Scotland's place in Europe after Brexit: between a rock and a hard place? A legal scoping exercise

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1. Introduction

For lawyers and political scientists alike, the United Kingdom's (UK) decision to leave the European Union (EU) following a referendum held on 23 June 2016 is probably the most exciting drama to be observed and commented on in a generation. While the main focus is understandably on the intricacies of the divorce settlement and the exact ramifications of any future relations between the EU and the UK, these questions are somewhat more complex from a Scottish viewpoint.

The main reason is that while the whole of the UK voted to leave the EU by a margin of 51.9% to 48.1%, the Scottish electorate voted to remain in the EU by a margin of 62% to 38% with not a single council area backing 'leave'. This led Scotland's First Minister Nicola Sturgeon to announce immediately after the referendum that she wished 'to take all possible steps and explore all options to […] to secure our continuing place in the EU and in the single market in particular'.[1]

The aim of this paper is to explore how, legally speaking, such a continuing place can be secured, if it can be at all.

2. Background: Scotland's place in the UK

Scotland is an integral part of the UK.[2] It has had its own parliament and government since 1999,[3] to which powers have been devolved from the central UK Parliament and Government at Westminster. The powers are extensive and include much of the civil and criminal law applicable in Scotland, environmental law, health, housing, agriculture, fisheries, policing, some taxation, education, just to name the most important ones.[4] The UK's devolution arrangement differs from federalism in two key respects: first, not all parts of the UK have devolved powers with the whole of England – by far the biggest part of the UK in terms of population and landmass – being governed centrally from Westminster. Second, the Westminster Parliament retains powers to legislate on devolved matters, though by convention it will normally only do so if the Scottish parliament agrees.[5]

[1] https://stv.tv/news/politics/1358534-nicola-sturgeon-speech-in-full-after-eu-referendum-result/ .
[2] The Union between Scotland and England was sealed in the Act of Union 1707; on the history of the Union see xxx
[3] Prior to that Scotland was governed centrally from Westminster.
[4] The model adopted in Scotland (but not in Wales, for instance) is one of 'reserved powers', i.e. the Scottish parliament can legislate on everything, unless it has been expressly reserved for Westminster. The reserved powers can be found in Schedule 5 of the Scotland Act 1998.
[5] This is the so-called Sewel Convention, which is now (partly) laid down in s. 28 (8) of the Scotland Act 1998.

There is a strong independence movement in Scotland and the pro-independence Scottish National Party has governed Scotland since 2007.[6] Following a political agreement with the Westminster Government in 2012,[7] the Scottish Parliament legislated for an independence referendum to be held in 2014. In that referendum the voters rejected independence by 55.3% to 44.7%.

From the perspective of the Scottish electorate the question arises whether the circle of reconciling their wishes expressed in two referendums within less than two years can be squared. In other words, would it be legally possible for Scotland to stay both in the UK and in the EU – or at least in the single market – considering the UK's desire to leave the EU?

If this proves unattainable, either legally or politically, would a vote for Scottish independence result in immediate EU membership under the same terms currently enjoyed or would there be additional hurdles? Moreover, what would EU membership of an independent Scotland mean for relations with the rest of the UK, which would after all be its biggest trading partner?

The election manifesto of the Scottish National Party promised that there should be another independence referendum 'if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.' The Scottish government has interpreted the result of the Brexit referendum to mean exactly that. Indeed, the Scottish Parliament has asked the Scottish Government to initiate a process whereby Westminster would grant permission for another referendum to go ahead even though this has fallen on deaf ears in Westminster so far.

There are thus three basic scenarios for Scotland after Brexit: the first is to leave the EU together with the rest of the UK (rUK) and under the same conditions. This would probably mean that Scotland (with the rUK) would be outside the single market and the EU customs union. There would be no free movement of people and trade would happen on the basis of a free trade deal. In addition, the UK might cooperate with the EU in certain policy areas, such as security, justice, and research. This would probably happen on a bilateral basis with the EU (where it has competence) or on a bilateral basis with individual MS where these are free to conclude international agreements under EU law. This scenario does not warrant further discussion in this paper.

The second scenario would see the rUK leave the EU, but Scotland would either stay in the EU or at least in the single market and would be able to cooperate with the EU separately in other fields. As will be shown This scenario is legally complex and politically highly ambitious.

Finally, the third scenario would see Scotland leave the UK and either become an EU Member State in its own right or, if that is either not feasible or desirable, become a

[6] Initially as a minority government (2007-2011) then as a majority government (2011-2016) and again as a minority government (since 2016).
[7] The so-called Edinburgh Agreement, http://www.gov.scot/About/Government/concordats/Referendum-on-independence. r

member of the European Free Trade Association (EFTA) and the European Economic Area (EEA) and be part of the single market as an independent country.

