European and External Relations Committee

The EU referendum and its implications for Scotland

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Scotland’s future relationship with the EU

- the value of Scotland’s membership of the EU and what Scotland's relationship with the EU should be in the future.
- how best Scotland can maintain its relationship with the EU as mandated by the recent vote in the Scottish Parliament.

Alternatives to EU membership

- the alternatives to EU membership
- the implications of these alternatives for Scotland

The referendum result will impact hugely on Scotland's relationship with the European Union (EU). Once the UK Government activates Article 50 TEU and leaves the EU, Scotland will also leave the EU, as long as Scotland remains part of the UK. This is because only sovereign states can be members of the EU.

The EU referendum has triggered constitutional uncertainty - and probably, eventually change - both at the domestic level and the EU level. At the domestic level, the referendum result has exposed and exacerbated the fragility of the UK’s devolution settlement. The referendum result has prompted calls from the First Minister of Scotland to ‘take all possible steps and explore all options to give effect to how people in Scotland voted.’ One of these options is a second independence referendum in Scotland, which the First Minister described as is ‘highly likely’ in the next two-and-a-half years following the UK’s vote to leave the EU. Should Scotland democratically secede from the UK it would then be in a position to be a member of the EU in its own right. An independent Scotland would be the clearest legal route to membership of the EU should the UK leave. The clearest, but by no means quick or easy - as with the first independence referendum, an agreement would need to be reached between Holyrood and Westminster to provide the necessary legislative competence for this to take place, and negotiations required with the EU in order to reorder Scotland’s relationship therewith. Assuming this could achieved, the particular legal route (Article 48 or 49 TEU) to such membership for Scotland is contested.

At the EU level, this is also unprecedented in political and legal terms. Article 50 TEU has never been activated before. The EU is also in the unenviable position of not knowing when the UK will trigger Article 50 TEU and what the preferred future relationship with the EU is. From its side, there is a degree of political goodwill towards Scotland on the basis that its electorate has expressed a desire to remain part of the EU. Certainly the EU is a remarkably flexible legal order; indeed the UK, more than any other EU Member State has taken advantage of the EU’s ability and willingness to accommodate different domestic preferences. EU law has also
allowed for differentiated application within the territory of the Member States, which might be a particularly instructive avenue to consider in negotiations on the possible future relationship between the EU and the UK and/or Scotland. Some specific examples of this form of intra-state differentiation, namely those relating to Cyprus and Denmark/Greenland will be considered further below. More generally, one would expect an openness from the EU to new degrees and forms of flexibility (in terms of (semi?-)-membership and (semi?-)-participation) in the coming years. With this in mind, a practice of building on good, existing and direct personal and institutional relationships between Holyrood and Brussels, seems entirely appropriate and even more desirable than ever to ensure that Scotland maintains the best possible relationship with the EU.

A second and parallel on-going discussion to the Scottish independence route to EU membership is whether Scotland could remain in the EU without seeking independence. Could England and Wales effectively withdraw their membership of the EU and the UK’s membership somehow be retained through a relationship with Scotland and Northern Ireland? Suffice to say, this would require a high level of political will and legal creativity at both the domestic and the EU level. This is uncharted political and legal territory although it is instructive to study and learn from those examples where the EU has accommodated differential territorial application within a Member State.

Scotland’s position following the Brexit vote invites comparison with atypical arrangements in the EU and other arrangements for states which are part of the European continent, but not part of the EU.

Overseas countries and territories are a distinct grouping in the EU and have their own agreements (for which provision is made in Articles 198-204 of the Treaty on the Functioning of the European Union (TFEU)) which regulate their relationships with the EU. Features common to all include being an island territory and having an enduring connection to an existing Member State. They tend to form part of the outermost regions of the EU – territories which are still part of a Member State, but are small in population and physically isolated – i.e. not even part of the European continent. This is clearly distinguishable from the UK and Scotland.

Greenland is one such, and remains connected to Denmark, while Aruba is part of The Netherlands. There are varying degrees of control that the Member State has in relation to the OCT – Greenland has full home rule, while Aruba is more or less an administrative region of The Netherlands – but the connection remains. The EU provides economic support to these territories, often in return for access to the natural wealth of these territories, such as fishing in Greenland. For the most part, the inhabitants of these islands are EU citizens, but EU law does not apply. The trade arrangements are established under a Council decision, the latest of which is still being debated.

Microstates in Europe

A number of microstates are surrounded entirely by Member States (e.g. Monaco and San Marino) but are not part of the EU. The critical element here, in relation to Scotland’s case, is that their governments are entirely independent of the larger State which surrounds them and that they are able to enter into independent agreements. Monaco has sought independence from the French government and
has become part of the customs union and the Schengen Area more recently as a consequence of its relationship with France. San Marino is in a similar position, having concluded a customs agreement with the EU. In 2012, a mandate was given by the Council to begin negotiations on an association agreement with San Marino, Monaco and Andorra.

