European and External Relations Committee

EU reform and the EU referendum: implications for Scotland
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The remit of the European and External Relations Committee is to consider and report on-

a. proposals for European Union legislation;
b. the implementation of European Communities and European Union legislation;
c. any European Communities or European Union issue;
d. the development and implementation of the Scottish Administration’s links with countries and territories outside Scotland, the European Union (and its institutions) and other international organisations; and

e. co-ordination of the international activities of the Scottish Administration.
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Convener’s Foreword

On 23 June 2016 voters will face one of the biggest decisions of their lifetimes when they go to the polls to vote on whether to remain in or leave the European Union (EU).

While discussions of “Brexit” have dominated the headlines since the Prime Minister announced the date for the referendum, there has been very little discussion of the implications for Scotland of a vote to leave the EU.

I hope that this report can provide information for those going to vote in Scotland on what EU membership means for Scotland, what the process for leaving the EU would be, and what alternatives there are to EU membership.

I also hope that this report can contribute to a genuine debate in Scotland about the EU and our future within it. The reform package negotiated by the Prime Minister has changed the UK’s relationship with the EU, providing for the UK to remain a member, but in the margins of the Union. But I believe that we should not be sitting on the fringes focusing on insular debates, but instead we should be asking ourselves about the future of the EU that we belong to and discussing our visions for Europe.

The EU currently faces many, and varied challenges. There is the physical migration of hundreds of thousands of refugees coming in to Europe. There are the continuing economic problems facing many countries, and the high levels of unemployment experienced by EU citizens. There are also the geopolitical challenges that surround the EU on its borders. It seems to me that this is not a time for looking inwards and disengaging, but a time to show leadership and develop solutions. I therefore hope that the debate in Scotland can extend beyond weighing up the pros and cons of EU membership to considering what we want our future to be in Europe.

Christina McKelvie MSP
Convener
Introduction

EU reform and the EU referendum: the Committee’s inquiry

1. The Committee decided to initiate this inquiry shortly after the intention to renegotiate the terms of the UK’s membership of the European Union (EU) and then hold a referendum on the UK’s continuing membership of the EU was announced in the Queen’s speech on 27th May 2015. The inquiry has taken place over a period of seven months. Towards the end of the inquiry, “A New Settlement for the United Kingdom within the European Union”1 was agreed at the European Council meeting of 18-19 February 2016. Due to limited time before the dissolution of the Parliament, the Committee was only able to hold one evidence session on the implications for Scotland of the reforms agreed.

2. Following the European Council, on 20 February, the Prime Minister announced that the referendum on EU membership will be held on 23 June, seven weeks after the elections to the Scottish Parliament. Since the announcement of the date for the referendum, there has been considerable debate on the merits of remaining in, or leaving the EU.

3. In embarking on this inquiry, the Committee was aware that the renegotiation of the “United Kingdom’s relationship with the European Union” and “reform of the European Union for the benefit of all member states” could take a number of months.2 In addition, the legislation to enable a referendum was being considered by the UK Parliament in the autumn of 2015. The Committee therefore decided to divide the inquiry into two strands: focusing first on the implications of a referendum on membership of the EU for Scotland, before turning to the issues of reform once detail was available on the final package.

4. In June 2015, the Committee issued a call for evidence seeking views on the proposed referendum, potential areas of EU reform and on intergovernmental relations between the UK Government and the Scottish Government in the context of EU reform. The Committee received 28 written submissions over the course of the inquiry and thanks all of those who provided written evidence. In addition, the Committee held a number of evidence sessions and wishes to thank the witnesses who gave evidence to the Committee. The Committee invited the UK Minister of State for Europe to give evidence to the Committee, but he twice declined to attend.3 A list of those that did provide oral and written evidence is attached at Annexe B.

5. The Committee also had two expert advisers for this inquiry. Professor Sionaidh Douglas-Scott of Queen Mary School of Law, University of London, advised the Committee on the process by which a Member State would leave the EU, and Professor Michael Keating of the University of Aberdeen, advised the Committee on alternatives to EU membership. The Committee would like to
thank both of its advisers for the briefings that they prepared for the Committee (attached at Annexe D) and for their advice on these areas.
Executive Summary

The Committee is concluding this inquiry as it comes to the end of Session 4 of the Scottish Parliament. Over the last five years the Committee has explored the impact of EU policy in Scotland and considered the key challenges facing the EU. The Committee is convinced that there is a positive case to be made for EU membership in Scotland. EU membership has contributed to Scotland’s economic prosperity and to the rights of those living in Scotland. It has improved Scotland’s infrastructure and offered training programmes to Scottish people to improve their skills and prospects in the labour market. Scotland’s agricultural sector has benefited from major economic funding for over four decades. Scotland’s universities have flourished as international research centres and have attracted students and academics from all over the EU. Scotland’s culture has been enriched by the interaction with other EU citizens whether at home or abroad. There are many, many areas in which the EU positively influences our lives.

This inquiry has highlighted to the Committee the ways in which the benefits brought by EU membership have become integral to our society and sometimes are not even recognised as originating in EU policy. The Committee believes that the decision facing voters on 23 June will be one of the most important of their lives. However, the emerging debate has very much focused on the risks and consequences of withdrawal, rather than there being a genuine debate about the value of EU membership. There has been very little discussion to date about what the EU could achieve or the kind of EU that we want.

The debate is also taking place against a backdrop of the refugee crisis in the EU, growing foreign policy issues and continuing problems in the Eurozone. Levels of confidence in the EU are at an all-time low across the Union. The Committee is concerned that at this moment in time, the UK is holding a referendum on EU membership. If the UK votes to leave the EU, there will be a clear and decisive break with the other countries that are our neighbours and with which we have collaborated closely for over four decades. If the UK decides to remain in the EU, the Committee feels certain that the UK’s relationship with the EU will be one of increasing detachment from the EU.

The Committee believes that there is more support for EU membership in Scotland than in many other parts of the UK. If the UK Government becomes increasingly detached from the EU, the Committee believes that the Scottish Government should seek to strengthen its engagement on EU policy issues, rather than being pulled to the periphery. In addition, the Committee recognises the value of EU immigration to Scotland both economically and in reversing population decline. It therefore calls on the Scottish Government to ensure that EU immigrants are not discouraged from coming to Scotland as a result of the provisions in the reform settlement on social benefits and free movement.

The EU referendum will take place shortly after the establishment of the Session 5 Scottish Parliament. The Committee expects that many of the issues raised in this report will be considered by its successor Committee as well as by the Parliament as a whole over the course of the new Session.
Key conclusions

The EU Referendum

The Committee considers it regrettable that 16-17 year olds were not granted the vote in the EU referendum. The opportunity for this age group to vote in the Scottish independence referendum helped to promote political engagement among young people, and it would have been beneficial to continue to promote political engagement by giving young people the opportunity to vote in the EU referendum. The Committee believes that the franchise for the EU referendum should include EU citizens resident in the UK as the decision taken in the referendum has the potential to have profound implications for this group. In addition, the Committee believes that UK citizens who have been resident in other EU countries for more than fifteen years should have the right to vote as their right to continue to live abroad could be affected by the result of the referendum.

The Committee is extremely concerned about the timing of the EU referendum given the short period between the Scottish parliamentary elections and the EU referendum date. The Committee believes that the importance of both polls merits sufficient time to be allowed for a separate focus on the two issues. In addition, the Committee is concerned about the potential impact of two successive purdah periods.

The Committee is concerned that there may not be enough factual information available to the electorate in Scotland on the relative benefits of EU membership for Scotland. While the UK Government has published the documents on the UK’s status in a reformed European Union and on alternatives to EU membership required by the Referendum Act, this information is not specific to the Scottish case.

What EU membership means for Scotland’s economy and its people, and the implications for Scotland of the UK leaving the European Union

The Committee is firmly of the belief that access to the single market is not just beneficial, but is crucial to the Scottish economy. Not only does Scotland export primarily with its nearest neighbours, but Scotland’s access to the single market attracts inward investment to Scotland. However, this has to be balanced against the regulations that Scottish businesses need to comply with in order to access the single market.

The Committee believes that freedom of movement has been culturally enriching. It has allowed Scots to study, work and live abroad, and it has brought EU citizens to Scotland to study, work and live. Moreover, freedom of movement has helped reverse the decline in Scotland’s population and respond to labour shortages in the Scottish economy.

The evidence collected by the Committee on EU funding testifies to its importance in a number of sectors in Scotland. Historically, EU funding has supported significant infrastructure projects in Scotland. Although Scotland now receives less EU funding than in the past, it still plays an important role in a number of sectors, ranging from farming to skills programmes for young people. The Committee was particularly
struck by the success of Scotland’s universities in accessing funding for research and the innovative and collaborative research projects that have benefited from this funding.

The Committee is concerned by the lack of clarity on how the sectors that currently benefit from EU funding would be funded in the event that the UK left the EU. There are very important questions relating to whether the UK Government would increase the Scottish Government’s block grant to match the funding previously received from the EU, and how the Scottish Government would allocate this funding.

The Committee believes that the benefits from “social Europe”, and the citizens’ rights that emanate from the EU, have had an important and positive effect on the lives of people in Scotland. Many people may not be aware that these rights result from membership of the EU, but they have significantly changed our lives for the better over the last decades. Over the course of this parliamentary session, the Committee has often felt that there are weaknesses in the way in which the EU communicates its policies and initiatives, and this is evident in the lack of awareness among people in Scotland of the impact that the EU has had on their lives.

The Committee believes that the ability to address challenges which do not respect borders, such as the environment or climate change, benefit from European coordination. The EU has introduced environmental standards and targets which have improved the quality of the natural environment in Scotland and the rest of the EU which demonstrates the value of cooperation.

**Leaving the EU: what would it mean for Scotland?**

Should voters in the UK support leaving the EU in the referendum in June, it is clear to the Committee that what would ensue would be a long and uncertain legal process characterised by complex and contested negotiations. There is no simple means for the UK to leave the EU, but rather a series of treaties and a raft of bilateral treaties that would need to be negotiated and agreed in order that the UK can trade on similar terms to those it currently enjoys with third countries.

While the UK has benefited from the goodwill of other Member States in the negotiations for EU reform, it was suggested to the Committee in strong terms that a decision to leave would fundamentally alter that relationship. The UK leaving would represent an unwelcome precedent and the negotiations for the UK to leave would be time-consuming for all Member States at a time when the EU faces many other challenges.

The Committee was struck by the scale of the domestic process of dealing with EU law that would result from a departure from the EU. Not only would it be an enormous exercise to “de-EU” UK law if that was the desired objective, but the repeal of the European Communities Act 1972 would leave a legal vacuum where EU legislation no longer applied. In the Committee’s view, this would result in legal uncertainty on a massive scale, with significant repercussions for businesses and consumers, as well as citizens, in relation to their rights.
For pragmatic and practical reasons, notably if the UK wished to have continued access to the single market, the UK might find that it had to retain EU law and voluntarily adopt it in the future. There could also be areas where it would be simply easier to continue with existing legislation, for example in relation to discrimination, rather than introducing a new regime. A close consideration shows that while the UK might choose to leave the EU, it is likely that the effects of EU law would continue to govern and shape our lives for many years to come.

The Committee also recognised the impact that this could have on the UK and devolved legislatures and the potential for it to detract from other scrutiny and inquiry work due to the time required to deal with the repealing, amending or replacing of EU law.

The Committee believes that the scale of negotiating bilateral agreements to replace the treaties that the UK is currently party to as a member of the EU would be significant, and there is a clear question about the extent to which this could be carried out at the same time as negotiating withdrawal from the EU. Without a smooth transition to new arrangements, UK exporters might face challenges in maintaining their market share in the face of cheaper competitors. Furthermore, there is no guarantee that the UK would be able to negotiate agreements which had as favourable tariffs and barriers as the ones that it currently benefits from as part of the EU. In addition, the UK would need to renegotiate membership of a number of international organisations.

The Committee considers that a decision to leave the EU would raise a huge issue for British citizens who live in other parts of the EU, and EU citizens living in the UK. If the UK did vote to leave the EU, it believes that there would be a need to resolve this issue in any withdrawal agreement in order to provide certainty for those groups of people. While there was strong evidence to suggest that British citizens have acquired rights, there were also questions about how these would be protected after the UK had left the EU.

The Committee heard that the process of the UK leaving the EU would raise the question of whether devolution legislation, notably in the form of the Scotland Act 1998, would need to be amended to take account of the UK’s departure from the EU. It also heard that a modification of the powers of the Scottish Parliament would require its legislative consent. The question of whether the legislative consent of the Scottish Parliament would be sought, and whether that consent would be given is a political one and could have significant constitutional implications.

In the event of the UK leaving the EU, and the repeal of the European Communities Act 1972, the Committee notes that the Scottish Parliament’s legislative competence, and the Scottish Government’s executive and policy competence, will be extended as they will be able to legislate in fields where the EU had previously had competence.

The Committee notes that a number of key organisations in Scotland felt unable to identify what the implications of leaving the EU would be due to the lack of clarity on what the alternative would be to EU membership. It also recognises that some organisations are in the process of reaching a position on EU membership. However,
the evidence that the Committee heard did demonstrate concern with the implications of leaving the EU for a range of sectors across Scotland.

**Alternatives to EU membership**

The Committee considers that any alternative to EU membership that would involve the UK “going it alone” would be deleterious to the UK’s economy and its place in the world. The Committee believes that the geographical proximity of the EU and the importance of the single market to the UK economy is such that an alternative in the form of operating under World Trade Organization rules or with a free trade agreement with the EU would not provide sufficient access to the single market. The Committee is strongly of the view that access to the single market and the ability to trade with other countries under the terms of the EU’s trade agreements are crucial to the Scottish economy, as well as that of the rest of the UK. The Committee therefore explored the two alternatives for a closer relationship with the EU by examining Norway and Switzerland’s relationship with the EU in more detail.

The Committee considers that both Norway and Switzerland, for different reasons, have developed a relationship with the EU that is the result of a series of compromises over a period of time. Both countries have recognised the economic importance of access to the single market and have accepted complex arrangements that allow them to access that market without being full members of the EU. The Committee does not believe that either of these solutions, if they were available to the UK, would represent a viable or desirable alternative to the status quo of EU membership.

The Committee believes that the Norwegian and Swiss options do not provide sufficient opportunity for shaping or influencing EU decisions. Instead, Norway and Switzerland have an obligation to accept EU legislation as the quid pro quo for being able to access the single market. The Committee considers that the opportunities provided by EU membership to influence the development of EU policy, and vote on EU legislation should not be abandoned in favour of a situation whereby no influence or power can be exercised to represent the interests of the UK in the EU.

The evidence heard by the Committee testified to the high levels of immigration experienced by Norway, but more particularly by Switzerland, which showed that the UK is in no ways unique in its experience of immigration. However, the Committee noted the comments of both the Norwegian and Swiss witnesses in relation to how important immigrants had been in key sectors of their economies. The evidence on the Swiss request to renegotiate its bilateral agreement on the freedom of movement demonstrated how central this pillar of EU policy is, and that access to the single market also requires acceptance of freedom of movement.

It is clear that Norway and Switzerland both make substantial contributions to the EU budget in return for access to the single market, even if they are not legally obliged to, and it is channelled as contributions to economic and social cohesion and key EU programmes. In particular, the Norwegian per capita contribution, of about €75 places Norway among the higher per capita contributors to the EU. Given that the UK has been successful in negotiating successive “rebates” in the form of abatements from the EU budget, and that its current per capita net contribution is around €110, it
is questionable whether the UK would contribute significantly less to the EU budget if it left the EU and instead secured a relationship with the EU that allowed it to access the EU single market.

The Committee concludes that neither the Norwegian nor the Swiss option would resolve the problems that are currently identified as resulting from EU membership. The same issues – sovereignty, freedom of movement and the financial contribution to the EU budget – would remain if the UK sought a relationship with the EU that allowed it access to the single market. Furthermore, the UK would lose the ability to influence EU policy-making and be involved in EU decision-making. Thus, the Committee cannot see how leaving the EU, but retaining a relationship that would allow access to the single market, could increase the UK’s power or influence. Instead, it would banish the UK to the fringes, where it would be obliged to accept continual compromises as the price for access to the single market.

**EU reform**

The Committee heard evidence suggesting that the reforms contained in the settlement agreed at the European Council would be limited in impact. The Committee’s greater concern, however, is that the UK becomes increasingly disengaged from the EU. The Committee believes that a more positive course of action would be to engage actively within the EU, with a view to influencing EU policies and decisions.

The evidence heard by the Committee on the reform package suggested that it was very limited in scope and effect, and questioned the practical impact of the settlement.

The economic governance provisions were perceived to be “problematic” by witnesses as although they gave non-Euro countries a voice, they would not have a vote in the Eurogroup.

The competitiveness provisions were regarded as adding little to the better regulation agenda already being pursued by the European Commission.

The provisions on “ever closer union” were perceived as symbolic and it was concluded that the “red-card” provision was unlikely to be used in practice.

The actual impact of the social benefits and free movement provisions was questioned, particularly in the context of the forthcoming living wage.

Doubts were also raised as to whether these provisions would be deemed acceptable by the Court of Justice of the European Union on empirical grounds. The Committee therefore considers that the settlement may make little difference on a practical level.

However, the Committee notes that the four sets of proposals respond to the key challenges set out by the Prime Minister.

**Intergovernmental relations**

It is clear to the Committee that there was virtually no formal consultation of the devolved administrations by the UK on the reform negotiations. The Committee
considering that this is a regrettable approach to intergovernmental cooperation on an issue of such importance to Scotland, Wales and Northern Ireland. The Committee therefore calls for improvements, as recommended by Lord Smith, in the structures and practices for cooperating on EU issues to ensure that there is genuine consultation in the future. It also calls for increased opportunities for Scotland to participate in relevant Council meetings.

The Committee hopes that there will be greater intergovernmental cooperation on the domestic legislation that will be required to underpin the new settlement, and calls on the Scottish Government to take an active role in ensuring that greater engagement takes place.
EU Referendum and Reform - the implications for Scotland

EU referendum: implications for Scotland

Background

6. In considering the implications of the proposed EU referendum on Scotland, the Committee agreed to focus on three key issues—

- What the implications for Scotland are of the EU Referendum Act in relation to the timing of the referendum, the franchise for the referendum and the question to be put to the electorate.

- What EU membership means for Scotland’s economy and its people, and what the implications for Scotland are of the UK leaving the EU.

- What the process would be for leaving the EU, including: the legal process with the EU and within the UK; withdrawal from the single market and EU trade agreements; the ending of free movement of persons; and transition arrangements.

7. The European Union Referendum Bill was introduced to the House of Commons on 28 May, the day after the Queen’s speech. Following its passage through the House of Commons and House of Lords, it received Royal Assent on 17 December 2015.

8. The Bill initially provided for the question for the referendum to be “Do you think that the United Kingdom should be a member of the European Union?” However, following the advice of the Electoral Commission this was changed to “Should the United Kingdom remain a member of the European Union or leave the European Union?”

9. The European Union Referendum Act (“the Act”) makes provision in relation to those who are entitled to vote in the referendum, the timing of the referendum, the conduct of the referendum, a duty on the UK Government to publish information on the outcome of negotiations between Member States and a duty to publish information about membership of the European Union.

10. The Act requires the referendum to take place by the end of 2017 and for the Secretary of State to indicate the date of the referendum by 31 December 2016. Following the agreement at the European Council on 18-19 February, the Prime Minister announced that the referendum would be held on 23 June 2015.

The EU Referendum Act

The referendum question

11. As noted above, following the report of the Electoral Commission in September 2015, which assessed the proposed referendum question to ensure that it was not biased, the initial question which was included in the Bill was changed to
“Should the United Kingdom remain a member of the European Union or leave the European Union”. In her briefing for the Committee, Professor Douglas-Scott highlighted the move away from a “Yes-No” question. She pointed out that the new question—

... contrasts with the Scottish referendum question – ‘Should Scotland be an independent country?’ which required a simple Yes/No answer. It also contrasts with the question asked in the UK’s 1975 Referendum on EEC membership which asked, ‘Do you think that the United Kingdom should stay in the European Community (Common Market)?’ The EU Referendum Bill is also a departure from established practice - of 264 referendums in democratic states since 1990, only six have not employed a ‘Yes/No’ question.8

Entitlement to vote in the referendum

12. The Act provides for those who would be entitled to vote in a UK general election, that is British, Irish and Commonwealth citizens over the age of 18 who are resident in the UK, and British nationals resident overseas for less than 15 years, provided that they appear on the register of Parliamentary electors. In addition, there is an entitlement for Commonwealth and Irish citizens resident in Gibraltar who would be entitled to vote in a European Parliament election to vote.

13. In his evidence to the Committee, Aidan O’Neill QC identified those that were not able to vote in the referendum—

- EU citizens, no matter how long they have been resident in the UK, from Member States other than Ireland, Malta, or Cyprus.
- British citizens who have resided outside the UK for more than 15 years, whether or not in exercise of their EU free movement rights.9

14. A key discussion relating to the franchise was the suggestion that it should be extended to allow 16 and 17 year olds to vote, as had happened in the independence referendum in Scotland. At the UK level, support for this proposal was mixed. In Scotland, there was wider support for this proposal, which was articulated by the European Movement in Scotland in written evidence—

As in the Scottish Independence Referendum, giving 16 and 17 year olds the vote would help re-engage this generation in the political process. ... Young people travel more and are more likely to migrate to other EU countries for education, career and life opportunities. Given its long term implications for the entire lives of 16 & 17 years olds, it is surely reasonable for them to participate in this decision.10

15. During the EU Referendum Bill's passage through the House of Lords, an amendment to extend the franchise to 16 and 17 year olds was passed, but was rejected by the House of Commons. The House of Lords did not further
insist on the change thus the right to vote in the referendum is available only to those aged 18 or over.

16. There is no single source of comparable data on the number of UK migrants living in EU Member States, and EU migrants living in the UK. However, the available data indicates that 1.2 million British migrants live in other EU Member States, compared with around 3.0 million EU migrants living in the UK.¹¹

17. Currently, British citizens living abroad can only vote in UK elections if they have been living abroad for less than 15 years. It is estimated that approximately one million people may be in this group. While proposed UK legislation will abolish this rule (Votes for Life Bill), it will not do so in time to take effect before the EU referendum. An amendment was also proposed to the EU Referendum Bill to allow for this group to vote in the referendum, but it was not passed and therefore not incorporated into the Bill.

18. EU citizens resident in the UK are eligible to vote in local government, devolved legislature and European Parliament elections. They were also included in the franchise for the 2014 referendum on Scottish independence. The European Movement in Scotland estimated that 90,000 EU citizens in Scotland would “be excluded from casting a vote on the future direction of the country in which they live and work.”¹² It further highlighted the inconsistencies in the franchise, suggesting that it was unfair to a “constituency which stands to be disproportionately affected” which pays “their taxes here and contributes more to the UK economy than they take out” to be excluded.¹³

19. In evidence to the Committee, Dr Tobias Lock brought up the question of whether the lack of equal treatment between citizens of some EU Countries, who have the right to vote if resident in the UK (Cyprus, Ireland and Malta) compared to other EU citizens resident in the UK might infringe EU non-discrimination law—

> One interesting question is whether the unequal treatment between different types of EU nationals would be a violation of the principle of non-discrimination under the EU treaties. Those people have all moved here, exercising their free movement rights, which is no problem. I would argue that the determination of who can vote goes to the heart of the sovereignty of a country. There is probably no problem with excluding foreigners from the franchise as such, but randomly—or seemingly randomly—picking a few who can and others who cannot might be a bit dodgy in terms of proportionality. Why should Cypriots, Maltese and Irish be allowed to vote when French are not? There is no clear, substantive reason for it.¹⁴

20. The possibility of a legal challenge to the franchise on the basis that it infringed EU non-discrimination law was raised by Aidan O’Neill QC in written evidence. Professor Sir David Edward expressed reservations about the extent to which the Court of Justice of the European Union might be prepared to support a
potential argument on discrimination, pointing out that the right for Irish citizens to vote was a legacy of the UK’s historic relationship with Ireland and that Cypriot and Maltese citizens could vote as a result of a continuation of the Commonwealth right to vote. Professor Sir David Edward observed—

I am not sure that the Court of Justice would be prepared to say that, because a country gives the right to vote to those people for long-standing historical reasons, that constitutes discrimination against the rest. My hunch is that that argument would not succeed. I think that the Court of Justice would be very reluctant to get involved in the details of national electoral law in that way, because many member states have special provisions in their electoral law as a result of history.

