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## DISCUSSION PAPER

# Accommodating an independent Scotland: how a British-style constitution for the EU could secure Scotland's future

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The possible dissolution of the United Kingdom (UK) raises an important question for all member states: what would be the future place of an independent Scotland and the rump UK in the European Union (EU)? Until now member states and the European Commission have largely been able to duck the issue. Yet, the lack of clarity is being instrumentalised within the UK, particularly by opponents of Scottish independence. There, it is increasingly claimed that the EU will adopt a punitive line towards Edinburgh, and perhaps towards London too, in an effort to prevent 'contagion' in the form of a wave of similar independence bids.

The below examination of available options and the political context suggests that the EU is indeed wary of the Scottish move for independence, but not primarily due to the risk of 'independence contagion'. Rather, the threat of Scotland demanding further opt-outs and exceptional positions within a European Union that is already breaking up into two-tiered membership better explains the hostility. Instead of punishing Scotland, then, the other members could fruitfully improve their capacity to accommodate diversity. Ironically perhaps, British constitutional practice may offer the best answers.

### **The *status quo***

With the Scotland Act in 1998 and the first Scottish parliamentary elections in 1999 there was a significant flow of power from London to Edinburgh, ranging from educational to justice affairs. Yet, despite the hopes of its proponents in the then Blair government, this devolution of powers has neither cemented the Labour Party's hold over Scotland nor stemmed calls for Scottish independence from a rump United Kingdom (rUK). This was made abundantly clear in 2012. A decision to establish for Scotland its own rate of income tax and extended borrowing powers<sup>1</sup> did nothing to undermine the progress of the independence movement, let alone the popularity of the Scottish National Party (SNP), which had won an overall majority in the Scottish Parliament a year earlier promising a referendum on the question of independence. At the time of writing, mid-October 2012, the Scottish First Minister and leader of the SNP, Alex Salmond, is set to meet with the British Prime Minister, David Cameron, to sign an agreement setting out the terms of that referendum. That meeting will mark the end-point of months of wrangling between the two governments.

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1. Severin Carrell, 'Scotland gets power to set its own income tax rate from 2016', in: *the guardian*, 21 March 2012, [www.guardian.co.uk/politics/2012/mar/21/scotland-power-set-income-tax-2016](http://www.guardian.co.uk/politics/2012/mar/21/scotland-power-set-income-tax-2016) (retrieved on 7 August 2012).

In the absence of any clarity about separation in the original constitutional settlement between Scotland and England, the idea of a referendum in which the Scottish people are asked to provide their government with a mandate for negotiations with London quickly emerged as the consensus option. The question of the timing of that referendum has, however, been long open to discussion. Whilst Salmond was keen on holding the referendum in 2014, an even earlier date would have suited the British government. London feared that the continued political mismatch between the Conservative-dominated UK government and the SNP government in Scotland would feed a desire for independence among Scottish voters. Given that the next British general election must be called in 2015 at the latest, the pressure for clarity about whom precisely the incoming MPs would represent provided an additional argument in favour of an early poll. In the end, it seems that Cameron has stipulated only that the poll should be organised before the end of 2014.

The question of what option(s) should be listed on the ballot papers and, more precisely, whether the electorate should be offered the choice of a series of gradations from the *status quo* to full independence has also been a matter of debate. Besides the independence option, two concepts have featured: 'devo-max' and 'devo-plus'. Each foresees a different distribution of competencies between the rUK and Scotland on issues such as tax.<sup>2</sup> As it stands, however, a simple yes-no question has gained overwhelming support on both sides of the border. One reason for this seems to be that both governments have gambled that the simple binary choice will play out in their favour – the UK government believing that full independence will be a step too far for most voters, and the SNP believing that this brings them closer to their goal of breaking with the rUK. But there is also an increasing recognition of the need to simplify and clarify the debate. The more options are listed on the ballot paper, the more difficult the result becomes to interpret. This desire for clarity is understandable, and both governments seem to be making progress to clarify the terms of the debate between them.

