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Independence, Scotland and EU Accession: Challenges Ahead?

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Introduction¹

As the Brexit politics of the UK continue their still uncertain path into a general election, the Scottish National party (SNP) is putting independence in the EU at the heart of their campaign. Yet the still unanswered question of whether, and in what form, the UK will leave the EU means there are also a range of scenarios for an independent Scotland's potential accession to the EU.

This policy paper considers whether and how an independent Scotland could join the European Union and the challenges it may face in doing so.

(1) Path to Independence in the Face of Brexit?

Scotland's First Minister, Nicola Sturgeon, has said she wants to hold an independence referendum in 2020 and that she will ask for a 'section 30' order from Westminster before the end of this year to enable a legally and constitutionally valid referendum to be held. But whoever is prime minister after the general election, a second independence referendum looks unlikely to come that quickly.

If Conservative leader Boris Johnson is prime minister, he will surely give an indefinite 'no' to such a request. If Labour is the largest party after the election – or the one best placed to form a sustainable minority government – there will be much more scope for the SNP to trade their support in the Commons for a future independence referendum. But Jeremy Corbyn has said he wouldn't want to see such a referendum in the early stages of a Labour government. Yet still, the Labour leadership's relative openness to a referendum, despite their opposition to independence, would leave questions of timing more open.

If a Labour government was in power, it will, it says, hold a new EU referendum. And, as its fudged Brexit policy also states, it would only decide later whether it will campaign for the deal it would negotiate with the EU or for remain or possibly, in Corbyn's case, for neither. Another EU referendum would surely be held before another independence referendum – assuming the EU do indeed agree yet another Article 50 extension to allow a putative Corbyn government to negotiate another tweaked version of the Brexit deal with the EU.

The strange contortions of Labour's position are well known but still bizarre. After all, after 3 and a half years, it is not difficult to compare EU membership to the costs (there are no obvious benefits) of another version of the EU-UK Brexit deal, albeit 'softer' than the current Johnson deal (quite likely very similar to Theresa May's deal in fact). But if a minority Labour government looked like it had the support needed to pass a new deal and to hold another referendum, the likelihood is that the EU would give another extension although this is not guaranteed.

Some have argued that renegotiating a deal and holding a referendum could not be done in six months. But reverting to a customs union deal (permanent for Corbyn rather than indefinite in May's case) and adding a single market side to that deal (either fully which would be straightforward or tweaked which would realistically be close to May's deal) need not take very long. All deals, it is clear, will build on the basic elements of the Withdrawal Agreement in both May and Johnson's deals.

Whatever the outcome of these political dynamics for the feasibility and timing of holding another independence referendum – which may well end up waiting at least until after the Holyrood 2021 elections – they also underline the current and future levels of Brexit

uncertainty, which in turn creates uncertainty on what the future Scotland-rest of UK (rUK) relationship could look like after independence.

A second EU referendum that led to the UK staying in the EU would be the quickest path to certainty. And such an outcome would make the EU side of independence much easier. There would be no customs or regulatory checks or barriers if an independent Scotland and the rest of the UK were both in the EU including its single market and customs union. Such an outcome would, of course, also take away any Brexit-related justification for another independence referendum. That's the case even though there would very probably, in such a scenario, be deep remaining political divisions in England and Wales in particular if the UK stayed in the EU. The UK's political crisis and failing politics will not simply dissolve away in the face of a remain vote and that may well continue to shift the dynamics of the independence debate.

But pragmatic politics could still intervene even if the UK stayed in the EU. If the UK has a minority Labour government that needs SNP votes then it may, even after a remain vote, be open to a second independence vote (even though if successful that would eventually take away SNP votes at Westminster that were propping it up). And if the UK voted for a Corbyn 'softer' Brexit in an EU referendum that would also give much more certainty.

If a Tory government comes in, it will continue its move towards a hard Brexit, with its deal already meaning fragmentation of the UK given the protocol for Northern Ireland (keeping it in the EU's single market for goods and agri-goods and effectively in the EU's customs union (even while in theory in the UK's)). The impact of this fragmentation would continue to reverberate in unpredictable ways in this scenario. Such an outcome could increase support for independence in Scotland, and will also lead to continuing deep Brexit divisions across the UK, notably in England and Wales. There is no 'getting Brexit done' scenario post-election that allows the current UK political crisis, nor negotiations and arguments over the future UK-EU relationship, to end. And pressures on the UK union will surely increase.