The Committee considers it regrettable that 16-17 year olds were not granted the vote in the EU referendum. The opportunity for this age group to vote in the Scottish independence referendum helped to promote political engagement among young people, and it would have been beneficial to continue to promote political engagement by giving young people the opportunity to vote in the EU referendum.

The Committee believes that the franchise for the EU referendum should include EU citizens resident in the UK as the decision taken in the referendum has the potential to have profound implications for this group. In addition, the Committee believes that UK citizens who have been resident in other EU countries for more than fifteen years should have the right to vote as their right to continue to live abroad could be affected by the result of the referendum.

Timing of the referendum and duties to publish information

21. The Act requires for the referendum to be held before the end of 2017, but it is clearly being held well before that date on 23 June 2016. Schedule 1 of the Act relates to campaigning and financial controls. The Committee questioned witnesses about the potential impact of the Scottish Parliament election and the EU referendum being held so close together.

22. Professor John Curtice of the University of Strathclyde referred to the referendum being held not long after elections to the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly, the London Assembly, as well as local elections in England and the election of the London mayor—

Of course, much more broadly, we are now witnessing the quite extraordinary sight of a party leader choosing to hold a referendum on a major divisive
issue just when we are about to hold the biggest set of mid-term elections
during the course of this Parliament, leaving aside the European elections.¹⁶

23. The Scottish Government Minister for Europe and International Development
(the Minister) referred specifically to the impact that the date of the referendum
might have on the Scottish Parliament elections—

Either the issues that we wish to discuss during the Scottish election—
important issues that affect people’s everyday lives, some of which I have
mentioned already, such as crime, education and health—will be subsumed,
diluted or overshadowed by the EU referendum, such that, every time that
people in Scotland turn on the news or the debates, they find that they are all
dominated by the EU. There will probably be debates between the leave
campaign and the remain campaign, so the question is whether they will
dominate or overshadow any debates that take place between the leaders of
the Scottish political parties.¹⁷

24. The Minister stated that the date for the EU referendum meant that there would
be “clear interference with our elections”, arguing that the “the political agenda
will be completely and utterly dominated by the EU issue, which could mean
that focus will be taken away from other issues” in Scotland.¹⁸ He further
stated—

Members will not be surprised to hear me say that I am disappointed that the
Prime Minister and the UK Government have chosen to hold the referendum
so soon after the Scottish elections and the elections in Wales and Northern
Ireland. It will cut across the election campaigns for devolved Parliaments,
and I do not believe that we have sufficient time or space to make the positive
case for membership.¹⁹

25. In addition, the Minister referred the Committee to a “letter signed by the First
Ministers of Scotland, Wales and Northern Ireland and the Deputy First Minister
of Northern Ireland [which] said that a June referendum would be unwelcome
for a number of reasons”.²⁰

26. “Purdah” is the term used to describe the period in the run-up to an election or a
referendum when there are restrictions on the publication of promotional
material by central and local government. The restrictions in relation to
referendums are set out in Section 125 of the Political Parties, Elections and
Referendums Act 2000 Act and will apply to the European Union Referendum
Act. However, UK Ministers have the opportunity to modify Section 125 by
allowing the publication of some materials during the 28 day relevant period.

27. The application of the relevant period for the European Union referendum for
Scottish Ministers is also 28 days. This has been confirmed by the Scottish
Government in its guidance for the Scottish Government, its agencies and
national devolved public bodies in relation to the Scottish Parliamentary elections to be held in May 2016.\textsuperscript{21}

28. This means that the purdah period for the Scottish Government would start on 27 May 2016. In 2011, following the Scottish parliamentary elections on 5 May, the First Minister was selected by the Scottish Parliament on 18 May and the motions to appoint Scottish Ministers, Scottish Junior Ministers and Scottish Law Officers were not considered and agreed by Parliament until the 25 May 2011. In effect, this means that the purdah period for the EU referendum could begin very shortly after the new Scottish Government is appointed in May 2016.

29. In response to questions from the Committee on the impact of the purdah period on the Scottish Government, the Minister explained that the cumulative impact of the Scottish Parliament elections and the EU referendum would result in “10-plus weeks of purdah, which is not helpful and could slow the Government down, which is not what any of us would want”.\textsuperscript{22} The Minister further elaborated on the impact that it would have on Scottish Ministers—

Purdah would not stop the Government from appointing ministers. However, ministers would be restricted from making pronouncements about the European referendum that were not already in the public domain. Purdah in the Scottish Parliament works in the same way. Scottish Government ministers are still Scottish Government ministers, even during purdah. You cease to be an MSP in the Scottish election but you do not cease to be a minister, and therefore you could, as a minister, reiterate those lines that are already in the public domain. What you cannot do is to create new policy and or make new announcements. Anything that is not in the public domain, we would not be able to say in the purdah period.\textsuperscript{23}

30. There are also two duties under the Act to publish information: one on the outcome of negotiations between the Member States, and the other on membership of the EU, including information about rights and obligations that arise under EU law as a result of the UK’s membership of the EU. The Act also requires the Secretary of State to include examples of arrangements that other countries have with the EU where they are not EU members. Following the announcement of the date for the EU referendum, the UK Government responded to these duties with the publication of “The best of both worlds: the United Kingdom’s special status in a reformed European Union”\textsuperscript{24} and “Alternatives to membership: possible models for the United Kingdom outside the European Union”\textsuperscript{25}

The Committee is extremely concerned about the timing of the EU referendum given the short period between the Scottish parliamentary elections and the EU referendum date. The Committee believes that the importance of both polls merits sufficient time to be allowed for a
separate focus on the two issues. In addition, the Committee is concerned about the potential impact of two successive purdah periods.

The Committee is concerned that there may not be enough factual information available to the electorate in Scotland on the relative benefits of EU membership for Scotland. While the UK Government has published the documents on the UK’s status in a reformed European Union and on alternatives to EU membership required by the Act, this information is not specific to the Scottish case.

What EU membership means for Scotland's economy and its people, and the implications for Scotland of the UK leaving the European Union

Scotland and the EU

31. As a constituent part of the United Kingdom, Scotland has been a part of the EU since 1973 when the United Kingdom joined the then European Economic Community. Since then, for over four decades, European Communities Law and then EU law has been applicable within Scotland.

32. The Lisbon Treaty clarified the division of competences between the EU and Member States, distinguishing between three main types of competence: exclusive competences, shared competences and supporting competences. Competence refers to the power of the EU institutions to legislate, to adopt non-legislative acts, or to take any other sort of action. The EU has exclusive competence (meaning that the Member States cannot exercise competence) in the following areas—

- Customs union
- Competition rules for the functioning of the internal market
- Monetary policy, for the member states which have adopted the euro
- Conservation of marine biological resources under the common fisheries policy
- Common commercial policy

33. The main areas where the EU has shared competence (meaning that the Union exercising its competence does not prevent Member States from exercising competence) are the following—

- internal market;
- social policy, for the aspects defined in this Treaty;
- economic, social and territorial cohesion;
- agriculture and fisheries, excluding the conservation of marine biological resources;
- environment;
- consumer protection;
- transport;
• trans-European networks;
• energy;
• area of freedom, security and justice;
• common safety concerns in public health matters.

34. The areas where the EU has supporting competence (meaning that it can support, coordinate or supplement Member State competences) are—

• protection and improvement of human health;
• industry;
• culture;
• tourism;
• education,
• youth, sport and vocational training;
• civil protection;
• administrative cooperation

35. In July 2012, the then UK Foreign Secretary launched a review of the EU’s competences in order to “audit what the EU does and how it affects the UK”. The objective was to have “a clear sense of how our national interests interact with the EU’s roles, particularly at a time of great change for the EU.” The balance of competences review was conducted over the course of four semesters between autumn 2012 and 2014, with individual UK government departments leading on key areas and producing reports on those areas.26 The Scottish Government contributed to this review, and has published its own “Agenda for EU reform.”27 Professor Drew Scott commented on the findings of the Balance of Competences review and the Scottish Government’s position on EU membership, arguing that—

It would not be misleading to suggest that the position of the Scottish Government – namely that EU membership substantially benefits the economy and society – reflects both the evidence produced by the UK Government’s extensive study into the costs and benefits of EU membership (Balance of Competences review) and the academic evidence over many years. Indeed the Balance of Competences review concluded that almost without exception EU membership has (net) benefitted the UK economy – a conclusion reinforced by the Scottish Government submissions to that exercise. Therefore whatever the case might be for renegotiating the UK terms of EU membership, it does not appear to be evidence based.28

36. The Committee invited written evidence on what EU membership means for Scotland’s economy and its people, and held a roundtable evidence session with stakeholders from key sectors. The Scottish Parliament’s Information Centre (SPICe) also prepared a comprehensive briefing for the Committee on the “The impact of EU membership in Scotland” (the SPICe briefing).29

Key points raised in evidence about the impact of EU membership on Scotland
37. The evidence gathered by the Committee broadly demonstrated the value of EU membership to Scotland in a number of areas: access to European markets, freedom of movement and skills shortage, trade agreements and Foreign Direct Investment (FDI).

**Economic Benefits**

38. The value of the single market to Scotland was the key issue to emerge in the evidence heard and received by the Committee. The single market allows for the free movement of goods, services, capital and labour within the EU without barriers or tariffs. For Scottish businesses, this means access to what is effectively a domestic market of over 500 million consumers. In addition, trade policy between the EU and external countries is a responsibility of the EU. Over 50 Preferential Trade Agreements have been agreed between the EU and third countries and other agreements are being negotiated such as those with Canada, the United States of America and Japan. These agreements allow Scottish companies to trade with these countries under advantageous terms.

39. The importance of the EU single market to Scotland is demonstrated in the statistics showing the EU is the main destination for Scotland’s international exports, “accounting for around 42% of Scotland’s international exports in 2014, with an estimated value of around £11.6 billion”.

40. The latest Scottish Export Statistics for 2014 show that of Scotland’s top ten international export destinations, six are EU Member States (Netherlands, France, Germany, Ireland, Spain and Denmark). In terms of jobs, the Financial Scrutiny Unit in SPICe has calculated that around 150,000 jobs were sustained directly in Scotland from exports to the EU in 2013.

41. Membership of the single market also means EU businesses can invest across borders thereby creating opportunities for FDI. According to SPICe, there are nearly 4,600 business sites in Scotland owned by non-UK European owned companies. These companies had turnover (sales) of £42.1 billion adding £15.8 billion in Gross Value Added (GVA) to the Scottish economy in 2013. Scotland has the highest share of its business economy accounted for by European companies of any UK country or region. Nearly one in every six pounds in the Scottish business economy is generated by companies based in the rest of the EU.

42. The European Movement in Scotland summed up the key benefits of the single market to Scotland—

> As a member of the Single Market our companies can sell to any other EU country, without paying import or export tariffs or having to obtain regulatory approval, and can invest wherever they wish within its borders. The ability for time-critical transport to be only minimally obstructed by border formalities is vitally important in the delivery of Scottish fresh agricultural, fishing and other perishable products to markets around Europe.
43. Andrew McCornick of the National Farmers Union in Scotland (NFUS) emphasised the importance of the single market to the agricultural sector in Scotland, stating that, “We depend on our export markets. We have a common agricultural policy market and we need a common policy to get our products from Scotland tariff free across the whole of Europe.” The NFUS summed up the significance of the single market to the sector—

Scottish agriculture, forestry and fishing exports to the EU amounted to £125 million in 2013; and exports to non-EU countries had a value of £135 million. Approximately 73 per cent of the UK’s total agri-food exports were destined for other European member states in 2014, and UK agri-food exports totalled €122 billion in 2014. Access to the European single market removes bureaucracy from Scottish and UK traders by establishing common rules and standards and removing burdensome tariffs and border controls. The interest of the European market in the Scottish food and drink offering is therefore clear.

44. Similarly, Derek Elder of the Institution of Engineering and Technology (IET) described how “the single market is vital to what Scottish engineering companies do”. IET recognised that, “While the pace of development in each of these areas is uneven and the institutional development of the EU can be criticised, it is however the case that the engineering and technology industries of Scotland are export oriented and benefit from easy access to this large market.” In particular, IET referred to the value of EU freedom of movement provisions as they allowed engineering and manufacturing firms to respond to skills shortages by sourcing skilled labour from within the EU. For example, in the oil and gas industry, in 2012, 14.4% of those employed were European Economic Area nationals.

45. Whisky is one of Scotland’s key international exports. The Scotch Whisky Association (SWA) identified the “EU’s single market, including its regulation of food and drink, and its single trade policy” as “central to Scotch Whisky’s success”. It also argued that “The EU’s weight and expertise in international trade helps Scotch Whisky secure fair access to overseas markets” and that the “UK’s continued influence in Brussels can shape the rules in a way that supports Scotch Whisky industry jobs and growth.”

46. The case study below draws on the written evidence submitted by the SWA to demonstrate how being part of the EU has helped to support the whisky industry in Scotland, its exports to the EU and its access to new markets.

**Scotch whisky and the EU – a case study**

“Scotch Whisky is Scotland’s leading single product export. Annual shipments to EU markets in 2014 were £1.24bn or 31% of the value of the industry’s global exports (the EU also represents around 37% of Scotch Whisky’s global volumes). France (2nd), Spain (5th), and Germany (6th) all feature in the industry’s top ten global export markets.”
“The SWA attaches a high priority to securing an appropriate regulatory environment within the EU’s single market, as well as EU accession countries. The single market is much simpler than the alternative in which 28 different regulatory regimes would operate. It is therefore important that the UK Government retains influence on evolving single market legislation. Current examples of relevant debates in Brussels include EU rules on the labelling of alcoholic drinks, bottle sizes, excise duty structures, non-preferential rules of origin, and the protection of geographical indications (GIs).

“It is also helpful to have the Scotch Whisky GI protected at EU level, enforced across the single market, and incorporated into EU trade deals.

“EU Free Trade Agreement (FTA) negotiations with individual countries or trading blocs are of key importance. Scotch Whisky exports benefit from trade liberalisation, with such negotiations offering the main opportunity to remove long-standing trade barriers.

“Market access is prioritised because exports are negatively impacted by tariff and non-tariff barriers to trade. Issues include tariffs and discriminatory taxes, as well as restrictive certification, labelling and licensing rules. Such measures distort competition between domestic and imported products. Inadequate intellectual property protection can also undermine potential growth.

“At present, the industry is particularly engaged on EU FTA talks with countries such as India, Malaysia, and the United States. Recent agreements with the likes of Canada, Colombia, and Viet Nam include important benefits for the whisky industry.

“As a result, it is important that, within the EU, the UK continues to exert its influence on FTA discussions and market access work more generally. This has resulted in numerous trade barriers being removed, supporting the competitiveness of the sector. Effective influence in the EU Trade Policy Committee and the Market Access Advisory Committee is also critical, helping to address market access problems confronting Scotch Whisky.

“The industry is active in the context of the World Trade Organisation, seeking trade liberalisation through multilateral negotiations, as well as using its mechanisms to challenge obstacles to exports. In such instances, there is significant advantage to the EU acting on behalf of the sector, lending its weight to advance industry issues.

“Withdrawal from the EU would create uncertainty and is a significant business risk, impacting the industry’s ability to secure the best possible access to its largest combined market, as well as to markets outside the EU.”

47. Protection for Scotland’s high quality food and drink products through the use of geographical indicators (GIs) across the single market was also identified as a positive benefit of EU membership by the NFUS—

Finally, the EU’s ‘geographic indicators’ (GIs) that identify the origin of products, such as Scotch whisky, Scotch beef, and Scotch lamb offer
valuable protection that gives prominence to Scottish product, enforces higher standards and is enforced across the EU single market. NFUS argues that it is in the interests of Scottish food producers to ensure GIs receive the necessary levels of protection in the European debate.41

48. While the single market was widely seen as beneficial for Scottish exports, there was a recognition that it did also involve regulation that could be onerous. Owen Kelly of Scottish Financial Enterprise (SFE) referred to regulation as “number 1 on our list of areas for reform.”42 He also suggested that more impetus could be put into developing the single market for financial services in the EU—

The investment products that are created and sold in Scotland can be distributed throughout the EU—to pension funds in Spain and so on—but that is not the case in relation to lots of other things, such as insurance policies. The predominant reason for that is member state tax frameworks. More can be done on the single market.43

49. However, IET provided an example of how the single market had reduced regulation in relation to trademarks and intellectual property. It explained that “the use of the Community trade mark and the registration of industrial designs which have reduced the burdens on business and protected intellectual property rights, as EU companies can register a trade mark or an industrial design in the knowledge that it will be recognised in all 28 member states.”44

The Committee is firmly of the belief that access to the single market is not just beneficial, but is crucial to the Scottish economy. Not only does Scotland export primarily with its nearest neighbours, but Scotland’s access to the single market attracts inward investment to Scotland. However, this has to be balanced against the regulations that Scottish businesses need to comply with in order to access the single market.

Freedom of Movement

50. Freedom of movement provides for Scots to go and live, work or study in other EU Member States and for EU citizens from other Member States to come to Scotland to live, work or study. It is currently estimated that 173,000 people in Scotland have the nationality of another EU Member State, and 181,000 people living in Scotland were born in another EU Member State.

51. The NFUS highlighted the importance of migrant labour for the seasonal requirements of the agricultural sector, and warned of the impact that restrictions on mobility might have on this sector—
With the UK’s resident workforce displaying a preference for permanent employment, the agricultural industry relies heavily on non-UK born seasonal workers who will come to the UK for a specified period of time to work as, for example, pickers in the fruit and vegetable industries. The food and drink manufacturing industry also depends upon migrant labour. Imposed restrictions on the movement of labour in and out of the UK outside of the EU could therefore have significant consequences for the agricultural industry.  

52. The European Movement in Scotland detailed the consequences of the provisions of the freedom of movement—

We can also travel, study, live, shop, do business, work and retire in any EU country. Those coming here from other EU countries make a positive contribution to our economy and society, and are particularly important to the competitiveness of our agricultural, tourism and academic businesses.

53. Freedom of movement has also helped address Scotland’s demographic challenges. The SPICe briefing provided information on the composition of EU migrants coming to Scotland based on figures provided by the National Records of Scotland (NRS). The NRS 2014 mid-year population estimates indicate that Scotland’s working age population has been supplemented by migration as a result of migrants tending to be younger than the general population. According to the NRS, “Of in-migrants to Scotland, 48 per cent from the rest of the UK and 68 per cent from overseas were aged 16-34 years, compared to 25 per cent in the resident population.”

54. This pattern is mirrored amongst Scotland’s non-UK EU population, according to the 2011 Census. The Census data shows that the non-UK EU born population in Scotland is younger than the total Scottish population. 84 per cent of the non-UK EU born population in Scotland is between the ages of 16 and 64, compared to 66 per cent of the total population. In addition, the majority of the non-UK EU born population (54 per cent) falls into the 16-34 age group, compared to a quarter of the total population. The benefits of inward migration for Scotland were outlined by the Minister—

It is critical to our success, our population growth and our economic productivity for the future that we are able to attract migration to Scotland. EU citizens have greatly contributed to our country and our society. Studies by University College London and many other studies have shown that the economic contribution of EU citizens has been substantial.

55. The 2011 Census also indicates that non-UK EU born citizens in Scotland have a higher employment rate than the overall figure for Scotland. This can in part be explained by the greater proportion of working age people amongst the non-UK EU population in Scotland than the UK born population in Scotland.
56. Freedom of movement has also allowed students based at Scottish universities to study abroad and the EU organised Erasmus Programme provides a route for students who wish to study part of their course in another EU or European Economic Area (EEA) country. In addition, academic staff from other EU countries are free to teach at Scottish universities. Universities Scotland explained the way in which universities encouraged their students to study abroad in the EU, and the value of staff mobility across the EU—

… we benefit from being able to help our students to be mobile through the EU and through the Erasmus programme. I think that we now have well over 2,000 students a year taking advantage of that to study across Europe. That mobility is also hugely important on the staff side. About 14 per cent of university academic staff are from the EU, and a lot are from countries outside the EU. The mobility of talent is hugely important. 49

57. Universities Scotland also estimated the “off campus” expenditure of the 24,000 EU students studying at all levels in Scotland to be £156 million a year. In addition, EU students contribute £17 million a year in fees at postgraduate level study in Scotland, and many stay in Scotland and contribute to the Scottish economy.

The Committee believes that freedom of movement has been culturally enriching. It has allowed Scots to study, work and live abroad, and it has brought EU citizens to Scotland to study, work and live. Moreover, freedom of movement has helped reverse the decline in Scotland’s population and respond to labour shortages in the Scottish economy.

EU Structural and Investment funding and Horizon 2020

58. The SPICe briefing provides detailed figures on the EU funding that Scotland has benefited from as a result of the UK’s membership of the EU, notably in relation to funding from the agricultural, fisheries, regional development and social fund, as well as the Horizon 2020 research funding.

59. A large proportion of the EU budget is allocated to Common Agricultural Policy (CAP) funding (including the European Agricultural Fund for Rural Development in the 2014-2020 funding programme), and the NFUS indicated that “a very significant part of the Scottish farmer’s income is the money coming out of Europe. We need that money to keep the job supported”. 50 The NFUS written submission emphasised that—

Farmers would prefer to farm without the financial support they receive from the EU but the reality is that most farms don’t make enough from the market for this to be possible. However, the NFUS also had significant reservations about the reform of the CAP and described the current spending round as
“technocratic, driving support away from the areas that need it most in Scotland and burdening farmers with regulation.”

60. The case study below draws on the written evidence submitted by the NFUS to show how EU funding impacts on the agricultural sector in Scotland—

**Case study – CAP funding in Scotland**

“The CAP accounts for a substantial proportion of the total annual EU budget; in excess of €58 billion or just under 39 per cent. Whilst it was originally introduced to control markets for agricultural products, the new, ‘decoupled’ system that has been adopted over the last decade instead seeks to deliver support to allow farm businesses to remain productive (via Pillar 1 funds), whilst also delivering on environmental outcomes (Pillar 1 greening and Pillar 2 rural development funds).

“Total Scottish farm income in 2014 was £823 million. Of this figure, 68 per cent (£560 million) was subsidy (support) and grants, demonstrating how significant public funding is to income. However, comparing the £560m support with output, the picture is more complex. Scottish agricultural output in 2014 amounted to £3.15 billion; costs were £2.85 billion. Therefore, the average farm support equated to 18 per cent of eventual output.

“A breakdown across the commodities shows that:

- **Beef** - Support is 42 per cent of output, and over 200 per cent of income
- **Sheep** – 34 per cent of output / 240 per cent of income
- **Dairy** – 9 per cent of output / 50 per cent of income”

61. European Structural and Investment Funds (ESIF) will be worth around €985 million to Scotland between 2014 and 2020 and once match funding is included around €1.9 billion. Scotland received around €800 million during the 2007 to 2013 programming period.

62. In relation to the ESIF funding, Universities Scotland explained that the “resource available through structural funds has become an important part of Scotland’s mix of financial support for innovation between universities and business.” In the previous programming period, Universities Scotland indicated that—

14 different Scottish universities were the lead partners in 60 ERDF projects between 2007 and 2013 to a value of over £62.5 million. Many of these projects have helped build and embed the infrastructure needed to support closer engagement with the business community and to increase the commercialisation of university research.

63. Universities Scotland also identified the specific funding that Strathclyde University’s Technology Innovation Centre (£6.5 million of funding towards the
total investment of £90 million needed) and the University of Edinburgh’s Scottish Centre for Regenerative Medicine (over £5 million) had received.

64. EU funding through the Horizon 2020 programme represents the third largest source of project funding for research in Scotland. Universities Scotland wrote—

Scotland’s universities receive £88.8 million of research funding a year from EU sources. Most of this, 85 per cent, comes from European Commission programmes. The rest from EU charities and business. This equates to 13% of the total annual research funding Scottish universities receive.55

65. Universities Scotland provided the following two case studies of projects funded by the Horizon 2020 programme in Scottish Universities.

**Case study: Significant European funding for pest control in agriculture**56

The University of Glasgow received €7 million in European grant funding for the development of a form of insect control based on neuropeptides. The nEUROSTRESSPEP project uses insects’ own neuropeptides against them to alter the hormones and pheromones of pests but causes no harm to other insects. The research project will be of value to the agricultural industry. The research funding is from the Horizon 2020 fund and the research will be taken forward by a large international collaboration of partners.

**Case study: Accelerating the discovery of medicines in the European Lead Factory**

The European Lead Factory concept, is a pan-European platform for drug discovery based in Scotland because the University of Dundee forms part of its hub. The Factory is the first of its kind and it was supported by Innovative Medicines Initiative, which is Europe’s largest public-private initiative working in medicine. The initiative, announced in 2013, brought €19 million to Scotland. Possibly more important than the funding is the collaborative approach to drug discovery the Factory takes and the unprecedented access, on a European-basis, that it gives to researchers. It represents an international consortium of 30 partners from industry and academia which offers promising new targets for research into drug discovery and new medicines. The partnership brings libraries of chemical compounds together to create a joint European Compound Collection of over half a million compounds, accessible to European partners.

