

SCOTTISH INDEPENDENCE AND EU MEMBERSHIP: PROCESS AND IMPLICATIONS

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Legal Briefings - By **Paul Butcher**

In 2016, shortly prior to the UK’s referendum on EU membership, the Scottish National Party (**SNP**) manifesto argued that “significant and material changes in circumstances that prevailed in 2014” would justify a second Scottish independence referendum and that “Scotland being taken out of the EU against our will” would constitute such change. Since then, the UK leaving the EU has been central to the SNP’s argument that what had been considered to be a “once-in-a-generation opportunity” referendum on independence in 2014 should be repeated in the “early part” of an SNP led Scottish Government’s new term following the 6 May 2021 election. See our [Routes and obstacles to a second Scottish independence referendum](#) briefing for more background.

It is therefore unsurprising that it is the SNP’s policy that an independent Scotland should join the EU as soon as practicable. This briefing looks at the process and requirements that would need to be followed and met and some of the implications of this policy, including for an independent Scotland’s relationship with the UK.

HOW COULD AN INDEPENDENT SCOTLAND SEEK TO JOIN THE EU?

Had Scotland voted for independence in 2014 and secured exit from the UK prior to the UK leaving the EU, the newly independent Scotland would not have been a member of the EU after it left the UK. This is because an independent Scotland will be a new State under international law and the EU is an [inter-governmental organisation with entry criteria](#). To that extent, the UK leaving the EU has not changed the fact that a newly independent Scotland will not be a member of the EU. To join the EU, it must follow the same application process, as set out in Article 49 of the Treaty on European Union (**TEU**), as any other potential applicant.

Article 49 allows any “European State” to apply to become an EU member. So Scotland must resolve its exit from the UK and be established as an independent sovereign state prior to making its formal application to join the EU.

Interim trading arrangements with the EU (and other countries)

Accordingly, there would be a hiatus following independence in which Scotland would not yet be a member of the EU, but also would not benefit from the EU-UK Trade and Cooperation Agreement. This is also the case for many of the other free trade agreements that Scotland was automatically part of within the UK. Scotland will face greater challenges than the UK did securing ‘roll-over’ or ‘continuity’ for these agreements when it carried out an [analogous process](#) when leaving the EU. It may take many years for an independent Scotland to renegotiate its trade relationship with the rest of the world. See our briefing on the [Scottish independence: the consequences of for trade](#) for further background.

Unanimity of EU members is required

Under Article 49, at the outset, any membership application requires the unanimous approval of the Council of the EU and a majority in the European Parliament. Given that Spain has been opposing its own Catalan independence movement, it has been suggested that it might veto any attempt by an independent Scotland to join the EU. This is one of the drivers behind the [SNP’s position](#) that Scottish independence must only be achieved in accordance with the laws of the UK (ie in order to distinguish Scotland from the position in Spain). Spain’s 1978 constitution refers to the “indissoluble unity of the Spanish nation” which means that the Catalan attempts at independence are not in accordance with the laws of Spain.

At the end of the process, all existing EU members also need to ratify the accession terms in accordance with their constitutional requirements.

The criteria that have to be met

An applicant must meet the accession criteria, or [Copenhagen criteria](#) (as defined by the European Council in Copenhagen in 1993) to join the EU. There are three pillars to the criteria:

- **political:** stability of institutions, guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- **economic:** a functioning market economy and the capacity to cope with competition and market forces;
- **administrative and institutional capacity** to effectively implement the EU's *acquis* (ie the body of rights and obligations that are binding on all EU members) and ability to take on the obligations of membership.

If the state meets the criteria, membership negotiations can start. For a newly independent Scotland it is the third pillar that might well cause delay. In particular, following independence, Scotland will need to set up a range of new institutions (for example, a new central bank and many regulators and agencies).

The process of joining the EU has normally been lengthy - Finland was the quickest country to join. Even though it had already adopted much of the required EU law as a member of the European Economic Area, it still took just under 3 years from membership application to accession.

Must Scotland join the Euro to join the EU?

The SNP's policy is not to seek to join the Euro, but, instead, to initially use sterling unilaterally (ie without a currency union with the UK) for a transitional period and then to introduce its own currency "as soon as practicable". See our briefing [Scottish independence and currency: choices, issues and implications](#).

The UK negotiated an opt out from participation in the Euro under the Maastricht Treaty in 1992. Denmark is the only current EU member that has such an official opt-out. However, following its 2003 referendum on joining the Euro (which those opposed to joining the Euro won) it has been accepted that Sweden will not in practice join unless or until there is a referendum which is in favour. Other countries such as Poland and the Czech Republic have repeatedly delayed moves towards joining the Euro. Therefore, while it seems unlikely that Scotland could negotiate a formal opt-out from joining the Euro, and would therefore have to commit (as required by the Maastricht Treaty) to joining the Euro once it meets the necessary economic and fiscal "convergence criteria", in practice it might be able to delay joining for a considerable period. It may be many years before an independent Scotland could meet the convergence criteria as set out in Article 140 of the Treaty on the Functioning of the European Union, for joining the Euro (including the requirement to be a member of the Exchange Rate Mechanism for two consecutive years).

IMPLICATIONS FOR THE UK/SCOTLAND RELATIONSHIP OF AN INDEPENDENT SCOTLAND JOINING THE EU

Must Scotland join the Schengen area and therefore give up passport free travel and free movement with the UK?

The SNP's policy is to seek an opt-out from the Schengen area as part of any process to join the EU. This is because joining the Schengen area would be incompatible with agreeing to continue passport free travel and free movement between an independent Scotland and the rest of the UK (and Ireland, the Isle of Man and the Channel Islands) as part of the Common Travel Area. Ireland and, before it left, the UK are the only EU members who were allowed opt-outs from the Schengen area when it became part of EU law with the Treaty of Amsterdam in 1997.

A hard border between the UK and an independent Scotland

Joining the EU would create a hard border between an independent Scotland and by far its largest trading partner: the UK. The [official Scottish Government estimates](#) of Scottish exports for 2018 (published 29 January 2020) show:

- 60% going to the rest of the UK;
- 21% going to the rest of the world; and
- 19% going to the EU.

While for imports, figures for 2017 (from [this](#) February 2021 London School of Economics paper) show 67% of Scotland's imports were from the UK.

Joining the European Economic Area (EEA) would be an alternative relationship with the EU to EU membership which would mitigate some aspects of a hard border with the UK. However, the only way to prevent a hard border with the UK would be for an independent Scotland to limit its trade relationship with the EU to a traditional style free trade agreement (of the kind that the UK and the EU now have). This would also require a future relationship agreement between an independent Scotland and the UK which would go well beyond a traditional style free trade agreement.

See our briefing on the [Scottish independence: the consequences of for trade](#) more generally.

Conclusion

The process of an independent Scotland becoming a member of the EU may not be rapid, straightforward or without potential costs.

[More on Scottish independence](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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