



The Scottish Parliament
Pàrlamaid na h-Alba

EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

AGENDA

10th Meeting, 2015 (Session 4)

Thursday 4 June 2015

The Committee will meet at 10.00 am in the Robert Burns Room (CR1).

1. **Decision on taking business in private:** The Committee will decide whether to take item 3 in private.
2. **The UK's future relationship with the EU:** The Committee will take evidence from—

Professor Michael Keating, Professor of Politics, University of Aberdeen and Director, ESRC Centre on Constitutional Change;

Dr Daniel Kenealy, Lecturer, University of Edinburgh's Academy of Government;

David Frost, CEO, Scotch Whisky Association and former diplomat.

3. **The UK's future relationship with the EU:** The Committee will review the evidence heard earlier in the meeting.

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The papers for this meeting are as follows—

Agenda item 2

Written evidence

EU/S4/15/10/1

PRIVATE PAPER

EU/S4/15/10/2 (P)

European and External Relations Committee

10th Meeting, 2015 (Session 4), Thursday 4 June 2015

The UK's future relationship with the EU

Written evidence

The Committee has received written evidence on the UK's future relationship with the EU. This evidence is attached in the Annexe.

- Dr Eve Hepburn
- Dr Daniel Kenealy

**Katy Orr
Clerk to the Committee**

Dr Eve Hepburn, University of Edinburgh

Overview

1. In response to an invitation from the EERC to present oral evidence on the UK's relationship with the EU on Thursday 4 June 2015, I would like to preface this by outlining what I think some of the key issues are in this area. In particular, I will focus on one of the key issues driving the UK's proposed in/out referendum on EU membership, and the primary aim of Prime Minister Cameron's efforts to renegotiate the UK's terms of EU membership this month: immigration and migrant rights.

2. In the brief I will therefore focus on what will likely become one of the most heated areas of debate in the referendum campaigns on in/out EU membership: immigration and its effects on UK, and in particular, Scottish society. Here, I briefly consider the immigration needs in Scotland; the position of key Scottish policy actors and public opinion on immigration; the distinct model of immigrant integration being pursued in Scotland; and the implications of the UK Government's proposed restrictions on migrant rights for Scotland. I will then broaden the discussion out, by examining the potential of current IGR machinery to enable Scotland to advance its immigration interests and protect its migrant rights model under the UK's current EU proposals.

3. The final part of this brief reflects on how the position of Scottish political actors on immigration and integration is just one area where there is clear disagreement with Whitehall on the UK's EU policy. However, due to weak IGR institutions, there are few formal mechanisms (that may be found in other federal-type states) that could protect Scotland's needs and priorities on this crucial EU matter during Prime Minister Cameron's stated period of negotiation (i.e. the latter half of 2015), or prevent it from being pulled out of the EU altogether in the event of an English majority voting against continued EU membership in the imminent referendum (in 2016/17). This brief concludes with some proposals that could help to protect Scotland's migration and integration-related needs and priorities during the period of EU re-negotiation. Finally, it considers ways in which the entrenchment of the Scottish Parliament's powers – through a form of 'federacy' – could protect it from being pulled out of the EU if a majority of Scottish voters wished to stay in.

UK Demands in Europe

4. At the time of writing this brief, PM David Cameron is touring Europe to begin his negotiations with key EU member-state leaders on the UK's conditions for remaining part of the European Union. Cameron has stated that if he is unable to successfully negotiate a 'better position for the UK' within Europe, his government will not support a 'Yes' in the proposed referendum which is likely to ask UK voters 'Should the United Kingdom remain a member of the European Union?'

5. Although the UK Government is yet to spell out the exact details of UK demands in a 'reformed EU', past speeches and policy documents give a

strong indication of what these are likely to be. In particular, in an article in The Telegraph in March 2014, Cameron set out seven specific changes he wants to make to the EU as part of his re-negotiation of UK membership. These are (as listed in The Telegraph¹):

1. New controls to stop “vast migrations” across the continent when new countries join the EU;
2. Tighter immigration rules to ensure that migrants come to Britain to work, not as tourists planning to cash in on “free benefits”;
3. A new power for groups of national parliaments to work together to block unwanted European legislation;
4. Businesses to be freed from red tape and “excessive interference” from Brussels, and given access to new markets through “turbo charging” free trade deals with America and Asia;
5. British police and courts liberated from “unnecessary interference” from the European Court of Human Rights;
6. More power “flowing away” from Brussels to Britain and other member states, rather than increasingly centralising laws in the EU;
7. Abolishing the principle of “ever closer union” among EU member states, which Mr Cameron says is “not right for Britain”.

6. As we can see, at the top of the list of Prime Minister David Cameron’s demands for renegotiation in the EU is the issue of immigration and migrant rights. Indeed, in November 2014, Cameron explicitly stated that the UK’s EU membership was dependent on states being able to withhold almost all benefits from EU migrants.² And arguably, out of all of David Cameron’s demands on renegotiation, ‘migrant rights’ is the one that has a direct impact on the Scottish Parliament’s powers. This is because various aspects of migrant integration are effectively devolved to the Scottish level, including migrant access to healthcare, housing, education and political participation. Areas in which migrant integration is not currently devolved are in the area of social security. However, given the Smith Commission’s recommendations on welfare, some of these rights are also being devolved in the draft Scotland Bill.

7. How, then, does the UK Government’s negotiating position on limiting migrant rights and reducing migrant numbers (from the EU but also, on the latter issue, from outside the EU) tally with the Scottish position on these issues?

The Migration Issue: Different Lenses in Scotland and the UK

8. The Scottish and UK approaches to immigration and migrant integration have, in many ways, been diametrically opposed.³ When Cameron set out his

¹ <http://www.telegraph.co.uk/news/newstoppers/eureferendum/10700610/David-Cameron-my-seven-targets-for-a-new-EU.html>

² <http://www.theguardian.com/politics/2014/nov/27/david-cameron-european-union-immigration>

³ See Hepburn, E. ‘Citizens of the region’: party conceptions of regional citizenship and immigrant integration. *European Journal of Political Research*, (2011) 50:4: 504-529.; Hepburn, E. and M. Rosie, ‘Immigration, Nationalism and Political Parties in Scotland’ in Hepburn, E. and R. Zapata-Barrero (eds) *The Politics of Immigration in Multilevel States: Governance and Political Parties* (Basingstoke:

proposals listed above for restricting the EU principle of 'Freedom of Movement' and significantly reducing EU migrant rights, the Scottish Government was advancing a liberal vision of immigration that welcomed newcomers in a multicultural Scotland.

