The Constitution Unit

Scotland's Place in Europe

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First Published 2001

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by

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The Esmée Fairbairn Charitable Trust

February 2001

[1] Of the many people who have contributed in one way or another, I would like to single out Professor Robert Hazell, Professor Eileen Denza, and Matthew Happold for casting a critical eye over earlier drafts. Thanks are also due to Caroline Boyle for her continued involvement in the project. This paper is part of a wider study into the consequences of Scottish independence, funded by a grant from the Esmée Fairbairn Charitable Trust. The usual disclaimer applies.

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Executive Summary

The Constitution Unit is carrying out a study of Scottish Independence, funded by a grant from the Esmée Fairbairn Charitable Trust: how Scotland might gain independence, and the consequences for Scotland and the rest of the UK if she did. As part of this study we have examined the place of an independent Scotland in Europe. Would Scotland remain a member of the EU?

1. The SNP claims that an independent Scotland would automatically succeed to the United Kingdom's treaty rights and obligations, including membership of the European Union. However, there is no automatic right to membership of the European Union. Continued membership would only be possible with the approval of all Member States.

2. Realistically, Scotland can expect negotiations for EU membership to begin before independence is gained. There would probably be a continuation of the imposition of Community law on an agreed basis until negotiations are completed and all sides ratify the agreement.

3. Should all negotiations fail, existing Community regulations and directives would continue to apply as they are part of Scots law. However, Scotland would be under no legal obligation to adopt any future EC legislation or follow any decisions of the ECJ. Moreover, the provisions of the Treaty on European Union would cease to be binding on Scotland and its citizens.

4. If Scotland were to apply to become a member timing would matter because the EU is in a process of enlargement and the terms that an independent Scotland could negotiate would differ if the EU had 21 or 28 rather than the current 15 Member States.

5. An independent Scotland which remained in the EU would continue to be eligible for grants from the Structural Funds. But EU enlargement changes the map of disadvantaged regions, boosting the position of Scotland relative to new EU averages and making it harder for Scotland to qualify for additional funds.

6. Enlargement also has an impact on the status of small states in the EU. Whereas an independent Scotland would have the right to nominate a Commissioner now, it may lose that right once the EU increases in size. Moreover, physical representation in the EU does not guarantee effective representation. Where would an independent Scotland find voting partners if their policy line does not receive the backing of the UK Government?

Introduction

The SNP's slogans "Scotland in Europe" and "Independence in Europe" are both catchy and complex. They are catchy and evocative for a multiplicity of reasons. On the one hand they act as a persuasive panacea for all who doubt that a small nation like Scotland would be able to stand on its own two feet in the big world. On the other hand they articulate that Scotland is not a parochial region of nationalist bigots but an open-minded and cosmopolitan one that embraces European integration.

But they are also complex statements in that they imply that an independent Scotland would have a natural right to be a player in the European Union. This, however, is assumed and not established. Moreover, the statements suggest that the alliance with Brussels is necessarily preferable to the alliance with Westminster and, indeed, wanted by those who advocate an independent Scotland.

This briefing examines the issue of State succession to the EU Treaty. Since the EU Treaty itself does not lay down rules on succession,[2] it is necessary to look at the rules governing succession to multilateral treaties in general and scrutinise individual examples of changes to the territorial application of the EU Treaty. The second part examines the effect an independent Scotland would have on the European Union.

The force of European law in the United Kingdom is based on the European Communities Act 1972 which accorded domestic legal effect to the Treaty of Accession by which the United Kingdom joined the European Communities (the European Economic Community, the European Coal and Steel Community, and Euratom). Were Scotland to withdraw from the United Kingdom, the consequences of an independent Scottish State would need to be addressed on the European as well as on the domestic level.

I The EU Treaty and Succession

The SNP argues that Scotland would enjoy the same rights and be bound by the same obligations currently in force for the United Kingdom. Not only that but membership to international organisations (including the EU), they claim, is governed by the same rules of succession. In 1997 and 1999 the SNP released dossiers on the legal basis for independence which endorsed statements made in 1989 by a number of lawyers. They argue that Scotland would naturally remain within the European Union. The legal and political opinion cited in

[2] The Treaty on European Union (as amended by the Treaty of Amsterdam) now provides for suspension of rights of membership if the Council, following the criteria and processes laid down in

the dossiers comes out in support of smooth and rapid accession to the EU. French advocate Maitre Xavier de Roux summarises the argument in the following terms:

> "Scotland is part of the Common Market territory by virtue of the United Kingdom's accession to the Treaty of Rome and by application of the Treaty of Union 1707. If the Treaty of Union was revoked and if Scotland recovered its international sovereignty, it would be accepted within the Common Market without any formality".[3]

As the EU Treaty includes Scotland within its remit and because EU law directly affects the Scots, Scotland is not a third party to the Treaty. On independence, it could not be regarded as a new applicant state (like Poland or Estonia) as the UK acted on behalf of Scotland when it joined the European Communities in 1973. According to de Roux's argument, a change in Scotland's political status would have no bearing on the legal status of Scotland in Europe.

Professor Emile Noel, former Secretary General of the European Commission, and Lord Mackenzie-Stuart argued that Scottish independence would result in the creation of two Member States of equal status. The rump United Kingdom (rUK) would not be more powerful than Scotland. And without evidence to the contrary, Noel is certain that "the will of the people would be interpreted as a desire to retain the European status quo".[4]

Former Director General of the European Commission and former EC Ambassador to the United Nations Eamonn Gallagher sees "no sustainable legal or political objection to separate Scottish membership of the European Community". If Scotland is willing and able to meet the demands and requirements of Co
mmunity membership, then the EU ought to be flexible enough to resolve any institutional matters arising in relation to, *inter alia*, weighted voting in the Council, the number of Members of the European Parliament (MEP), and number of Commissioners.

With such heavyweight opinion to back up their claim, as well as various statements by European and foreign officials, Ministers, Ambassadors and politicians of Member States who cannot conceive of Scotland being excluded from membership, the sentiment that Scotland might *not* be admitted to the EU does seem "specious and [without] constitutional or legal credibility".[5]

Articles 6 and 7, finds that human rights or other fundamental values of the EU have been flagrantly violated by a Member State

[3] SNP Press Office, *Independence in Europe Dossier*, 28 May 1999.

[4] *Ibid.*

[5] *The Herald*, 7 November 1998.

1. Background of the Vienna Convention on State Succession in Respect of Treaties

The SNP's claim to succession to EU Treaty rights and obligations stands or falls on the application of the Vienna Convention on State Succession in Respect of Treaties (henceforth the Convention).[6] Their claim will be examined in greater detail below. A closer look at the Convention, however, is required beforehand.

The Convention is concerned mainly with the position of the 'newly independent State', which Article 2(1)(f) defines as "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". The focus on colonies is not coincidental. The Convention is concerned with State creations in the post-colonial context which is important when thinking about its relevance for Scotland.