Overall, uncertainty is rife. We don't know whether and when there might be a second independence referendum, whether the UK will leave the EU or not, and whether it will be a hard Brexit or not if it does. Some of that uncertainty could be resolved relatively soon depending on the outcome of the election. But if Johnson gains a majority – in which case Brexit would be likely to happen by the end of January 2020 – there will be much remaining uncertainty on when a UK-EU trade and security deal would be negotiated by and whether the transition period would be extended from the end of December 2020 to one or two years later. And even after that, if a Tory government was later replaced by a Labour government, a Tory basic, hard Brexit, free trade deal could in principle be replaced by forming a customs union with the EU if that was then Labour's policy.

These political unknowns means the path to EU accession for an independent Scotland and the nature of its future border with the rest of the UK – a significant issue – will remain uncertain for some time, although that uncertainty might end sooner under a Labour government. With opinion polls² now showing a close to 50:50 divide in Scotland on independence, political debates over an independent Scotland in the EU are not likely to go away even if the UK did remain in the EU – although how the polls shift on independence after the election will certainly be closely watched. And the question of the path to EU accession for an independent Scotland, and its implications for the future Scotland-rUK relationship will remain central in those debates.

(2) The Road to EU Accession

Any European state that respects the EU's values can apply to join the EU (as article 49 of the Treaty on European Union states). It's what happens next that determines the road – or not – of any applicant to EU accession. An independent Scotland would have the unusual characteristics of having recently been a part of an EU member state and having only recently gained independence – both of these characteristics could impact on its path to the EU.

Applying: The first step towards joining the EU is to put in an application and to hope to be granted candidate status and then from that to move to opening actual negotiations. The application would be assessed by the European Commission using its so-called Copenhagen criteria to evaluate, in particular, whether Scotland was both a fully democratic state, respecting human rights and the rule of law, and a fully functioning market economy. It would then make a proposal to the European Council to accept Scotland as a candidate country which would be decided on at unanimity.

Some of this would seem straightforward, in many ways, if independence was relatively soon after Brexit and either within or shortly after a Brexit transition period i.e. where the UK was still in the EU's customs union and single market (or if Brexit hadn't happened). Scotland would, in that case, have still been meeting almost all EU rules and regulations – apart from those areas where the UK has opt-outs i.e. the euro, Schengen and some of justice and home affairs. But as a newly independent state, Scotland would also need to show it had all the relevant institutions and capacity in democratic and economic terms that would have to be built before, on and after independence. It would also have to have brought, into Scottish law, EU laws that were previously integrated in UK law and to have dealt with any divergence from EU rules consequent on Brexit.

Politics of Accession: How political this accession process would be is uncertain. If Scotland's independence had been based on a constitutionally and legally sound process, then as a small advanced economy and democracy, this process would look more straightforward than, for instance, it was for the countries of central and eastern Europe in the 1990s who were rebuilding democratic institutions and market economies after decades as part of the Soviet bloc. And the impact of Brexit, and of Scotland's remain vote, on EU attitudes to Scottish independence has been to soften or remove the political negativity on display in 2014 – when there was no wish amongst EU leaders to help the potential break up of a then member state.

Having said that, a number of member states face secession movements – not only in Spain but also in Austria, Belgium and Italy – so the possibility of these concerns impacting on a European Council decision has to be taken into account. And the European Council does have to make the final accession decision at unanimity, alongside a vote in the European Parliament. But in the face of a legally, constitutionally sound independence process, it would be surprising if Scotland were not given a green light to candidate status. And off-the-record, it is common to hear from officials and commentators from a range of EU member states, that accession of an independent Scotland would not pose any major challenges.

