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# An Independent Scotland and the EU

Can an Independent Scotland join the EU?

The Practical Challenges of EU Membership

Economics of Independence

Strategic Security Relations of an Independent Scotland

Lessons from the Republic of Ireland



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## Foreword

Dr Daniel Kenealy

It is my pleasure to write this short foreword for the Buchanan Institute's series of papers on 'Scotland and the EU'. As Scotland's independence referendum approaches this very important topic is one that deserves further study and attention. Too often, in the midst of a fierce political campaign, discussion of this topic has generated far too much heat and far too little light.

Since Jose Manuel Barroso, the outgoing president of the European Commission, intervened in the debate back in December 2012 in a letter to the House of Lords the issue has been a political football, thrown back and forth periodically for eighteen months.

This series of short papers, written by students of the University of Edinburgh, attempt to tackle some of the most difficult issues posed by an independent Scotland's relationship with the EU. If there is a single take-home message it is this: any negotiations with the EU following a 'Yes' vote on 18 September will be long and complicated.

The short papers herein tackle the full range of issues associated with EU membership for an independent Scotland, from economic and commercial issues to strategic security relations. And they shed light on the complex requirements that an independent Scotland would have to meet in order to become a Member State of the EU (these requirements are complex despite the oft-repeated and incorrect phrase that Scotland is already fully compliant with the EU's rulebook). The final paper introduces a comparative element by considering lessons from the Republic of Ireland.

Senior politicians have failed to get to grips with many of these issues in their public debate. One cannot entirely blame them for this. First, the issue is not one that drives public opinion in a significant way. Second, the issue is one destined to remain shrouded in considerable uncertainty until realities force the parties to deal with it. Third, the issues are highly complicated and in the 'sound bite' referendum it would have been difficult to fully explore these issues.

Congratulations should go to the project coordinators, two final year students whom I also had the pleasure of supervising for their dissertations, Njord Gording and Walter Hawes. The final product represents considerable work and energy on their part, as well as on the part of the individual contributors. It can only be hoped that the Buchanan Institute continues in this vein, tackling difficult issues confronting policy makers and trying to shed some new light on them.

## Executive Summary

Njord Gording

An independent Scotland is eligible to join the EU, but must apply on the same terms as any prospective EU state, and meet the requirements listed in the Copenhagen Criteria before a formal bilateral negotiation process between Scotland and the EU can begin.

Meeting the formal requirements within the 18-month timeline is likely to prove the most difficult for Scotland to do in the "gap between the vote and the moment of independence",<sup>i</sup> and so it is not unimaginable that Scotland will remain formally outside the EU beyond the 18-month timeline agreed between the Scottish and UK governments.

Economically, Scotland can maintain strong trade relations with both EU and non-EU countries regardless of EU membership, but must at least join the EEA in order to avoid facing the common external tariff imposed on non-EEA trade partners. Independence from the UK will also shift economic dependence towards mainland Europe, as the convenience of doing business across the Scotland-UK border will lessen, and the regulatory systems diverge.

In terms of national security, Scotland will benefit from preexisting military installments and infrastructure, but will suffer from a severely decreased defence budget and exclusion from the "Five-Eyes" intelligence-sharing community of the UK, US, Australia, Canada, and New Zealand. The future of Scottish security capabilities will ultimately depend heavily on the outcome of negotiations with the UK and EU on cooperation in areas such as intelligence, defence, and law enforcement.

The UK independence and EU ascension process is likely to face obstacles not foreseen in the White Paper nor by sitting ministers, and negotiations with the UK and EU will not be on Scotland's terms, especially given the application of the 'continuity of effect' doctrine.<sup>ii</sup> The Republic of Ireland's independence process may therefore provide valuable insight on everything from how to switch national currency to questions of membership in the Schengen free travel area.