Newly independent and other successor States are treated differently under the Convention. Controversially, the former are presumed to begin life unencumbered with a clean slate ('negative' theory), whereas other successor States are presumed to continue automatically the treaty obligations of the predecessor State ('universal succession'). Article 2(1)(b) of the Convention defines the succession of States as the "replacement of one State by another in the responsibility for the international relations of territory". Does the SNP hope that Scotland would fall into the latter category and be the successor State in international law to the United Kingdom? Would Scotland be resurrecting its age-old historic claim to statehood rather than establishing a brand new one? According to international practice, rUK rather than Scotland would be the successor State (or better: the continuing State). Continuity is presumed for the sake of legal certainty (Articles 34 and 35 of the Convention). In practice there is a clear tendency to succeed to multilateral treaties and conventions of a legislative or universal nature.

The Convention targets only the above two scenarios of State succession (neither of which applies to Scotland) and does not consider the various routes succession can take (continuation, separation, dissolution, merger, cession etc). Under the two available definitions Scotland would have to be squeezed into the category of a newly independent

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[6] Adopted 22 August 1978; see 17 ILM (1978) 1488, or http://www.un.org/law/ilc/texts/treasucc.htm (visited 08 February 2001). The Convention has been ratified by more than the necessary fifteen states and entered into force on 6 November 1996 in accordance with Article 49(1). By the end of 1999 it had twenty signatories and seventeen parties, namely Bosnia-Herzegovina, Croatia, Czech Republic, Dominica, Egypt, Estonia, Ethiopia, Iraq, Morocco, St. Vincent and the Grenadines, Seychelles, Slovakia, Slovenia, the Former Yugoslav Republic of Macedonia, Tunisia, Ukraine, and Yugoslavia. Source: "Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 1999" Vol. II at 277, (United Nations Publication). It can thus be seen that the Convention took a very long time to attract even fifteen ratifications (out of nearly 200 potential parties), and that the states which have ratified are to a

State within the colonial context. What the framers of the Convention had in mind, however, were in the first instance colonial territories that were granted independence and could not be expected to continue the bilateral treaty obligations of their colonial ruler (Article 16 of the Convention).[7] Ideally there should have been included a third category of "'quasi-newly independent States' which would have included States emerging outside a colonial context but in circumstances resembling the emergence of a newly independent State" (Kamminga 1996: 471). Indeed, the International Law Commission had proposed such a category for cases like the partition of East and West Pakistan from India in 1947.[8] However, France and Switzerland objected to this category, apparently because they did not want to undermine the territorial integrity of their unitary State by inadvertently promoting separatist movements (ibid.).

In sum, the situation the Convention envisages does not fit squarely with the situation Scotland's secession would create.

2. Relevance to the EU Treaty

Since the SNP believes that it nonetheless has an arguable case for establishing that the Convention would govern Scotland's succession to the EU's rights and obligations, their claim needs to be addressed in more detail. The case of separation of States is covered by the Convention, which emphasises continuity of treaty relations. In relation specifically to the EU Treaty, the SNP relies heavily on Article 34(1) of the Convention which provides:

> When a part or parts of a territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed; [...]

On the face of it, Article 34(1) of the Convention would seem to support automatic continuation of the EU Treaty provisions in an independent Scotland, and it would apply regardless of whether the United Kingdom continued to exist. Relying only on this provision, French Advocate de Roux argues (for the SNP) that "the simple acceptance by the successor state [an independent Scotland] of the obligations contracted on its behalf by its predecessor [the United Kingdom] is equivalent to an accession by that successor state".[9]

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disproportionate degree small states recently involved in questions of state succession. The United Kingdom has not ratified the Convention, nor has any other major state.

[7] The principle of non-succession is also echoed in Articles 17 and 24 of the Vienna Convention on the Law of Treaties whereby a new state is under no obligation to succeed to a treaty.

[8] Yearbook of the ILC (1974) II, Part One, 260 – 266).

[9] SNP Press Office, *Independence in Europe Dossier*, 28 May 1999.

However, there are numerous and severe difficulties relating to the assumption that the EU Treaty will continue to apply by virtue of Article 34(1).

First, the EU Treaty establishes its own legal regime and creates an international organisation that is fundamental to the substantive legal regime established. The general rules of succession in international law do not apply to this case. Rather, Article 4 of the same Convention governs treaties establishing international organisations to which the predecessor State was a party. It provides that:

> The present Convention applies to the effects of a succession of States in respect of:
>
> a) any treaty which is the constituent instrument of an international organization *without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;*
>
> b) any treaty adopted within an international organization without prejudice to any relevant rules of the organization..
>
> (emphasis added)

The Convention in one of its very early provisions places paramount emphasis on the rules of accession and the rules of the international organisation in question. In other words, the Convention does not override the regime set up by the EU Treaty.

Second, paragraph (1) of Article 34 of the Convention has to be read in conjunction with paragraph (2) of the same provision which states that the former paragraph does not apply if:

> a) [...]
>
> b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.
>
> (emphasis added)

The object and purpose of the EU Treaty can be found in the preamble as well as in Articles 2 and 3 TEC. The creation of a new Scottish State would – if only formally – change the conditions for operation and application of the institutional and financial provisions of the

EU Treaty. It would be adding a new Member State to the EU and this would require formal treaty changes according to the specific rules of EU accession rather than the general and vague rules of international law on succession to multilateral treaties. To illustrate, the EU Treaty is premised upon the existence of a particular number of Member States. Voting rights are weighted and numbers of representatives are allocated on the basis of the size of the State. Amendments to those provisions require negotiation of an amending treaty and its subsequent ratification by all the existing Member States and by the newly acceding State.

Third, the rule enshrined in Article 34(1) is widely believed to be "too rigid and simplistic and [not to] correspond...to international practice: therefore it cannot be considered a customary norm" (Mullerson 1993: 488). For instance, bilateral treaties and multilateral treaties with limited participation concluded by the Soviet Union passed over only to Russia. The other successor States had to discontinue their participation or renegotiate the treaty in question. Former Deputy Foreign Minister of Estonia Rein Mullerson goes on to argue that, as far as international practice is concerned, it is the proviso in Article 34(2) that best encapsulates the general rule that the tenor of the treaty in question is to be respected above all else.

Fourth, the Convention is of only limited value to the present discussion. First and foremost, although it has been open for signature since 1978 and in force since 1996, the United Kingdom is not a party to the Convention; nor is any other EU Member State. Whereas the Legal Advisor to the U.S. State Department expressed the view in 1980 that the rules of the Convention were "generally regarded as declarative of existing customary law by the United States"[10], a majority within the Committee of Legal Advisors for the Council of Europe agreed that the Convention did not so reflect customary law.[11] But even if doubts regarding the Convention as a whole persist, there seems widespread consensus that "the formulation in Article 34 cannot be taken as reflective of customary law" (Shaw 1997: 690). There is, therefore, no general rule which would permit a seceding entity (like Scotland) to succeed to a treaty (like the EU Treaty) if such succession would upset the treaty regime.

Fifth, the International Law Commission has also asserted that, where membership is on account of a formal process of admission (such as is the case with the EU)

> "a new State is not entitled automatically to become a party to the constituent treaty and a member of the organisation as a successor State simply by reason of

[10] 1980 Digest of United States Practice in International Law 1041 n.43 (quoting memorandum of Roberts Owen, U.S. State Department Legal Advisor.

