

A Brexit could make it easier for Scotland to join the EU as an independent state

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One of the key issues in the 2014 referendum on Scottish independence was the question of how an independent Scotland could join the EU and whether it would retain the same membership terms as the UK. [Merijn Chamon](#) and [Guillaume Van der Loo](#) revisit the issue in light of the UK's upcoming referendum on EU membership. They argue that if the UK were to leave the EU, it could simplify the process for Scotland to retain its membership should the country opt to become independent.



In the run up to the 2014 referendum on Scottish independence, a number of posts (by [Jo Murkens](#), [Daniel Kanealy](#) and [ourselves](#)) appeared on this blog in which the legal and political difficulties of assuring a smooth (re-)accession for Scotland into the European Union were highlighted.



The Scottish government's proposal to rely on Article 48 TEU (the Treaty revision procedure) was found to be legally flawed and also politically uncertain. The procedure to allow a new state into the Union (Article 49 TFEU) was found to be the proper procedure but it is politically unattractive for a newly independent state, since it would be faced with a temporal paradox: namely, how to make sure that the outcomes of two, in principle, logically successive negotiations (on intra-UK independence and inter-EU accession) coincide perfectly. It was further far from clear whether Scotland (as a new EU Member State) would be entitled to keep the opt-outs applicable to the UK (including with respect to Schengen, the euro, Justice and Home Affairs cooperation, and the UK's rebate).

Given the outcome of the referendum, these questions need not be resolved at the present time, but the upcoming referendum on the UK's continued EU membership could open up a third way to EU membership for an independent Scotland. Interestingly, unlike the options discussed in the run up to the 2014 referendum, it would be both legally and politically more sound, allowing for a less cumbersome transition from an EU region within the UK to an independent state and EU Member State in its own right.

Scotland's EU membership

Drawing from the previously cited articles, it should be recalled here that the problem for a Scottish accession under Article 48 TEU is that Scotland would not be a party to the EU Treaties where this is a prerequisite for being a Member of the EU. The problem under Article 49 TEU is that it cannot guarantee Scottish EU Membership taking effect on the same day as Scottish independence from the UK. In addition, Scotland would be a new Member State which, just like the Member States from the 2004 enlargement, would enter the EU with an obligation to participate in the entire *acquis*.

Paradoxically, at first sight a Brexit could address all these difficulties. The gist of the reasoning would be as follows: if the UK as a whole votes to leave the EU, while in Scotland a majority votes to stay, the procedure of Article 50 TEU could be used to allow the UK (minus Scotland) to withdraw from the EU, while Scotland would be entitled to pursue the UK's EU Membership. Both issues would of course have to be negotiated by the (still unified) UK government. While the Article 50 TEU solution would not do away with all legal and political obstacles, it would be less uncertain than the options of going through Article 48 or 49 TEU.

Expanding this argument, it is clear that a first precondition is that a 'fault line' within the UK would manifest itself on 23 June following the referendum. In this regard, Scottish First Minister Nicola Sturgeon [remarked](#) that 'a vote to

leave the European Union against Scotland's wishes would "almost certainly" trigger another independence referendum.' Supposing then that the second referendum on Scottish independence would result in a vote for independence, the necessary preconditions for using Article 50 TEU as a backdoor to EU membership would be met.

Although Article 50 TEU only prescribes the procedure for a Member State (e.g. the UK) to leave the EU, this provision can also serve to govern the withdrawal of [only a part of a state](#) (e.g. England, Wales and Northern-Ireland) and as a legal basis to keep an independent Scotland in the EU in the context of a Brexit – under the condition that there is a political consensus for this among the three parties involved (i.e. the EU, Scotland and the UK minus Scotland). The negotiations foreseen in Article 50 TEU would then have two main aims: defining the EU's relationship with the UK (minus Scotland) post-Brexit and adapting the terms of the UK's EU membership to Scotland (i.e. adjusting them to Scotland's size).

While under international law, Scotland would become a new legal entity, in the EU legal order it could remain being regarded as the Member State that joined in 1973. At least one remaining difficulty (under international law) would be the succession of obligations in relation to the many mixed agreements concluded between the EU and the Member States (on the one side) and third countries (on the other side). For each of these treaties, an agreement should be reached with each third state concerned on the proper identity of its 'UK' counterparty. Still, from the perspective of the EU legal order this solution would allow Scotland to keep the UK's opt-outs (subject to a possible renegotiation in the Article 50 TEU procedure) and it would allow for a smooth transition between being part of the EU as a region of a Member State and as a Member State in its own right.

After all, Article 50 TEU allows for the postponement of the actual withdrawal (as long as necessary, given the need to first conclude an intra-UK agreement on Scottish independence) if the European Council agrees so unanimously. This unanimity requirement should not be too problematic, since Scottish EU membership would be linked to the UK's withdrawal. Even if some Member States might have (domestic) reasons to hinder Scottish EU membership, it is in everyone's interest to have the UK withdraw in an orderly fashion. Forging a package deal between the two issues could then be Scotland's easiest road to EU membership.

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