

European and External Relations Committee

The EU referendum and its implications for Scotland

Written submission from Dr Nikos Skoutaris

Introduction

1. I am Lecturer in EU Law at the University of East Anglia. I have written extensively on the interrelationship between the EU legal order and the constitutional orders of Member States with legislative regions, such as the UK. Currently, I am finalising my second monograph,¹ which sets the UK devolution arrangement into a broader comparative perspective within the European constitutional landscape. Full details of my formal pieces are on my website www.skoutaris.eu.
2. More importantly for the purposes of the present inquiry, I have recently published a paper that analyses how it would be possible for Scotland (and Northern Ireland) to remain in the EU following the Brexit referendum.² The paper has received significant academic interest and its findings have been discussed and reported by the media³ contributing to the debate on the continuing EU presence of those two regions.
3. This response will not address each and every question raised in the call. Based on my academic expertise, I will comment on three distinct but interrelated issues: (i) How can Scotland be represented in the Brexit negotiations? (ii) Possible alternatives to EU Membership (iii) How can Scotland remain in the EU?

How can Scotland be represented in the Brexit negotiations?

4. Given the idiosyncratic nature of the UK uncodified constitution, the participatory rights of the three devolved administrations are guaranteed by soft non-binding law, as provided for by the [Memorandum of Understanding and the Concordats on Co-ordination of European Union Policy Issues](#). To the extent that the Brexit negotiations will be deemed as a matter related with 'international relations' and 'relations with the EU', Scotland will be included to them in accordance with those 'statement[s] of political intent [that] should not be interpreted as binding agreement[s]'.⁴
5. Paragraph 18 of the Memorandum of Understanding makes clear that '[a]s a matter of law, international relations and relations with the European Union remain the responsibility of the UK Government and the UK Parliament.' Notwithstanding, it also envisages the full involvement of the

¹ *Territorial Pluralism in Europe: Vertical separation of powers in the EU and its Member States* (Oxford, Hart Publishing, 2017).

² N Skoutaris '[From Britain and Ireland to Cyprus: Accommodating "Divided Islands" in the EU Political and Legal Order](#)' EUI Working Paper AEL 2016/02.

³ See for example '[Constitution must be changed if Scotland to stay in EU says legal expert](#)', *The National*, 16 July 2016; '[Scotland to choose between two families of nations](#)', *The Scotsman*, 18 July 2016; '[UK Brexit: Could Cyprus inspire pro-EU Scotland?](#)' *BBC*, 23 July 2016.

⁴ Memorandum of Understanding, para 2.

devolved regional authorities in the formulation of the UK position.⁵ In general, the UK negotiating position is discussed at the Joint Ministerial Committee (JMC) on Europe. Ministers and officials from the three devolved administrations may be also part of the UK team, with the UK minister determining the final position and retaining overall responsibility.⁶

6. So, Scotland may be involved in the formulation of the UK negotiating position primarily through the JMC 'channel'. In addition, its Ministers and officials may be part of the negotiating team should the UK Minister decides so. However, the laconic provisions of the Memorandum of Understanding and the Concordats and their non-binding nature mean that the Scottish involvement to the Brexit negotiations will depend on the political priorities of Whitehall and the Bute House, their cooperation and the wider political constellation.