66. Universities Scotland also highlighted the value of transnational research, indicating that collaborative research on an international level is 1.4 times more impactful than research within national boundaries and that, “It is in the interests of high quality research that Scotland’s universities maintain access to as wide a pool of potential research partners as possible.”57 This importance of collaborative research was echoed by Genetic Alliance UK, which referred to the EU’s research framework as “not solely a source of funding, but also a
significant driver in the formation of partnerships across the EU.” It explained that this was important as “the type of activity we are involved in can only happen at a continental level.”

The evidence collected by the Committee on EU funding testifies to its importance in a number of sectors in Scotland. Historically, EU funding has supported significant infrastructure projects in Scotland. Although Scotland now receives less EU funding than in the past, it still plays an important role in a number of sectors, ranging from farming to skills programmes for young people. The Committee was particularly struck by the success of Scotland’s universities in accessing funding for research and the innovative and collaborative research projects that have benefited from this funding.

The Committee is concerned by the lack of clarity on how the sectors that currently benefit from EU funding would be funded in the event that the UK left the EU. There are very important questions relating to whether the UK Government would increase the Scottish Government’s block grant to match the funding previously received from the EU, and how the Scottish Government would allocate this funding.

Citizenship rights

67. Under the EU Treaties, all persons who hold the nationality of a Member State are also granted citizenship of the EU. In addition, Article 18 of the Treaty on the Functioning of the European Union (TFEU) provides that no citizen shall be discriminated against on the basis of nationality. This means that EU citizens across all Member States must be treated in the same way. The citizens of Member States also have a number of social and employment rights that derive from EU legislation and, following agreement of the Treaty of Amsterdam in 1997, the EU Treaties have enshrined principles relating to non-discrimination in the areas of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 19 TFEU). As a result, the EU has developed comprehensive legislation in the area of non-discrimination and equality. It began with sex equality in the employment context and has now extended to race, disability, sexual orientation, age and religion or belief in employment, and race and sex in the provision of goods and services.

68. The evidence gathered by the Committee highlighted some of the rights that emanated from the EU. Alison Cairns of the Scottish Council for Voluntary Organisations (SCVO) reminded the Committee that “it should not be forgotten that lots of employment rights and protections, such as paternity leave and equality of pay in maternity, were set by the European Union, not the UK.” The European Movement in Scotland highlighted the 26-week maternity leave
period guaranteed by EU legislation. It also referred to some of the rights that workers benefited from as result of EU legislation—

The EU has provided important social protections for workers in Scotland and across the continent, including four weeks paid holiday a year and protections from redundancy, amongst other things. The EU has also extended these benefits to workers on fixed-term temporary contracts.60

69. Similarly, Helen Martin - Assistant Secretary, Scottish Trades Union Congress (STUC) highlighted the importance of “social Europe”, explaining that it was key to trade unions’ support for the European project.” The STUC stated that the EU had “secured useful social protections within the workplace including rights for women, rights for part-time, temporary and agency workers, rights in situations of redundancy and information and consultation, rights for working parents and a range of health and safety rights, including limitations on excessive hours and the creation of a work-life balance”.61

70. SCVO also highlighted the positive benefits of engaging with other organisations across the EU. It presented the example of how a pan-European platform of organisations working on dementia had been established. SCVO argued that “our problems are local but the solutions are global”62 and that the EU environment provided the opportunity for civil society to come together to tackle problems. The case study below draws on the evidence presented by Alison Cairns of SCVO.

**Case study - Dementia Europe**63

“I want to mention the example of a big platform called dementia Europe that involves all the dementia organisations across Europe. Dementia Europe works really hard at a European level to address issues around dementia and the services for people who are affected by the condition throughout the EU because it is a big global issue for us as a society. Dementia is just one area, but civil society is working collectively on that big policy area. The dementia Europe platform directly represents the interests of people who suffer across the whole spectrum of dementia, as well as those who work in the field, carers and families. Who better represents the interests of somebody who is suffering from dementia—that platform or the political structures and environment? For us, the issue is how civil society can participate in the democratic processes. The implications of our not being involved in that way will not be fully visible until we are not there.

71. In addition, the case study below sets out a range of citizens’ rights, drawing on the evidence provided by European Movement in Scotland on the ways in which membership of the EU had benefited EU citizens more generally.
Case study – some of the rights that EU citizens benefit from as a result of EU legislation:

- When we go to work or university, go on holiday, make a phone call or buy a product online, we benefit from our membership of the European Union.
- Freedom of movement means that we can travel, live, study, shop, work and retire in the EU country of our choice.
- EU action has abolished roaming charges, and greater competition between suppliers has led, for example, to a cut in air fares through freedom of European skies thereby ensuring consumers get the best value for money.
- Consumers benefit in price, range and quality from access to the wider range of products available across the EU.
- If you fall ill or have an accident anywhere in the EU, you are entitled, through the European Health Insurance card, to public healthcare under the same conditions as you would receive in Scotland.
- Holidaying in the EU is easier than anywhere else in the world. With no visas, and often no passport controls either, traveling in Europe is largely hassle-free.
- Through the EU, Scotland is part of a union with some of the highest standards of food and product safety in the world - producers worldwide must match the EU’s standards if they want to sell their products in Scotland.
- EU citizens are strongly protected when shopping online - you have the right to return products within 14 days if they are unsatisfactory, even when shopping outside Scotland.
- The EU has guaranteed that if your train, plane, bus or ferry is cancelled or delayed, you will receive compensation.
- If you get into difficulty whilst outside the EU, you can receive help from any EU Member State’s embassy or consulate if there is no UK assistance available.

The Committee believes that the benefits from “social Europe”, and the citizens’ rights that emanate from the EU, have had an important and positive effect on the lives of people in Scotland. Many people may not be aware that these rights result from membership of the European Union, but they have significantly changed our lives for the better over the last decades. Over the course of this parliamentary session, the Committee has often felt that there are weaknesses in the way in which the EU communicates its policies and initiatives, and this is evident in the lack of awareness among people in Scotland of the impact that the EU has had on their lives.
Environmental policy – a shared competence

72. As indicated earlier in this report, environmental policy is one of the areas where the EU has shared competence with the Member States. As environmental policy is a devolved matter, it is one of the key areas where the Scottish Government shares a competence with the EU. Scotland Europa has estimated that more than 80% of all environmental legislation transposed by the Scottish Parliament originates at EU level. Examples of EU environmental legislation include the Habitats and Birds Directive, the Marine Strategy Framework Directive and the Water Framework Directive.

73. The co-ordination of action in relation to the environment and climate change was identified as one area in which the EU had added value. It has developed policies in relation to safe drinking and bathing water, improving air quality and reducing noise, reducing or eliminating the effects of harmful chemicals, recycling waste and promoting habitats. The European Movement argued that—

Addressing environmental challenges requires collective action involving the EU, national, regional and local governments, businesses, Non-Governmental Organisations (NGOs) and ordinary individuals. It must include outreach to our international partners inside and beyond the EU so that action can be taken on a global scale. … As the world’s largest economic bloc, the EU has led in this critical area by protecting our living environment. It has some of the world's highest environmental standards. Environment policy helps green the EU economy, protect nature, and safeguard the health and quality of life for people living in the EU.

74. A key value of EU cooperation is its ability to support a unified approach aimed at addressing challenges that span national borders. The EU plays a strong role in international climate negotiations by acting as a strong bloc and EU leaders have agreed an EU-wide climate emission reduction goal to cut emissions by at least 40% by 2030. Equivalent UK and Scottish targets remain higher than the EU ambition for 2030.

75. The EU has also developed EU-wide approaches aimed at reducing emissions, for example the development of the Emissions Trading System (ETS) and vehicle efficiency targets. In a number of areas Scotland’s progress in meeting its own emission targets rely on measures that have been developed and implemented at an EU level.

The Committee believes that the ability to address challenges which do not respect borders, such as the environment or climate change, benefit from European coordination. The European Union has introduced environmental standards and targets which have improved the quality of
the natural environment in Scotland and the rest of the European Union which demonstrates the value of cooperation.

Attitudes to EU membership

76. In evidence to the Committee, Professor Curtice recognised the discrepancy in opinion polls on the EU referendum according to whether they had been conducted via the internet or via the telephone. He explained that, “The telephone polls suggest that maybe as many as 75 per cent of people in Scotland will vote in favour of remaining; and the internet polls put it at about 66 per cent”.

77. During the course of the committee’s inquiry, Ipsos Mori carried out two Scottish polls which specifically asked the referendum question. The results of these polls suggest that the majority of people in Scotland wish to remain in the EU.

<table>
<thead>
<tr>
<th></th>
<th>November 2015</th>
<th>February 2016</th>
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<tr>
<td><strong>Remain a member of the</strong></td>
<td>65%</td>
<td>62%</td>
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<tr>
<td><strong>European Union</strong></td>
<td></td>
<td></td>
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<tr>
<td><strong>Leave the European Union</strong></td>
<td>22%</td>
<td>26%</td>
</tr>
<tr>
<td><strong>Don’t know</strong></td>
<td>13%</td>
<td>12%</td>
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78. Professor Curtice also indicated that there was a link between support for Scottish independence and EU membership—

Staying inside the European Union has been part of the idea of independence in Europe, and being inside the European Union is seen as a pathway towards Scottish independence. I think that the way in which those two issues have been linked and the relative popularity, still, of independence in Scotland is the principal explanation as to why Scotland is quite clearly going to vote to remain.

79. However, Professor Curtice also referred to evidence from the Scottish social attitudes survey showing that 60 per cent of the population in Scotland wished either to leave the EU or have its powers reduced, a figure which was only slightly lower than the figure of 65 per cent which was recorded for the UK as a whole.

80. The Scottish Chambers of Commerce provided the Committee with evidence from a survey of its members that it had carried out in August 2015, drawing on the views on 504 firms based in Scotland. The survey indicated that 73.5 per cent of respondents would remain a member of the EU at that point in time, and 13.5 per cent would vote to leave. The reforms that businesses believed would have the most beneficial impact for them were: reducing regulation/red tape (61.4 per cent), changing the balance of power between Brussels and member countries (43 per cent) and changing the way the EU budget is spent (23.1 per cent).
Leaving the EU: what it would mean for Scotland?

Background

81. A key focus of the Committee’s inquiry related to the process for leaving the EU. No Member State has ever withdrawn from the EU and Article 50 of the Treaty on European Union (TEU), which was introduced by the Treaty of Lisbon, has never been tested. The Committee therefore considered that it was important to understand the various steps that would be needed at the four key levels: the UK, the domestic, the international and the Scottish levels. Furthermore, the Committee wished to explore the implications of a departure for British citizens in the UK, British citizens in the EU, and EU citizens in the UK. Would the process be one of ease, involving little more than the repeal of the European Communities Act 1972 as has been suggested by some of those in favour of leaving the EU, or would it be more complex and time-consuming? The Committee explored the process for leaving the EU with legal academics, and the implications of leaving with key stakeholders in Scotland.

82. At the end of February 2016, the UK Government published a document on “The process for withdrawing from the European Union”, which estimated that “It could take up to a decade or more to negotiate firstly our exit from the EU, secondly our future arrangements with the EU, and thirdly our trade deals with countries outside of the EU, on any terms that would be acceptable to the UK.”

83. The evidence the Committee gathered drew many analogies to a messy divorce process: with long and difficult negotiations, a series of complex agreements to cover a range of issues, and doubt about the final outcome for the UK. In a meeting with the Institute for International and European Affairs in Dublin, it was suggested that prior to the referendum, there would be a phase of goodwill with other Member States seeking to find an accommodation of the UK Government’s reform agenda. However, if the UK did vote to leave the EU in a referendum, then it was suggested that “the gloves would be off” and there would be “no Queensberry rules” to govern the negotiations. This view was echoed, albeit more gently, by Professor Sir David Edward, who said—

As one person from another member state said to me, “We will do everything possible to keep you in, but if you wish to go, we will give you nothing.” I am not sure that that will not be the attitude of a great many other member states.

84. Furthermore, the Committee heard suggestions that if the UK decided to leave, there would be the potential for other Member States to benefit by attracting businesses that were currently located in the UK to locate elsewhere in the EU to access the single market, or for other Member States to benefit from enhanced opportunities for FDI.
85. In addition to the written evidence that it collected on the process of leaving the EU, the Committee also held a round table evidence session with legal experts. It gathered evidence on the legal process for leaving the EU under Article 50 of the Treaty on European Union (TEU); the domestic legal processes that would ensue following the signature of a withdrawal agreement; the implications for treaties with third parties; acquired rights; and legislative consent and the legal implications of leaving the EU for Scotland.

**Leaving the EU: the Article 50 process**

**Article 50**

86. Article 50 TEU – the provision regulating the process by which a Member State would leave the EU – was introduced by the Treaty of Lisbon. As there is no precedent for a Member State leaving the EU, and the provisions within Article 50 remain untested, there was considerable discussion among witnesses as to the process for departure under Article 50. The text of Article 50 is set out below—

<table>
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<th>Article 50</th>
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<tr>
<td>1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.</td>
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<tr>
<td>2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.</td>
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<tr>
<td>3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.</td>
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<td>4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.</td>
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<tr>
<td>A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.</td>
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<tr>
<td>5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.</td>
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87. The Committee’s legal adviser for the inquiry, Professor Sionaidh Douglas-Scott explained the reasons for the lack of detail – academic or otherwise - on Article 50, pointing out that it was “not surprising because it has never been used, and until the UK declared its intention to renegotiate the terms of its membership, the possibility of its use was considered theoretical only.”

Leaving the EU: the likely steps involved under Article 50

88. The evidence heard by the Committee identified a series of steps in the process for the UK to leave the EU under article 50 if that was the outcome of the referendum—

- The first step, under Article 50(2) would be for the Member State to notify the European Council of its intention to withdraw from the Union. In effect, this notification would set the clock ticking for the two-year period identified in Article 50(3).

- The European Council would agree and provide negotiating guidelines. It is likely that a negotiator would be appointed to manage this process. For example, the European Commission might be given responsibility to negotiate on the basis of the guidelines agreed by the European Council. A parallel for such an approach would be the way that the Council gives the European Commission a mandate to negotiate trade deals.

- A withdrawal agreement in the form of a treaty would be negotiated and concluded between the EU and the UK. This would set out the arrangements for the UK’s withdrawal, and would take into account the framework for the UK’s future relationship with the Union.

- Under Article 50(4), as the departing Member State, the UK would not be able to participate in the European Council or Council discussions or decisions concerning its departure. This would mean that only the remaining 27 Member States would be party to these discussions. Significantly, this would cover all decisions concerning the framework for the UK’s future relations with the EU.

- If the withdrawal negotiations were successfully concluded within two years, then the date of the UK’s withdrawal would be the date of the entry into force of the agreement. At that point, the Treaties would cease to apply to the UK. If the negotiations were not successfully concluded within two years, Article 50(3) effectively provides a guillotine clause whereby withdrawal would happen automatically two years after the date on which the UK had notified the European Council of its intention to withdraw. However, the European Council – acting by unanimity – could agree with the UK to extend this period.

- The agreement will be concluded by the Council of Ministers, having secured the consent of the European Parliament, acting by a Qualified
Majority Vote and would not, therefore, require unanimity. However, if it was a mixed agreement, that is if it was an agreement between the EU and the Member States as it covered areas of Member State competence as well as EU competence, it would need to be ratified by other Member States in accordance with their own constitutional arrangements.

- The withdrawal agreement would instigate the need for a revision of the EU treaties in accordance with Article 48, at a minimum to amend them where they referred to the United Kingdom and to remove the protocols specific to the UK.

- Finally, Article 50(5) includes a disincentive to a potentially equivocating Member State by introducing a requirement that re-joining the EU would take place through the various steps outlined in Article 49 TEU.

Leaving the EU: the treaties required

89. In effect, the process under Article 50 would result in the following treaties being agreed—

- a Treaty between the EU and the UK (or a Treaty between the Member States of the EU and the UK if it was a mixed agreement) setting out the terms for the UK’s withdrawal.

- a Treaty between the EU and the UK (or a Treaty between the Member States of the EU, and potentially the EEA, and the UK if it was a mixed agreement) setting out the terms of the UK’s future relationship with the EU /EEA. Or, if the UK decided it did not wish to be a member of the EEA, a series of individual treaties with each of the Member States to govern future relations.

- an EU Treaty to amend the Treaties to take account of the UK’s departure.

Would the withdrawal agreement be a mixed agreement?

90. Professor Adam Łazowski, of the University of Westminster, identified two options under Article 50. One option was a “withdrawal agreement providing the terms of withdrawal and a fully-fledged future regime”, which he considered could take a “number of years”.\(^7\) In evidence, Professor Łazowski suggested that the process for leaving the EU might be divided into separate areas in the same way that accession negotiations are divided into chapters. He identified the steps that might be involved in such an agreement, including those relating to a “mixed agreement”. A mixed agreement is one which is agreed between the EU and its Member States on one side, and with the third party on the other as the EU would not have sufficient competence in all of the areas covered by the agreement to agree it unilaterally. He identified the following key steps in a comprehensive withdrawal agreement—
From a procedural point of view, the EU will first have to have a negotiation mandate. Guidelines will come from the European Council. The question is how detailed they will be and to what extent the European Commission and the Council will be involved in designing the negotiation mandate for the European Union. Then, a little bit like accession negotiations, it will have to be divided into different chapters, where those dossiers will be separately negotiated. If it is a mixed agreement, it will have to be concluded by two decisions of the Council on the EU side, and we must take into account the fact that the legality of both can be challenged at the Court of Justice under article 263.\textsuperscript{75}

91. The second option presented by Professor Adam Łazowski, was for Article 50 to “provide some sort of bridging agreement until a proper fully fleshed-out association agreement is concluded.”\textsuperscript{76} However, he considered that option to be weak due to the lack of legal certainty that it would provide. It is possible that a simple agreement, which left the detail to be set out in another treaty, might not be a mixed agreement and would be one between the EU and the UK.

92. Dr Tobias Lock of the University of Edinburgh also thought that the agreement was likely to be a mixed agreement as the latter are very common in the field of external affairs, where a political dialogue is included, or where there are budgetary implications for the Member States. He concluded that, “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.”\textsuperscript{77} There would be a higher degree of risk implicit in a mixed agreement as it would require unanimity among all of the Member States, as well as ratification by the Member States in accordance with their own domestic procedures.

93. If the agreement was a mixed agreement, Professor Łazowski suggested that this would add to the time for concluding the process, stating that, “there would be a very long ratification process, which usually takes two to three years, as we see if we look at the most recent association agreements with Georgia, Ukraine and Moldova, so it will be a very long and painful process.”\textsuperscript{78} Thus, it is likely that in addition to the time taken to negotiate the withdrawal agreement, there could be a long period while ratification took place across the remaining EU Member States. This might mean that a four to five year process would be the minimum for concluding and ratifying a withdrawal agreement.

Timing and associated risks

94. The risks relating to a failure to reach an agreement within the two year period identified in Article 50(3) were raised in evidence. Professor Sir David Edward addressed the scenario that would emerge if negotiations had not been completed within two years, and the UK was not satisfied with the results of the negotiations—
Article 50 says that the negotiations will complete within two years unless there is agreement to continue the negotiations, so there could be a rather odd situation in which negotiations were going on—let us assume that they were going rather badly for the UK—and the UK could simply say, “We are not prepared to agree to any further continuation. That’s it.” There would then be a bizarre situation in which the withdrawal takes place, because two years is up, but you would not have fully determined the future relationship. That is something that article 50 does not cope with.79

95. Dr Lock considered what would happen under a scenario whereby no agreement had been reached within two years of the notification to withdraw and there had been no agreement by the European Council to extend this period in agreement with the UK (which would require unanimity within the European Council). He pointed out that—

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 agreement 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.80

96. There might also be a need to renegotiate or amend World Trade Organization (WTO) agreements where the UK was previously part of a WTO agreement made by the EU as a whole and these would have to be renegotiated with all 161 WTO members.

97. Considerable concern was expressed in evidence in relation to the scale of the negotiations that would be required in order to conclude a withdrawal agreement, as well as the impact that those negotiations could have more widely. The Law Society of Scotland emphasised that, “The negotiation period under Article 50 could be lengthy because of the legal, political, financial and commercial issues to be agreed.”81 Furthermore, it stressed the need to avoid or mitigate disruption, stating—

Withdrawal from the existing law or policy issues like the CAP or CPF would require great care in order to minimise disruption. Transitional arrangements for alternative regimes would have to be dealt with in relation to projects and other work funded by the EU. Recognition of rights of establishment, legal rights and obligations under EU law would also be affected. Other issues would be the termination date for participation in EU institutions and bodies and the employment of EU staff members who are citizens of the departing State.”82
98. Professor Sir David Edward emphasised the importance of the goodwill and co-operation of other Member States in reaching an agreement in the two-year time period allowed for by Article 50—

What we know about all previous negotiations is that they take a long time. Two years was what was put into the Lisbon treaty, and I suppose that, with good will, it could be concluded in that time, but that assumes that the other member states would be prepared to go some way towards accommodating a future British relationship, which I suspect they might not be if we say, “Right, we want to withdraw.” Remember that article 50 makes no provision for having second thoughts. Once you have given notice, that is it—you are on the train. If Britain has said to the others, “Right, we want to leave,” I am not by any means certain that the others would be enthusiastic about making generous concessions to the UK, so you could have a deadlock.”

99. Professor Łazowski suggested that the two-year deadline might act as an incentive for an agreement. He argued that it could have been inserted into the Treaty “to discipline the member states and the withdrawing country”, arguing that, “It is in the interests of all sides to negotiate a proper withdrawal agreement, because a unilateral withdrawal would be a legal economic calamity.”

100. Dr Lock drew the Committee’s attention to the role of the European Parliament. He argued that its role would not only add time to the period for agreeing the withdrawal agreement, but could present a risk due to the difficulty in predicting how its Members might vote. He pointed out that—

…one dark horse in the equation is the European Parliament, which has to agree to the withdrawal agreement. It is much more difficult to predict where the European Parliament is going to go. It tends to be more integrationist than the member states’ Governments that are represented in the Council.

Should voters in the UK support leaving the EU in the referendum in June, it is clear to the Committee that what would ensue would be a long and uncertain legal process characterised by complex and contested negotiations. There is no simple means for the UK to leave the EU, but rather a series of treaties and a raft of bilateral treaties that would need to be negotiated and agreed in order that the UK can trade on similar terms to those it currently enjoys with third countries.

While the UK has benefited from the goodwill of other Member States in the negotiations for EU reform, it was suggested to the Committee in strong terms that a decision to leave would fundamentally alter that relationship. The UK leaving would represent an unwelcome precedent and the negotiations for the UK
Leaving the EU: the domestic process

101. In addition to the withdrawal agreement required for the UK to leave the EU and establish a new relationship between the UK and the EU, the UK would need to address its domestic situation in regard to EU law. The evidence collected by the Committee indicated that the scale of this could be huge, although it would depend on the extent to which the UK Government, and the devolved administrations, decided to retain EU law domestically. In evidence to the Committee, there was a discussion about the process for “de-EUifying” domestic legislation. Dr Cormac Mac Amhlaigh pointed out that, “There is the EU side, but there is also the domestic side after withdrawal, which would require a lot of legislative change in order to de-EU British law. EU law is embedded in many statutory provisions and I would envisage that that would probably take place over the long term.”

102. Professor Catherine Barnard described the legal process of withdrawal at a domestic level as “a gargantuan exercise that will tie the civil service—both in Whitehall and in the devolved Administrations—up in knots for years to come.” She suggested that it could “paralyse the operation of day-to-day government, because so much time will be devoted to unpicking some very complicated issues.”

Ratification of the withdrawal agreement by the UK Parliament and repeal of the European Communities Act 1972

103. The first step that would be involved at the domestic level would be the ratification by the UK Parliament of the withdrawal agreement reached between the UK Government and the EU. The second step would be the repeal or amendment of the European Communities Act 1972. There was general agreement in evidence that as this is the foundation for the application of EU law domestically, and it gives EU law primacy over UK law, then it would need to be repealed or substantially amended.

