

Scottish Independence Convention (SIC)

Transition Paper No. 7

EUROPE IS OUR OYSTER

Scotland's Accession to EFTA, EEA and/or the EU¹

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Introduction

This paper considers two aspects of an independent Scotland's future foreign policy with the focus on Europe. It is based on the assumption that Scotland's independence has been formally recognised, whether by the rest (remainder) of the United Kingdom (rUK) or by the rest of the world, and that it is therefore capable and competent to enter into trade and other relations externally.

There are two clear, legitimate options: accession to the European Economic Area (EEA) through the European Free Trade Association (EFTA); and accession to the European Union (EU). This paper looks at each option in turn outlining why one may want to accede to the EEA or EU (and to an extent, present the pros and cons of doing so); some of the legal and technical steps involved; and the potential timings.

In 2016, a majority in Scotland voted to stay in the EU. Of those who did not vote to stay in the EU, there will be some who would prefer the EEA option. Whichever option is preferred, it does appear to be the case that Scotland wishes to forge a closer relationship, in terms both of trade (think of selling lobsters and langoustines to French or Spanish customers) and of sharing values (think of students spending an Erasmus term abroad), than is currently being offered by the government at Westminster.

EFTA

We need to talk of EFTA because EFTA is the gateway to the EEA. But in truth it could also be a "final destination".

What is EFTA?

EFTA is an inter-governmental organisation set up for the promotion of free trade and economic integration to the benefit of its member countries. When it was established through the 1959 Stockholm Convention it had seven members: Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK. By accession (the "joining") of some of those countries to the EU, and as a result of some specific inter-governmental arrangements, there are currently now only four member countries: Iceland, Norway, Switzerland and Liechtenstein.²

The seat of EFTA's secretariat – its headquarters – is in Geneva. It employs approximately 90 staff and the contributions made by the members to run it in 2019 were (in Swiss Francs): Iceland CHF 892,999; Liechtenstein CHF 254,230; Norway CHF 12,133,214; and Switzerland CHF 10,511,557 (totalling CHF 23,792,000 – approximately £19 million).³

The EFTA Convention eliminates tariff barriers between the four member countries and addresses some non-tariff barriers, for instance mutual recognition of conformity assessments (standard requirements). Common rules on customs are established as well as on the protection of intellectual property rights.

Other issues such as free movement of persons (for work purposes), coordination between social security systems and mutual recognition of diplomas are also covered. As a result, movement of most goods and services (though not financial services) and of economically active persons between the EFTA countries is similar to what you see between the EU and Switzerland through their bilateral agreements.

Other than that, its inter-governmental character is underlined by the absence of supra-national bodies – there is no parliament, no Commission, no court, no common commercial policy, no common foreign and security policies, no customs union, and so on.

What EFTA does positively for its members is to negotiate trade agreements with third countries. As a single negotiating group there is some collective clout and economies of scale when it comes to managing international trade negotiations.⁴ At the time of writing, EFTA has successfully concluded 29 free trade agreements covering 40 countries.⁵ Those agreements typically cover the following topics: elimination of import duties on industrial products, including fish and other marine products; processed agricultural products (such as soup, yogurt, chocolate); rules of origin (determining which products may benefit from preferential trade treatment based on where they are processed/originate); trade facilitation (to ease customs procedures); sanitary and phytosanitary (SPS) (concerning the health of plants) measures; intellectual property rights protection; competition; some services; investment; and public procurement.

Over and above those 29 agreements, EFTA member states remain free to conclude separate trade agreements if they wish. For example, EFTA free trade agreements typically do not cover basic agricultural goods such as grain, milk or sugar as EFTA states do not have a common agricultural policy. EFTA member states are also not in a customs union with each other, meaning that they can negotiate different customs tariffs and import duties with countries not covered by an EFTA agreement. Accordingly, the approach used in EFTA is very flexible. If a member country wants to conclude a free trade agreement with a non-EFTA/EU country and the other EFTA countries do not follow, it can proceed to conclude that agreement on its own.⁶

Why would Scotland want, or not want, to join EFTA?

