

WRITTEN EVIDENCE FROM DAVID CRAWLEY

Enquiry into issues surrounding the place of an independent Scotland in Europe

INTRODUCTION

1. I am grateful for this opportunity to submit a note to the European and External relations committee. As members may be aware my background is that of a civil servant from 1972 to 2006. I have been involved in a number of major European negotiations over that period from both a Scottish and a UK point of view, starting with fisheries from 1977 to 1981. I was a Counsellor in the UK Permanent Representation (UKREP) from 1990 to 1994 and as Europe Director was the then Scottish Executive's representative in Brussels at the time of the UK Presidency in 2005. As head of agriculture in the Executive from 1999 to 2002 I was closely involved in the CAP reforms of that period. I hope that this background (plus my other involvement in the present Scottish constitutional arrangements) gives me a useful perspective for this study although it is only fair to point out that the European context has changed substantially since I have had day to day involvement.

2. My comments are in two parts: first the wider case for Scottish participation in Europe and, second, the issues surrounding the pathway of an independent Scotland into membership of the EU. I should emphasise that the views in this note are my own personal ones.

THE CASE FOR SCOTLAND IN EUROPE

3. In my view it would be wholly in the interests of Scotland – were it to become independent – to become a full member state within the European Union. I agree fully with the Scottish government's view of why membership of the EU matters, expressed in its paper 'Scotland in the European Union'. As a relatively small nation state on the edge of Europe it is difficult if not impossible to imagine a context other than full membership of the EU in which Scotland could prosper economically; and to throw away the huge economic, social and cultural advantages of EU membership would in my view be a major strategic mistake. The Scottish government's paper sets out well enough why this is the case; and points accurately to the severe weaknesses of any alternative, notably the idea of membership of the EEA.

4. There are however practical realities which require consideration. For example:

(a) I welcome the Scottish government's explicit recognition that the EU is a system of governance in which legislative and policy outcomes are the result of a process of discussion and negotiation and that compromise is inevitable. In other words we cannot get all we want; that is an important reality. Moreover, when the EU agrees a legislative instrument, it has binding effect either directly or through member states' obligation to implement fully and timeously in domestic law. Surrender of this degree of sovereignty is an

inescapable element of EU membership – another important reality which has to be accepted;

(b) all states – irrespective of size – need to form **alliances** on both the general approach to EU matters and on specific issues. Alliances shift regularly over time although some interests – such as most northern member states' commitment to higher common environmental standards and firmer support for free market principles – remain the same. It requires constant effort and engagement to develop and maintain alliances across Europe and it will be critical for a newly independent Scotland to do so. That may well require some pretty hard thinking about Scottish objectives e.g. on fisheries or the rebate, which are likely to prove unpopular with some potential allies. As noted below, it will also require resources;

(c) there is a good deal of debate about how well **small states** can do out of the EU system. In my view this rather depends on where and how the small state positions itself (or is lucky enough to find itself positioned). For example:

- If there is a powerful and general EU political objective. The fall of the Berlin wall and the opening of the east led quickly to a strong political tide which – despite some initial objections from some member states – swept East Germany into the EU closely followed at intervals by the other former communist states. Over many years the political and economic need to drive up the prosperity of the Mediterranean states, especially Spain, Portugal and Greece and southern Italy and more recently Cyprus and Malta, has brought them huge benefits through the structural funds – and, arguably, led to some becoming members of the Eurozone well before they should have done. As a new small state, Scotland would need to be able to catch new winds of change, albeit from the position of being an established democracy and a more prosperous economy in European terms than newer member states;
- If the state can ally itself with one or more larger member states. In regular Council business and at European Councils (of heads of state) it is evident that the larger members' states can (and mostly do) wield substantial influence in discussions. That reflects not only voting weight on qualified majority issues but also effectiveness of coordination and application to detail (both UK strengths since accession in 1973), commitment to the European strategy and financial and economic power (Germany) or deft handling of the diplomacy and politics (traditionally France). Small states – which can offer votes and support – benefit from working with larger and more influential partners with whom they share major geographical, economic and strategic issues.
- Close alignment with the Commission and the full package of European ideals and objectives. This was typically how the tiniest state of all - Luxembourg – did so well out of the EU often jointly with Belgium and until quite recently the Netherlands. Even the French have achieved much through vocal support for the European objective, if not always matched by their practice.

(d) The **resource implications** of an active and effective role in the EU are considerable. Scotland has always made a significant contribution to EU debate both through involvement in UK led negotiations and through direct involvement in commission working groups, with the European Parliament and other institutions. But we have been able to be selective and play to our strengths. An independent Scotland will need to devote – and pay for – much more capacity in breadth and depth in order to deal effectively with the EU. Comprehensive diplomatic representation in Brussels and across Europe and consistent ministerial and official engagement with emerging policies and proposals will be required. The Scottish Government will need to employ a much wider range of expertise than it has at present to cover all the domestic and international policy issues dealt with at European level. Consideration will have to be given to where that expertise may be found.

5. A central plank of the Scottish Government's position is that Scotland will necessarily achieve more as **an independent state within the EU** than it would by remaining part of the UK. This is a political point and it is not the aim of this note to engage with that. However, drawing on my own experience, I would argue that the view that Scotland has been disadvantaged by its position within the UK is debatable. Going back as far as the late 1970s and early 80s, the Scottish position was at the centre of the UK's position on the Common Fisheries Policy (and the fishermen were there to ensure that!); Scottish interests were fully recognised in the negotiations on successive structural fund regimes which have been of major benefit to Scotland over many years; and in very many areas of EU legislation such as health and safety, environment, employment and the single market, UK and Scottish needs and objectives have largely coincided. Clearly this has not always been the case especially where the UK – mainly because it is a substantial net contributor even with the rebate – has argued for reducing EU funding or renationalizing funding responsibilities. Yet Scotland has often got much of what it wants because other member states share Scottish concerns (aspects of the 2002/3 CAP deal being in my view a case in point). It is interesting in this context that the Scottish Government has stated that it expects to retain a share of the UK rebate (an objective which it is very hard to see being achieved in the light of the strong and continuing resentment which most other member states feel for the current arrangement).