[11] Committee of Legal Advisors on Public International Law for the Council of Europe, Extraordinary Meeting (16 January 1992), at 3.

the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organisation".[12]

As with other international organisations, a new State can only become a member if the existing members agree to admit it. The EU Treaty would require alteration to make room for Scotland's representation and this in turn requires the consent of all Member States. There is no automatic right of entry and no precedent for such a proposition. As Happold concludes, "...the structure of the EU's constituent treaties themselves does not permit a State to succeed to membership of the Union" (2000: 31). Scotland cannot claim membership to the EU as of right. This conclusion is also supported by the practice of international organisations to which new States cannot succeed automatically but have to apply to join.

The above analysis rebuts the SNP's claim that Article 34 (1) would govern automatic membership to the EU.

II Application of EU Law in Scotland Post-Independence without Succession

Even though EU law would not continue to apply by virtue of Article 34(1) of the Convention, that is not to say that Scottish membership of the EU would never be automatic. Much would depend on the overall political context, on the attitudes taken by the (rump) UK and on relations between the UK and the EU. The EU has at least three options:

- It could decide that a newly independent part of an existing Member State is automatically a member of the EU;
- The EU could give the new State expedited membership; or
- The EU could insist that the new State is to be treated like an applicant State and has to apply for admission.

But importantly, in none of these three cases is it for Scotland to decide which possible route is chosen. The EU chooses whom it lets in and it does so rigorously: all membership applications require unanimity among the Member States negotiating accession, assent by the European Parliament, and ratification by all the national parliaments. It ought to be borne in mind that the UK would have a veto with respect to Scottish membership (although it is doubtful on what grounds it might be exercised), so it is imperative that the

[12] (1974) Y.B.I.L.C., Vol.II, pt.1, at 177-8.

internal negotiations are sorted out amicably and prior to an Intergovernmental Conference which recognises Scotland (either as a new or as a successor State).

Realistically, Scotland can expect – more or less automatically – negotiations for EU membership to begin before independence is gained. In the event that the negotiations are not completed at the date of independence there would be a continuation of the imposition of the acquis communautaire on an agreed basis until negotiations are completed and all sides ratify the agreement.

Scotland's options are two-fold and subject to external pressure. It can keep a low profile and go for smooth and rapid acceptance by the EU. By conforming to the UK's terms of membership and adopting the acquis in its entirety, Scotland would continue its place in Europe in a spirit of co-operation and continuation that is unlikely to raise objections from other Member States.

Alternatively, Scotland could decide to make use of its newly gained independence and re-negotiate the terms of membership. It might, for instance, try and secure a better deal on fisheries than the UK did or demand more money for the Highlands and Islands out of the Structural Funds. Once Scotland starts cherry picking, adopting the legislation it likes and rejecting the legislation it does not, it will meet with resistance from and tough negotiations with other Members. The question then becomes how much time and resources the other Member States want to invest if Scotland enters negotiations in a spirit of confrontation and conflict. Scotland's strategy could easily backfire and it may end up having to relinquish access to fishing grounds, for instance, in order to 'buy off' some Member States.

III Worst Case Scenario

The worst case scenario is that both law and politics fail Scotland's independence. On the legal plane, the Vienna Convention on Succession of States in Respect of Treaties is somewhat doubtful evidence of customary international law and Scotland does not have a right under the Treaty to succeed to the United Kingdom's EU rights and obligations. On the political plane, negotiations with the other Member States could run into difficulties and Scotland could then find itself outside the EU. But even then it still seems hard to accept that all the substantive law that has emanated from Brussels since 1958 and has applied in the United Kingdom since 1973 would cease to have effect overnight in Scotland at the date of its independence. There is an instinctive feeling that because of the long-standing object and purpose of the European Union, the profound impact of European law, and the evolving nature of the Union as a whole that integration – of the kind Scotland has mastered – cannot be revoked with the stroke of a pen.

What would happen if Scotland became independent but did not – for whatever reason – negotiate with the EU? The position of Professor Neil MacCormick (SNP MEP) is that the application of the EU Treaty in Scotland would continue post-independence. In a letter to the *Glasgow Herald* (1 June 1999) he wrote:

> "The Greenland precedent is of decisive importance, for it shows that as a matter of European law a territory cannot sever itself unilaterally from the constitutional jurisdiction of the European Communities (or, now, European Union) simply by means of a change of the constitutional relationships within a member state."

According to his analysis, the Denmark/Greenland negotiations demonstrate that a part of the EU can move outside or cease to be subject to EU law only through a negotiated settlement. It is thus plausible that the whole body of European law would continue to apply unless and until a decision is reached to end it. There would have to be a negotiated exit of Scotland, as with Greenland.

MacCormick's conclusion, however, is itself contestable. That Greenland's exit from the EC had to be negotiated cannot be taken as evidence that an independent Scotland would remain in the EU unless it specifically negotiated an exit. In 1979 Greenland did not become independent of Denmark, and the referendum held in 1982 was simply a vote to leave the EC by a portion of a continuing State. The situation is analogous to a vote by Scotland to seek to leave the EU whilst remaining part of the UK. Furthermore, the negotiations were not simply about Greenland leaving but about the terms on which it could transfer to oversees countries and territories (OCT) status.

In fact, if Scotland failed to negotiate, the status of Community law would be ambivalent. That ambivalence is best borne out by the following, extremely unlikely, scenario. Say Scotland issued a unilateral declaration of independence and then relied totally on automatic membership and did not engage in any negotiations with the European Union. Even then Community law would continue to apply, as it is part of Scots law by virtue of the European Communities Act 1972 as amended. So EC Regulations and domestic laws applying EC Directives on fishing or the environment would remain law until an independent Scotland changed them – which it could do if it wanted.

However, Scotland would be under no legal obligation to adopt any pending or future EC legislation or follow any decisions of the European Court of Justice (ECJ).[13] Moreover, the whole Treaty insofar as it gives rights, gives them to Member States and their nationals. So Scottish individuals could not claim Treaty rights (e.g. to free movement or non-discrimination) because Scots would no longer be treated as EU nationals would as they

would no longer be "UK nationals".[14] The Treaty provisions would not apply unless Scotland became a member. Scotland could also not be taken to the ECJ under Article 228; ex Article 171 EC), bring an action under Article 232 TEC (ex Article 175 EC) or seek its guidance under Article 234 TEC (ex Article 177 EC).