Yet, there remains one major question which the pair cannot clear up bilaterally: How would the European Union react to a Scottish breakaway? With the financial crisis reinforcing trends towards political separatism across the EU, not least following the 11 September demonstration in favour of Catalan independence under the slogan 'Catalonia, a new state in Europe', the issue of Scottish independence has moved up the European agenda.<sup>3</sup> National capitals and the European Commission have, however, been slow to take a position. This is unfortunate, and not just for the quality of the discussion in the UK. A separation of Scotland from the rest of the United Kingdom would have myriad unpredictable consequences, not only on the political level, but also in economic terms. Proper preparation is required. There is thus growing pressure for the member states and EU institutions to clarify an independent Scotland's future place in the European Union.

## **The EU and Scottish independence: from an accidental role to a reluctant one**

The European Union has already played an important, if primarily accidental and often ambivalent, role in the flowering of the Scottish independence movement. Firstly, and most obviously, it has shifted the Scottish government's calculation of the risks and costs associated with independence. Gaining independence under the protective umbrella of the European Union would allow entities like Scotland to increase their autonomy without losing the benefits of EU membership, such as access to cohesion funds, participation in the Single Market, free movement of people and a voice in international (trade) negotiations. Furthermore, the SNP argues, Scotland would appoint its own commissioner and gain weight in the European Parliament and (European) Council.<sup>4</sup> In its 2012 pamphlet 'Your Scotland, Your Future', the Scottish National Party argues that

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2. In the first, Scotland would be entitled to maximum fiscal autonomy, raising all taxes in Scotland and transferring only a minor share to Westminster for the remaining common policy areas, such as foreign policy. It is an option that has been discussed most notably by the SNP. The second ("devo-plus") is slightly different and was proposed by Scottish Liberal-Democrat, Conservative and Labour politicians, suggesting that when extending fiscal autonomy, the responsibility for VAT, but also for national insurance and pensions should stay at union level. Lesley Riddoch, "'Devo plus' for Scotland? Let's unpack it", in: *the guardian*, 28 February 2012, [www.guardian.co.uk/commentisfree/2012/feb/28/devo-plus-scotland-future](http://www.guardian.co.uk/commentisfree/2012/feb/28/devo-plus-scotland-future) (retrieved on 22 September 2012).
  3. Raphael Minder, "Protest Rally in Catalonia Adds a Worry for Spain", in: *The New York Times*, 11 September 2012, [www.nytimes.com/2012/09/12/world/europe/12iht-barcelona12.html?\\_r=0](http://www.nytimes.com/2012/09/12/world/europe/12iht-barcelona12.html?_r=0) (retrieved on 14 October 2012).
  4. Nick Powell, "EU31: Will Scotland be the thirty-first Member State?", in: *eureporter*, 30 July 2012, [www.eureporter.co/2012/7/eu31-will-scotland-b/](http://www.eureporter.co/2012/7/eu31-will-scotland-b/) (retrieved on 6 August 2012).

"[i]ndependence will give us a voice on the world stage. As a member of the European Union and United Nations, we will be a fully-fledged partner in the international community".<sup>5</sup>

Secondly, European integration has restricted London's scope to hold the national territory together. Classic domestic transfer policies, used as a means of overcoming divisive internal disparities, have increasingly been restricted by EU norms or replaced by measures at the European level. European competition laws restrict the use of subsidies and, where the EU has developed comparable transfer policies of its own, their focus has shifted eastwards and away from Scotland in the wake of the 2004/07 enlargement of the Union. Such developments have persuaded Scotland to mobilise directly at the European level in pursuit of its interests. Like the German *Länder* and other European regions, Scotland runs its own representation office in Brussels, giving Scottish interests a voice in the European arena and cultivating relations with other institutions. Scotland has no competence to pursue a *Nebenaußenpolitik* of course, but it nevertheless profits from the international recognition of running a representation.

