WRITTEN SUBMISSION FROM IAN HUDGHTON MEP AND ALYN SMITH MEP, SCOTTISH NATIONAL PARTY GROUP

The European and External Relations Committee of the Scottish Parliament is seeking views from individuals and organisations on the Scottish government’s proposals for an independent Scotland’s membership of the European Union. The Scottish National Party group in the European Parliament is delighted to take the opportunity to submit its views.

The SNP has had continuous representation in the European Parliament for almost four decades. Winnie Ewing was initially appointed to the institution in 1975 and was subsequently elected in the first direct elections in 1979. The SNP won a second seat in 1994 and has retained these two seats at all elections since. This continuity of elected representation as well as longstanding staff appointments within the political secretariat has given the SNP group a thorough institutional knowledge of the workings of the EU.

Scotland in the European Union

The SNP is committed to an independent Scotland remaining within the EU. As the powers and competences of the EU have grown over the decades, so the importance of remaining within the European family has increased.

Access to a single market of some 500 million citizens is of immense value to the Scottish economy. Cooperation in areas such as security and home affairs has offered key tools in delivering justice; the outcomes of a number of high profile criminal cases, for example, have benefited from use of the European Arrest Warrant. The EU’s social agenda ensures that the benefits of the single market do not come at the cost of citizens’ rights.

The EU also contributes to the political culture of Scotland. The SNP’s MEPs – indeed all MEPs – are able to pursue their political agendas in an atmosphere of conciliation and compromise. Since the Scottish election of 2007, SNP ministers have attended Council meetings and have taken the opportunity to brief Scottish MEPs of all parties on the progress being made. In the EU’s institutions there is no built-in majority, whether political or national. All institutional actors represent minorities and compromise must therefore be found.

Unfortunately Scotland’s continued membership of the EU is currently threatened by our remaining within the UK. Whilst no party arguing for an exit from the EU has made any significant electoral progress in Scotland, the same cannot be said of other parts of the UK. The apparent rise of UKIP in England combined with the Prime Minister’s inability to control the more reactionary elements of his party mean that an in/out referendum for the UK is becoming increasingly likely. Suggestions that a 2017 EU referendum may not proceed or that the result cannot be predicted miss the fundamental point: Scotland’s continued membership of the UK brings great uncertainty to our membership of the EU, with all the repercussions for our citizens and economy that that entails.
As the Committee has noted, there are alternatives to EU membership such as the European Free Trade Association. Whilst the nations which have opted for these arrangements have done so in line with their electorates’ priorities, we do not consider that this would be the best choice for Scotland. The EFTA nations are required to transpose all EU legislation dealing with the single market yet have no representation in any of the legislative institutions. Furthermore, because Scotland has been a full part of the EU for 40 years, our industries are fully integrated into those areas of EU competence which fall outwith the scope of the EFTA treaties. To seek EFTA membership would require complex negotiations to exit these areas of competence in return for a diminution of influence in single market decision making processes.

With regard to Scotland’s size, it should be noted that Scotland’s population is similar to those of Denmark, Finland and Slovakia, and greater than that of nine Member States¹. Furthermore, and as previously noted, each Member State acts as a minority in the European institutions. Scotland is a nation of five million regardless of the outcome of the referendum. The difference is that at the moment we have six MEPs in contrast to the 13 allocated to similarly sized independent nations²; likewise we have no direct and independent access to the Council of Ministers and must ultimately depend on representation by a UK minister, regardless of the electoral preferences of the people of Scotland.

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

Legal basis

As the Scottish government has noted, the Treaties contain no provisions for a part of an existing Member State democratically choosing to become an independent country and there are no useful precedents. What can be stated from experience is that the EU is a pragmatic set of institutions.

When the SNP first entered the European Parliament it did so within an institution of nine Member States; the act of Scottish independence will bring that up to 29. The most recent additions have seen former Communist states, whose economies were until relatively recently wholly different from those of the EU, integrated with no major upset. The idea that Scotland, after 40 years of continuous membership, would face obstacles to a swift transition to independent membership is not based on the realpolitik which characterises the EU.

