people in Scotland; to maintain the international reputation of businesses in Scotland; and to *'make it easier, when the time comes, as I believe it will, for Scotland to return to the EU'*. The assumption is that, by keeping pace with EU law within the context of devolution, Scotland after independence would be better placed to demonstrate its on-going conformity to the *acquis communautaire*, thus easing its accession to the EU.

'Keeping Pace' with EU Law

The Scottish government is set to introduce legislation to enable Scotland to keep pace with EU regulatory standards in devolved policy areas. This could see Scots law, for example, in environmental standards, fisheries management, agriculture and food safety, and other devolved areas, continue to conform to standards and requirements set by the EU.

The legislation is expected to reintroduce the 'keeping pace' provisions from the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, passed by the Scottish parliament in March 2018 to ensure continuity in Scots law after EU exit. That bill was introduced as an emergency response to the UK Government's EU withdrawal legislation. The UK bill was regarded by the Scottish and Welsh governments as a 'power grab' that undermined devolution. The Scottish continuity bill, like its Welsh counterpart, was at least in part intended to push for changes to the devolution clauses of the UK bill. Arguing that the bill was beyond the legislative competences of the Scottish Parliament, the UK government referred it to the Supreme Court, thus stopping it from securing royal assent. In the [Court's judgment](#), for the most part, the Scottish continuity bill had been within the competence of the Scottish parliament at the time that it was passed. However, much of it was then rendered beyond competence by the inclusion of the EU (Withdrawal) Act 2018 – the UK parliament's own continuity legislation – among those that are protected from modification in the Scotland Act 1998.

The parameters of the new 'keeping pace' legislation are likely to be similar to those set out in section 13 of the Scottish continuity bill. The policy memorandum that accompanied that bill likened the provisions to section 2 of the now repealed European Communities Act 1972. During the UK's EU membership, section 2 of the ECA had provided for new EU Treaty rights, obligations and regulatory constraints to either have legal effect automatically, without the need for further UK legislation, or to be given effect through secondary legislation made by ministers. The corresponding provision in the Scottish continuity bill would have given Scottish government ministers power to make regulations to give effect to EU law – EU regulations, decisions and directives – that come into force after 'exit day', in order to ensure that

devolved Scots law continued to align. These powers extended to any provision that might be made by an Act of the Scottish Parliament (subject to some restrictions). In a [letter](#) sent to the Presiding Officer last April, when new 'keeping pace' legislation was first mooted, Michael Russell, Constitutional Relations Secretary, noted:

“The extent to which devolved law aligns itself with the law of the EU should be a decision for the Scottish Parliament to take, not the UK government. This government is committed to no regression in standards or protections should EU exit take place, and the replacement of regulatory powers lost in consequence of EU exit will be essential to ensure that.”

These powers were expected to be temporary, up to a maximum of 5 years. Clearly, the SNP government's ambitions are such that, by then, Scotland would have re-joined the EU, or be in the process of rejoining, after a Yes vote and a transition to independence. However, the plan to use regulatory powers to maintain alignment with EU law in the interim period may face some significant hurdles.

Barriers to Alignment

There are several barriers to maintaining alignment with EU law under devolution. First, provisions similar to those set out within the continuity bill would give extensive law-making powers to Scottish government ministers. Although the continuity bill was widely supported in parliament – only the 32 Conservative MSPs voted against it – a new bill focused principally on these keeping pace provisions, and with more time for legislative scrutiny (the continuity bill took 3 weeks to complete its parliamentary passage), might raise wider concerns. These regulatory powers could significantly enhance the Scottish government's authority vis-à-vis the Scottish parliament. It would also mean that Scottish ministers would be implementing laws made by the EU institutions over which neither they nor any Scottish parliamentarians had had any say. As Professor Alan Page noted in his [submission](#) on the original bill, this could represent 'a major surrender by the Parliament of its legislative competence'.

Second, if Scots law is to keep pace with legal developments in the EU, the government will have to invest in continued monitoring of EU legislation. Table one, below, suggests that this is no mean task. In 2019, over 2000 regulations, directives and decisions were passed by the EU, two thirds of which were wholly new (basic) Acts, with the remainder amending existing EU law. Even if only a fraction of the EU's annual legislative outputs matched devolved competence, identifying when and how they do could be a considerable undertaking.

Third, although EU law spans both devolved and reserved competences, much of the legal authority in areas corresponding to the EU internal market is reserved to the UK parliament under the devolution settlement. Even if 'keeping pace' powers ensure that devolved Scots law continues to conform to the *acquis*, an independent Scotland would inherit the body of law that the UK parliament had made for Scotland in reserved areas. That retained UK

law, as we might come to call it, could have diverged quite significantly from EU law by the time Scotland begins life as an independent state. UK regulatory divergence from the EU would therefore limit the extent to which an independent Scotland seeking accession to the EU could demonstrate that it was already aligned to EU law.

Table One: Acts Adopted by the EU in 2019

	Basic	Amending
Acts passed by the ordinary legislative procedure	75	51
Other legislative Acts	321	76
Delegated Acts (Commission regulations)	64	74
Implementing Acts	515	359
Other Acts	409	89
Total	1384	649

Source: [EUR-Lex](#)

Significant UK regulatory divergence is not inevitable. Obligations to ensure a level playing field are central to the EU's negotiating mandate in the future relationship negotiations with the UK. For its part, the UK government is adamant that it will *'not accept nor agree to any obligations where our laws are aligned with the EU or the EU's institutions, including the Court of Justice'*, as succinctly put by [Michael Gove](#), the Chancellor of the Duchy of Lancaster. But regulatory autonomy doesn't necessarily imply divergence from EU law. The UK government could choose to exercise its sovereignty by mirroring EU law in domestic law. This is the difference between policy ownership and policy divergence. However, despite Boris Johnson's [recent reassurances](#) that *'We are not leaving the EU to undermine European standards, we will not engage in any kind of dumping whether commercial, or social, or environmental'*, the refusal to commit to regulatory alignment has raised regression concerns.

If the UK government does choose to diverge from EU law, this could represent a further barrier to alignment in devolved areas. As the Scottish government seeks to keep pace with EU law, it is likely to face conflicting pressure to remain in alignment with the rest of the UK. At least before the election, officials from the UK's four administrations had been working cooperatively to develop common UK frameworks where these were felt necessary to replace EU frameworks to avoid new regulatory barriers emerging between the four UK territories. Of the 112 areas of EU law identified by the Cabinet Office as intersecting with Scottish devolved competence, 21 areas were considered to require a common legislative framework. These included potentially contentious areas such as the services directive, emissions trading, agriculture, fisheries, and food safety, where the UK Government may seek to diverge from EU law. Common UK frameworks, especially if underpinned by legislation, could make keeping pace with EU law more challenging. Conversely, the Scottish government's determination to keep pace with EU law could make it even more difficult to agree UK common frameworks.

The UK government could choose the high stakes route. It could use the controversial 'freezing' powers it was given by section 12 of the EU Withdrawal Act to prevent the Scottish government or parliament from making changes to 'retained EU law', i.e., the body of EU law that was incorporated into domestic law when the UK left the EU. It could use its parliamentary majority to exploit the sovereignty of the UK parliament to make any law it considers necessary to maintain the UK internal market. Relations between the UK and Scottish governments are already very difficult. If UK legislation were to make changes to the law on devolved matters without the consent of the Scottish parliament, casting aside the Sewel convention, the relationship would surely deteriorate even more.

Alternatively, the UK government could opt for a more emollient approach, allowing divergences to emerge. That could see laws passed for England in areas that fall within devolved competence in Scotland diverge significantly from EU law at the same time as the Scottish government sought to keep pace with EU developments. Under such circumstances, even without independence, maintaining alignment with EU law in Scotland could deepen the regulatory border between England and Scotland. This is unlikely to go down well with those producers who trade more across the Anglo-Scottish border than with the EU, especially in areas where UK regulations are viewed more favourably than EU law.

Asserting the Scottish government's commitment to remain aligned with EU law, the First Minister declared her belief that doing so was in the best interests of Scotland's health, wellbeing and economy. Quite clearly, it also serves the symbolic purpose of emphasising Scotland's continued commitment and sense of belonging to the EU. In practice, though, the combination of political pressure and legal constraints outlined above may render maintaining alignment with EU law more difficult than it at first appears.

4. Transition from the UK and to the EU

Fabian Zuleeg

In case Scotland becomes independent, the question of EU membership would arise. The overarching goal for an independent Scotland is likely to be membership of the European Union as soon as possible, with transition/interim arrangements to minimise the economic disruption in the transition from the UK via independence to being an EU member state. As the UK has left the EU, an independent Scotland would need to apply to become a member of the European Union under Article 49 Treaty on European Union (TEU), like any other aspirant accession country. This would only be possible if Scottish independence is achieved in a constitutional manner and Scotland is internationally recognised as an independent country; if there was any doubt on the legitimacy of the independence process, the doors of the EU are likely to be closed for an independent Scotland for the foreseeable future.

To become a member of the European Union, the applicant country has to fulfil the Copenhagen Criteria, which include commitment to democracy, a functioning market economy and the ability and commitment to take on the body of law of the European Union. If Scotland were to leave the United Kingdom, it is likely to be close to fulfilling these criteria but with two caveats. Firstly, the more Scotland has diverged from the EU, which is likely to be determined by Westminster and the length of the period of the UK being outside the EU before Scotland becomes independent, the bigger the necessary readjustment will be. Secondly, there are a number of independent institutions that will be required for EU membership, which Scotland would have to set up before joining.

In addition to being a technical and legal process, accession is clearly a political process. The starting point of this process is an unequivocal commitment by the accession country to EU membership, including a willingness to fulfil the conditions for accession. While there might be the possibility of temporary derogations in some areas (if and only if a clear case can be made why this is in the EU's interest), the expectation would be that EU membership for an independent Scotland would include all rights and obligations of the Treaties; the exceptions the UK negotiated as a member would not be on offer. If Scotland commits to EU membership and the associated conditions, it is likely that an independent Scotland could join the EU rather quickly, given the path to independence via Brexit and the close alignment of Scotland with the EU body of law.

A Transition Phase to Exit the UK?

Nevertheless, the implication is that there will be a time period between independence and EU membership. Becoming an EU member will take time. It is not feasible or credible that EU membership will immediately follow from independence. In particular, there will potentially be a gap between an independent Scotland being inside the UK economic framework and entering into the EU's single market and customs union. Such transitions impose adjustments and uncertainty, which implies economic disruption and thus

costs. It is thus in the interest of Scotland to minimise the number of transitions and the period of uncertainty. But it is also in the interest of the EU to make the accession process as smooth as possible, not least to ensure that the Scottish commitment to the EU is maintained.

One way of bridging the gap between independence and EU membership is to extend the period Scotland remains in the UK economic framework beyond the point of *de jure* independence; economically, there could be transition agreements that imply that *de facto* economic independence comes after *de jure* independence. This would need to be a time-limited arrangement, not dissimilar to the transition period the EU and the UK agreed upon within the Withdrawal Agreement, dependent on the agreement of both an independent Scotland and the rest of the UK.

Transition to the EU

While some make the argument for full European Free Trade Association/ European Economic Area (EFTA/EEA) membership to bridge the period until an independent Scotland joins the EU, this carries the danger of being stuck in this state forever, not realising the ambition of EU membership, and not achieving the power and influence an EU member has. In addition, for many EU member states, it would confirm, in their view, that Brexit was only a convenient vehicle to achieve independence but that Scotland is not committed to EU membership and values. EFTA is also technically different from EU membership, for example in terms of governance and with regard to international trade. Joining the EEA – with EFTA countries Iceland, Liechtenstein and Norway and the EU27 as members – entails that Scotland would first have to join EFTA. That would require the agreement of the EFTA/EEA 3 and Switzerland (being in EFTA but not the EEA). Scotland could then apply to join the EEA. The EFTA countries would be reluctant to amend their arrangements for a temporary member, on the way through to EU membership, only being in EFTA and the EEA for a limited amount of time. Most likely for an independent Scotland to join EEA would require negotiating a new pillar (i.e. separate arrangements that take into account the specificities of the Scottish situation), which could be as tricky and lengthy as negotiating EU accession.