The latter two scenarios will be addressed in turn. It will become evident that there is no silver bullet for Scotland. Each scenario brings with it advantages and drawbacks.

3. Scotland as part of the UK: the legal options around a special deal

a. EU membership for Scotland as part of the UK?

Arguably, the will of the Scottish electorate – as expressed in the two recent referendums – would be best reflected if Scotland were able to stay part of the UK and in the EU.

No Member State has ever left the EU, so that the Scottish situation is in unprecedented. There is no provision in the EU Treaties allowing a part of a Member State to remain in the EU while the rest of the Member States leaves. Nor is there a general provision allowing for regionally differentiated integration of existing Member States.

At the same time, the EU Treaties provide plenty of evidence that there is flexibility to accommodate unusual constitutional situations. There are many individually negotiated examples of territorial differentiation in the EU.[8] Examples include Cyprus, where the EU's acquis is suspended in the northern part of the island given that the Cypriot government does not exercise effective control there;[9] as well as Gibraltar which is outside the customs union, but within the EU.[10]

A possible solution mooted for Scotland in the immediate aftermath of the EU referendum was the so-called 'reverse Greenland' option.[11] Greenland became part of the European Communities with Danish accession in 1973, but left in 1985 after a referendum whilst remaining part of Denmark. In technical legal terms, this was effected by way of Treaty change. The Greenland Treaty[12] added Greenland as one of the overseas territories of the Member States, in what is now Annex II to the Treaties. As a consequence Greenland was no longer part of the EU, but became a territory 'associated' with the Union.[13] Association primarily serves the end of furthering 'the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.'[14]

[8] Nikos Skoutaris, 'From Britain and Ireland to Cyprus: Accommodating 'Divided Islands' in the EU Political and Legal Order' (2016) EUI Working Papers 2016/02 page 6-9.
[9] See Protocol 10 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded [2003] OJ L 236/955; see also ibid page 9-11.
[10] See Article 28 of the UK's Accession Treaty to the EEC [1972] OJ L 73/3.
[11] See e.g. here https://www.opendemocracy.net/uk/adam-ramsay/reverse-greenland-letting-scotland-stay .
[12] [1985] OJ L 29/1
[13] See Article 198 TFEU.
[14] Ibid.

A 'reverse Greenland' model for the UK would mean that the UK would formally remain a Member State, but that the EU Treaties would no longer apply to England and Wales (which voted to leave), but only to Scotland and possibly Northern Ireland.[15] The EU Treaties would thus need to be amended to not apply to England and Wales. In technical terms this would require Treaty change according to Article 48 TEU, but given that the EU Treaties would need to be amended anyway to reflect 'Brexit', this should not present too high a hurdle.[16]

Apart from being politically toxic in that it would mean that formally the UK would still be in the EU, the legal consequences of pursuing a 'reverse Greenland' for the UK would be significant.

First, unless rUK remained in the EU's customs union, it would result in an internal customs border within the UK. Second, with rUK outside the single market, regulatory divergences would occur over time and might result in non-tariff barriers to trade in goods and services. A related issue concerns trade in agricultural products. If Scotland continued to be covered by the Common Agricultural Policy, but rUK could set its own levels of subsidy, this would in all likelihood result in different market conditions (and therefore prices) over time. Under what conditions would rUK be willing to allow Scottish produce on the market? Trade between Scotland and rUK would happen under the same conditions as trade between rUK and the rest of the EU. Scotland would not be in a position to agree a special trade deal with rUK as the power to do so rests exclusively with the EU.[17]

Third, rUK would probably want to end free movement of people, which Scotland would still need to accept. While this would not necessarily mean immigration controls at the border,[18] it would pose challenges. For one, EU nationals legally resident in Scotland would not be able to reside in the rUK, at least until they have obtained either permanent residency with effect for the whole of the UK or UK citizenship. In addition, Scottish companies employing EU nationals would either not be able to send these employees to rUK to perform work or there would need to be a special arrangement for these purposes. Furthermore, UK citizenship would no longer automatically lead to EU citizenship, but only for 'Scots.' The difficulty of defining who would be Scottish and who would not, could be based on either a residency requirement or a (harder to fulfil) domicile requirement. Either way, it would lead to two classes of UK citizens.