Determining how to deal with EU law

104. The third step would relate to the complex process of assessing and deciding how to deal with the EU legislation on the statute book in the UK. The scale of the challenge linked to this step is evident in the quantity of domestic legislation deriving from the EU. The Law Society of Scotland estimated that there are “around 3,500 items of legislation from the EU including over 1,000 Regulations, 451 Directives and 254 Decisions.” The UK Government, and the devolved administrations, would need to determine which legislation to retain and which to repeal and replace. The UK’s future relationship with the EU would be crucial to determining this process. If the UK wanted continuing
access to the single market, then it would need to comply with the majority of EU legislation.

105. There are three key legal instruments used by the EU: regulations are binding legislative acts which are applied directly across the EU, directives are legislative acts which set out goals for EU Member States to achieve and are transposed domestically by EU member states, and decisions are binding on those whom they address and are directly applicable. The next paragraphs focus on how EU regulations and directives might be dealt with domestically following the ratification of the withdrawal agreement.

EU regulations and repeal of the European Communities Act 1972

106. EU regulations have direct application in the UK via section 2(1) of the European Communities Act 1972. Thus, repeal of the European Communities Act 1972 could automatically result in these laws lapsing. Professor Douglas-Scott argued that “in many cases this would leave an undesirable vacuum in domestic law”, and that it “would be particularly serious in areas where the EU has an exclusive competence.” She suggested that it might be “necessary to introduce new domestic laws very swiftly to cover many of these areas, such as in the licensing of medicines, much of which is currently dealt with by EU Regulations.”

Similarly, the Law Society of Scotland stated that leaving the EU would mean that—

... over 1,000 regulations could cease to apply in the former Member State with immediate effect, creating enormous legal uncertainty for institutions, people and businesses.

107. The question of the extent to which it would be prudent to repeal EU legislation was addressed by Professor Barnard, who highlighted the importance of complying with EU standards, much of which takes the form of regulations and requirements under the “Technical Standards Directive”, in order to be able to trade with the EU and have access to the single market. She pointed out that—

... the EU is and will remain our principal trading partner because of its geographic proximity, so any of our goods that are to be sold into the EU and any of our services that will be provided into the EU will have to comply with EU technical standards. Therefore, simply repealing in one fell swoop all the EU rules would promptly make it extremely difficult for our traders to trade. They will have to comply with those rules and it would be sensible to keep them on the statute book in some form so that traders know with what they have to comply.

EU Directives

108. EU directives are transposed by primary or secondary legislation passed by the UK Houses of Parliament or the devolved legislatures. Decisions would be needed as to whether to retain, repeal or amend this legislation. Professor
Douglas-Scott referred to the Extradition Act 2003 as an example of primary domestic legislation which gave effect to an EU obligation in the form of the European Arrest Warrant. She pointed out that if this Act “continued unamended after the EU Treaties stopped applying to UK” then it “would still provide a legal basis for extradition requests from other member states.” However, she also pointed out that, “Whether requests from the UK would be acted upon in other member states would, however, depend on the state of EU or national law there.” Thus, there might also be directives that the UK might wish to retain for pragmatic or policy reasons.

In addition, Professor Douglas-Scott pointed out that secondary legislation implementing directives is enabled by section 2(2) of the European Communities Act 1972, and that a repeal of the Act would mean that such legislation would no longer have legal effect, thus again requiring “speedy action if undesirable gaps were not to emerge in UK law.”

Some EU directives relate to matters devolved to the Scottish Parliament under the Scotland Acts and have been transposed by the Scottish Government in subordinate legislation. In these cases, the decision to retain, repeal or amend this legislation would be the responsibility of the Scottish Government and the Scottish Parliament. This could result in greater policy divergence between the constituent parts of the UK where currently EU law gives effect to a large degree of policy coherence. Furthermore, if the Scottish Government wished, it could continue to voluntarily comply with EU law in devolved areas.

While there would be some areas of EU law that the UK might be obliged to retain if it wanted continued access to the single market, in the flanking measures such as employment, environment, consumer rights and social provisions, it would be a political decision, as well – potentially - as one of expediency. Professor Barnard drew the Committee’s attention to equality legislation, much of which was passed in the form of directives and transposed into UK legislation. She explained that while the UK had passed some of its own equality legislation, “the EU directives of 2000 extended the protection to sexual orientation, disability, age, and religion and belief.” She questioned whether the UK would wish to repeal the Equality Act 2010 thereby effectively denying protection to those groups, or whether the UK Government would introduce a UK version of the equality act. She identified “the time and energy involved in disentangling EU provisions” as “an extraordinary waste of time and energy for everyone involved.”

“Intertwined law” and the need to assess where EU law is applicable

Professor Łazowski explained to the Committee that EU and domestic law can be intertwined to give effect to provisions. He provided the example of legislation on the European company - the societas Europaea, which combined regulation, directive and domestic law. Similarly, he explained that there was an EU regulation on compensation for flight delays and cancellations, but there are
domestic provisions that fill the gaps in the legislation. Thus, repeal of the European Communities Act, which gives effect to EU regulations, could partially remove laws but leave gaps which were covered either by EU directives and other EU measures, or domestic legislation.

113. Professor Łazowski therefore suggested to the Committee that in order to “de-EU the legal orders of the United Kingdom” there would be a need to assess where EU law applied. He said—

> We would have to … screen the entire legislation to see exactly where EU law is. Then, in many areas of law, we would need to recreate the legislation, because, for example, if we get rid of all directives in employment law, we have huge gaps in the legislation. That will take years and will require an army of people, not to mention the fact that it will be quite expensive.”

Interpretation of EU law

114. If the UK decided to leave the EU, but domestic legislation implementing EU measures remained on the statute book, the question arises as to the extent to which the UK would be bound by the decisions of the European Court of Justice when interpreting the directives on which the legislation was based. Currently the rulings of the European Court of Justice (CJEU) have precedential value, meaning that UK courts are obliged to follow the rulings of the CJEU. Professor Bernard suggested that the rulings might have “persuasive value rather than precedential value”.

Dr Lock said that it was “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.” He concluded that this would be a matter for domestic law and “may eventually have to be determined by the courts.”

The Committee was struck by the scale of the domestic process of dealing with EU law that would result from a departure from the EU. Not only would it be an enormous exercise to “de-EU” UK law if that was the desired objective, but the repeal of the European Communities Act 1972 would leave a legal vacuum where EU legislation no longer applied. In the Committee’s view, this would result in legal uncertainty on a massive scale, with significant repercussions for businesses and consumers, as well as citizens in relation to their rights.

For pragmatic and practical reasons, notably if the UK wished to have continued access to the single market, the UK might find that it had to retain EU law and voluntarily adopt it in the future. There could also be areas where it would be simply easier to continue with existing legislation, for example in relation to discrimination, rather than introducing a new regime. A close consideration shows that while the UK might choose to leave the EU, it is likely that the effects
of EU law would continue to govern and shape our lives for many years to come.

The Committee also recognised the impact that this could have on the UK and devolved legislatures and the potential for it to detract from other scrutiny and inquiry work due to the time required to deal with the repealing, amending or replacing of EU law.

Treaties with third parties under International law

Treaties with third parties

115. In addition to the withdrawal agreement and the domestic process of deciding which EU laws to retain, there would also be the challenge posed by replacing the international agreements that the UK had been party to, as a member of the EU, with third countries - notably in relation to trade. Professor Łazowski indicated that these agreements could not form part of the withdrawal agreement as they were negotiated with third counties. He explained—

The United Kingdom will lose all agreements that the European Union has with third countries. ... We will lose 40-plus free trade agreements, for example. The procedural question, which is quite tricky, is when to renegotiate those agreements. Do we do that when we leave the European Union, which would mean that we would have a huge gap in legal terms after the withdrawal, or do we start renegotiating when we negotiate withdrawal, although there is no guarantee that we will actually withdraw at the end of the day?\(^{103}\)

116. A written submission from a group of legal academics from the School of Law, University of Dundee explained that the EU is party to hundreds of treaties with non-EU States, some of which have been entered into by the EU on the basis of its exclusive competence. This means that only the EU, and not the Member States, are party to the treaty. They provided examples of these agreements, referring to some trade agreements and agreements providing for the access of EU fishing vessels to the waters of third States such as Norway. They explained that in the case of exclusive treaties, were the UK to decide to leave the EU, then—

...the default position would be that the UK would no longer enjoy rights under such treaties (e.g. for Scottish vessels to fish in Norwegian waters). In some such cases the UK would no doubt want to conclude its own treaties with the third States concerned.\(^{104}\)

117. There are also a number of international treaties which the EU and its Member States are party to as they are mixed agreements, covering areas in which both the EU and the Member States may legislate. In relation to mixed agreements, the legal academics from the University of Dundee argued that—
…the UK would continue to be a party to such treaties after withdrawal. However, for a mixed treaty whose object is a relationship with the EU, such as a preferential trade agreement, it would not make sense for the UK to continue as a party to the treaty following its withdrawal from the EU, and it would therefore no doubt seek to withdraw from the treaty. It might, however, wish to seek to establish its own trade relations with the third State(s) concerned by concluding a separate treaty with it.\textsuperscript{105}

118. The legal academics from the University of Dundee also indicated that the situation in relation to the membership of international organisations was similar to that relating to treaties, pointing out that in some cases the EU is a member of an international organisation, while in others – where there are areas of shared competence - the “treaties are entered into not only by the EU but also together with its Member States”.\textsuperscript{106} The UK would thus no longer be a member of some international organisations where the EU was the signatory.

The Committee believes that the scale of negotiating bilateral agreements to replace the treaties that the UK is currently party to as a member of the European Union would be significant, and there is a clear question about the extent to which this could be carried out at the same time as negotiating withdrawal from the EU. Without a smooth transition to new arrangements, UK exporters might face challenges in maintaining their market share in the face of cheaper competitors. Furthermore, there is no guarantee that the UK would be able to negotiate agreements which had as favourable tariffs and barriers as the ones that it currently benefits from as part of the EU. In addition, the UK would need to renegotiate membership of a number of international organisations.

Acquired rights

119. As noted earlier in this report, there are about 1.2 million UK citizens living elsewhere in the EU and 3 million EU citizens living in the UK. In addition, there are businesses that have legal identity and operate across the EU. The departure of the UK from the EU would bring into question the rights of individuals and the freedoms that they currently enjoy to live, work or study abroad, and also of businesses that have enjoyed the right to operate transnationally in the single market. In evidence, the situation faced by both of these groups was considered, firstly in relation to the desirability of addressing the issue in the withdrawal agreement, and secondly, the degree to which EU citizens and legal persons had acquired rights.

120. Professor Łazowski stated that the “withdrawal agreement will have to regulate comprehensively the terms of withdrawal and future relations” in relation to EU citizens living in the UK and British citizens living abroad.\textsuperscript{107} He argued that “if the withdrawal agreement provides for the application of free-movement-of-
persons rules and secondary legislation to UK citizens in the EU, they will not be as affected by withdrawal. However, it should be noted that Article 50 provides no specific obligation to agree on acquired rights, in contrast to some international treaties, such as the European Convention of Human Rights, or the Energy Charter Treaty, which provide specific protection for individuals’ acquired rights on termination of the treaty. Nonetheless, when Greenland withdrew from the EU in 1985, the European Commission took the view that, on withdrawal, the rights acquired by EC nationals in Greenland and vice versa should be protected, and that ‘new arrangements must contain a clause allowing the Council, on a proposal from the Commission, to adopt transitional measures as may be required.’

So there is some precedent for suggesting that protection of acquired rights would be a concern for negotiating parties in the course of a UK withdrawal.

121. If there was no provision within the withdrawal agreement in relation to EU and British citizens, Professor Barnard explained that the EU nationals already living in the UK, and the British people living in the EU would no longer enjoy the rights of EU citizens as laid down in the treaties, notably free movement, residence and equal treatment. She observed that this would “have serious implications for those with second homes, or indeed first homes, in Spain or France, because the protection that they enjoy at the moment is laid down by EU law.” This would raise a question about the extent to which the rights of those people could be protected under the domestic law of the states where they were living. While they would still enjoy rights under the European Convention of Human Rights, which can be enforced domestically under the Human Rights Act 1998, and might have some acquired rights under the Vienna Convention on the Law of Treaties, there would be a practical difficulty in enforcing those rights. Professor Barnard emphasised that, “One of the most accessible, comprehensible and important features of EU law is that I can go to my local court in Cambridge—or to your local court in Edinburgh—to get my EU rights enforced.” However, international law rights cannot be enforced at local courts, so people might have acquired rights, but not “enjoy the simple but effective protection of direct effect and remedies in the national systems.”

122. In her briefing for the Committee, Professor Douglas-Scott considered the extent to which EU citizens have acquired rights under EU law. She explained that—

The presence of Article 50 TEU acknowledges that the EU treaties have established vast systems and structures of rights and obligations, and thus the need for an orderly process for state withdrawal from the EU. These rights and obligations exist between member states, but also with regard to the nationals and companies of those states. The European Court of Justice (ECJ) stated as long ago as 1963 in the van Gend en Loos case that such rights are part of individuals’ ‘legal heritage.’ Such acquired rights and mutual dependencies cannot be immediately and directly extinguished.
123. Professor Sir David Edward explained that acquired rights “began with the right not to have duties increased; in other words, not being subject to discriminatory taxation is a right derived directly from the treaty.” Other rights followed this, including “the rights to free movement of goods, many aspects of the free movement of persons and services and the right to set up an office or company.” Thus, not only individuals, but also legal persons such as businesses have acquired rights.

124. Dr Lock said that there was a degree of uncertainty about the level of protection that would be afforded by acquired rights. He presented a scenario under which a German pensioner had moved to the Highlands, which he currently would have the right to do under the citizens' rights directive as he had sufficient resources to support himself and had health insurance. Dr Lock suggested that there was a question about the extent to which the individual concerned would be protected under international law in relation to the right of movement following a UK withdrawal from the EU—

If the UK leaves the EU on 1 January 2020 and there is no provision in the withdrawal agreement on how to deal with such people, the question will be whether he is allowed to stay as a matter of acquired rights—rights that he had once but would not have if he had moved after the UK's withdrawal. An argument could be made that he had such rights under EU law. I am not sure that international law provides for such comprehensive protection of those kinds of movement rights, although it provides for protection of property rights.

125. Dr Lock also discussed the issue of how rights could be enforced if the UK no longer had access to the European Court of Justice. He questioned whether, in a case where a person challenged a removal order from the UK Border Agency and went to the High Court for judicial review, whether “the High Court have to respect that as a matter of UK law?” He further questioned, “If the 1972 Act had been repealed, where would be the basis for the position? Would there be a basis at common law?” The general principles of legal certainty and legitimate expectations may be of relevance here, as there is agreement that they are closely related to acquired rights. However, if the UK withdrew from the EU, then it is hard to say that legitimate expectations, or legal certainty, should continue to apply in the UK as general principles of EU law (although they might be applied as domestic principles, but that is another matter). They might be applied, however, in countries such as Spain and France that remained in the EU, enabling protection of UK’s citizens’ acquired rights under EU law there. Dr Lock concluded that the number of questions arising from a consideration of rights would mean that “such points need to be dealt with in a withdrawal agreement.”
The Committee considers that a decision to leave the EU would raise a huge issue for British citizens who live in other parts of the EU, and EU citizens living in the UK. If the UK did not vote to leave the EU, it believes that there would be a need to resolve this issue in any withdrawal agreement in order to provide certainty for those groups of people. While there was strong evidence to suggest that British citizens have acquired rights, there were also questions about how these would be protected after the UK had left the EU.

Legislative Consent and legal implications of leaving the EU for Scotland

126. As discussed above, a departure from the EU would require the UK to adapt its domestic legislation, including repealing or amending the European Communities Act 1972. This raises the question of whether devolution legislation would need to be amended to take account of the UK’s departure from the EU. Professor Douglas-Scott indicated that “although the Westminster Parliament may repeal the European Communities Act 1972, this would not bring an end to the impact of EU law in the devolved nations” and that it would “still be necessary to amend the relevant parts of the devolution legislation.”

127. In written evidence, Dr Cormac Mac Amhlaigh observed that, “it is trite law that the Westminster Parliament retains the power in law to repeal the European Communities Act 1972 which gives legal effect to the UK’s current membership of the EU, as well as amend or repeal parts or all of the Scotland Act 1998.”

128. The Sewel Convention has operated since the establishment of the Scottish Parliament. It gives effect to the UK Government’s commitment that “Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.” The draft Scotland Bill being considered by the Westminster Parliament at the time of publication of this report includes a draft clause providing that “it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.” However, as Michael Clancy of the Law Society of Scotland noted, there is no reference in the Scotland Bill to the alteration of the “the legislative competence of the Parliament or the executive competence of the Scottish Ministers” which is included in Devolution Note 10.

129. EU law is a very significant part of the devolution statutes in Scotland. Notably section 29(2)(d) of the Scotland Act 1998 provides that Acts of the Scottish Parliament that are not compatible with EU law are “not law”. Section 57(2)(d) provides that the “Scottish Ministers have no power to make any subordinate legislation, or to do any other act, as far as the legislation or act is incompatible with … EU law.”
130. If the UK does leave the EU, and the European Communities Act 1972 is repealed, a question arises as to whether Westminster would seek the Scottish Parliament’s consent to amend the legislation on devolved matters, and, if it did, whether the Scottish Parliament would be willing to give that consent. In written evidence, Dr Mac Amhlaigh recognised that, “It is a political convention which gives the legislative consent motion its bite such that any attempt by the Westminster parliament to act in breach of the convention would have significant political ramifications.”

131. Michael Clancy of the Law Society of Scotland raised a specific question about how the courts would interpret the provisions currently in the Scotland Bill that is being considered by the UK Parliament in relation to legislative consent once it had been enacted. Michael Clancy posed the question as to the interpretation of “normally” by the courts in relation to departure from the EU—

I do not know what the courts would say when they came to interpret that provision, because it includes the words “not normally legislate”. In a situation where the UK had exited the European Union and there was legislation that needed to be dealt with that was abnormal, would that engage the convention? Would we see litigation on the meaning of “normal”, “a new normal” and “abnormal”?  

132. In addition to the discussion on the constitutional implications of the legislative consent of the Scottish Parliament being sought, or not being sought, the evidence also referred to the question of whether the Scottish Parliament’s consent would be sought in relation to the repeal of the European Communities Act extending the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers. Dr Mac Amhlaigh stated—

We are moving to a position in which it is generally accepted that modifying the powers—up or down—of the Parliament would require an LCM. One of the biggest restrictions on the Parliament is that it cannot legislate in violation of EU law. On those grounds, if the 1972 Act were to be repealed—if that encumbrance were removed so that EU law was no longer applicable—the powers of the Scottish Parliament would be massively expanded in the sense that it could freely legislate on matters of EU law that are within its competence. Other provisions would trigger an LCM, but that is probably the most obvious one. 

133. If the UK were to leave the EU, the Scottish Parliament would continue to be able to exercise legislative competence, and the Scottish Government would continue to be able to exercise executive policy functions in areas of devolved matters which had been occupied by the EU on the basis of its competences. This would include areas where the EU had previously had exclusive competence (notably in relation to conservation under the Common Fisheries Policy) or shared competence (environment, agriculture and fisheries). Furthermore, it would also impact upon the UK’s financial settlement with
Scotland as any replacement for funding formerly received from the EU - primarily in relation to the Common Agricultural Policy, the Common Fisheries Policy, the European Structural and Investment Funds and research - would need to be included in that settlement.

134. This effective extension of legislative and policy powers would provide the Scottish Government with the opportunity to introduce legislation and develop policy in fields previously occupied by the EU. For example, in relation to environmental policy, which is a key part of Scotland’s climate change commitments, the Scottish Government could decide whether to retain domestic legislation implementing EU directives in this area. It could also decide whether to voluntarily adopt legislation to implement existing EU environmental regulations in Scotland. This would mean that the Scottish Government could choose to shadow EU policy-making and coordination in this field. It might also result in further policy and regulatory divergence between Scotland and other parts of the UK if different approaches were taken in those jurisdictions. Currently, many EU directives are transposed by virtually identical legislation in the constituent parts of the UK in order to ensure consistency, a practise that might change in devolved policy areas if the UK was to leave the EU.

The Committee heard that the process of the UK leaving the EU would raise the question of whether devolution legislation would need to be amended to take account of the UK’s departure from the EU. It also heard that a modification of the powers of the Scottish Parliament would require its legislative consent. The question of whether the legislative consent of the Scottish Parliament would be sought, and whether that consent would be given is a political one and could have significant constitutional implications.

In the event of the UK leaving the EU, and the repeal of the European Communities Act 1972, the Committee notes that the Scottish Parliament’s legislative competence, and the Scottish Government’s executive and policy competence, will be extended as they will be able to legislate in fields where the European Union had previously had competence.

Implications for key sectors in Scotland of leaving the EU

135. The implications for key sectors of leaving the UK were discussed in a roundtable evidence session in December 2015. There was a consensus among those giving evidence that without more information on what the alternative to EU membership would be, it would be hard to make any definitive comments on the implications for Scottish organisations of leaving the EU.
136. Owen Kelly of Scottish Financial Enterprise indicated that it was difficult to respond to the question of the impact of the UK leaving the EU on the financial services sector because “we do not know what the terms of the relationship between the UK, if it votes to leave, and the EU would be.” However he also added it was “important to focus on what we can know rather than making assumptions about what might or might not be negotiated.” He explained that, for the financial services sector, it was “currently very difficult to generalise about what companies might or might not do in response to a vote to leave the EU” as it would largely depend on the location of their customers—

It will all depend on where their customers are. Some of our member companies have all of their customers outside the UK. Big issues for them would include how it might be to operate outside the EU while still trying to serve customers within the EU. We know that those who wish to provide, say, insurance in the large EU market would need to do something to ensure that they complied with EU regulatory requirements.

137. The issue of funding was a key focus of the discussion on the implications of leaving among stakeholders. As discussed earlier, if the UK left the EU, there would be a need to provide alternative funding in areas where EU funding had previously played an important role. The NFUS raised this point in relation to the agricultural sector, observing that as nearly 40 per cent of the EU budget is allocated to CAP, “leaving the EU would have pretty serious implications for our industry” and that “absolutely nothing has been said about how, if we exited Europe, that money would be replaced.” The NFUS indicated that—

In 2014, £560 million in support payments for agriculture came into Scotland, and although the money is directed at agriculture, it delivers benefits a long way down the chain. Each pound that is spent through CAP is roughly equivalent to £4 going into the rural economy, because of the way in which it cascades down through the various businesses that in turn keep other businesses in the area going.

138. SCVO referred to the importance of the European Structural and Investment Funds in Scotland for third sector organisations. SCVO stated that, “Less and less money has been coming to the third sector in Scotland through structural funds but there is no guarantee that if we left the EU, that money would come back to the third sector.”

139. Universities Scotland echoed the point made by others about the implications of leaving depending on the alternative. As noted earlier in this report, Scottish universities have been very successfully in securing EU finding for research and innovation. Universities Scotland also emphasised that “there is an awful lot in what we currently get out of the European Union, and it would present a substantial risk if we lost that.” Universities Scotland stressed that the free movement of talent was particularly important to universities as internationally connected organisations. Furthermore, cross-border research, funded by the
Horizon 2020 programme and the Marie Curie initiatives, had helped “researchers to cross borders and develop their research careers”. In addition, he explained that “being within the European Union provides us with the capacity to ensure that that intellectual property is protected across the whole EU when it is generated and patented.”

140. The IET emphasised “the uncertainty and disruption” that he thought would result for the engineering and technology sector if the UK were not in the EU. The IET also questioned whether UK firms would wish “to stay in the UK if it were outside the EU?”

141. The Scottish Chamber of Commerce (SCC) told the Committee about some of the findings from research that it had conducted with its members in August 2015. SCC explained that—

When we drilled down into the figures and looked at the potential benefits and threats from an exit from the EU, we found that a large number of businesses thought that they would not be affected either way, but, when the threats and benefits were identified, the threats substantially outweighed the perceived benefits. Principal among the benefits was trading, so businesses that export or import—approximately one third of all the businesses that we surveyed—told us that they perceived that coming out of the EU would have negative impacts on their export or import strategy. About 40 per cent of businesses also told us that there would be threats to their overall growth strategy.

142. SCC concluded that the evidence collected by the survey had shown that there was “certainly a wide range of perceived threats, including, but not restricted to, threats to the single European market, to which we export almost £13 billion of goods and services each year.” SCC considered that as there was no indication concerning the eventual outcome of the referendum “we ought to take those threats seriously.”

143. The ability to recruit employees was also raised as a potential difficulty by SCC and IET. SCC told that Committee that more than one in five businesses had indicated that an exit from the EU “would mean a threat to their recruitment strategy.” IET said that the “importance of labour mobility in the European Union” could not be underestimated due to the number of engineers from various EU countries working in Scotland.