9. In particular, the Scottish Government produced a white paper on independence that advocated a more inclusive model of citizenship in an independent Scotland, with a commitment to increasing migrant rights and increasing migrant numbers to the EU average.⁴ Scotland's distinct approach was largely driven by the fact that Scotland has very different migration needs compared to (the southeast of) England.⁵ In Scotland there have been concerns of an ageing population and the need to fill key gaps in the labour market through increased immigration. But there has also been a different ideological approach. The SNP Government has followed previous Labour-Liberal Democrat governments in its commitment to multiculturalism, and a desire to portray Scotland as open, tolerant and progressive.

10. Meanwhile, the UK approach has followed the trend towards more coercive 'civic integration' approaches to migration and citizenship across Europe.⁶ Here, the UK approach has been driven by the perception that there is *too much* immigration, that the UK's social benefits to migrants are too generous and make the UK too attractive to migrants, that migrants were failing to integrate – leading to pockets of extremism, and that public opinion was turning against the mainstream parties on this issue, fuelling a rise in support for the UK Independence Party (UKIP).

11. In legal terms, the acquisition of nationality and citizenship – which determine the criteria for membership of the citizenry – and immigration and asylum - which covers selection and admission – are powers reserved to the UK government under the Scotland Act (1998; schedule 5). As such, decisions about levels of migration and access to benefits are managed by the Home Office, with the Scottish Government playing no significant role in influencing immigration control. This has not always been the case. In 2004 the Labour-LibDem Scottish Executive launched the 'Fresh Talent' initiative in response to concerns that "the single biggest challenge facing Scotland as we move further into the 21st century is our falling population".⁷ The Fresh Talent Working in Scotland Scheme (FTWiss) allowed international graduates that had pursued studies at a Scottish university to live and work in Scotland for two years without the need for a work permit directly after graduation.

Palgrave Macmillan, 2014); Hepburn, E. 'Scotland's hidden policy competence: immigrant integration and policy-making in Scotland since devolution'. Paper presented at the Policy & Politics annual conference, University of Bristol, 16-17 September 2014; Hepburn, E. (2015--forthcoming) 'Is there a Scottish approach to citizenship? Regional citizenship, national belonging and migrant integration in Scotland', *European Yearbook of Minority Issues*. Hepburn, E. (2014) 'Independence and the Immigration Debate in Scotland', *British Politics Review*, 9(2): 10-12.

⁴ Scottish Government (2013), *Scotland's Future. Your Guide to an Independent Scotland* (Edinburgh).

⁵ The immigrant community only makes up about 7% of the overall Scottish population (less than half that of England).

⁶ Joppke, C. 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe.' *West European Politics* (2007) 30(1):1-22.

⁷ Scottish Executive (2004) *New Scots, attracting Fresh Talents to meet the Challenge of Growth*.

However, the scheme was subsequently rolled out to the rest of the UK and then terminated. There have been recent calls, however, to reinstate the scheme.

12. Furthermore, the SNP Government in Scotland wishes to moderately increase levels of immigration to Scotland, with the aim of raising the demographic growth rate to the EU average.⁸ This is part of the Scottish Government's perception that attracting and retaining migrants is a key driver of population and economic growth in Scotland. The SNP Government has consistently criticized London's immigration policies as 'damaging' to the (economic) interests of Scotland. Instead, the Scottish Government has sought to pursue in a more liberal immigration policy, to grow the economy and to enrich Scotland's cultural diversity and international linkages.⁹

13. These aims – of moderately increasing immigration to meet labour market needs and of welcoming migrants in an open and multicultural Scotland – have received broad support amongst Scottish political parties, trades unions, universities, businesses and civil society in general. For instance, all of the political parties in Scotland have advanced a positive position on the contributions of immigrants and ethnic minorities to Scottish society.¹⁰ In contrast to the increasingly anti-immigrant debates amongst political parties in England, Scotland's parties have carefully crafted an "elite discourse that portrays immigrants as key players in an open, inclusive and multicultural Scotland".¹¹ Scottish Government plans to increase immigration have been welcomed by the business community in Scotland, which is keen to fill key gaps in the labour market. A more liberal immigration policy is also supported by Scottish universities, which seek to attract the highest calibre international students. And civil society in Scotland has supported efforts to protect the human rights of refugees and asylum seekers and provide supportive structures for migrant integration.

14. Public opinion in Scotland is also moderately more positive about immigration than in the rest of the UK. Research by the Oxford Migration Observatory revealed that 20% of Scots would support the number of immigrants being increased by "a lot", which compared with only 2% in favour of increased flows in the south of England. The Observatory has put the more positive Scottish attitudes down to Scotland's more 'tolerant political culture'.¹² But this does not mean that Scots want more immigrants. The Observatory also found that the majority of Scots support reduced immigration (58%),

⁸ Ibid.

⁹ Scottish Government (2013), *Scotland's Future. Your Guide to an Independent Scotland*.

¹⁰ Hepburn, E. 'Scotland's hidden policy competence: immigrant integration and policy-making in Scotland since devolution'. Paper presented at the Policy & Politics annual conference, University of Bristol, 16-17 September 2014; Belanger, E., E. Hepburn, R. Nadeau, A. Henderson (2016— forthcoming) *The National Question: Parties and Voters in Quebec and Scotland*.

¹¹ Hepburn, E. and M. Rosie, 'Immigration, Nationalism and Political Parties in Scotland' in Hepburn, E. and R. Zapata-Barrero (eds) *The Politics of Immigration in Multilevel States: Governance and Political Parties* (Basingstoke: Palgrave Macmillan, 2014)

¹² Migration Observatory (2014) *Immigration and Independence: Public Opinion on Immigration in Scotland in the Context of the Referendum Debate*. Oxford: Migration Observatory.

though this is far lower than England and Wales (75%). In any case, there appears to be some lingering positive effect of the 'One Scotland' campaign on public opinion, although given that the campaign has been dormant for some time, these effects may be slowly wearing off as Scottish opinion falls in line – aided by an anti-immigrant tabloid media – with the rest of the UK.

Migrant Rights: the Legal Framework

15. Given that Scotland has a distinct approach to immigration and integration, which would be significantly undermined if Cameron is able to negotiate stricter controls on EU migration to the UK and a drastic reduction in migrant rights, what could it potentially do about this to make its voice heard?