IV The Political Knock-On Effects

The above scenario is unrealistic but it illustrates the crucial link between membership and the application of EU law. In a real-life case, continued membership in the EU depends as much on political negotiations as on European law. Politics may or may not work in Scotland's favour. Where there is political will within the EU there is without doubt a way in for Scotland. Without such a will, however, Scotland may find itself staring in the face of politics. Accession to the EU requires unanimity. Germany, France, Italy and Spain are the big boys of Europe and are anxious to avoid splintering their states. Some commentators cannot imagine that they would watch Scottish independence without any form of resistance. According to Professor Clive Archer from the University Association for Contemporary European Studies, such idleness would "defy both logic and politics". The implication is that Catalonia, Lombardy, Corsica, Brittany, Flemish Belgium, and even Bavaria would be casting a keen eye on Scotland, acutely observing the follow-on improvements and drawbacks that are significant not least for their own regions. This was the position held by Robin Cook, the Foreign Secretary, in the past. In November 1998 he suggested that EU Member States, many of whom have secessionist movements of their own which their central governments are not keen to encourage, would veto Scottish membership.[15]

Others, however, do not share these worries. Secessions and the break-up of states happen all over the world. Would the mere fact that Scottish secession took place in the context of the EU set a dangerous precedent for other Member States? Would the same not be true for all other separatist movements the world over? Arguably, so long as Scottish independence is the expression of the democratic will of the people and provided the UK resolves the matter in a democratic and civilised manner, no Member State would have the right or interest to block Scottish membership. It is an internal affair of the UK. Robin Cook's current position has become more closely aligned with this view. In July 2000 he said: "Europe is not going to throw Scotland out. It's in the nature of the European Union, it

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[13] The Scottish Government may, as a matter of politics, choose to adopt such legislation and follow such rulings, as do a number of Eastern European candidate states.

[14] This term is defined by a unilateral declaration by the United Kingdom which was last amended in 1981 to take account of the British Nationalities Act 1981. The rUK would no doubt ensure that it was amended to take account of Scotland's independence.

[15] "EU rebuffs Cook claim in attack on SNP", *The Guardian* 21 November 1998.

welcomes all-comers and Scotland would be a member". He added, however, that membership itself was not the issue. "The issue is what is the price at which Scotland becomes a member of the European Union" and renegotiation would not work in Scotland's favour.[16] (Renegotiation of Scottish membership is discussed below).

Is Scottish independence a political movement that nation-states would want to stop in its tracks? Would it be difficult for the British Prime Minister to rally round his counterparts in Germany, France, Italy and Spain and block entry of Scotland to the EU? On what grounds would Scotland's entry be blocked? As Dr. Robert Lane from the University of Edinburgh concludes

> "Independence in Europe for Scotland (and for England) can be brought about only if action at the national level proceeds concurrently with action at the Community level, thus producing, at the end of the day, an agreed result which necessarily includes the concurrence of the Community institutions and all member states. A Scotland bent upon independence grounded in the clear democratic support of the Scottish people would create a moral and, given the international law principle of self-determination, probably a legal obligation for all member states to negotiate in good faith in order to produce such a result, *but this solution lies essentially within the domain of politics, not law*" (1991: 154-5; emphasis added).

In the interaction of law and politics, the law is, however, a serious constraint and whoever leads Scotland into independence would be wise to move within the parameters of the legal framework.

V Scotland and EEA/EFTA

The SNP's 'Scotland in Europe' mantra was identified early on as complex. It creates a dilemma for certain voters, namely those who favour independence but outside the EU. It would be wrong to assume that the Scots are generally more EU-friendly than the English or Welsh. They may conclude, for example, that the EU does not offer their fishermen the best deal and that Scotland should not seek to be a Member State.

Scotland as a whole may find that its fortunes lie outside the EU and that it is better off within the European Economic Area (EEA). The EEA widens the net of the EU's Single Market to cover three of four European Free Trade Association (EFTA) countries: Norway, Iceland and Liechtenstein. Switzerland is a member of EFTA but voted against EEA membership in 1992. The analogies with Iceland and Norway are close – one is a fish producing country and the other a fish and oil producing country like Scotland.

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[16] http://news.bbc.co.uk/hi/english/uk/scotland/newsid_845000/845039.stm [visited 08 February 2001].

The EEA brings together the 15 EU Member States with the three EFTA EEA States. Together they form a huge single market that is governed by a common set of rules, which the EFTA EEA countries are – at least in theory – able to influence.

The benefits for Scotland would be real. It would have access to the Single Market on a reciprocal basis. The four freedoms (of goods, services, capital and persons) are guaranteed within the EEA. That means that, subject to a few exceptions in certain areas, the citizens of 18 States have the right to move freely throughout the EEA in order to live, work, set up business, invest or buy real estate. Crucially, the EEA Agreement does not cover the EU's Common Agricultural Policy or the Common Fisheries Policy. It is limited to certain provisions governing various aspects of trade in agricultural and fish products.

EEA membership would also make life 'easier' for the other EU Member States. The institutional consequences an independent Scotland would have on the EU Treaty (votes in the Council, a Commissioner, a judge, MEP's etc) need no longer be accommodated. It is easier to imagine EEA membership being accorded without the other EEA Members taking advantage of Scotland and demanding something in return.

The SNP does not advocate such a policy. But it is a real alternative should membership in the EU not be possible or desirable.

Practical difficulties

That said, there are a number of difficulties with the EEA. The EU reserves the right to discontinue the whole EEA agreement if any EEA member fails to adopt and implement all Community legislation. That places an onerous obligation on the EEA States when they do not take part in the elaboration and adoption of Community legislation. It is a common complaint, especially from Iceland, that EEA countries have none of the rights but all of the obligations.

Moreover, the EEA grants access only to the Internal Market. But the most important Community developments are currently taking place outside the Internal Market. Economic and Monetary Union, enlargement, asylum, justice and foreign affairs, common foreign and security policy are areas that do not bear on EEA countries at all.

The final question is whether the EEA would at all be open for new members. One could certainly not count on any goodwill from the EU to re-invigorate the EEA. There would be a great reluctance to open it up for new membership.

For these reasons Scotland's future lies either within the EU or outside it.

Conclusions:

- The Vienna Convention on State Succession in Respect of Treaties was drawn up against a colonial background and lays down the rules relating to newly independent States (which are given a clean slate) and other successor States (which are presumed to succeed automatically to the treaty heritage of their predecessors), which do not accurately reflect customary law and have not proved generally acceptable.
- There is no automatic right to membership of the European Union. State succession to treaties has to be governed by the nature of the treaty. Continued cover by the EU Treaty of the Scottish territory would thus only be possible with the approval of all Member States.
- Realistically, Scotland can expect – more or less automatically – negotiations for EU membership to begin before independence is gained. In the event that the negotiations are not completed at the date of independence there would probably be a continuation of the imposition of the acquis on an agreed basis until negotiations are completed and all sides ratify the agreement.
- Should all negotiations fail, Community regulations and directives would continue to apply in Scotland as they are part of Scots law by virtue of the European Communities Act 1972 as amended. Scottish nationals and companies would, however, lose EU rights elsewhere in Europe (including rUK).
- However, Scotland would be under no legal obligation to adopt any future EC legislation or follow any decisions of the ECJ. Moreover, the provisions of the EU Treaty would cease to be binding on Scotland and its citizens.

Accession to the European Union

In the case where Scotland secedes from the United Kingdom and finds itself outside the European Union, whilst rUK continues in the footsteps of the United Kingdom, the Scottish Government would have to decide whether or not to apply for EU membership. If Scotland desires to be a Member State then, alongside negotiations with the UK Government, the Scottish negotiating team would have to consider an independent Scotland's relationship with the EU. These negotiations would have to be handled in tandem. The events of German reunification and Greenland's withdrawal from the EC illustrate that such major issues arising today have to be "treated as a Community issue rather than in terms of traditional nation-state perspectives" (Spence 1991: 47).