Moreover, a reverse Greenland model would raise complex questions regarding Scottish devolution. Much EU secondary law is currently implemented by Westminster. This includes consumer law, product standards, employment law, indirect taxation etc. It would therefore become necessary for Westminster to devolve these powers to Scotland.[19] But even if this happens, the consequences of EU law can be rather unpredictable. The UK

[15] Northern Ireland also voted to remain with a vote share of 55%.
[16] See Adam Łazowski and Adam Lazowski, 'Withdrawal from the European Union and alternatives to membership' (2012) 37 European Law Review 523, 529.
[17] See Article 207 TFEU.
[18] For details see below.
[19] Alternatively, Westminster could continue legislating in these fields with effect for Scotland only.

would still need to accept the primacy of EU law in cases of conflict between a Westminster Act of Parliament and EU law as far as its application in Scotland is concerned.

Finally, a reverse Greenland model is difficult to square with the EU's Common Foreign and Security Policy (CFSP). Even if Scotland were to be given fully autonomous status within the UK, the UK would still remain responsible for its defence and for its security.[20] Just how Scotland would be able to participate in the CFSP without the UK as a whole taking part in it or aligning its own policies with it, is not clear.

This shows that apart from its political unattractiveness, the reverse Greenland model (or any other model attempting to keep Scotland in the EU) would result in the erection of enormous hurdles to intra-UK relations and would make it impossible for Scotland to participate in the CFSP.

It cannot therefore be considered a valid option for Scotland.

b. Scotland in the single market as part of the UK?

It can be assumed that the difficulties associated with a 'reverse Greenland' solution prompted the Scottish Government not to pursue this option in its paper 'Scotland's Place in Europe' published just before Christmas 2016.[21] In this paper the Scottish Government sets out its various options to secure that Scotland stayed in the single market, which it defines as being in 'Scotland's national interest'. The focus of the paper is on outlining a differentiated solution for Scotland short of Scottish independence, which would see Scotland remaining a member of the EEA with the rUK quitting the EEA.[22]

As will be shown, this solution avoids some of the pitfalls of the 'reverse Greenland' model mentioned above, but would require constitutional engineering both at the European as well as at the UK level.

aa. Joining EFTA and the EEA

Before Brexit, Scotland finds itself within the EEA on the basis of the UK's EU membership. With Brexit, the UK will also leave the EEA, unless it decides to re-join EFTA and stay in the single market. This option has, however, been ruled out by the Prime Minister. There is some discussion as to whether the UK would need to give separate notice under Article 127 EEA Agreement to quit the EEA or whether this is implied in the withdrawal notification made under Article 50 TEU.[23] For the present discussion this does not matter much.

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[20] Otherwise, Scotland would have to be considered independent, see the criteria for statehood in the 1937 Montevideo Convention.

[21] Scottish Government, *Scotland's Place in Europe* (available at http://wwwgovscot/Publications/2016/12/9234, 2016).

[22] Ibid, para 119.

[23] The argument that a separate notification of withdrawal was necessary was the basis of a court case brought against the UK Government arguing that such withdrawal could only be made with the approval of Parliament. This case was not heard by the High Court because it considered it premature, see https://www.theguardian.com/politics/2017/feb/03/fresh-brexit-legal-challenge-blocked-high-court-article-127.

Given that EEA membership is predicated on a country either being an EU Member State – in which case it is mandatory – or an EFTA Member State, Scotland would need to join EFTA first.[24] EFTA is open to 'any State' acceding to it, provided that the EFTA Council approves of accession.[25] State in this context means an independent state, so that Scotland – if it stayed part of the UK – would currently not be able to join. Hence the EFTA Convention would need to be amended in order to allow sub-state entities to join.[26] The same would be true for the EEA Agreement, which equally allows only 'States' to join.[27] Both treaties can be amended unanimously by all their parties. Given that all parties need to approve a new member joining, the necessary amendment could be agreed in the treaty allowing Scotland to join itself, so that no sequencing – first opening up the two treaties to sub-state entities, then negotiating Scottish accession – would be legally necessary.

The far greater act of constitutional engineering, however, would need to happen at the UK level. Just like the 'reverse Greenland' option, Scottish EFTA/EEA membership would require the devolution of additional powers to Scotland in order to enable Scotland to comply with EEA rules, which may not be considered a desirable step from a Westminster perspective.