16. Migrant integration was not specifically spelled out as a policy area in the legislation that created the devolved Scottish institutions (Scotland Act 1998), nor in subsequent enhancements to devolution in 2014/5. This is largely because 'migrant integration' has not, until recently, been part of the British policy lexicon. Instead, the preferred terms to address the status of individuals with a migration background have historically been black and minority ethnic (BME) policy, race relations policy, and more recently, "community cohesion" policy. However, none of these terms specifically address the situation of new (often white) migrants to the UK; instead, the focus was on integrating the UK's visible minorities during the postcolonial era.¹³

17. Regardless of this lack of explicit legislative control over migrant integration, because devolution is based on a 'retainer' model – whereby anything not specifically reserved to the UK level is devolved to the Scottish level – the majority of policy areas that affect an immigrant's incorporation into their host society – such as health, education, housing, children's services, legal aid and policing – are devolved to the Scottish Parliament. To that end, migrant integration can be understood as a devolved competence to Scotland. This is in line with other multi-level devolved or federal states such as Belgium, Spain, Italy, Germany and Canada, where immigrant integration policies are the exclusive competence of substate administrations¹⁴.

18. Some recent research has revealed how successive Scottish executives have pursued an explicitly multicultural approach to migrant integration that has diverged significantly from UK/English policy.¹⁵ The multiculturalist orientation was first evident in the early 2000s when Scotland's first executive, led by a Scottish Labour--Liberal Democrat coalition, launched the 'One Scotland, Many Cultures' campaign. The One Nation campaign involved the promotion of race equality and multiculturalism in school curricula and the funding of cultural groups in Scotland.¹⁶ The principles underlying the One Scotland campaign – of diversity and multiculturalism – have been endorsed

¹³ Hepburn, E. 'Scotland's hidden policy competence: immigrant integration and policy-making in Scotland since devolution'. Policy & Politics conference, University of Bristol, 16-17 September 2014.

¹⁴ See Hepburn, E. & R. Zapata-Barrero (eds) (2014). *The Politics of Immigration in Multilevel States: Governance and Political Parties*. (Basingstoke: Palgrave); Joppke, C. and L. Seidle (2012) *Immigrant Integration in Federal Countries* (Montreal: McGill-Queens University Press).

¹⁵ Hepburn, E. 'Scotland's hidden policy competence', op cit.

¹⁶ Scottish Executive (2006), *Promoting Equal Opportunities in Education*.

by subsequent SNP governments.¹⁷ In particular, the theme of multiculturalism and openness to newcomers was underlined in the Scottish Government's *New Scots* policy document on refugee integration.¹⁸ This emphasis on multiculturalism marks a strong contrast with the civic integration approach in England, whereby multiculturalism is "never talked about" and the preferred approach is to emphasise the need to integrate into British culture.¹⁹

19. Recent research has also revealed that immigrants are offered greater access to health services, housing support and language-training in Scotland as compared with England.²⁰ For instance, refugees have more extensive housing rights as the Scottish Government has one of the most progressive homelessness strategies in Europe, and refugees are granted the same rights as Scottish nationals.²¹ Scotland also funds greater provision of ESOL classes to immigrants, whereby the Adult ASOL Strategy for Scotland recognizes 'the vital contribution which New Scots and settled minority ethnic communities make to our society and in the Scottish labour market'.²² As a result of this commitment, Scottish ESOL provision is more extensive than in England, where ESOL has received significant funding cuts and there is 'greater rationing of free places...so that some low paid migrants can no longer access classes at no cost'.²³ Finally, asylum seekers are granted support from their first day of entry into Scotland, including access to public services. The Scottish Government is also seeking to change the law so that asylum seekers can obtain a work permit, which is currently forbidden under UK law.²⁴

20. The Scottish Government has also earmarked a considerable sum of money to try to alleviate the negative effects of the austerity reforms of the current UK Government on migrants and citizens in Scotland. In its document *Welfare Mitigation: The Scottish Government Response* (2013) it stated that: 'The Scottish Government aims to mitigate the worst impacts of welfare reform, as far as it can, within the powers it has available'.²⁵ This included an extra £9.2 million invested in the Scottish Welfare Fund for 2013-14 (including helping people on housing benefit). Furthermore, the recommendations of the Smith Commission, some of which were included in the draft clauses of the Scotland bill, moderately increase the Scottish Parliament's powers over welfare. In particular, Scotland will be allowed to vary the frequency of Universal Credit payments and set the rules on, for instance, benefits for carers and people with disabilities. David Cameron has also recently stated

¹⁷ Hepburn, E. (2015--forthcoming) 'Is there a Scottish approach to citizenship? Regional citizenship, national belonging and migrant integration in Scotland', *European Yearbook of Minority Issues*.

¹⁸ Scottish Government (2013), *New Scots. Integrating Refugees in Scotland's Communities*.

¹⁹ Lewis H. and C. Craig (2014) "'Multiculturalism is never talked about': community cohesion and local policy contradictions in England", *Policy & Politics* 42(1): 21-38.

²⁰ Hepburn, E. 'Scotland's hidden policy competence' op cit.

²¹ Scottish Government (2013), *New Scots. Integrating Refugees in Scotland's Communities*.

²² Scottish Government (2007) *The Adult ASOL Strategy for Scotland*. Available at: <http://www.scotland.gov.uk/Publications/2007/05/09155324/0>

²³ Spencer, S. (2011b) 'Integration in the UK: Why the silence?', Open Democracy. Available at: <http://www.opendemocracy.net/5050/sarah-spencer/integration-in-uk-why-silence>

²⁴ <http://www.scotland.gov.uk/Publications/2013/12/4581>

²⁵ <http://www.scotland.gov.uk/Resource/0042/00426512.doc>

his openness to increasing the devolution of welfare to Scotland, including housing benefits.²⁶ If these social benefits are devolved, it should therefore be at the discretion of the Scottish devolved institutions of which of these social benefits (EU and non-EU) migrants are entitled to – which may contravene Cameron’s aim to reduce the social benefits of EU migrants across the UK.

Challenges to Scotland’s Migration Approach

21. However, these attempts to carve out a distinct Scottish approach to citizenship have not been without their constraints. As immigration is reserved to Westminster, this poses particular limitations on the extent to which Scotland can diverge from the UK model. One obvious example is the Fresh Talent scheme – which was supported by all of the political parties in Scotland and claimed as a success – but which was abolished by the UK Government against the wishes of Scottish political actors.

22. Another example is the UK Government’s proposal to require migrants to pay an up-front ‘health levy’ when they arrive in the UK (*The Guardian*, 28 November 2014). Although the provisions of the Immigration Act (2014), which introduces a new health tax for immigrants amongst other restrictive measures to immigrant rights²⁷, will apply across the UK, access to healthcare is governed by Scotland and the other devolved administrations. As the Migrant Rights Network queries, it is therefore unclear how these provisions will affect Scotland.²⁸ According to Scottish policy makers, there is no evidence of ‘health tourism’ that motivated the introduction of the policy in England, and instead there is a concern that the health levy will ‘put people off from coming to Scotland’, especially international students.²⁹

22. The same arguments may apply to the UK Government’s desire to restrict EU migrants’ rights to access public services and tax benefits, in order to make the UK a ‘less attractive’ destination for migrants. As Scottish policy makers seek to moderately increase (or at the very least, maintain) levels of immigration and to demonstrate a distinctive Scottish approach to supporting migrant rights, Cameron’s attempts to cut EU migration and migrant rights directly undermine these aims.