- If an independent Scotland positively chooses not to pursue the EU accession option, EFTA is a logical fall-back option, a destination in and of itself.
- If Scotland does not become, or does not want to become, a member state of the EU, it is only through EFTA that it can legally join the EEA (see below).
- Joining EFTA maintains free trade and movement of persons (workers) with the four other EFTA member countries.
- Joining EFTA allows, and indeed imposes a legal obligation on Scotland to apply to join the EFTA agreements already covering 40 countries (which include Singapore, Mexico and South Korea).
- EFTA has no supra-national structures. It is a truly inter-governmental construct.
- Membership leaves Scotland free to negotiate other arrangements with third countries, including on agricultural goods, for example, and on customs arrangements with, for example, the rUK.
- Norway's level of contributions to EFTA in 2019 was approximately £9.5 million;⁷ Scotland's would be less as contributions are calculated according to Gross domestic product (GDP). Switzerland's is less because they do not contribute to the EEA-related work of the EFTA secretariat.
- EFTA membership is the only viable stepping stone for Scotland to join the EEA, which itself is arguably a stepping stone to membership of the EU.⁸
- Joining an inter-governmental construct shows good international faith and an ambition to be outward looking.

The legal steps to accede to EFTA

There is no recent precedent of a country joining EFTA. It has been more a case of countries leaving EFTA to join the EU. Therefore, the following is the theory and not something that has been seen in practice.

Article 56(1) of the EFTA Convention provides that:

"any State may accede to this Convention, provided the Council decides to approve its accession, on such terms and conditions as may be set out in that decision (...)"

There is no more to it than that. The steps an independent Scotland could take are as follows:

- Once independent and formally recognised as such, Scotland formally confirms its intention to apply to become a member of EFTA by sending a letter to that effect to EFTA's Council in Geneva. The Council is EFTA's highest governing body and decides on issues related to economic and trade relations between the EFTA states. It manages issues related to agreements with non-EU countries (and agreements with the EU and EU countries outside the scope of the EEA Agreement). The Council deals with administrative and financial matters, as well as enlargement. It usually meets eight times a year at the ambassadorial level (heads of permanent delegations of the four member countries to EFTA) and twice a year at ministerial level. The summer council session discusses EEA/EFTA matters and trade agreements with non-EU countries. The winter session only covers agreements with non-EU countries.⁹ Presumably, it would be at one of the Council's winter sessions, and through its committee on third country relations, that Scotland's application would be entertained.
- A unanimous decision would then have to be taken by the Council whether or not to open accession negotiations (Article 43(5) EFTA and Article 56 EFTA).
- If such a decision is taken, the negotiations would focus on the terms and conditions of accession and would cover the assumption by Scotland of the rights and obligations contained in, and flowing from, the EFTA Convention.
- Once the Council adopts a unanimous decision confirming accession, the instrument of accession is deposited with the Depositary (it tends to be Norway), which then must notify all other EFTA member states.
- The EFTA Convention enters into force in relation to Scotland on the date indicated in the Council's decision.

The four EFTA member countries' individual parliaments do not ratify the accession decision. The whole procedure is conducted and completed inter-governmentally by the Scottish Government and the governments of the EFTA states as represented in the EFTA Council. That said, under Norwegian constitutional law, the Government of Norway will need approval from the Norwegian parliament before it can agree to Scotland joining EFTA, but that approval can be given in advance so it is not ratification in itself. The same may be true for the other EFTA states, depending on their respective constitutions.

Article 56(3) of the Convention then requires that, on accession, Scotland must apply to join all the agreements that EFTA has concluded with third countries. Legally speaking, an extension of the EFTA free trade agreements to Scotland would require the agreement of all signatories to those agreements, necessitating that Scotland formally negotiates with those 40 countries under the 29 agreements.

Comments on EFTA accession

The closest examples of failed accession attempts to EFTA – with the intention of later joining the EEA – are those of Andorra, Monaco and San Marino between 2010 and 2015, despite encouragement from the EU. Apparently, EFTA states were not overly positive about those microstates associating themselves more closely with the EU through EFTA and then through the EEA.¹⁰ Their principal hesitation was that the microstates would slow down the decision-making process within EEA, which operates on the basis of unanimity. And whilst the idea of absorbing the UK – with its 60 million

consumers – back into the EEA through EFTA – as floated during Brexit negotiations – elicited some concerns, in particular from Norway, even that did not entirely put off the likes of Iceland.¹¹

Scotland is, however, a different prospect from the microstates because of its size and geography and also because Scotland was part of, and contributed to, EFTA/EEA dynamics as a constituent part of UK membership of the EU up until 31 December 2021. It is also a country with similar orientations to those of Iceland and Norway (think fish, oil, shared social outlooks); its population size (currently 5.2 million) does not pose the same type or level of concern as the threatening heft and political baggage of a relatively massive UK.

As for the 29/40 trade agreements, those negotiations need not be fraught, not least because they are with countries with which Scotland already had – up until 31 December 2021 – or indeed still has thanks to the UK Government's roll-over agreements¹² – formal trade relations. Moreover, those EFTA agreements will have been negotiated with the EFTA member states' interests at heart and those interests are arguably aligned in major part with Scotland's, albeit not with whisky or agricultural exports in mind.