144. At the time when the Committee heard from key stakeholders, in December 2015, some explained that that they had not yet fully considered the EU referendum and the impact that it would have on their sectors. For example, SCVO told the Committee that, “The third sector in Scotland does not really know what all the implications of a vote to leave are” explaining that it was “in the initial stages of conversations with people in the sector to raise awareness of the debate and to get people to think about the issue.” Similarly, Scottish
Environment Link said that its “approach should be ready for spring or early summer” 2016.\textsuperscript{138}

145. However, SCVO did emphasise the wider collective importance of the EU. It explained—

For civil society, the European Union is much more than a peace project or a free trade area. Civil society has a fundamental desire for collaboration and there are benefits from closer collaboration with civil society across Europe. Our broad interests in social issues, containing market forces and stronger welfare policies make us politically and ideologically compatible. … We have a strong desire to collaborate and to understand and to try to come up with solutions to the issues faced by human beings—the people in our communities and society. The EU is a much greater entity than just a free trade area.\textsuperscript{139}

146. SCVO also stressed the value that it attributed to the opportunities that it had to “input into policy areas around employability, the environment, poverty, gender equality and human rights” at the EU level, commenting that if the UK left the EU then there would—

…be no guarantee that we would have the same participation, the same voice or the same influence. We certainly would not have the same collective collaboration and understanding.\textsuperscript{140}

147. Scottish Financial Enterprise raised the question of the UK’s international position in regard to trade if it left the EU, asking “if we believe that it is a good idea to have a trusted and respected world trade framework, being part of a very large trading bloc such as the EU makes us one of the big players; outside the EU, who knows?”\textsuperscript{141}

148. The NFUS was the only organisation to comment specifically on the process for leaving and the implications of the process whereby decisions would be taken among the remaining Member States. The NFUS referred to the process for leaving the EU and expressed a concern about the extent to which the UK would be involved in the negotiations—

I do not think that we would be allowed to even discuss how we exit. We would be thrown out, and decisions would be made without us. There would be no guarantees about what tariffs we would face when trading with the EU, which, as I said, accounts for 73 per cent of the UK’s export market. There are also implications for other countries exporting to the UK and Scotland. We would lose the strength that we have gained through using Europe as a negotiating body. We would be a poorer and weaker negotiator, and that would result in other products coming in that would make our market even more difficult.\textsuperscript{142}
The Committee notes that a number of key organisations in Scotland felt unable to identify what the implications of leaving the EU would be due to the lack of clarity on what the alternative would be to EU membership. It also recognises that some organisations are in the process of reaching a position on EU membership. However, the evidence that the Committee heard did demonstrate concern with the implications of leaving the EU for a range of sectors across Scotland.

Alternatives to EU Membership

149. The process for leaving the EU set out in Article 50 foresees that the future relationship of the departing state with the EU be agreed as part of the withdrawal agreement. However, the UK Government’s position is that it is campaigning to remain in the EU and it does not therefore contemplate any scenarios which involve the UK leaving the EU. Although those supporting the “Leave” campaign have referred to a number of alternatives, none of them has settled on one specific alternative for the UK in the event of a vote to leave the EU. Thus, the Committee considers that it is possible that the electorate will go to the polling station on 23 June without knowing exactly what “leave” would mean for the UK’s future relationship with the EU, as well as its other transnational and international relationships.

150. The Committee agreed to explore the alternatives to EU membership as a key element of its inquiry in order to consider how other European countries, which were not part of the EU, had developed relationships with the EU and how these relationships functioned. The Committee’s adviser for this strand of the inquiry – Professor Michael Keating – provided the Committee with a briefing in which he set out and discussed the potential alternatives to EU membership. This briefing is included in Annexe D.

A future relationship with the European Union

151. As discussed earlier in this report, Article 50 TEU provides for the departing State to agree a withdrawal agreement which takes account “of the framework for its future relationship with the Union”. In evidence to the Committee, Michael Clancy of the Law Society of Scotland suggested that in this provision there was an “anticipation that there is going to be some kind of relationship with the EU.” Within the European continent, the majority of countries are members of the EU, have agreements with the EU which link them closely to the EU, or have sought to initiate the process of joining the EU. If the UK were to vote to leave the EU, one of the first questions that the UK government would need to consider would be its future relationship with the EU.

152. Professor Keating, in his briefing for the Committee, noted that, “Few of the protagonists in the debate favour isolation or protectionism and there is broad
support for free trade. At the core of the EU is the single market, which provides a significant free trade area for the members of the EU and the EEA. The single market was developed to remove tariffs and barriers to trade and has been underpinned by EU legislation establishing common regulatory standards. The four freedoms of the single market allow for the free movement of goods, services, capital and labour within the EU, effectively making the EU a free trade market of 500 million people.

153. While the UK has sought opt-outs from a number of EU initiatives, and crucially has remained outside the Eurozone, the UK has been credited as a key driver behind the establishment and development of the single market. In evidence to Committee, Dáithí O’Ceallaigh - Chair of the UK Project Group, Institute of International and European Affairs and former Irish Ambassador to the UK – described the single market as “largely a British invention”. Moreover, the ongoing development of the single market in relation to services offers significant opportunities for many UK companies. However, the free movement of labour is one of the four freedoms, and the level of EU immigration into the UK has featured heavily in the debate on the UK’s continuing membership of the EU.

154. Where the EU legislates, it has legal supremacy over domestic law in the Member States. In the UK, much of the political debate on EU membership has focused on the issue of sovereignty, which is articulated primarily in concerns about the degree to which the UK’s membership of the EU restricts the sovereignty of the UK Parliament, either to legislate in fields where the EU has competence or to overturn EU legislation with which it does not agree. However, access to the single market is contingent on accepting the acquis communautaire (the body of law which underpins the single market) and this raises a question about the extent to which a continuing relationship with the EU would be acceptable to those who wish to leave the EU, as it would reduce the UK’s influence in shaping and agreeing EU legislation.

155. In addition, there are two other areas related to EU membership that would still be a factor in any future relationship with the EU that provides access to the single market. The first factor is the flanking measures that support the single market. It is the EU’s legislation in some of these areas that critics of the EU perceive as being particularly intrusive in policy terms. The second factor is the cost of EU membership which features heavily in discussions on the value of EU membership for the UK. As the evidence shows, the non-EU countries which access the single market also make significant contributions to economic and social cohesion within the EU.

156. Thus, weighing up the benefits and constraints deriving from access to the single market is likely to be crucial in determining any decisions on the UK’s future relationship with the EU, should there be a vote to leave the EU. As the Committee heard in evidence, access to the single market would not alleviate
the perennial concerns relating to a loss of sovereignty, the need to adopt EU legislation, or the cost of membership.

157. Professor Keating outlined two potential alternatives to EU membership—

- The first entails the end of any privileged partnership with the EU and the insertion of the UK as an independent actor in the global trading order (going it alone);
- The second seeks to retain the present trading arrangement based on the European single market but without the political framework, infringements on national sovereignty or the non-trading aspects of the EU.\(^{146}\)

158. The following sections of this report explore these potential alternatives to EU membership, looking first at the going it alone option, before examining the second option in more detail with specific reference to the Norwegian and Swiss cases.

**Going it Alone**

159. In his briefing, Professor Keating set out the options for the UK in “going it alone”. He explained that some of those advocating withdrawal from the EU had suggested that the UK could seek to trade under the WTO rules. This would allow the UK to focus on countries with growing economic strength, as opposed to the EU which is perceived by the proponents of this scenario to be declining in global economic importance. Under this scenario, it is argued that the UK would regain the sovereignty lost to the EU and would be free from EU legislation. Professor Keating explained how this scenario might function in practice—

- The WTO option would entail the end of completely free trade with the EU and the imposition of tariff and non-tariff barriers. While EU tariffs overall are rather low, in some sectors such as motor vehicles they are quite high, which is why some non-European manufacturers have invested in EU states, including the UK. There would also be no free trade in services; so financial services providers might opt to set up subsidiaries in EU countries (or even move entirely) in order to remain in the single market. The UK would also face non-tariff barriers, such as European product standards.\(^{147}\)

160. In addition, Professor Keating observed that as WTO rules are negotiated in regular rounds, often dominated by the major trading powers – including the EU – then it was not clear whether the UK on its own “would have weight in these negotiations and so be able to press its free-trading priorities.”\(^{148}\)

161. Alternatively, the UK could develop bilateral free trade agreements with other countries, but Professor Keating suggested that “the UK would be in a weaker position to negotiate agreements and it is likely that third countries would prefer just to extend their agreements with the EU to the United Kingdom.”\(^{149}\)
Furthermore, as noted earlier in this report, the EU has in excess of 50 trade agreements with third parties and considerable time would be required to negotiate bilateral treaties with so many other countries.

A Free Trade Agreement with the EU

162. Professor Keating identified a further alternative for the UK, which would be to sign a free trade agreement with the EU allowing free access to European markets, similar to the agreement that the EU has with Turkey. However, while this agreement provides for a customs union and free trade in goods, it does not cover agriculture, services or free movement of labour. Nor would such an agreement remove non-tariff barriers to trade, so the UK would still be subject to the EU’s public procurement rules and regulatory standards.

163. The importance of the EU as a market for UK goods has been highlighted earlier in this report, but the UK is also an important market for other EU countries. Thus, there would be an incentive for the EU Member States to collectively or individually reach agreements with the UK in order to facilitate trade. However, a core principle underpinning the single market is fair and equal competition and any agreement reached by the EU with the UK in relation to trade would not be acceptable to the Member States if it undermined this principle. For this reason, Professor Keating argued that “it is likely that they would insist on the social and environmental regulations that currently exist”, or might insist on an agreement like the one with the EEA.\textsuperscript{150}

164. A free trade agreement with the EU would not provide full access to the single market, which the Committee had heard would be crucial to a number of key sectors in Scotland. Thus, if there was a vote to leave the EU, the UK Government might find that UK businesses articulated a strong demand for access to the single market.

The Committee considers that any alternative to EU membership that would involve the UK “going it alone” would be deleterious to the UK’s economy and its place in the world. The Committee believes that the geographical proximity of the EU and the importance of the single market to the UK economy is such that an alternative in the form of operating under World Trade Organization rules or with a free trade agreement with the EU would not provide sufficient access to the single market. The Committee is strongly of the view that access to the single market and the ability to trade with other countries under the terms of the EU’s trade agreements are crucial to the Scottish economy, as well as that of the rest of the UK. The Committee therefore explored the two alternatives for a closer relationship with the European Union by examining Norway and Switzerland’s relationship with the European Union in more detail.
The Norwegian and Swiss alternatives

165. Norway is the largest member of the European Free Trade Association (EFTA) and the European Economic Area (EEA), and Switzerland is a member of EFTA and has a series of bilateral agreements with the EU.

166. EFTA was established in 1960 by the “outer seven” European countries (as opposed to the “inner six” in the EEC), which wished to benefit from a trading bloc, but which were either unable or unwilling to join the EEC. The UK shortly afterwards decided to seek membership of the EEC, but was twice blocked in 1963 and 1967. The UK eventually joined the EEC at the same time as Ireland and Denmark in 1973. Some of the other EFTA states also sought membership of the EEC and EFTA became less viable as a trading bloc. Thus, in 1994, an agreement establishing the EEA as a free trade area came into force between all of the then EFTA states – with the exception of Switzerland, which voted against membership in a referendum – and the EU member states. As a number of EFTA states left EFTA and became members of the EU, the current EEA EFTA states are now Norway, Iceland, and Lichtenstein.

167. The EEA is a free trade area composed of the three EEA EFTA states and the 28 EU Member States covering the four freedoms of the single market and the “flanking policies” such as social policy, consumer protection, and environment policy. As Professor Keating identified, the EEA Agreement excludes “external relations, agriculture, fisheries, transport, regular budget contributions, regional policy and monetary policy.” The EEA EFTA states do, however, make a financial contribution to economic and social cohesion in the EEA.

Reasons for remaining outside the EU

168. Although Norway has twice completed the accession process for joining the EU, Norwegians voted against membership in 1972 (53.5 per cent against) and 1994 (52.25 per cent against). Norwegian scepticism in relation to EU membership has been consistently strong for decades, predating recent crises in the EU. In the current political context, support for EU membership has further declined in Norway. Niels Engelschion - Deputy Director General, Department for European Affairs, Ministry of Foreign Affairs, Oslo - indicated that currently “perhaps around 20 per cent of the Norwegian population are in favour of Norway becoming a member of the EU.” He acknowledged that “people do not wake up in the morning thinking that the EEA agreement is fantastic, but it works for us” and that it represented “a compromise that is acceptable to most people.”

169. Niels Engelschion, set out the reasons why Norway had voted against membership in 1972 and 1994. He explained that the three main reasons were “the situation in the agriculture sector, fisheries management and the sovereignty principle.” He then argued that the EEA agreement had worked “as a political compromise for about 22 years now and is the backbone of our relations with the European Union.” He further stressed the broad political
support for the EEA agreement, arguing that “It is important to note that every Government and Parliament in question has based its European policy on the EEA agreement as the main agreement in its relations with the European Union.”

170. The key rationale for Norway’s relationship with the EU was presented as an economic one, with Norway described as being “fully integrated with the internal market” and 80 per cent of Norway’s of its imports and exports being with the EU. Niels Engelschøien concluded that “there is no option for not co-operating strongly with it”, and summed up Norway’s position on the EEA agreement in the following terms—

We believe that our EEA agreement effectively ensures equal treatment and predictability for operators and gives us a certain degree of participation in EU processes. It ensures full access to the internal market, with the exception of fisheries and agriculture, and it means that the same rules and regulations apply in Norway as in Scotland, Portugal or any other EU state.

171. Switzerland submitted an application for accession to the EEC in May 1992. However, after a referendum held in December 1992 rejected EEA membership by 50.3 per cent to 49.7 per cent the Swiss government suspended negotiations for EU membership. Professor Dr Andreas Auer LL.M. - Emeritus Professor, Universities of Zurich and Geneva - explained that—

One of the reasons why Switzerland said no to the EEA in 1992 was our direct democracy system. People got the impression that, if we transferred powers that belong to the Swiss Parliament and the people to the quasi-union, people’s right to participate in government would be reduced and that would be a danger for Swiss direct democracy. Legally speaking, that is not a sound argument, but it was quite efficient politically at the time. The Swiss people have never been asked to join the European Union because the Government has never had the courage to ask the question—perhaps because it knows the answer.”

172. Professor Auer explained that the result of the referendum on joining the EEA had been a “shock” as the EEA had, in part, been developed as a compromise for Switzerland and the other EFTA states. Switzerland was therefore in a new situation and had to start the complex process of negotiating bilateral agreements with the EU and its Member States. He set out how the bilateral treaties, which are made up of more than 120 sectoral agreements with the EU, were concluded in two waves, the first in 2000 and the second in 2004. He stated that, “Legally speaking, they are among the most complicated treaties that you can imagine.”

173. The two sets of bilateral agreements largely incorporate the same provisions as those adopted by the EEA countries. They cover free trade in goods, but not services or agriculture. They are also less extensive than the EEA in the
“flanking policies” and do not include a requirement in relation to economic and social cohesion. Professor Auer commented that, “I would never consider the Swiss situation as being a solution for anyone—not even for Switzerland, which is currently in a very difficult position.” However, he did recognise that since the agreements had been reached, Switzerland had experienced a significant increase in its gross national product. He also highlighted the centrality of economic reasons for Switzerland’s relationship with the EU, stating—

...our economic system is densely integrated with the single market. Some 55 per cent of Swiss exports go to and 75 per cent of imports come from EU countries. Switzerland has been very strongly integrated since 1972, when the first free trade agreement on industrial products was signed between the European Community and Switzerland. That is the basis of our integration with the EU economy.\(^\text{160}\)

The Committee considers that both Norway and Switzerland, for different reasons, have developed a relationship with the EU that is the result of a series of compromises over a period of time. Both countries have recognised the economic importance of access to the single market and have accepted complex arrangements that allow them to access that market without being full members of the EU. The Committee does not believe that either of these solutions, if they were available to the UK, would represent a viable or desirable alternative to the status quo of EU membership.

Sovereignty

174. As discussed earlier, one of the key arguments presented by those in the UK who wish to leave the EU is a desire to repatriate sovereignty to the UK, which is articulated as the powers of the UK Parliament to make laws in all policy areas or to be able to reject EU legislation. This sovereignty argument was highlighted by the Prime Minister in his letter to the President of the European Council, Donald Tusk, when he stated, “As you know, questions of sovereignty have been central to the debate about the European Union in Britain for many years.”\(^\text{161}\) The Committee therefore explored the extent to which Norway and Switzerland adopted EU legislation and the opportunities that they had to influence that legislation.

175. Norway can participate in the single market on the condition that it applies the *acquis communautaire* in relation to the four freedoms – the free movement of goods, services, capital and labour – and in relation to a number of the “flanking policies” such as social policy, environmental policy and consumer protection. Niels Engelschion explained to the Committee that in the EEA, “the EFTA countries take in all legislation that is relevant to the internal market, which means everything under the free movement of persons, goods, capital and
services, as well as public procurement and state aid." This includes “all the regulations and directives that are linked to the internal market function—except those that relate to agriculture and fisheries.”

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176. There is some provision for consultation with the EEA on the elaboration of legislative proposals, but EEA countries are not involved in the decision-making in Council configurations. Niels Engelschïøn acknowledged this in evidence, explaining that legislation was adopted “through a particular procedure that is often talked about in relation to the democratic deficit.”

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He set out the key elements of the process—

As an EEA-EFTA country, we are allowed to participate with experts when the decisions are shaped and the proposals are made in the European Commission. As you know, the Commission is the only institution with the right of initiative. In that phase, until the proposal is tabled to the member states and the European Parliament, we can take part in the same way as any other EU country, as experts in working groups and so on.

However, the day that the proposal goes from the Commission as a formal proposal to the member states and Parliament, we are formally out of that process. It is processed within the institutions, in Parliament and in negotiations with the member states and so on, and then it comes out the other end.

That is when it goes into the EEA system again. We then have a look at the final text, assess it and consider whether we should take it into our legislation. We have said yes every time. We have some issues when we are not in agreement with the EU, which might be to do with relevance, for instance. Is the legislation relevant to the EEA internal market or not? We have a few issues such as that, but mainly we agree to what comes out of the process and we take it into our own legislation. Sometimes that will not happen until some time afterwards, but the main bulk of EU legislation goes into Norwegian legislation.

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177. Neils Engelschïøn argued that while Norway did not participate in the formal decision-making in the EU, “most of the legislation is unproblematic” and indicated that “sometimes it is better than what we already have or it may be something that we do not have.”

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178. As Professor Keating noted in his briefing, there are fewer opportunities for the Swiss to influence the development of EU legislation or policies than the EEA countries. However, Switzerland is not obliged to implement future EU decisions and there is no mechanism for adapting the bilateral agreements to evolving EU legislation.

179. Owen Kelly of Scottish Financial Enterprise referred to the need for Switzerland to implement EU legislation in his evidence to the Committee. He stated that—
We have learned from our counterparts in Switzerland that, in our industry—and I suspect that others will be in the same boat—although some people might think that leaving the EU means that we can think less about it, the opposite is the case. Switzerland has to spend an awful lot of time tracking every single piece of EU legislation because it wants to be part of the single market. The idea that we can step away from the EU and that we will not have to worry about it so much is completely wrong.  

180. Professor Drew Scott referred to the use of the term “regulation without representation” to refer to the process by which EU legislation is adopted by the EEA. He indicated that if the UK sought EEA EFTA membership as an alternative to EU membership, that it “would have no role in enacting EU laws and policies that impact on Scotland’s economic (and, increasingly, societal) interests and would be unable to reflect these interests in any effective manner during the EU legislative and policy-making process.”  

181. There is some evidence of mounting frustration within the EU level with the raft of bilateral agreements between the EU and Switzerland, particularly in comparison to the overarching framework that the EEA provides. In December 2014, the EU General Affairs Council concluded that—  

A precondition for further developing a bilateral approach remains the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the EU’s internal market, in order to ensure homogeneity and legal certainty in the internal market. The Council welcomes the opening of negotiations on such a framework in May 2014, expects further efforts in order to progress with these negotiations and reiterates that without such a framework no further agreements on Swiss participation in the internal market will be concluded.  

182. In February 2014, a slim majority (50.3 per cent) of the Swiss population voted in favour of amending the constitution to introduce annual quotas on the number of non-Swiss nationals. This triggered the EU to suspend other agreements (under the “guillotine” clause) in relation to Horizon 2020 and the Erasmus programme and discussions around the framework have stalled.  

183. Dáithí O’Ceallaigh commented on the issue of sovereignty and membership of the EU, explaining that from an Irish perspective, his country’s sovereignty had in fact increased as a result of Ireland’s membership of the EU. He explained that—  

Sovereignty is tied up with the notion of whether we can look after our own affairs and resolve our own problems. I strongly believe that the independence of my state has been increased rather than reduced by the fact that we have engaged with Brussels. We have been able to look after and advance our interests by being at the table in Brussels. The problem with the Norwegian and Swiss solutions—and even more so with the Turkish
solution—is that they are not at the table where decisions are made about the regulations under which they have to operate. Given the experience on my own island, I firmly believe that we are less sovereign but more independent than we were 40 years ago.169

The Committee believes that the Norwegian and Swiss options do not provide sufficient opportunity for shaping or influencing EU decisions. Instead, Norway and Switzerland have an obligation to accept EU legislation as the quid pro quo for being able to access the single market. The Committee considers that the opportunities provided by EU membership to influence the development of EU policy, and vote on EU legislation should not be abandoned in favour of a situation whereby no influence or power can be exercised to represent the interests of the UK in the EU.

Freedom of movement

184. One of the key areas in which the Prime Minister has sought EU reform relates to immigration from other Member States under the freedom of movement provisions. In his letter to Donald Tusk, he referred to the scale and speed of immigration to the UK and the pressures that it has brought on the country.170

185. Both Norway and Switzerland have to accept free movement of persons as one of the four freedoms of the single market. Norway and Switzerland also signed up to the Schengen Agreement which allows passport-free movement between 26 European countries. For this reason, both the Norwegian and Swiss witnesses giving evidence to the Committee perceived their countries as being more integrated than the UK.

186. Neils Engelschiøn told the Committee that freedom of movement had benefited Norway. He explained that Norway was “totally dependent on foreign workers in a lot of sectors, such as services and construction” and that main groups of economic immigrants - Poles, Swedes and Lithuanians – had “largely contributed to Norway’s economy over the years.”171 Knut Hermansen - Minister Counsellor, Norwegian Mission to the EU - also emphasised the “positive effect” that had resulted from freedom of movement provisions for Norwegians as they could go to other EEA countries to work or study.172

187. Switzerland has a separate bilateral agreement dating from 2004 on free movement. Professor Auer indicated that “the proportion of the Swiss population that is made up of foreign people is very strong” and that the annual immigration figures showed that close to 80,000 people, mainly from the EU, had moved into and were working in Switzerland in 2014. Professor Auer stated that “The Swiss economy is quite successful and totally dependent on foreign workers in many fields, such as construction, health and other services.”173
188. Professor Auer explained the consequences of the referendum on migration in 2014 —

...put into our constitution a number of provisions that are incompatible with the agreement on the free movement of persons and which are now open to implementation and discussion. So that constitutional provision exists, but it must be implemented by a statute; according to the constitution, if the Parliament is unable to do that, the Government has to implement it by decree within three years. That is a huge problem.174

189. The EU rejected the Swiss Federation’s request to renegotiate the bilateral agreement on freedom of movement, categorically stating that it considered “that the free movement of persons is a fundamental pillar of EU policy and that the internal market and its four freedoms are indivisible.” Switzerland was also suspended from the Horizon 2020 programme.

The evidence heard by the Committee testified to the high levels of immigration experienced by Norway, but more particularly by Switzerland, which showed that the UK is in no ways unique in its experience of immigration. However, the Committee noted the comments of both the Norwegian and Swiss witnesses in relation to how important immigrants had been in key sectors of their economies. The evidence on the Swiss request to renegotiate its bilateral agreement on the freedom of movement demonstrated how central this pillar of EU policy is, and that access to the single market also requires acceptance of freedom of movement.