6. An even more challenging issue is where the balance of advantage for Scotland would lie if a future UK government were to take the rest of the UK out of the EU following a referendum. I share the view that this would be hugely damaging; but the implications for Scotland have not been considered at all. If the UK were to become a non EU country with Scotland remaining in the EU the effect within the British Isles on trade, the economy and the movement of people would be massive. This will need much more analysis if the referendum plan does appear in any UK party's manifesto for the next UK election.

THE ROAD TO MEMBERSHIP

7. The road by which an independent Scotland would become or, depending on the point of view remain, a member of the EU has been the subject of much heat and, at least until recently, not much light. It is now agreed between all parties that negotiations with all member states within the framework of the European Treaties will be required for Scotland to become a member state in its own right. That must be right: the EU is based on successive Treaties signed by the Governments of the member states. Despite the rhetoric and the laudable aims of the EU it is based, formally, on agreements between states, not peoples.

8. Equally, it is largely accepted both that it is entirely reasonable for Scotland, if independent, to become a state member of the EU and that for the most part the EU would expect and welcome such an outcome. However this leaves room for major uncertainties over the appropriate legal basis for Scotland's potential entry to the ranks of full membership, the complexity and difficulty of the negotiations and therefore the timing.

9. It has been argued that the only basis for Scotland to become a member is for it to proceed as a conventional accession candidate and in effect to join an orderly queue with Turkey and others and await its turn for detailed analysis and chapter by chapter negotiation with each stage subject to Council and Parliament approval. The Commission appears to have endorsed this view so far. The Scottish government has put forward an alternative view based on a presumption that there should be continuity of the effect of Scotland's participation in the EU as part of the UK; and that article 49 of the European treaty would allow any necessary Treaty change to be made to provide for this.

10. Unfortunately, whatever Scottish government lawyers think, this view is little more than an interesting argument – possibly one which would catch the sympathy of many other EU member states but with little effect unless both the Commission legal services and the Council legal services could be persuaded that it was indeed the right and only approach. If EU lawyers remain firmly of the view that the accession articles are the ones that must apply it will be very hard to follow any alternative; and if there is any notion that the question might be tested in the European Court of Justice, it should be dismissed. It is hard to see any basis under which this might be put to the court and any attempt to do so would involve massive delay.

11. Having said that, I am not convinced that the actual basis should make all that much difference. Either way, there is no explicit provision in the EU treaties for a situation in which part of an existing member state secedes from that state but wishes to be a member of the EU. Previous examples sometimes quoted are in fact opposite to this – Greenland left the EU but remained a part of Denmark; and East Germany joined both Germany and the EU. It is certainly true that the EU managed to accommodate these exceptional situations but the legal provisions relating to the accession of new member states are far more clearly established now. It is also probable that, whatever the basis, the actual work the Commission will need to carry out to assess Scotland's application will be much the same i.e. primarily a detailed

analysis of the economy and the extent of implementation of the current body of EU law.

12. The central point is that, in the absence of an explicit Treaty provision, the unanimous agreement of all existing member states will be needed both to the process to be followed and to the nature and outcome of the negotiations. The position of most states will depend heavily on the advice and preparatory work carried out by the Commission and on the views of the Council legal service. It is already clear that at least one major state – Spain – is likely to be difficult in view of the precedent Scottish accession would set; and there may well be others who decide to be awkward for their own reasons. Sympathy and goodwill for Scotland is no bad thing but it won't cut much ice for some.

13. Scotland does have in its favour the fact that it has long been geographically part of the EU; and also the fact that the full body of EU legislation has been implemented subject to any opt outs granted to the UK. Inevitably however, demands for special measures will complicate negotiations. Opt outs from the euro; Schengen and even a demand for a share of the rebate seem likely to dent the welcome Scotland hopes to receive from other states.

14. The complexity and extent of issues to be negotiated will be bound to lengthen the time the whole thing takes. Even assuming a reasonably fair wind the timetable suggested by the Scottish Government seems unrealistic. Within the EU Scotland's position will be seen as a difficult issue but it is very unlikely to be top of the EU's collective priority list. Much will depend on the pace the Commission moves at. It is likely to be well into 2015 before it is able to present a full report to Council on the issue and only then can real discussions start. The fact that the UK government will be the only body competent to negotiate on Scotland's behalf before Scotland becomes a recognised independent state is a further and major complicating factor. However much goodwill there may be, a responsible UK Government will be bound to think carefully about how to take this forward; and of course there is a UK election scheduled for mid 2015.

15. In the absence of a clear timeline agreed not only by the UK government but also by EU member states and institutions it is very hard to be confident that full Scottish EU membership can be delivered by March 2016. I would expect that attention will need to turn sooner rather than later to interim arrangements needed to maintain Scotland's legal relationship with the EU until final decisions are taken.

CONCLUSION

16. I am clear that if Scotland decides to leave the UK it should become a full member state of the EU and also that most – possibly all – EU member states and institutions would want to see that happen in the end. It is nevertheless essential to be realistic about the genuine negotiating complexities and obstacles that lie in the way of this outcome; to acknowledge and deal with the fact that it is more than likely to be a longer process than the Scottish

government currently believes; and for Scotland to develop a clear strategy for achieving this outcome. This will need to recognize that not all aspirations may be attainable in a negotiation in which Scotland will not have the upper hand, and therefore that some compromises will be inevitable.

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