

# 'Inquiry into EU Reform and the EU referendum: implications for Scotland'

Written evidence to the European and External Relations Committee  
of the Scottish Parliament  
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## Introductory Remarks

This submission deals with some of the **legal questions** raised by the Committee. These are answered on the basis of the law as it currently stands and to the best of the author's knowledge. It does not purport to provide evidence on the political or economic prudence of the planned renegotiations of the UK's EU membership, of an EU referendum or indeed of a withdrawal of the United Kingdom from the European Union.

In order to fully appreciate the following remarks it is important to distinguish between the domestic (UK) perspective and the perspective of European Union law. Some of the procedural ramifications for and effects of a possible withdrawal of the United Kingdom from the European Union may be determined by domestic UK law and open to political negotiations at the national (and possibly sub-state) level. Others are pre-determined by European Union law.

This submission attempts at complying with the stipulation that submitted evidence be brief. It cannot therefore claim to be exhaustive.

## Process for leaving the EU, its effects, and implications for Scotland

### 1. Process under Article 50 of the Treaty on European Union (TEU)

Article 50 TEU outlines the procedural steps to be taken by a Member State wishing to withdraw from the European Union. This provision was only introduced by the Treaty of Lisbon and has consequently only been in force since 1 December 2009. It has never been used. Article 50 TEU sets out the steps necessary *under the Law of the European Union*. As Article 50 (1) TEU makes clear, European Union law does not interfere with the constitutional requirements that may exist in the Member State concerned. In particular, European Union law **makes no provision for sub-state entities** in this regard, but leaves these questions to be determined *by the law of the Member States*.

**Procedurally**, Article 50 TEU requires that a Member State notify its intention to withdraw to the European Council. Under the provision no reasons need to be given. In case of the United Kingdom, the central government would thus need to notify the President of the European Council of this fact. European Union law does not determine *how the decision to withdraw is reached internally*. In particular, it does not require the holding of a referendum. Therefore the wording of the referendum question or the extent of the franchise are of no concern to European Union law.

Article 50 TEU foresees two options in which withdrawal can occur. The first option is the **conclusion of a withdrawal agreement**. A withdrawal agreement would not only set out the exact ramifications of withdrawal (e.g. the withdrawal date; the role of UK representatives in the EU institutions during a transitional periods; what would happen with civil servants with British nationality working for EU the institutions; and so on), but it would also regulate the future

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relationship between the EU and the United Kingdom. Article 50 TEU does not provide any more specifics. This means that the future relationship is negotiable in its entirety.

Negotiations would happen in accordance with Article 218 (3) TFEU, i.e. the Council of the EU would nominate a negotiator or negotiating team for this purpose. On behalf of the European Union the agreement would then need to be concluded by the Council acting with a qualified majority. For this purpose the United Kingdom would not participate in the Council, i.e. the qualified majority would have to be calculated on the basis of (currently) 27 Member States.

As far as the United Kingdom is concerned, the agreement would be concluded by the central government.

It is noteworthy that the Treaties envisage the agreement would consist in a bilateral agreement between the EU and the UK. In contrast to an agreement for the accession of a new Member State it would therefore not necessarily be multilateral (i.e. concluded by all Member States) and would thus not be capable of modifying the EU Treaties themselves. Hence any withdrawal agreement must be compliant with the Treaties so that a future relationship between the EU and the UK cannot contradict them. However, practical reasons may well result in the withdrawal agreement being concluded as a so-called mixed agreement. Mixed agreements are concluded between the EU and its Member States on the one side (hence the adjective 'mixed') and other countries or organisations (in this case the UK) on the other. Mixed agreements are very common in the European Union's practice of external relations. They are concluded where the European Union does not have sufficient competence to conclude the agreements on its own. This will often be the case where either a political dialogue is included<sup>2</sup> or where there are budgetary implications for the Member States. Given the immense complexities of any withdrawal agreement it may thus become necessary to involve the Member States given that the EU may be lacking the competence to conclude the entirety of an agreement regulating all matters necessary.<sup>3</sup> This would mean that the Member States would be parties to it as well, which would trigger ratification processes in all Member States and might prolong duration of withdrawal considerably.

The second option is that no agreement can be reached. Here a Member State ceases to be a Member State two years after the notification of its intention to withdraw, unless the European Council decides to extend this period in agreement with the United Kingdom.<sup>4</sup> Should the UK's membership terminate on this basis, there would be no agreement regulating the future relations with the European Union. The United Kingdom would thus be in the position of a third country. The main agreements governing trade between the UK and the EU in such a scenario would probably be the WTO agreements. This fact alone makes a scenario such as this unlikely to occur in practice as it would be in the interest of all parties concerned to come to an arrangement.

## 2. Effects of withdrawal

The **effects of withdrawal** are that a Member State's rights and obligations under European Union law cease to exist. Article 50 (3) TEU makes it clear that this is only so from the date of withdrawal. This means that all rights and obligations incurred beforehand would continue.

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<sup>2</sup> See for instance the partnership and cooperation agreements with Eastern European countries, such as Russia.