I Requirements

The current applicant states are expected by the EU to satisfy the so-called 'Copenhagen criteria' for EU membership, which stipulate the following.

> "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."[17]

These criteria go beyond the formal requirements in the Treaty on European Union as amended by the Treaty of Amsterdam, which are limited to being a "European State" (Article 49 TEU) that respects those fundamental values enumerated in Article 6 TEU (liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law). The Copenhagen criteria are, however, largely declaratory of the political values which have been applied to other candidate states in the past. These criteria will be dissected and addressed in turn.

1. Political criteria

Article 6 TEU (ex Article F EU) designates that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rules of law". Meeting these criteria will not be an issue for Scotland. In its strategy paper on

[17] European Council in Copenhagen, 21-23 June 1993, *Conclusions of the Presidency*, SN 180/93.

enlargement, the Commission looked at public administration, the judiciary, corruption, childcare institutions, gender equality and minority protection.[18]

2. Economic criteria

The two fundamental economic criteria are (1) the existence of a functioning market economy and (2) the capacity to withstand competitive pressure and market forces within the Union. The Commission Communication on Agenda 2000 elaborated on these criteria.

The existence of a functioning market economy presupposes the liberalisation of prices and trade as well as the existence of an enforceable legal system and property rights. The emphasis is on performance of the economy (through macroeconomic stability and consensus about economic policy) and efficiency of the economy (through a strong financial sector and the absence of barriers to trade). In EU terms the efficient running of a market economy is required so that common policies such as the Single Market and the four freedoms of goods, persons, capital and services can be implemented smoothly and given full effect.

The capacity to withstand competitive pressure and market forces within the Union requires a stable market economy as well as a propensity to permit economic agents to make decisions in "a climate of predictability". Nationalised industries must be privatised and investment is seen as the key to improved efficiency.

3. Other obligations of membership

a) The acquis communautaire

The final point in the Copenhagen criteria is that membership requires "the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union."

Accordingly, Scotland would have to adopt, implement and enforce the 'acquis communautaire' (to the extent that it has not already done so), by which is meant the commonality of rights and obligations that bind the Member States together. This body includes not just the successive treaties but also all secondary legislation (such as regulations and directives, as well as the jurisprudence of the European Court of Justice) that stems from the European Union.

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[18] EU Commission Strategy Paper: Regular Reports from the Commission on Progress towards Accession by each of the candidate countries, 8 November 2000, at 14.

There is no principled reason why Scotland should not be able to meet the *acquis*. Rather, the hurdles it needs to surmount are practical. Many of the physical structures like central banks, tax collection structures and securities regulators have yet to be set up and implemented. The same can be said for customs, free movement of capital and other institutions.[19] But such difficulties are neither new nor insoluble. According to the European Commission Representation in Scotland, the system that had been in place to communicate the adoption of national legislation emanating from EU legislation has already had to adapt to the requirements of devolution. Under Schedule 5 of the Scotland Act, the Scottish Executive may select its own implementation methods for EU Directives covering a devolved matter. Linkage mechanisms are certainly in place in Scotland but they would take a considerable amount of money and time to improve were Scotland to become independent, thus adding to the transition costs.

Moreover, respecting and recognising the *acquis* takes place not just at the level of government and administration but also at the level of businesses, regional and local bodies, and professional organisations. The European Parliament, the Economic and Social Committee, and the Committee of the Regions wish for deeper involvement of civic society in the *acquis*. Scotland's authorities would need to improve communication with the Scottish parliament to clarify the *acquis* and to foster nationwide adoption and implementation.

b) EMU and the Euro

Adopting Economic and Monetary Union (EMU) and the convergence criteria are a further part of the acquis which new Member States have to sign up to. However, achieving the convergence is not part of it. Since the UK has opted out of EMU the question is whether Scotland would inherit the benefit of the UK opt-out if it wanted to? This is not an offer made to current applicants. Member States would have to decide but would probably not allow Scotland to opt-out. Adopting the euro is very much seen as the crowning of what will have been a long process of economic integration in the EU.

The process of adopting the euro is divided into three stages:

- the pre-accession phase: focus is on functioning market economy and macroeconomic stability;

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http://www.europa.eu.int/comm/enlargement/report_11_00/index.htm (visited 08 February 2001).

[19] For a list of the *acquis* chapter headings used in the screening of applicant states see: http://www.europa.eu.int/comm/enlargement/negotiations/screen_en.htm [visited 08 February 2001].

- the intermediary phase: the new member has acceded to the EU Treaty and participates fully in the Single Market whilst progressively integrating its monetary policy with the euro zone and participating in the exchange rate mechanism;
- and finally, participation in the euro zone.

Conclusion

There is nothing to suggest that Scotland would not be able to meet the criteria set out above. But meeting the accession criteria is not the be all and end all for applicant states. There will still be plenty to quarrel over, ranging from the number of votes in the Council to financial contributions and such like. There will in practice have to be a whole raft of negotiations with the Commission in the preparatory stage and the EU members in the negotiation of an accession treaty. The process of negotiation is discussed in "Application of EU Law" in the context of deciding whether continued membership in the EU would be prompt or problematic. The next section will continue examining the case where Scotland has to apply to join any applicant state.

II The Process

Scotland cannot be compared to the other applicant countries currently queuing to be admitted to the EU. Crucially, the Scots have enjoyed EU rights and obligations for almost 30 years. The following will provide an indication of the laboriousness of the process although it is extremely probable that most of this process will be side-stepped for Scotland unless Member States seriously want to make an awful example of Scotland for their own reasons.

1. Negotiations

The guidelines for the negotiations approved by the Luxembourg European Council (1997) and the Helsinki European Council (1999) provide that each applicant country proceeds at its own pace. The level of preparedness is a crucial factor. Applicants are assessed on their own merits and join the EU when they are found ready to meet the Copenhagen criteria. This is not anticipated to be problematic for Scotland.

Negotiations are generally carried out in bilateral accession conferences (i.e. between the existing Member States and Scotland). With respect to the dozen or so applicant countries currently waiting to 'sail' into the EU under the 'regatta principle' or 'flotilla system' as

adopted by the European Council in Helsinki in December 1999,[20] the acquis was divided into 31 chapters. At the date of the EU's enlargement report in 8 November 2000 negotiations with the six first countries had taken place in all but two chapters (on 'institutional questions' and 'other questions') and 11 to 16 chapters had been provisionally closed, meaning that credible commitments as regards the harmonisation of laws plus administrative enforcement had been given. The Commission monitors those commitments.

2. Changes for the EU

Assuming that an independent Scotland can meet the Copenhagen criteria, it would then need formally to accede to the EU whilst the EU Treaty would have to be amended to cover Scotland. The process of accession is laid out in Article 49 TEU (ex Article O EU) and requires an application to the Council which, having consulted the Commission, must act unanimously. An absolute majority in the European Parliament must also agree to the new accession.