One feasible route to bridge from *de facto* independence to EU accession might be a comprehensive and ambitious pre-accession agreement, coming into force as early as possible. In terms of economic arrangements, it could contain a provision for associate EEA membership, essentially ensuring that an independent Scotland would be within the single market from the moment the pre-accession agreement comes into force, offering a mechanism of dynamic alignment that would minimise divergence between Scotland and the EU even if the time period until membership is longer than expected. A temporary docking on to the EEA (rather than permanent membership) could be an economically, technically and politically feasible economic 'bridge' to membership. Such an ambitious pre-accession agreement would be a clear signal that an independent Scotland is committed to EU membership, and that

this aspiration is recognised and supported by the EU. It would open the door to further cooperation, including potentially the participation in EU programmes, in areas such as research and education.

A comprehensive pre-accession agreement would provide an independent Scotland with a 'safe harbour', no matter how long the delay to membership. While it is likely that this period is comparatively short, it is an effective insurance mechanism that provides continuity and minimises disruption. But it would require a real commitment by Scotland to EU membership and its obligations. What implications such an arrangement would have for the Scotland-UK relationship will depend not only on Scotland's separation process from the United Kingdom but also on where the EU-UK relationship is at that point. Potentially it could be a win-win, with Scotland helping to bridge the gap between the EU and the UK, including in relation to Northern Ireland, but this will depend on the cooperation and good will of all parties involved.

Leaving the UK and joining the EU for an independent Scotland will inevitably imply economic changes, raising new challenges and opportunities. Scottish independence implies making different choices, including on EU membership. If an independent Scotland aspires to become a member of the European Union, a pre-accession agreement promises to minimise uncertainty, making the process as smooth as possible, which would be in the interests of Scotland and of the European Union.

5. What Representation Would an Independent Scotland have in the EU?

Steve Bullock

It has been argued that a Scotland that gained independence from the UK and then joined the EU would have given up representation and influence in one union in favour of less representation and influence in a much larger one. The argument is an intuitively attractive one – that Scotland's voice would be comparatively smaller in a union of 28 member states and nearly half a billion people than in a union with 4 members and fewer than 70 million people. The argument, however, massively underestimates the influence small member states can have in the EU and the extent of representation that an independent Scotland would have as an EU member state.

The influence Ireland had upon the UK-EU Withdrawal Agreement shows the political impact that a comparatively small member state can have. Ireland's role in Brexit negotiations deserves an article or book of its own, but the short version is that the entire Withdrawal Agreement depended upon a member state with a slightly smaller population than Scotland's being content with it. Throughout the negotiations, all 26 other member states and most of the European Parliament stood in solidarity with Ireland, and were guided by its positions. Small member states can have enormous influence when it matters.

Even if this is passed off as a special case though, an independent Scotland in the EU would, based on the EU's current arrangements and rules, have very extensive representation in the EU and its institutions at every level. The challenge facing the government of an independent Scotland after accession to the EU would not be finding a voice or opportunities to use it, but rather how best to use the huge opportunities its representation at an EU level would present.

Scotland would probably be the eighteenth or nineteenth largest member state. Its population is just under 5.5 million people, putting it just below Finland and Denmark, about equal with Slovakia, and slightly above Ireland. It would therefore have a similar voting weight in Council under qualified majority voting (QMV) to those countries. In reality though, most decisions are not made by counting votes in Council, but by consensus, even in those areas subject to QMV. Presidencies see failing to get consensus as a failure, even if dissenting member states would not be able to form a blocking minority, and try to avoid passing proposals without consensus unless absolutely necessary. For that reason, small member states can have influence beyond their simple voting weight, even on QMV dossiers.

Scotland would also have a veto in all areas where unanimity is required. These include very important areas such as the EU budget, tax, social security, most of foreign policy, and constitutional and institutional issues including treaty change. In these areas, Scotland would have the same raw voting power as Germany or France.

In terms of representationⁱⁱⁱ, there would be a seat for a Scottish government minister at every Council meeting, and for the head of government at every European Council and summit. Scottish government officials would be in every committee, Scottish diplomats in every Council working group, and the Scottish ambassador to the EU – the permanent representative – and their deputy would be in the COREPER II and I meetings (of the permanent representatives in the former and their deputies in the latter) that happen once or twice a week. Scotland would chair Council meetings^{iv}, the two COREPERs and working groups when it took its turn as the rotating presidency (as Croatia, who joined in 2013, now is).

As a topical illustration of what this Council representation would give Scotland, in addition to gaining access to all of the EU's current trade deals on accession, Scotland would participate in agreeing and monitoring the mandate for negotiating new ones, and the power of ratification or non-ratification of new ones where they are, like CETA, "mixed" agreements.

An independent Scotland in the EU could expect 13-14 seats in the European Parliament (Scotland had 6 MEPs from 2009-2020) and wide representation on its committees. The exact number would be decided prior to joining, but this is what similar sized member states now have, and there are seats currently left undistributed post-Brexit and therefore available to a new member state.

In addition to these political and government representatives, Scots would also be represented in the institutions themselves. All member states have a government-nominated Commissioner^v in charge of a portfolio within the European Commission. Scottish citizens would also be recruited as European civil servants in the Commission, Council and Parliament secretariats and other institutions. Scottish diplomats would be deployed around the world for the European External Action Service.

There would be 3 Scottish judges at the Court of Justice of the EU (CJEU) – one at the European Court of Justice and two at the General Court – plus the chance to nominate an Advocate General for a six-year term when its turn comes round. It would also have a member of the Court of Auditors, the EU's external auditor of finances.^{vi}

Scottish regions would have seats on the Committee of the regions, and the Scottish government could nominate Scottish civil society, employees and employers representatives to the European Economic and Social Committee.

An independent Scotland in the EU would become a member of the European Investment Bank with a board member, and would have access to low-interest, long-maturity loans for infrastructure, green tech, SMEs, housing and other investments.

As the other contributors to this report have pointed out, EU membership for an independent Scotland would be neither instant, nor a panacea for every challenge that the country would face. The point is that when it did join, the

very extensive political and institutional representation Scotland would have would mean that, like existing member states of similar sizes, it would play a full role in decision-making and policy development at every level. It would be a full member of a Union in which smaller members are not only taken seriously and listened to by their larger partners, but also take their turn to lead, and often wield considerable influence that belies their relative population size.

I have only attempted here to show the representation and powers an independent Scotland in the EU could expect to have, and not to make a direct comparison with those that Scotland currently has as part of the UK. What should be clear though is that Scotland could expect to be a full member state in every sense of the word, with very extensive representation and influence in EU decision-making structures and on the future of Europe itself. Membership as an independent country would be an opportunity to multiply Scottish influence in Europe and beyond, and would certainly not diminish it.

Part Two: Scotland's Border as an External Border of the EU

6. Borders: Lessons from Ireland

Katy Hayward

If it were to be an EU member and to hold its own as a sovereign state and trading partner, an independent Scotland must be capable of effectively managing its borders. What this means can be summarised succinctly in terms of three cornerstones for border management. The Scottish authorities will need to be able to prove themselves capable of all three:

- To know what is crossing the border;
- To be sure that it meets the criteria for doing so;
- To be able to prevent entry/exit if needs be.

These principles relate to all forms of movement across borders but because effective border management for the movement of goods is so key to the integrity of the EU's single market and customs union (which Scotland will have to prove itself capable of upholding), this short article will concentrate on that.

The cornerstones of border management must work in conjunction with each other. It is no use knowing what is crossing without being able to ensure it meets the necessary criteria, and being able to prevent entry if it doesn't. It should also be recognised that these three cornerstones are not of equal weight. If, for example, it can be assumed that goods crossing the border meet the criteria for doing so (i.e. customs procedures not required, regulatory standards met) then the other two pillars are much less important. This is how border management within the European Union typically works. If, however, that cannot be assumed (e.g. at a border between an EU state and a third country), then the other two pillars become much more significant. If the future UK-EU trading relationship is a fairly distant one, then we can be sure that all three pillars will be important for an independent Scotland in the EU, including the pillar of entry prevention.

In having to enforce the rules of the EU's single market and customs union at its borders, Scotland would face quite similar challenges of border management to those faced by Ireland as a consequence of Brexit. One obvious parallel is that it would have a land border with a non-EU country; furthermore, that same non-EU country would function as the 'land bridge' for Scotland to the rest of the EU. Secondly, apart from that one land border with England, it is surrounded by the 'natural' border of the sea. And it also has islands to surveil as part of its national territory. There are also significant differences between the two cases; it is likely that those differences rather than the commonalities are ones that will be emphasised by the EU when it comes to what it would expect in terms of Scotland's border management.

Scotland's border with England is around 150km long and 5 main arterial roads (motorways and A roads) cross it. There are many B and C roads that traverse it too, but far fewer than in the case of the Irish border, with its 270-odd crossing points along a 500km historically-contested boundary. As was the case for the Irish border for much of the twentieth century, controls along the Scottish land border would be a challenge to design and administer. They would require new systems of cooperation and communication (including to facilitate and process customs declarations), new infrastructure (e.g. facilities for veterinary inspections), new recruits for border management (among whom customs inspectors are but the tip of the iceberg), and new rules for traders to comply with if they wish to move goods across Scotland's borders.

Furthermore, it is worth recognising at this point that any effective border management system will need to have effective enforcement of anti-smuggling controls as well as trade facilitation. Very early on in its preparations for independence, therefore, Scotland would need to be considering the measures necessary to counter the inevitable rise in illegal movement of goods. Technology can be a useful tool in the effective operation of borders but it does not in itself avert the need for controls nor, indeed, does it avoid the need to be clear about the system of border management that is to be applied. Such measures may come into play far from the geographical border or entry point and can involve a very wide range of actors (e.g. accountants, lorry drivers). One thing we can be sure of: implementing an external border of the EU between Scotland and England would bring challenge and disruption. How much flexibility could we expect from the EU? Here's where we might take lessons from how it approached the topic of the Irish border in negotiating the UK's withdrawal – and they are not necessarily ones to set minds at ease.

When the EU and UK put the Irish border as a top priority for the withdrawal negotiations, it was in explicit recognition of the 'unique circumstances of Northern Ireland'. These special conditions do not only arise from the legacy of the Troubles and the fragile peace process, but also from the genuinely exceptional geographical and political position of the region itself. This position is embodied in the three strands of cooperation in the 1998 Good Friday (Belfast) Agreement which are either defined by the border (e.g. unionist/nationalist) or which actively work across it (north/south, British-Irish). The vital importance of the Irish state vis-a-vis Northern Ireland is key to understanding the flexibility shown towards it in the UK-EU Withdrawal Agreement.

And the flexibility that the EU showed Northern Ireland was quite remarkable. But it also had a certain logic to it. The fact that the Northern Ireland/Ireland Protocol in the Withdrawal Agreement means that the boundary of the EU's customs union and single market will not have to be enforced along that border is, on the face of it, a rational and pragmatic outcome. Bluntly put, it is easier to manage a customs and regulatory border in sea and air ports than across a land border. But if Ireland's Brexit experience – and the debacle of the backstop and the front stop and the dramatics in-between – has

demonstrated anything, it is that ‘taking control of borders’ is not just a catchphrase for the EU but a solid, strictly enforced principle.

To illustrate this, consider the experience of another EU state: Slovenia, whose border experience illustrates two things: firstly, that the EU is very familiar with complicated and integrated borders (such as Scotland and England’s) and, secondly, that the EU tends to show very little flexibility for such cases, even where this brings inconvenience and disruption to those most affected.

Slovenia has borders with four countries: Italy, Austria, Hungary, and Croatia, the latter of which it is in an on-going dispute with over their 670km border. Prior to 1991, Slovenia and Croatia were both part of socialist Yugoslavia. Under Tito, the border between them had little significance other than some administrative differences. 1991 brought independence for both countries and the border thus became more formalised, with passport and customs controls introduced along its length. In 2004, Slovenia joined the EU which meant that it was now in the single market and customs union, bringing increased border controls and new criteria for entry along the Croatian border. Then, in 2007, it joined Schengen, bringing in more stringent passport controls at the EU’s insistence.^{vii} It was not until Croatia acceded to the EU, in 2013, that customs controls on the Slovenian-Croatian border were abolished. So EU membership for Slovenia brought about an increase in border controls and checks that severely interfered with daily lives, commutes, trading and business. There is little reason to doubt that the EU would be willing to see this for the Scotland/England border too.