Possible Alternatives to EU Membership

7. First, the UK could participate in the European Economic Area (EEA). The EEA was established in 1992 between the EU and Iceland, Liechtenstein and Norway. It is a parallel to the EU legal order. It is parallel in the sense that any EEA provision that is similar/identical to an EU provision is interpreted in conformity with the rulings of the EU Court of Justice. More importantly, the EEA agreement evolves. Its members have to adopt the new or reformed regulations that the EU institutions produce. They are also required to comply with the full regulatory framework of the Single Market in order to have access to it.
8. Second, the EU-UK relations could follow the EU-Switzerland model. Switzerland decided not to participate in EEA. As a result more than 120 bilateral sectoral agreements have been signed. They regulate the relations between the EU and Switzerland. Those agreements cover among other things the free movement of people, technical barriers to trade, air transport, taxation of savings, combating fraud, and Switzerland's participation in Schengen and Dublin etc. Although the scope of the institutional framework is to align Swiss policies with the EU policies, this framework is more static than the EEA one given that the synchronisation is more limited. This means that Switzerland enjoys a more limited access to the Single Market.
9. Third, instead of a model of enhanced bilateralism, the EU and the UK might choose to build their new relationship on a bespoke bilateral agreement that would look like an Association Agreement or a Free Trade Agreement. The former 'includes next to political and economic cooperation, an enhanced institutional framework and innovative norms on regulatory and legislative approximation'. An example of that is the Ankara Agreement with Turkey that has led to a customs union with the EU since 1995. According to it, Turkey enjoys quota-free trade with the EU on most goods but services are not covered by the agreement. An example of the latter, is the recent Free Trade Agreement with Canada. Although such

⁵ See Memorandum of Understanding, paras 18–21. See also Concordats on Co-ordination of European Union Policy Issues, paras B1.2, B1.4, B4.5 to B4.11.

⁶ *Ibid.*

agreements provide for quota-free trade with the EU in a number of areas, significant non-tariff barriers remain. More importantly for the UK, none of the Free Trade Agreements include financial services passporting provisions.

10. In a recent speech, the Scotland's First Minister set out five key national interests in the Brexit negotiations: (a) democratic interest – the need to make sure Scotland's voice is heard (b) economic interest - safeguarding free movement of labour, access to single market and the funding for agriculture and education, (c) interest in social protection - ensuring the continued protection of workers' and wider human rights (d) interest in the solidarity of independent countries working together to address global challenges and (e) interest in continuing to influence EU decisions.
11. In order to safeguard the majority of those interests, the UK would have to participate in the single market. But even if the UK opts for an EEA membership, it will not be able to secure its participation in the shaping of the EU policies and thus safeguard the last of Scotland's key national interests. This can only be secured if Scotland remains in the EU.

How can Scotland remain in the EU?

12. In a [recently published paper](#), I have argued that there are two pathways in order Scotland to remain in the EU. The first one entails the secession of Scotland from the UK through a democratic referendum. The second one explores how it would be possible for Scotland to remain in the EU even without seceding from the UK. It does so by focusing on other cases of differentiated application of EU law within the territory of Member States such as Greenland and northern Cyprus.

Pathway One: Seceding from the UK, Remaining in the EU

13. According to section 29 of Scotland Act 1998, Holyrood may legislate in areas that are not considered as 'reserved' competences of Westminster. The latter are enlisted in Schedule 5 of Scotland Act 1998, and include issues related to the Constitution of which 'the Union of the Kingdoms of Scotland and England' is part.
14. In 2011, there was a debate whether Holyrood had the legislative competence to unilaterally organise an independence referendum.⁷ The 'two governments of Scotland' decided to resolve this important constitutional question with a political agreement,⁸ the [Edinburgh Agreement](#). In accordance with this agreement, a new section 29A was introduced to Scotland Act 1998. This new section explicitly conferred the power on Holyrood to organise an independence referendum by no later than 31 December 2014.
15. From this, it is clear that the right of the Scottish legislature to organise another independence referendum has a temporal limitation. This means

⁷ For an analysis of the debate, see C Mac Amhlaigh, '[... Yes, But is it legal? The Scottish Independence Referendum and the Scotland Act 1998](#)'.

⁸ For an analysis of the legal nature of the *Edinburgh Agreement*, see C Bell, '[The Legal Status of the Edinburgh Agreement](#)'.

that, in order to have a second independence referendum that is constitutional, a similar political arrangement should be achieved. Differently, an unauthorised referendum might lead to a Unilateral Declaration of Independence.