But it is the second paragraph of Article 49 TEC that causes much difficulty and confusion. According to this sub-clause:

> "The conditions of admission and the adjustments to the treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member-States and the applicant state. This shall be submitted for ratification by all the contracting states in accordance with their respective constitutional requirements."

Different international organisations deal with accession and secession in different ways. Whereas the UN Charter, for instance, does not require amendment the European Treaty does. Some of the reasons for amendment are:

- to name the Member States of the Union;
- to define the territorial application of the Treaty;
- to stipulate the number of Members of the European Parliament (Article 190 TEC (ex Article 138 EC));
- to state the number of weighted votes held by each Member State when the Council is required to act by a qualified majority (Art 205 TEC (ex Article 148 EC));
- to nominate a member of the Commission (Article 213 TEC (ex Article 157 EC));

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[20] Six countries (Cyprus, Estonia, Hungary, the Czech Republic, Poland and Slovenia) began negotiations on 31 March 1998 and are hoping to be admitted as soon as possible. Six other countries have been negotiating since 15 February 2000. Latvia, Malta and Slovakia are the strongest candidates, followed by Lithuania, whilst Bulgaria and Rumania are lagging behind. A thirteenth possibility is Turkey which has so far not taken up detailed negotiations.

- to nominate judges in the European Court of Justice (Article 221 TEC (ex Article 165 EC));
- to place a member in the Court of Auditors (Article 247 TEC (ex Article 188b EC));
- to increase representation in the Economic and Social Committee (Article 258 TEC (ex Article 194 EC));
- to increase representation in the Committee of the Regions (Article 263 TEC (ex Article 198a EC)).

The SNP has called for Treaty amendment, among other reasons because of what they call the 'West Luxembourg' question. Whereas Luxembourg (with 360,000 inhabitants) currently has six members on the Committee of regions, Scotland has only four. Scotland has eight Members of the European Parliament (MEP) compared to Denmark's 16, although both have similar populations. According to calculation by the SNP, an amended Treaty after the Nice summit in December 2000 would give rise to the following changes:

SNP forecasts of Scottish representation within the EU

- Commission: Within the UK, Scotland has no right to nominate a Commissioner but would acquire that right as an independent Member State.
- Council of Ministers: Within the UK, Scotland has no guaranteed right to attend, lead or vote in national or European interest. As a Member State Scotland would have a guaranteed seat as well as speaking rights and 7 votes (equal with Denmark, Finland and Ireland) which is roughly a quarter of the current UK total (29 votes).
- European Parliament: Within the UK, Scotland will lose seats down from 8 to 6 or 7. As an independent Member State Scotland would have 13 MEP's (matching its comparator countries Denmark and Finland in terms of population).[21]

Other changes, according to the SNP, would be as follows:[22]

	Scotland Now	Scotland as Full Member of the European Union
Economic and Social Committee Seats	*2*	*9*
Committee of the Region Seats	*4*	*9*
Able to take a turn as President of the Council?	*No*	*Yes*
Able to nominate member of the European	*No*	*Yes*

[21] SNP Scottish Parliamentary Group, 11 December 2000.
[22] SNP Manifesto for the European Parliament Elections 1999.

Court of Justice?		
Member of the Court of First Instance?	*No*	*Yes*
Member of the European Court of Auditors?	*No*	*Yes*
Member of the European Investment Bank?	*No*	*Yes*
Member of the Committee of Representatives COREPER?	*No*	*Yes*
Beneficiary of balance in the 28,000 civil service jobs among nationalities?	*No*	*Yes*

Even if the SNP's predictions were correct the continued inclusion of Scotland in the European Union is more problematic than automatic. The above table lists the numerous necessary changes to be made to the EU Treaty in order to give full effect to Scottish membership. As discussed above, there can be no question of Scotland demanding that such changes be made as of right. They have to be negotiated and discussed at an Intergovernmental Conference.

Furthermore, the SNP's predictions are (unsurprisingly) very generous. They assume, for instance, that Scotland would have a right to nominate a Commissioner. Whilst this would arguably be true if Scotland were independent now, it will not be true in the long run. The Nice summit agreed that as from 1 January 2005 the five big states give up their second commissioner in order to reduce the size of the Commission. Each Member State will have one Commissioner until the EU has 27 members, after which the Council will unanimously decide the size of the Commission. The Commission will then consist of fewer members than there are Member States and commissioners will be appointed by rotation among Member States on the basis of equality. As Scotland would be one of the small states, it would probably have to join the rotating system. The details have yet to be worked out but it cannot be taken for granted that Scotland will have the right to nominate a commissioner.

Another instance where the SNP's calculations are optimistic is with their estimation that an independent Scotland would have more MEPs than it currently has. To be sure, the previous cap of 700 for the number of MEPs was set aside and increased to 732 at the Nice summit. But Scotland cannot necessarily rely on the figures for its comparator countries. The exact allocation of seats is not systematic but was an impromptu decision to compensate for the weighting of votes in the Council. The examples of the Czech Republic and Hungary illustrate that the present allocation of seats is contrary to the principle of equality, as the number of seats allocated to those countries is smaller than the number assigned to Member States with smaller populations. So enlargement means a reduction of MEPs per state to accommodate the newcomers. If Scotland became independent at a time when the EU has 21 Member States, it would force a further reduction of MEPs per state or an increase in the overall number of MEPs.

III Effectiveness of Scottish Representation

The SNP's slogan "Independence in Europe" once more brushes over the specific issues and the nuts and bolts of EU membership. From a dispassionate Scottish perspective the question is not so much whether Scotland could be an independent player in Europe (for there can be no doubt that it could) but whether independent Scottish representation in the EU would be more effective than its current representation via the United Kingdom. This section considers the SNP's drive for better representation and examines the way Scottish representation has been handled since the creation of the Scottish Parliament. Finally, it raises questions as to the efficiency of an independent Scotland's representation.

Devolution has not led to any increase in attendance by Scottish ministers at meetings of the Council of Ministers in the European Union. Although they may attend all meetings that concern devolved matters (such as justice, transport, health, agriculture and fisheries), research done by the SNP in December 2000 showed that Scottish ministers had attended only eleven out of 120 Council sessions since the creation of the Scottish Parliament. In comparison, all 15 EU Member States (including Scotland's comparator countries Ireland, Denmark and Finland) had a 100% attendance record. For the SNP the 9% attendance record of Scottish Ministers flags up the underlying compromise of Scottish devolution. Scotland may enjoy certain devolved powers but it does not have a regular voice in Europe. Since the Scotland Act stipulates that Scottish ministers may attend EU meetings the SNP is determined that "under an SNP government, there will be a Scottish Ministerial or official representation at every Council of Ministers meeting".[23]

The trouble with the SNP's determination to attend each and every EU forum is that it ignores the reality of the devolution settlement. Most of the devolved areas (agriculture, economic development, industry, transport, and the environment) also form part of the EU policy agenda – and so one might have expected more Scottish direct participation. But when negotiating at EU level (a non-devolved matter of foreign policy), it is the UK Government which represents the interests of Scotland, Wales and Northern Ireland. The United Kingdom representatives have to speak in unison at those meetings. There is no room for dissent from the devolved parliament before the EU. It is thus not for the SNP to determine that they will attend each EU formal meeting once they make up the Scottish Executive; it is for the United Kingdom government to invite Scottish Ministers to attend such meetings.