23. However, given that Scotland has devolved powers over an increasing number of areas that the UK Government wishes to renegotiate EU membership on, including

²⁶ <http://www.theguardian.com/politics/2015/may/15/cameron-consider-beefing-up-bill-scotland-welfare-tax-powers-sturgeon>

²⁷ The Immigration Act 2014 introduced an ‘immigration health charge’, which requires migrants to pay a charge for any potential National Health Service (NHS) costs in the future, (Migrant Rights Network, 2014). The Immigration Act also restricts access to justice for migrants by removing the right of appeal for most immigration decisions. It also restricts access to private housing, bank accounts and driving licenses, by requiring landlords, banks and the DVLA to check and verify the immigration status of applicants. These measures have raised strong concerns amongst migrant and refugee communities and organisations about the detrimental effect on their rights.

²⁸ <http://www.migrantsrights.org.uk/blog/2014/05/immigration-act-2014-what-next-migrants-access-nhs-care>

²⁹ Interviews conducted with the author in 2014.

migrant access to housing and healthcare, and proposed control of housing benefits, social care benefits, and disability benefits, this creates a situation in which Scotland could potentially grant such rights to EU migrants at its discretion, while Cameron's welfare cuts for EU migrants would only apply in the rest of the UK.

Protecting Scotland's EU and Migration Interests

23. One way in which Scotland could seek to protect its interests in EU and migration matters is through intergovernmental machinery, such as the Joint Ministerial Committees. However, the UK's current system of IGR has been broadly criticized for its weak, vague, informal, executive-driven and top-down nature. These issues were directly addressed during the Smith Commission's deliberations, whereby there was recognition of the need to create more effective IGR machinery. This is especially important in order to deal with disagreements between the two levels of government on shared, overlapping or 'transversal' policy issues, under which category both the issue of European integration and the issue of migrant rights falls. However, the details of such IGR arrangements are clearly not yet in place.³⁰ As one witness to the Devolution (Further Powers) Committee, Prof. Aileen McHarg, stated,

"The devolved administrations have no consistent means of ensuring that they are consulted, or that their views are taken into account, and there is a risk that their interests may simply be overlooked by UK policy-makers."

24. It appears that the interests of the devolved administrations have been overlooked in the case of the UK's current efforts to renegotiate the UK's terms of agreement on EU membership, whereby David Cameron has organized a number of high-profile bilateral meetings with EU member-state leaders on 'red line' issues such as migrant rights, without consulting the devolved administrations on their views, despite the impact that this will undoubtedly have on their interests and competences.

Policy recommendation

25. I would now like to make several policy recommendations to strengthen the Scottish devolved institutions' ability to protect their EU and migration interests.

26. The first recommendation is to create a Scottish Policy Framework on Migrant Inclusion that is based on an extensive evidence-based review and a comparative lesson-drawing analysis. Scotland is currently one of the few sub-state nations in the EU that does not have its own migrant rights policy strategy (for instance, the Belgian Regions, German Länder, Austrian Länder, Italian Regions, Spanish Autonomous Communities, as well as the Canadian provinces and US states all have their own territorially tailored migrant inclusion strategies). Although Scotland does have a policy strategy on refugee integration, *New Scots*, this does not address the needs, rights and inclusion of migrants as a community as a whole. By designing a Scottish

³⁰ http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Reports/dfpr-15-03w-rev.pdf

Migrant Inclusion strategy and embedding it in law, this would make it far more difficult to be overturned by legislative actions elsewhere.

27. The second recommendation is the need to strengthen and formalise IGR machinery on Europe – which has been advocated extensively elsewhere – in order to strengthen the voice and input of devolved administrations in areas of common concern. But as a new category I suggest that migration should also be added as an issue of discussion at JMCs between the central and devolved governments of the UK due to its transversal nature and impact on both devolved and reserved policies.

28. Finally, there is an issue to consider of whether some of the demands that the UK government is making in its EU renegotiation efforts, are actually incompatible with devolution as Scotland has some control over migrant rights – such as seeking to limit migrant access to social benefits, over which the Scottish Parliament may soon be gaining control. Indeed, these new Scottish powers may mean that Cameron is only able to negotiate restrictions on migrant access to benefits in parts of the UK outside Scotland (rUK), as the UK Government is unable to legislate on Scottish matters.

29. This links with a broader issue of whether the UK Government would actually be able to negotiate an exit from the European Union, as this would directly affect Scotland's competences as set out in the Scotland Act, which requires the UK to gain Scottish consent. In order to fully protect Scottish competences, I have suggested elsewhere that the permanence of the Scotland Bill be clarified, and that any re-wording includes a new provision that any changes to the Scotland Act must require mutual consent from both the UK and Scottish Parliaments.³¹ This would put the Scottish Parliament on a more federal type footing (what I have referred to as a federacy³²), whereby its powers are entrenched and cannot be revoked or amended without its consent. According to the evidence that Prof. Douglas-Scott and I submitted to the Devolution (Further Powers) Committee, this would mean that:

“if the UK proposed to radically alter its relationship with the European Union – as is currently being proposed by the UK Government – then the Scottish Parliament could potentially veto any changes proposed by the UK Parliament that had a profound impact on its competences. These could include any changes resulting from the withdrawal of EU membership, which would have a significant impact on the competences of the Parliament. Likewise, if the Scottish Parliament were truly made permanent, then it would also have a right to block any opt-ins to European or other international treaties that would result in the amendment of its competences.”

29 May 2015

³¹ Eve Hepburn (2015) Written Evidence to the House of Commons Political and Constitutional Reform Committee Inquiry into 'Constitutional Implications of Draft Scotland Clauses', 6 Feb.