Additionally, the EU’s values, to which all Member States must subscribe, are found in Article 2 of the Treaty on European Union (TEU) and include respect for democracy and the rule of law. The Scottish referendum is clearly an example of democracy in action and, following the entry into force of the Scotland Act 1998 (Modification of Schedule 5) Order 2013, is incontestably taking place fully within the rule of law. Both the UK and Scottish governments have committed themselves, in

Paragraph 30 of the Edinburgh Agreement, “to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.” It is inconceivable that the EU would seek to obstruct the democratic wishes of the people of Scotland.

There has been considerable discussion on the precise Treaty mechanism through which Scotland would attain independent Member State status. As noted above, the Treaties are unclear and no useful precedent exists.

Categorical statements to the effect that Scotland must apply for membership under Article 49 TEU are not based on legal fact and are purely speculative. Comparisons with historical accession procedures, including the stalled negotiations with Iceland, are fundamentally flawed. Scotland is currently a full part of the EU, the people of Scotland are European citizens and the Scottish legal system is fully compliant with the acquis communautaire.

This quite clearly contrasts with previous accessions to the EU. In each of the previous rounds of accession, the candidate countries have gone through lengthy procedures to make their legal systems fully compliant with the entire body of EU law. When a new Member State joins the EU it is expected to have adjusted its laws and public policies to have that full compliance from day one of membership; preparations for this are complex and considerable.

This process will, quite simply, not be necessary for Scotland as our systems already fully comply. The fact that Scotland has had a fully developed market economy operating within the EU for four decades quite obviously differentiates our position from that of recent accessions from the east of Europe. Comparisons with the stalled Icelandic negotiations are equally flawed: whilst Iceland does comply with those areas of the acquis relevant to EFTA, their non-compliance in areas such as agriculture and, in particular, fisheries made negotiations difficult.

Arguments that Article 49 must be used for Scotland to acquire independent Member State status seem to be predicated on the notion that upon gaining independence Scotland would need to apply as an independent state. This implies a period when Scotland would cease to be a part of the EU.

These arguments ignore the vital fact that there is no provision for the expulsion of an existing part of the EU and that the EU, throughout its evolution, has tended towards both pragmatism and expansionism. The only mechanism which exists for exit from the EU is Article 50 TEU, through which a Member State may withdraw. Aside from the fact that Scotland has shown no intention to withdraw from the EU, application of Article 50 itself requires negotiation.

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As Sir David Edward has noted:

"The reason why Article 50 requires a period of negotiation is that withdrawal from the Union would involve the unraveling of a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations."\(^4\)

Given the legal background and the pragmatic nature of the EU, it seems clear that a rigid application of Article 49 would run counter both to historical trends and the spirit of Article 2.

In light of this legal and institutional background, it seems clear that the issue facing Scotland and the wider EU is the question as to the most appropriate mechanism for Scotland to maintain EU membership both during and after the negotiations for independence. Suggestions of a forced Scottish exit from the EU lack credibility and, in the absence of Treaty provisions or meaningful precedent, the EU must find a means to maintain its political and territorial integrity.

The precise mechanism for ensuring continuity of Scotland’s place in the EU will be established by the Member States operating within the Council of Ministers. The Commission and European Parliament will also be involved in the transition to independent Scottish membership. It is the experience of the SNP group in the Parliament that the EU is adept at finding satisfactory outcomes to unforeseen circumstances.

It appears to us that Article 48 TEU offers the best opportunity for a relatively seamless transition to independent membership. Use of this mechanism would ensure that the rights and obligations enjoyed by all EU citizens and businesses would be retained throughout the negotiation period and that no unnecessary disruption to the integrity of the internal market would be caused.

**Continuity of effect**

The values outlined in Article 2 TEU and the EU’s pragmatic nature would also suggest that application of the principle of continuity of effect would seem reasonable. In the event of the people of Scotland democratically opting for independence, to apply any other principle would amount to the EU erecting unnecessary barriers to achieving that democratic goal.

In the field of opt-outs, the Treaties already acknowledge special circumstances and there is no logical reason to suppose that these would be denied to Scotland. Protocol (No 20) dealing with the Common Travel Area (CTA), for example, refers to “the existence for many years of special travel arrangements between the United Kingdom and Ireland” and goes on to exempt the two states from the Schengen zone. Given that the Protocol expressly recognises the particular circumstances involved in the CTA, it seems unlikely that Scotland’s special relationship with the remaining UK and Ireland would be denied by a mandatory imposition of Schengen rules.