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[23] Address by the leader of the SNP John Swinney to the Scottish European Association in Brussels, entitled "Independent Scotland in EU Partnership", 6 November 2000.

The Scottish Office recognised these difficulties early on and helped draft a Concordat on Co-Ordination of European Union Policy Issues[24] which guarantees a consultative role for the devolved administrations. Whilst the EU remains the responsibility of the United Kingdom Government

> the UK Government wishes to involve the Scottish Executive as directly and fully as possible in decision making on EU matters which touch on devolved areas (including non-devolved matters which impact on devolved areas and non-devolved matters which will have a distinctive impact of importance in Scotland). In general, it is expected that consultation, the exchange of information and the conventions on notifications to EU bodies will continue in similar circumstances to the arrangements in place prior to devolution.
>
> Participation will be subject to mutual respect for the confidentiality of discussions and adherence by the Scottish Executive to the resulting UK line without which it would be impossible to maintain such close working relationships. This line will reflect the interests of the UK as a whole. In accordance with these general principles, the co-ordination mechanisms should achieve three key objectives:
>
> - they should provide for full and continuing involvement of Ministers and officials of the Scottish Executive in the process of policy formulation, negotiation and implementation, for issues which touch on devolved matters.;
> - they should ensure that the UK can negotiate effectively, in pursuit of a single UK policy line, but with the flexibility that fast-moving negotiations require; and
> - they should ensure EU obligations are implemented with consistency of effect and where appropriate of timing.[25]

The current position is that the influence of the Scottish Executive on EU policy making is only indirect via the UK Government. The Scottish Executive must respect confidentiality as well as the UK Government's position.

It is therefore not surprising that the SNP sees material benefits for an independent Scotland at EU level. Scotland's view is currently merged into the UK's view. The Unionist position plays into the hands of the SNP who can exploit the weaknesses of the Scotland Act. The political compromise at national level fails, in practice, at supranational level.

The perceived benefits of having an independent Scotland negotiate at EU level, and 'punching above its weight' as it is commonly said, are misleading. On the one hand, Scotland would be better represented numerically at EU level. Just looking at the weighted votes in the Council it appears that an independent Scotland might get seven votes, whilst

[24] In "Memorandum of Understanding and supplementary agreements", Cm 4444, October 1999.

rUK would either keep its current 29 or face a reduction but to no fewer than 27 votes (equal with Spain). The joint force of those votes would be a remarkable 34-36 votes – provided that Scotland and rUK vote together. But the conclusion that Scottish interests are therefore better or more efficiently represented is wrong. As of now the Scottish voice is heard in Europe via UK representation. If Scotland needed to pursue a policy of its own, it would be more effective if it received the backing of the UK Government. The guarding of national interests by small states, on the other hand, is particularly difficult in the EU. Whilst small countries will continue to enjoy disproportionately large voting power (compared to the size of their population) in the Council, the Nice Summit did weaken their future position. The Summit also extended Qualified Majority Voting (QMV) to a number of areas so that small states will find it increasingly hard to secure exceptional arrangements for themselves.

The questions that will remain unanswered are to do with the political line taken by a future Scottish Government. In which policy areas would Scotland adopt the same or different policies to the UK? There are conceivable 'grey' areas, such as food standards, employment, and the adoption of the Euro currency, over which an independent Scotland and rUK could clash. But those are not the only conflict areas. According to Sloat (2000:104):

1. Over 60% of the fishing industry is in Scotland;
2. Scottish agriculture is based on sheep and hill-farming on less-favoured land, while England has more prairie farms suited to beef and dairy;
3. Scotland has more peripheral areas than England, creating a greater need for Structural Funds.

The difference here appears to be in the emphasis placed on different policy sectors (hill farming vs. sheep farming) rather than different policy areas. That said, those differences may become substantial rather than subtle. Some have suggested that the BSE crisis should have been treated as an 'English' – as opposed to 'British' crisis – because Scotland and Northern Ireland had different regulatory practices (*ibid.*). So if Scotland wanted to choose a line of policy distinct from rUK, where would it find allies? Would Scotland gang up with other small countries (like Ireland, the Nordic Countries, or Benelux) to form a powerful voice that may be – in political terms – stronger than the sum of its parts? Or would it follow the lead of small countries and look to either Germany or France to safeguard its interests?[26] Scotland would not have a stronger voice in the EU if it found no allies and was constantly outvoted. If it ended up voting with its natural ally – the United Kingdom – the gains of independence in Europe would be apparent rather than real.

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[25] Paragraphs B1.3 – B1.4.
[26] "Nice Uncle Gerhard and the little 'uns", *The Economist* 3 February 2001, p.44.

IV Terms of admission

If it were the case that an independent Scotland found itself outside the European Union and had to negotiate its re-admittance into the EU it is worth considering on what terms it might be re-admitted. Scotland would most likely lose its allocation of the budget rebate. In 1984, the then Prime Minister Margaret Thatcher negotiated a special discount on budget contribution worth £2bn a year and the United Kingdom has defended the rebate ever since. In July 2000, the Foreign Secretary Robin Cook told business leaders in Edinburgh that he did "not for one moment believe that other countries of the European Union would allow [an independent] Scotland to retain the budget rebate from which taxpayers in Scotland benefit".[27] At the Berlin summit in March 1999 the Labour government refused to negotiate the rebate even though the planned changes in contributions would have given the United Kingdom a windfall.

V. The European Structural Funds

The SNP has claimed that Scotland does not receive the amount of EU funds from the UK Government which is its due.[28] The question is whether Scotland currently receives an appropriate share of the Structural Funds allocated to the United Kingdom by the EU, or whether Scotland would be better off as an independent country. The European Committee of the Scottish Parliament considered the matter in 2000[29] and its findings are considered below.

The Structural Funds are a cornerstone of EU support for those areas suffering from high unemployment figures and undergoing economic regeneration. The Structural Funds are made up of four separate parts:

- the European Regional Development Fund (ERDF);
- the European Social Fund (ESF);
- the European Agricultural Guidance and Guarantee Fund (EAGGF);
- the Financial Instrument for Fisheries Guidance (FIFG).

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[27] http://news.bbc.co.uk/hi/english/uk/scotland/newid_845000/845039.stm [visited 2 February 2001].

[28] "EU aid for Scotland 'goes astray'", *The Independent* 02 June 1999.

[29] European Committee, 6th Report (2000), *Report of the Inquiry into European Structural Funds and their Implementation in Scotland*, Scottish Parliament, Edinburgh.

Scotland has been in receipt of EU funding ever since the Structural Funds were set up in 1975. Until 1988, no specific funds were set aside for Scotland. The European Commission approved individual projects on a case-by-case basis, as and when they were submitted within the quotas of the ERDF allocated to each Member State. The Structural Funds were reformed in 1988 and eligible regions (such as the Highlands and Islands) received allocations for multi-annual development programmes covering the 1989-92, 1992-93 and 1994-99 programme periods.