³² <http://blogs.lse.ac.uk/politicsandpolicy/scotland-if-not-independence-then-a-federacy/>

Summary

- Opinion polls and public attitudes data would suggest that it is likely that the UK would vote to remain within the EU. However, this should be no cause for complacency. Scotland's independence referendum showed us that public opinion on hugely complex issues might shift quite markedly in relatively short spaces of time.
- The package of reforms that the UK Government seems likely to pursue point towards the need for revision of the EU's treaties. There is seemingly little appetite in Berlin, Paris or Brussels to re-open the treaties.
- Key EU partners, including Germany, want the UK to remain in the EU and there is a pragmatic appreciation that something must be done to help facilitate that. However, that pragmatism does not override all other considerations.
- Many of the proposals put forward by the UK Government remain vague and under-specified, furthering the impression that this exercise is just as much, if not more, about party management and politics than it is about public policy.
- The Prime Minister finds himself walking a tightrope between the demands of a number of his backbench MPs and the willingness of his EU partners to grant concessions that might enable the UK to remain within the EU.
- It would be useful if the Scottish Government could be clearer about what, if any, distinct and specific interests Scotland has in this process as opposed to repeatedly calling for a multiple-veto lock.
- For the Scottish Parliament to be able to effectively scrutinise the performance of the Scottish Government in this area, it would be useful if the Cabinet Secretary could explain clearly what the objectives being pursued are and via what mechanisms they are being pursued.

Public attitudes

1. Public attitudes towards the EU can be a little slippery and, as is often the case, different surveys with slightly different questions and/or sampling methodology will throw up different results. If we look at surveys by YouGov, which have asked a consistent question monthly since early 2012 we can see that opinion has shifted in recent years (**figure 1 in the Annex**). Since January 2015 about 45% of respondents have said they would vote to remain in the EU, with about 35% saying they would vote to leave. Around 15% of voters remain uncertain. However, throughout 2012-2014 there was regularly, in fact commonly, a poll lead for 'Leave the EU'.

¹ I am a Lecturer based at the University of Edinburgh Academy of Government. Email: Daniel.Kenealy@ed.ac.uk. This submission is based on a long-standing research agenda on the history and institutions of the EU as well as interviews with officials and politicians.

2. YouGov also ask a slightly different question, with a qualification concerning the renegotiation. They ask people to imagine that David Cameron has secured changes and says that the interests of the UK are now protected. When asked how they would vote in such a scenario the proportion responding 'Remain in the EU' jumps to over 50% (and that has been the case since March 2014). When the question is asked in this way never, since 2010 when it was first asked by YouGov, has the 'Leave the EU' response been higher, or even close to 'Remain in the EU' (**figure 2 in the Annex**).

3. So it seems that public opinion is increasingly in favour of remaining in the EU. However given the fluctuations recorded in the very recent past, there ought be no complacency on the part of those wanting the UK to stay in the EU. We know from the independence referendum that when minds are concentrated, and an issue that has been in the air for a long time becomes **the** national debate, opinion can shift quite rapidly and markedly. Furthermore, it appears that the perception of the merits of any deal the Prime Minister is able to secure, and the success with which that is spun, could prove crucial to the outcome.

4. Thinking about Scotland specifically, we have a clear picture from the Scottish Social Attitudes data (asking the question differently from YouGov), which allows us to look at shifts in attitudes over time (**figure 3 in the Annex**). Although the number of people in Scotland saying they think the UK should leave the EU has roughly doubled in the past 15 years the figure remains low, at around 20%. What we can see in this data is a hardening of views on the EU, with more people saying we should leave, and more people saying we should work to reduce the powers of the EU. Equally fewer Scots now say we should try to increase the EU's powers or work towards a single EU government than was the case 15 years ago.

Table 1: Views on Britain's long term EU strategy² by country (%)

	England	Scotland	Northern Ireland	Wales
Leave the EU	31	22	26	28
Stay in the EU and try to reduce the EU's powers	43	46	45	41
Leave things as they are	16	20	17	19
Stay in the EU and try to increase the EU's powers	7	8	8	7
Work for the formation of a single European government	2	3	5	4
Total (100%)	3646	1457	549	1082

"Don't know" responses were excluded from this analysis; Percentages are weighted, sample size is unweighted

² Question wording: "Do you think Britain's long-term policy should be to leave the European Union (EU), to stay in the EU and try to reduce the EU's powers, to leave things as they are, to stay in the EU and try to increase the EU's powers or to work for the formation of a single European government?"

5. In a recent survey organised with colleagues at Edinburgh University we got the results presented in **table 1** when we asked about public attitudes to the EU across the four constituent parts of the UK (note this is the same formulation used by Scottish Social Attitudes). There are some differences in views about the UK's long-term strategy towards the EU, with Scots being slightly less likely to favour exit. Overall, however, there is no majority for an exit in any part of the UK, but a strong majority throughout for a reduction of powers of the EU (including Scotland). The differences between England, Scotland, Wales and Northern Ireland are therefore rather nuanced and not as large as sometimes suggested.

6. This raises the issue of whether some form of multiple lock/veto should be a part of the decision process in any EU referendum. The First Minister has argued that the four constituent parts of the UK should each have a veto. That is to say that majorities in favour of exit should exist in each of England, Scotland, Wales and Northern Ireland.³ Sinn Fein also supports such a system. The original call for this system, in October 2014 coincided with a poll that suggested Scotland and England would vote in opposite ways in a EU referendum, a poll that jars somewhat with the overall thrust of public opinion data.

7. In the independence referendum, whilst it may have been somewhat unclear what further powers might be devolved in the event of a 'No' vote, what was clear was that a 'No' vote meant that issues of foreign and international affairs would remain something on which the UK as a whole took decisions. But let us recast the EU referendum as a constitutional question, not an international affairs question for a moment. In some federal countries (e.g. Canada, Australia, United States, Germany) changes **to the constitution** have to overcome obstacles greater than a simple majority vote. However, the UK is not a federal system and the asymmetries present (England being so large relative to Scotland, Wales and Northern Ireland) make devising such a system difficult. Furthermore, in none of the aforementioned countries is any constituent part of the whole given a veto.

8. In addition to the above arguments recent survey evidence, from a research project run with colleagues at Edinburgh University, reveals that public attitudes across the UK are opposed to such a multiple veto system (see **table 2**). The majority of people in all four constitutive parts of the UK see 'Brexit' as a decision that should be taken by the population as a whole and not by separate parts. While there is some significant support for the First Minister's proposition (ranging from 32% in England to 45% in Scotland), it is a minority position.

³ The First Minister initially suggested this system in October 2014 and it was included in the SNP's 2015 General Election manifesto. See *Stronger for Scotland: Scottish National Party Manifesto 2015* (Scottish National Party: Edinburgh), p. 9; and <http://www.snp.org/media-centre/news/2014/oct/sturgeon-eu-amendment-pledge-transform-debate>.