At the same time, the EFTA/EEA solution would remove a number of the legal obstacles inherent in the 'reverse Greenland' option. First, Scotland would not be obliged to take part in the CFSP. Second, Scotland would not need to be part of the EU's customs union and would therefore seem to be free to remain in a customs union with rUK.

bb. Trade in goods and services

However, Article 56 (3) EFTA Convention requires a new member of EFTA to 'apply to become a party to the free trade agreements between the Member States on the one hand and third states, unions of states or international organisations on the other.' This is, of course, not comparable to the duty to sign up to the EU's acquis – including EU trade agreements – upon accession given that first, EFTA itself does not conclude these agreements, but the EFTA Member States. This means that EFTA Member States – once they are members – are free not to join an EFTA trade deal. Second, because EFTA does not entail a customs union there is no logical need for EFTA Member States to apply the same tariffs to third countries. Third, the requirement in Article 56 (3) EFTA Convention would therefore seem to allow for flexibility – either express or implied – that Scotland would not sign up to those trade agreement with third countries that would be incompatible with its customs relationship with rUK. Hence there might be political wriggle-room for Scotland in this regard even though a strict legal reading, of course, would mean that the EFTA/EEA model advanced by the Scottish Government is not feasible.

[24] See Article 128 (1) EEA Agreement.
[25] See Article 56 EFTA Convention.
[26] According to the Scottish Government's paper, the Faroe Islands have asked Denmark to support its application to join EFTA, see Government, *Scotland's Place in Europe*, para 108.
[27] See Article 128 EEA Agreement.

Assuming then that Scotland manages to win the approval of EFTA/EEA states and of the UK to pursue this option, would this result in frictionless trade in goods and services between Scotland and the rUK on the one side and Scotland and the EU27 on the other?

As far as tariffs are concerned, the solution of staying in a customs union with the UK will indeed mean no disruption at the Scottish-rUK border. Non-tariff barriers, however, may present a problem. With the rUK and Scotland possibly being subject to different regulatory regimes, differences in standards will develop over time. Scotland would remain subject to EU rules and regulations, whereas the rUK would be able to set its own standards influenced both by its trading relationships with third countries as well as by a desire to cut red tape – short for lowering standards – which after all was a key argument in the EU referendum debate.

For instance, vacuum cleaners traded within the Single Market must comply with EU environmental standards and not use more than 1600W of energy. Imagine rUK changes its product rules in this regard and allows more powerful vacuum cleaners to be sold there. If an English producer of vacuum cleaners wanted to sell its vacuums into the EU, it would have to comply with the 1600W limit, but it could produce a more powerful product for the UK market. But what if it wanted to sell its vacuum cleaner to Scotland? Given that Scotland would be applying EU standards, there is a potential problem of the EEA/EFTA solution leading to a disruption of the UK's internal market: while goods could be traded tariff-free they could in practice not flow freely because of diverging product standards. The same would be true for services.

The Scottish Government's paper seems to have discovered a solution for this, however.[28] The principle of 'parallel marketability' (parallele Verkehrsfähigkeit) is currently in place for trade between Switzerland and Liechtenstein. Liechtenstein is in a customs union with Switzerland and in the EEA, whereas Switzerland is not in the EEA. The principle of parallel marketability allows products to freely circulate in Liechtenstein fulfilling either the EEA or Swiss product requirements.[29] Crucially, however, it restricts access of products to other EEA countries marketed under diverging Swiss product requirements and vice versa. Compliance with it is monitored the Liechtenstein customs authority. It is the responsibility of Liechtenstein to ensure that no goods cross the open border into Switzerland that would not be compliant with Swiss product rules.[30]

If adopted for Scotland, this would mean that the English vacuum cleaner could be sold in Scotland. But traders would not be able to circumvent the rules of the Single Market by importing sub-standard products from England and then selling them on to the Single Market. Just like in the Swiss/Liechtenstein example, this would require some form of surveillance. Scottish exporters to the EU would need to make sure that their products

[28] Ibid, para 152.

[29] Jacques Pelkmans and Philipp Böhler, *The EEA Review and Liechtenstein's Integration Strategy* (Centre for European Policy Studies available at https://wwwcepseu/system/files/EEA%20Review_Liechtenstein%20Finalpdf, 2013) page 21; see the Gesetz vom 22. März 1995 über die Verkehrsfähigkeit von Waren, Liechtensteinisches Landesgesetzblatt Nr 94 (1995).

[30] The Gesetz quoted above gives far-reaching powers of inspection to the Liechtenstein authorities (see Article 7).

meet EU product standards, in particular if the products originate in England. In addition, the same might apply to exports to the rUK. In case the envisaged EU-rUK free trade agreement makes diverging product standards possible, the rUK might require Scotland to ensure that products from the EU not meeting rUK-standards are not traded into rUK. This of course would require some paperwork to be filled in and seamless trade – as it exists currently – would not be achievable.

cc. Free movement of people and immigration

A further question is how the EFTA/EEA model for Scotland would affect the UK government's ambition to end free movement of people from the EU.