Borders have two sides and border management requires cooperation. Whatever border arrangements Scotland (and the EU) decides upon, they will have to be broadly matched on the other side. This does not relate only to the movement of goods. Much of Scotland is bordered by national parks and nature reserves. As we can see from the management of the US/Canada border through protected indigenous American territories, customs enforcement has its own difficulties in such conditions but it receives little attention, primarily because the economic value of what can be smuggled in such circumstances is reduced by the practical obstacles to doing so. However, there are other forms of risk associated with borders that cut through natural, remote landscapes, and these come with the movement of those things that can traverse the border by themselves, e.g. wild animals, water, diseases. These are hard to control for and instead can only be managed by cooperation with those on the other side of the border, with coordinated response plans etc.

Ultimately, an independent Scotland can only be sure of its readiness for sovereignty and the security of its borders if it is willing and able to work collaboratively. First, it will need to work closely with those on the other side of its borders, i.e. England. No matter how well-resourced or prepared, a secure border cannot be achieved or maintained by just one side. Secondly, it will need to acknowledge – as Ireland had to when confronted with the prospect of Brexit – that whatever it has to do at its borders will be not just a domestic

concern but will be subject to heavy direction and scrutiny from the rest of the EU.

One thing we can be sure of: Scotland's capacity for border management at its sea and air entry points will already be considerably enhanced as a consequence of Brexit itself. In a future scenario of independence and EU membership, such a process of increasing border management capacity would be wider and deeper. We should not presume a great deal of flexibility from the EU. Indeed, if Scotland wants a model from Ireland for border management, it should fall along these lines: the rules Ireland is going to have to implement at its sea border with the UK come 1 January 2021, an independent Scotland is going to have to be ready to implement at its land border.

7. Borders: Free Movement and the Common Travel Area

Imelda Maher

Should Scotland leave the UK and look to apply to join the EU, could it remain part of the UK/Ireland Common Travel Area or would it have to join the Schengen area, that ensures frontier-free movement of EU citizens? Remaining in the Common Travel Area (CTA) Scottish citizens would be free to move in the UK and Ireland.^{viii} Irish and British citizens would have free movement in Scotland. However, like Irish citizens, outside of Schengen, Scottish citizens would be subject to border controls entering other member states and other EU citizens would also be subject to border controls entering Scotland.

Here we explore the CTA and what issues might arise for Scotland should it look to remain part of the CTA, after independence and if it joined the EU.

Borders matter. As Tankard reminds us^{ix}, the word as a noun constitutes a splitting apart while as a verb it suggests adjoining and it is this double quality that reflects the complexity of land borders. The history of the EU has been one of emphasising the adjoining quality of internal borders rendering it a Europe without frontiers.^x Hence, under the Schengen Convention, there are no frontiers between states for their citizens.^{xi}

Ireland and the UK (when a member) always stood apart from these arrangements. This was because Ireland and the UK already had their own Schengen area: the Common Travel Area, which emerged initially from inertia around inserting barriers to free movement between the two jurisdictions after the creation of the Irish state in the 1920s.^{xii} In essence, the CTA allowed for the complete free movement of British and Irish citizens between the two states. In fact, it goes a lot further than free movement across borders with full access to social welfare and extensive voting rights for example.^{xiii} There are no systematic passport checks on either side of the land border.^{xiv}

The CTA remains intact although more formalised, following Brexit. The endlessly flexible and largely unwritten CTA has now been committed to a written but still formally non-binding memorandum of understanding (MoU) between the two states. Following Brexit, Ireland retains its opt out from the Schengen area so it can retain borders with its fellow member states and continue with the CTA, privileging free movement with the UK and of British citizens over frontier-free movement in the EU.^{xv} The Withdrawal Agreement expressly allows the CTA to continue and develop subject to fully respecting the EU Law rights of natural persons.^{xvi}

For an independent Scotland, minimising the land border with England and Wales would be important for the same cultural, economic and political reasons as it is for Ireland. It also would have only one land border which would be external to the EU and that would be with England. These factors would suggest that Scotland could look to remain in the CTA and outside the

Schengen Convention for the same reasons as the UK (when a member) and Ireland.

There are two main legal issues that arise. First, Ireland and the UK would have to agree to Scotland joining the CTA. As it is enshrined in an MoU and is not a binding international agreement this could be achieved legally without much difficulty provided there was a political willingness to do so and the continuation of Scotland within the arrangement was not seen as interfering with Irish obligations under EU Law. In other words, a provision similar to that in the Withdrawal Agreement between the UK and Ireland would need to be set out, indicating that the CTA can continue and develop provided the EU law rights of natural persons continue to be respected.

Scotland would need to secure exemption from Schengen and permission to retain borders with fellow EU member states. On accession, new member states are required to accept the *acquis communautaire* of the EU i.e. the entirety of its statute book. In addition, Article 7 of Protocol 19 TEU (the Schengen Protocol) expressly states that new member states must accept in full the Schengen acquis and any measures taken in relation to it.^{xvii} If Scotland wanted to be a party to the CTA, it will require an exemption from Schengen which can only be achieved as an amendment to the Protocol. This would have to be agreed ultimately by all the member states as the accession agreements between the EU and the accession state is subject to ratification by all the member states in accordance with their own constitutional requirements.^{xviii}

At the moment, several states are outside Schengen. Bulgaria (2007), Croatia (2013), Cyprus (2004) and Romania (2007) all joined the EU on the dates indicated but are not yet fully integrated into Schengen as they do not meet the conditions for removal of internal border controls. On the other hand, non-member states (Iceland, Liechtenstein, Norway, and Switzerland) are members of the Schengen border-free area. The position of Ireland is different as it enjoys an opt-out and this opt-out is what Scotland would seek to rely on in negotiations.

It would be possible – if the political will is forthcoming – for Scotland to be treated like Ireland and to remain outside Schengen and in the CTA, ensuring free movement of Scottish citizens throughout the UK and Ireland.

Thanks to Ronan Riordan for research assistance.

8. The Economics of the Scotland-rUK Border

David Bell

The UK constitutional settlement is in a fragile state. The chances of Scotland remaining part of the UK have diminished following the 2019 general election. Recent polls have suggested that independence commands majority support among the Scottish electorate. The probability that Scotland becomes independent and then re-joins the EU may be small but has been growing.

If this chain of events occurs, the Anglo-Scottish border would become an EU – rump UK (rUK) border. This is the scenario which this chapter seeks to address. What would be the economic implications for Scotland? While the chapter focuses on the detail of this prospect, a recurrent theme is the close analogy between pro-Brexit arguments relating to prospective UK-EU borders, and those relating to an independent Scotland's border with rUK. Arguments concerning “border frictions” between the UK and EU translate straightforwardly into the Anglo-Scottish border context.

It is also worth noting that Brexit means that current arguments about the role of the Anglo-Scottish border differ substantively from those made at the time of the 2014 independence referendum. In 2014, with the assurance that the remainder of the UK would remain part of the EU's single market, the argument centred on whether Scotland could re-join the EU and therefore, as part of the single market, have a frictionless border with England. Within the scenario imagined in this chapter, this situation is reversed. An independent Scotland within the EU would be part of the EU's single market: England and Wales would be outside.

As a member of the EU, Scotland would not be part of the UK customs union and would not be party to trade deals negotiated by rUK. Instead, as a full member of the EU, its trade deals would be arranged by the EU Commission on behalf of all the member states. As part of the largest trading block in the world, this would likely mean that it would benefit from more advantageous deals than rUK is likely to be able to negotiate. However, Scotland would have to accept the standards that the EU is likely to impose on such deals. These include the “precautionary approach” which it uses to guide environmental, health and animal welfare standards and which, for example, has led to the prohibition of imports of GM crops. Nevertheless, in Scotland's case, the negotiating strength of the EU might, for example, have the advantage of more effective “geographical indication” protection – particularly important for the food and drink sector.

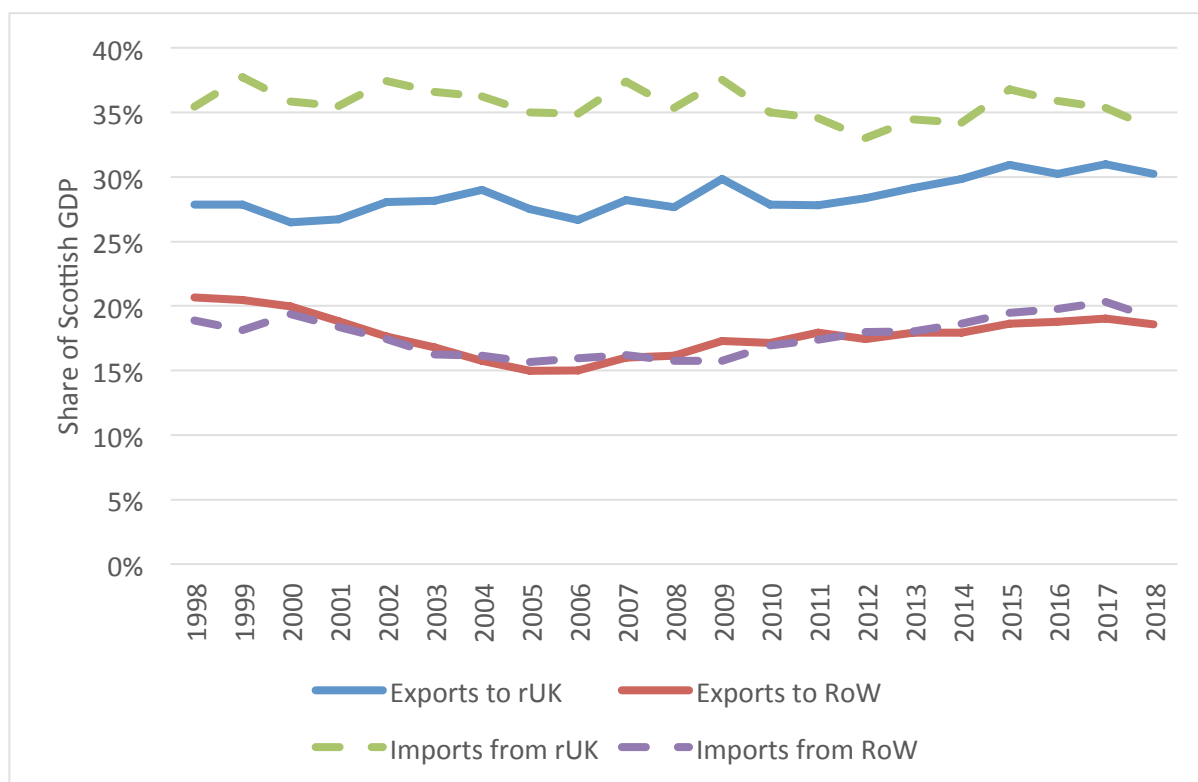
Barriers to trade are generally bad for growth and prosperity. But it is difficult to predict what specific barriers an independent Scotland might face until the shape of the EU/UK trade deal becomes clear. The greater the divergence on trade issues between the EU and the UK, the more frictions there will be at the border.

Northern Ireland would be inside the UK customs union. It would therefore be part of any trade deals that the UK agrees with third countries. Yet if the UK government keeps the commitments it made in the EU Withdrawal Agreement, checks will have to be carried out on goods coming from Great Britain to Northern Ireland that are “at risk” of being shipped to Ireland, and thus to the EU single market. Customs checks within the existing UK territory will therefore be in place before Scotland becomes independent. The paradox of these arrangements is that the UK government will wish to show that they have minimal impact on NI/GB trade, while at the same time arguing that similar checks on the Anglo-Scottish border will have a devastating effect on the Scottish economy.

The border checks may be quite significant. The UK has just indicated that it is not seeking a waiver on EU Safety & Security Border declarations. This will mean that each consignment traded between the EU and UK will have to complete lengthy paperwork after end of the transition period in 2020. Whether this approach will survive the inevitable conflict with British business, particularly those traders working with perishable goods including the Scottish fishing industry, is perhaps unlikely. And where the UK is treated by the EU as a “third country”, there would also be checks to ensure relevant tariffs are paid, that the correct VAT on goods that carried tariffs, checks on VAT, sanitary and phytosanitary checks on foodstuffs and checks to determine whether goods comply with relevant rules of origin. These would clearly disrupt cross-border trade at a cost to both parties.