The key difference again is the fact Scotland cannot take any independent action in respect of international agreements. Scotland could not, at present, negotiate to become part of the customs union or to enter into an association agreement with the EU that goes beyond any post-Brexit agreement entered into by the UK Government. The acquisition of the necessary legal competence to enter into binding international agreements through further devolution of power would mark a significant increase in Scotland’s autonomy within the UK. Such powers do exist at sub-state level elsewhere in Europe, e.g. the Swiss Constitution provides that certain cantons may conclude treaties within their area of competence with foreign states, under article 56, allowing them certain treaty-making powers.

The UK government may of course choose the option of seeking to enter into specific association agreements with the EU, post-‘Brexit’, as a way to retain certain aspects of EU membership that it considers desirable. A commitment from the UK Government of input into the UK line and the possibility to achieve some tailor made arrangements for Scotland (taking account of, for instance, specialist goods markets such as shellfish and whisky or areas where reserved and devolved issues overlap) would be desirable.

Other States in Europe

Norway, Iceland and Liechtenstein are party to the European Economic Area agreement, along with the members of the EU, and consequently have access to the single market, with the requirement that relevant EU law be implemented at the domestic level. The States are able to participate in EU agencies, but have no voting rights, leading to the frequent lament of ‘all pay, no say.’

The EEA represents one of the main models under discussion for the UK’s future relationship with the EU. This would allow the UK to be part of the EU internal market, subject to limited exceptions, in addition to cooperation in other important areas such as competition, research and development, education, social policy, the environment, consumer protection, tourism and culture, collectively known as “flanking and horizontal” policies. The Agreement guarantees equal rights and obligations within the Internal Market for citizens and economic operators in the EEA.

The EEA does not cover a) Common Agriculture and Fisheries Policy (exceptions re aspects of trade in agriculture and fish products) b) Common Trade Policy c) External Customs Union d) Justice & Home Affairs e) Economic and Monetary Union f) Common Foreign and Security Policy.

It is questionable whether the UK leaving the EU automatically means leaving the EEA. Exit from the EU would mean that the EEA Agreement would no longer be binding on the UK as a matter of EU law under Article 216(2) TFEU, but that for so long as the UK does not invoke the exit mechanism under Article 127 of the EEA Agreement, it remains a ‘Contracting Party’, and therefore the EEA Agreement would continue to be binding on the UK as a matter of public international law. It would
therefore continue to produce effects under domestic law for so long as the European Communities Act remains in its current form.

Switzerland has a different relationship with the EU. It enters into bilateral agreements with the EU, which allows for cooperation to be agreed on a case by case/issue by issue basis. Through a wide range of agreements, the EU has closer ties with Switzerland than with any other non-European Economic Area (EEA) country. It is not plain sailing however. Some of the important treaties are linked, so that if Switzerland or the EU pulls out of one, the others also collapse. The relation is currently under strain, though, after a Swiss referendum vote to cap immigration from the EU. The EU has responded by stating its intention to withdraw from any negotiations on the internal market if the principles of non-discrimination, freedom of establishment and right to reside are not respected.

Cyprus

Cyprus is worth studying as an example of a Member State in which EU law applies in only part of the territory. Cyprus is composed of two parts, one of which unilaterally seceded in 1983 and which is not recognised as separate by any State other than Turkey. The application of the EU’s acquis is suspended in the northern part (Protocol No 10 of the Treaty of Accession 2003) and applies only in the west and south Greek-speaking areas of the country. Cyprus has sometimes been highlighted as an example of a situation where select parts of a territory can be ‘inside’ the EU, while the rest remains ‘outside’.

In the UK context, this scenario would involve an agreement - which assumes that the UK would remain a member of the EU - whereby EU law would cease to apply to England and Wales, but continue to apply to Scotland and Northern Ireland. Numerous, significant practical difficulties stand in the way of this scenario playing out, both at the internal (UK) level and the external (EU) level. Not least among them, the erection of some sort of internal border for goods and persons would be required and decision-making powers would need to be addressed to enable Scottish and Northern Irish administrations to participate in EU processes and execute functions on behalf of the UK Government.

The withdrawal process

- how the withdrawal process might be managed at the EU and UK level
- what steps would be involved in this process and how individual policy fields might be dealt with
- the amount of time that might be required to deal with the negotiations
- how the interests of Scotland and the other constituent parts of the United Kingdom can be represented in those negotiations and what role the Scottish Government should have in those negotiations
- the positions likely to be taken by other Member States in the negotiations
The power to negotiate and conclude treaties lies with the Crown. In order to create rights and obligations in the United Kingdom, treaties must then be ratified by Parliament. In addition, Parliament would be required to repeal or amend the European Communities Act 1972 to accommodate such arrangements as are required by the treaty or treaties concluded following withdrawal. Accordingly, in formal terms, Scotland’s role could be limited to the exercise of influence by Members of Parliament representing Scottish constituencies.