As far as EU migration into Scotland is concerned, the solution would not require the establishment of a hard border between Scotland and England. Free movement of people to Scotland only would mean that EU citizens could work and reside in Scotland, but not anywhere else in the UK. It is possible to put checks in place – which is already UK practice through employers and landlords for instance – to ensure compliance.[31]

An EU citizen who took up employment and residence in England regardless, would do so illegally. But the prevention of this eventuality does not require immigration checks at the Scottish-rUK border provided that – as is likely – EU citizens will continue to be able to visit the UK visa-free.[32] If they do so regardless, they act illegally, and there are sanctions and enforcement mechanisms in place to prevent this.[33]

As outlined in the discussion of the 'reverse Greenland' solution, the EFTA/EEA solution would equally require UK citizens to be divided into those who still have free movement rights – i.e. those one can designate as 'Scots' – and those who will no longer be able to avail of these rights. The Scottish Government's paper mentions the criterion of 'domicile', which is a more permanent status than residency. 'Domicile' is a concept found in private international law. It goes further than mere residence.

This would certainly avoid abuse where, for instance, a Welshman moves to Edinburgh for a few months in order to qualify as an EEA national (ie a Scot) and be then allowed to move on to the EU. The distinction between being domiciled and being resident can, however, be a tricky one to draw, so that if this were adopted we might be seeing much litigation from Scots living in England temporarily, but claiming to be still domiciled in Scotland.

At the same time, the rules on domicile have a reputation for being old-fashioned and sometimes leading to absurd situations given that the 'hook' for a person's domicile of origin is where their father had his domicile at the time of the person's birth. This can mean that an individual who has spent all their life outside Scotland would qualify, whereas somebody born and raised in Scotland might not.

[31] Nina Miller Westoby and Jo Shaw, Free Movement, Immigration and Political Rights , SULNE position paper on Brexit, https://sulne.files.wordpress.com/2016/11/free-movement-immigration-and-political-rights-sulne-roundtable-oct-2016-4.pdf page 11.
[32] As can citizens of many non-EU countries, such as the US, Canada, Australia, etc.
[33] The scenario is no different in this regard to 'reverse Greenland'.

dd. The effects of EFTA/EEA law in the legal order of Scotland

Finally, the question arises as to how EFTA/EEA law would affect the Scottish legal order, in particular how dispute settlement would be affected. While there is no dispute settlement mechanism for EFTA itself, the (somewhat misnamed) EFTA court decides on the interpretation of the EEA Agreement. An important difference between the EEA Agreement and the EU Treaties, however, is that the EEA Agreement lacks many of the supranational features of EU law: there is no direct effect nor does the EEA Agreement require primacy.[34] It merely requires compliance. In addition, the decisions of the EFTA court in preliminary reference procedures are advisory only.[35]

Hence the EEA/EFTA solution would potentially be less intrusive than the 'reverse Greenland' scenario. Given that it would require devolution on a large scale from Westminster to Scotland, there would probably not be too many conflicts between Acts of the Westminster Parliament and EEA law, but this cannot be excluded. The lack of direct effect and primacy, however, would make a solution of these conflicts less hierarchical and would in any event only require changes with effect for Scotland. It might thus be more palatable to those who wish to ensure that UK law is interpreted and applied by domestic judges only.

ee. Conclusion

The EFTA/EEA solution would therefore seem to pose fewer practical and legal problems than the 'reverse Greenland' scenario. Nonetheless, it would be very difficult to achieve in practice given the constitutional obstacles both on the EFTA/EEA side and in particular on the UK side.

4. Scotland as an independent country

The alternative would be for Scotland to opt for independence and either apply to become an EU Member State or an EFTA/EEA Member State in its own right. It is axiomatic that in this scenario there would be no need to adapt the accession criteria of either organisation or to resolve complex devolution issues. However, there are a number of legal obstacles on the path to independence, which will be explored here before briefly addressing the merits of the options an independent Scotland would have with regard to European integration.

a. The path to an independence referendum

As a first step, Scotland would need to become independent. The 2014 precedent means that the only politically conceivable step would be to hold another referendum asking Scottish voters whether Scotland should become an independent country.

[34] See e.g. Tor-Inge Harbo, 'The European Economic Area Agreement: A Case of Legal Pluralism' (2009) 78 Nordic Journal of International Law 201

[35] Of course this does not detract from the fact that they are highly persuasive.

UK constitutional law is not entirely clear as to whether the Scottish Parliament can unilaterally call another independence vote or whether it needs the prior approval from the Westminster Government. According to s 29 (1) of the Scotland Act 1998, an 'Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.' And in paragraph 2 (b) it says that an Act falls outside that competence if 'it relates to reserved matters'. Reserved matters are defined in of the Scotland Act 1998 whose section 1(b) includes the 'Union of the Kingdoms of Scotland in that category. For some commentators, it follows from this that an Act providing for a referendum aimed at the break-up of that very Union relates to a reserved matter and is therefore outside the competence of the Scottish Parliament.

