
Could an independent Scotland join the European Union?

Graham Avery

The people of Scotland vote on 18 September 2014 in a referendum on the question "Should Scotland be an independent country?" The Scottish Government aims, if the result is 'yes', for Scotland to become independent in March 2016 and to join the main international organisations including the European Union. Would that be possible? How could Scotland join the EU? What is the link between Scotland's referendum on independence and a British referendum on EU membership?

BACKGROUND

In elections to Scotland's Parliament in 2011 the Scottish National Party (SNP), with the promise of a referendum in its manifesto, won a majority and formed a government in Edinburgh. The British government in London agreed to authorise a referendum, and to respect its result. However, all the main political parties in London are opposed to Scottish independence, and are campaigning for 'no': they argue that Scotland and the rest of the United Kingdom have better prospects if they stay together.

The arguments of the 'yes' campaign are based on a 670-page White Paper ('Scotland's Future') published by the Scottish government. In brief, decisions on the future of Scotland should be taken by those who live there; important decisions are now taken in London, where Scottish representatives are in a minority, and policies of Conservative governments are particularly unpopular in Scotland.

Opinion polls in Scotland show that 'no' has more support than 'yes', but the gap has diminished, many voters are undecided, and the result may be close. A recent poll showed 46% 'no', 34% 'yes', and 20% 'don't know'.¹

STATE OF PLAY

Scotland & Europe

Scotland has historic links with the continent. Attitudes to social policy are similar to those in Nordic countries. Public opinion is somewhat more favourable to the EU than in England, and political parties hostile to the EU – the UK Independence Party and the Conservative Party – have little support.

The Scottish Government states that 'Scotland should continue to be a member of the EU. It benefits from EU membership and the EU benefits from having Scotland as a member'. It argues that EU membership should be negotiated in the 18 months following the referendum, and should be based on the principle of 'continuity of effect' of EU rules currently applying in Scotland. Alex Salmond, Scotland's First Minister, has declared that an independent Scotland would be 'an enthusiastic, engaged and committed contributor to European progress'.²

Important questions remain:

- What would be the procedure for Scotland's EU membership? Should it be the same as for non-EU countries, such as Croatia or Turkey? This would require Scotland to leave the EU and apply to rejoin it from outside. Or should it be an 'internal' procedure, under which arrangements for Scotland's membership would be negotiated before independence?

- What would be the conditions for Scotland's EU membership? Would it demand the same 'opt-outs' as Britain? Would it seek other concessions? What would Scotland's position be in relation to the euro, the Schengen area of free movement of people, the EU budget, or the common fisheries policy?

Procedure

Some lawyers argue that the traditional accession procedure of Article 49 of the EU Treaty should be used. This could not begin until Scotland obtains independence, and could last a long time – it took Croatia ten years to join the EU.³ Others argue that since the case of a member state dividing into two member states is not covered by the Treaty, the revision procedure of Article 48 could be used in the period between the referendum and independence to negotiate the Treaty changes necessary for Scotland's accession.

If Scotland votes for independence, the decision on how to proceed will not be taken by lawyers, but by the EU's leaders in the European Council, and they will decide on the basis of practical and political considerations:

- From the political point of view, Scottish membership could hardly be opposed on the grounds that it weakens the EU, or is contrary to its basic principles or interests.⁴ It is difficult to see how the Union could reject 5 million Scots, who are already EU citizens and have applied European policies for 40 years. In this respect, the situation of Scotland is not the same as that of non-EU countries.⁵
- However some EU members have political reasons to be concerned by Scottish independence: Spain is faced by demands from Catalonia for a referendum, and five members (Spain, Slovakia, Romania, Greece, Cyprus) have refused to recognise Kosovo's unilateral declaration of independence in 2008 because it could be a precedent for separatists in their own countries. In this respect, the case of Scotland is different from Kosovo or Catalonia, since the Scottish referendum is not unilateral but part of a constitutional process agreed by London.
- From a practical point of view, no member state has a material interest in Scotland remaining outside the EU, even for a short time. This would deprive the EU of the benefits of Scotland's membership (budgetary contribution, fisheries resources, etc). Scotland outside the EU, and not applying EU rules, would be a legal nightmare for: EU member states, whose citizens and enterprises would lose their rights in Scotland. No member state, particularly not the rest of the UK, would have an interest in creating such an anomaly.

These considerations suggest that it would be in the interest of the EU to follow an 'internal' procedure under Article 48 of the Treaty, coupled with an assurance that this could not be a precedent for unilateral declarations of independence. In this solution:

- The procedure would be accompanied by elements associated with Article 49, such as an Opinion of the Commission on Scotland's capacity to fulfil the 'Copenhagen criteria' for EU membership.
- To satisfy the concerns of Spain and others, the EU would reaffirm its respect for the constitutional arrangements of member states. In recent weeks it has affirmed the principle of constitutionality strongly in relation to Ukraine.⁶

An alternative solution would be for the EU to follow the 'external' accession procedure under Article 49, coupled with an offer of a special relationship ('everything but institutions') under which Scotland would apply the EU's rules and enjoy reciprocal rights in the EU:

- Such an agreement would be similar to the European Economic Area, but more comprehensive. To avoid controls at the Scottish border, Scotland would need to be in the EU's customs union; it would need to be in the common fisheries policy, etc. In fact the scope and timetable for such an agreement would be similar to that for 'internal' accession.
- However, it is doubtful that the Parliament of an independent Scotland would accept for an extended period of time an obligation to apply all the European rules without the right to a voice and a vote in EU decision-making that comes with membership.

Questions for negotiation

What would be the main problems in negotiations for Scotland's EU membership?