How such checks may play out along the NI/GB border in the near future is unclear. Nevertheless, if the UK government were to persist with antagonism towards measures that reduce trade frictions, then the checks on the Anglo-Scottish border would be damaging to current trading patterns. But to do so would harm its own exporters as much as Scottish exporters. And it might encourage trade diversion, in the same way that Brexit has caused the Irish government to establish direct routes to mainland Europe, obviating the need to use the UK land-bridge to access EU markets.

Trade flows across the Anglo-Scottish border are substantial. Figure 1 shows the size of imports and exports (excluding offshore effects) relative to Scottish GDP from 1998 to 2018 (figures for 2017 and 2018 are provisional). While Scotland’s trade with the rest of the world (RoW) is almost consistently in balance, it runs a deficit in goods and services with rUK, which has averaged 5.7 per cent of Scottish GDP during the last ten years. This would be an issue for a Scottish government if it set up a separate currency and could not establish compensating capital inflows. On the other hand, the argument put forward by the Brexiteers was that the EU needed a trade deal with the UK more than the UK with the EU because of the UK’s trade deficit with the EU – so a similar logic applies to a Scottish/rUK deal?



Source: Scottish National Accounts Programme: Whole of Scotland Economic Accounts Project 2019

Scotland could establish deals with rUK independent of the EU because the single market is not complete: whereas most trade in goods is covered, very little progress has been made in respect of trade in services. Both rUK and Scotland are service-dominated economies. Hence there may be opportunities to agree sector-by-sector deals (e.g. some areas of banking, health, education) that would not threaten obligations that Scotland might have under EU treaties.

Similar consideration would apply to the movement of people between Scotland and rUK. Like Ireland, Scotland would likely prefer to be part of the Common Travel Area rather than join the Schengen zone to which most EU countries belong. This would mean there would be no need to show passports on crossing the border and given the volume of movement, this would save substantially on administrative costs.

How the establishment of an Anglo-Scottish border will affect Scottish GDP in the medium to long-term is impossible to predict. Frictions in trade are likely to restrict growth in the short-run, as we are about to observe when the UK leaves the EU. However, its existence will set up a new set of incentives for individuals and companies: whether these play in Scotland's favour depends very much on the choices that the UK government is currently making in respect of the post-Brexit relationship between the UK and EU, and future policy choices that an independent Scottish government might make.

Under the scenario of an independent Scotland rejoining the EU, foreign investors might consider Scotland a desirable location given its unfettered access to EU markets, a well-educated English-speaking workforce, some trade integration with rUK in respect of services and good communications. But Scottish workers might be attracted to rUK if it offers better long-term income prospects. How these and other incentive effects might balance out is impossible to anticipate.

The closest analogue to these issues lies in the situation that Ireland now confronts in its relationship with the UK. Immediately post-independence, Ireland's GDP per head was 56 per cent of that of the UK. In 2018, Irish gross national income^{xix} per head was 43 per cent above the UK level. A [report](#) prepared for the Irish government suggested that Irish GDP might fall by up to 7 per cent if the UK opted for "no deal" with the EU. This would pose a serious problem for Ireland, but its GDP per head would obviously continue to be well above UK levels. It is clearly possible for a small country to succeed economically in a similar situation to that which would confront an independent Scotland within the EU and establishing a new border. But because it is possible does not mean it is inevitable. It would require both good fortune and skilful, occasionally tough, policymaking.

Part Three: EU Policy Challenges and Adaptation

9. The EU's Fiscal Criteria: Debit, Deficit and Currency Questions

David Gow

Introduction

Such is the binary nature of political debate in Scotland that views on the economic prospects for an independent Scotland to join the European Union are overwhelmingly Manichean.

Either the country will sail through the accession process in a matter of months post-independence. Or the economic, fiscal and monetary obstacles will be so high it may never happen – and Scotland will forever be saddled with outsider status. A North Sea Belarus.

It should go without saying that neither of these extreme positions – *ultra-independista* and *nec plus unionista* – is based in reality. What matters is less the current state of the Scottish economy – hard to disentangle from a 313-year-old economic and monetary union – than what it might or could be x years from hence when or if Scotland is an independent country. And that is a big unknown.

One reason for this uncertainty is that (at the moment of writing) the UK government has published a negotiating mandate for the talks with the EU on future relations that puts the accent on divergence.

The more a post-Brexit UK, including willy nilly Scotland, pursues deliberate divergence the harder it will be for an independent Scotland to meet the criteria for (re)joining, although the Scottish government hopes to stay aligned to EU law in some devolved areas of policy including the environment. As a sub-state, albeit with devolved powers, Scotland has limited room for manoeuvre economically. It could easily be dragged down in any UK-wide recession.

And the longer this economic uncertainty goes on, and the lengthier the process of seeking and winning independence, it will become even more difficult to meet the specifically fiscal and monetary criteria for EU membership.

The State of Scotland

The Scottish Fiscal Commission delivered its latest 5-year forecasts for the Scottish economy in early February (post-Scottish budget, pre-UK budget), showing GDP growth a shade over 1% per annum. Tax revenues, however, show a much healthier upward trend, largely on the back of sustained wages growth bringing a higher income tax yield. But no forecast for the budget deficit is given. Equally, other neutral commentators such as the Fraser of

Allander Institute are sceptical about the degree of wages growth forecast (3% a year roughly).

The budget deficit is a key number when it comes to accession to the EU but not as determinant as some commentators (disingenuously) suggest. In 2018-2019, the deficit, including a share of North Sea revenues, was 7% when the UK's was 1.2%. The OBR forecasts it will hover around 6% up to 2023-24 – or the period when, on a generous time horizon, Scots might be waking up to being in an independent country. In comparison, the current eurozone government deficit is 0.7% and that of the EU28 0.9%, with the suggestion that this is an inappropriate straitjacket imposed by the Germans and other "frugals" when the eurozone economy faces recession. In Scotland, meanwhile, there is considerable debate over the true scale of the deficit upon independence and whether or how to bring it down to such low value.

The Scottish government, drawing on the report of the Sustainable Growth Commission, estimated^{xx} an inherited deficit in 2021-22 of 5.9% of GDP, assuming lower spending on defence, debt servicing and "some other services". It says: "An independent Scotland would need tight public spending rules to bring the country's deficit down from around 6% in 2021-22 to below 3% over a period of 10 years". The 3% target is that set by the EU's Stability & Growth Pact (SGP) aka Maastricht criteria. So far, there has been no credible indication of what policies, let alone concrete spending measures or cuts, would be put in place to achieve such an outcome. The Growth Commission proposed that total public spending should increase by 1% less than GDP for the first decade post-independence. As it assumed GDP growth of 1.5% a year, spending on public services and benefits would increase annually by just 0.5%. The Institute for Fiscal Studies observed: "Such an approach would see spending on public services and benefits fall by about 4% of GDP over that decade. Add on the growing amount the Scottish government would have to spend on servicing its increasing post-independence debt, and overall public spending and hence the deficit would fall by 3% of GDP. Together with some assumed but unspecified efficiency savings (0.3% of GDP), that brings the forecast deficit down to 2.6% of GDP one decade after Scottish independence."^{xxi} Of course, the Growth Commission is targeting 3% annual GDP growth which, if attainable (a big if), would imply a softer fiscal regime and easier path towards a sustainable deficit.

For the year to end-March 2019, UK government debt stood at 85.2% of GDP, a shade below that of the eurozone (EA19) at 86.1% in Q3 2019, and above that of the EU28 at 80.1% compared with the Maastricht reference value of 60%. Central government gross debt stood at £1.8 trillion at end-March 2019, but we have no idea what Scotland's share of this would be. The 2013 Scottish government white paper, before the 2014 independence referendum, suggested this could be either via population share or aggregated fiscal deficit (starting arbitrarily at 1980-81 in that report or just prior to when North Sea oil revenues kicked in.)^{xxii} Another suggestion^{xxiii} in that period was to follow the example of the Czechs and Slovaks during their 'velvet divorce' of 1993 and divide assets on a geographic basis (oil, say, in the Scottish case) and debt

via the share of population. The Growth Commission suggests – somewhat airily – that national debt should "not increase" beyond 50% of GDP and stabilise at that level.

Meeting the criteria

Political commentators, often across the binary divide, confuse the criteria for joining the EU with those for adopting the single currency, the euro. There is no demand for an extant budget deficit of 3% or debt-to-GDP ratio of 60% for entry to the EU: these are, once again, the Stability and Growth Pact reference values, not a barrier as the Croatian case underlines and are more relevant (though not absolute) for adopting the euro. The Croats joined the EU in 2013 when their net government deficit was 5.3% after falling to as low as 2.4% in 2007 and rising to 7.9% in 2011 as the financial crisis and economic slump took their toll.

In other words, they had to show they were on a downward path and indeed the country registered a small surplus (0.2%) German-style in 2018, with similar ones projected for this year and next. The crucial point, however, is what happened post-accession. Croatia was rapidly, after its first 6 months only, put under the EU's Excessive Deficit Procedure (EDP) and then carried out a fiscal squeeze to comply with the deficit conditions. So, an independent Scotland could ask for a transition period during which it would work towards meeting the Stability and Growth Pact targets, pointing out any progress already made but the Commission and the member states would decide whether progress towards the targets was adequate. And it and they could insist on a tight schedule.

Here the question is whether the Scottish polity, let alone populace, is aware of how severe the spending squeeze might have to be – coming not that long after a decade of austerity. Would an independent Scottish government and civil society be both able and willing to accept strict spending controls/cuts? The typical answer that independence will, by itself, trigger an entirely different set of (positive) economic outcomes may be wishful thinking. As matters stand, we simply have no way of knowing whether that's likely or not.

Equally, there is no doubt that an independent Scotland would have to indicate its willingness to join the euro – at an unspecified point. Eight EU countries, including Denmark, which has an opt-out, and Sweden, which does not, are not in the single currency. In this case, the five convergence criteria – on inflation, deficit, borrowing costs – are stricter than for entering the EU per se.

What matters more is the currency question itself, arguably the one that undermined Alex Salmond in the 2014 independence referendum. His successor, Nicola Sturgeon, simply asserts that "... it is not true to say that we would have had to have established an independent currency before joining the European Union." She abides by the Growth Commission process of 'sterlingisation' or sharing sterling before adopting an independent Scottish currency further down the line. That may be problematic. Initially, at least, the Scottish Central Bank (as proposed by the Growth Commission) would not set

its own monetary policy, including interest rates – unlike, say, the Slovenes which set theirs up as early as 1991 in the break-up of Yugoslavia. Slovenia entered the EU on January 1 2004 and joined the euro exactly three years later. But, two decades later at least, a newly independent Scotland might face a different – and very political – interpretation of whether it met the economic criteria, including the key one of "macroeconomic stability (including adequate price stability as well as sustainable public finances and external accounts)".

Conclusion

The national debate about an independent Scotland joining the EU, broken off to all extents and purposes in 2014, has been rebooted but at a low energy level within the Scottish government and Holyrood. If it is to be meaningful, there needs to be far more active engagement by both the political class and civil society. At the core of this national debate must be the economy and whether it can be brought to a position where Scotland can and will meet the criteria for accession if it so wishes. So far, it does not meet those economic criteria in their entirety – notably monetary policy as well as exchange rate, as set out in Chapter 17 – but the true state of the economy if and when the Scottish government embarks upon the EU accession process may be more favourable then.

Ultimately, this will be a political decision. And the EU holds many if not most of the cards. As the latest iteration of enlargement policy spells out: "The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration. The EU reserves the right to decide when a [candidate country](#) has met these criteria and when the EU is ready to accept the new member."