This means for some[36] that the only constitutional way of holding another independence referendum would be to follow the 2014 precedent where use was made of section 30 of the Scotland Act 1998, which allows the Westminster Government to make an 'Order in Council' – a form delegated legislation – to modify Schedule 5 and allow for a referendum to go ahead.[37]

Others, however, argue that this would not be the case if the referendum legislation made it clear that the referendum would be advisory only. It would thus constitute a mere mandate for the Scottish Government to negotiate independence with Westminster.[38]

The most recent developments suggest that the latter route might be tried out after the UK Government seems intent on not agreeing to another Scottish independence referendum for the time being.[39]

For a seamless transition to either EU membership or EFTA/EEA membership, the timing of the referendum will be crucial. If – as expected – the UK leaves the EU at the end of March 2019,[40] it will be practically very difficult, if not impossible, for Scotland to stay in the EU without first having to leave as part of the UK.

This is because the Scottish Government does not want the referendum to take place before the contours of a final Brexit agreement and of the future EU-UK relationship are known. Given the two-year timeline, one cannot expect this to be the case before the autumn of 2018. Add to that a period of negotiations for Scotland to extricate itself from the UK,

[36] See e.g. Adam Tomkins, : https://ukconstitutionallaw.org/2012/01/12/adam-tomkins-the-scottish-parliament-and-the-independence-referendum/.

[37] The 2013 Order was passed following the approval of both Houses of Parliament and the Scottish Parliament see the Scotland Act 1998 (Modification of Schedule 5) Order 2013 (S.I. 2013/242). It was time-limited in that the referendum had to be held before 31 December 2014.

[38] See Anderson and others, https://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/; Nick Barber, https://ukconstitutionallaw.org/2012/01/11/nick-barber-scottish-independence-and-the-role-of-the-united-kingdom/ ; MacCormick, "Is there a constitutional path to Scottish independence?" (2000) 53 *Parliamentary Affairs* 721, at pp 725-6.

[39] Even though the recently called General Election, to be held on 8 June 2017, might change the political landscape again.

[40] I.e. after the expiry of the two-year period for negotiations envisaged by Article 50 TEU

which even optimists estimate to take at least 18 months, Scotland would still be part of the UK at the end of March 2019, even if it voted for independence.[41]

Even if there were a vote for independence, Scotland would therefore in all likelihood leave the EU together with the rest of the UK. Its relationship with the EU would therefore be the same as that of the rUK from April 2019 onwards. It seems now unlikely that the EU-UK the future relationship will have been determined and negotiated at that point. It is therefore probable that the immediate post-Brexit period will require a transitional relationship between the EU and the UK to be agreed. It seems that both the UK and EU side accept this as a matter of principle.[42]

It is not clear what exact contours this relationship will have, but it is likely that the UK will remain in the customs union and in the single market for a limited period of time after Brexit.[43]

There are essentially three options for an independent Scotland's relationship with the EU: accession; membership of EFTA/EEA; and a looser relationship with a free trade agreement or no such agreement. Given that the main driver behind the Scottish independence movement – the Scottish National Party – is in favour of EU membership and given that a key pro-independence argument in a second referendum is likely to be that an independent Scotland could maintain closer links with the EU than Scotland as part of the UK, the third option will not be discussed here.

b. Accession to the EU

It should be pointed out at the start that an independent Scotland after Brexit would be faced with a different scenario than an independent Scotland would have been in 2014. In 2014 Scotland would have seceded from an existing (and presumably continuing) EU Member State and would have tried to accede to the EU in addition to it. According to pro-independence advocates such an 'internal enlargement'[44] there would not even have been a transitional period where Scotland would have found itself outside the EU for a while, though this had been disputed by many others.

In case of a second independence referendum the situation would be different. As pointed out above, Scotland would certainly be out of the EU before becoming independent and would therefore have to apply to join the EU as a new Member State. The accession process would therefore happen according to the procedure set out in Article 49 TEU.

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[41] For a more detailed exposition of the timing issues see Kirsty Hughes/Tobias Lock, http://www.europeanfutures.ed.ac.uk/article-4667.

[42] See UK Government White Paper on Brexit, which calls it a 'phased process of implementation' as well as the EU's (leaked) nonpaper on key elements likely to feature in the draft negotiating directives see https://ig.ft.com/non-paper-annotated/.

[43] See e.g.