\(^4\) http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx
Timescale

As referred to above, previous timescales offer little guidance to Scotland given our longstanding participation in the EU. It might be added nevertheless that in the case of Austria negotiations for membership began in February 1993 and were completed in April 1994\(^5\), whilst Sweden began negotiations in February 1993 and finished March 1994\(^6\). Both of these countries were entering from outwith the Union, and both had significantly more complex negotiations to undertake than Scotland will, for example in areas such as agriculture. Nevertheless, both managed to complete negotiations well within the 18 month timescale envisaged by the Scottish government.

Small states within the EU

As previously noted, Scotland’s size after 18\(^{th}\) September will not be dependent on the outcome of the referendum. We are currently a nation of 5.3 million people – albeit one which lacks the representation in the EU afforded to similarly sized independent nations.

Opponents of Scottish independence overstate the power of the “big” UK. The UK regularly takes positions in the Council which are defeated by the other Member States. In recent times the UK has voted against legislation targeting bankers’ bonuses - but was defeated. David Cameron famously failed to achieve his desired concessions on financial services regulation – and left the UK isolated by walking out.

More recently UK government ministers have been fuelling hostility against immigrants by suggesting caps on EU migrants. These suggestions are causing considerable concern amongst our EU partners – in addition to being contrary to European law. The importance of migration to Scottish society is largely ignored.

More fundamentally for Scotland, regardless of the UK’s relative voting strength in the EU institutions, we are currently represented by a UK government largely rejected by the people of Scotland. The supposed benefits of greater voting power are completely lost when those votes are exercised by a government over whom we have no control.

Furthermore, the UK’s inability to use its relative size to swing outcomes in EU negotiations is not atypical. As Jonathan Golub, Associate Professor in Political Science at the University of Reading has noted:

“…there is absolutely no indication that large states beat small ones. If anything, France, Germany and Italy do particularly badly, whereas Luxembourg, Ireland, Austria and the Nordic states do especially well.”\(^7\)


\(^6\) [http://www.government.se/sb/d/3470/a/20685](http://www.government.se/sb/d/3470/a/20685)

After independence, Scotland will become an equal in a club with 28 other members. SNP experiences in the EU institutions inform us that Scottish arguments will be listened to and evaluated on the basis of their merit; coalitions will be formed on specific issues and compromises will be reached.

At present Scotland’s views in the Council of Ministers are only heard if they coincide with those of the UK government.

Conclusion

It is the view of the SNP’s MEPs that Scotland’s future lies within the EU. The EU has evolved greatly over the decades and will evolve yet further. Scotland’s interests are best served by remaining inside Europe – and we believe that this reflects mainstream Scottish opinion.

Scotland’s interests are also best served by achieving independent Member State status. Independence will mean that the people of Scotland will get the government they vote for every time – and that accordingly Scotland will be represented by that government in vital EU negotiations. At present we have no such power and are unable to fully influence the development of European policy and institutions.

Throughout its evolution the EU has adapted to new circumstances and acted pragmatically. Whilst neither the legal texts nor historical precedent offer clear guidance, the EU’s development has continually been based on encouraging more European nations to accede. The effective exclusion of an existing part of the EU’s territory is wholly unprecedented and contrary to the whole ethos of the institutions. The EU will adapt to ensure that respect for democracy and the rule of law will be upheld. This precludes Scotland’s forced exit in the event of the Scottish government receiving a popular mandate to negotiate independence.

The respect for democracy and the rule of law has been enshrined in the Edinburgh Agreement signed by the Scottish and UK governments. With both parties committed to cooperating constructively after the vote, it seems reasonable to conclude that our EU partners will be similarly minded.

Finally, we consider that it is incumbent upon all Scottish politicians to act within the spirit of the Edinburgh Agreement. In the event of a yes vote, the people of Scotland have a right to expect their elected representatives to work towards a satisfactory conclusion to negotiations – and for Scotland’s independent membership of the EU to be achieved within the timescale suggested.

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