To be clear, EFTA membership would provide no formal relationship with the EU and so it cannot be considered as an alternative to those constructs that do formalise that relationship: EEA or EU membership.

As with everything, politics and the politicians will dictate how smoothly the barely existent technical and legal procedures for EFTA accession are navigated. While applications to become a member of EFTA are considered on a case-by-case basis,¹³ from Scotland's perspective, there ought to be no excuses.

EEA ACCESSION

What is EEA?

The EEA offers a half-way house between the inter-governance of EFTA and the supra-national EU.

On 2 May 1992, the EEA Agreement was signed and on 1 January 1994 it entered into force. On one side of the EEA relationship are three of the EFTA countries – the "EFTA 3": Iceland, Norway and Liechtenstein. In 1992 Switzerland narrowly voted not to join and instead has struck a series of bilateral deals with the EU on sector and topic-specific areas. On the other side sit the EU and its 27 Member States.

What the EEA covers

The EEA incorporates the four freedoms of the EU's internal market (free movement of goods, people, services and capital) and related policies (competition, transport, energy, and economic and monetary cooperation). Accordingly, a cosmetic product made in Norway is deemed to have been made to the standards and legal requirements that apply in France and can thus be sold without hindrance throughout the rest of the EU/EEA. An EEA based financial service provider selling insurance can have Icelandic as well as Maltese client cases.¹⁴ And a Liechtensteiner student can study in Malaga through Erasmus and vice-versa. The internal market includes:

- Horizontal policies related to the four freedoms: social policies (including health and safety at work, labour law and the equal treatment of men and women); policies on consumer protection, the environment, statistics and company law.
- A number of flanking policies, such as those relating to research and technological development, which are not based on the EU *acquis* (the body of common rights and obligations that are binding on all EU countries as EU members) but are implemented through cooperation activities.
- Free movement of persons (not only workers and the economically active), as guaranteed by the EU Citizenship Directive.¹⁵
- Cooperation on customs checks (see Protocol 10).

- EU rules on food safety, veterinary controls, and so on (very important to Norwegian exporters of fresh seafood).

What the EEA excludes:

- Common agricultural policy and common fisheries policy (although the EEA does contain provisions on trade in processed agricultural and fishery products and the food safety and veterinary rules mentioned above).
- Customs union (but includes cooperation with regard to customs controls for goods coming from third countries).
- Common trade policy.
- Common foreign and security policy.
- Justice and home affairs (although all the current EFTA countries, including Switzerland, are part of the Schengen area).
- Economic and monetary union (EMU).

The EEA establishes supra-national bodies to ensure the proper functioning and application of the areas covered by the EEA:¹⁶

- The job of the independent EFTA Surveillance Authority (ESA), based in Brussels, is to ensure that the EFTA 3 (Iceland, Norway and Liechtenstein) abide by their EEA obligations. It is a policing role with the same type of enforcement powers that the European Commission enjoys with regards to EU Member States when ensuring that they comply with, for example, their state aid obligations and implementation of EU rules and regulations. The ESA's powers fall far short of the European Commission's in other respects. For example, the European Commission proposes legislation, ESA does not.
- The (misleadingly named) EFTA Court, based in Luxembourg, operates similarly to the European Court of Justice (ECJ, also in Luxembourg) but with less binding oversight. Its rights to hear cases are more restricted and where, for example, the EU's senior court issues judgments which are binding on EU Member State courts, EFTA's Court decisions are advisory only. The EFTA Court is also bound by the principle of "homogeneity", meaning that EU case law and EFTA case law have to be consistent with one another with regard to EEA rules taken over from EU law.

The running of the EEA is also assisted by the EFTA Secretariat (based in Brussels and Geneva) whose task is to help the EFTA 3 implement the EU legislation that is relevant to the EEA Agreement.

In summary, the EEA Agreement binds all members to certain forms of economic integration and conformity with a single body of economic law, but without any requirement to pool political sovereignty or any ideological commitment to an "ever closer union". In that regard, the EEA's aim has been described as being "unambiguously economic in nature, although it goes beyond the types of provisions that are to be found in many, less comprehensive free trade agreements."¹⁷

Why would Scotland want, or not want, to accede to the EEA?

There are perceived positives and negatives and much will lie in the beholder's eye. As with many things in life, the more you "get", the more you have to "give".

