

Scotland's route to EU membership

In this post, **Darryn Nyatanga** analyses the possibilities and the difficulties involved with EU accession for an independent Scotland, which will be a major issue in a future Indyref campaign.

With the May 2021 Holyrood elections coming up, the SNP-led Scottish government have stated that their constitutional objective for Scotland is independence and EU membership. If they return a majority ([which many polls suggest they will](#)) they are likely to begin their governance with a [roadmap](#) to a second referendum on independence (Indyref 2).

The route to EU membership

During the first independence referendum campaign in 2014, the SNP led Scottish government placed importance on the need for [continued EU membership for Scotland](#). This resulted in questions over whether an independent Scotland would have to reapply for EU membership being raised. Clarity over this was finally given in 2012 by José Manuel Barroso, the EU Commission President at the time, in a [letter](#) to Lord Tugendhat.

This letter confirmed, that by breaking away from the UK's union, an independent Scotland would become a third country with respect to the EU, and would therefore need to apply for EU membership. In the same letter, Barroso went on to outline the [Article 49 Treaty on European Union \(TEU\) accession process](#). Essentially, Barroso was alluding to the fact that, as a third nation, an independent Scotland would have to apply to join the EU under Article 49 TEU, a process that requires negotiations and the consent of all EU member states. The letter has now become known as the Barroso doctrine.

On the 31st of January 2020, the UK ceased to be a member of the EU and the revocation of Article 50 TEU was no longer possible. This marked the beginning of the transition period (which ended on the 31st of December 2020). This also confirmed that there would be no ambiguity regarding the applicability of the Barroso doctrine for an independent Scotland, given that the UK is now a third country.



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Phase one: Ensuring compliance with the Copenhagen criteria

The legal basis for EU accession for a potentially independent Scotland is still through the Article 49 TEU process. Constitutional legal scholars such as [Kirsty Hughes and Tobias Lock](#) argue that Scotland could complete the accession process as laid out in Article 49 TEU, in as little as 3 to 4 years after independence. In their view, Scotland, as a former EU member (via the UK's membership) could easily prove compliance with the [Copenhagen criteria](#), which the EU requires candidate countries to comply with. The [criteria](#) are set out as follows:

- “political criteria: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- economic criteria: a functioning market economy and the capacity to cope with competition and market forces;
- administrative and institutional capacity to effectively implement the *acquis* and ability to take on the obligations of membership.”

The political and economic criteria are not problematic, however, the last set of criteria could delay the process depending on when Scotland gains independence. Prior to the day, the transition period ended (31st December 2020), Scotland adhered to most of the EU's *acquis* i.e. Customs union, Single market, Environment Policy and the Common Agricultural Policy. From the genesis of the Brexit referendum result in 2016, the Scottish government were [clear](#) in their objective of ensuring conformity to the EU's *acquis communautaire*. In February 2020, Scotland's First Minister Nicola Sturgeon, in a [speech](#) at the European Policy Centre in Brussels, highlighted the reasons behind this commitment: “to protect the health and wellbeing of people in Scotland, to maintain the international reputation of businesses in Scotland, and to make it easier, when the time comes, as I believe it will, for Scotland to return to the EU.”

The Scottish government and Parliament enacted legislation that would ensure conformity with the EU's *acquis* post – Brexit, the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. The Act provides ministerial powers to allow for Scotland to ‘keep pace with developments in EU law.’

However, the Scottish government's plans to keep pace with EU law developments may potentially be curtailed by Westminster's UK Internal Market Act 2020. The Act amongst other things sets out the legal framework for the UK internal market, based on the trade law market access principles of mutual recognition and non – discrimination. However, such principles do not take into account the unique features of the UK internal market. For instance, English dominance in terms of population size and economy, and also the constitutional dominance of Westminster over its devolved counterparts. In practice, this dominance would invalidate some of the regulations put in place by the devolved administrations. This is why the Welsh and Scottish devolved administrations withheld their consent to the legislation, stating that it was a [‘power grab.’](#) Given the potential for divergence from the EU's *acquis* via the UK's internal market, this would be incremental to the Scottish government's plans for joining the EU.

Phase two: Negotiating an ascension treaty

Once the Copenhagen criteria are satisfied, the European Council then grants the given country ‘candidate status,’ after which the accession treaty negotiations begin. The EFTA countries, Austria, Sweden and Finland, took just 23 months to negotiate and ratify an accession treaty before the three states formally joined the EU in January 1995.