There are, though, other wider enlargement politics at play as well. Germany (and indeed the UK) has always been more positive, in general, on enlargement than France – something that was seen even back in the 1990s³. More recently, France's president Emmanuel Macron blocked the start of accession talks with Albania and North Macedonia at the EU's October summit – to considerable upset amongst other member states and the Commission and Parliament. France has long been ambivalent on enlargement for a mixture of reasons, not least its wish to see a politically strong and powerful EU on the global stage – something that the current range and diversity of views in the EU, together with populist and authoritarian

strands in the governments of Poland and Hungary, have not helped. Macron also appeared to be suggesting a more moderated process towards candidates moving into the EU, though exactly what this meant has not so far been spelled out – the EU has always struggled to find ways to create a more varied multi-speed Europe after all. But the wider political dynamics around enlargement at any point in time will also have to be reckoned with. There is probably more enlargement fatigue around now than there was twenty years ago.

Even so, overall, as a small European state that met the Copenhagen criteria and that was, Brexit notwithstanding, in a relatively stable part of Europe, Scotland would most likely move relatively swiftly to accession negotiations with the EU after achieving candidate status.

(3) The Accession Negotiations

Coming into line with all EU rules and regulations is a process that can take place partly before and partly during the accession negotiations. The EU typically agrees, before accession, an association agreement with candidate countries (in the case of the western Balkans these have been stabilisation and association agreements – and such association agreements have also been used with non-candidate countries including Ukraine)⁴.

Transition: There is, relatedly, a further transitional question for Scotland that hangs in particular on its independence process. In 2014, when the UK was still in the EU, there was a question as to whether Scotland might stay in some sort of ‘holding pen’ rather than leaving and re-joining the EU. Whether such a special status is feasible would come back into discussion if the UK abandoned Brexit. But if the UK has left the EU, then Scotland would need an association agreement with the EU, spelling out its trading relations, regulatory alignment, participation in EU programmes and so forth.

There would also be a question of what Scotland’s relationship with the EU would be on day one of independence. The EU negotiates association agreements with third countries – not with sub-states within a third country. So while the Scotland-rUK divorce talks were going on ahead of independence, this question would also need to be addressed if Scotland EU trade was not to be disrupted on day one of independence.

There would seem to be two main possibilities. The first would be for Scotland, on becoming independent, to remain, for a short period, part of whatever relationship the UK had with the EU at that point (a basic free trade deal for instance) – and then to rapidly agree an association agreement with the EU (which would need to be ratified but could be provisionally applied). The second, perhaps, would be if there was a possibility of informal talks about the form of an association agreement, based on existing models, ahead of independence, so that the time gap between independence and such an agreement could be sharply reduced. However, in the case of Montenegro, it voted for independence after the EU had already launched talks on a stabilisation and association agreement with Serbia and Montenegro. So Montenegro had to start new talks – which took about 12 months to be fully and formally agreed.

Of course, Scotland going independent might also have knock-on effects onto any trade deal the UK and EU had agreed since Scotland’s economy and resources being taken out of the UK might impact on that deal’s content (not least for instance on fisheries and in the case of security). Any UK EU talks to amend their deal would have to take place in parallel to independence talks.

European Economic Area: Some have suggested that an independent Scotland could first join the European Economic Area (alongside Norway, Iceland and Liechtenstein). But the EEA is not a waiting room, it is an alternative to EU membership. If Scotland wants to join the EU,

it should go directly down that path including agreeing an association agreement with the EU as soon as possible.

Of course, the debate – relatively muted recently – as to whether an independent Scotland should apply to join the EEA instead of the EU will doubtless revive at some point. But, as the Brexit debate has shown, being outside the EU's customs union imposes border costs and frictions. If the rUK stays outside the EU's customs union, in a hard Brexit, there would be a case for Scotland staying in a customs union with rUK and joining the EEA not EU. But that would mean regulatory borders between an independent Scotland and rUK and customs borders between Scotland and the EU – so it would create friction at both crucial borders which would seem undesirable. The EEA option would also create a significant democratic deficit. And the EU's strong support of Ireland during the Brexit process has been well noted in Scotland – there are many advantages in terms of influence and democracy to being at the table even as a smaller state.

The Negotiations and Opt-outs: It has often been noted that accession negotiations are not, in reality, negotiations; it's an application to join a club and the power is all on the EU's side. Moreover, over time, not least after the EU's experience with the 'big bang' accession in 2004, there has been a shift to ensuring promised laws and policies are not simply passed but actually fully implemented. For Scotland, as currently part of the EU, this should not be overly onerous.