# Can an Independent Scotland join the EU?

Liza Root

Scottish independence presents a scenario for which there is no historical precedent within the EU, and for which the EU Treaties make no provision. The absence of a clear legal path provides an opportunity for a wide range of opinion about an independent Scotland's future relationship with the EU. Overall, those in favour of independence claim that transition to EU membership will be straightforward, (e.g. Alex Salmond's assertions in the White Paper). Those against claim there will be immense obstacles preventing a beneficial outcome for Scotland. They cite Jose Barroso who has stated that a full accession procedure through Article 49 would have to be followed<sup>iii</sup>, or Gordon Brown who has stated that Scotland would not be able to negotiate terms as favourable as their current situation as part of the UK.<sup>iv</sup>

An independent Scotland outside of the EU is a real possibility, though an unhappy one in many respects. As illustrated by Sir David Edward, Scotland would no longer be bound to the rates of VAT and corporation tax, European Erasmus students would no longer be qualified to benefit from the program and non-Scottish fishermen (of which there are many) would be excluded from Scottish waters.<sup>v</sup> Far worse, the "unravelling of a complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations"<sup>vi</sup> caused by a sudden ending of EU citizenship rights in Scotland would be hugely inefficient and resource draining. There are four key difficulties to be overcome if the above scenario is to be avoided. Each is currently either exacerbated or downplayed depending on political interests.

**i. Legal impediments.** The traditional Article 49 accession procedure is complex and time-consuming involving an intergovernmental examination of Scotland's capacity to implement each of the 35 chapters of the *acquis communautaire* (considered in the following chapter). It would involve Scotland experiencing a large-scale and expensive disruption resulting from it being excluded from the EU on the day of separation. Yet, even with a simplified procedure following Article 48, legal obstacles will be encountered as this unprecedented situation would call for changes in EU legislation.

**ii. Veto.** Scottish accession through Article 49 or Article 48 would require unanimity. Accession could therefore be thwarted by the veto of any member state. For instance, it has been implied that Spain would invoke its veto to discourage Catalanian secessionist ambitions.<sup>vii</sup>

**iii. Budgetary negotiations.** Negotiations of budgetary matters would require difficult discussions with London and Brussels. Moreover they would be of great interest to other member states. As a result it may be that an independent Scotland will not be able to negotiate as favourable terms as it currently has being part of the UK.

**iv. Administrative difficulties.** In order to avoid complete exclusion, negotiations would have to begin during the 18-month period before separation. In which case, these negotiations would have to be conducted by the UK government on behalf of Scottish interests, which could be administratively difficult since Westminster is openly opposed to Scottish independence.

However, it is important to recognise that there are two time periods which will provide the context within which these difficulties will be debated. The first time period is one of political campaigning ending on September 18<sup>th</sup>, the day of the vote. The second time period, should Scotland vote for independence, will be the 18 months leading up to separation. During this period the same parties who campaigned against independence by emphasising its problems, will then find it in their interest

to work in a spirit of cooperation to solve these problems and ensure a smooth accession for Scotland to the EU. They will approach the same difficulties from a completely different point of view: they will be looking for pragmatic solutions rather than pointing out theoretical difficulties. Consequently, in the event of a 'Yes' vote, previously divergent interests will tend to converge.

A primary goal for some member states has been to get Scotland to remain in the UK. If this becomes impossible, the next goal would be preserving Europe-Scotland relations and preventing Scotland's exclusion. It will be in the interest of other member states, the rest of the UK and the European Commission for Scotland to become a fully functioning member state as smoothly as possible.

The spirit of EU treaties also obliges them to allow that to happen. Article 4.2 of the Lisbon Treaty states: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." Moreover, EU law was written with flexibility in mind, enabling adaptation to new situations whilst preserving the values of the EU: peace, democracy and economic prosperity.<sup>viii</sup> Taken together these factors would provide the conditions in which the four key difficulties mentioned above could be resolved. This will require complex and intense negotiation by all stakeholders, particularly given the relatively short time period, but given the conditions above there is no reason why this process should not be successful.

In conclusion, in the event of a "Yes" vote, there will be many complex issues to resolve before Scotland can achieve full EU membership. These issues will require intense negotiation between all parties involved, under a challenging deadline, which should not be underestimated. At the same time, many of the potential difficulties that are now being emphasised by those opposed to independence would be approached in a different context after a vote for independence. It would become in the interest of those parties currently opposed to independence to work collaboratively and in a spirit of cooperation with the Scottish government to find pragmatic solutions to these problems.