Thirdly, European integration encroaches upon the balance of political competencies within the UK, causing tension between Edinburgh and London. The devolution settlement formally reserves all aspects of the UK's EU policy to Westminster, meaning that the devolution of competencies to the Scottish government is *de facto* limited by decisions taken in Brussels by the UK government, shifting policies to some extent back to London. To mitigate this effect, a comprehensive Memorandum of Understanding, including a Concordat on Co-ordination of European Union Policy issues, was agreed in 1999 to establish a framework for the participation of devolved governments in the UK's EU policymaking. This also includes a Joint Ministerial Committee (Europe) responsible for resolving possible disagreements over EU affairs between devolved administrations and the UK government. Scotland can also choose to follow UK secondary legislation when implementing its European obligations, and in principle Westminster retains the power to enact secondary legislation should Scotland renege on EU commitments.<sup>6</sup>

Even if the EU's effect on the progress of Scottish independence has so far been largely accidental, then, the very existence of this effect does at least imply that the bloc has some scope to influence the outcome of the Scottish independence referendum. In the absence of clarity from their EU partners, indeed, British politicians and academics have been able to make competing 'evidence-based' claims about Scotland's future position in the EU, seeking to scaremonger or soothe the public according to their preferred referendum outcome. Each side has adopted a rather instrumental view of the EU, plotting a future vision that just happens to suit their political agenda. Whereas SNP politicians tend to deny that an independent Scotland would have to apply for membership of the EU, Unionists suggest it would entail a formal application for re-accession. Although it is not the EU's role to question the sovereign decision of the Scottish – or indeed British – people, the Union does have the power to help them make an informed choice and illustrate possible scenarios for Scotland's future in the EU.

Since the European Commission is in charge of the negotiations with candidate countries, there is pressure for it to step in and clarify the terms of the debate. Recent remarks by Commission President José Manuel Barroso mark a step in this direction, but a rather limited one: Stating that new states need to follow an application procedure whose outcome is contingent upon them being democracies and on the consent of other member states provides the Scottish public with little new information. At the same time, the President refused to get involved in the discussion on secessionist movements in the EU and pointed to the responsibility of each member state to determine its "form in the future".<sup>7</sup> The Commission thus seems unlikely to extend its role in such supposedly national matters, its reticence reflecting the faulty assumption that abstaining from stating a position is the same as refraining from influencing the decision.

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5. Scottish National Party, "Your Scotland, Your Future", 2012,

[www.scotlandforward.net/media/scotland-forward.pdf](http://www.scotlandforward.net/media/scotland-forward.pdf) (retrieved on 22 September 2012).

6. Andrew Scott, "The UK and the European Union", in: Andrew Scott *et al.*, *Scotland in Europe*, Edinburgh: The David Hume Institute, 2010, pp. 1-6.

7. BBC News, "Scottish Independence: EC President Jose Manuel Barroso on new states' membership", 12 September 2012, in: *BBC News*, [www.bbc.co.uk/news/uk-scotland-scotland-politics-19567650](http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19567650) (retrieved on 22 September 2012).

As the referendum plans become more concrete, and in the absence of formal clarity, it is therefore worth setting out some options available to the EU in dealing with the situation. Similar exercises have already been undertaken but from a rather passive legal perspective<sup>8</sup>, and so it seems sensible to take into account the current political background and the motivations of the main actors in pursuing the possibilities before them. From this perspective, the issue of 'independence contagion' is usually felt to be paramount in the thinking of other member governments and the Commission, and two options can be identified to deal with that threat.

## Two options for dealing with the 'contagion' effect

### *Option 1: Disrupting Scottish independence in order to prevent 'contagion'*

In the matter of Scottish independence, the interest of the bloc is deemed relatively clear: it lies in ensuring that the United Kingdom remains whole. This is the best means for the EU to stem the contagion effect of Scottish independence. In this regard, most attention has focused on those member states with their own domestic separatist movements. Countries such as Cyprus, Greece, Romania, Slovakia and Spain are expected to harbour a particularly intense interest in ensuring that the Scottish bid for 'independence in Europe' does not set a general precedent for separations within the EU. In the case of Kosovo, they have proved that they are prepared to act on this interest.

