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MUCH ADO ABOUT (SCOTLAND IN) EUROPE

Daniel Kenealy

Abstract

The issue of an independent Scotland's relationship with the European Union (EU) has been one of the most contentious and recurring issues of the referendum campaign. Discussion, to date, has been characterised by competing assertions from the two sides of the campaign. There has been little in the way of reasoned debate and consideration of the issue. Instead it has become grist to the mill of two campaign meta-narratives, one concerning the uncertainty inherent in a 'Yes' vote and the other concerning the continuity and stability that Scotland would enjoy following a 'Yes' vote. In this essay I will problematise the official position set out by the European Commission, clarify some of the outstanding issues, and raise questions about the proposed timescale for securing an independent Scotland's continuing membership of the EU. I argue that it would be in the interests of all parties, in the event of a 'Yes' vote, to avoid a scenario in which Scotland found itself outside of the EU and its legal framework for any period of time.

Keywords: European Union; European integration; SNP; Independence campaign.

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1. Introduction

The issue of an independent Scotland's relationship with the European Union (EU) has been one of the most contentious and recurring issues of the referendum campaign. In this essay I will trace the main contours of that debate, making the following key arguments (For a more comprehensive discussion of the issue see Kenealy, forthcoming; Kenealy and MacLennan, forthcoming). First, the two sides of the debate have turned the EU issue into grist to the mill of their chosen meta-narratives, one concerning stability and the other concerning uncertainty. Second, official statements by senior EU figures, whilst exhibiting consistency, have utterly failed to engage with the deeply impractical scenario they would trigger if they came to fruition. Third, irrespective of the legal basis on which the situation were to be resolved the EU's 28 Member States will each have to consent to a new, sovereign, nation state joining their club. In other words, each will have a veto. Fourth, negotiations seeking to secure an independent Scotland's place within the EU would be incredibly complex and the time between 'Referendum Day' and 'Independence Day' may not be sufficient to reach a resolution. The possibility of some form of bridging arrangement must therefore be taken seriously.

Overall the conclusion of this essay is that it would be in the best interests of all existing EU Member States, and of an independent Scotland, to avoid a scenario in which Scotland found itself outside of the EU and its legal framework for any period of time. Such a scenario would invite any number of practical difficulties that the EU would be best to avoid having to tackle. It would also be deeply problematic, on normative grounds, for the EU as an actor itself to exclude an independent Scotland – not to mention millions of existing EU citizens – from a club that extolls the virtues of democracy as a by-product of the exercise of a democratic right to self-determination. Thus for both pragmatic and normative reasons it can be reasonably argued – although no more than *reasonably argued* – that an independent Scotland would transfer relatively seamlessly from part of an existing EU Member State (the UK), to a Member State in its own right. However, and perhaps crucially for the politics of the campaign, the issue of EU membership is not especially salient for voters.

2. A convergence of views

In some respects the debate has come a long way. Consider that once, senior figures within the SNP argued publicly that membership of the EU for an

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independent Scotland would be 'automatic' (Nicola Sturgeon in Scottish Parliament, 2007). The claim of automaticity was always a murky one and, in a 2007 document, the (then) Scottish Executive more cryptically stated 'an independent Scotland would continue in the European Union ... following negotiations on the detailed terms of membership' (Scottish Executive, 2007: 23). In the 2009 manifesto similarly the claim was that membership would continue but that negotiations on such housekeeping matters as the number of MEPs and voting weight in the Council of Ministers would be required. (Scottish Government, 2009: 110). Therefore, recognition of some form of negotiation goes back to at least 2007. Since adopting the idea of 'Independence in Europe' in 1988, the argument that EU membership would be effectively automatic has been important to the SNP. 'Independence in Europe' was an idea embraced for 'largely pragmatic' reasons (Hepburn, 2009: 193), with the (then) European Communities cast as a welcoming and familiar international society in which an independent Scotland would be embedded (Lynch, 1996: 39). It was far from certain, given the history of the SNP's attitude towards European integration, that such an idea would be embraced, yet it has remained a firm plank of SNP policy for over a quarter of a century (for a comprehensive discussion see Mitchell, 1998: and Hepburn, 2009). In February 2013, with the issue firmly in the public gaze, Nicola Sturgeon delivered a speech in Brussels, which made it clear that the SNP recognised that negotiations would be required to secure EU membership for an independent Scotland, and that there was nothing automatic about the process.¹ It was taken by some to be a significant U-turn on the issue but, in reality, the SNP's at times vague and loose choice of words over the preceding years always made it difficult to firmly establish what their position was (Gardham, 2013).