# The Practical Challenges of EU Membership

Dionisis Pelekis

## **This part will:**

1. Examine the regulatory and institutional requirements an independent Scotland would be required to satisfy before joining the EU.
2. Discuss the challenges and problems Scotland might face in the process of satisfying those requirements.

## **The Requirements**

In the 18 months between the referendum and independence, Scotland can start taking steps that would make its application to the EU easier. The first thing an independent Scottish Executive should examine is the Copenhagen Criteria. Set out by the European Council in 1993, it forms the formal body of rules that define whether a country is eligible for EU membership.

Scotland, which has been a functioning country within a member state for the past 40 years, seems certain to fulfil most of these criteria by default. The first set of criteria are political. Scotland must have a “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” This is demonstrated not only by Scotland’s being part of the UK which for example gave their legal commitment to the Human Rights Act 1993, but also by Scotland’s own national longstanding commitment to democracy and human rights from the Declaration of Arbroath nearly 800 years ago to contemporary liberal values demonstrated by institutions such as the Human Rights Consortium Scotland.

The second set are economical. Scotland must have a “functioning market economy and the capacity to cope with competitive pressure and market forces within the union.” Scotland’s recent economy history shows it has been committed to having an open competitive economy. For instance, in the last 50 years Scotland has successfully established a range of new hi-tech and electronics industries in “Silicon Glen”. Though dipping in success since the turn of the century, Scotland’s electronics currently compete on the global economy and in 2011 accounted for 10% of Scotland’s international manufacturing exports.<sup>ix</sup>

The 35 Chapters of the *acquis communautaire*, which formally are not part of the Copenhagen Criteria, are much more complex. Those chapters, alongside the Treaties (TEU & TFEU), can provide helpful guidelines to the Scottish Executive in its attempt to create the new institutions necessary following independence. If the Scottish Executive works towards achieving some of the institutional requirements outlined in the *acquis*, it can effectively take advantage of the 18-month period and take a large step towards EU accession.

The reforms needed however, will be complex and laborious. Scotland will need to set up a National Competition Authority and a Central Bank, to conform to Chapters 8, 9 and 17 of the *acquis* and Title VII of the TFEU. A Scottish central bank may prove exceptionally difficult, as Scottish politicians have voiced interest in pursuing a 'Sterling union' with the UK, run by the Bank of England. Furthermore, under Chapter 16 of the *acquis*, the creation of a national taxation and customs office to be in charge of VAT and excise duties will be required. All these institutions, of course, are required to be fully operational by March 2016.

Throughout the *acquis* different areas of policy, most of which require the existence of some sort national overseeing authority are detailed. Those range from a national statistical authority to a food safety agency. Most of those, however, are rather straightforward, and are at any rate institutions all sovereign states need. It will be in the interest of an independent Scotland to closely follow the terms of the *acquis* and the example of other EU Member States when setting up such authorities, in order to ensure that, when this stage of the accession negotiations is reached, Scotland will not have an issue satisfying the relevant criteria.

### **The Challenges**

Not all the requirements are as easy to implement, and of them stand to cause significant problems. Notably, the UK has opt-out clauses in a number of EU agreements, and it is unlikely that Scotland would inherit all, if any, of those special deals. This means that Scotland will be in uncharted waters, as they are forced to adopt whole sets of policies that never existed during its EU involvement under the auspices of the UK.

For example, because of the natural resources in the North Sea and the infrastructure required to exploit them, Scotland might have issues with Chapter 27 on Environmental Policy, as the chapter is based on the “polluter pays” principle. Furthermore, Chapter 13 on Fisheries might prove challenging, mainly in relation to the creation or adoption of fisheries agreements and conventions with neighbouring third states that have a high interest in fisheries policy, such as Norway and Iceland. Finally, adopting the Euro will be extremely complex, as at the moment the UK satisfies only one out of the five Euro convergence criteria, and Scotland will have to focus its monetary policy on that particular issue if they wish to join.