Financial contributions

190. The cost of EU membership features prominently in the debate on UK membership of the EU. Niels Engelschion told the Committee that Norway did “not pay a fee for participating in the internal market” but that it did contribute to social and economic cohesion. He indicated that for the next seven-year budgetary period, Norway would contribute a total of €2.8 billion which would be directed towards the 15 countries with the lowest economic GDP in the EU. In addition, Norway pays for participation in programmes, the most significant one being the Horizon 2020 research programme. Niels Engelschion explained that Norway was “not legally obliged to pay for economic and social cohesion, but a political obligation is quite present.” He estimated that the cost of the contribution to cohesion was “about €75 per capita” which puts Norway at “the higher end of the European Union members” for per capita contributions to the EU budget.175 According to the House of Commons Library, the UK’s per capita net contribution was €110 in 2014.176
191. Professor Auer explained that for Switzerland there was “no general fee for participation in the single market and all the treaty agreements that we have concluded” but that Switzerland did pay to participate in a range of projects such as research framework programmes and Galileo.\textsuperscript{177} There is also a contribution for air transport of about 10 million Swiss francs, and a contribution to Frontex and the IT programmes within that. Switzerland also contributes to social and economic cohesion, and following the 2004 enlargement of the EU, Switzerland “agreed to pay 1.6 billion Swiss francs towards the cohesion principle.”\textsuperscript{178}

It is clear that Norway and Switzerland both make substantial contributions to the EU budget in return for access to the single market, even if they are not legally obliged to, and it is channelled as contributions to economic and social cohesion and key EU programmes. In particular, the Norwegian per capita contribution, of about €75, places Norway among the higher per capita contributors to the EU. Given that the UK has been successful in negotiating successive “rebates” in the form of abatements from the EU budget, and that its current per capita net contribution is around €110, it is questionable whether the UK would contribute significantly less to the EU budget if it left the EU and instead secured a relationship with the EU that allowed it to access the EU single market.

The Norwegian and Swiss options – an alternative for the UK?

192. Some have proposed that the UK might be able to seek an alternative relationship with the EU either based on the Norwegian or the Swiss model. The Committee questioned whether either of these options might be viable for the UK. Professor Auer indicated that he considered that “the bilateral treaty solution would be unacceptable” and that it had also “come to an end in Switzerland, in a way.”\textsuperscript{179} He explained that—

\begin{itemize}
  \item The EU has now told Switzerland that the treaty solution is no longer workable, that we need a framework agreement and that we should agree to automatically adapt and accept the development of the acquis communautaire. Of course, that is a huge sovereignty issue in Switzerland, especially with regard to the question of who will have the final word. What court is going to decide whether Switzerland must obey the new acquis communautaire? The Government has proposed that it could be the European Court of Justice. Legally speaking, that is probably the only court that could solve all those problems. However, that would raise sovereignty issues, and the idea of involving foreign judges is a red flag in the Swiss political system.\textsuperscript{180}
\end{itemize}
193. Knut Hermansen explained the steps that the UK would need to follow if it wished to join the EEA, including—

- negotiation with the other members of EFTA to become a member of EFTA;
- deciding whether to apply for EEA membership;
- negotiation with all of the EEA contracting parties, “including the three EEA EFTA states and the EU side with its member states.”
- accepting “the four freedoms that are the backbone of the EEA agreement”; and
- negotiations on financial contributions to social and economic cohesion within the EEA.\(^{181}\)

194. Knut Hermansen commented that—

> Of course, it will be a challenge for the UK to take the acquis communautaire on the EFTA pillar of EEA co-operation, and the common agricultural policy and the common fisheries policy will not apply because they are not part of the EEA. The procedure is set up, and there will be negotiations. I would say that there will be some difficult negotiations.\(^{182}\)

195. Knut Hermansen also suggested that the UK joining would change the power structure within the EFTA pillar of the EEA and that it might inhibit the possibility of finding pragmatic solutions—

> The EEA has proved to be a solid platform for co-operation between Norway and the EU because of its flexibility. We have a pragmatic approach that allows us to solve problems. Because Norway, Iceland and Liechtenstein are small countries, our interests do not have such a great impact on the EU internal market. However, if the UK decided to join the EEA on the EFTA side, the EU would be more interested. With such a large country coming in, it is more likely that there would be conflicting interests, so it might in the future be more difficult to find pragmatic solutions.\(^{183}\)

196. Professor Drew Scott questioned both the suitability of the Norwegian and Swiss options for the UK, and whether such a solution would be acceptable to the EU. He stated that—

> … the EEA (as well as the EU’s bilateral agreements with Switzerland) is an arrangement designed for a few relatively small European states outside the EU. There is no obligation on the EU to agree to the UK’s membership of that arrangement. Indeed the EU may instead adopt a “hard exit” strategy in Brexit negotiations fearful of setting what may be perceived among other member states as a precedent for an “easy option” form of EU affiliation.\(^{184}\)

197. Dáithí O’Ceallaigh referred to the work conducted by the UK Project Group at the Institute of International and European Affairs, commenting that they had examined “what might happen should the UK exit by considering the Norwegian solution, the Swiss solution and the Turkish solution, and we felt that none of
those provided answers to the UK Government’s questions about its position within the EU.”

198. Dáithí O’Ceallaigh further commented that in relation to Norway and Switzerland that “most of the regulations under which they operate are made elsewhere.” From the UK perspective, this would not change if the UK left the EU as “regulations will not be made in London; they will be made in Brussels.” He therefore concluded that—

> It seems to me that the question is really this: does the UK wish to be at the table when the regulations are being made or does it just want to pay for them and operate them after they have been made? That is a little simplistic, but it is the reality.

The Committee concludes that neither the Norwegian nor the Swiss option would resolve the problems that are currently identified as resulting from EU membership. The same issues – sovereignty, freedom of movement and the financial contribution to the EU budget – would remain if the UK sought a relationship with the EU that allowed it access to the single market. Furthermore, the UK would lose the ability to influence EU policy-making and be involved in EU decision-making. Thus, the Committee cannot see how leaving the EU, but retaining a relationship that would allow access to the single market, could increase the UK’s power or influence. Instead, it would banish the UK to the fringes where it would be obliged to accept continual compromises as the price for access to the single market.

EU reform

199. Following the announcement in the Queen’s speech in May 2015 that a referendum would be held on the UK’s membership of the EU, negotiations were initiated with the EU in relation to reforms for the UK. Initial discussions were held at the European Council meetings in June and October. Then, in November 2015, the Prime Minister wrote a letter to Donald Tusk, the President of the European Council, setting out the key areas in which the UK wished to seek reform. An initial discussion was held at the December European Council meeting on the key areas for reform identified by the Prime Minister. In addition, the Prime Minister held a series of bilateral meetings with EU leaders in the period between June 2015 and the European Council meeting in February 2016.

200. On 2 February 2016, Donald Tusk wrote to members of the European Council presenting “a proposal for a new settlement of the United Kingdom within the European Union.” Following protracted discussions at the European Council
meeting on 18-19 February 2016, the proposal for a new settlement for the United Kingdom within the European Union was agreed.

The legal status of the settlement

201. In his letter to Donald Tusk, the Prime Minister referred to the need for a legally binding and irreversible agreement which would provide for a lasting settlement for the UK’s membership of the EU. The European Council Conclusions state that the Decision provides “legal guarantees that the matters of concern to the United Kingdom” that were set out in the Prime Minister’s letter have been addressed. The Conclusions also state that the Decision is fully compatible with the Treaties, is legally binding and will take effect if the UK votes to remain in the EU in the referendum.

202. The settlement consists of a number of different texts, the principal one being a Decision of the Heads of State or Government, meeting within the European Council (the Decision). The Decision will have the status of an instrument of international law, and will come into force if the UK votes to remain in the EU and notifies the Secretary General of the European Council to this effect. There are two precedents for this type of agreement: the agreement at the European Council in Edinburgh relating to “problems raised by Denmark on the Treaty on European Union” and the 2009 Decision on the “concerns of the Irish people on the Treaty on European Union.”

203. The Council’s Legal Service prepared an opinion on the Decision which indicated that it would not constitute a definitive decision to change the Treaties, but rather an agreement to change “the substance” of the Treaties at some point in the future. At that point the precise wording would be negotiated by the Member States as part of the wider negotiations on the Treaties.

204. In addition to the Decision, there are a series of other documents that provide more detail on the agreement and give effect to it in the form of draft European legislation which will be adopted if the UK votes to remain in the EU. The settlement includes provisions in four key areas—

- Economic governance
- Competitiveness
- Sovereignty
- Social benefits and free movement

205. The settlement was agreed shortly before the Committee needed to conclude its inquiry in order to be able to report before the dissolution of the Scottish Parliament in advance of the Scottish Parliament elections. The Committee therefore was only able to take evidence from witnesses at one meeting.

206. The Committee explored the significance of the settlement with witnesses in evidence. There was a broad consensus that the provisions secured by the UK
in the settlement were rather limited. Professor Michael Keating argued that, “In a narrow sense, nothing very much has changed, because the concessions that were made to the UK were fairly minor and are not going to affect, say, migration flows.” Dr Kirsty Hughes said that “some parts of it are fairly insignificant and irrelevant, as a whole.” Professor John Curtice described the negotiations as being “primarily about symbolic politics, not about substantive politics.”

207. Dr Fabian Zuleeg referred to the negotiation process being a unilateral process focused on the UK, rather than one aimed at long-term reform for the whole Union—

We have to recognise that the process that we are talking about is not the way to change policies at EU level, to influence the system and to have the possibility of creating long-term reform. It is a unilateral process that is focused on one member state. If we want true EU reform, we need a process that must not only involve the 28 member states but all of the institutions fully. That is a long-term process, because it is about deciding on a common vision for where the European Union should go. All of that is not possible in the current timeframe and process.

208. Although the witnesses did not consider that the individual reforms were significant, they did express reservations about the implications of the settlement for the UK’s future relationship with the EU. Professor Keating stated that—

... the whole debate and the framing of the referendum itself are very significant, because they effectively represent the UK’s disengagement from the continuing European project. We might stay in the EU but whatever the referendum result it seems much more likely than not that the UK will opt out of future moves towards further integration. Although rather symbolic, the provision on not being bound to “ever closer union” is a recognition by the other member states that in future a UK opt-out could become the norm rather than the exception.

209. Dr Hughes described the agreement as being one of “never-closer union”, and argued that it represented a significant change for the UK in its relationship with the EU. She explained that—

Although Britain already has major opt-outs, it managed in the past to balance having those with playing an influential and occasionally leading and strategic role in the EU—for example, in enlarging the EU eastwards after the Berlin wall came down. If we write into a treaty that the UK is not committed to further political integration, we are making an extraordinary statement and stepping back.”
210. Professor Keating suggested that the settlement might result in policy divergence within the UK in relation to the EU if Scotland supported a closer relationship with the EU than the UK Government—

"...if the UK is travelling in one direction towards a looser relationship with the European Union, Scotland might want to travel in a different direction. In that respect, the critical issues are to do with migration, possibly energy and the social dimension of the European project."

The Committee heard evidence suggesting that the reforms contained in the settlement agreed at the European Council would be limited in impact. The Committee's greater concern, however, is that the UK becomes increasingly disengaged from the EU. The Committee believes that a more positive course of action would be to engage actively within the EU with a view to influencing EU policies and decisions.

Economic Governance

211. Section A of the Decision relates to Economic Governance and covers economic and monetary union and use of the euro. It allows for a non-Eurozone member state to object to an economic governance provision if, in the Member State’s view, the proposal does not respect key principles relating to the internal market or social and territorial cohesion and therefore places non-Eurozone members at a disadvantage. In practice, non-Eurozone members will be able to object to, but not veto, a provision. This responds to the Prime Minister’s concern that future changes in the Eurozone “will respect the integrity of the Single Market and the legitimate interests of non-Euro members.”

212. The Decision also provides that in future non-Eurozone member states will not be required to participate in "emergency and crisis measures to safeguard the financial stability of the euro area". This means the United Kingdom will not be required to contribute to future bailouts for Eurozone Member States.

213. In evidence to the Committee, Professor Keating described the economic governance provisions as "highly problematic, because there is a very weak provision whereby non-euro countries will have a voice but not a vote in decisions in the Eurogroup", the informal body where the ministers of the euro area member states discuss matters relating to their shared responsibilities related to the Euro. He further explained that non-Eurozone countries counties would be allowed to—

"... voice their concerns, but the other countries will still be allowed to meet as a Eurogroup formation and take decisions that affect themselves. However, they will also affect the United Kingdom because almost anything that happens in the Eurozone has an impact in the United Kingdom. If the euro is
going to survive, that will be through a tighter monetary, regulatory and banking union. That will necessarily involve the United Kingdom, because many Eurozone banks are based in London. Therefore, whatever happens, the City of London will be partly regulated by the Eurozone, which I think will become immensely problematic. If the euro collapses, the problem will be resolved but, if the euro survives, that provision is really inadequate to resolve the question of what the relationship of the UK’s regulatory system will be to that of the Eurozone.²⁰³

Competitiveness

214. Section B of the Decision concerns competitiveness. It reiterates the EU’s desire to strengthen the internal market and “take concrete steps towards better regulation”. The section on Competitiveness is accompanied by a European Council Declaration on Competitiveness which includes a European Commission Declaration on subsidiarity implementation mechanism and a burden reduction implementation mechanism. The Commission Declaration commits to “efforts to make EU law simpler and to reduce regulatory burden for EU business operators without compromising policy objectives”.²⁰⁴

215. The European Council Declaration states that Europe must make itself more internationally competitive, particularly in the energy and digital single markets. It also expresses support for a continued effort to expand the number of EU trade agreements such as those being negotiated with the United States and Japan. The European Council Declaration commits the EU institutions and Member States—

... to strive for better regulation and to repeal the unnecessary legislation in order to enhance EU competitiveness while having due regard to the need to maintain high standards of consumer, employee, health and environmental protection. This is a key driver to deliver economic growth, foster competitiveness and job creation.²⁰⁵

216. Dr Zuleeg referred the Committee to the better regulation agenda that was already being pursued by the European Commission. He said—

In a narrow sense, the competitiveness chapter in the deal is quite thin. That reflects the agenda of the Juncker Commission, which has moved to a large extent in the direction that the UK Government wanted. The Juncker Commission’s economic reform agenda is very close to the priorities of the UK Government. There is an overlap.²⁰⁶

217. In written evidence, Professor Drew Scott also referred to the progress made under the existing reform agenda being pursued by the European Commission—

The European Commission has been pursuing a simplification and reform agenda with respect to EU legislation for many years, and has greatly
strengthened the pre-legislative impact assessment and subsidiarity procedures that are designed to ensure EU regulations are not excessively burdensome. The current REFIT programme is the latest comprehensive initiative introduced by the Commission to reduce regulatory (compliance) costs and includes the possibility of withdrawing and repealing EU regulatory proposals this approach shows to be overly burdensome.\(^{207}\)

218. Dr Hughes told the Committee that, in her view, “growth and productivity growth interact and tend to go together, so productivity growth may not be everything that we mean by competitiveness, but we need the two together if we are to move forward and be competitive globally.”\(^{208}\)

Sovereignty

219. Section C of the Decision addresses the Prime Minister’s demand for a removal of the commitment to “an ever closer union” in the Treaties. The Decision states that—

> It is recognised that the United Kingdom, in light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision”.

220. It also includes a statement explaining that, “The references in the Treaties and their preambles to the process of creating an ever closer union among the people of Europe do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation.”\(^{209}\) The Decision also recognises the opt-outs that the UK and other Member States have from areas covered by the EU Treaties, and accepts that Member States may choose to follow their own path of integration.

221. The section on Sovereignty also extends the role of national parliaments under the Subsidiarity Protocol in the Treaty of Lisbon. The Decision sets out a procedure which allows for “national parliaments” to object to a legislative proposal in the form of a “red-card”. The red-card would be achieved if more that 55% of the votes allocated to the national parliaments are deployed via reasoned opinions within 12 weeks of a draft EU legislative proposal being transmitted indicating that the proposal does not conform with the principle of subsidiarity. If the 55% red-card threshold is reached, then the “Council Presidency will include the item on the agenda of the European Council for a comprehensive discussion on these opinions.” Following discussion in the European Council, consideration of the legislation will be discontinued by the Council “unless the draft is amended to accommodate the concerns expressed in the reasoned opinions”.\(^{210}\)

222. To achieve reasoned opinions from more than 55 per cent of the votes allocated to the national parliaments, at least 31 of the available 56 votes would be required. Each Member State national parliament has two votes and, where
the parliament is bicameral, each chamber has one vote. The proposed reforms make no mention of any further role for regional parliaments beyond what is currently set out in the Protocol attached to the Treaty of Lisbon.

223. The Committee raised the issue of sovereignty with witnesses. Dr Zuleeg told the Committee that he found “the debate on non-sovereignty quite misguided.” He emphasised that shared sovereignty was fundamental for the EU to achieve its purpose—

- We should look at the European Union’s purpose, which is to transfer certain competences to the European Union in which we then exercise shared sovereignty. That is the whole point of having an instrument such as the EU. In those areas of shared competence the final word must of course lie with the European Court of Justice; otherwise, you would have a completely meaningless framework at the European level, because every member state, at the point that something does not suit it any more, will then try to go back to its national decision-making processes and cancel whatever has been agreed at the European level.211

224. It has been suggested that the threshold for a red card procedure is unlikely to be achieved very often as Member State Parliaments broadly reflect the same views as Member State Governments, in which case the procedure would not be agreed in the Council. In evidence to the Committee, Dr Hughes referred to the limited use of “yellow” and “orange” cards under the Lisbon Protocol and questioned the extent to which the red card procedure might be used in practice—

- The red card can only be used if 55 per cent of the votes of all the national Parliaments use it, so it would require other countries to use it. However, the so-called yellow and orange cards have barely been used since the Lisbon treaty brought them in, so I think that the red card is not very likely to be used.212

Social Benefits and Free Movement

225. Section D of the decision relates to Social Benefits and Free Movement. It reiterates that the free movement of workers within the EU is an integral part of the internal market, although it also acknowledges that Member States have the right to design their social security systems as they wish. The Decision states—

- …the social security systems of the Member States, which Union law coordinates but does not harmonise, are diversely structured and this may in itself attract workers to certain Member States. It is legitimate to take this situation into account and to provide, both at Union and at national level, and without creating unjustified direct or indirect discrimination, for measures limiting flows of workers of such a scale that they have negative effects both for the Member States of origin and for the Member States of destination.
226. Whilst Member States have to ensure procedures do not breach the principles of non-discrimination as set out in Article 45 TFEU, the Decision identifies that there is scope for deviating from this in the event that actions can be justified on the grounds of public policy, public security or public health.

227. The section on Social Benefits and Free Movement aims to clarify current rules with regard to access to social benefits, such as stating that Member States can refuse to pay social benefits to those persons who have moved to the Member State solely to obtain benefits. This section also proposes new ways in which Member States may introduce social welfare restrictions; these are to “act to prevent abuse of rights or fraud in relation to the access of social benefits”, and to “index child benefit payments to the Member State where the child resides.” This latter provision will only apply to new claimants initially but from 1 January 2020 can be applied to all exported child benefits.

228. In addition, the introduction of an “emergency break” allows Member States (on application to the Council) to restrict access to non-contributory in-work benefits to newly arriving EU workers for a period of four years. The access to benefits should be removed gradually during the four year period. If instigated, the “emergency break” procedure will initially apply for seven years. Professor Christina Boswell emphasised that the provision would not be a “blanket ban”—

One of the aspects to bear in mind is that this so-called alert and safeguard mechanism—the emergency brake—is not only limited to seven years and to the first four years of people arriving in the UK. I think that this is actually overlooked in media reporting, but there is also a stipulation that the limitation should be graduated—that it should be gradually phased in over those first four years—so it is not a blanket ban over four years.\footnote{14}

229. In evidence to the Committee, Professor Curtice suggested that the link between immigration and benefits in this provision was a response to public opinion, “The fact that immigration was linked with welfare benefits touched on not just the undoubted high level of concern about immigration in the UK but the increasing unpopularity of in-work benefits in British public opinion.”\footnote{15}

230. In response to a question from the Committee concerning whether the Court of Justice of the European Union (CJEU) might wish to assess whether the provisions were compatible with the Treaties, Professor Boswell observed, “Even if it agreed in principle that an emergency brake was justified in those exceptional circumstances, the empirical grounds on which the UK could claim to meet the conditions are very weak.”\footnote{16} She further explained that—

\begin{quote}
There is a real possibility of that occurring, although that is less the case in relation to the indexation of child benefit, as that will probably be seen as broadly consistent with non-discrimination principles. However, the ban on in-work benefits clearly implies differential incomes for EU nationals and UK and non-UK nationals. A weakness in the declaration and the decision is the
\end{quote}
grounds on which a member state can claim such an emergency brake. The deal talks about really quite severe circumstances in which “an exceptional situation exists on a scale that affects essential aspects of” the member state’s “social security system, including the primary purpose of its in-work benefits system” and so on. That is really stringent.  

231. Professor Boswell also suggested that the provisions might have “a number of unanticipated inadvertent effects on mobility”, stating—

> For example, it might well lead to a short-term increase in mobility to the UK in the year or so leading up to it entering into force. It might affect the household decisions of those who are most affected by the reduction or ban on in-work tax credits. The families that are likely to be most affected are households with children, where one of the partners is working, or there is only a single parent. That might encourage the second parent to take up employment and, in the case of single parents, it could have an adverse effect on welfare. Therefore, we really have to worry about the welfare impact of this measure. 

232. In addition, Professor Boswell referred to the impact that the introduction of the national living wage could have in encouraging immigration. She pointed out that, “The introduction of the national living wage and the gradual increase in its level may have quite significant impacts on mobility.”

> Those impacts could go in different directions, depending on how stringently the national living wage is enforced. If it is not stringently enforced, which is likely given current trends in the enforcement of illegal employment rules, it may well create a pull factor and encourage employers who cannot or feel that they cannot afford the high costs to want to undercut the new wage levels by employing EU migrants on an irregular basis. That is a worrying trend to look out for.

The evidence heard by the Committee on the reform package suggested that it was very limited in scope and effect, and questioned the practical impact of the settlement.

The economic governance provisions were perceived to be “problematic” as although they gave non-Euro countries a voice, they would not have a vote in the Eurogroup.

The competitiveness provisions were regarded as adding little to the better regulation agenda already being pursued by the European Commission.
The provisions on “ever closer union” were perceived as symbolic and it was concluded that the “red-card” provision was unlikely to be used in practice.

The actual impact of the social benefits and free movement provisions was questioned, particularly in the context of the forthcoming living wage.

Doubts were also raised as to whether these provisions would be deemed acceptable by the Court of Justice of the European Union on empirical grounds. The Committee therefore considers that the settlement may make little difference on a practical level.

However, the Committee notes that the four sets of proposals respond to the key challenges set out by the Prime Minister.

Intergovernmental relations

233. The current relations between the UK Government and the devolved administrations in relation to the European Union are set out in the Memorandum of Understanding (MOU) and the Concordat on Coordination of European Union Policy Issues between the UK Government and the devolved administrations in Scotland, Wales and Northern Ireland.221 The MOU established a Joint Ministerial Committee (Europe), which usually meets before European Council meetings to “discuss issues affecting the UK and the devolved administrations” and act as “a forum for the exchange of information and the discussion of strategic or cross-cutting issues where there is a devolved administration interest.”222

234. In the Smith Commission report detailing Heads of Agreement on further devolution of powers to the Scottish Parliament,223 the parties agreed that the implementation of the current Concordat on the Co-ordination of European Policy issues224 should be improved by—

- ensuring that Scottish Ministers are fully involved in agreeing the UK position in EU negotiations relating to devolved policy matters;
- ensuring that Scottish Ministers are consulted and their views taken into account before final UK negotiating positions relating to devolved policy matters are agreed;
- presuming that a devolved administration Minister can speak on behalf of the UK at a meeting of the Council of Ministers according to an agreed UK negotiating line, where the devolved administration Minister holds the
predominant policy interest across the UK and where the relevant lead UK
Government Minister is unable to attend all or part of a meeting.

235. The Committee sought to explore the extent to which the current
intergovernmental structures and arrangements provided for meaningful
involvement of the Scottish Government on the UK’s agenda for renegotiating
the UK’s position in the EU.

236. In evidence to the Committee, Professor Drew Scott argued that “the
intergovernmental agreement governing consultation on EU matters between
central and devolved governments is subject to two principal limitations.”
He elaborated on these limitations in his evidence—

First it only relates to EU legislative and policy issues that impact directly on
devolved competences. Accordingly it does not require consultation on the
UK Government’s position regarding EU treaty reform even where this reform
process is triggered by proposals by the UK Government itself – proposals
that have themselves not been subject to discussion nor agreement with the
devolved governments or parliaments. Second even in those legislative and
policy areas where intergovernmental discussion can be expected (i.e. where
devolved competences are directly affected), the UK Government is under no
obligation to accept the proposals of the devolved authorities or to provide a
reasoned response to these proposals where they have not been accepted.