[44] This term is used by Neil Walker, Internal Enlargement in the European Union: Beyond Legalism and Political Expediency, Edinburgh School of Law Research Paper No. 2015/32 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676025; an argument for a Union doctrine on internal enlargement see Carlos Closa, 'Secession from a Member State and EU Membership: the View from the Union' (2016) 12 European Constitutional Law Review 240.

Having received a Scottish application for EU membership, the European Commission would assess Scotland's application, make a non-binding recommendation to the Council on whether to proceed - and if a green light is given - start the talks. This would then be followed by a phase of negotiations which would result in an accession treaty to be agreed upon by the Council with unanimity; by the European Parliament with a majority of its members; and to be ratified by all Member States (as well as Scotland) according to their constitutional requirements.[45]

As a matter of principle Scotland would need to sign up to the EU acquis. At present, the law applicable in Scotland is compliant with most aspects of it given that the UK is still an EU Member State. There would however be three challenges.

The first challenge relates to the period that Scotland is likely to spend outside the EU and in how far its laws would be have started to diverge from the EU acquis during that period. The length of that period is difficult to predict with precision, but the following calculation might give an indication. Assuming that Scotland voted for independence in late 2018 and assuming that it would take another 18 months to two years for Scotland to negotiate its way out of the UK, Scotland would formally become independent in the second half of 2020 at the earliest. It would then be in a position to apply for EU membership.[46] If one takes the relatively short accession negotiations with the four EFTA countries Norway (which then did not join), Austria, Sweden, and Finland as a rough blueprint, the timeline would look roughly like this: accession talks took 13 months (to complete 'politically'), and it took 17 months in total (from February 1993 to June 1994) to negotiate and sign the accession treaties. There was then a further 6 months for ratification, so they joined in January 1995. Hence Scotland might be in a position to join the EU in late 2022 or early 2023.

This would, however, mean that it would find itself outside the EU for a period of three to four years. That period itself would be divided into two parts of Scotland outside the EU as part of the UK; and Scotland outside the EU as an independent country. The question in how far Scotland's laws would begin to deviate from the EU acquis – which is under constant development – would therefore depend first on the relationship between the UK and the EU in the transitional period after Brexit; and on the relationship between an independent Scotland and the EU after independence but before EU accession. As for the former, there is a certain likelihood that the UK will remain close or indeed part of the single market, so that key EU rules might continue to be applied and updated. If not, Scotland should try to ensure to keep up with the EU acquis as far as its competence allows; and as far as developments of the EU acquis cannot be followed because the policy area is

[45] It is often claimed that Spain – which has its own problems with separatism – might veto Scottish accession to the EU. However, recent comments by the Spanish foreign minister suggest that Spain would not block Scotland's application to become an EU Member State, http://www.scotsman.com/news/spain-would-not-block-independent-scotland-eu-application-1-4409892.

[46] Hence the question whether the Barroso theory that an independent Scotland seceding from the UK as an EU Member State would automatically find itself outside the EU is correct, is irrelevant for this scenario; on the lack of merits of this theory see David Edward, 'Scotland's Position in the European Union' (2013) 1 Scottish Parliamentary Review 1.

reserved, either ask Westminster for a section 30 order allowing the Scottish Parliament to legislate anyway, or failing that, update Scots law immediately upon gaining independence.

As for the time after independence, Scotland would need to ensure that it continues to mirror the EU acquis as far as possible. As far as the single market is concerned, this might in practical terms best be achieved if Scotland joined EFTA/EEA even if just temporarily. This would not only ensure compliance with the EU acquis in view of a later accession, but also enable Scotland to benefit from trading within the single market.

The second challenge then consists of ensuring that Scotland either adopts those parts of the EU acquis that it currently is opted out from by virtue of the UK's existing opt-outs or that it can secure similar opt-outs in the accession negotiations. The idea that Scotland would by law be in a position to simply continue benefiting from the UK's current opt-outs, which had been mooted by the Scottish Government in the run-up to the 2014 vote, should be dismissed.[47] This is because the Scottish Government's argument at the time was based on a seamless transition from leaving the UK – an EU Member State – to becoming an independent Scotland – also as an EU Member State. As argued above, this is not going to be the case.

The UK's three major opt-outs concern the Area of Freedom Security and Justice (AFSJ),[48] the Schengen agreement,[49] and Economic and Monetary Union.[50] However, the EU has opted into certain AFSJ measures and participates in some aspects of the Schengen acquis.