Sturgeon's February 2013 speech came on the back on an intense period of activity in which the question of an independent Scotland's EU membership had been especially controversial. The closing months of 2012 saw the First Minister, Alex Salmond, embroiled in a controversy concerning legal advice received by the Scottish Government on the issue of EU membership. Salmond appointed Sir David Bell to carry out an independent inquiry into whether the Ministerial Code had been breached (Carrell, 2012; Johnson, 2012a, 2012b). By January 2013 Salmond had been cleared of intentionally misleading the public on the issue of EU legal advice, although he was criticised for giving 'muddled' responses.² Around the same time, in December 2012, the European Commission president, José Manuel Barroso, waded into the debate in the form of a letter written to the House of Lords Economic Affairs Committee, a matter to which the essay returns in the next section.

The UK Government has also moved some distance on this issue. In late 2011 UK Government legal advice, arguing that an independent Scotland would have to apply to the EU from scratch and would have to adopt the euro, was leaked (Johnson, 2011). In February 2013 the UK Government published its first Scotland Analysis document, which considered the issue of EU membership within an annex concerning the international law aspects of independence. Two noted international lawyers (although not EU experts), James Crawford and Alan Boyle, acknowledged that it was not 'inconceivable for Scotland automatically to be a EU member'. They went on: 'the relevant EU organs or Member States might be willing to adjust the usual requirements for membership in the circumstances of Scotland's case. But that would be a decision for them, probably made on the basis of negotiations' (UK Government, 2013: 67). In a further Scotland Analysis paper, published in February 2014 and focused more directly on EU issues, the UK Government stated that 'there is a strong case that it [Scotland] would have to go through some form of accession process to become a member of the EU. It would also have to enter negotiations on the terms of its membership' (UK Government, 2014: 7).

There has thus been something of a convergence in views. Both the UK Government and the Scottish Government are in broad agreement that a set of complex negotiations would be required. They are distinguishable principally on two issues: firstly, on what legal basis Scotland might secure membership of the EU and, secondly, on their degree of optimism about whether Scotland will be able to achieve membership quickly and with the opt-outs and special provisions currently enjoyed by the UK. Ultimately, however both sides have used the EU issue as grist to the mill of their chosen metanarratives (for an extended discussion see Jeffery, 2014). For the pro-independence side the EU is – along with the pound sterling, the Queen, the various other forms of shared assets that the SNP claim will be retained – one of the many structures in which an independent Scotland will continue to be embedded. It thus serves as a symbol of continuity. For the pro-union side the EU issue represents little more than another element of uncertainty and risk in a 'Yes' vote. The issue has been caught up in these two metanarratives and is often reduced to little more than a clash of competing statements.

3. A problematic official position

Senior European Union officials who have weighed in on the issue have certainly provided more comfort to the pro-union side than the

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pro-independence side. The European Commission, speaking through its president, has adopted a clear stance on the issue dating back to 2004:

‘If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the [EU] Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU.’ (Prodi, 2004. See also Barroso, 2012 and Johnson, 2013)

The position suggests that Scotland would remain part of the EU until the moment of its independence and then, at that moment, would cease to be so. It would then be possible for a newly independent Scotland to approach the EU and apply for membership in the same way as any other state wishing to join. Article 49 of the Treaty on European Union (TEU) would govern this process.

The position of European Commission is problematic in several ways. First, it is not for the Commission to decide this issue. If the issue is one of accession then it is for the Member States, in the Council, to determine the outcome. The Commission’s role in that process is advisory and confined to the technical process of ensuring that various requirements of membership are met. Second, and more significantly, the position invites the chaos of creating a hole in the EU single market. In the words of Sir David Edward, a former UK judge of the European Court of Justice, there would be a midnight hour at which the legal framework of the EU would cease to apply to the territory of Scotland, territory that had been within that framework for over four decades (Edward, 2012, 2013). What this would mean in practice is difficult to fully grasp but it would have the potential to alter the status of every national of a EU Member State currently living in Scotland and it would leave any Scottish nationals living and working throughout the EU in legal limbo. As Sir David pointed out, Scotland’s territorial waters would move outside of the EU and the common fisheries policy would cease to apply (perhaps a welcome benefit for some areas of Scotland heavily dependent on fishing, but likely not to other Member States with significant fishing industries).