10. A Return to the Common Fisheries Policy?

Arno van der Zwet and John Connolly

Fishing has occupied a peculiar role in the Brexit saga. On the one hand, the fishing industry makes up a very small part of the UK economy, 0.1%^{xxiv} of the overall economy. On the other hand, it provided, in political terms, a convenient narrative for the Leave campaign, appealing to a sense of identity as an Island nation and control over borders. Fishing is, therefore, guaranteed to take a prominent place in the Brexit negotiations. Of course we do not currently know what sort of deal will be agreed but the UK government seems, at least for now, committed to ensure full control over fishing stocks in UK waters.

But the question here is how fishing might play a role in any future negotiations with the EU should Scotland become an independent country after Brexit. The first thing to note is that, in Scotland, the fishing industry in terms of economic contribution is more important than in other parts of the UK. Scotland's fleet capacity is almost twice that of England and it lands almost three times more fish than England.^{xxv} However, it remains very small. Fishing generates just over £300 million gross value added, which accounts for about 0.25% of the overall Scottish economy.^{xxvi} On the other hand, geographically, the fishing industry is concentrated in specific coastal communities where they underpin the local economy.

Research just before the 2016 referendum demonstrated that almost all fishers in Scotland supported leaving the EU at the time of the Brexit referendum, with 93 per cent of those surveyed indicating that they would vote to leave the EU.^{xxvii} Fishers, particularly disliked the EU's Common Fisheries Policy which was regarded as unfair and not taking into account the industry's interests. However, other parts of the industry have expressed anxieties about maintaining EU market access for their products.

From the EU's perspective, Scotland's waters are important for fishing communities in its member states. Scottish fishing waters are some of the richest in Europe and the Scottish fishing industry accounts for about 8% of total EU landings. It is estimated that over half of all fish and shellfish in the UK's Exclusive Economic Zone^{xxviii} is landed by EU vessels;^{xxix} a major part of this is caught in Scottish waters. The UK as a whole has a large trade surplus with the EU, accounting to 71 % of total UK exports of fish.^{xxx} The French, Spanish, Portuguese, Dutch and Danish have fishing industries that have long relied on riches in UK waters.

In the 2013 White Paper, *Scotland's Future and Scottish Fisheries*,^{xxxi} the SNP led Scottish government argued that Scottish independence would mean that the fishing industry would be regarded as a national priority. The SNP has long expressed concerns that the UK government has not served Scottish fishing interests as fisheries was not regarded a priority for the UK economy. It argues that the UK government has throughout history been willing to use the industry as a bargaining chip to secure other priorities. In any future

independence campaign, the SNP will likely continue this line of argument i.e. that an independent Scotland would be better placed to represent Scottish interests at the top table in Brussels than the UK has done so in the past; an independent Scotland will, according to the SNP, be able to secure more favourable terms for Scottish fishers.

Against this background, the Scottish government would, if Scotland became independent, need to demonstrate that it is able to prioritise fisheries in negotiations with the EU and protect the interests of the catching industry, particularly if the UK government has, by then, continued its hard-line and secured an outcome that meets the current expectations of fishers. Negotiations on an independent Scotland joining the EU would almost certainly be predicated on the basis that Scotland would have to adopt the Common Fisheries Policy. However, this would not be welcomed by most of the fishing industry and it could prove politically awkward if the Scottish government would sign up without any concessions that would benefit the fishing communities. Such concessions might be found, for example, in relation to a greater share of the European Maritime and Fisheries Fund (EMFF); an EU fund that provides support for fishers and fishing communities in terms of diversifying coastal economies and job creation, and developing sustainable fishing practices and aquaculture. The share of EMFF funding that Scotland has received in the past has been considered unfair, given the importance of Scottish waters to fishing communities from other EU member states.

As an EU member state, Scotland would have to negotiate its share of the EU's fishing quotas as part of a fixed arrangement which would be enshrined in the CFP. It would also mean that Scotland would have to allow vessels from other EU countries into its waters. However, as a member state the Scottish government would be responsible for deciding how that quota would be distributed and therefore it would be able to keep quota holdings for the benefit of Scottish fishers, providing there is sufficient capacity to fish these quotas. An independent Scotland could therefore distribute quotas more equally as opposed to the current situation in the UK where a small number of companies control a large share of the quota.^{xxxii}

One important dimension, in future EU negotiations, is that Scotland, as an independent nation, would already have considerable scientific and analytical capacities when it came to the management of fisheries. However, there would be questions about how to deal with the fact that negotiations at an EU/international level have been channelled through the UK Department for the Environment, Food and Rural Affairs. Scotland would need to ensure it had or rapidly built up adequate negotiating expertise. Moreover, an independent Scotland within the CFP would lead to considerable uncertainties with regards to the nature of government relationships with the industry.

A major part of the Scottish fishing industry, such as the Scottish Fisheries Federation, see Brexit as a 'sea of opportunity',^{xxxiii} based on the UK government's vision of no longer being part of the CFP. However, Scotland's continued membership of the CFP as an independent state in the EU means

that it will be difficult for Scotland to broker positive relationships with parts of the industry. This might reduce the capacity for effective policy-making in the sense that having industry as an insider stakeholder group based on positive relationships would, ideally, be of mutual benefit for government and industry.

The evolution of the relationship between government and industry will, however, likely require trust building, with the onus being placed on the government to facilitate this. That being said, the industry will have no choice but to adapt and to view a reconvened relationship with the CFP from a pragmatic perspective.

The beginning of the trust-building process would commence via the negotiation process surrounding Scotland's EU membership i.e. a CFP that works better for Scotland's fishing industry would need to be very high on the negotiating agenda. Additional concessions such as greater EMFF allocations may go some way to establish some sense of trust but are unlikely to be a big enough plaster on its own. For many Scottish fishers the idea of Scotland being part of an independent non-EU coastal state might be seen as a 'sea of opportunity' but an independent Scotland in the EU would, at least for some time, produce a 'sea of uncertainties'.

11. Justice and Home Affairs

Kenneth Campbell QC

Superficially, there might be thought to be little about court procedure and judicial cooperation – civil or criminal – which has an EU-law dimension. In fact, there are a number of areas where there are rules to facilitate cross-border processes, and this chapter focuses on three significant areas:

- Gathering evidence in civil cases
- Recognition of judgments in civil cases
- Criminal justice cooperation – including the European Arrest Warrant

At the point of the UK's exit from the EU, the Scottish legal system was fully aligned with the Justice and Home Affairs *acquis*, so at first glance that might be thought to be the 'restore' point in the event of an independent Scotland seeking membership of the EU. Of course, both domestic and EU structures will have developed in the interim. There is no reason in principle why non-reserved matters could not be conducted on a basis which preserves a large degree of alignment. However, for reasons that will become apparent, it is likely that in the interim, important aspects of coordination at an operational level may be led by UK government policy.

In the discussion which follows, there is little to be said about substantive rules of law, partly for reasons of space, but mainly because much of the EU action in this area sets a framework for cooperation and mutual recognition.

Gathering Civil Evidence

Council Regulation (EC)1206/2001 provides a mechanism for co-operation between courts taking evidence in civil and commercial matters, in all member states except Denmark. In brief, this provides for a standardised and relatively expedited procedure for obtaining evidence in terms of which a request must be executed by the receiving court within 90 days of receipt.

Currently, Scottish rules of court facilitate this process. However, they are dependent on the Regulation, and hence will cease to have meaningful effect at the end of the transition period. The existing process could conceivably be preserved for incoming requests using procedure in the European Union (Withdrawal) Act 2018, but outgoing requests would no longer fall under the Regulation, and reciprocity improves the efficacy of such arrangements.

Some alternative legal basis for this procedure, in both directions, is required now, and seems likely to form part of an agreement between the UK and the EU, because civil justice cooperation is on the agenda for future relationship negotiations. At the point of independence, some interim arrangement to facilitate evidence-taking would be desirable, at the very minimum building on whatever arrangement is agreed by the UK with the EU as part of the future relationship. As part of the preparation for accession, the Scottish government will require to ensure that the Scottish court procedure is in a form which is

compatible with Council Regulation (EC)1206/2001, or any subsequent revision of it.

Recognition of Civil Judgments

Recognition and enforcement of court judgments is more commonly encountered than gathering of evidence. To give two examples: it is a necessary consequence of cross-border trade, and is also vital in family law, recognising the mobility of modern families.

There is a long history of international agreements in this area, even prior to the existence of the EU. However this is an area where there are a significant number of EU instruments, given effect in Scotland via the Civil Jurisdiction and Judgments Act 1982. This is a harmonised procedure for recognition and enforcement of judgments across EU member states, and works by adapting a number of EU law instruments, set out as schedules. The original conventions have been supplemented over time by a series of Regulations, called Brussels I, Brussels II and Brussels (recast), and by the Lugano Convention of 2007. The same legislation also significantly remodelled Scots law on jurisdiction, deliberately harmonising key rules with EU law, and the domestic aspects are unaffected by UK exit.

The UK government has recognised this is an area where disruption of existing arrangements is undesirable. A Private International Law (Implementation of Agreements) Bill was introduced into parliament in February 2020 to give continued effect to several Hague Conventions on family law matters. The Bill also contains paving provisions to allow the UK to sign the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of in its own right after the transition period. Much of the key architecture appears likely to remain in place in this area. Many aspects of this area are either devolved, or shared competence with the UK; it should be possible for a degree of alignment to be maintained so that realignment would require relatively little work at the point an independent Scotland sought to re-join the EU. Accession to the Lugano Convention by an independent Scotland would be an important interim step, while EU membership was negotiated.

Criminal Justice

Here the picture is complicated by the number of instruments and processes, and by the UK government's approach to its future relationship with the EU. The European Arrest Warrant (EAW) has become one of those aspects of EU legal order which is misunderstood and misrepresented, but is vitally important to some of the same political interests which express such strong views about it. That ambivalence was also reflected in Protocol 21 to the Lisbon Treaty about the application to UK (and Ireland) of aspects of area of freedom justice and security, which conferred an opt out, with the ability to choose to opt back in again on specific measures. Given the changed European political climate since the Lisbon Treaty was agreed, it seems unlikely such an opt-out would be available to an independent Scotland, even if it were thought a desirable negotiating goal.

The EAW is applied throughout the EU and has replaced extradition procedures within the EU's territorial jurisdiction. Its key feature is expedition: judicial procedures have been designed to facilitate the surrender of people for the purposes of criminal prosecution or executing a custodial sentence. Currently, the EAW is given effect under the Extradition Act 2003: UK primary legislation. The UK government has recently signalled it will not participate in the EAW as part of a future relationship agreement, proposing instead arrangements based on the EU's Surrender Agreement with Norway and Iceland. As extradition arrangements are treaty-based, competence is reserved to the UK government, even though many aspects of criminal justice are devolved.

If the EAW is not retained, there are options for re-establishing some form of mutual recognition in criminal matters with EU member states. That would most likely feature reversion to the European Convention on Extradition 1957, which is a Council of Europe Treaty to which all EU member states are signatories, along with a number of other states. While the process is not as smooth as the EAW, it does at least afford a common approach to extradition, albeit at the cost of increased cost and complexity. Accession to the Extradition Convention by an independent Scotland would be an important interim step, while EU membership was negotiated.

Information Sharing in Justice Matters

Justice cooperation is not confined to the EAW; twenty-two of the EU member states are part of the Schengen arrangements for open borders and its associated information sharing. While the UK had an opt-out from Schengen, that is unlikely to be available to new applicants (and there are particular reasons why five current member states are not currently Schengen participants). While the EU starting point in accession negotiations might be that an independent Scotland would be expected to participate in Schengen, there would be scope for argument that the geographical position of Scotland, and the likely desire of the government of an independent Scotland to maintain some form of Common Travel Area with Ireland and, presumably, the remaining UK, should permit an opt-out.

There are a number of important data-sharing structures in the justice and home affairs area. These include:

- European Criminal Records Information System
- Prüm DNA system
- Passenger Name Record data exchange
- Europol

As part of the future relationship agreement, the UK government seeks equivalent access rather than continued membership (where that is available). For the most part, these are operational processes rather than substantive rules, though statutory backing for some aspects of operation may be required. The Scottish government will have involvement in operational matters. That is infrastructure which would be transferrable in a situation where an independent Scotland was negotiating EU membership. Perhaps a

key requirement will be ensuring systems remain compatible, both in terms of hardware and operating procedures.