The process for joining the EU is rather arduous, as indicated by the recent statements of Barroso and Van Rompuy, and coordinated planning in the 18 months prior to independence will be necessary. An example that we should bear in mind is that of Iceland. Iceland applied for membership in July 2009 and prior to its application it enjoyed a high degree of integration with the EU through membership in the European Economic Area (EEA), Schengen Area, European Free Trade Association (EFTA) and NATO. It is also a signatory of the Dublin regulation on asylum policy and a partner in the EU's Northern Dimension policy to promote cooperation in Northern Europe. Notwithstanding that rather high level of integration, by 2013, after almost three years of negotiations on the Chapters of the *acquis*, only 11 of those had been closed. Scotland of course enjoys much deeper integration with the EU, but the Icelandic timeline can serve as a cautionary tale to those who submit that an independent Scotland will join the Union in a heartbeat. The process will be lengthy and exhausting, but with proper planning it can be made significantly easier.



# Economics of Independence

Dillon Zhou

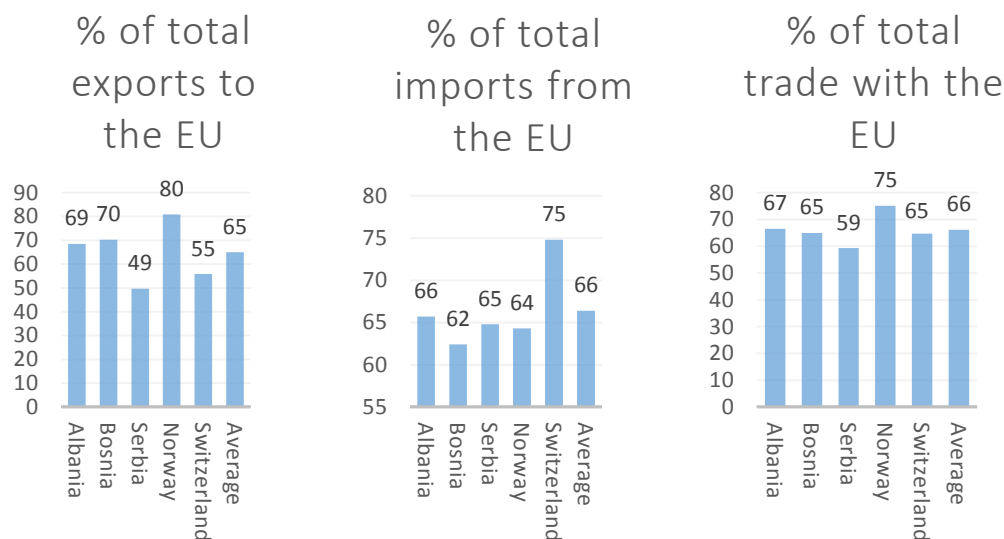
## Four conclusions on trade and economics:

1. Not being an EU member is unlikely to damage Scotland's chances of successfully relying on the EU for trade. The data shows that a lack of EU membership does not prevent a European country from successfully relying on the EU for trade.
2. It is highly unlikely that the EU would isolate Scotland, treating it as an outsider. An arrangement will likely be agreed between the referendum and Independence Day (2016) to allow Scotland-EU economic relations to continue as usual.
3. Scotland is likely to trade less with the rest of the UK (rUK) in the long term and focus more on Europe. An independent Scotland will treat the EU 28 and the RUK more and more similarly in the longer term.
4. The current debate fails to acknowledge, arguably for political reasons, the high degree of uncertainty surrounding future Scotland-EU relations. Scotland's future relationship with the EU is a *known unknown*. As a result, policymakers must be prepared for uncertainty being in itself certain.

## Non-EU status is not economic demise

The data shows that there is almost no difference between how much EU and non-EU European countries rely on the EU for trade – only 0.98% for exports and 2.4% for imports.

Trade *within* the EU in 2009 accounted for 66% of the overall exports of the member states and 64% of their imports (IMF, 2010). These numbers are almost identical for the following non-EU European countries:<sup>x</sup>



This suggests that for European countries, being outside the EU does not damage trade with the EU. Across Europe about two thirds of imports and exports, of both non-EU and EU countries, is with the EU. This suggests that being outside the EU does not mean a European economy cannot successfully rely on the EU for trade.