The underlying point is clear. The interdependencies that an institution like the EU creates, and the reciprocal rights and obligations that it creates, mean that the expulsion of any part of its existing territory carries with it negative risks for all other Member States. You cannot surgically remove one part of the market without sending very disruptive ripple effects throughout the entire market. The Member States recognised this when, through the Lisbon Treaty, they corrected an oversight and added a legal provision dealing with how a

Member State might leave the EU. Article 50 TEU makes it clear than the Treaty does not permit immediate withdrawal (for a discussion of Article 50 see Hofmeister, 2010). Any departure can occur only after a carefully negotiated settlement that includes a requirement to 'take account of the framework for its [the departing Member State's] future relationship with the Union'. Implicit within Article 50 is recognition that immediate departure from the EU would be disruptive and deeply impractical. Whilst no specific Treaty article deals with the precise scenario that an independent Scotland would present it is fair to conclude that the framers of that Treaty cannot have 'reasonably intended that there must be prior negotiation in the case of withdrawal but none in the case of separation' (Edward, 2012).

The Commission itself, tasked with preserving the integrity of the single market and refraining from any actions that would threaten it, might even be in dereliction of duty in advocating its current stance. It certainly cuts against the EU's commitment to the general principles of good faith, democracy and self-determination (see Articles 2 and 4 TEU), not to mention the notion of the EU as a normative power in the world, a power that derives much of its influence from what it is, what it represents, and how it operates (The concept of Normative Power Europe is well-established in the EU studies literature – see Manners, 2002). Excluding territory and millions of individual citizens because they exercise a democratic right to self-determination is, as SNP leaders have been eager to point out, somewhat contradictory with the spirit of the club.

4. Everybody gets a say on who joins the club

If Barroso's comments have done anything they have served to highlight the so-called 'Article 49 versus Article 48' debate. In essence this debate concerns the precise legal route through which an independent Scotland might attain EU membership. The Commission (and Herman Van Rompuy, the President of the European Council) have identified Article 49 as the appropriate route. This is, as stated above, the article dealing with the accession of new states. The Scottish Government, in its White Paper and supplementary document on the EU, argue that an amendment to the existing Treaties would be sufficient to grant Scotland membership of the EU as an independent state (Scottish Government 2013a, 2013b). Article 48 TEU could thus be used and this would, the Scottish Government believe, expedite the process of securing membership. This belief is certainly open to challenge, both on legal grounds and on the grounds that it would be a more expeditious.

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Legally, the balance of evidence presented to date suggests that Article 49 would be the more appropriate route (see, for example, Armstrong, 2013; Piris, 2014; Scottish Parliament, 2014). However the issue of 'which Article' is of more interest to EU lawyers than it is to those who are trying to reason through this scenario in a practical and policy-oriented way. Far more than the law it is the politics that will determine the outcome of this particular situation. If the political will exists to find a solution then one legal mechanism, or the other, can be plausibly employed to attain a politically agreed goal.

The biggest strike against the Article 48 route, as proposed by the Scottish Government, is that it might actually extend the amount of time required to secure membership. Anybody familiar with the history of the EU knows Member States are often reluctant to open up the Treaties as to do so is potentially pulling at a thread that can quickly untangle a complex set of different national desires and interests. In short, it may be unpalatable for Member States to put Treaty change on the agenda to facilitate Scottish membership for fear that the process would be hijacked by other Member States seeking changes elsewhere in the Treaty. Furthermore, the appropriateness of Article 48 does remain legally debatable. Should another Member State feel that an inappropriate Treaty base is being employed to attain the goal of membership for a new state then a challenge could be brought before the European Court of Justice and this would only serve to lengthen the process.

Whichever route is taken the reality is that all existing EU Member States will have to agree to Scotland becoming a member in its own right, and the terms of that membership. Both accession (Article 49) and treaty amendment (Article 48) require a unanimous vote in the Council, followed by ratification processes in each of the Member States. This raises the spectre of a Spanish veto, a possibility oft-remarked upon in discussion of this issue to date. Whilst it is reasonable to infer that the Spanish Government has an interest in ensuring that Scotland votes 'No' – given the strength of the independence movement in Catalonia – there has been no suggestion, to date, that a Spanish veto would be played (At the time of writing the most recent intervention by Spanish Government officials was in early February 2014. The Spanish foreign minister did not suggest that Spain would veto, but did point out that the process of securing membership for an independent Scotland would be difficult and protracted; see *Scotsman*, 2014.) The Spanish Government has been clear that it sees the Scottish situation as setting no precedent for Spain, given the differences between the UK and Spanish constitutional set up. It is also important to remember that Spain is a state

with a number of different interests. It is unwise to assess the Spanish Government's response to Scottish independence on a single metric, namely what it means for 'the Catalan question'. There are other interests at stake (fisheries being the most obvious example) and they must be considered in the interests of reaching a balanced judgment.