Conclusion

Much of the infrastructure necessary for (re)integration into the EU justice and home affairs landscape currently exists in Scotland. Some of that will change shape as a result of the UK government's negotiating brief for the future relationship. Other parts are devolved, and there is more scope for tracking the developing EU *acquis*. In the event an independent Scotland sought to negotiate accession, there are a number of interim positions which might help with (re)alignment, which would themselves involve adopting other treaties.

12. Scotland's Accession and the EU's Common Foreign, Security and Defence Policies

Daniel Kenealy

Introduction

An independent Scotland's accession to the EU is unlikely to be complicated by issues related to the EU's common foreign, security and defence policies. However, the accession process is not unconcerned with such matters and a number of negotiating chapters are directly related to the broad area of foreign affairs. In order to ensure that this area of policy posed no difficulties, an independent Scotland would have to: (1) align its foreign policy with existing EU foreign policy declarations and conclusions; (2) create the administrative and legal structures necessary to assure the EU of Scotland's capacity to participate in EU foreign policy from accession; and (3) set out credible commitments about its future foreign and defence policies and how it could contribute to the development of EU policy in the longer-term.

EU Accession and Foreign, Security and Defence Policy

There are numerous parts of the accession process that touch on external affairs, such as trade and development. The focus here is specifically on the EU's Common Foreign and Security Policy (CFSP). Established in 1992 to give the EU a stronger voice in international politics, the CFSP has been institutionally strengthened with each successive EU treaty change. In 1999, what is now known as the Common Security and Defence Policy (CSDP) was launched to develop military and civilian capabilities to complement the EU's growing diplomatic activity. Both the CFSP and CSDP work largely on an intergovernmental basis – member states are in the driving seat as opposed to the EU's institutions. Decision-making is, with a few exceptions, subject to unanimous agreement by all 27-member states. Despite high barriers to decision-making, both areas have seen considerable activity over recent years and CFSP declarations, actions, and agreements form part of the EU's *acquis communautaire* – the combined body of rules and laws that applicant states must adopt or harmonise with before securing membership.

The EU accession process is a negotiation – structured by regular dialogues, monitoring and reporting – organised around a series of 'Chapters'. Chapter 31 is concerned with the CFSP and CSDP and is concerned with three broad questions. First, does a candidate country uphold the values and principles that shape EU foreign policy? Those values include democracy, respect for the rule of law, human rights, and respect for the UN Charter and international law.^{xxxiv} Second, has a candidate country sufficiently aligned with existing EU foreign policy, including existing sanctions imposed by the EU on third countries? Third, will a candidate country be capable of contributing to, and implementing, the CFSP and the CSDP as a member state?^{xxxv} Some have argued that candidate countries – especially smaller ones – therefore lose some autonomy over their foreign policy during the accession process.^{xxxvi}

The first and second questions are designed to avoid importing disunity into the EU's existing foreign policy. The third question is designed to ensure that,

once admitted, a new member state possesses institutions and laws robust enough both to implement EU foreign policy – such as monitoring arms and dual-use technology exports and imposing sanctions – and to contribute to its development. The process for the candidate country is a painstaking one of documenting policies, laws, and institutions to the European Commission. Fundamentally, it is about offering assurance to the EU. Commission questionnaires to candidate countries on Chapter 31 can often run to more than 100-pages of detail covering hundreds of declarations that the country aligned its foreign policy to and providing granular details about how its foreign ministry would be equipped to work fully and effectively with institutions such as the EU's Political and Security Committee and the European External Action Service.

Another important requirement – established by the European Council in the aftermath of the Kosovo War – is that candidate countries ought to have settled any bilateral disputes.^{xxxvii} The 2013 negotiating framework for Serbia's accession encouraged the 'normalisation of relations between Serbia and Kosovo'.^{xxxviii} The EU-27 would rather avoid importing festering foreign policy disputes. A broader principle of being a 'good neighbour', which speaks directly to foreign policy, has been developed and weighs on the accession process.^{xxxix}

An Independent Scotland's Path to Accession

The EU's desire to avoid importing disputes makes the relationship between an independent Scotland and the remainder of the UK (rUK) crucial. Although hard bargaining between governments in Edinburgh and London would characterise Scotland's transition to independence, it would be in the interest of both sides to avoid antagonism. Two issues have the potential to flare-up. The first is maritime boundaries in the oil-rich North Sea, which would also have implications for fishing. The second is the removal of the rUK nuclear deterrent (Trident) from Scottish territory. However, it is politically unlikely that either would escalate to the point of obstructing accession.

Returning to the three issues covered by Chapter 31, Scotland meets the values and principles criteria and the Scottish government already, in its external affairs policy, seeks to advance the EU's values. Similarly, a glance at the foreign policy declarations that Scotland would be required to align with reveals no obvious flashpoints during negotiations. As a brand new state, Scotland would be unique. Most candidate countries follow a process of adapting and amending their existing foreign and defence policies. Scotland would be developing policies largely from scratch and could use existing EU declarations as a starting point. It is likely that the Scottish government would be invited, during the accession process, into current EU dialogues on key issues and to align with CFSP declarations.

Chapter 31's third issue – whether a candidate country will be capable of engaging fully and contributing to the CFSP and the CSDP as a member state – is where the hardest work would be required. The EU-27 would have realistic expectations of what an independent Scotland, as a new state, would be capable of in the short and longer-term. Although the period of transition to

independence would be used to expand the Scottish government's existing external affairs directorate into the beginnings of a Scottish foreign ministry, the scaling up of diplomatic and military capacity would likely take close to a decade.^{xI} In the short-term, and upon accession, the EU would want to ensure that Scotland was capable of enforcing CFSP decisions domestically – such as on sanctions – and that it was diplomatically set-up to participate in the key EU institutions. The European Commission would want to understand how the Scottish foreign ministry would interact with EU institutions, what domestic legal frameworks would govern Scotland's foreign relations, and which ministries or agencies would monitor sensitive exports and compliance with sanctions.

In the medium-to-long-term, the EU wants members to play a constructive role in the CFSP and CSDP. What will be required during accession is a credible commitment by the Scottish government to grow into such a role over time, and a credible plan to get to that point. The Scottish government's 2013 White Paper set out a vision of an independent Scotland's foreign and defence policies designed to complement the CFSP and CSDP.^{xii} The document stressed working with coalitions of like-minded small states – with particular emphasis on Ireland and the Nordic states – and an intention to play a full role in the CFSP. There was a further commitment to building a 15,000-strong defence force over a decade. By the end of that decade, the intention was for Scotland to possess military and civilian capabilities that would allow it to contribute to CSDP missions focused on peacekeeping, post-conflict stabilisation, and civilian police training. A Scottish national security strategy, drafted during the transition to independence, would be a helpful exercise in signalling these commitments once again.

Conclusion

Without minimising the scale of the task that the Scottish government would face in establishing a new state, there is nothing in principle in the area of foreign, security, and defence policy that ought to hinder EU accession. The primary work required during accession would not be markedly different to other policy areas – it would be a process of aligning existing policy and demonstrating that robust laws, regulations, and institutions were in place domestically to give effect to EU decisions. In the longer-term Scotland would have an opportunity to play a more active role in the CFSP and CSDP: the EU-27 would expect it to. But during accession the EU will look for credible commitments and a credible plan to meet them.

Part Four: Lessons from Current and Previous Enlargements

13. The Fast Track Queue for EU Membership: Scotland versus the Western Balkans

James Ker-Lindsay

Scotland's possible membership of the European Union inevitably looms large in any discussions about the possibility of another independence referendum. In particular, two questions repeatedly arise. The first is whether Scotland would have to go to the back of the queue for membership if it was to become independent. Secondly, would or could it be treated differently from the countries that are already in line to join.

While interlinked, the two questions in fact highlight two very different aspects of the accession process.

The Process of Enlargement

First of all, it is important to bear in mind that accession is primarily a legalistic process. It is about meeting the terms of the *acquis communautaire*, the EU's body of laws.

To join the EU, a country must be able to show that it has managed to not only align its laws and institutions across the 35 chapters of the *acquis*, it must also show that it is actually implementing those laws effectively. There is little, if any room, for latitude. Countries must meet the necessary terms of the *acquis* – or else arrange temporary exceptions designed to manage a transition process. This is the essence of the negotiation process. The process of evaluating convergence with the *acquis* is overseen by the Commission.

However, underpinning this legalistic process is an intensely political framework. The decision to open negotiations, as well as to formally open and close individual chapters, belongs exclusively to the member states. While the Commission makes the recommendations, it is the member states that decide. Moreover, it is an area where the veto of individual members still stands. They can choose to do so for whatever reason they wish.

This has a very clear bearing on Scotland, especially in the context of debates about how it would line up in the accession process alongside the countries already in line.

The State of Enlargement

At present, there are just three formal candidates in negotiations for membership: Montenegro, Serbia and Turkey.

Turkey can essentially be left out of the discussion. While it has opened 16 of the 35 chapters of the *acquis*, its accession path is now effectively suspended due to concerns over the political direction that the country is taking under its

authoritarian president, Recep Tayyip Erdogan. Many feel that it may never restart accession talks in a meaningful way.

Montenegro is currently the leader of the pack. It has now opened all the chapters. However, it has closed just three chapters. Looking ahead, it is unclear how quickly it will be able to close them as there are real concerns about implementation. Serbia is next in line. It has opened 17 chapters. Again, it is not clear how long it will take to open the rest, let alone close them all. In Serbia's case, the question of Kosovo looms large. A final settlement will need to be found. At present, the most optimistic assessment is that they may be in line to join the EU by 2025. However, 2027 looks to be more realistic.

Following on from this, two more countries are in line to start accession talks. North Macedonia was first recommended for candidacy over a decade and a half ago. However, this was blocked by Greece as part of a dispute over the country's name. As this has now been resolved, the way is open for talks to begin. In addition, Albania has also been given the green light by the Commission to begin talks.

The problem is that France has expressed deep reservations over starting negotiations with both countries. Officially, Paris argues that the accession process is not fit for purpose. In reality, President Macron is worried about domestic political opposition to further enlargement, especially when it involves countries from Eastern Europe. However, it seems likely that France will relent in the months ahead.

Finally, there is Bosnia-Herzegovina and Kosovo. Bosnia still remains deeply divided and politicians have done little to address the deep-rooted problems in the country that stand in the way of membership. Kosovo is obstructed by the fact that five of the EU's member states – Cyprus, Greece, Romania, Slovakia and Spain – have not recognised its 2008 declaration of independence from Serbia.

Scotland versus the Western Balkans

In terms of the political framework, there is no doubt that Scotland stands apart from the countries currently in the queue. In every way, the historical, political, economic and even social contexts are completely different.

The Western Balkans is a region that has been scarred by the conflicts of the 1990s. There are still unresolved issues that need to be tackled, such as the relationship between Kosovo and Serbia, and the political deadlock in Bosnia. These need to be resolved. Assuming Scotland's independence is consensual, there is no reason to believe that Spain or the other EU members that have not recognised Kosovo would object to its membership.

On top of this, there are significant shortcomings in terms of the rule of law and fundamental democratic principles. Corruption remains a huge problem. Press freedom is an issue in other places. There are also deep concerns about the effectiveness and impartiality of the judiciary in many countries –

hence the decision to make these the first areas to tackle in the current enlargement methodology. None of these issues apply to Scotland.

On top of this, the economic profile of the countries is very different from existing members. The per capita GDP of the countries of the region is significantly below that of the European Union average. And while growth rates have been respectable in recent years, all serious economists note that even under the rosier conditions the region would take many decades to catch up with the rest of the EU. Again, there is no comparison to Scotland.

Leaving aside the fact that Scotland was part of the EU for 47 years by virtue of British membership, the differences between Scotland and the Western Balkans could not be starker.

A Very Different Enlargement Process

So, what does all this mean for Scotland?

No policy maker would put Scotland in the same basket as the Western Balkans. Inevitably, all this means that EU members will almost certainly treat Scotland very differently when it comes to making the political decisions about whether or not to open accession talks.

However, while the political framework could not be more different, one would imagine that the formal negotiating process will have to remain essentially the same. The Commission would assess the situation in terms of each chapter and report back on whether convergence exists. It would then be for member states to make their decisions.