A likely explanation is that EU commercial (trade) policy is designed to protect Europe as a whole and not only EU members. So the EU does not treat non-EU European countries the same way it treats 'external' nations outside the continent. Further, the EU does not benefit economically and politically from alienating European non-members as trading partners.

Two notes on methodology also need to be made. One, these non-EU European countries have been chosen because they are comparable to Scotland. Bosnia-Herzegovina (pop. 4.5m), Serbia (7.3m) and Albania (3.6m) have similar populations to Scotland. Switzerland (8m) and Norway (5m) are similar in terms of wealth and population.

Two, the newly separate Scotland and these other European countries (that have had many years to develop trade relationships with the EU) *are comparable*. This is because a temporary agreement (discussed next) would allow Scotland, in practice, to avoid suffering the consequences of being outside the EU customs union. This agreement would be a 'halfway house' between full EEA membership and outsider status.

### **The EU will not cut Scotland out entirely**

It is highly unlikely that the EU will marginalise and isolate Scotland economically. What is likely however is a simple bridging agreement, which will let Scotland continue exporting to the EU. Between independence and probable re-admission into the EU, such an agreement would allow business to continue as usual. As a result, current trade patterns would continue largely unchanged in the short term.

There is no evidence to suggest that the EU would isolate a newly independent Scotland. Doing so would greatly destabilise the Scottish economy, be unnecessarily and overly aggressive, and would not benefit the EU. Scotland has been in the EU for many years, has healthy economic ties with the continent, and would be applying for EU membership immediately after independence. Such a move by the EU would create unnecessary tension in an already fragile union – something the EU is keen to avoid.

### **Scotland will trade less with the UK, and more with the EU**

An independent Scotland's optimal and likely role within Europe will be different to the status quo. Currently, Scotland trades mostly with the rUK (see Fig. 4).<sup>xi</sup> This is unusual in Europe since intra-EU trade is around 65% (as previously mentioned).

Currently, studies such as the Government's *Scotland Analysis*<sup>xii</sup>, predict that trade frictions between the Scotland and the rUK will rise following independence. These frictions will almost certainly not decrease. But it is uncertain what kind of trade frictions will materialise between Scotland and the rUK, and how severe they will be.

While it will be difficult to overcome an increase in Scotland-rUK trade frictions, over time, Scottish businesses are likely to view the rest of the EU and the rUK more similarly than they currently do because of these higher frictions. Such a trend would likely cause Scottish exports to become a more Europe-focused – in line with what the average EU country currently does. This seems to be a view that is being largely ignored by UK government research at the moment. An independent Scotland is unlikely to drastically change its export destinations and quantities in the short term, so a shift towards Europe and away from the rUK is expected to be a long-term trend.

## Destination of Scottish exports by value

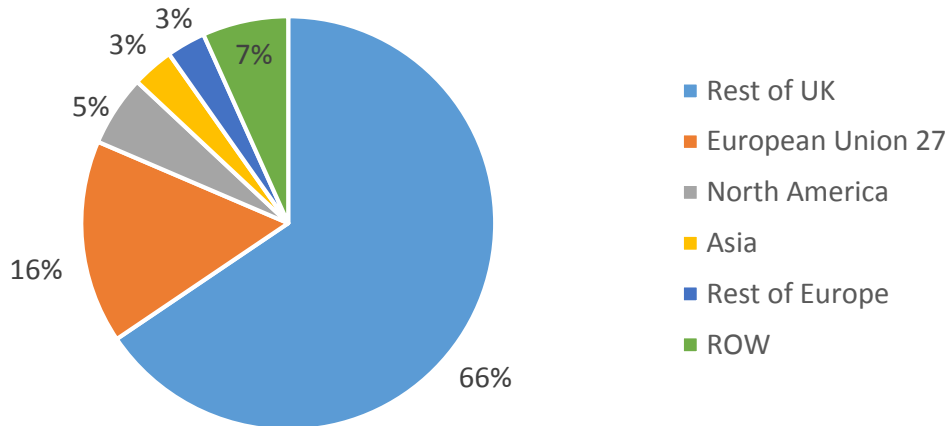


Fig. 4

### **No one is acknowledging the definite uncertainty**

Scotland-EU negotiations are effectively a battleground of competing interests. Therefore from a policy perspective, Scotland must prepare for a relatively wide array of eventualities. The existing corpus on future Scotland-EU relations systematically fails to take into account the definite uncertainty surrounding EU issues.