237. The negotiations on EU reform took place in the European Council, or in
bilateral meetings between the UK Government and other Member States. In
addition, the European Commission appointed a task force responsible for
strategic issues related to the UK referendum. Professor Keating pointed out
that there were no formal arrangements for the representation of the devolved
administrations in the reform negotiations —

The EU renegotiation, however, raises other matters. It is under the umbrella
of the European Council (heads of government) rather than the Council of
Ministers, and devolved administrations are not represented there. The
devolved territories may have interests in the renegotiation going beyond
devolved matters (for example on freedom of movement). Negotiations take
place behind closed doors, there are trade-offs among issues, and things can
move rapidly.

238. In the report from the Joint Ministerial Committee (Europe) held before the
European Council meeting in December 2015, under an agenda heading on
preparations for the European Council, there is only a comment that “It is also
expected that there will be some discussion of the UK Government
renegotiation asks and some level of agreement on Competitiveness, Economic
Governance, and Sovereignty is expected.” Under a discussion on EU reform
and the referendum, the Minister indicated that he made the following intervention—

> I expressed that the Scottish Government was pleased that the House of Lords had voted to extend the franchise to 16/17 year olds and hoped that the UK Government would allow this amendment to stand. In addition I stressed that the Scottish Government still believes that a ‘double majority’ system should be in place to ensure that no part of the United Kingdom is removed from the European Union against the will of its people.

> On the subject of the Renegotiation process, I reiterated the Scottish Government's position, stressing that it is the belief of the Scottish Government that membership of the EU is in the best interest of Scotland and the UK. I asked for assurance that the Devolved Administrations would be included in further discussion prior to February Council when a full agreement is expected to be negotiated.229

239. No JMC(E) was held before the European Council meeting in February at which the settlement was agreed.

240. The Minister made the following comments to the Committee on intergovernmental relations on EU issues—

> On intergovernmental relations, there are many, ever-evolving pieces of work going on with the UK Government and the other devolved Administrations. I have been on the joint ministerial committee on Europe for the past few years, and it is fair to say that that forum could definitely work better. It is a bit formulaic and set piece at times. There is an understanding of that, so officials are doing work in the background between the UK Government and devolved Administrations to determine how we can make that better. Similar conversations are also happening with other intergovernmental forums, such as the British-Irish Council. There is often talk about how that can be refreshed and how it can work better for all the stakeholders who are involved.230

241. There was some comment in evidence about how the current intergovernmental arrangements could be improved. Professor Scott suggested that the “current structures should be revised to ensure the devolved administrations form part of a wider reflection group convened by the UK Government to determine a common position on major EU issues that impact – directly or indirectly – on their respective jurisdictions.”

> This would include EU treaty reform, substantive EU policy questions (including EU budgetary matters), and issues of strategic importance to the UK (e.g. EU foreign policy; justice and home affairs; asylum and immigration). Such an arrangement need not be restricted only to the UK Government and devolved administrations. It would be important to include representation from
English regions insofar as this was possible. Nor should such discussions necessarily be limited to governments. Closer cooperation between the relevant committees of the Westminster parliament the devolved parliaments and assemblies could also be considered. 231

242. In its publication “The best of both worlds: the United Kingdom’s special status in a reformed European Union”. 232 There is a reference to the consultation of the devolved administrations on the domestic legislation that will underpin the statement. The document states—

The European Commission has committed to bring forward new legislation where it is needed to implement the UK’s new settlement. These European Commission proposals will be agreed jointly by the Council and the European Parliament. Representatives of the major political groups in the European Parliament have been consulted on the UK’s new settlement. The UK will also pass domestic legislation to underpin this settlement. The Government recognises that in some cases the implementation of this agreement will involve the Devolved Administrations and is committed to working closely with them on this in the coming weeks and months.

It is clear to the Committee that there was virtually no formal consultation of the devolved administrations by the UK on the reform negotiations. The Committee considers that this is a regrettable approach to intergovernmental cooperation on an issue of such importance to Scotland, Wales and Northern Ireland. The Committee therefore calls for improvements, as recommended by Lord Smith, in the structures and practices for cooperating on EU issues to ensure that there is genuine consultation in the future. It also calls for increased opportunities for Scotland to participate in relevant Council meetings.

The Committee hopes that there will be greater intergovernmental cooperation on the domestic legislation that will be required to underpin the new settlement, and calls on the Scottish Government to take an active role in ensuring that greater engagement takes place.
Conclusions

244. The Committee is concluding this inquiry as it comes to the end of Session 4 of the Scottish Parliament. Over the last five years the Committee has explored the impact of EU policy in Scotland and considered the key challenges facing the EU.

245. The Committee is convinced that there is a positive case to be made for EU membership in Scotland. EU membership has contributed to Scotland’s economic prosperity and to the rights of those living in Scotland. It has improved Scotland’s infrastructure and offered training programmes to Scottish people to improve their skills and prospects in the labour market. Scotland’s agricultural sector has benefited from major economic funding for over four decades. Scotland’s universities have flourished as international research centres and have attracted students and academics from all over the EU. Scotland’s culture has been enriched by the interaction with other EU citizens whether at home or abroad. There are many, many areas in which the EU positively influences our lives.

246. This inquiry has highlighted to the Committee the ways in which the benefits brought by EU membership have become integral to our society and sometimes are not even recognised as originating in EU policy. The Committee believes that the decision facing voters on 23 June will be one of the most important of their lives. However, the emerging debate has very much focused on the risks and consequences of withdrawal, rather than there being a genuine debate about the value of EU membership. There has been very little discussion to date about what the EU could achieve or the kind of EU that we want.

247. The debate is also taking place against a backdrop of the refugee crisis in the EU, growing foreign policy issues and continuing problems in the Eurozone. Levels of confidence in the EU are at an all-time low across the Union. The Committee is concerned that at this moment in time, the UK is holding a referendum on EU membership. If the UK votes to leave the EU, there will be a clear and decisive break with the other countries that are our neighbours and with which we have collaborated closely for over four decades. If the UK decides to remain in the EU, the Committee feels certain that the UK’s relationship with the EU will be one of increasing detachment from the EU.

248. The Committee believes that there is more support for EU membership in Scotland than in many other parts of the UK. If the UK Government becomes increasingly detached from the EU, the Committee believes that the Scottish Government should seek to strengthen its engagement on EU policy issues, rather than being pulled to the periphery. In addition, the Committee recognises the value of EU immigration to Scotland both economically and in reversing population decline. It therefore calls on the Scottish Government to ensure that
EU immigrants are not discouraged from coming to Scotland as a result of the provisions in the reform settlement on social benefits and free movement.

249. The EU referendum will take place shortly after the establishment of the Session 5 Scottish Parliament. The Committee expects that many of the issues raised in this report, will be considered by its successor Committee as well as by the Parliament as a whole over the course of the new Session.
3 The correspondence between the Committee and the Rt Hon David Lidington MP, Minister of State for Europe, is available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90965.aspx
8 Professor Sionaidh Douglas-Scott. See Annexe D.
9 Aidan O’Neill. Written submission.
10 European Movement in Scotland. Written submission.
12 European Movement in Scotland. Written submission
13 European Movement in Scotland. Written submission
21 Guidance for the Scottish Government, its agencies and national devolved public bodies http://www.gov.scot/Publications/2016/01/3207/1
28 Professor Drew Scott. Written submission.
32 These figures refer to the European continent. The main European countries contributing the most additional business activities countries outside of the EU are Norway and Switzerland.
33 European Movement in Scotland. Written submission.
National Farmers Union of Scotland. Written submission.

European and External Relations Committee, Official Report, 3 December 2015, Col 3.

The Institution of Engineering and Technology. Written submission.

Scotch Whisky Association. Written submission.

Scotch Whisky Association. Written submission.

This case study draws on Scotch Whisky Association. Written submission.

National Farmers Union of Scotland. Written submission.

European and External Relations Committee, Official Report, 3 December 2015, Col 7.

The Institution of Engineering and Technology. Written submission.

National Farmers Union of Scotland. Written submission.

European Movement in Scotland. Written submission.

Scottish Parliament Information Centre (2015). The impact of EU membership in Scotland. SPICe briefing paper 15/71


European and External Relations Committee, Official Report, 3 December 2015, Col 10.

European and External Relations Committee, Official Report, 3 December 2015, Col 13.

This case study draws on the National Farmers Union of Scotland written submission.

Universities Scotland. Written submission

This case study draws on the Universities Scotland written submission

Universities Scotland. Written submission

Universities Scotland. Written submission

Genetic Alliance UK. Written submission.


Scottish Trade Union Congress. Written submission.

European and External Relations Committee, Official Report, 3 December 2015, Col 23.


This case study draws on the European Movement in Scotland. Written submission

https://www.scotlandeurope.com/eu-policy/environment.aspx

European Movement in Scotland. Written submission.


http://whatscotlandthinks.org/questions/should-the-united-kingdom-remain-a-member-of-the-european-union-or-leave-the-eu?groups=null&companies=[%222244f004f-8b03-459a-bc29-a10011d739a%22]#bar


See Annexe C for the report of the Committee’s fact-finding visit to Dublin in November 2015.

Professor Sionaidh Douglas-Scott. See Annexe D.


Dr Tobias Lock. Written submission.


Dr Tobias Lock. Written evidence.

The Law Society of Scotland. Written submission.

The Law Society of Scotland. Written submission.

European and External Relations Committee
EU reform and the EU referendum: implications for Scotland, 2nd Report, 2016 (Session 4)

Letter from the Prime Minister to the President of the European Council, Donald Tusk. 10 November 2015.


Letter from the Prime Minister to the President of the European Council. Official Report, 3 December 2015, Col 22.
Michael Keating. See Annexe D.
Michael Keating. See Annexe D.
Michael Keating. See Annexe D.
Michael Keating. See Annexe D.
Michael Keating. See Annexe D.
Michael Keating. See Annexe D.
Letter from the Prime Minister to the President of the European Council, Donald Tusk. 10 November 2015.

Professor Drew Scott. Written submission.

Professor Drew Scott. Written submission.


Professor Drew Scott. Written submission.
Letter from the Prime Minister to the President of the European Council, Donald Tusk. 10 November 2015.

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Professor Drew Scott. Written submission.


Memorandum of Understanding between the UK and the Devolved Administrations. 

Professor Drew Scott. Written submission.

Professor Drew Scott. Written submission.

Professor Michael Keating. Written submission.

Letter from Scottish Government Minister for Europe and International Development to Convener of the European and External Relations Committee. 21 December 2015.

Letter from Scottish Government Minister for Europe and International Development to Convener of the European and External Relations Committee. 21 December 2015.


Professor Drew Scott. Written submission.

UK Government. 22 February 2016. The best of both worlds: the United Kingdom's special status in a reformed European Union.
Annexe A

Extracts from the minutes of the European and External Affairs Committee and associated written and supplementary evidence

17th Meeting, 2015 (Session 4), Thursday 19 November 2015

EU update: The Committee took evidence from—

David Coburn MEP, Ian Hudghton MEP, and Catherine Stihler MEP, European Parliament;
Dr Ian Duncan MEP, European Parliament (via video conference).

Written evidence

- David Coburn MEP (489KB pdf)
- Alyn Smith MEP (157KB pdf)

18th Meeting, 2015 (Session 4), Thursday 3 December 2015

EU reform and the EU referendum: implications for Scotland: The Committee took evidence, in a round-table discussion, from—

Alison Cairns, Head of Development, Scottish Council for Voluntary Organisations;
Garry Clark, Head of the Economic Development Intelligence Unit, Scottish Chambers of Commerce;
Ross Dougal, President, Scottish Fishermen's Federation;
Derek Elder, Chairman, Institution of Engineering and Technology;
Owen Kelly, Chief Executive, Scottish Financial Enterprise;
Helen Martin, Assistant Secretary, Scottish Trades Union Congress;
Andrew McCormick, Vice President, National Farmers Union Scotland;
Andy Myles, Advocacy Officer, Scottish Environment Link;
Serafin Pazos-Vidal, Head of Brussels Office, Convention of Scottish Local Authorities;
Alastair Sim, Director, Universities Scotland.

Written evidence

- COSLA (94KB pdf)
- The Institution of Engineering and Technology (IET) (49KB pdf)
19th Meeting, 2015 (Session 4), Thursday 17 December 2015
EU reform and the EU referendum: implications for Scotland: The Committee took evidence, in a round-table discussion, from—

Professor Catherine Barnard, Professor of European Union Law, University of Cambridge (via video conference);
Michael P Clancy, Director of Law Reform, the Law Society of Scotland;
Professor Sir David Edward, former Judge of the European Court of Justice;
Professor Adam Lazowski, Westminster Law School, University of Westminster;
Dr Tobias Lock, Lecturer in EU Law and Co-Director Europa Institute, School of Law, University of Edinburgh;
Dr Cormac Mac Amhlaigh, Lecturer in Public Law, University of Edinburgh.

EU reform and the EU referendum: implications for Scotland (in private): The Committee reviewed the evidence heard earlier in the meeting.

Written evidence

The Law Society of Scotland (184KB pdf)
Dr Tobias Lock, Edinburgh Law School (301KB pdf)
Dr Cormac Mac Amhlaigh (62KB pdf)

2nd Meeting, 2016 (Session 4), Thursday 21 January 2016
EU reform and the EU referendum: alternatives to EU membership: The Committee took evidence from—

Professor Dr Andreas Auer LL.M., Emeritus Professor, Universities of Zurich and Geneva;
Niels Engelschien, Deputy Director General, Department for European Affairs, Ministry of Foreign Affairs, Oslo;
Knut Hermansen, Minister Counsellor, Norwegian Mission to the EU, Brussels;
Dáithí O'Ceallaigh, Chair of the UK Project Group, Institute of International and European Affairs and former Irish Ambassador to the UK.

EU reform and the EU referendum: alternatives to EU membership (in private): The Committee reviewed the evidence heard earlier in the meeting.
4th Meeting, 2016 (Session 4), Thursday 25 February 2016

EU reform and the EU referendum: implications for Scotland: The Committee took evidence from—

Professor Christina Boswell, Director of Research, School of Social and Political Science, University of Edinburgh;
Professor John Curtice, Professor of Politics, University of Strathclyde;
Senior Research Fellow, ScotCen Social Research; and Economic and Social Research Council (ESRC) Fellow, ‘The UK in a Changing Europe’ programme;
Dr Kirsty Hughes, Associate Fellow, Friends of Europe, Brussels;
Professor Michael Keating, Professor of Politics, University of Aberdeen and Director, Economic and Social Research Council (ESRC) Centre on Constitutional Change;
Dr Fabian Zuleeg, Chief Executive and Chief Economist, European Policy Centre (via video conference);

Humza Yousaf MSP, Minister for Europe and International Development, and Craig Egner, Head of European Relations Team, Scottish Government.

EU reform and the EU referendum: implications for Scotland (in private):
The Committee reviewed the evidence heard earlier in the meeting.

Supplementary written evidence

Kirsty Hughes, Associate Fellow, Friends of Europe (137KB pdf)
Annexe B

List of other written evidence

- Dr Mary Braithwaite (12KB pdf)
- John Bruton (30KB pdf)
- European Movement in Scotland (84KB pdf)
- Genetic Alliance UK (94KB pdf)
- Dr Andrew Glencross (39KB pdf)
- Kirsty Hughes (42KB pdf)
- Michael Keating (50KB pdf)
- Legal Academics, the School of Law, University of Dundee (60KB pdf)
- Leslie D McDade (98KB pdf)
- Aidan O'Niell QC (321KB pdf)
- Scotch Whisky Association (58KB pdf)
- Professor Drew Scott, School of Law, University of Edinburgh (81KB pdf)
- James Scott (34KB pdf)
- Jennifer Volk (27KB pdf)
- Andrew Wilson (47KB pdf)
Annexe C

Committee fact-finding visit to Dublin, 5 November 2015

The Committee travelled to Dublin to discuss a range of issues relating to the EU referendum and EU report with the Irish Government, the Houses of the Oireachtas Joint Committee on European Union Affairs and the Institute for International and European Affairs. The Committee found these meetings extremely valuable and thanks all of those who gave of their time to speak to the Committee.

The key areas of discussion were the following—

- potential areas in which the UK might seek reform
- the process and likely timetable for agreeing reforms at the EU level
- what reform would mean in terms of the UK’s future engagement with the EU
- the Irish experience of referendums on EU issues
- the impact of a Brexit on Ireland and its relationship with the UK
- The impact of Brexit on the UK
- the benefits of EU membership to Ireland
- the process for a Brexit
- attitudes among other Member States to the UK
- alternatives to EU membership.

Programme

The following Committee members participated in the visit—

Christina McKelvie MSP, Convener
Hanzala Malik MSP, Deputy Convener
Adam Ingram MSP
Jamie McGrigor MSP
Anne McTaggart MSP

Meetings—

Meeting with Dara Murphy TD, Minister for State at the Departments of An Taoiseach and Foreign Affairs and Trade with special Responsibility for European Affairs and Data Protection.

Meeting with members of the Houses of the Oireachtas Joint Committee on European Union Affairs—

Deputy Dominic Hannigan, Chairman of the Committee
Deputy Seán Kyne, Vice-Chairman
Deputy Timmy Dooley
Deputy Seán Crowe
Deputy Joe O'Reilly
Senator Aideen Hayden
Meeting with representatives of the Institute for International and External Affairs (IIEA)—

Tom Arnold, Director General of the IIEA
Brendan Halligan, Chairman of the IIEA
Tony Brown, IIEA Co-Founder and Senior Fellow
Andrew Gilmore, Senior Researcher, IIEA
Dr John Bradley, International Research Consultant
Annexe D

Adviser briefings to the Committee

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

I. EU REFERENDUM BILL

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

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

At time of writing, this Bill had completed its passage through the House of Commons and Lords, but the Lords had proposed several amendments which have yet to be agreed by the Commons.¹

1. The question put to electorate

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

This contrasts with the Scottish referendum question – ‘Should Scotland be an independent country?’ which required a simple Yes/No answer. It also contrasts with the question asked in the UK’s 1975 Referendum on EEC membership which asked, ‘Do you think that the United Kingdom should stay in the European Community (Common Market)?’ The EU Referendum Bill is also a departure from established practice - of 264 referendums in democratic states since 1990, only six have not employed a ‘Yes/No’ question.²

¹ References to clauses in the Bill refer to the latest version of the Bill as it stands on 4 December 2015.
² UCL Constitution Unit, ‘The EU Referendum Bill: Taking stock’.
2. The Franchise:

Clause 2 of Bill confirms that the referendum will use the parliamentary franchise, although with some additions. In summary, a vote will go to: British citizens living in the UK; Irish citizens resident in the UK; citizens of Gibraltar; Commonwealth citizens who meet the residency requirement for registration as an elector in UK; British citizens who are overseas voters using their entitlement to register as overseas voters for up to 15 years after leaving the UK; service voters. Unlike in parliamentary elections, members of the House of Lords are also entitled to vote in this referendum, as are Commonwealth and Irish citizens who would be entitled to vote in European elections in Gibraltar.

At the Report Stage of the Bill in the House of Lords on 17 November 2015, an amendment to extend the franchise for the EU referendum to 16 and 17 year olds was agreed. This amendment was rejected by the House of Commons on 8 December but the House of Lords may still table a further such amendment.

Issues that have emerged in relation to the EU referendum Bill

a) The extension of the franchise to 16 and 17 year olds?

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

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

This is unlikely now, as the Bill has passed through Commons and Lords without such an amendment succeeding. However, UK citizens living in other EU countries may worry about the consequences of a possible UK exit from the EU. If the UK left the EU, they might have to apply for work permits, migrant visas, and reciprocal health schemes could be reduced.

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

³ UCL Constitution Unit, Votes at 16: What effect would it have on the EU referendum?
⁴ ‘Expat vote ban lifted, but not in time for EU referendum’, The Telegraph, 28 May 2015.
c) Whether EU citizens resident in the UK would be able to vote

This is also unlikely, given that amendments to this effect have not succeeded in the Commons or Lords. However, as there is (a small) possibility of legal challenge (see below) it is worthy of a short note.

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

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

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

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

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

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

3. Timing of the Referendum

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

There is a problem with this referendum timing, however, if David Cameron’s desired

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6 Michael Wilkinson, and Rosa Prince, ‘When is the EU Referendum?’, Telegraph, 4 October 2014.
reforms require EU treaty change. In this case, it will not be possible for treaty ratification to be completed in each of the 28 EU member states before the end of 2017. This means that the only agreement between EU states that could be agreed by the referendum itself would be some sort of inter-governmental agreement for future treaty change, which could still be rejected by some EU national parliaments. Although Clause 6 of the Bill as it currently stands contains a ‘Duty to publish information on outcome of negotiations between member States’, before the final 10 week period, the absence of legally binding treaty revision at that date could have an impact on the case for remaining in the EU, as it might not reassure voters that desired reforms could actually be achieved.

Furthermore, if the Lords’ amendment to allow 16 and 17 years olds to vote is eventually accepted, this may limit the chances of an earlier referendum, as eligible 16 and 17 year olds would have to be added to the electoral register. This will take time - experts suggest around nine months. On the other hand, even if the Lords’ amendment is overturned in the Commons, this ‘constitutional ping-pong’ process will still take time and it may be unlikely that the referendum bill will be passed into law within the current parliamentary session. It is even possible that the 1911 and 1949 Parliament Acts may have to be invoked, if the House of Lords refuses to pass a Bill which does not include 16 and 17 year olds in the franchise. In that case, the Bill could not be passed and would have to be returned in the 2016-17 session for legislation without consent of the House of Lords. As a government manifesto commitment Bill, however, the Salisbury-Addison Convention could apply, suggesting that the House of Lords should not reject the Bill nor adopt ‘wrecking amendments’. It has also been suggested that this is a Bill with financial implications (it costs money to add 16/17 year olds to the franchise) in which case section 1 Parliament Act 1911 could apply and the Bill could become law at the end of this parliamentary session.

Either way, the Lords amendment regarding 16/17 year olds complicates matters and could make an early referendum less feasible. If the referendum date is set closer to the second half of 2017, then the French and Germans will have major elections, and the UK is scheduled to hold the presidency of the Council of Ministers, a far from ideal time to hold a referendum.

4. Outcome of the Referendum

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

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

Further, the Bill does not require a threshold of a certain percentage of votes to be cast in order for further action to be taken (unlike the polls in Scotland and Wales in 1978 on the question of devolution).
Nor is there a requirement of a ‘double lock’ threshold, requiring each constituent part of the UK (England, Scotland, Wales and Northern Ireland) to vote to leave before the UK can withdraw from the EU. In some federal countries there is requirement for certain referendums to secure a majority in the population as a whole and in a majority of the states. This is the case in Australia, where referendums to approve changes to the constitution must achieve a majority of voters as a whole (voting is compulsory), and a majority in a majority of states. While the Referendum Bill was in the House of Commons, the SNP tabled an amendment to require such a double majority threshold, but were unsuccessful.

5. Could there be legal challenges to the referendum?

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

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

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

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

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

1. What are the processes within the EU?

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

Although such a mechanism exists, this does not mean negotiations between the EU and UK would be uncomplicated. There is very little information, academic or otherwise, on Article 50 TEU. This is not surprising because it has never been used, and until the UK declared its intention to renegotiate the terms of its membership, the possibility of its use was considered theoretical only. Apart from the case of Greenland in 1985 (which occurred prior to the introduction of Article 50) the EU has no experience in managing

\(^7\) Article 50 TEU is set out in the Annexe to this briefing.
the exit of a member state. Further, the Greenland example offers very little guidance because of Greenland’s dependence on Denmark and its great reliance on fish, which dominated negotiations. Nothing of substance had to be changed in the Treaties when Greenland left. Greenland became associated as an Overseas Country and Territory through the Greenland Treaty. This kind of association would not be an option for the UK.

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

1. **Formal Notice**: The withdrawing member state must send a formal notice to the European Council. This means that the UK would have to inform the President of the European Council, but would not have to give any reasons for why it wished to withdraw.

2. **Negotiating Guidelines**: The European Council then issues guidelines on the basis of which the terms of exit and future relationship between the EU and that member state are negotiated. The Council of the EU would nominate a negotiator for this purpose – presumably, but not necessarily, officials from the European Commission.

3. **Negotiated Withdrawal**: The terms of exit and post-exit relationship are negotiated by the EU on the basis of recommendations by the Commission (Article 218(3) TFEU) and the Council then concludes the agreement (by a qualified majority, after receiving the consent of the European Parliament). During the negotiation, the UK could continue to participate in other EU business, but could not participate in EU discussions or decisions as to its own withdrawal.