That said, one cannot overlook the specific circumstances that would arise in the case of Scotland. Assuming the degree of divergence that has taken place after the end of transition process is not that great – and this is one of the great unknowns of the Brexit process – one would expect this to be a relatively straightforward and swift process.

Ultimately, if the member states wish to acknowledge the fundamental differences that exist between Scotland and the Western Balkans, and adjust the wider framework of negotiations, they can – and I suspect would – do so. To this extent, any claim that Scotland would have to go to the back of the queue may be theoretically correct, but only as a simple statement of fact. At the moment of independence, it would not have taken any of the steps to join that the others have done.

However, it would almost certainly be moved to the fast track line. From there, it would still be subject to the same checks as everyone else. However, assuming the paperwork is all in order and there haven't been many or significant divergences, one would expect it to overtake the other countries in short order and join the EU relatively quickly.

14. Lessons from the EFTA Enlargement: How Would the EU Accession Process Look Today?

Saila Heinikoski

On 1st January 1995, 25 years ago, three EFTA (European Free Trade Association) countries, Finland, Sweden and Austria, joined the European Union. Norway was also involved in the accession negotiations, but 52.2 % of Norwegians voted against the membership in their 1994 referendum, just as an equally slim majority (53.5%) had done in the 1972 referendum.

Looking back after twenty-five years, two important perspectives on the enlargement process arise. Firstly, what characterised the public debate in the EU pre- and post-accession phase and secondly, how would the accession process look today? These questions will be assessed from the perspective of the smallest country in the EFTA enlargement process, Finland (ca. 5.5 million people), and how its possibilities to influence were seen.

EU De-Politicised in Finland for almost Fifteen years Post-Accession

Compared to Sweden (application submitted in July 1991) and Austria (application in July 1989), the Finns entered the Union in a record time: after less than three years from Finland's application, the country was a member of the European Union. The 1995 enlargement process was speedy, and the actual negotiations were concluded in a year, but some sources tell us that Finland was still lamenting their too slow progress at the time. After Finland signed the accession treaty, on 23 June 1994, a consultative referendum was organised on 16 October 1994. It was after the Austrian referendum, but before the referendums held in Sweden and Norway. Citizens in Austria, Finland and Sweden gave their consent to joining the Union, with 66.58 % of Austrians, 56.89 % of Finns and 52.3 % of Swedes voting in favour of joining the European Union.

Practically all political parties in Finland were internally divided over EU membership, but officially, the three main parties supported membership, which was thought to bring economic and security benefits for a small country that had aimed to achieve a balance between the East and West with its neutrality policy during the Cold War. Prior to the referendum, the major Finnish newspapers also declared their support for EU membership and the government sent out an information leaflet on the EU to all citizens. So the climate of opinion seemed favourable to membership, while the main and most vocal opponent of EU membership was the Central Union of Agricultural Producers and Forest Owners (MTK), which was worried about the negative effects of EU membership for Finnish farmers.

Even though only a fairly slim majority voted in favour of EU membership, EU issues were subsequently hardly visible in the political debate post-accession. The first fifteen years of Finland's EU membership were, by and large, characterised by general acceptance of that membership and non-politicisation of EU issues. This applied not only to politicians but also to the

general public. In a Eurobarometer survey conducted in April-May 1995, a year after the referendum, only 18% of Finnish respondents regarded EU membership as a bad thing. This figure did increase, however, during the financial crisis, when almost a third of the respondents had a fairly or very negative image of the EU. However, the EU seems now to have regained its popularity among Finns. Despite the recent re-politicisation of EU issues and re-emergence of euroscepticism, the most recent Eurobarometer showed an even lower figure than in 1995. In autumn 2019, only 14 per cent of the Finnish respondents had a negative image of the European Union, which is six percentage points lower than the European average (at 20 per cent).

There can be many reasons for EU issues disappearing from the political debate from the mid-1990s on, evidenced already in Finland's 1995 parliamentary elections where EU issues practically played no role. One explanation could be the more pressing domestic concerns for a country recovering from severe recession. Furthermore, a role was certainly played by the reluctance of the party leaders to bring up controversial issues that divided basically all parties prior to accession. Judging by the Eurobarometer results, it seems that the public acquiesced to the result along with the political leadership.

The post-accession EU debate was characterised by political consensus and the Union remained effectively marginalised in political debates until the 2010s. Starting from the financial crisis, the populist Finns Party gained electoral victories with, among other issues, criticism towards the EU particularly over the bailout packages during the financial crisis. After the 2011 elections, an electoral promise of no more bailouts kept the Finns Party out of the government. Even so it became the second largest party in the 2015 and 2019 elections, and even joined the governing coalition in 2015–2017 until the party split in 2017. Now, the EU seems to have come to stay in the political debates, mainly because topical EU issues such as migration and asylum policies are no longer characterised by cross-party political consensus but by fierce debates over the role of the EU, sometimes even inside the governing coalition. But would Finnish citizens decide to join the Union if the referendum was held today?

A thought experiment: what if Finland applied for EU membership today?

If Finland's accession negotiation took place today, it would probably take more time and focus on more issues. In the early 1990s, the Finnish negotiations were divided into 29 negotiation chapters, whereas contemporary negotiations include 35 chapters, which may, therefore, take more time to conclude.

Take, for example, the Icelandic accession negotiations, which were started in July 2010 and discontinued in June 2013, when only 10 negotiation chapters were closed. Iceland is a member of the European Economic Area (as Finland was from 1994) so both already met EU single market criteria.

Upon joining the EU, it was important for Finland not to be left on the sidelines in economic and security terms, so much so that Finland reformulated its previous neutrality policy into one of military non-alignment and decided to join the euro from the beginning. Out of Finland's four Nordic partners, two are EU members (Sweden and Denmark), whereas two NATO countries have decided not to join the EU despite being involved in accession negotiations with the Union (Norway and Iceland). Had Finland not joined the EU, it would have been the only Nordic country not belonging to either NATO or the EU.

Probably, Finland would also have become a member of the Schengen area just like Norway and Iceland, if it had been in the EEA not the EU. It would have had to join Schengen when becoming an EU member state and fulfilling the conditions such as the effective control of the country's external borders. Becoming a member of the Eurozone could also have been more controversial in the current post-crisis environment. Currently, Finnish support for the euro reaches 81% according to the most recent Eurobarometer, three times higher than the figure in Sweden, 27%, where citizens rejected the euro in a 2003 referendum.

In the early 1990s, the hardest part of the Finnish negotiations was agricultural policy, which would probably constitute the most difficult issue to agree on even today, though the number of farmers has gone down in Finland since then. Pre-accession, food prices were higher in Finland and farmers were provided with more subsidies than in the EU member states, but the issue was eventually settled with special support for Finnish farmers. In the last 25 years, the size of farms has increased while the number of farms has decreased from ca. 100,000 farms to the current 46,700. And while the total utilised agricultural area as well as the number of livestock has slightly increased during the past 25 years, the number of people who get their living from agriculture has more than halved from 141,000 to ca. 65,000 people.

Joining the European Union also affirmed Finland's western identity especially for young people: 68% of those aged between 18 and 25 voted in favour of accession. As we saw in the exploitation of social media in the Brexit campaign, it is safe to assume that, held today, pre-referendum campaigning would involve much more polarisation. Today, the confrontation between the factions would likely take place mainly through the instant and sometimes anonymous social media platforms rather than through letters to the editor where only the most carefully formulated opinions become published. In the pro-membership media and political climate in 1994, it was much more difficult for the anti-EU campaigners to reach and target anti-accession contents to the 'don't knows' than it is in the contemporary social media environment.

The EU in 1994 was in some key ways different from today's Union. When Finland joined, the 'sovereignty-sensitive' issues, justice and home affairs and foreign and security policy, were separated in intergovernmental pillars and aroused little debate in Finland, which was mainly concerned with maintaining some sort of continuity with the country's Cold War neutrality policy. The contemporary European Union is a different constellation, with much deeper

integration in the field of core state powers, such as border management and the euro/monetary policy – even though defence and foreign policy remain essentially intergovernmental. Accepting everything in one package would be a bigger step than being involved, as a member state, in designing the deepening cooperation over 25 years. Then again, even as a non-member Finland would have had to conform to EU standards in order to participate in the single market. Being a member of the club gave Finland the voice and vote – and so the power – to contribute to common rules and not just to conform to them.

If an independent Scotland applied to join the EU, it would be able to draw some lessons from Finland's experience. If Scotland had not diverged much, at the time of its application, from EU rules and regulations, then the single market part of EU rules might not take too long to negotiate. However, the broader areas including those around the euro, monetary policy, justice and home affairs, borders and more, mean that Finland's experience offers only a partial guide.

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15. Lessons for Scotland from the EU's Enlargement to Central and Eastern Europe

Kirsty Hughes

For the EU, the 1990s – following the fall of the Berlin Wall in 1989 and the subsequent collapse of the Soviet Union – was a decade both of integration and enlargement. For the central and eastern European countries, these were years of hope, of a 'return to Europe', and too, years of sometimes frustratingly slow progress before the so-called 'big bang' enlargement of 2004.

With the Efta group of countries (Austria, Sweden and Finland) having joined the EU in 1995, the EU eventually expanded from 12 countries in 1989 to 25 in 2004 and 27 in 2007 (then 28 once Croatia joined in 2013).

The possibility of the EU doubling in size in terms of number of member states brought many political concerns as to whether a rapid and wide enlargement of the Union would undermine and weaken its political clout, decision-making capacity and its further integration^{xlii}. France, the Netherlands, Belgium and others all particularly shared these concerns, while Germany (having re-unified in 1990) and the UK were strong supporters of eastward enlargement. The UK's support for enlargement was treated with particular suspicion since it was not a supporter of moves towards further integration. Overall, despite French reluctance – seen again more recently in its delaying of talks with Albania and North Macedonia last^{xliii} – it was clear that the historic changes in Europe after 1989 could not simply be ignored.

But progress towards the big 2004 enlargement was not particularly fast. There was broad agreement inside the EU that it must get its own house in order first. That included the major steps forward in the Maastricht Treaty, in 1992, including setting the EU on a path towards the euro, and greater integration in justice and home affairs. More steps towards simplification of decision-making, including more qualified majority voting, were taken in the Amsterdam (1997) and Nice (2001) Treaties, as well as bringing the border-free Schengen area into the EU treaties. There was also considerable debate, at this time, as to whether a core Europe, or multi-speed, variable geometry EU should be developed, not to lose all momentum through enlargement.

The Path to Accession

The central and eastern European countries that applied to join the EU in the 1990s were a diverse group. The Baltic countries of Estonia, Lithuania and Latvia regained their independence in 1991. Slovenia too declared its independence in that year, managing to extricate itself from the disastrous conflicts as the former Yugoslavia fell apart. Czechoslovakia had a 'velvet revolution' in 1989 followed by a 'velvet divorce' in 1993. These ten countries (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Romania, Poland, Slovakia, Slovenia) varied in size, in economic structures, and in political challenges as they re-established democratic structures. But by 2004,

eight of them (alongside Malta and Cyprus) joined the EU, with Bulgaria and Romania joining three years later in 2007.

One exception to this was the former East Germany which joined the EU through German reunification in an ad hoc and one-off process negotiated with the EU. Some suggested that, if Scotland had gone independent before Brexit happened, a process like East Germany in reverse could have been considered (i.e. a sub-state that met all EU rules, going independent and remaining in the EU, rather than a sub-state not meeting the rules merging with another state and so joining the EU). It would certainly have been interesting to see, in this scenario, whether Scotland would have had to leave then re-join the EU or managed to stay in some sort of 'holding pen' – but now Brexit has happened that scenario is no longer relevant.

The EU was no stranger to accession processes – the UK, Ireland and Denmark had joined in 1973, then Greece, Portugal and Spain during the 1990s. But the challenges the central and eastern European (CEE) countries faced in the democratic and economic transitions they had to make were substantial – albeit political transition in Greece, Portugal and Spain had also been reinforced by EU membership.

As the EU debated its own internal adjustments and progress, the Commission started to set out a path for the CEE ten, which was then agreed by the Council, offering association agreements (Europe agreements as they were called) and pre-accession assistance from the early 1990s. There was reluctance to open accession talks too soon, and the Copenhagen Criteria were first introduced, in 1993, to set out new benchmarks that these pre-candidate status countries should meet on their economic and political development towards being functioning market economies, democracies and being able to take on the EU's *acquis*.