Table 2: Preference for a veto for each UK country in EU referendum⁴ by country (%)

	England	Scotland	Northern Ireland	Wales
Majority in each country required	32	45	40	36
Overall majority decides	68	55	60	64
Total (100%)	3322	1426	520	1000

"Don't know" responses were excluded from this analysis; Percentages are weighted, sample size is unweighted

What does the UK Government want?

9. It remains difficult to piece together exactly what the UK Government is seeking. An interview on *The Andrew Marr Show*, back in January 2015⁵, was perhaps the most revealing the Prime Minister has been to date. It should be noted that there now seems to be recognition that the UK Government will need to seek Treaty change. It is unlikely that Treaty change, under the full revision procedure, could be negotiated, agreed and ratified in time for a 2017 referendum, leaving the possibility that UK voters may be asked to vote on a promised slate of reforms, rather than a final package. Piecing together various speeches and press conferences suggests the following major areas (see also **table 1 in the Annex**).

10. **'Ever-Closer Union'**. The Prime Minister has suggested, "We need to get out of ever-closer union. That is something that shouldn't apply to the United Kingdom". The phrase appears in the preamble to the Treaty and has no direct legal effect. It is hard to see this as anything more than symbolism and very difficult to see what practical impact it would have. It is also misleading to present the phrase 'ever-closer union' in isolation. The full sentence reads: "an ever-closer union among the peoples of Europe in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity". So the commitment is to devolved decision-making, not centralised control by the EU.

11. Perhaps implicit in the call to get the UK out of a commitment to 'ever-closer union' is the idea that Member States should hold vetoes in more areas than they currently do. This would mean that fewer things could be 'forced' on them against their will by a majority of other EU Member States. One pattern that has animated the history of the EU and its treaty changes is that more and more issues are decided in the Council of the European Union under the principle of Qualified Majority Voting, rather than unanimity (which grants every Member State a veto). It seems highly improbable that the EU is about to lurch backwards and move policy areas back from QMV to unanimity. Nor is it realistic that the UK would be given the right to opt-in or out of every piece of EU legislation as that defeats the purpose of membership.

⁴ Question wording: "Consider that a referendum on whether the UK should remain part of the European Union or not will be held in 2017. Some people have suggested that for the UK to leave the EU a majority of voters in each of England, Scotland, Wales and Northern Ireland would have a veto on whether the UK leaves. Others have suggested that only an overall majority of all voters in the UK voting to leave would be required. Which of these do you agree with?"

⁵ The interview can be viewed at <https://www.youtube.com/watch?v=JpkpUaJF8Og>.

12. A more realistic prospect is some sort of political agreement that recognises flexibility in how different states pursue ever-closer union, an agreement that might at some future point be added into the EU Treaties.

13. **Stronger role for national parliaments.** The Prime Minister has suggested that it ought to be easier for national parliaments to combine to block EU regulations. He has failed so far to specify the details although he is clearly not suggesting that individual parliaments should be able to veto legislative proposals (which would amount to a national veto). A provision already exists in the so-called 'Yellow Card' mechanism. If one third of the national parliaments object to a proposal from the European Commission then the Commission has to withdraw, amend or justify the proposal. If half of the national parliaments object then an 'Orange Card' is issued. The Commission must review their proposal but, in addition, there are then specific votes in both the European Parliament and the Council of the European Union, either one of which can kill the proposal in question.

14. The problem with the current system is that it remains difficult to coordinate national parliaments (the Yellow Card has been used twice, the Orange Card never). It may be more productive to work on efforts to strengthen inter-parliamentary dialogue, rather than trying to amend a provision that already exists. Furthermore, there is much that could be done here at home to strengthen the role of the Westminster parliament (and the devolved parliaments/governments) vis-à-vis UK Government ministers negotiating on our behalf in Brussels.

15. Any change to the current Yellow/Orange card system would require amending Protocol 2 of the EU Treaties (the protocols have Treaty status). There may be a far less arduous ways of revising this process, through inter-institutional dialogue rather than full-blown Treaty change.

16. **Safeguarding the interests of non-Eurozone members.** The Prime Minister has been keen to argue that the EU single market must be protected from decision-making that favours the Eurozone members as opposed to the EU as a whole. It should be noted that most of what the EU does remains EU-wide, as opposed to specifically concerned with the Eurozone. However, it is conceivable that as the Eurozone members integrate further a set of preferences and interests could emerge that set the Eurozone apart in some way. This is still hard to imagine as, for example, on issues such as liberalisation of the market in services or digital the Eurozone does not speak with one voice and the UK can find itself in agreement with some of the strongest Eurozone members, e.g. Germany, the Netherlands.

17. Nevertheless, a precedent exists in the voting rules agreed for the operation of the European Banking Authority. A double majority is required, both a majority of Eurozone members and a majority of non-Eurozone members for new rules in the area of financial regulation to be created. That principle could be applied in other areas going forward. However, if the Prime Minister wishes for all EU single market law to be made through such a

double-majority system that would require amending the Treaties and creating a new 'type' of vote in the Council of the European Union.

18. EU migrants and access to the UK welfare system. This has come to be the set piece of the renegotiation drama. Everything else is garnish. Interestingly it did not feature that prominently in the Prime Minister's Bloomberg speech, delivered in January 2013.⁶ There has been increasing pressure and focus on this issue over the past two years. This is not the place to re-rehearse all of the data available on EU migration to the UK but we ought to recall that: (a) most migrants in the UK come from outside the EU⁷; (b) it is a two-way street and many UK citizens live or work across the EU although the net figure is of migration to the UK⁸; and (c) EU migrants contribute more to the UK economy in taxes than they take out.⁹

19. The Prime Minister has pin pointed the following changes: "I think that everyone can understand that under the proposals I have that if someone comes to Britain from Europe looking for a job they don't get unemployment benefit; if they don't have a job within six months they have to go home; they have to work for four years before they can claim things like tax credits. Crucially you don't get child benefit with respect to children that you leave at home with your family in other countries. Those four changes are hugely important." There is thus a distinction between restrictions sought on the rights of migrant jobseekers and the rights of migrant workers.

20. The European Court of Justice has made it clear that anyone moving to another EU country simply to claim benefits is not entitled to do so.¹⁰ There is an existing requirement that EU migrants be working, studying, or self-sufficient in order to live legally in another Member State. However, the European Court of Justice has extended some of these rights to jobseekers who can credibly claim they have a chance of securing work. The UK Government's suggestion that, for example, they may seek to exclude such migrants from accessing Universal Credit may fall foul of the Court.

21. The proposed changes to the benefits available to EU migrants who are in work raise significant questions given the EU Treaties commitment to non-discrimination against workers. The Prime Minister's stated aims in this area would require the UK to amend, or secure an opt-out, from EU directives and regulations concerned with free movement and the coordination of social security systems. A more secure and comprehensive way to make changes in this area would be to attempt Treaty reform. This would also have the benefit of securing any agreement from interference by the European Court of Justice, who could rule that amended or new directives and regulations contravene EU law.