Should no agreement be reached, then Article 50 stipulates that membership of the EU will cease two years after notification of intention to withdraw, unless the European Council decides to extend this period, in agreement with the country in question. But it is probably unlikely that no agreement would be reached, as it would certainly be in the UK’s (and the EU’s) interests to come to an arrangement.

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

1. **A treaty regarding UK withdrawal**

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

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

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

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

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

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

2. The withdrawal process in the UK

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

The process of domestic disentanglement from EU law would by no means be straightforward, nor would it mean a direct return to the status quo existing before the UK joined the then European Economic Community (EEC) in 1973. EU law is part of UK law and its adoption has given UK citizens, companies and public authorities rights and duties – repealing or amending them would be a complex and demanding process.
The European Communities Act (ECA) 1972 is the main legal provision, or gateway, whereby EU law is applied domestically and would need to be repealed or at the very least amended. Other primary legislation implementing or relating to EU law would also have to be repealed if the Government did not want it to form part of national law. For example, section 29 Scotland Act 1998 makes direct reference to EU law and would have to be amended. Again, this raises the issue of a legislative consent motion (see further below under section III advisor briefing).

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

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

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

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

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

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

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

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

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

A pragmatic solution suggests that the EU and UK would negotiate a transitional period in order to manage issues such as these – and indeed such arrangements were made in the case of the only (to date) example of withdrawal from the EU – that of Greenland in 1985 (see for example, \textit{Status of Greenland: Commission opinion}, COM (83) 66 final, at 12). On the other hand, it is questionable to what extent the Greenland example sets a precedent, given the very different circumstances and much smaller population of Greenland, and most importantly, the fact that Greenland was not itself a member state,

but only part of Denmark, which remains an EU member state. Greenland’s interests are still represented via Denmark and Greenland’s major concern was to exercise exclusive rights over fisheries. Greenland’s exit did not dictate any changes of substance to the EU treaties.

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

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

III. SIGNIFICANCE OF AN EU EXIT FOR SCOTLAND

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

An economic and more general social analysis of Scotland’s EU membership has been the subject of another briefing. However, in short, an important aspect of Scotland’s EU membership involves access to the Single Market. The EU is the main destination for Scotland’s international exports, ‘accounting for around 46% of Scotland’s international exports in 2013, value c. £12.9 billion’. Scotland benefits from the Single Market by importing goods and services from other EU member states. The Scottish Government estimated c. 336,000 Scottish jobs directly associated with exports to the EU in 2011. The EU’s Free Movement provisions allow Scots to travel to other EU member states and other EU nationals to come and work/study in Scotland.

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

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10 See eg SPICe Briefing ‘The impact of EU membership in Scotland’ 30 October 2015 15/71.
12 But see SPICe Briefing ‘The impact of EU membership in Scotland’ for a different view.
13 HC Briefing 7213, 4/6/15: ‘Exiting The EU: Impact In Key UK Policy Areas.’
14 SPICe Briefing ‘The impact of EU membership in Scotland.’
The Scottish Government has repeatedly argued that Scottish public opinion is more pro-European than in the rest of the UK. Nicola Sturgeon set out this view in a speech at the EPC in Brussels on 2 June 2015.\(^\text{15}\) At the last European Parliament elections in May 2014, UKIP gained the largest percentage of votes in the UK overall, with 27.5%, but in Scotland only 10.46% of the vote.\(^\text{16}\) EU regional funding tends to benefit Scotland, Wales and Northern Ireland more than it does England. Furthermore, the Scottish Government’s *Agenda for EU Reform* paper\(^\text{17}\) disagrees with the proposed renegotiation of Britain’s EU membership, does not support the potential subsequent referendum, and believes EU reform can be delivered without major treaty change.

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

## 2. Implications for Scotland of the UK leaving the EU

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

Even if the UK were to have some sort of ‘free trade’ arrangement with the EU - whether within the EEA or by some bilateral arrangement, Scotland could still lack some of the existing benefits of EU membership. EEA countries such as Norway play no effective part in influencing or legislating EU laws and policies, although these EU laws undoubtedly affect their own interests. If the UK exchanged its EU membership for the EEA, it too would have no control over such measures. There may be also be a danger that foreign companies located in Scotland, and Scottish companies with a major EU business interest would relocate to other EU states in order to maintain influence and lobbying capacities in the EU. On the other hand, if the UK were a member of the EEA, it and therefore Scotland, would still have a sizeable (because of the size of the UK’s GDP in relation to the EU overall) budgetary liability to the EU.

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

Further, as discussed above, following a UK exit, steps would be taken by the UK Government to ensure that EU law, as it presently stands, ceased to apply within the UK. As well as the issues of repeal of EU law discussed in the last section, another

\(^{15}\) [https://firstminister.gov.scot/a-positive-case-for-europe/](https://firstminister.gov.scot/a-positive-case-for-europe/)

\(^{16}\) [UK Election results 2014, viewable at http://www.bbc.co.uk/news/events/vote2014/eu-uk-results](http://www.bbc.co.uk/news/events/vote2014/eu-uk-results)

important issue is whether a Legislative Consent motion would be necessary in order for devolution legislation to be amended to take account of a UK ‘Brexit’.

EU law is incorporated directly into the devolution statutes in Scotland. For example, section 29(2)(d) of the Scotland Act 1998 provides that Acts of the Scottish Parliament that are incompatible with EU law or with ECHR rights are ‘not law.’ Therefore, although the Westminster Parliament may repeal the ECA 1972, this would not bring an end to the impact of EU law in the devolved nations. It would still be necessary to amend the relevant parts of devolution legislation. But this would not necessarily be straightforward. This is because, although, as a sovereign parliament, the UK Parliament retains the power to amend the Scotland Act, the UK government has stated that it will not normally legislate on a devolved matter, or on any change to the powers of the devolved nations, without the consent of the devolved legislature. This requires a Legislative Consent Motion under the Sewel Convention. The question is whether Scotland would be willing to grant assent, especially as the Scotland Bill currently in the Westminster Parliament includes a commitment to strengthen some of the Scottish Parliament’s powers, and to enshrine the Sewel Convention in legislation. So the need to amend devolution legislation renders a UK EU exit constitutionally more complicated.

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

Constitutional conventions have been traditionally defined as ‘a rule of behaviour accepted as obligatory by those concerned in the working of the constitution.’ Whether or not they are legally enforceable is debatable, as they are not embodied in hard law. In the UK, they have not traditionally been enforced by the courts, although courts have acknowledged their existence as aids to judicial interpretation. So it is unclear whether a challenge mounted to UK legislation adopted in the absence of legislative consent would be justiciable. However, Conventions do trigger soft legal commitments – Sewel is subject to a Memorandum of Understanding and a supplementary agreement between the UK Government and devolved authorities. Significantly, in 2011, Michael Moore, then Secretary of State for Scotland, in his speech opening the House of Commons second reading debate on the Scotland Bill, appeared to interpret the Sewel

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18 The Scotland Office paper, *Maintaining and strengthening the Scottish devolution settlement* (updated in 2014) states that the Sewel Convention is triggered not just by substantive Westminster legislation on devolved matters, but also by constitutional change which ‘alters the legislative competence of the Scottish Parliament.’
19 In Scotland, consent was refused for parts of the UK Welfare Reform Bill in 2011. In Wales, consent has been refused, including for the UK Enterprise and Regulatory Reform Bill. The Welsh Assembly passed its own Bill, which was referred to the Supreme Court by the Attorney General on the basis that it might not fall within the Assembly’s competence. The Supreme Court unanimously concluded that the Bill fell within the competence of the Welsh Assembly: *Agricultural Sector (Wales) Bill – Reference by the Attorney-General for England and Wales* [2014] UKSC 43. In this way a very interesting ‘constitutional’ jurisprudence is in the process of being created on the issue of devolved competence.
Convention as binding the UK Government to the requirement of consent, stating, ‘... the bill will fundamentally change the powers and responsibilities of the Scottish Parliament. For that reason, the Government will proceed with the Bill only with the formal and explicit consent of the Scottish Parliament.’

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

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

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

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

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

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

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

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\(^{23}\) Hansard 27 January 2011, col 477.

\(^{24}\) *H v Lord Advocate* [2012] UKSC 24.

\(^{25}\) [https://firstminister.gov.scot/a-positive-case-for-europe/](https://firstminister.gov.scot/a-positive-case-for-europe/)

First, is the reform desired by the UK government possible, and would treaty reform be necessary?

Second, what are the implications of such EU reform for Scotland?

Third, what role might Scottish institutions be expected to play in this reform process?

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

a) Immigration

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

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

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

b) Economic Governance

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

The crisis of the Eurozone has been a major EU preoccupation in recent years, and has prompted EU reforms, including collectively funded bail-out facilities and steps toward a European banking union. A further move to EU fiscal union to ensure the survival of the

27 Article 7 of the EU Regulation on Freedom of Movement for Workers within the Union (Reg 492/2011).
euro is also contemplated. Such a union would give the EU control over fiscal policy, and require national governments to cede some sovereignty over domestic taxation and public spending policies. For the most part, the UK has excluded itself from these moves, but is nonetheless concerned that the greater integration of Eurozone states will also affect non-euro members.

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

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

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

**c. Sovereignty**

**An ‘Ever Closer Union’**

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

This expression has been present in EU law since the EEC’s earliest days. It was contained in the Preamble to the 1957 Treaty of Rome and subsequently the Maastricht Treaty Preamble, and is currently in Article 1 TEU and the TFEU Preamble. Notably, the reference is actually to ‘ever closer union of the peoples’ of Europe, not the governments. These references do not create any specific EU competences, nor require that the EU continuously expand its powers, nor do they entail that power may not be removed from the EU. The expression does not take the form of a precise legally enforceable obligation and imposes no specific obligations on the UK.
The wording ‘ever closer union’ has not prevented Britain from obtaining a range of opt-outs from EU integration in the past. Further, in June 2014, the European Council noted that ‘the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.

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

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

National parliaments

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

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

If the suggestion is not for a ‘red card’ veto proposition, then what is probably sought is to enhance existing treaty provisions, such as the ‘early warning system’ in the Lisbon Treaty Protocol.28 However, the problem with present arrangements is that it is difficult

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28 This is the so-called ‘yellow card’ procedure, whereby a minimum of one third of national parliaments may require a legislative proposal to be reviewed by the EU institutions, and also the ‘orange card’ procedure - if one half of national parliaments object, the Commission must review the proposal but, in
to coordinate the actions of national parliaments, which probably explains why these procedures have so far achieved little. Further, any changes are likely to require amendment of Protocol 2, which has Treaty status, and so would need unanimity. However, it would be possible to agree to apply such rules informally, without giving a cast-iron guarantee. For instance, the Commission could agree that it would make a practice of withdrawing a proposal to which one third of national parliaments were opposed.

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

‘Clear proposals to achieve Subsidiarity’

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

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

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

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

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

addition, there are then specific votes in both the European Parliament and the Council, either one of which can veto the proposal in question
d. Competitiveness

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

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

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

Mechanisms for EU reform generally

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

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

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

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

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

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

Migration

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

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

Additionally, reform could also have implications for Scots living in other EU/EEA countries, since other member states would then be free to impose corresponding restrictions on their benefits. The implications for Scots resident overseas would depend on the attitude of the EU state in which in which they resided, but nevertheless

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30 Nicola Sturgeon’s speech to EPC June 2015.
restrictions on entitlement to benefits, and other restrictions on rights of residence and changes to immigration status, could result in some of them seeking repatriation.

More general implications

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

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

Aside from this, amendments to fundamental aspects (such as the EU’s aims or objectives) of the EU Treaties might also trigger the Sewel convention.\(^3\) This is because relevant provisions in the Scotland Act, read in conjunction with s2(2) ECA, permit the Scottish Government to ‘have regard to the objects of the EU’ when exercising powers conferred on it by the Scottish Parliament. If renegotiations resulted in a fundamental change to EU objects, this could be interpreted as affecting the devolved power of the Scottish government to act pursuant to the provisions of ASPs. For example, the removal of the commitment to an ‘ever closer union’ could be interpreted as such a fundamental change to the EU’s ‘objects’, given that it has been a fundamental objective of the EU since its earliest days. Therefore restrictions could be placed on the ability of the UK government to fulfil its ambitions regarding renegotiation of the UK’s EU membership.

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

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

However, EU renegotiation takes place under the general aegis of the European Council (Heads of State and Government) rather than the Council of Ministers, so the

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\(^3\) The relevant provisions are the implementing powers of the Scottish government pursuant to an Act of the Scottish Parliament under, para. 15, Schedule 8 SA read in conjunction with s. 2(2) ECA.
devolved administrations are not represented there. In response to the Smith Commission, the Scottish Government proposed new powers for Scotland, which in the context of the EU, included a formal role for Scotland in determining the UK’s policies on agreements relating to reserved matters that affect Scottish interests. If this power were in place, which it is not, the Scottish Government might have had a greater role in contributing to the UK Government’s position on re-negotiations at EU level.

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

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

In the UK, in the absence of federal constitutional provisions securing the position of sub-state governments at EU level, it would be necessary to adopt legislation and tighten the existing concordats and memoranda of understanding between the UK and Scottish Government in order to protect the Scottish competences affected by EU law and to detail the working practicalities for EU policy making. Existing arrangements fail to do this sufficiently adequately.

However, it is nonetheless the case that, if the UK proposed to radically alter its relationship with the EU then the Scottish Parliament could potentially veto any changes proposed by the UK Parliament that had a profound impact on its

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competences. These could include any changes resulting from the withdrawal of EU membership, which would have a significant impact on the competences of the Scottish Parliament.
Annexe - Article 50 Treaty on the European Union

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

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

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

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

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

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

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1. The United Kingdom has the right, under the Lisbon Treaty, to leave the European Union, as explained in Sionaidh Douglas-Scott’s paper for the Committee. Yet it remains unclear what the consequences of a vote to leave would be, given the uncertainty about the alternatives. Few of the protagonists in the debate favour isolation or protectionism and there is broad support for free trade. There are differences among supporters of ‘leave’ as to whether, and what form of, transnational institutions should be retained. Neither the main ‘leave’ campaigns nor the UK Government has yet outlined alternatives to membership. This may play to the advantage of the ‘remain’ campaign, which will be able to play on the risks and uncertainties about leaving. This was a critical factor in the Scottish independence referendum. There are several alternatives to UK membership of the European Union but choosing among them would depend on what one dislikes about the EU and what the reasons for leaving are.

2. The European Union is, at its most basic, a free trade area, with no tariffs on goods. Yet it is more than this. It is a single market, in which there is free movement of goods, but also of services, capital and labour. Product standards are harmonized or subject to mutual recognition, under which if a product is recognized in one state it can be marketed in all the others. There is a common external tariff and the EU negotiates international trade agreements on behalf of all its members. The EU has also expanded its competences into other areas such as environmental and labour market policy, which expand on and support the single market; these are called ‘flanking policies’. Competition policy, enforced by the European Commission and the European Court of Justice, sustains market conditions.

3. The EU has also extended its competences into security cooperation, justice and home affairs, research and territorial cohesion. There are programmes for cooperation in social policy matters, providing a ‘social dimension’ alongside the market vision of Europe. Some countries have adopted the Euro, which entails the loss of control over monetary and exchange rate policy. All except the UK and Ireland are committed to the Schengen area of free travel.

4. The EU is also a political union, with common institutions, whose laws are binding within member states, thus constraining national sovereignty. Members have to accept the *acquis communautaire*, the existing body of law and policies, although the UK secured some opt-outs from new policies.

5. Opponents of membership object to different aspects of this, and their objectives include:
   a. Restoring sovereignty to the United Kingdom, giving it freedom to make its own laws;
   b. Economic advantage, in eliminating EU financial contributions and freeing the UK from what is seen as a declining economic bloc;
c. Avoiding European regulation in matters where the UK might prefer a different approach. This particularly affects the ‘social dimension’ of Europe, notably in and employment and labour market regulation;
d. Limiting immigration and, in particular, eliminating the free movement of labour.

6. Alternatives to EU membership are of two types, each of which offers different possibilities for achieving these aims:
a. The first entails the end of any privileged partnership with the EU and the insertion of the UK as an independent actor in the global trading order (going it alone);
b. The second seeks to retain the present trading arrangement based on the European single market but without the political framework, infringements on national sovereignty or the non-trading aspects of the EU.

Going it Alone

7. Some advocates of EU withdrawal call for the end of a privileged relationship with Europe. They point to the rise of new economic powers and the shift of economic gravity away from Europe.

8. One version of this thesis argues that the World Trade Organization (WTO) provides sufficient rules for world trade, preventing unfair competition or protection. The UK could work to strengthen global free trade by expanding and deepening the WTO, in accordance with its free trade traditions.

9. This would restore national sovereignty and free the UK from EU regulations.

10. The WTO option would entail the end of completely free trade with the EU and the imposition of tariff and non-tariff barriers. While EU tariffs overall are rather low, in some sectors such as motor vehicles they are quite high, which is why some non-European manufacturers have invested in EU states, including the UK. There would also be no free trade in services; so financial services providers might opt to set up subsidiaries in EU countries (or even move entirely) in order to remain in the single market. The UK would also face non-tariff barriers, such as European product standards.

11. WTO rules are negotiated in regular rounds, which tend to be dominated by the big trading powers, of which the EU is one. It is not clear that, on its own, the UK would have weight in these negotiations and so be able to press its free-trading priorities.

12. There has been a tendency in recent years, given the difficulties in progressing WTO rounds after the breakdown of the Doha round in 2008, towards regional trading blocks such as the EU, the North Atlantic Free Trade Agreements (NAFTA) and Mercosur (in South America).

13. Another version of going it alone involves negotiating bilateral free trade agreements with other countries. Again, the UK would be in a weaker position to...
negotiate agreements and it is likely that third countries would prefer just to extend their agreements with the EU to the United Kingdom.

A Free Trade Agreement with the EU

14. The UK could sign a free trade agreement with the EU allowing free access to European markets. Such an agreement exists with Turkey. It includes the customs union and free trade in goods. It excludes free trade in agriculture and services (a particular concern for the UK) and does not provide for free movement of labour. There are no common institutions or policies and under a free trade agreement the UK would be free to make its own laws in most fields. A free trade agreement would not remove non-tariff barriers to trade, such as product standards and public procurement rules. EU countries would have a strong incentive to sign a free trade agreement with the UK, as it is an important export market, but would not want the UK to undermine their competitiveness. So it is likely that they would insist on the social and environmental regulations that currently exist. Indeed they might insist on something like the EEA arrangement. Turkey is not necessarily a relevant case to compare as it is a candidate for EU membership and is slowly adopting the *acquis communautaire*.

15. A free trade agreement would not provide the full provisions of the single market, which is something to which successive UK governments have been committed. Yet it is not possible to adopt the single market provisions selectively, where it suits a non-member state; this would amount to free-riding. Rather, entering it entails duties and paying the price. This suggests a closer association with Europe. There are two practical examples of this: the European Economic Area (EEA) and the Swiss model.

The EEA or Norwegian Option

16. The European Economic Area (EEA), based on the European Free Trade Area (EFTA). EFTA was founded by the UK in 1960 as an alternative to the European Economic Community (EEC, now the EU) and included countries not willing to join the EEC. Within two years, the UK itself had decided to join the EEC and was eventually followed by all EFTA states except Norway, Iceland, Switzerland and Lichtenstein. The EEA was set up in 1994, with Norway, Iceland, Lichtenstein and the EU. The EEA is a free trade area but it does include much of the single market provision. It excludes external relations, agriculture, fisheries, transport, budget contributions, regional policy and monetary policy.

17. Norway is the principal country concerned with EFTA, hence the ‘Norwegian option’. Norway’s agreement with the EEA does not allow for EU law to be directly applicable, in contrast to the situation in EU member states. This formal sovereignty is, however, constrained in practice.

18. EEA countries on accession have to accept the whole body of relevant EU law, accounting for much of the *acquis communautaire*. Technically, they are not obliged to accept future EU laws but the scope for opting out is limited and they then risk exclusion from the whole relevant field. So opt-out is regarded as highly exceptional. There is provision for consultation with EEA before EU laws are
adopted, there is some participation in working groups and there is an EEA Joint Committee. Non-EU states, however have no vote on the adoption of EU laws, which are the basis for agreement. An EFTA Surveillance Authority polices EEA rules and the arrangement is updated annually to take account of new EU laws. There is an EFTA Court but it tends to follow the decisions of the European Court of Justice (ECJ) and national courts follow in turn. EU regulatory agencies interpret the rules and apply them across the EEA, which has caused problems and delays in EEA countries, for example in relation to financial services. The EFTA Council does, however, have to formally adopt the laws, which can take additional time.

19. It is estimated that some three quarters of EU regulations are applicable to Norway. EEA countries must accept EU rules on the free movement of labour.

20. Norway has also chosen to join the Schengen free travel area, which allowed it to keep its free travel area with the other Nordic countries. It also participates in European foreign and security policy and the Dublin agreements on police and asylum, again without a say in the making of policy. As part of its association with the EU it pays for EU policies, and contributes to programmes for social and economic cohesion across the EU.

21. Norway also has a set of bilateral agreements with the EU.

22. It is not clear that the UK would be allowed to join EFTA and thereby get into the EEA. In negotiations with the EU, EFTA has to speak with a single voice. At present, Norway is the dominant member, since it is so much larger than the other two. The UK, however, would be many times larger than the other three together and could overwhelm them. UK membership of EFTA/EEA could also cause problems for the EU, as the UK would be a more significant player. It could also set a precedent for other EU member states seeking a looser relationship without all the obligation of membership. Membership of EEA would require the agreement of all EEA member states, including the remaining 27 EU members.

The Swiss Option

23. Switzerland decided, by referendum, not to join the EEA but has a bilateral relationship allowing it access to EU markets. Two sets of bilateral agreements were negotiated, in 2000 and 2004; altogether there are some 120 bilateral treaties. Further agreements have not followed as the EU is very reluctant to extend the arrangement, which it sees as cumbersome and time-consuming, and has declared its preference for over-arching arrangements like the EEA.

24. The agreements include free trade in goods but not services (which the EU refused) or agriculture and are less extensive than the EEA on ‘flanking policies’ such as social provisions, environmental and consumer and employment matters. There are no requirements for a financial contribution to cohesion.

25. The Swiss arrangement lacks the common structures of EEA and consultation on the development of EU policies is less intense. There are joint committees but
their functions are more limited than in the case of the EEA. The agreements apply only to existing EU policies so that, unlike Norway, Switzerland is not bound to future EU decisions. The various Swiss agreements are linked so that, if one side reneges on one agreement, the other side can suspend others (the ‘guillotine’ provision). Switzerland, unlike Norway, does not have to transpose EU laws but does have to have its own legislation to the same effect. The easiest way to do this has often proved to be to transpose EU law anyway. Switzerland is not formally bound by decisions of the European Court of Justice and there is uncertainty about the application of case law. In practice, the Joint Committee with the EU incorporates ECJ rulings.

26. Like Norway, Switzerland has to accept free movement of labour. This in turn obliges it to adopt policies on labour regulation such as the Working Time Directive.

27. A referendum in 2014 narrowly decided to restrict free movement, which triggered a crisis in Switzerland’s relationship with the EU as the latter refused its request to change the law. The immediate effect was Switzerland’s suspension from the EU research programme (Horizon 2020). Switzerland was later partially re-admitted but the issue remains unresolved.

28. The influence of the EU over Norway and Switzerland is perhaps even stronger than the formal arrangements suggest, as there is a big incentive to voluntary adoption of single market measures in order to compete effectively in Europe.

Balancing the Options

29. There have been attempts to quantify the economic loss or gain of the various options. Concern has been expressed that any outcome that leaves the UK out of the single European market would harm trade and investment. Others have argued that, freed from a preferential relationship with Europe, the UK could more successfully compete in global markets. It is very difficult to quantify the costs over the long term. Much would depend on the precise terms of any new arrangement and the decisions that governments, given their degrees of autonomy, would take. Some have argued that, free of the EU, the UK could pursue a market-based strategy of competition founded on low taxes and less regulation, but that is essentially a political choice.

30. The Norway/EEA and Swiss options would partially restore UK sovereignty but would leave it subject to European decisions over which it has no say. It would not be subject to the common agriculture or fisheries policies but would be obliged to accept free movement of labour. The EEA would provide for free trade in services, which is a priority for the UK, while the Swiss option would not.

31. The Go it Alone options would restore more of UK sovereignty but it would lose access to the single European market and would have to negotiate international trade agreements on its own.
32. None of the options would leave the UK as a completely free actor, since it will always be subject to international trading rules of one sort or another.