- For an annual contribution,¹⁸ Scotland would have privileged access to the EU's vast consumer base and an ability for its citizens to trade, live, study and work across 30 borders on its geographically closest continent, albeit with important exceptions on agricultural produce and seafood.
- Scotland would have no legal right to vote on the adoption of EU legislation relevant to the EEA while having to accept its imposition in Scotland. It has been called a "fax democracy" whereby the EFTA 3 + Scotland's role is to wait by the fax machine to see what new law Brussels has told

them to implement. While it is true that the EFTA countries can and do influence the EU law adoption process,¹⁹ there is no right to vote and the fax analogy would appear appropriate.

- Scotland would be subject to supra-national bodies in the form of the ESA and EFTA Court but with Scottish representation on those bodies.
- Scotland would be free to develop its own agricultural, fisheries, economic/monetary and foreign and security policies and seek to strike deals/agreements with the EU and any other country/union.
- Critically, Scotland would be relatively free to strike its own trade deal with rUK, including on customs tariffs and customs procedures. It is relative because Scotland would have to balance a desire for frictionless trade across the Dumfries and Galloway/Cumbria and Scottish Borders/Northumberland border roads with the EEA legal requirements that Scotland follows EU/EEA laws on product composition, for example, and rules of origin. In other words, Scottish products cannot contain chemicals banned by the EU, as implemented in EEA/Scots law, and the French purchaser of a Scottish product would have to show that the product's origin is mainly in Scotland and not in a factory somewhere in England or Wales. Suffice to say that the freedom to strike trade deals brings with it both flexibility and complexity and the mechanisms required to be put in place to ensure compliance with product composition and rules of origin necessarily imply a reduction in trade flow and/or additional costs at the Scotland/rUK border.
- As the EEA allows for free movement of persons, some may argue that there needs to be a hard "passport" border between Scotland and rUK to prevent, for example, an Icelander exercising their freedom of movement within Scotland to cross the border with rUK. That need would be more dependent on rUK attitude to immigrants/tourists because, as Lock mentions,²⁰ if the fear is that the Icelander illegally takes a job or rents a flat in Carlisle, it would be the employer and landlord who would be acting unlawfully. I would add that EEA membership does not require membership of the Schengen Agreement,²¹ though the EFTA 3 are members of it.

The legal steps to accede to the EEA

In a post-independent Scotland, accession to the EEA is possible in only two ways: through EFTA accession or through EU membership (see Article 128(1) and (2) EEA).

Assuming that the political choice is taken by Scotland only to accede to the EEA via EFTA, the following steps will need to be completed successfully:

- Prior to application, Scotland would have to be in position to guarantee that its judiciary and administration are capable and competent to ensure effective and homogenous application of EEA law. That in turn means that it has, in effect, ensured that all EEA law forms part of its national law. In practice, then, many of the EU's "Copenhagen criteria" chapters regarding the internal market, in the context of EU accession, will have to be shown to be completed and that Scotland has the institutional infrastructure to ensure enforcement of compliance with those laws.²²
- Once it is able to offer that guarantee, Scotland must address its application for accession to the EEA Council which meets twice a year at ministerial level. The EFTA States are represented in the EEA Council by their respective ministers of foreign or European affairs. The EU is represented by the rotating presidency of the Council of the EU, as well as representatives of the European External Action Service and the European Commission. Although there is no express "admissibility" sift stage, it would be most likely conducted by the EEA Council at this point.
- Assuming that the sift is passed and the Council is satisfied that the application is serious and Scotland is capable and competent, negotiations will take place to determine what technical adjustments need to be made to the EEA, such as changing the Preamble and Article 2 which identify countries to which the EEA applies. An acceding state would not be expected to make substantive demands to change the EEA and it remains more of a "like it or lump it" scenario.²³
- On a strict reading of Article 128 EEA, an Enlargement Agreement to include Scotland will have to be "approved" by (a) the EFTA 3, (b) the EU, and (c) the individual EU 27 Member States, each in accordance with their own procedures. It has been argued that the EU alone could approve it for

the EU 27 Member States because the agreement would fall within its exclusive competence to do so.²⁴ If that were not the case and the likes of Belgium's Flemish Parliament would also have to ratify it, it is clear that the overall process may take a considerable amount of time. For that reason, a clause similar to the one in Article 6(3) of the 2004 EEA Enlargement Agreement should be negotiated.²⁵ The EU ratifies the agreement on the basis of Article 217 of the Treaty on the Functioning of the EU ("TFEU") which requires, amongst other steps, a final unanimous decision of the Council of Ministers and consent, by simple majority, of the European Parliament. Article 217 TFEU also allows the Council to agree by qualified majority. That has been used in the past, for example with Croatia which acceded to the EU in 2013 but whose accession to the EEA was delayed by non-ratification by some Member States resulting in an agreement between the EFTA 3 and the EU that the EEA would nevertheless be applied provisionally to Croatia.²⁶

- The Agreement on Scotland's accession to the EEA would otherwise normally enter into force on the day following the deposit of the last instrument of ratification or approval.