One overall effect of this rather slow, as it seemed at the time, path towards accession talks and membership was that talks when they finally started went rather swiftly – much of the *acquis* had already been taken on by the candidates. Amidst a debate as to whether there should be a 'regatta' or 'big bang' enlargement or a more sequenced set of accessions, the EU had decided to open talks in 1998 with a front-runner group of six countries: Cyprus, the Czech Republic, Estonia, Hungary, Poland and Slovenia. But rather soon afterwards, in 2000, the rest started talks i.e. Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia. And, with the exception of Bulgaria and Romania, negotiations were completed for all ten (the CEE group and Cyprus and Malta) in 2002, allowing them all to join as a group on 1st May 2004.

In hindsight, the process looks, in many ways, relatively smooth though there were disagreements along the way – including a moment in 1996 when the Commission held back some pre-accession aid to Poland for not making sufficient progress. However, after the EU had expanded, there were some concerns that, while the new member states had passed the EU's rulebook of laws and regulation into their domestic law books, they had not always

thoroughly or well implemented all the laws and regulations in practice. This led to a rather tougher approach with Bulgaria and Romania.

Some academics have also expressed concern that in moving down the EU path in the 1990s, the CEE states did not ground their newly (re-)developing democracies in their own economic policy choices, following the EU's rules and laws instead^{xiv}, and trace a path from this to today's growth of populism in some of the CEE countries.

Lessons for Scotland

If an independent Scotland applied to join the EU, it would look both similar and different to the experience of the CEE countries. Like some of them, it would be a newly independent state. However, if independence happened, for example, in the next five years, it would probably have a shorter path from independence to potential EU membership than countries like the Czech Republic and Slovakia who joined the EU eleven years after independence. And, while the European Commission has experience of working with newly independent states, it would be rather unique that Scotland was still rather close to the EU's rule book (if it was) and had already been part of an EU member state for several decades.

If Scotland, at the point of applying to join the EU, had not diverged too much from the EU's *acquis*, that it mostly met while it was in the EU and in the UK, then it could expect an accession process that might, at the fastest, take four to five years (including up to two years for ratification of the accession treaty by all the EU27 in that).^{xiv} Depending on timing, it could be possible that an independent Scotland might be ready to join the EU at the same time as some of the Western Balkans candidates. Candidate countries once ready, and with the unanimous agreement of the European Council, do not have to wait for other countries. But it is notable how down the decades, most enlargements have involved two or more countries – with just Greece and Croatia joining on their own.

An independent Scotland would certainly have to go through the same stages of being assessed as the CEE countries to see that it met the Copenhagen criteria of being a market economy and a rule-based, human rights-respecting democracy. It would also be likely to agree an Association Agreement with the EU, and to get some pre-accession assistance. The CEE experience also shows that the time the actual accession talks take (two to four years for the first eight countries, plus two years for ratification) may not be any more important, in some ways, than the screening and adaptation process that happens ahead of talks. Once Scotland, as a candidate country had done its homework, accession talks lasting two to four years would be feasible (or possibly slightly less^{xvi}), just as it turned out to be for the CEE states.

And Scotland's negotiators and politicians would need to be aware or learn what the CEE, and other, candidates have had to learn, sometimes painfully – that these are not really two-sided negotiations. Accession talks are a process where the EU holds all the cards and is scrutinising each candidate, in great detail, as to whether it comes up to the mark or not. It is not a moment or

process to ask for several or major exceptions or opt-outs, though there may be some specific issues where some transition or exception will be considered.

Conclusion

Overall, the message from the CEE experience, for an independent Scotland aiming to join the EU, is by and large a positive one. A diverse range of states, facing their own major political and economic transitions (including for several becoming or regaining independence), all joined the European Union. The EU's own political debates about the wisdom of enlargement, and the internal changes needed to accommodate accession, did not, in the end, stop the process from happening. Scotland, as the various chapters in this report show, would face its own challenges as a candidate country. But there is no reason to think that, as with the CEE countries, those challenges could and would not be overcome.

Report End Notes

Chapter One

ⁱ Kirsty Hughes (2016) "Scotland and Brexit: shockwaves will spread across the EU" Policy Paper, *Friends of Europe*

ⁱⁱ Kirsty Hughes (2019) "Independence, Scotland and EU Accession: Challenges Ahead" Policy Paper, *Scottish Centre on European Relations*; Kirsty Hughes and Tobias Lock (2017) looked at how it might even take only 3-4 years: "An Independent Scotland and the EU: What Route to Membership?" *European Futures website*

Chapter Five

ⁱⁱⁱ Excluding Eurozone-only meetings

^{iv} Except Foreign Affairs Councils, which are chaired by the High Representative

^v The Lisbon Treaty reduced the default number of Commissioners to less than one per member state, but left flexibility for Council to decide to continue with one per member state. It chose to do so (European Council Decision 2013/272/EU of 22 May 2013) and re-confirmed this with its nominations for the current Commission in 2019.

^{vi} Thank you to Eleanor Sharpston, UK Advocate General at the CJEU, and twitter users @simonjbr and @Mojluf (Mojluf Cohen) for their advice on this part.

Chapter Six

^{vii} The UK's Brexit border management has been made slightly easier by the fact that both it and Ireland are outside the Schengen zone, meaning that passport controls are not required at UK/Ireland borders but are already needed at other UK/EU borders. If Scotland were to remain outside Schengen and in the Common Travel Area (as discussed by Imelda Maher in this report), then passport controls are not likely to be needed at the Scottish land border.

Chapter Seven

^{viii} See I. Maher, 'Crossing the Irish Law Border after Brexit: The Common Travel Area and the Challenge of Trade' (2018) *Irish Yearbook of International Law* 51

^{ix} L. Tankard, Review of Roy Jacobsen, *Borders* (2017) *World Literature Today*, January 2017.

^x Article 26 TFEU “an area without frontiers in which the free movement of goods, persons, services and capital is ensured”.

^{xi} Schengen being the town where the first agreement around removal of border controls for people was signed in 1985 see European Commission Directorate-General for Migration and Home Affairs on the Schengen Area. https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en

^{xii} I Maher, Crossing the Irish Land Border after Brexit: The Common Travel Area and the Challenge of Trade, (2018) Irish Yearbook of International Law 13, pp. 6 – 7.

^{xiii} See the Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland concerning the Common Travel Area and associated reciprocal rights and privileges. Regarding social provision see paragraphs 4, 10 & 11. With reference to voting rights see paragraph 13. See generally S.de Mars, C. Murray, A. O'Donoghue and B. Warwick, Discussion Paper on the Common Travel Area, research commissioned by the Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission.

http://www.nihrc.org/uploads/publications/Discussion_Paper_on_the_Common_Travel_Area.pdf

^{xiv} Although checks can be carried out under anti-terrorism legislation see Independent Chief Inspector, Inspection Report on Countering Abuse of the Common Travel Area in Northern Ireland and Scotland, May 2011.

^{xv} Protocols 19 and 20 TEU.

^{xvi} The revised Ireland/Northern Ireland Protocol (Article 3) and the Political Declaration (Article 54).

^{xvii} Protocols are integral to the EU treaties and carry the same legal status see Article 51 TEU.

^{xviii} Article 49 TEU. On treaty amendment see D. Hodson and I Maher, The Transformation of EU Treaty Making: The Rise of Parliaments, Referendums and Courts since 1950 Cambridge University Press, Cambridge, 2018

Chapter Eight

^{xix} Comparisons of GDP per head in recent years are not meaningful measures of welfare due to the distortionary effects of high levels of profits declared by multinational corporations in Ireland.

^{xx} <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2018/09/foi-18-02282/documents/foi-18-02282---summary-report/foi-18-02282---summary-report/govscot%3Adocument/FOI-18-02282%2B-%2Bsummary%2Breport.pdf>

Chapter Nine

^{xxi} <https://www.ifs.org.uk/publications/13072>

^{xxii} <https://www.centreonconstitutionalchange.ac.uk/opinions/scottish-independence-debt-and-assets>

^{xxiii} <https://www.centreonconstitutionalchange.ac.uk/opinions/scottish-independence-and-uks-debt-burden>

Chapter Ten

^{xxiv} This figure includes fishing and fish processing.

^{xxv} Huggins, C., Connolly, J., McAngus, C. van der Zwet, A. (2020) "Brexit and the Uncertain Future of Fisheries Policy in the United Kingdom: Political and Governance Challenges", *Ocean Yearbook*.

^{xxvi} Scottish Government (2019) Scotland's marine economic statistics 2017

^{xxvii} McAngus, C. (2018) “A survey of Scottish fishermen ahead of Brexit: political, social and constitutional attitudes”, *Maritime Policy*, vol. 17, pages 41–54

^{xxviii} An area defined in international law as extending up to 200 nautical miles from a country’s coast.

^{xxix} Ian Napier (2016) “Fish Landings from the United Kingdom’s Exclusive Economic Zone, and UK Landings from the European Union’s EEZ”, University of the Highlands and Islands. Available on: <https://www.nafc.uhi.ac.uk/research/eez-reports/fish-landings-from-the-united-kingdoms-exclusive-economic-zone-and-uk-landings-from-the-european-unions-eez/>

^{xxx} House of Commons? (2017) “Debate Pack – the UK fishing industry”, Number CDP 2017/0256, 6 December 2017.

^{xxxi} Scottish Government (2013) “Scotland’s Future and Scottish Fisheries”, available on: <https://www.gov.scot/binaries/content/documents/govscot/publications/corporate-report/2014/08/scotlands-future-scottish-fisheries/documents/00458445-pdf/00458445-pdf/govscot%3Adocument/00458445.pdf>

^{xxxii} Financial Times (2018) UK fishing quotas concentrated in five families, says Greenpeace, 11 October 2018, <https://www.ft.com/content/ab03945a-cc92-11e8-9fe5-24ad351828ab>

^{xxxiii} BBC (2008) “Brexit should create ‘sea of opportunity’ for fishing” <https://www.bbc.co.uk/news/uk-scotland-45703809>

Chapter Twelve

^{xxxiv} See in particular Article 21 of the Treaty on European Union.

^{xxxv} See the European Commission’s details on Chapters of the *acquis*, at https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en.

^{xxxvi} C. Hillion, ‘Adaptation or autonomy? Candidates for EU membership and the CFSP’, *Global Affairs*, 3:3 (2017), p. 265.

^{xxxvii} See European Council, *Presidency conclusions*, Helsinki (1999), at https://www.europarl.europa.eu/summits/hel1_en.htm.

^{xxxviii} See the joint report by the European Commission and the EU High Representative (2013), at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52013JC0007>.

^{xxxix} E. Basheska, ‘The good neighbourliness condition in EU enlargement’, *Contemporary Southeastern Europe*, 1:1 (2014), pp. 92-11.

^{xl} Scottish Government, *Scotland’s Future* (Edinburgh: Scottish Government, 2013), chapter 6.

^{xli} *Scotland’s Future*, chapter 6.

Chapter Fifteen

^{xlii} Heather Grabbe and Kirsty Hughes (1998) *Enlarging the EU Eastwards Chatham House Paper*

^{xliii} The French government produced a ‘non-paper’ in November 2019 on creating more stages (and reversible ones) in the accession process “Non-Paper Reforming the European Union accession process”. This led to a new European Commission Communication (2020) “Enhancing the accession process - A credible EU perspective for the Western Balkans”, Com (2020) 57 final, which attempted to partly respond to French concerns while keeping the accession process on the road.

^{xiv} Ivan Krastev and Stephen Holmes (2019) *The Light That Failed* *Allen Lane*; and see Abby Innes (2014) *The political economy of state capture in central Europe*. *Journal of Common Market Studies*, 52 (1). pp. 88-104.

^{xv} Kirsty Hughes (2019) "Independence, Scotland and EU Accession: Challenges Ahead" Policy Paper, *Scottish Centre on European Relations*

^{xvi} Kirsty Hughes and Tobias Lock (2017) "An Independent Scotland and the EU: What Route to Membership?" *European Futures website*