- Adjustments to the Treaty to bring Scotland into the EU's institutions (Council, Parliament, etc.) could be made by reference to member states of comparable size (Denmark, Finland, Slovakia), and should not be problematic, though account would need to be taken of the Parliament's limit of 751 members.
- Edinburgh envisages seeking derogations from the Treaty's provisions for the euro and Schengen. There can be little doubt that the EU would refuse such opt-outs. But in reality they are not necessary for Scotland to obtain 'continuity of effect'. The EU has neither the will nor the means to compel its members to join the eurozone or Schengen; in practice, member states join them only if they wish to do so (Sweden is not in the euro; Ireland is not Schengen).
- Scotland's contribution to the EU budget would be a sensitive issue. Edinburgh envisages that it could share the British rebate until 2020, when the EU's current budget agreement expires.
- It seems unlikely that Edinburgh would pose problems for the EU in other areas. The SNP's attitude to the common fisheries policy, for example, is positive: it says that Scotland will seek 'leadership through alliance'.

Edinburgh & London

The British government has promised to respect the result of the referendum. It follows that London will accept Scottish independence, if the result is 'yes'. But a new relationship between Scotland and the rest of the United Kingdom would require bilateral negotiations between Edinburgh and London on a multitude of matters. Such questions could prove difficult – the SNP's request to share the British pound after independence has already been rejected by London.

Until Scotland becomes independent, the British government will continue to represent it in the EU institutions. If London presents positions in Brussels concerning Scotland and the EU that are disputed by Edinburgh, the situation would be complicated. If agreed positions could be presented, EU partners would be more likely to agree.

With good will, agreement on key questions could be reached in the 18 months planned between the referendum and independence – after all, the dissolution of Czechoslovakia took only six months. But such negotiations would be a severe test of cooperation between Edinburgh, London and the rest of the EU.

PROSPECTS

What if?

What if Scotland says 'yes' on 18 September'? One would expect a first discussion at EU level at the European Council's meeting on 23-24 October, when the EU's leaders would wish to listen first to Britain's Prime Minister. According to Spain's Foreign Minister García-Margallo 'the attitude of the United Kingdom would be the determining factor at the time of deciding our vote'.⁷ That is logical, for Spain wants its own voice to be determinant in the case of Catalonia.

What if Scotland says 'no'? The SNP has declared that it will respect the result of the referendum, which it describes a 'once-in-a generation' event. It seems clear that, following a 'no', Edinburgh would obtain the devolution of more competences from London.

Why?

Why did the British Government and Parliament, strongly opposed to Scottish independence, consent to a referendum?

Prime Minister Cameron has explained that in response the Scottish 2011 elections 'I did what I thought was the right thing, which was to say 'you voted for a party that wants independence, so you should have a referendum that is legal, decisive, and fair''.⁸ The journalist Gideon Rachman has commented that 'morally and practically the United Kingdom can only be kept together on the basis of consent...the British brand is built

around tolerance, the rule of law and democracy, and there is no better demonstration of those values than the Scottish referendum'.⁹

The other referendum

What are the links between Scotland's referendum and a British referendum on the EU?

Mr Cameron has promised that, if his Conservative Party forms a government after the British elections in May 2015, it will negotiate a new relationship with the EU and hold a referendum in 2017 on the question of British membership. The possibility of this other referendum is a factor in the debate on Scottish independence:

- The SNP argues that the best way for Scotland to remain in the EU is to leave the UK. This is a source of concern for those who wish the rest of the UK to remain in the EU, since Scottish independence in 2016 with the departure of 5 million Scottish voters would make it more difficult to obtain a 'yes' for EU membership.
- If Scotland remains in the UK, but a referendum in 2017 produces a 'no' to EU membership in England and a 'yes' in Scotland, then the question of Scottish independence would inevitably be re-opened.
- Both debates concern Unions: some who argue in favour of Scotland remaining in Union with England ('better together') nevertheless wish Britain to leave the European Union.

In conclusion, Scotland in future is likely to remain in the EU, either as an independent country or as part of the United Kingdom. But the Scottish vote could affect whether the rest of the United Kingdom stays in the EU

Graham Avery is a Senior Adviser at the European Policy Centre, Senior Member of St. Antony's College, Oxford University, and Honorary Director-General of the European Commission. This text expresses his personal views.

1 ICM survey completed 15/5/2014.

2 College of Europe, Brugge, 28/4/2014.

3 President Barroso of the European Commission and President Van Rompuy of the European Council have made statements implying that Article 49 would be used. But this matter will not be decided by the Commission: it will be decided by the Council, which has not yet discussed it.

4 or more on this question see 'Independentism and the EU' by Graham Avery, EPC Policy Brief, 7/5/2014.

5 President Barroso has said (BBC TV, 16/2/2014) that it would be 'extremely difficult, if not impossible' for Scotland to join the EU. This cannot be correct: 13 states have joined the EU during the last decade, including seven that recently gained, or regained, independence.

6 The European Council declared (20/3/2014) that the EU 'does not recognise the illegal referendum in Crimea, which is in clear violation of the Ukrainian Constitution'. The Foreign Affairs Council declared (20/5/2014) that 'the EU will not recognise ... any future illegitimate and illegal "referenda"'.
7 La Vanguardia, 16/12/2103.

8 The Guardian, 8/5/2014.

9 The Financial Times, 18/2/2014.

European Policy Centre ■ Résidence Palace, 155 rue de la Loi, 1040 Brussels, Belgium
Tel: +32 (0)2 231 03 40 ■ Fax: +32 (0)2 231 07 04 ■ Email: info@epc.eu ■ Twitter: [@epc_eu](https://twitter.com/epc_eu) ■ Website: www.epc.eu



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