Comments on EEA accession

For Scotland, EEA accession cannot happen without (at least) EFTA accession first. Whether the two accession procedures can run in parallel is uncertain but only because it has never been tried before. There is in practice nothing to prevent it.

That said, for as long as Scotland remains aligned as closely as it can to the areas of law covered by the EEA²⁷ and where it can swiftly set up the regulatory infrastructure to demonstrate enforceability of EEA Law in Scotland, there ought to be no obvious technical issues preventing submission of the application and a successful negotiation. There are some very clear advantages as well to sticking with the EEA:

- The currency debate would be much less heated, playing far less of a role with questions of "austerity+" and deficits receding into the normal domestic background.
- Scotland would be free-er to negotiate its border and customs relationship with the rUK than if it were a member of the EU.
- Scotland can forge its own agricultural and fisheries policies.
- The EEA avoids any transfer of sovereignty, in the strictest formal understanding of that concept, and may constitute a workable compromise in a situation where 38 percent of Scotland's population voted against continued UK membership of the EU in 2016.

But politically, if Scotland opts for the EEA option alone, that decision will probably be viewed by the EU as the "final destination" for Scotland. It would be unreasonable for Scotland to demand of the EU that it invest time and energy in two separate and consecutive negotiation processes, one to the EEA and the other to the EU. Why would the EU favour Scotland with an expedited timetable or devote more resources to it when, for example, there are currently eight other countries who have all expressed an absolute political commitment to "skip go" and join the EU compared with Scotland's wait-and-see approach? Using the EEA as a waiting room necessarily means that accession to the EU is some way off (another 5, 10, 20 years?).

Given that much of what requires to be done by an independent Scotland to demonstrate competence to accede to the EEA would need to be done in order to accede to the EU, one must question whether the advantages of EEA membership really would outweigh the potential disadvantages of going for full EU membership. For example, if the rules of origin that apply under the EEA are going to be difficult hurdles to overcome anyway and/or add a disproportionate cost to the price of a Scottish product bound for the EFTA 3 or the EU, why not consider going for full EU membership instead?

Economic arguments aside, the key attraction of the EEA is the freedom of movement of persons which is similar to the freedom we would enjoy as a member of the EU. That freedom is based on a sharing of values and cultures, not merely a question of Pounds, Kroner and Euro. There would also be relative flexibility in terms of future trading relationships with rUK. But if Scotland does go the EFTA/EEA route, it should do so as a "final destination" and thus embrace all the positives and negatives that would go with that.

EU

What is the EU?

I imagine most people can recall what the EU was – and up until 31 December 2020 it was Scotland's European political/trading/constitutional *status quo*. Suffice to say it is a massive consumer market of 450 million plus EU citizens with supra-national institutions ensuring that, amongst many other aims, the peoples of the EU "come closer together". Another way of framing its aim is given by the President of the European Parliament's Renew Europe political group, Dacian Cioloș MEP: "The EU is not an ATM, it is a community of values driven by the needs of our citizens".²⁸

The legal steps to accede to the EU

Anthony Salamone has definitively described the legal, technical and practical steps that Scotland must follow in order to accede to the EU and his work is to be commended and should be read.²⁹

In summary, the criteria are:

Treaty criteria

The law is presented in relatively simple terms. Article 49 of the Treaty on European Union (TEU) states that "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union". The reference to Article 2 TEU is uncontroversial for Scotland as it requires only that it respects what it unarguably is already doing: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Other criteria

The conditions for accession are further described in the "Copenhagen criteria", devised in 1993 to accommodate the anticipated wave of applications from war-torn or ex-Communist Central and Eastern European and Balkan countries.³⁰ They are as follows:

- Political criteria: "stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".
- Economic criteria: "a functioning market economy and the ability to cope with competitive pressure and market forces within the union".
- The ability to take on the obligations of membership: "adherence to the aims of political, economic and monetary union, adoption of the EU *acquis* and the administrative capacity to effectively implement and enforce the EU *acquis*".

Other conditions have since been added, in particular the EU's capacity to accept new members (absorption capacity).³¹ The assessment is merits based³² so it is conducted case-by-case, not by joining a queue. This means that the question of *when* one accedes is as much in the gift of the applicant as it is of the EU. The Commission has also set out a further development of conditionality in its 2013 enlargement strategy. It outlined a "fundamentals first" approach, which emphasises – as well as the rule of law – the importance of economic governance, democratic institutions, fundamental rights and the resolution of bilateral issues.