A candidate country has to show it meets all EU criteria through tough and steady progress through all 35 chapters of the EU's so-called *acquis* (i.e. its full body of laws and regulations). There may be some small scope for flexibility for very specific characteristics of a country (such as Denmark got on its accession on sales of holiday homes in Denmark). But the major opt-outs that the UK and Denmark got were achieved later when they were member states not on accession. There is little chance that Scotland would get a budget rebate, a euro opt-out, or a justice and home affairs opt-in. And if Scotland is to be welcome as an EU member state, it would also be vital politically that it presented itself as intending to be a serious, full-hearted EU member state, in the run up to accession, not as one that had similar doubts, or that was after a similar semi-detached status, as the UK has had.

The one exception to the opt-out point is in the case of the border-free Schengen zone. Both Ireland and the UK have opt-outs from Schengen – if Ireland had opted-in then the common travel area between the two countries would not function as it now does. Assuming Scotland also stayed in the common travel area on independence, then it would need a Schengen opt-out on joining the EU.

On the euro, Scotland would very likely not meet the criteria for joining the euro, including on the budget deficit. So it would be a member state 'with a derogation' of which there are currently seven (Bulgaria, the Czech Republic, Croatia, Hungary, Poland, Romania and Sweden). The UK and Denmark have actual opt-outs and are in a different position. Whether and when Scotland would meet the criteria for joining the euro is a matter of debate but once inside the EU, joining the euro would be done with its agreement.

The question of Scotland's currency could prove challenging in other ways. According to current SNP policy, an independent Scotland would, for a transition period of some years, use the pound sterling as its currency before introducing a new Scottish currency. But member states with a derogation on the euro are obliged to treat their exchange rates as a matter of common concern and to target price stability in their monetary policy. While using sterling as its currency, and with the UK outside the EU, this would not be possible – the UK would determine these issues not Scotland. So the SNP's currency policy could get in the way of a relatively swift accession process – or perhaps even be a stumbling block at the Copenhagen criteria stage though that seems less likely.

There is also much debate over the likely size of an independent Scotland's budget deficit. Certainly, if it was above the EU's target of 3%, then the European Commission, during negotiations, would look to ensure Scotland took measures to bring it onto a consistently downward path. But it would not necessarily need to reach exactly 3% or lower pre-accession but it would need to show, on agreed data and forecasts, it would reach that limit rapidly. Croatia joined the EU with its budget deficit over 3% but came under rapid pressure, through an excessive deficit procedure, to bring it within that limit soon after accession. Such procedures have been used against many member states both within and outside the euro.

(4) Timing

How long might it take an independent Scotland to negotiate EU membership? Assuming no political blocks, then if Scotland put in a swift application to join the EU, it might, at the fastest, get the green light from the Commission and then Council in one year from its application⁵. When the EFTA states of Finland, Austria and Sweden negotiated to join the EU in the early 1990s, the actual talks took a little over a year, and with the process of ratification, the whole process took just two years. Accession now takes longer, not least as ratification processes across 28 (soon perhaps to be 27) member states easily take two years.

In comparison to the EFTA states' rapid process, the central and east European candidate countries started talks in 1998 (the first group, a second group began talks in 2000) and then 10 countries (including Malta and Cyprus) joined in the big bang enlargement of 2004. So those talks took between two to four years followed by two years for ratification (during which they had observer status). Others, notably Bulgaria and Romania, and Croatia, took longer.

It is unlikely that Scotland would need the length of time that the central and east European countries took not least since it would have been meeting most EU laws in the recent past (depending when/whether Brexit took place and when independence happened). So unless questions around the currency (and use of sterling) became problematic or unless bringing down Scotland's deficit took longer, or unless wider EU politics intervened, there could be a relatively speedy but normal accession. From applying to join, through getting approval for talks, the talks happening, and ratification, could take four to five years. For example, if Scotland voted for independence in 2020, and actually became independent in 2022, then EU accession might happen around 2026 – if any independence vote is later or UK-Scotland divorce talks take longer, then the likely accession date would shift accordingly.