More important than any possible veto of the process is when the process of dealing with an independent Scotland can actually begin. If Article 49 is read literally then Scotland will have to wait until the moment of its independence to apply for EU membership.³ That is to invite the nightmare scenario of the sudden and sharp dislocation to the single market. A relaxed interpretation of Article 49, or alternatively the Article 48 route, might allow for negotiations to begin shortly after a 'Yes' vote with the UK Government as a party alongside a team representing the nascent Scottish state and possessing delegated authority from London. However, even if negotiations can commence quickly following a 'Yes' vote, the timetable of eighteen months remains challenging.

5. A tight timetable

Whilst it is true that Scotland already complies with the majority of the *acquis communautaire* (the combined body of EU law) there would remain work to do to ensure that an independent Scotland was ready to assume all of the responsibilities of full EU membership. Many of the regulatory responsibilities that EU Member States must meet are currently exercised, on behalf of Scotland, by UK institutions. The EU Commission and the other Member States would have to satisfy themselves that an independent Scotland had put in place the necessary regulatory structures and agencies necessary to 'speak' to Brussels. Many issues will have to be resolved between Scotland and the UK before they can be resolved between Scotland and the EU. When you consider that each Member State will then have to ratify the treaty that brings Scotland within the EU – whether an accession treaty or a treaty amendment – then eighteen months begins to seem ambitious.⁴

Negotiations will no doubt be made more contentious by the fact that the Scottish Government is seeking so-called 'continuity of effect' (Scottish Government, 2013b: 12, 87–8). Essentially, this means that an independent Scotland would retain all of the current opt-outs and special provisions that the UK currently possesses. Some of these opt-outs relate to sensitive issues such as membership of the euro and the Schengen Area. Without inheriting such opt-outs there would be a legal obligation on Scotland to make progress

towards joining both. The reality however is more complex. No state can be compelled to join the euro and Sweden is notable as an example of a state that has simply refused to join the Exchange Rate Mechanism (ERM-II), thus failing to meet one of the convergence criteria (for a fuller discussion see Scott, 2012). Membership of the Schengen Area, similarly, requires strict criteria to be met and unanimous agreement from all existing members.

More interesting than the question of whether an independent Scotland might be able to negotiate these opt-outs for itself – and again, that will be a function of the political interests of the other Member States – is the broader question of what type of EU Member State it might wish to be? By setting out a stall in favour of ‘continuity of effect’ the Scottish Government is signalling, as Michael Keating has put it, that it wishes ‘to cling to the rest of a United Kingdom that seems to be moving away from, if not altogether out of’ the EU (Scottish Parliament, 2013: Col. 1555). Absent from the White Paper and supplementary document is a positive vision of an independent Scotland in the EU. Almost certainly, in the short-to-medium term there is no realistic prospect of an independent Scotland adopting the euro or gaining membership of the Schengen Area. It seems certain that, in the years ahead, an independent Scotland would have to choose whether to move towards the core of the EU, or remain with the UK on the periphery.

6. Conclusion

In the final analysis perhaps the most that can be said is this: in the event of a ‘Yes’ vote in September there will be tremendous pressure on all EU Member States to avoid a sudden and sharp dislocation to the single market. That pressure ought to concentrate minds and lead to negotiations between ‘Referendum Day’ and ‘Independence Day’. The outcome of those negotiations will be a function of a set of political interests held by the 28 Member States, and also by the manner in which Scotland approaches its European partners. Despite the intermittent controversy sparked by this issue it remains a low salience issue for voters in the referendum (Eichhorn and Kenealy, 2014). As the two sides – pro-independence and pro-union – trade barbs about what would happen to an independent Scotland vis-à-vis the EU, the voters seem to be shrugging their shoulders at an issue that is neither particularly important to them in making up their minds, nor a subject about which much more clarity can be expected ahead of September.

Notes

1. Nicola Sturgeon, Speech to the European Policies Centre, Brussels, 26 February 2013, available at <http://www.scotreferendum.com/2013/02/speech-to-european-policy-centre-in-brussels-26-february-2013>.
2. Sir David Bell, 'Scottish Ministerial Code: Complaint by Catherine Stihler MSP', 7 January 2013, available at <http://www.scotland.gov.uk/Resource/0041/00412247.pdf>.
3. Article 49 TEU reads: 'any European state . . . may apply to become a member of the Union'. Read literally Scotland would not be a European state until 'Independence Day' but it would be far more pragmatic to recognise Scotland as a European state in embryonic form following a 'Yes' vote.
4. The most rapid completion of the accession process to date was the 1995 enlargement, which brought Austria, Finland, and Sweden into the EU. Negotiations were completed in thirteen months with ratification taking a further ten months. See Sedelmeier, 2010: 404–5.

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