The principal obstacles and challenges for Scotland

If Scotland were to seek membership of the EU, there are at least three significant challenges:

1. The *Acquis* (common rights and obligations)

The EU will study the extent to which the candidate country has adopted, implemented and is capable of enforcing all of the EU's current rules. For example, under chemicals law there must be a law in place capturing the obligations of all parties according to the REACH Regulation.³³ There should also be a government authority that can make sure that only those companies that have registered with the European Chemicals Agency can place their chemicals on the Scottish – and therefore EU – market.

The *acquis* are divided into 35 different policy fields (chapters), such as transport, energy, environment, etc., each of which is negotiated separately.³⁴

Up until 31 December 2020, the greatest challenge was on the competence to ensure the enforcement of the various EU rules and regulations as a matter of Scots law. That was because a lot of that capability was shared with UK agencies based outside Scotland. While the requirement to duplicate the enforcement competence remains, the principal additional concern now is the extent to which Scotland will diverge from EU rules and regulations before it achieves its independence or some other provisional arrangement prior to independence where the UK Government allows it to follow its own legislative way in order to remain aligned with EU law.

Legislative steps have been taken in that regard but they do not cover all the policy areas covered by the 35 chapters. The Scottish Government itself has noted that it has fully devolved competence for only 12 chapters.³⁵ One should therefore be under no illusion that it will be a simple box-ticking task that the *acquis* are already completed but for a few tweaks here and there.

The longer Scotland is subject to the UK Government diverging away from EU rules and regulations, the longer and more complex it will be for an independent Scotland to re-adopt all the EU laws necessary to adopt the *acquis*.

2. Currency (Chapter 17)

Chapter 17 refers to the "*acquis* in the area of economic and monetary policy" which "contains specific rules requiring the independence of central banks in Member States, prohibiting direct financing of the public sector by the central banks and prohibiting privileged access of the public sector to financial institutions. Member States are expected to co-ordinate their economic policies and are subject to the Stability and Growth Pact on fiscal surveillance. New Member States are also committed to complying with the criteria laid down in the Treaty in order to be able to adopt the euro in due course after accession. Until then, they will participate in the Economic and Monetary Union as a Member State with a derogation from the use of the euro and shall treat their exchange rates as a matter of common concern."

The review of whether or not a country has achieved this is not limited to scrutiny of its deficit or the health of its currency.

Take Montenegro as an example. After having first used the German Deutsche Mark in 2001, Montenegro adopted the Euro as its *de facto* domestic currency in 2002 even though it is not part of the Eurozone. In the most recent report on the state of play of accession negotiations for Montenegro, however, the Commission did not include a requirement or even a suggestion that it must stop using the Euro and launch its own currency.³⁶ Instead, it noted that Montenegro "remains moderately prepared in the area of economic and monetary policy" with a need to: (a) "implement the action plan for alignment with the EU *acquis*"; (b) "provide necessary resources and develop capacities of Monstat's [National Statistical Office] national accounts department"; and (c) "significantly improve cooperation between Ministry of Finance, Central Bank of Montenegro and Monstat on the division of tasks and production of statistics aligned with the ESA [European System of Accounts] 2010 methodology".

This allows me to clear up a couple of points: Scotland does not need to adopt the Euro from day one of accession. But it does need to commit to joining the Eurozone without, however, having to commit to any particular timeline in that regard.

3. Borders/Schengen

No one wants to have to show a passport at the border with rUK. Yet Chapter 24 of the *acquis* requires the candidate country to show compliance with the "Schengen *acquis*, which entails the lifting of internal border controls in the EU". That does not imply, however, that Scotland would have to impose a passport border between Carlisle and Dumfries. The European Commission itself states that, "for the new Member States substantial parts of the Schengen *acquis* are implemented following a separate

Council Decision to be taken after accession".³⁷ And Avery commented in 2014 that "the EU has neither the will nor the means to compel its members to join the eurozone or Schengen; in practice, member states join them only if they wish to do so (Sweden is not in the euro; Ireland is not Schengen)".³⁸

The reference to Ireland is instructive as Lock mentions in 2017: "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."³⁹

If Scotland does not wish to face a hard passport border on accession day, it is likely that a cogent argument – legally and politically – can be made to maintain that post accession.