16. Now let us assume, that Whitehall and Holyrood reach a similar agreement to the one that led to the 2014 referendum and that the Scottish electorate votes in favour of independence in that second referendum. The next question we should address is what is the appropriate legal basis in order for Scotland to become a Member State. Although Article 49 TEU provides for a clear legal basis for the EU accession of new Member States, the Scottish government and a number of experts suggested in 2014⁹ that a different legal basis was applicable.
17. They based their argument¹⁰ on the fact that the Scottish situation is *sui generis*. According to them, it would be the first time that a region would secede from an EU Member State by a consensual and lawful constitutional process. Article 49 only regulates 'conventional enlargement where the candidate country is seeking membership from outside the EU'.¹¹ But Scotland is part of the EU since 1973. Therefore, the appropriate legal basis that would facilitate Scotland's transition to Union membership is Article 48 TEU, the generic provision on the amendment of the EU Treaties. In other words, the Scottish position has been that the amendment of Article 52 TEU, which provides for the States to which the Treaties apply and the relevant Articles concerning the composition of the EU institutions would be sufficient in order for Scotland to become an EU Member State after its independence.
18. Notwithstanding, I would argue that, in the current legal framework, it is Article 49 TEU that provides for the appropriate legal basis to regulate Scotland's EU accession. The reason is twofold. 'The choice of the legal basis for a [certain measure and/or action] may not depend simply on an institution's [or Member States'] conviction as to the objective pursued but must be based on objective factors... Those factors include in particular the aim and content of the' action.¹² So, as long as the objective pursued by this treaty amendment will be the accession of a new Member State, the EU Treaties provide for a *lex specialis* rule, i.e. Article 49 TEU. In other words, if the Treaty on European Union is interpreted in accordance with the ordinary meaning to be given to its terms, following the well established rule of Article 31(1) of the Vienna Convention on the Law of the Treaties, it would be difficult to justify the use of the generic provision on the amendment of the Treaties (Article 48 TEU) when there is a special provision regulating the accession of new Member States (Article 49 TEU). Of course, the counterargument is that it would not be the accession of a new Member State but rather a change in status of an entity that is already part of the EU. From a public international law perspective, this is a rather unconvincing argument. If Scotland secedes from the UK, it would be considered to be a newly independent country under public international

⁹ For the different views on this debate, see [here](#).

¹⁰ See Scottish Government's blueprint on [Scotland's Future](#) 216-224.

¹¹ *Ibid*, 21.

¹² Case C-300/89 *Commission v Council* [1991] ECR I-2898.

law. It would have to apply to be admitted as the 194th member of the United Nations. In that sense, it would be a new European State that would also have to apply for EU membership under Article 49 TEU.

19. It is important to note that the EU Treaties, including Articles 48 and 49 TEU, do not make any distinction based on the process of the formation of the States with regard to their EU accession. If the EU and the Member States opted for Article 48 in order to regulate Scotland's EU Accession, they would *de facto* distinguish between European States that have become independent from old Member States through a consensual procedure and the rest. Consequently, they would create a special procedure for the EU accession of the former, although this is not envisaged in the Treaties. Of course, the Member States as Masters of the Treaties could always amend the text in order to provide for such a distinction. But until that happens, Article 49 TEU is the appropriate procedure, not least because it allows for the same level of pre-accession scrutiny that all the candidate States have to be subjected to.

Pathway Two: Remaining in the UK, Remaining in the EU

20. The fact that Greenland is the only historical precedent of a partial territorial withdrawal from the EU has led a number of experts to discuss whether a 'Reverse Greenland' model could be used if Scotland decides to remain in the EU without seceding from the UK.¹³ According to this model, the Treaties would be amended to the extent that EU law would not apply to England and Wales but would apply to Scotland.
21. Theoretically speaking, this could be possible. However, there are certain legal and practical issues that would have to be dealt with not least because – unlike Greenland and Denmark – Scotland and England share a territorial border. This would mean, for instance, that, – if England and Wales leave the customs union – there might be an internal customs border. Equally, if free movement of people does not apply to England and Wales, there is a question to be posed about how this may influence people crossing between the two sides of the internal border.
22. This is exactly why examining how the EU has accommodated the other 'divided island', Cyprus, within its legal order is useful. Cyprus is the only Member State where the *acquis* does not apply to a significant part of its territory and where there is a territorial border between the part where it applies and where it does not. This is not to suggest in any way that the post-Brexit political situation in the UK bears any resemblance to the historical and political conditions that led to the Cyprus issue. However, the legal arrangements that were used in order to accommodate the Cyprus problem could offer some much needed inspiration if Scotland was to decide to remain in the EU without seceding from the UK.
23. The Republic of Cyprus (RoC), as a whole, became an EU Member State, on 1 May 2004, although Turkey exercises effective control over part of its