As a corollary of the extensive power residing in the government of the United Kingdom, however, there are no legal impediments to the inclusion of the Scottish government in the process of withdrawal. Indeed, a Concordat on the Coordination of EU Policy Issues provides that the ‘UK Government will involve the devolved administrations as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters.’ Historically, this has afforded the Scottish Government a limited degree of influence. Nevertheless, the Concordat (i) does not have the force of law, and (ii) recognises the privileged position of the UK Government insofar as it requires ‘adherence to the resultant UK line’. The legal power of the UK Government to conclude treaties independently of devolved administrations is therefore unaffected.

The Prime Minister has declared that she will seek outcomes that are to the satisfaction of all parts of the United Kingdom. Desirable as this is, it is not entirely clear that the Scottish Government’s position is compatible with that of other parts of the UK. It follows that the extensive involvement of the Scottish Government in the process of withdrawal may be politically difficult in the absence of especially creative compromises.

Insofar as UK constitutional arrangements are concerned, there has been some discussion concerning the extent to which the Scottish Parliament could exercise control over the outcome of the withdrawal process. It is argued that the Sewel convention requires the agreement of both the Scottish Parliament and the UK Parliament in order for changes to the Scottish constitutional order to be made. We are not persuaded, however, that this amounts to an effective veto. The constitutional law of the United Kingdom is founded on the principle that Parliament is sovereign and that acts of parliament (i) override conventions, and (ii) repeal all previous acts with which they are incompatible. It follows that the powers of the Scottish Parliament are limited to political influence, as opposed to legal force.

In addition to the above noted domestic roles, Scottish representatives in the European Parliament may exercise some influence over the process of withdrawal. The consent of the European Parliament will be required in order for a withdrawal agreement to be concluded with the United Kingdom (as per Article 50 TEU). Scottish MEPs may be well placed to influence the position of their respective political groupings. Nevertheless, the extent of the European Parliament’s role may be limited as a consequence of executive dominance in the withdrawal process.

The domestic process for dealing with a withdrawal from the EU

- the implications for the devolution settlement of withdrawal from the EU
The Scottish devolution settlement is based partly on law and partly on politics. The law on the subject takes a very black and white view of devolution, giving the Scottish Parliament certain powers, but Westminster remains the most significant legislator and political actor on the part of the Scottish people, as part of the British polity. The areas which are likely to be affected by EU negotiations illustrate some tension between devolved and reserved powers, and thus competence to negotiate. Agriculture and fishing is devolved, while trade and industry is reserved. Economic development is also devolved, however, connected areas such as immigration, employment law and equality are reserved. Foreign affairs and the constitution, two key areas for future decision-making and international relations in Scotland, are also reserved.

There are non-binding agreements in existence which permit consultation of the Scottish Government at relevant discussions, for example, the Memorandum of Understanding of 1 October 1999 is effectively a gentleman’s agreement between Westminster and the devolved regions, including Scotland, which commits in honour alone each party to good communication and cooperation regarding, among other things, the EU. However, EU business is confirmed as the responsibility of the UK government alone. The recent meetings between devolved administration leaders and EU officials demonstrate the non-binding character of this agreement. Accordingly, devolution is more akin to the sharing of responsibility than the handing over of power. The above comments underline the importance of Westminster for Scottish legislation and representation at the EU level; there is no separate EU delegation for Scotland, despite devolved powers to legislate domestically in these areas. Many Scottish MEPs take an active interest in debates that affect Scotland and represent the people at that level, but there is no ‘Scottish delegation’ or sole Scottish representation at the EU level.

As no powers have been given to the Scottish Parliament or government to negotiate on the part of Scotland at the EU level, the devolution settlement and powers of the Scottish government are not particularly affected by the process of withdrawal itself. However, the constraints on the exercise of powers will be altered as a consequence of the reordering of governance above the regional level. The clear desire of the Scottish population to remain in Europe is a separate issue, and one which existing precedent does not cover.

- the implications for UK and Scots law of a withdrawal from the EU, particularly the need to repeal legislation and prepare new legislation to fill the gaps left by EU legislation

It should be noted that there is not necessarily any particular need to change any laws which are in conformity with EU law, or even those which have been drafted to comply with EU law such as the Procurement Reform (Scotland) Act 2014.

The authors support the position outlined by Professors Tom Mullen and Aileen McHarg in their submission to this call for evidence

- the scale of the task [and] the implications for the Scottish Government and Scottish Parliament

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