The timing (including pre-agreements)

Previous accession timetables can only give an idea as to how long it may take Scotland from date of application to date of accession. But when reviewing timetables, one must bear in mind that Croatia, the Czech Republic and Finland were able to fulfil the Copenhagen criteria – including a functioning economy – in the time given. It is inconceivable that Scotland would take longer than a country exiting from the social, economic and humanitarian complications of the USSR or the backdrop of a war involving ethnic cleansing.

- **Croatia: 10 years** – Date of application February 2003; date of accession July 2013
- **Czech Republic: 8 years** – Date of application January 1996; date of accession May 2004
- **Finland: less than 3 years** – Date of application March 1992; date of accession January 1995

For Scotland, from the date of application to day of accession, Salamone believes the timing could be between approximately 4 and 6 years and for Lock and Lippert⁴⁰ it is 3 or 4 years.

Even if the timing is closer to the average of, for example, the ex-Communist states (approximately 8 to 9 years), any wait is to be placed in the context of the EU's tendency and practice to have interim arrangements prior to formal accession. As the UK Government has recognised, "prior to opening accession negotiations, the EU almost invariably enters into an agreement with the aspirant state to help bring the law and practice of the latter closer to that of the EU. This is usually in the form of an Association Agreement, as set out in Article 217 of the Treaty on the Functioning of the European Union (TFEU). It may be entered into by the EU alone or together with its Member States."⁴¹

Such agreements tend to be asymmetrical, designed to promote convergence between the candidate country and the EU.

Actual sequencing between Scotland (a) being part of the UK, (b) leaving the UK and becoming independent, and (c) negotiating a new relationship between an independent Scotland and the EU makes the negotiation and entry into force of an Association Agreement complicated. It stands to reason that the sooner and more smoothly this can happen, the better for Scotland. It also may depend on how the current arrangement is functioning between the EU and the UK. Suffice to say, however, that the "half-way house" option of the Association Agreement is likely to be on offer.

From the day it applies to the date of accession, Scotland can reasonably assume that it will benefit from both an Association Agreement and, indeed, technical and financial assistance. Such assistance is designed to "help the beneficiaries make political and economic reforms, preparing them for the rights and obligations that come with EU membership". When Iceland was a candidate country before eventually withdrawing its application, for example, it received IPA-assistance in 2010 (Instrument for Pre-accession Assistance).⁴²

Comments on EU Accession and Conclusion

Many Scots harbour doubt that those applications will be successful. I often hear this statement: "I would vote for independence if I knew we'd get back into the EU".

An independent Scotland will have the right to seek accession to the EU. There is nothing at all to support the doubt except if you believe that Scotland will not comply with the rules and procedures. Clearly, if a gallus Scotland makes demands of the EU which are politically and technically unacceptable, its application is doomed to fail or at least take much longer and be less favourable. But if Scotland approaches the accession process with the subtle diplomacy that must anyway mark such steps, there is no reason to doubt that the application will be successful. It is as simple as realising this: if the people in Scotland want to go through the changes necessary to fulfil the conditions of accession, accession will happen. The answer to the statement above is therefore this:

"We will get back to the EU but it's really up to all of us to make it happen".

Accession to EFTA should be painless and swift. Accession to the EEA will take more time and if the appropriate political and diplomatic attitude is adopted together with a commitment to undertaking the necessary technical/legal steps, then accession should happen and it should do so in a timeframe of less than 5 years – probably around 2 to 3 years.

The biggest (?) prize – accession to the EU – will require greater time and more fundamental change but the relative pain is designed to be matched by greater upsides. EU membership permits Scotland to become part of something far greater than it, the UK or any other international construct for which it could be eligible. It allows Scotland to have a voice that is heard instead of being dismissed as mere grievance-mongering. And with that voice, EU membership allows Scotland to maximise the influence that it, even if forever vertically-challenged, will be able to wield.

If an independent Scotland has real international ambition and if it wants to be more like Ireland, Luxembourg or Denmark with the legal power of veto over big ticket political decisions like accession and Treaty amendments, then it is EU membership which ticks the boxes. It is the model, however, that will pose the most tension with rUK and will require greater patience and sacrifices – think, for example, of the current issues at the border between the EU and UK. An independent Scotland will face similar challenges because it will become the new border between the EU and rUK.

If an independent Scotland wants to be more like an Iceland or Norway, on the other hand, unilaterally defending interests that matter to it – fish and agriculture – while giving up on having a legal say on most other matters that regulate trade and movement of EEA persons, then the EEA via EFTA is the appropriate model. Compared to the EU, this model offers a more flexible trading and border relationship with rUK. It ought to be quicker and requiring of less change.