In setting a new precedent of punishing separatist states within the EU, and thus quelling their own domestic fragmentation, this group of states could expect a degree of support from the EU institutions. The European Commission and Parliament will worry that European integration could lose its appeal for federal or unwillingly divided states in its Eastern neighbourhood and beyond, or will fall prey to the nationalist pressures it was supposed to overcome. Moreover, this group of states could also count on the support of other member states. None has an interest in seeing the Union 'balkanise', and none professes much appetite to see a further step in the EU's fragmentation: the loss of a powerful and cohesive member state like the UK.

In their more cynical moments, of course, other governments might fantasise about how much easier EU integration would be without the UK. But, whereas Britain's attempted blockage of the Fiscal Compact in December 2011 and its hindering of further EU-wide integration on fiscal and economic policies have revealed red lines that are unlikely to be crossed by any UK government in the near future, it would be too simplistic to assume that the marginalisation of the UK through its break-up would smooth the course of EU integration. As the recent Blenheim speech by the Polish foreign minister shows, EU governments, – and particularly Stockholm and those of Central European states not yet in the common currency – can be effusive in their desire to have a United Kingdom that is active and engaged in the European integration process.

It seems then, that the EU would gain little from a UK break-up: although Scottish independence might cause a shake-up of the UK's representation in international organisations, for instance, it does not necessarily follow that this would reinforce moves towards a unified EU representation. There is little doubt, by contrast, that a cohesive UK can spearhead the EU's efforts in international affairs. It would be a significant blow for the EU's stance, for example in the G20 framework, to see one of its strongest players weakened or indeed take the opportunity to leave the bloc. The British-French military cooperation agreement signed in 2010, and recent statements by both treaty parties that the agreement is open to other EU members, shows the continued role that London could play in such matters.

The emergence of an independent Scotland could, by contrast, considerably complicate regional cooperation, precisely because so many British resources are shared between the two countries. Again, the example of defence policy is apposite. There, the SNP faces a dilemma, which until settled could disrupt the EU's efforts to build European capabilities. On the one hand, Scotland's voters call for British military bases and nuclear

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8. Aidan O'Neill, "A quarrel in a faraway country? Scotland, independence and the EU", *EUtopia* (online), 14 November 2011, <http://eutopialaw.com/2011/11/14/685/>, (retrieved 22 September 2012); Arabella Thorp and Gavin Thompson, "Scotland, Independence and the EU", House of Commons Library Paper, November 2011.

submarines to be removed from Scottish territory. On the other hand, there is a need to maintain some sort of operational armed forces to defend Scottish citizens from terrorism and other such threats, as well as to preserve the country's economic interests in the North Sea – both of which would entail a cumbersome effort to reconcile NATO interests and treaty obligations with sceptical public opinion in Scotland.<sup>9</sup>

Perversely, perhaps, those areas where an independent Scotland might be a boon to the EU would be the most unsettling aspect for a bloc worried about contagion. There is no guarantee of course that the Scottish economy would flourish on its own. In case of independence, the border between Scotland and the rUK would gain in importance, and significant asymmetries would emerge thanks to the different regulatory regimes, subsidies, labour markets and levels of taxation. The new border could even lead some companies to refrain from investing anywhere on the island at all, for fear that it would become a more fragmented and less predictable market. Nevertheless, Salmond has stated "that, combined with Scotland's significant offshore wind and marine energy resources, and other industries such as whisky, [the North Sea oil and gas fields] would make Scotland the OECD's sixth wealthiest nation".<sup>10</sup> From the point of view of contagion, this is a matter for concern rather than rejoicing.

Against this background, the other member states have various means at their disposal to make Scottish independence an unattractive option: the EU could single out Scotland, insisting that it negotiates an exit agreement under Article 50 TEU before demanding re-application should Edinburgh wish to re-join the Union. A rather aggressive option would be to question whether either Scotland or the rUK could assume to inherit the UK's membership, thereby putting pressure not just on Edinburgh but also on Westminster to make every effort to achieve a unionist outcome for the referendum. Already, the EU might commission a legal report in order to undermine, in an ostensibly neutral manner, some of the claims being made by Scottish politicians regarding the country's continued EU membership.