¹³ See for instance T Lock, '[A European Future for Scotland?](#)'; L Besselink '[Beyond Notification: How to Leave the EU without Using Article 50 TEU](#)'

territory.¹⁴ The unprecedented (for an EU Member State) situation of not controlling part of its territory is acknowledged in Protocol No 10 of the Treaty of Accession 2003. Article 1(1) provides for the suspension of the application of the *acquis* in northern Cyprus.

24. Until the withdrawal of the suspension takes place, Article 2 of the Protocol allows the Council to define the terms under which the provisions of EU law apply to the *de facto* 'territorial border' between northern Cyprus, where EU law is suspended, and the Government Controlled Areas, where EU law applies. This provision provided the legal basis for the adoption of the Green Line Regulation.¹⁵ This is an interesting piece of legislation because it regulates the free crossing of people and goods between an area of a Member State where the free movement *acquis* applies and is within the customs union and one where the free movement *acquis* does not apply and is outside the customs union. In that sense, this legislative device could be seen as a useful legal tool that could provide for some inspiration if Scotland decides to remain in the EU without seceding from the UK while England and Wales withdraw from the EU.
25. Concerning free movement of people, given the suspension of the *acquis*, Article 21 TFEU, according to which every EU citizen has the 'right to move and reside freely within the territory of the Member States' applies only in the southern part of Cyprus. By the same token, it could apply only in Scotland but not in England and Wales.
26. The Green Line Regulation defines the terms under which the free movement of persons applies to this 'territorial border' between an area of Cyprus where the *acquis* applies and where it does not. The central provision is Article 2(1). According to it, RoC has the responsibility to carry out checks on all persons crossing the 'border' who should undergo at least one such check in order to establish their identity.¹⁶
27. If a similar measure were to be applied in the territorial border between England and Scotland, it would be the Scottish authorities that would have to police this 'EU border'. Interestingly, the Cypriot authorities carry out checks on all persons crossing the borders including their own citizens and other EU citizens, not least because Cyprus is also not part of the *Schengen* Area. By analogy, this would mean that the Scottish authorities would be faced with the tantamount task of policing a border that tens of millions cross every year. Of course, this problem would not arise if free movement of people would apply to the whole UK territory in the future as well.
28. Concerning free movement of goods, the main hurdle that the EU had to surpass in order to establish trade relations with a part of its territory where there is an unrecognised government was exactly to avoid any form of recognition of it. In order to do so, the EU, in agreement with RoC,

¹⁴ *Cyprus v Turkey* (Application No 25781/94) (judgment 10 May 2001), ECHR Reports 2001-IV, para 77.

¹⁵ For a comprehensive analysis of the Green Line Regulation regime see N Skoutaris, 'The application of the *acquis communautaire* in the areas not under the effective control of the Republic of Cyprus: The Green Line Regulation', 45 *Common Market Law Review* (2008) 727.