I have always disliked the word "independence" to describe the destination of the journey that Scotland appears to be on. If anything, "self-determination" conveys best what a vote for independence entails: that we accept responsibility for our actions, for our choices, for our future. And with regard to Europe, we have three choices – EFTA, EEA, EU – posing increasing levels of difficulty, both economically and politically, as well as in terms of timing and the sacrifices (for that is what they are) that we will have to endure in order to eventually enjoy the benefits that come with them.

References

- 1 Peter Sellar is a private practice lawyer who advises on EU law. The views expressed in this paper are purely his alone, writing in a personal capacity. He is grateful for reviews of sections of this paper by Professor Dr Halvard Haukeland Fredriksen of Bergen University and Anthony Salamone FRSA of European Merchants.
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- 3 <https://www.efta.int/About-EFTA/Financial-Information-748>
- 4 David Phinnemore and Cenni Najy. June 2017. The Option of Association: The United Kingdom Post-Brexit and the European Free Trade Association. Foraus-Policy Brief, p.7.
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- 6 Examples of such an approach include the Japan/Switzerland Economic Partnership Agreement. See Professor Dr Carl Baudenbacher, President of the EFTA Court, University of St. Gallen. 13 October 2016. After Brexit: Is the EEA an option for the United Kingdom? p.8.
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- 8 That view is disputed though. See Catherine Yarrow and George Yarrow. March 2017. *The European Economic Area Agreement: A short introduction*. p.3.
- 9 Phinnemore and Najy. p.8.
- 10 Christophe Hillion. 8 February 2018. Agreement on the European Economic Area: A Commentary. p.968. See also <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0680:FIN:en:PDF> point 5.4 on p.17 and point 6.2 on p.18.
- 11 Baudenbacher, p.7.
- 12 <https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries#trade-agreements-that-took-effect-from-1-january-2021>
- 13 Phinnemore and Najy, p.12.
- 14 <https://eftacourt.int/cases/joined-cases-e-15-15-and-e-16-15/>
- 15 See EFTA Court cases: <https://eftacourt.int/cases/e-26-13/> and <https://eftacourt.int/cases/e-28-15/>
- 16 See Baudenbacher, p.3.
- 17 See Catherine Yarrow and George Yarrow, p.6.
- 18 EFTA states normally fund their participation in EU programmes and agencies by an amount corresponding to the relative size of their GDP compared to the GDP of the whole EEA (Article 82 EEA). For Norway, its contribution over the period 2014-2020 was EUR 391m to 15 EU beneficiary Member States and EUR 447m to EU programmes such as Erasmus+: <https://www.regjeringen.no/en/topics/european-policy/Norways-relations-with-Europe/financial-contribution/id684932/>
- 19 Henrik Nordling. 5 July 2016. The EEA Agreement and the 'Norway option': integration without co-determination. <https://eutopialaw.wordpress.com/2016/07/05/the-eea-agreement-and-the-norway-option-integration-without-co-determination/>
- 20 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138455
- 21 <https://www.schengenvisainfo.com/schengen-agreement/>
- 22 Common Weal. 2018. *How to Start a Country* (<https://commonweal.scot/weve-been-needing-blueprint-building-independent-scotland-and-its-finally-here>). p.148.
- 23 That said, on each of the recent accessions to the EU, a new financial mechanism – i.e., contributions by the EFTA 3 – has been negotiated and hence the relevant protocol (no. 38) to the EEA has been changed substantively.
- 24 See Hillion, p.967. The relevant EU case law on this point is complex, the most recent iteration of it being Opinion 2/15 on the EU/Singapore trade agreement. <https://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN>
- 25 <https://www.efta.int/sites/default/files/documents/legal-texts/eea-enlargement/agreement-2004.pdf>
- 26 [Decision 2014/343/EU, OJ L 170/3 of 11.6.2014 \(https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014D0343\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014D0343). The Decision itself was adopted on 24 March 2014 and entered into force that same day. At the time of writing, 20 of 32 Parties have ratified the agreement on Croatia's accession to the EEA.
- 27 The UK Withdrawal from the European Union (Continuity) (Scotland) Bill [2020] became an Act on 29 January 2021. It "aims to make sure that Scottish law can continue to align with EU law after 31 December 2020". <https://beta.parliament.scot/bills-and-laws/bills/uk-withdrawal-from-the-european-union-continuity-scotland-bill-2020>
- 28 <https://www.reneweuropegroup.eu/news/2020-07-07/mff-renew-europe-outlines-plan-to-safeguard-the-rule-of-law>
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- 30 <https://www.consilium.europa.eu/media/21225/72921.pdf>
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- 32 Ibid, paragraphs 2.14 and 2.66.
- 33 <https://echa.europa.eu/regulations/reach/legislation>

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