### ***Option 2: containing the problem by making an exception for Scotland***

It is clear, however, that attempts to disrupt the progress of Scottish independence could backfire. Governments on the mainland continent would risk stirring up their own domestic separatist movements by interfering in the affairs of other peoples. A punitive settlement for Scotland would be understood as an expression of internal repression too. This could be the reason why Spain, often cited as the state with the greatest interest in impeding Scottish independence, was the first EU government to break cover and come out saying that it would not block a potential Scottish request for EU membership.

Moreover, any kind of mainland continental interference in the Scottish debate could stir up Euroscepticism in Scotland, something which has in any case been on the rise in recent times. With opinion polls registering Scottish discontent with the EU at above 50 percent<sup>11</sup>, any reapplication for EU membership would not only be difficult, but would also stir things up south of the border. A Scottish exit from the EU would break a taboo and strengthen the hand of those British politicians who would like to see their nations leave the bloc. Both the Labour and Conservative parties in the UK are already talking openly about the need for an in-out referendum on Britain's EU membership. In short, any heavy-handed moves to cajole the UK into staying whole could thus backfire quite severely.

The question, then, seems to be how best to make an exception for an independent Scotland: How to allow it to transition seamlessly to independent membership, whilst signalling that the same courtesy would not be extended to other breakaway states? A possible legal basis for the transition has been proposed by Scottish

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9. Malcom Chalmers, "The End of 'Auld Sang'. Defence in an Independent Scotland", *Briefing Paper*, Royal United Services Institute, April 2012.

10. Severin Carrell, "Could crude, whisky and wind make Scotland richer than England?", in: *the guardian*, 25 March 2012, [www.guardian.co.uk/business/2012/mar/25/crude-whisky-wind-scotland-sixth-wealthiest](http://www.guardian.co.uk/business/2012/mar/25/crude-whisky-wind-scotland-sixth-wealthiest) (retrieved on 18 September 2012).

11 See ComRes, "Cuts Index Survey", 2011, [www.comres.co.uk/polls/Cuts\\_Index\\_23Oct11.pdf](http://www.comres.co.uk/polls/Cuts_Index_23Oct11.pdf) (retrieved on 18 September 2012) and Chatham House, "YouGov Survey 2012", 2012 [www.chathamhouse.org/sites/default/files/public/Research/Europe/0712ch\\_yougov\\_survey\\_0.pdf](http://www.chathamhouse.org/sites/default/files/public/Research/Europe/0712ch_yougov_survey_0.pdf) (retrieved on 22 September 2012).

scholars<sup>12</sup>, and there are suggestions that the Lisbon Treaty would facilitate an informal solution to some thorny institutional problems.<sup>13</sup> The Scots have, however, been less forthright about the potential limits of exceptionalism. And this is a significant lacuna. Although the Spanish foreign minister recently referred to the constitutional differences between the UK and Spain when declaring that Spain would respect a UK-Scotland agreement on Scottish independence<sup>14</sup>, it and other contagion-prone states may be wary of seeing Scotland awarded too cosy a transition.

The SNP argues that it expects Scotland, as one of two successor states of the United Kingdom, to inherit the opt-outs and special arrangements which the UK currently enjoys, claiming in particular that Scotland would not have to adopt the Euro.<sup>15</sup> This is quite an assumption to make, and would hardly be in the EU's interest from the point of view of contagion. This status as a 'new old' member state, with the same privileged arrangements negotiated by past British governments on behalf of the UK, could itself prove an attractive model for other would-be breakaway regions in Europe, whilst proving a considerable source of annoyance for prospective members. Being in a weaker negotiating position than Scotland, candidate countries that are already re-evaluating the attractiveness of the EU membership terms offered to them, such as Tomislav Nikolic's Serbia and a fishery-sensitive Iceland, would rightly feel discriminated against by such a policy.

That said of course, the UK's current position would inevitably provide the starting point for Scottish membership negotiations, as well as marking out the current state of Edinburgh's adaptation to the EU. Moreover, the Scottish government could cement this situation by the way in which it frames the referendum debate – for example, by offering the Scottish people the option of a currency union with the rUK, and thus *de facto* ruling out the Euro as an option in the near term. And yet, the EU can easily shift the political framing of the argument in its favour. After all, the very basis of Scotland's independence movement is that it is not like England, inferring that if it wants to play its proper role in the EU and beyond, it cannot hang onto an exceptional status. Aspects of its legal system, for example, are rooted far more in the continental tradition than in common law, meaning that Scotland has fewer legitimate grounds to demand special treatment on EU justice matters.