⁶ Available at <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>.

⁷ See <http://www.ons.gov.uk/ons/rel/migration1/migration-statistics-quarterly-report/february-2015/stb-msqr-feb-2015.html#tab-1--Net-migration-to-the-UK>.

⁸ See footnote 7.

⁹ See http://www.cream-migration.org/files/Press_release_FiscalEJ.pdf.

¹⁰ See <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-11/cp140146en.pdf>.

22. Ultimately, far more clarity is needed from the UK Government before we can offer a full appraisal of what needs to be done in this area.

What are Scotland's interests and how can they be advanced?

23. The Scottish Government has clearly suggested that it is in Scotland's interests to have a veto in the forthcoming referendum. Beyond that it remains hard to pin point any specific points of agreement/disagreement. Clarity on this would be welcome from the Cabinet Secretary.

24. The principal, and formal, way for Scotland to have its say in the process of formulating the UK Government line on EU matters is through the Joint Ministerial Committee Europe (JMCE). This is one formation of the JMC system established post-devolution. JMCE is the formation that has met most frequently and regularly since 1999.

25. The JMCE meets in advance of each European Council meeting – so typically four times per year – and is chaired by the Foreign Secretary. It allows an opportunity for devolved administrations to feed into the UK line in EU negotiations. Ultimately, the decision remains one for the UK Government but the JMCE provides a clear and formal point of access for the devolved administrations to make their views known.

26. Whitehall officials often cast the JMCE in a positive light. Scottish Government officials have reported that whilst the venue is useful for discussion and information sharing, and whilst there is a genuine effort on the part of the UK Government to consult, the JMCE is least useful when the views of the two governments diverge. Too often the JMCE is a forum for devolved administrations to put their questions and concerns, and for the UK Government to respond, rather than a forum for genuine political negotiation.

27. Alongside the JMCE and occurring much more regularly are bilateral contacts and conversations between Scottish Government officials and appropriate counterparts across Whitehall. It is said that these are often the more effective channels of persuasion and influence, working as they do below the radar, between officials and allowing for a gradual build-up of mutual trust and respect. However, this remains one of the areas of government activity that is least susceptible to rigorous research.

28. It would thus be advisable for the Scottish Government to devise a strategy that incorporates appropriate bilateral channels of influence in parallel to the formal machinery of the JMCE. Given the issues that seem likely to be prominent in any renegotiation and given what we know about the way the UK Government are likely to organise themselves for this endeavour key links should be sought in the UK Treasury, Cabinet Office, and the Department for Work and Pensions.

Conclusion

29. The UK's attempt to renegotiate its EU terms of membership will be a political balancing act. Having marched the country to the top of the hill, the Prime Minister cannot march us straight back down again. He will need to strike a balance between a deal that can be 'sold' politically here in the UK and a deal that is acceptable to his EU partners. Insofar as Scotland has any distinct interests in the process there are both formal and informal routes through which those interests can be pursued. Further clarity from the Scottish Government about both what those interests are and through what mechanisms they seek to advance them would be welcome. The notion of a veto for the four parts of the UK might serve as a good headline but is generally not supported by people across the UK and is a poor substitute for a genuine statement of aims.

Annex

Figure 1. How would the UK public vote in a referendum on EU membership (YouGov, 2012-2015)¹¹

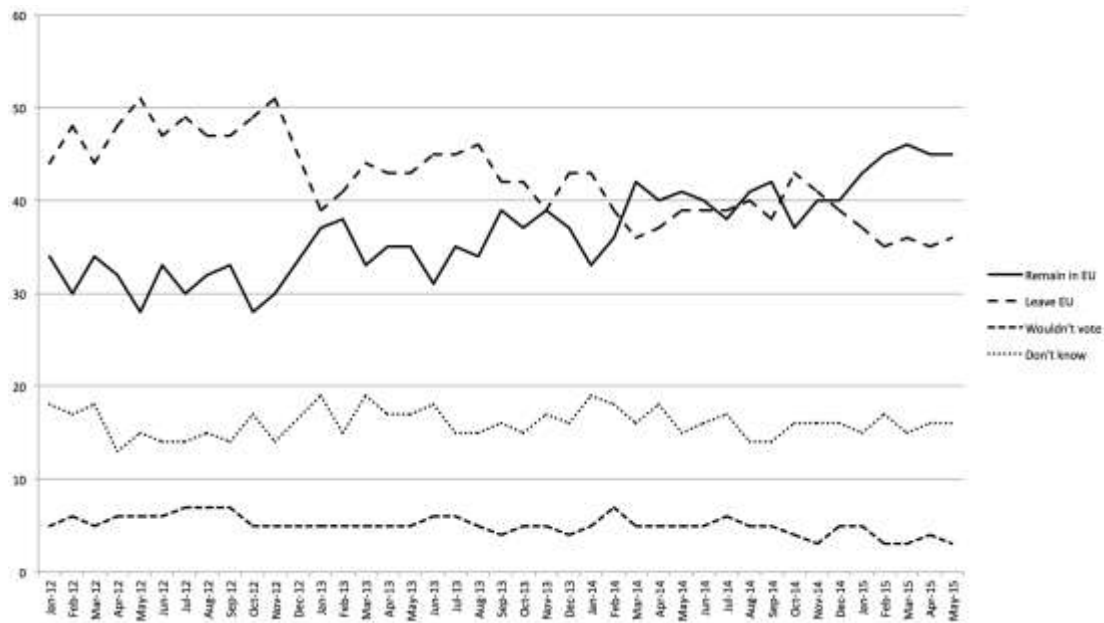
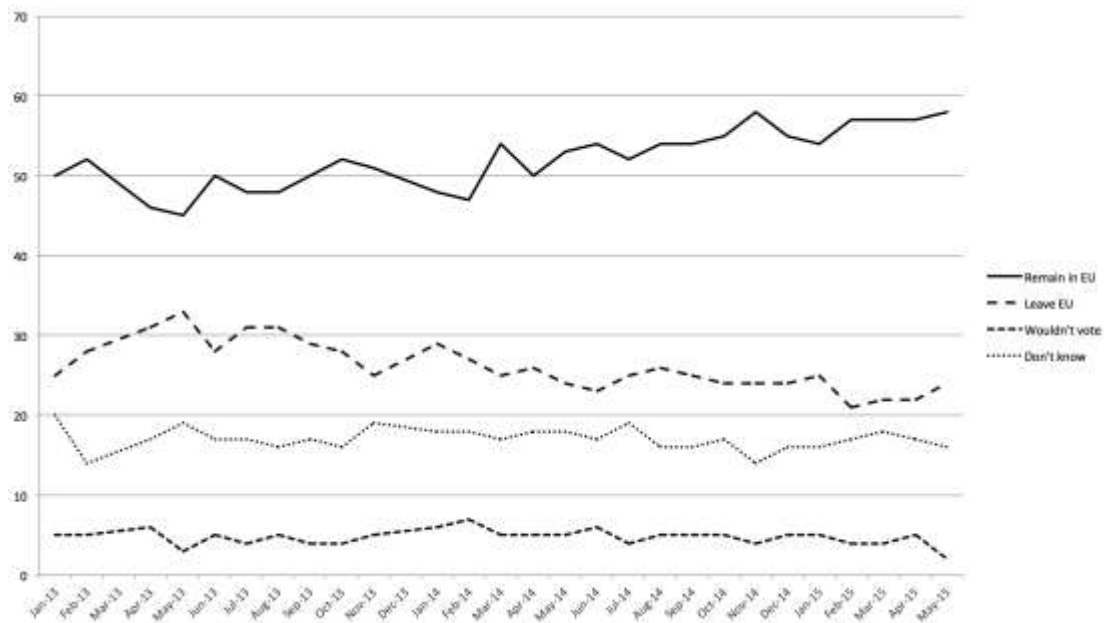