Among the most important of these is the choice of currency. Section 5, *The Irish Example*, considers the currency of an independent Scotland more fully. What economic theory can be certain about, however, is that it is impossible to simultaneously have a fixed exchange rate, free capital movement, and an independent monetary policy.

# Strategic Security Relations of an Independent Scotland

Grace Rosinski

An independent Scotland will face many security and defence related problems. The Scottish government must create a comprehensive defence policy and establish a security infrastructure, including counterintelligence agencies, cyber-security networks, and conventional military capabilities. The extent and manner of the defence reform required, however, will undoubtedly depend on Scotland's relationship with the rest of the UK (rUK) and the EU. This brief will detail the security interests of an Independent Scotland, as outlined primarily in the 'White Paper' on Scottish independence. It will then consider the impact that independence would have on Scottish security capabilities, particularly due to the altered relationship with the rUK. Finally, it will analyse how an Independent Scotland could enhance its security by becoming a member of the EU and what role it should play in that organisation.

## **Security Aims of an Independent Scotland**

The 'Yes Scotland' campaign forecasts one fundamental security and defence benefit of independence: the autonomy to create a consensual strategy. An element of independence is the creation of a written constitution, which would include safeguards to make state security and military decisions bound to popular opinion. Beyond this fundamental interest, the 'Yes' campaign has outlined the following security interests:

- Establish a single security and intelligence agency
- Develop new security and defence capabilities
- Improve maritime safety
- Defend North Sea oil holdings through increased air and water protection
- Cooperate with the rUK and EU on issues of cross-border policing, organised crime and terrorism
- Develop closer relationships with European cyber-security agencies
- Participate in international humanitarian and peace-building missions
- Be fully committed to the EU Common Foreign and Security Policy (CFSP)
- Maintain a partnership approach to the Area of Freedom, Security and Justice (AFSJ) in the EU

These broad interests can act as a foundation in the case of independence, but it is crucial that an independent Scotland develop detailed security policies, especially on issues like migration. The efficiency of the new Scottish state is not the only variable affecting the coherence of Scottish security policy; it is highly dependent on the security relationships Scotland would have with rUK and the EU. It is therefore important to analyse how those relationships could function.

## **Impact of Independence on Scottish Security Capabilities**

The exact structure of Scotland-UK cross-border security cooperation would be subject to bilateral negotiation in the case of independence, making the nature of the new relationship

difficult to predict. However, there are some discernable costs and benefits to independence from the Westminster Government. By understanding these, an independent Scotland could shape a security strategy that best suits its capabilities.

The potential benefits of independence all relate to the fundamental desire to have Scottish autonomy from the military decisions of the rUK. Decisions on troop commitments and capability development have often not conformed to the needs or preferences of those that live and work in Scotland. The benefits of independence would be:

- Transfer of powers currently reserved by Westminster, such as controls over firearms and the proceeds of drug trafficking, and immigration policy
- Removal of the British nuclear arsenal from Faslane (Trident Project) and the conversion of that facility to a conventional naval base
- Ability to target conventional military development to the needs of Scotland, especially regarding maritime defence in the North Sea
- Ability to have Scottish military decision reflect popular will, and thereby avoid commitment in unpopular conflicts, such as Iraq in 2003

However, it is important to recognise the costs of independence:

- The proposed security **and** defence budget for an independent Scotland is £2.5bn, compared to the £33bn for defence and over £2bn for security and intelligence agencies currently spent by the UK.
- Scotland would not be a member of the “Five-Eyes” intelligence sharing community between the UK, US, Australia, Canada, and New Zealand.
- Scotland would lose access to the capabilities and resources of MI5, SIS, and GCHQ.
- Scottish citizens would lose access to UK consular support located in 154 countries and 12 Overseas Territories

Scotland is capable of developing its own security and defence infrastructure. The planned spending on these services is also significantly less than UK spending, but much of the infrastructure would need to be built from the ground up. It is important that voters and policymakers recognise that independence bears these costs, and that, at least initially, security structures in an independent Scotland would not be as equipped as those in the rUK. By acknowledging the potential drawbacks, an independent Scotland can avoid a ‘capabilities-expectations’ gap.

### **Benefit of EU Membership to Scottish Security Strategy**

Assuming a successful accession to the EU, an independent Scotland would benefit from participation in the Area of Freedom, Security and Justice (AFSJ), the Common Security and Defence Policy (CSDP) and the Common Foreign and Security Policy (CFSP). Not only would Scotland finally have its own voice in EU conversations, but an independent Scotland could employ the resources and expertise of the EU to help develop its own security and defence capabilities.

Some distinct security and defence benefits of Scottish membership in the EU are:

- Scotland has an interest in areas of the AFSJ into which the UK has not opted, such as the common European asylum system, proposals on criminal sanctions for insider dealing,

financial support for police cooperation and crisis management under the Internal Security Fund, and the EU Agency for Law Enforcement Cooperation.

- Scotland could use the EU delegations of the European External Action Service (EEAS) as proxy diplomatic representation, in order to avoid the high cost of establishing new embassies and consulates
- Scotland would be able to pursue its interest in participating in peace-building missions through the CFSP structure
- The unanimity voting system of CFSP/CSDP would protect Scotland from unwanted involvement in conflict

Scotland could mitigate the costs of independence from rUK security services by employing the expertise available within the AFSJ, especially regarding cyber-security, policing and counter-terrorism. An independent Scotland could promote its international interests in human rights and democracy through the EU external policy structures, and help to develop the CFSP system to be more effective.

It is important, though, to recognise that while the EU could benefit Scotland *on balance*, there are costs to membership. The bargaining processes involved in the decision-making processes for CFSP/CSDP give more negotiating power to states with more economic and political capital. Scotland, as a small country with a limited projected defence budget, without nuclear capability, would not have the same negotiating power as the UK currently does. Moreover, there is no guarantee that Scotland would be afforded the same flexibility in the AFSJ as the UK currently enjoys, i.e. Scotland might not have the ability to selectively opt-in to proposals.

It would also be in Scotland's interest to join NATO, but it will have to reapply for membership and gain the unanimous support of all 28 nations. Scotland will here yet again be faced with the reality that there are NATO states who fear the consequences admitting Scotland into the defence union would have on separatist movements within their own borders, and therefore have political motive to veto Scottish membership. That said, the relatively 'safe' location of Scotland from possible foreign state aggression makes NATO membership less important than otherwise: the Republic of Ireland, for example, is not a NATO member.

A common theme in any discussion on Scottish independence is the uncertainty of it all. Security policy and infrastructure in an independent Scotland would be highly dependent upon the relationships the new government would be able to negotiate, with the UK and with the EU. In order to pursue its security interests, an independent Scottish government would have to recognise the necessity of compromise, perhaps even on key issues like the location of the British nuclear arsenal. Security interests would have to be prioritised. Most importantly, an independent Scotland should strive to develop effective domestic security and defence capabilities quickly, to protect the stability of itself as a new state.

# Lessons from the Republic of Ireland

Ella Joyner

The current White Paper fails to acknowledge the uncertainty regarding future negotiations with the UK and the EU. Scotland's negotiations with the EU and UK will not be on its own terms, especially concerning the application of the 'continuity of effect' doctrine. The Irish example of an independent EU member state with strong relations with the UK can offer useful ideas about which key issues ought to be prioritised and which compromised. The areas to be discussed in this brief will be Justice and Home Affairs and the Schengen Area.