¹⁶ Article 2(2) of the Green Line Regulation.

authorised the Turkish Cypriot Chamber of Commerce,¹⁷ to issue accompanying documents so that goods originating in northern Cyprus may cross the line and be circulated in South Cyprus and the Union market. More importantly, those goods are deemed as originating in Cyprus/EU and thus they are not subject to customs duties or charges having equivalent effect when they are introduced in the Government Controlled Areas.¹⁸

29. In Cyprus, there are two competing claims of legitimate rule. This is very different from the possible future situation in the UK where there would be no recognition conflict. However, the existence of a customs border between England and Wales and the rest of the UK would mean the following. English and Welsh traders would face the Union common external tariff even when they 'export' to Scotland and Northern Ireland. Of course, if the UK signs a Free Trade Agreement with the EU, goods that would be wholly obtained or have undergone their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, in England and Wales¹⁹ would not be subject to customs duties or charges having equivalent effect.²⁰ All the other goods would face Union common external tariff unless all four UK constituent nations are part of the EU customs union. Although at the moment we cannot second guess the negotiating position of the new British government on the future relationship between the UK and the EU,²¹ it seems that they favour a free trade agreement but not a customs union. In that sense, one has to wonder how the existence of different external tariffs – the EU one for Scotland and the UK one for England and Wales – would impact the economy of the UK.
30. Finally, the Green Line Regulation provides for the rules that apply with regard to goods sent to northern Cyprus. According to Article 5(1), goods which are allowed to cross the line should not be subject to export formalities. A similar arrangement could be easily applied to 'exports' of goods originating in Scotland to England and Wales.
31. By focusing on how the Union legal and political order has accommodated the Cyprus issue, we managed to appreciate some of the issues that would have to be addressed if Scotland is to remain in the EU without seceding from the UK. All those issues relate one way or another to the differentiated application of the fundamental freedoms. However, in such a scenario, the representation of Scotland to the EU institutions would also have to be settled. The reason being that, if England and Wales withdraw from the EU, it would be practically impossible and politically not prudent for the UK government to represent Scotland to the EU. This means that ways will need to be found to ensure that Scotland is represented in various EU *fora*, such as the European Council, the Council etc.²²

¹⁷ Article 4(5) of the Green Line Regulation.

¹⁸ Article 4(2) of the Green Line Regulation.

¹⁹ Council Regulation (EEC) No 2913/92 establishing the Union Customs Code [1992] OJ L 302/1.

²⁰ A similar arrangement applies to goods originating in northern Cyprus, Article 4(2) of the Green Line Regulation.

²¹ For a brief discussion of the possible alternatives to EU Membership see among others N Skoutaris, '[The Day after the Referendum Before: Possible Alternatives to EU Membership](#)'.

²² Art 15 TEU.

32. It goes without saying that, in order to achieve such an arrangement, there needs to be a fundamental constitutional amendment of the devolution arrangement, not least in order for the Scottish government to possess the relevant competences to effectively participate in the EU decision-making processes. The flexible nature of the idiosyncratic UK constitution suggests that the hurdle will not be insurmountable from a legal point of view. Having said that, such an amendment to the devolution arrangement would mark the complete transformation of the UK state to one of the most decentralised in the world. The UK government would have to at least share its competences with the Scottish government, even in the area of external relations and defence, to the extent that Scotland might want to participate in the Common Foreign and Security Policy and the Common Security and Defence Policy. Moreover, the Scottish ministers would need to be able to sign international agreements, such as multilateral conventions that are concluded as mixed agreements. In that sense, Scotland would be arguably the region with the highest legislative autonomy in the world, making it hard to see the difference between their status and independence.
33. The biggest hurdle, however, to the achievement of such arrangement – that could be reached via Article 48 TEU – is that it would mean that formally, at least, the UK will not withdraw from the EU. In the current political constellation this is almost unthinkable. Given the dramatic changes that such an arrangement would also mark to the constitutional status quo of the UK, one has to wonder why the UK government would opt for such a solution. Equally, there is a question why Scotland would settle for something less than its secession from the United Kingdom.
34. For the UK government, the biggest incentive to offer such a solution to Scotland would be that it represents a tangible alternative to secession. The United Kingdom might become almost a confederation but it will still be one recognised State under international law. In other words, it could save the Union, which at the moment seems to be in grave danger. On the other hand, Scotland could inherit at least some of the privileges of the UK's EU membership such as keeping the sterling.