More than this: if the Scottish Executive argues that its historical and constitutional peculiarities are the basis for independence from the rUK, it will also have to revisit the historical and constitutional grounds for the UK's exceptional status within the EU. Scotland, as a some-time beneficiary of EU budgetary munificence and a historical bastion of opposition to Thatcherism, will struggle to justify the retention of the budget rebate deal won by the previous Conservative government in the 1980s. On an informal level, if the Scottish government continues to base its arguments for independence on the perceived benefits of being a small country, and that it will be joining a class of nimble European states such as Norway and Finland, then it must live with the costs as well. The UK's voice is heard even on issues such as EU economic and financial governance, where it has exercised its opt-out. This occurs not out of politeness but because it is a big state. Except for those matters where the consent of all members is required, smaller Scotland could expect no such treatment.

Scotland, then, could only expect to retain its special status for a limited period. The UK won its opt-outs on the basis that the EU of today is not the Union which it signed up to in the 1970s. At its accession, the UK was joining an economic community and common market, one based in large part on liberal principles of deregulation and free trade. The EU of today is, by contrast, a political project, with heavy regulatory influence over sensitive domestic issues such as borders, asylum, budgets, and financial regulation. The UK

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12. O'Neill, "A quarrel".

13. Memorandum by Professor John A Usher, Professor of European Law and Head of the University of Exeter School of Law, to the House of Lords Select Committee on the Constitution House of Lords, 19 March 2008.

14. Newsnet Scotland, "Spanish Foreign Minister confirms that Spain would accept Scottish independence", 26 February 2012, [www.newsnetscotland.com/index.php/scottish-politics/4428-spanish-foreign-minister-confirms-that-spain-would-accept-scottish-independence](http://www.newsnetscotland.com/index.php/scottish-politics/4428-spanish-foreign-minister-confirms-that-spain-would-accept-scottish-independence) (retrieved on 18 September 2012).

15. See for example Ian Hudghton, "Scottish independence and EU membership - how would it work?", in: *Public Service Europe*, 1 March 2012, [www.publicserviceeurope.com/article/1581/scottish-independence-and-eu-membership-how-would-it-work](http://www.publicserviceeurope.com/article/1581/scottish-independence-and-eu-membership-how-would-it-work) (retrieved on 17 September 2012).

cannot subscribe to this, and the other EU states show grudging sympathy for that fact. The Scottish case is different. Even if Edinburgh is not put through the cumbersome process of exiting the EU and then reapplying for membership, the other member states would view Scotland's decision to remain in the EU as evidence of its desire to join the Union as it is today. That means that any opt-outs which it does inherit would be transitional. They would be retained so that Scotland can adapt to the EU, and would gradually fall away.

Most claims for Scottish exceptionalism actually prove how normal Scotland is. They arise in response to the dilemma faced by all newly-independent states in a heavily-interdependent region: Edinburgh is being asked to transfer to an international organisation the sovereign powers that it has only just gained. Other European states have reached their own accommodation with this problem, including those in Central and Eastern Europe with more recent histories of independence than Scotland. Most of them have managed to embrace European integration, and indeed have found that their past experience of living under conditions of limited sovereignty makes them better adapted to the demands of EU membership than countries like the UK that have little or no such historical experience. From this perspective, Scotland would be treated as a very normal member state, similar in many ways to say, Poland, or Estonia. It would thus undergo its own process of 'EU accession'. This would see it retain an exceptional status only in the short term and until it was fully integrated.

