

Memorandum

[1] The following comments address two assumptions that underlie the Scottish National Party's position on Scottish independence. The first assumption is that an independent Scotland would inherit all the UK's international rights and obligations as a successor state. The second assumption is that an independent Scotland would continue to be a member state of the European Union and inherit the current treaty opt-outs (e.g. on the single currency and on the Schengen Agreement). These points will be addressed in turn.

State succession under public international law

[2] There are three distinct forms of state succession in public international law.

- a) Continuation: if Scotland broke away from the United Kingdom and became an independent state, the remainder of the United Kingdom, i.e. England, Wales, and Northern Ireland (rUK) would be referred to as the continuing state. The rUK would retain the rights and obligation of the United Kingdom. Scotland would be referred to as the successor state.
- b) Separation: in a separation, the United Kingdom would dissolve into two independent states (rUK and an independent Scotland). Both states would be referred to as successor states and would resume their respective pre-union state personalities, rights and obligations (as well as some of the rights and obligations of the United Kingdom).
- c) Dissolution: in this case, the United Kingdom would dissolve into two independent states of which none would be considered a continuing state. Both rUK and Scotland would be successor states and treated equally in respect of the rights and obligations of the United Kingdom.

[3] Separation (b), whereby the rUK and Scotland assume their pre-Union status, is not a viable option. After more than 300 years the *status quo ante* could no longer be restored, and

the repeal of the Acts of Union 1707 would not (contrary to what is sometimes assumed¹) see the re-emergence of the old kingdoms of England and Scotland.

[4] Dissolution (c) is favoured by some nationalist Scots as it would place all constituent parts of the Union on an equal footing as far as EU and public international law rights and obligations are concerned. Both the rUK and an independent Scotland would be regarded as 'successor states' in international law. There are three problems with this view. The first issue relates to precedent. Ireland joined the Union in 1801 and seceded in 1922 without, however, dissolving the United Kingdom. If Ireland's secession did not dissolve the United Kingdom, why would an independent Scotland have that effect? The second problem is constitutional: it is easier to bring about an independent Scottish state than it is to create an English state (with or without Wales and Northern Ireland). The United Kingdom is a union state with a central and supreme Parliament in Westminster. An independent Scotland would not have the power to destroy the United Kingdom as a legal entity.

[5] The third concern is that dissolution simply is not a realistic option. Were Scotland to become independent, the rUK would assert itself (and be recognised by the international community) as the continuing state (a) with identical international legal personality as the current United Kingdom (albeit with a territory reduced by one-third and a population reduced by 5.2 million). All international treaties (other than those referring solely or mainly to Scottish matters) would maintain their legal force as between the rUK and the other contracting parties. The rUK would also continue to be represented in those international organisations of which it is currently a member, such as the United Nations, the European Union, NATO, and the International Monetary Fund.

[6] Support for this position stems from the dissolution of the Soviet Union in 1991. The Russian Federation asserted itself as the continuing state which was accepted by the international community. As in the case of rUK succeeding the United Kingdom, the nuclear issue was a key determining factor. Russia not only held most of the nuclear assets of the former USSR, it also wanted to remain a nuclear power and keep its seat and its veto power in the UN Security Council.

[7] In order to maintain international stability, the international community would be likely to recognise the rUK as the continuing state of the United Kingdom.

¹ See e.g. Dr M.J. Williams, 'Defence Implications of possible Scottish independence', HC 483, July 2012.

The request for accession to EU member state under the EU treaties

[8] The SNP's position is that an independent Scotland would continue to be a member state of the European Union, and that it would inherit the UK's opt-out from the Euro and keep sterling as its currency.

[9] The clarity of the SNP's position is based on the assumption that an independent Scotland would be in full command of a defining characteristic of a sovereign state: policy choice in two key areas. Its leadership sometimes argues that an independent Scotland would automatically continue to be an EU member. At other times, somewhat confusingly, it claims that it has [a choice whether to join the EU or EFTA](#) (or neither, one presumes). It also claims freedom of choice over the currency and that it will choose sterling unless and until the Scottish people decide to adopt the Euro in a referendum (Jason Allardyce, Scots 'must use euro' if union ends, *Sunday Times*, 30 October 2011).

[10] These claims will be addressed in turn. There is no automatic right to membership of the European Union. Continued membership would only be possible with the approval of all 27+ Member States. The process of accession is laid out in Article 49 TEU 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'.

[11] An independent Scotland would have to join the EU as a new accession state, a process that could take many years. Obviously, there is no problem with Scotland meeting the formal criteria for membership: the Scots have enjoyed EU rights and obligations for almost four decades. But since unanimity is required, a single state, such as Spain, could block an

independent Scotland's accession to the EU (The Independent, *Spain could wield veto over Scotland's EU membership*, 22 January 2012).

[12] The loss of membership status following separation naturally impacts on the UK's derogation from the single currency. An independent Scotland would not inherit the opt-out the UK negotiated for the Treaty of Maastricht. Of course, the politics of the Euro might have changed dramatically by the time Scotland becomes independent. But, currently, the formal position is as follows. All (old and new) Member States (except UK and Denmark, who secured opt-outs in the Maastricht Treaty) are expected eventually to join the Mechanism and to adopt the Euro. All the new MS (after 2004) are legally obliged to adopt the Euro at some future point (with no opt-out clauses).

[13] Formal EU law can at times appear unduly rigid: under the terms of the EU's Treaties, Greece, for instance, would have to leave the EU if it chose to leave the Eurozone – a result that defies the 'spirit' of the Treaties. Even if there suddenly was room for manoeuvre for an independent Scotland on the currency, the Euro would become another factor in the raft of negotiations (following a positive independence referendum outcome in Scotland) with the Commission and the 27+ Member States, meaning that Scotland would have to negotiate a formal opt-out (which no other new Member State has secured).

[14] None of the above suggests a true policy choice for the SNP. An independent Scotland will not automatically join the European Union, but will have to apply. EEA/EFTA membership is neither attractive nor realistic: its members have to adopt and implement EU law, but without the participation rights, and no one believes that the framework is open to new members.² Both EU membership and the issue of the Euro will not be decided by the SNP or by the people of Scotland, but will be regulated (in principle) by the EU Treaties and (on the detail) by the Commission and the other Member States in negotiations with an independent Scotland.

[15] Finally, it should be appreciated that Scottish independence is not a purely internal affair for the United Kingdom, but would also involve parallel negotiations with and the consent of the European partners. On the one hand, Germany, France, Italy, and Spain can have no interest in witnessing the diminution of the United Kingdom and in setting a precedent for

² See generally, D. Buchan, 'Outsiders on the inside: Swiss and Norwegian lessons for the UK', Centre for European Reform, 24 September 2012.

other European secessionist movements. Moreover, experience shows that the international community as a whole shows an interest in the activities of states especially in cases of break-ups. On the other hand, if Scottish independence is the expression of the democratic will of the people and if the United Kingdom resolves the matter in a procedurally fair and transparent manner, the attitude of the Commission and the other Member States may be positively influenced and Scotland's application could be fast-tracked. The UK's attitude may in turn depend on how Scotland has behaved during the independence negotiations, and whether they have been conducted smoothly and amicably, or the reverse.

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