

Brexit – What, realistically, are the options for Scotland?

Which options are likely ones depends both on what is legally possible and what is politically feasible. And all is made more complicated by uncertainty in both respects. There is debate amongst lawyers, for example, as to whether Article 50 of the Lisbon Treaty, which triggers the withdrawal process, can be revoked once invoked. My own guess is that the answer is actually much more a political one – that it cannot be done unilaterally but might be possible with the agreement of the European Council and (possibly) of the European Parliament too.

As far as actual negotiations are concerned, no one quite knows how hard a line the UK government, on the one hand, and the European Council and the European Commission, on the other, are going to take. There is similar uncertainty as to whether another Scottish referendum would lead to a vote for independence. Questions, too, over the possibilities for and the conditions of an independent Scotland joining the EU are already well rehearsed. There has, too, been some canvassing of the idea of major realignments, involving, in various combinations, Scotland, Gibraltar, Northern Ireland and Ireland. Aside from the obvious political uncertainties, all raise issues of considerable legal complexity. Equally, there are pressures from a number of quarters to find some democratic means of reversing the Brexit vote, including a commitment on the part of Liberal Democrats to fight the next general election on a platform of Remain/Rejoin.

Since all such developments, however, are even more in the realms of speculation than what follows, for present purposes the assumption is being made that Brexit shall actually happen and that Scotland remains as part of the UK. In this context, I can see three possible ways in which things might develop. The first is “Brexit pure”. The second is membership of the EEA. The third is some kind of new trading relationship with the EU.

By “Brexit pure” I mean straightforward withdrawal from all existing commitments at European level, together with accompanying steps to forge new trading relationships with Commonwealth countries, the US, China, Japan etc. From some of the things Liam Fox has said, this would be his preferred approach. How good this would be for the economy in both the shorter and longer term is moot.

Membership of the EEA, along with countries such as Norway and Iceland, is, effectively, the opposite outcome. What it would mean is a return of agriculture and fisheries to domestic jurisdiction. I think it might also provide a bit more flexibility over state aid. And the UK would be able to negotiate its own trade treaties with countries outside the EEA. But we would still have to abide by the rules of the single market, including free movement of persons. The only difference would be that this could be restricted on the grounds of “public policy, public security or public health”. This is certainly not meant, though, as a “carte blanche” and, given the role immigration played in the referendum debate, might well not satisfy hard line Brexiteers or a considerable proportion of the British population. Another problem for such Brexiteers is the emphasis that they put on regaining control – the irony of EEA membership is that we actually lose it along with our seat at the negotiating table.

As an aside, I think there may well be a legal uncertainty where EEA membership is concerned. The UK signed the Treaty in 1994 whilst part of the EU but in its own right. So does leaving the EU automatically mean leaving the EEA or does our membership continue? Because, if it does, and hardline Brexiteers prevail, we may have to give 12 months notice of withdrawal from it too, depending on the obligations that would continue.

The last option is to rejoin EFTA (the European Free Trade Association) or to negotiate some kind of generalised association agreement with the EU, concentrating on tariff free trade. That, however, would still mean us having to conform to a large number of EU rules, those on product safety being a prime example. Again we would have no say on their content. Another possibility in this category is a number of specific association agreements, allowing us to salvage certain aspects of our membership, such as continuing the Erasmus programme for students, joint research projects and so on. Again, it is unclear just how well this kind approach would be regarded by the remaining member states. Also, lack of free movement of services might well create problems for the City of London.

The options for Scotland, in the context of continuing as part of the UK, are both internal and external and vary according to Brexit pure, EEA membership and some kind of new trading relationship.

Brexit pure – This would return legal control to Scotland over all currently devolved areas, including farming and fishing and state aid. So, for example, the

need to tender ferry services might possibly disappear, though I am not well enough acquainted with EEA rules to know for sure. There would still be a need, though, to conform to various international treaties. So, as an instance, freedom on fisheries might not be quite as extensive as some fishermen fondly imagine. Also, even though there would be effectively sole use of the exclusive economic zone, rights to fish in e.g. Norwegian waters would require to be renegotiated.

What might be achievable politically, in return for Scotland not attempting to raise difficulties about the nature of any Article 50 agreement, is a further increase in devolved powers. Examples could be over employment law, welfare and immigration. Further, given the new voices that have been raised in support of what has long been Liberal Democrat policy, namely a fully federal UK, there could be developments in that direction. I am just not sure how strong the political impetus is likely to be.

Another possibility is for Scotland to “keep” existing EU law in devolved areas insofar as it has already been incorporated into Scots law and to mirror it in future legislation. Although I do not personally think Scotland can do anything legally to prevent Brexit as such, I am wondering if the refusal of legislative consent to the unpicking of EU law in devolved areas would preserve some of the status quo. Even if not, I cannot see any legal barrier to just re-enacting it. Certainly this would put Scotland in a good position for independent EU membership at some later date.

With UK membership of the EEA much the same would apply, except that EEA rules would stay in place in any event. For trading relations, again, what I have suggested for Brexit pure and EEA membership still applies domestically, although obviously we would remain tied into UK arrangements at a European level. But we might achieve some that are tailor made for Scotland. Scotch whisky is an obvious area. As there are currently no external tariffs on imports of whisky to the EU, no immediate problem is posed for our exports there – but it would be good to have some safeguards and there are, besides, issues to do with labelling, bottle sizes and so on. A guarantee of some input into the decisionmaking process would be helpful here. Again, given the amount of fish, particularly shellfish, that we export to the continent of Europe, some special arrangements would be useful in this regard.

It is possible, too, that Scotland might be able to compound for some other types of association agreement. Normally these are made by the EU with non-member states but there are some exceptions. For example, the Faroe Islands are part of one called Horizon 2020. Admittedly Denmark, which is part of the EU administers their foreign relations, but they do set a kind of precedent.

Finally, I want to mention the issue of EU citizenship. We gained such citizenship by being nationals of a member state. If we do not retain it, we revert to being British “subjects” and not citizens at all. The bulk of legal opinion seems to be that Brexit, whether pure or in softer form, means that we lose it. Interestingly, though, there is a European Convention on Nationality that deals with involuntary loss of nationality and the Brexit situation does not seem to be one of the permitted grounds. Unfortunately, the UK is not even a signatory to the Convention. Even so, negotiating continuing citizenship status might well be an option – though more feasibly for everyone in the UK than for Scots alone. Certainly this would benefit our “expats”. But, again, the quid pro quo would almost certainly be “free movement” for all EU and EEA citizens and so not compatible with Brexit pure.

In conclusion, in the context of Brexit actually going ahead and setting aside the possibilities of independence for Scotland, what we might hope to salvage, in line with existing Liberal Democrat policy, is a properly federal UK that is fully part of the EEA.