The Structural Funds are generally implemented through regional development programmes. It is for the most part up to the Member States and regions to define their priorities for development. But since the programmes are part-financed by the EU, the Member States and regions also have to take Community priorities into account so as to further the stated objective of economic and social cohesion.

Prospective EU enlargement has necessitated a re-evaluation of the Structural Funds. Continuous operation of the Funds would not be possible without reform as EU expansion invariably places increased demands on resources. For the period 2000-6 the previous six objectives have been streamlined and divided into three objectives:[30]

- Objective 1: Assistance will still be targeted at (i) areas with a GDP per capita of less than 75% of the EU average, (ii) former Objective 6 areas, and (iii) certain remote regions. Coverage will be reduced from 25% to 20% of the EU population. There will be at least four Objective 1 areas in the UK: Cornwall and the Isles of Scilly, Merseyside, South Yorkshire, and West Wales and the Valleys.

  Since 1999 the GDP per capita in the Highlands and Islands has risen above 75% of the EU average. It was only due to the special characteristics of the region (in particular peripherality and low population density) that the Berlin summit in March 1999 agreed to a further cash injection of Euro 300 million (£194 million at 1999 prices) under the Special Transitional Objective 1 Programme. The programme is targeted at the Highlands and Islands from 2000 till 2005 and the Islands only in 2006.

- Objective 2: The new Objective 2 supports the economic and social conversion of areas facing structural difficulties, particularly socio-economic problems in areas of industrial decline, rural areas, urban areas and fishery-dependent areas. It brings together Objectives 2 and 5 (b) of the current programming period and extends them to cover

[30] Various figures are found in the literature on Structural Funding. The divergences stem mainly from converting Euros (which is the default currency for Structural Funds) into pound sterling. The figures used here stem from the *Scotland in Europe* brochure by the European Commission and from the European Commission's *Highlands and Islands Special Transitional Objective 1 Programme 2000-2006* (June 2000).

other areas. Three programmes are devoted to Western, Eastern and Southern Scotland with a total allocation of Euro 807 million (or £521 million).

- Objective 3: The new programme amalgamates the previous Objectives 3 and 4 and provides funding from the European Social Fund to support the adaptation and modernisation of policies and systems of education, training and employment. It will fund assistance outside the areas covered by Objective 1 and 2, which will receive ESF allocations as part of their programmes, and provide a framework for all measures to promote human resources in each Member State. The UK's total allocation is Euro 4,568 million (£2,947 million), of which 10.5 %, or Euro 481 million (£310 million), has been allocated to Scotland.

For the 2000-06 period, Scotland has been allocated Structural Funds of £1,094 million (10.8% of the total UK allocation). There has thus been a marked drop in Scotland's share from 24.9% of the UK total in 1975-88 to 10.8% in 2000-06. The question the European Committee of the Scottish Parliament sought to answer was whether the UK government has allocated Scotland sums under the Structural Funds of a similar value to those the EU would expect Scotland to receive.[31]

The European Committee of the Scottish Parliament concluded that the allocation process by the UK is "relatively transparent and objective", and that (as far as it can tell) Scotland receives "an appropriate share of the Structural Funds allocated to the UK by the EU".[32] There is also no evidence to suggest that over the 2000-6 period "Scotland is losing out in the allocation for Structural Funds in the Assigned Budget". The Committee acknowledged that the converse had been argued but stated that "in the absence of the relevant information, this cannot be confirmed".[33]

As can be seen from the above, the allocation of Structural Funds to any Member State depends on a number of factors: the indicators selected to measure relative disparities in income per head, unemployment, population etc among the regions of the EU; the relative disadvantage of regions relative to EU averages; and the political influence of Member States on the allocation of EU funds (the designation of eligible areas and the allocation of finance to those eligible areas). Scotland has historically benefited from the Structural Funds due to its disadvantage in relation to the rest of the EU. This is unaffected whether Scotland is part of the United Kingdom or an independent State.

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[31] *Ibid.* at paragraph 43.
[32] *Ibid.* at paragraph 45.
[33] *Ibid.* at paragraph 52.

But at least two factors have to be borne in mind. First, the EU is in the process of enlargement and the streamlining of the Objectives means that existing beneficiary states will lose much if not all of their funding. According to EU Commission figures, Scotland's annual receipts for Objectives 1, 2 and 3 will drop by 4% from Euro 244 million between 1994-99 to around Euro 234 million between 2000-06. That may not seem like much of a reduction. But looking only at Objective 2, eligibility will drop from Euro 170 million a year in 1994-9 to around Euro 87 million a year in 2000-06 – roughly speaking a 50% drop that corresponds to population reduction. The eligible population for Objective 2 and 5(b) in 1994-99 was 3,704.000, whereas now it is 2,029.000. The difference of 1,675.000 will receive transitional support of almost Euro 200 million.

The second factor is that the United Kingdom has been able to negotiate special deals on behalf of Scotland, for instance the Special Transitional Objective 1 Programme for the Highlands and Islands at the Berlin Council in March 1999. It can be argued that Scotland, negotiating as an independent State without the weight of the UK, would not have been able to negotiate such an arrangement against all the odds. On the other hand, agreement on Structural Funds at the time of the Berlin Council required unanimity among the Member States and that might well have allowed Scotland to secure the special deal for itself anyway. Unanimity would have allowed Scotland to argue its own interests resulting in at least the same deal for the Highlands and Islands.

In conclusion, Scottish independence will largely leave untouched the issue of the Structural Funds. EU enlargement changes the map of disadvantaged regions, boosting the position of Scotland relative to new EU averages and making it harder for Scotland to qualify for additional funds.

Moreover, at the Nice summit in December 2000 it was decided that the Structural Funds will be subject to QMV as from 2007. QMV reduces the ability of states to secure special deals for themselves – which is why Spain, Greece and Portugal, who have always done well out of the Fund, were so unwilling to give up their veto rights. Arguably, Scotland would be better off as part of the UK regarding its negotiating position, especially if the UK makes the Highlands and Islands a priority. Alternatively, it is also quite possible that an independent Scotland could ally itself with the Nordic countries and negotiate 'en bloc' a favourable settlement for sparsely populated areas.

Conclusion

If Scotland were to apply to become a member timing would matter because the EU is in a process of enlargement and the terms that an independent Scotland could negotiate would differ if the EU had 28 rather than the current 15 Member States. The first intake of new

members will likely take place from the end of 2002. But the possibility of transition periods should be noted. The accession treaties will include transitional measures on the free movement of persons to quell fears of cheap migrant labour from the Eastern bloc flooding the EU. Full membership of Poland, Hungary and Estonia, the applicant States with the best credentials, is not expected to be granted until 2005/2006.

The process of negotiation is unlikely to be easy even for Scotland. Evidence from other candidate countries suggests that the EU uses its pre-accession bargaining strength to extract the maximum concessions from acceding parties. Member States are obviously aware that once candidates have joined, existing Member States will never have such an advantage again. Moreover, all new accession treaties have to be ratified by all national parliaments, a process which takes a minimum of twelve months and may take much longer if (as with the Treaty of Maastricht) major issues are at stake, or the treaty is rejected by a national parliament or in a referendum.

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