It is difficult to see how Scotland could avoid having to sign up to the Economic and Monetary Union or the AFSJ. There is no practical-political argument – other than that it might be unpopular – to allow Scotland to stay out of these fields of integration. The Schengen acquis might be different, however, given that Scotland would have a political interest in continuing to keep an open border with rUK. Even as an independent country, Scotland might want to stay part of the Common Travel Area, which operates throughout the UK, Ireland, the Channel Islands, and the Isle of Man.[51]

The third challenge for Scotland would consist in preparing the ground for swift EU membership internally. It would need to set up an administrative structure independent of that of the UK. Thanks to devolution, this is already partly in place, but Scotland currently lacks institutions such as a central bank or a competition authority, which would need to be in place before joining the EU. In addition, it would need to retain as part of Scots law those pieces of UK legislation that can be considered to be part of the EU acquis.

It made sense that EU membership for an independent Scotland was the stated aim of the Scottish Government in 2014 given that it any reason to assume that the rUK would continue to be in the EU. The question now is whether the case for EU membership has not

[47] See Scottish Government, Scotland's Future, 2013, pages 216 et seq, available at: http://www.gov.scot/Resource/0043/00439021.pdf.
[48] See Protocol No 21 of the Lisbon Treaty.
[49] Protocol No 20 of the Lisbon Treaty.
[50] Protocol No 15 of the Lisbon Treaty.
[51] The latter are not part of the UK, but are Crown Dependencies.

been weakened in light of the UK's future outside the EU. The drawbacks for trade in goods of being in the EU customs union when the rUK is not were outlined above. Add to that the possible need to sign up to the Schengen acquis,[52] which would mean the need for passport checks at the border between Scotland and rUK, and one can see that Scottish EU membership may not be as attractive politically as it might have been in 2014. In addition, Scotland would have to continue being signed up to the EU's Common Fisheries Policy, which is not popular among those involved in Scottish fishing. Even though in practice there may not be much of a difference between an independent Scottish fishing policy and being subjected to the Common Fisheries Policy,[53] fisheries are an emotive issue in Scottish politics, so that it may become an important battle ground in an independence referendum.

c. Accession to EFTA/EEA

The obvious alternative to EU membership for an independent Scotland would be to sign up to EFTA and the EEA. According to Article 56 of the EFTA Convention, an independent Scotland could apply to become a member of EFTA. The only condition is approval by all four EFTA states. EEA membership is open to EFTA states.[54] According to Article 128 (2) EEA Agreement, the terms and conditions of EEA membership are subject to the accession treaty, which all (in the future 30) EEA Member States must ratify.

The key advantage of EFTA/EEA membership would be that an independent Scotland would remain free to negotiate a closer relationship with rUK than is likely to exist between the EU and the UK. If the EU-UK relationship primarily consists in a free trade agreement abolishing tariffs between them and providing for some form of reduction of non-tariff barriers,[55] then Scotland could opt for a closer relationship including e.g. a free movement of people, a common customs area, and even a currency union.

Of course, there would also be drawbacks. The discussion above on a differentiated solution for Scotland featuring EFTA/EEA membership show this.

4. Conclusion

The EU referendum of 23 June 2016 has left Scottish voters somewhere between a rock and a hard place. Having rejected Scottish independence in 2014, they are now facing the prospect of being dragged out of the EU and the EU single market against their will. Realistically, remaining in either the single market or the EU is only going to be possible if Scotland opts for independence.

In-between solutions are conceivable, but very difficult to bring to fruition. The most realistic one would be Scottish EFTA/EEA membership, but it would still have drawbacks. Not only would it be difficult to negotiate given that the Scottish Government is not directly

[52] Though there might be wriggle room for Scotland in this regard.
[53] See Thomas Appleby and James Harrison, 'Brexit and the Future of Scottish Fisheries: Key Legal Issues in a Changing Regulatory Landscape' (2017) 25 Journal of Water Law 124.
[54] See Article 128 EEA Agreement.
[55] E.g. through common regulatory standards and/or mutual recognition where no such common standards exist.

involved in the Brexit negotiations, so that Westminster would need to be convinced to negotiate this solution not only with the rest of the EU, but separately with the other EFTA states with whom no negotiations are currently planned. In addition, this would need to happen under serious time-pressure. Moreover, it would also require significantly more devolution to Scotland, which would in practice result in Scotland having almost full autonomy from rUK. Again, this is legally possible, but politically difficult.

Overall this demonstrates how the UK's own unsettled constitution – with its much praised flexibility – is put under pressure by Brexit. It used to have the great advantage of being able to accommodate different visions of the constitution under one roof. For some devolution was just that: powers of the sovereign Parliament transferred to Scotland for the time being, exercisable centrally at any time and, of course, revocable. For others devolution meant a quasi-federal structure with powers permanently conferred on a permanent Scottish Parliament. It seems that a seismic event such as Brexit calls this flexibility into question as it requires hard answers to unresolved constitutional questions.

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