### **A third option: absorbing asymmetries**

The need to punish what would in truth be a legitimate, even normal, political development, points to a deeper weakness in the EU's set-up: its inability to deal with variety within its membership. Truth be told, it is not the threat of 'independence contagion' that primarily motivates the majority of governments. It is the prospect of having another troublesome member which does not engage properly with European integration. The UK is already on the outside of numerous developments – a proposed banking union, a euro zone discussing the establishment of its own special common budget, and a new wave of regulation in sensitive policy areas such as justice and home affairs. Even London's recent statement about opening up its defence capabilities to European partners was so couched in diplomatic caveats as to make this one glimmer of hope deceptive for many governments. The spectre of an independent Scotland following in the mould of today's UK is unacceptable to many.

Scottish independence could also trigger the EU's laborious and formalistic mechanisms for institutional reform. As there is still no universal formula in place, the precise allocation of European Parliament seats is subject to negotiations whenever new members states join. Since the principle of degressive proportionality is fixed in the Lisbon Treaty, it is likely that after Scottish independence, there would be not only more Scottish MEPs, but also more MEPs for the remaining rUK. A similar effect seems likely for the future distribution of votes in the Council. In the current economic situation, and with the UK apparently deeply opposed to the kind of treaty change that Scottish independence could entail, European policymakers would think twice before going down this path. Some, indeed, would probably welcome the sight of Scotland leaving the EU, especially if it were to take the remains of the UK with it. It is an outcome that is vastly preferable to an increase in the number of political voices in the EU.

That is not to deny that the EU has been seeking to improve its capacity to deal with the diversity of its membership. The idea of embracing asymmetric integration is certainly doing the rounds in EU policy circles. Yet, the thinking replicates precisely the kind of narrow, legalistic mentality that spawned such mechanisms as opt-outs and enhanced cooperation, which are causing so many problems today. One recent proposal, for instance, would see the establishment of a parallel treaty mirroring the EU institutions for an avant-garde group of states if existing provisions fail to deliver.<sup>16</sup> Such ideas may seem neat in principle, but in reality they will merely cement exclusion and fragmentation. Thus if member governments and EU institutions have quietly lined up behind those actors that fear 'independence contagion' and increasingly hint at the need to

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16. Jean-Claude Piris, "The Future of Europe. Towards a Two-Speed EU?", Cambridge: Cambridge University Press, 2012.

press Scotland into normal membership or see it leave the bloc, it is because they have run out of ideas on how to offer it an alternative.

It seems necessary, then, for the EU to look around for better means of dealing with what might be termed 'fragmentation contagion', as opposed to 'independence contagion'. How can the EU grant member states a right of non-participation in EU policies, without leading to situations of structural exclusion, unfairness and free-riding? In its constitutional practice, the EU has sought to emulate the approach to political integration typical of a nation-state like Germany, where there is a clear constitutional hierarchy and a sense of common destiny amongst its constituent parts. It is disappointing, though not exactly surprising, that the EU has not looked to the UK itself for lessons. The UK famously offers a constitutional and political model that is deeply at ease with asymmetries. Britain provides a model of governance suited to shallow political hierarchies, pluri-national membership and no given sense of shared destiny – a situation not unlike the EU set-up. British constitutional practice may, therefore, be more suitable to the realities of EU integration than the EU's current model.

The greatest strength of British constitutional practice is its capacity to mediate between different political communities, preventing the emergence of permanent disparities and points of difference between them. British constitutional practice thus questions the idea of the integrated political community as a given, preferring the notion of a project-based (*Zweckgemeinschaft*) group which comes together organically. This explains not only the frequent British emphasis on the need for the EU to develop a sense of its global role and purpose, but also the innovation of governance tools that are less clear-cut than the formalistic mechanisms of mainland Europe. This means, for example, a focus on on-going 'fair play' rather than static 'fair shares' – the point being always to receive a proper hearing in making one's case, rather than to focus on gaining a fair share of any final outcome. But it can also mean obfuscation rather than transparency; open-ended outcomes rather than binding commitments; and the existence of informal and opaque understandings, rather than robust impersonal norms.