## **Justice & Home Affairs**

The case for Scottish independence, according to the 'continuity of effect' doctrine and as outlined in the White Paper, assumes the preservation of the Common Travel Area, and opt-ins to Justice and Home Affairs, resulting in a seamless transition to EU membership for Scotland. There is, however, no legal basis for assuming a 'continuity of effect' as regards Scotland's EU and UK relations.

In lieu of a precedent in these cases, it is much more likely that the EU and its member states treat Scotland's EU-bid on the same terms as a new candidate state. As such, it is likely that Scotland would be expected to adopt all EU current and future legislation, including aspects of the legislation to which the UK opted out. Scotland is for example unlikely to retain the 'opt-in' approach to JHA that the Republic of Ireland and the UK have. For example, in budget negotiation, it is difficult to envisage Scotland retaining the budget rebate negotiated by Margaret Thatcher in 1984.

Ireland, like the UK, was able to secure an 'opt-in' approach to Justice and Home Affairs during the negotiation of the Lisbon Treaty. Being the only country with the legal duty to ratify the treaty by referendum, the Irish people's rejection of the Lisbon Treaty placed them in a powerful position where they were able to negotiate preferential terms for themselves, in order that the Treaty would go ahead despite the fact that it was not unanimously accepted by all member states.

Scotland must therefore be prepared that during its negotiation process, it will not have its position strengthened, as Ireland did.

- Scotland can cite Ireland as an example of a member state with significant Justice and Home Affairs concessions that is still very much European in outlook.
- Scotland will have difficulty in negotiating the maintenance of both protocol 21 and protocol 19, as it will not benefit from the strong negotiating position that Ireland did
- However for the reasons stated above, Scotland will face difficulty in securing the JHA concessions held by the UK and ROI.

## **Schengen Area**

The White Paper's case for independence is based on the strategy of a Scotland with no borders between the rUK, but Scotland is unable to remain a member of the Common Travel Area if it is required to become a member of the Schengen Area, and EU law states that all candidate states must accept in full the Schengen Agreement.<sup>xiii</sup>

As recognised by both the devolved Scottish and UK governments, the preservation of the CTA is vital to the economic interests of Scotland and the rUK. In the case of a 'Yes' vote, it is unlikely that the rUK would not try to preserve the CTA, as it is in both the rUK and Scotland's interest.

As the Schengen *acquis* is originally based on an agreement outside of EU law and given that there are many precedents of opting-out of the Schengen Area (Annex 7), it ought not to be problematic for Scotland to preserve its membership in the CTA.

Ireland chose to opt-out from Schengen in favour of the preservation of the pre-existing CTA. Membership to the Schengen Area would have meant the erection of internal border controls between Northern Ireland and the Republic of Ireland (RoI), which would have been unacceptable to the public. Scotland, with its internal border with England has equally strong grounds to argue for the maintenance of the CTA. With the RoI, it also has a clear and comparable precedent.

- The maintenance of the CTA would be easier to achieve than JHA concessions, since it is also in the rUK's interest and is less likely to be contentious with other EU member states.
- The case for 'continuity of effect' is stronger here, as the erection of borders between Scotland and the rUK would cause great economic and social disruption.
- There seems little incentive for any political party to push for Scotland to join the Schengen Area (at least in the short term).

## **Conclusion**

Protocol 21 is likely to be much more difficult to secure. Despite the White Paper's insistence on the viability of 'continuity of effect', there are no legal precedents for this. Scotland will not be entering into negotiations with Brussels or London on its own terms. Although 'continuity of effect' seems logical, it could also be construed as special treatment compared to other new member states. Ireland's opt-in protocol was secured under a different political climate.

An Independent Scottish government should prioritise the security of protocol 19 over protocol 21, given the likely detrimental effects of the erection of a border between Scotland and the rUK on Scotland's economy and trade relationships. There is a clear and comparable precedent in the form of Ireland.

Essentially, this author believes that Scotland is not entering negotiations with as much negotiating power as what has been presented in the White Paper. Scotland may have to give up the 'opt-in' approach to EU legislation, in order to guarantee the maintenance of the CTA.



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## References

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