(5) Brexit, Borders and EU Accession

An independent Scotland's future relationship with rUK would be negotiated across many dimensions during the period between an independence vote and the actual date of independence. But if Scotland joined the EU, then the trading relationship between Scotland and rUK would be determined by whatever UK-EU relationship was agreed post-Brexit (unless the UK remained in the EU). The Scotland-rUK border would be an EU border.

The harder the Brexit that the UK ended up with, then the harder the Scotland-rUK border would be. The Brexit debate itself and the discussions around the implications of the Northern Ireland protocol for an Irish Sea customs and regulatory border, under Johnson's deal, show the range of administrative, tariff and non-tariff barriers that can be faced. And, of course, the Northern Ireland protocol is a special case – where EU customs duties will not be applied for goods going from Britain to Northern Ireland if there is no risk of them going on into the Republic of Ireland. There is no reason for the EU to treat Scotland as a special

case (in particular as the Northern Ireland deal was driven by the need to protect the peace process and is very much a one-off, unique deal but also as Scotland would be independent not part of the UK still).

If Johnson's deal goes through as the basis for Brexit, then there will be a difference in the EU-Northern Ireland relationship (and an open Irish border) compared to the EU-Britain relationship and border. So, in terms of goods, an independent Scotland, as part of the EU, would face an open border with Northern Ireland. But unlike Northern Ireland it would be fully part of the EU single market including services. So it would be likely, in a hard Brexit, for there to be barriers to services trade between Scotland and rUK, and customs and regulatory barriers, including at the border, for Scotland-England & Wales trade. Even if a no tariffs, no quotas, free trade deal were agreed, there would still need to be rules of origin checks, VAT and regulatory checks (assuming England and Wales diverge from EU regulatory rules on goods, agriculture and fisheries – and indeed even if they did not, as a third country checks would still be needed).

If Scotland remains in the common travel area, there should not be passport checks. But a customs and regulatory border for goods, and barriers to services trade, will surely be a central debate in any independence referendum including the costs that would impose compared to the benefits of being independent in the EU⁶.

The Brexit process has provided many estimates of how borders between the EU and UK will impose costs on the UK depending on the nature of the future relationship. The costs of a harder border between Scotland and rUK will depend on the nature of Brexit and on the advantages of EU membership. How much clarity there is on the future UK and EU relationship at the time of an independence referendum is, as discussed above, an open question. If the UK did leave the EU but had a customs union with it and close regulatory alignment, then the Scotland-rUK or Scotland-England & Wales border would be much softer than in the case of Johnson's planned Brexit. However, even in a softer Brexit, as loosely described by Jeremy Corbyn, there would be regulatory barriers unless the UK was fully inside the single market – and there are open questions on what deal would be struck on agriculture and fisheries (where the example of Norway illustrates the potential for tariffs and checks).

Conclusion

What would make Scottish accession to the EU unusual compared to other accessions is that Scotland would – at least until fairly recently – have been part of an EU member state when it applied to join and would have only just become independent. And if Brexit goes ahead, then the timing and nature of the future UK-EU relationship will also impact on an independent Scotland's border with the rest of the UK – which would become an EU external border. Compared to 2014, Brexit would add to the complexity of independence at the same time as increasing support for it too.

During any accession process, there can be hiccups along the way – whether political or technical – which could slow the process down and Scotland will not be immune from this. Overall, however, an independent Scotland would probably face a relatively normal accession process to the European Union – one that on current trends might take around four to five years.

¹ I am grateful to a number of people in the EU who have given me their views on these issues. All views expressed are the author's alone.

² See, for example, Panelbase poll for the Sunday Times, carried out 9-11 October 2019
<https://www.drg.global/wp-content/uploads/Sunday-Times-Tables-for-publication-261019.pdf>

³ Heather Grabbe and Kirsty Hughes (1998) *Enlarging the EU Eastwards* Chatham House

⁴ For an excellent overview of enlargement, see "Review of the Balance of Competences between the United Kingdom and the European Union EU: Enlargement" (2014) UK Government

⁵ See Kirsty Hughes and Tobias Lock (2017) "An Independent Scotland and the EU: What Route to Membership?" *European Futures website*

⁶ For a more general discussion of leaving the EU versus leaving the UK see Kirsty Hughes (2019) "Brexit, Scottish Independence and Leaving a Union Lessons to Learn?" *SCER Policy Paper*