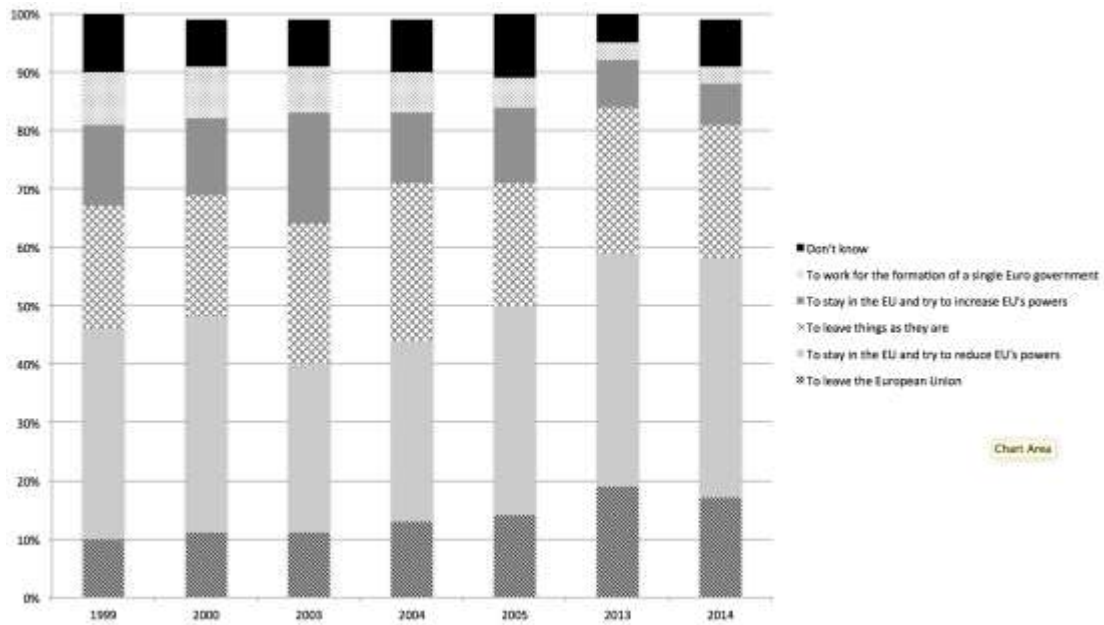
Figure 2. How would the UK public vote in a referendum on EU membership after a renegotiation that was presented as successful (YouGov, 2013-2015)¹²



¹¹ Question wording: If there was a referendum on Britain's membership of the European Union, how would you vote?

¹² Question wording: Imagine the British government under David Cameron renegotiated our relationship with Europe and said that Britain's interests were now protected, and David Cameron recommended that Britain remain a member of the European Union on the new terms. How would you then vote in a referendum on the issue?

Figure 3. Scottish Social Attitudes Survey question on what the long term EU policy of the UK ought to be¹³



¹³ Question wording: "Do you think Britain's long-term policy should be to leave the European Union, to stay in the EU and try to reduce the EU's powers, to leave things as they are, to stay in the EU and try to increase the EU's powers or to work for the formation of a single European government?"

Table 1. Summary of UK Government possible demands and how they might be pursued.

Issue/theme	Relevant Treaty articles	UK Government aim	Mechanism
Ever-closer union	Preamble; Article 1 TEU.	<ul style="list-style-type: none"> UK government opt-out from the principle of ever-closer union. 	<ul style="list-style-type: none"> Treaty could be amended to change current words of the preamble. That would require treaty revision under the ordinary revision procedure.
National parliaments	Protocol No. 2, Article 7.	<ul style="list-style-type: none"> Strengthen the role of national parliaments working together to block EU legislation. 	<ul style="list-style-type: none"> A clearer proposal would be required for how the Protocol would be strengthened. To amend the Protocol would require treaty revision under the ordinary revision procedure. Potential for a softer change, through inter-institutional dialogue and agreement by the Commission.
Safeguarding non-Eurozone members in the EU single market	Article 16 TEU; Various specific articles of TFEU.	<ul style="list-style-type: none"> To ensure that the interests of non-Eurozone member states are not overridden by those of Eurozone members. 	<ul style="list-style-type: none"> For new institutions or policy areas there could be agreement outside of the Treaty (e.g. the European Banking Authority). To change the voting rules for areas of policy already covered by the Treaties would require changes to specific articles of the TFEU and, perhaps, a revision to Article 14 TEU setting out the voting procedures in the Council. This could be done under the simplified revision procedure if the needed amendments were to Articles 26-197 TFEU (Part III).
Access to UK benefits for EU migrants	Article 45 TFEU; several key directives and regulations on free movement and social security (e.g.) Regulation 2004/883, Directive 2004/38).	<ul style="list-style-type: none"> Restrict ability to claim unemployment benefits upon arrival/access to Universal Credit. Restrict access to certain in-work benefits for up to four years. 	<ul style="list-style-type: none"> Amendment or replacement of certain key regulations and directives, through the ordinary legislative process, requiring approval by the European Parliament and the Council of the European Union. To be secure of potential overruling by the European Court, Treaty change would be advisable, specifically Article 45 TFEU, which could be done under simplified revision procedure.