Nonetheless, no precedence currently exists whereby an EU prospective member state has managed to negotiate opt-outs from major EU policy areas. This would arguably be one of the biggest hurdles Scotland would face during the negotiation process. Such opt-outs would include those that the UK enjoyed as an EU member state i.e. the Economic and Monetary Union and the Schengen zone.

With regard to the former, during the campaign on indyref in 2014, the Scottish government stated that its preferred currency arrangement for an independent Scotland would be a pound sterling monetary union with the rest of the UK. Following the refusal by the UK government to allow this, the recent Scottish government proposal has been to introduce its own currency after independence.

In relation to the latter, opting out of the Schengen zone in favour of the continued participation in the Common Travel Area (CTA) would be more desirable for Scotland, based on many economic, cultural, and political reasons. As a result, Scotland would need to first opt-out of the Schengen Zone during its accession negotiations, and also secure continued participation in the CTA. The CTA makes arrangements for nationals of both the UK and the Republic of Ireland (ROI) to travel 'passport free' allowing for a great degree of openness to the border. This arrangement is similar to the EU's border-free area, the Schengen zone which neither the ROI nor the UK are party to. The UK has remained reluctant to be part of this zone since its establishment, resulting in the ROI having no choice but to 'follow suit' and opt-out as well, in efforts to maintain the feasibility of the CTA. The ROI has confirmed their intention to remain outside the Schengen area.

By maintaining that status quo, Scottish citizens would continue to enjoy the freedom of movement in the ROI and the rest of the UK. Other EU citizens as a result would continue to be subject to border checks in Scotland. The regime of the CTA is recognised within the EU's legal framework and most notably under Protocol 20, Article 2, of the Lisbon Treaty. And under the Ireland / Northern Ireland Protocol, Article 3.

Apart from having to successfully negotiate an opt-out of the Schengen zone, the only other legal obstacle Scotland would face in joining the CTA would be gaining the acceptance of both the UK and the ROI. In essence, a similar provision as the one noted in the Ireland / Northern Ireland Protocol would need to be set out for Scotland. This should not be too difficult to achieve given that Scotland's current participation in the CTA does not interfere with the ROI's obligations under EU law.

As shown above, by drawing some inspiration from the Irish context, maintaining the status quo regarding the free movement of persons on the border between Scotland and the rest of the UK is achievable.

A new EU frontier

Scotland as an independent member of the EU would have to ensure that it enforces the rules of the EU's single market and customs union on its border. Because of Brexit, the ROI was faced with the same challenge. Just like the ROI, Scotland as an EU member state would share a land and sea border with a third state.

Despite the parallels, the most significant difference between the two cases is over the political sensitivity in one, which is non-evident in the other. Due to this then, the border arrangements in the Scottish context will be far different from the special solution provided for the Irish context via the Ireland / Northern Ireland protocol.

In protecting its single market and customs union, the EU will most likely apply strict conditions regarding the Scottish context. For instance, before their independence in 1991, Slovenia and Croatia, which share a land border, were both parts of Yugoslavia. In 2004, Slovenia ascended into the EU, which also meant joining the EU's single market and customs union. The EU in this instance did not invoke any special arrangements despite the historical ties between the two states. As a consequence of this, Slovenia had to introduce increased border controls along its land border with (a third country at the time) Croatia. This border management arrangement was abolished in 2013 when Croatia joined the EU.

Regarding the Scottish context then, the EU would most likely look to apply similar border arrangements seen on the Slovenian – Croatian border. This would entail the need for new infrastructures on the land border between Scotland and the rest of the UK, to ensure that checks are carried out on goods and to protect against illegal activities such as smuggling.

In the Irish context, the ideas of propping up new physical infrastructures on the land border were quickly nullified, given the potential for the re-ignition of violence. By having to manage the border via these means, trade frictions would emerge on the Scotland and England land border. These new border controls would create disruption and barriers to trade, which could have the potential to negatively impact the economies of both sides of the border.

Conclusion

The issues discussed above will be central to a future indyref campaign. The prospect of EU membership would strengthen the Scottish government's quest for independence. On a broader constitutional level, the arguments above illustrate that the implications of Brexit on Scotland have the potential to continue even after independence.

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