<sup>3</sup> Adam Lazowski, 'Withdrawal from the European Union and alternatives to EU membership' 37 European Law Review (2012) 523, 528.

<sup>4</sup> This might, for instance, happen if withdrawal negotiations are still ongoing after two years.

Moreover, European Union law would only cease to have effect in the relations with the European Union. Again, one has to distinguish the domestic perspective from the EU law perspective here. From a domestic perspective European Union law would continue to take effect within the United Kingdom on the basis of legislation implementing EU law. The most important piece of legislation in this regard is the European Communities Act 1972 (as amended). Hence as long as and as far as that legislation has not been revoked, European Union law continues to apply within the UK. In addition to constitutional statutes such as the European Communities Act or the Scotland Act 1998, which in s. 29 makes reference to EU law, a large amount of other legislation has been influenced by and is (partly or wholly) based on EU law. Examples include the Equality Act 2010, the Working Time Regulations, the Environmental Impact Assessment Regulations, and so on.

From a legal point of view, this poses an additional challenge. Should this legislation remain on the statute books, a question arises as to its interpretation. As long as the UK is a member of the EU, legislation based on European Union law (chiefly EU Directives), must be interpreted in accordance with EU law.<sup>5</sup> From the point of view of European Union law, this obligation to interpret in accordance with EU law would cease to exist from date on which withdrawal from the EU takes effect. Yet there may be cases that arose before the withdrawal date (e.g. working time dispute between an employee and an employer where the material facts occurred before the UK's EU membership ended). It is suggested that for such scenarios EU law would continue to apply to the UK as before withdrawal. This of course means that even after the UK has left the EU, there may be a great number of legal relations still governed by European Union law.

As far as cases are concerned where the material facts occurred after a UK withdrawal but where legislation governing them was originally based on EU law and is still in force (e.g. the Equality Act 2010), it is unclear how such legislation would have to be construed, i.e. whether it would still be interpreted in light of EU law or whether they would be given a 'new' and entirely domestic interpretation. This would be a matter for domestic law and may eventually have to be determined by the courts.

In addition to the position of the Member State, the **legal position of people living in the UK could change fundamentally**. It is necessary to distinguish between UK citizens and other EU citizens currently resident in the United Kingdom. As far as UK citizens are concerned, they would most probably lose their status as EU citizens. While of course the concrete ramifications of the future relations between the EU and the UK are subject to negotiations, it is unlikely that the citizens of a non-EU Member State would be accorded EU citizenship. Depending on the future relations between the EU and the UK, these rights may differ considerably. While, for instance, citizens of countries pertaining to the European Economic Area (EEA) may reside in another EEA country for up to three months even without being economically active<sup>6</sup>, EU citizens have further-reaching rights once they have moved.<sup>7</sup> For instance they enjoy voting rights (active and passive) in municipal and European elections. As far as EU citizens who do not have British citizenship currently residing in the UK are concerned, their status may change accordingly. Depending on the stipulations of the withdrawal agreement, they may even become subjected to immigration control after withdrawal. The same would be true for UK citizens residing in other EU Member States.

Similar effects would be felt by **legal persons based in the UK**. The future relationship between the UK and the EU would determine their access to the EU internal market (i.e. free movement of goods,

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<sup>5</sup> See for instance Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153.

<sup>6</sup> Article 6 of Directive 2004/38.

<sup>7</sup> See Articles 18-23 TFEU; Article 39-46 EU Charter of Fundamental Rights.

freedom of establishment, of capital and to provide services). A number of possible future relationships are conceivable. There is no precedent as no state has ever left the EU.

The first option would be for the UK to re-join the European Free Trade Association (EFTA) and join the European Economic Area (EEA). This would give natural and legal persons in the UK access to the internal market of the EU (free movement of goods, services, capital, establishment, workers) and give natural and legal persons from other EEA countries access to the UK's market (including workers). Worth noting from a Scottish perspective perhaps would be that the EEA does not include participation in the Common Agricultural and Fisheries Policies.

The second option would be a *sui generis* arrangement, along the lines of the relationship between the EU and Switzerland. That relationship is currently governed by a bundle of bilateral agreements. It currently includes free movement of goods and persons, but not services. It is noteworthy that the EU regards this relationship as cumbersome to maintain as it lacks an institutional structure. Hence it is likely that the EU would be reluctant to agree a *sui generis* arrangement with the UK even though this cannot be excluded and need of course not follow the Swiss model.

The third option is that no agreement is reached. This is an unlikely scenario and would result in the United Kingdom having to rely on general international trade law, such as WTO law, for its trade relations with the EU. Importantly, the levying of customs duties on UK products by the EU would be possible.

### 3. Implications for Scotland

A withdrawal of the United Kingdom from the European Union **would have effect for the whole of the United Kingdom and thus include Scotland**. Hence in the absence of any specific arrangement, Scotland would find itself outwith the European Union.

#### **Implications of EU reform for Scotland**

The implications of EU reform for Scotland are difficult to predict given that no concrete reforms have been negotiated.

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