In short, British constitutional practice poses a challenge to the Enlightenment thinking embraced by the EU and which underpins most notions of good governance.<sup>17</sup> But precisely because the supposedly impersonal norms and presumption of commitment typical of that thinking are proving so divisive within the EU<sup>18</sup>, Britain may have something useful to offer. Here are three examples:

1. *Reversing institutionalisation*: it is not by chance that the fragmentation of the EU has coincided with the heavy institutionalisation of the European Council under the Lisbon Treaty. The Council was formerly the glue at the heart of the EU, providing just the kind of strong interpersonal links and informal mutual understandings which the legalistic European Union otherwise lacked. The contrast between the cosy dinners of earlier times and the sight today of European leaders rushing to Brussels to fit in a summit in the small hours of the morning and after a normal day's work at home could not be starker. Far from being conducive to mutual respect between governments, the new intergovernmentalism has lent itself to dominance and power-plays. The institutionalisation of summits has robbed the bloc of its informal conventions and understandings, leading to intolerance of disparities and differences.

2. *Delaying commitment*: once signed up to, EU policy commitments are hard to overturn. This is designed to create a strong sense of certainty and security: in a bloc of 27, only firm rules can ensure compliance and long-term integration. Yet, to British eyes, demands for long-term commitments to rigid policies actually increase uncertainties. They rob participants of the capacity to react and adapt to unforeseen events, making an initial policy of muddling-through more attractive. Faced with demands for early commitment, the UK reaches for its opt-out. A more inclusive option would therefore be to delay commitment, through soft policy

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17. On this idea, albeit in another national context, see for example: Peter Bratsis, "Corrupt compared to what? Greece, capitalist interests, and the specular purity of the state", *LSE Discussion Paper 8*, 2003.

18. Roderick Parkes, "A lack of transparency has some virtues", in: *European Voice*, 1 March 2012, [www.europeanvoice.com/article/imported/a-lack-of-transparency-has-some-virtues/73729.aspx](http://www.europeanvoice.com/article/imported/a-lack-of-transparency-has-some-virtues/73729.aspx) (retrieved on 7 August 2012).



approaches that slowly harden. This kind of muddling-through sees all parties commit to the process of eventually finding a firm policy approach, rather than splitting the EU into those that are prepared to sign up at once and those who are not.

3. *Rethinking exit*: including exit clauses in directives and regulations seems to speak of a lack of commitment to European integration, indeed seem particularly discredited just now as the UK talks of backing out of its existing EU Justice and Home Affairs commitments in 2014. How can a policy commitment remain credible if its parties are given the opportunity to drop out after a certain amount of time? Yet, to British minds, a well-placed exit clause actually increases commitment. Having the option of exit – and the act of not taking it – increases ownership over policies, as governments cannot claim to be unwillingly party to their European commitments. Moreover, exit clauses can prevent those states which have outlier preferences from being marginalised or excluded. The possibility of threatening to exit an agreement allows a state to strengthen its hand in the negotiations that particularly matter to it. In this way, the inclusion of an exit clause has actually been shown to reduce the propensity for exclusion, non-commitment and exit.

These examples are trivial perhaps, but they point to the possibility of an enrichment of the constitutional practice in the EU. Moreover, recent innovations by the EU, such as the use of the Trio Presidency in the regulation of the Fiscal Compact, suggest that this is beginning to occur.<sup>19</sup> Upcoming Trio Presidencies bring together non-eurozone states, as well as small and peripheral members, which have no 'right' to influence these matters to any great degree. By involving them in decisions about the enforcement of the Compact, the EU can increase the sense of fair play and legitimacy at a time of division between the Euro-17 and the rest. The British constitution is full of examples of such thinking, which could usefully be examined by legalists seeking to avoid the splintering of the EU.

## Conclusions

There is a marked wariness within the EU about the prospect of Scottish independence. Commentators have been quick to put this down to a fear of 'independence contagion'. Other states in the EU are concerned about 'independence in Europe' emerging as a viable model for their own breakaway regions. They thus have an incentive to make this as unattractive an option as possible. They might thus allow Scotland to remain part of the EU, but without the same privileged set of opt-outs or budgetary arrangements as the UK. Indeed, they might threaten Scotland and even the rump UK with the need to reapply for EU membership under more punitive terms.

Yet this is only half the story. If there is hostility towards the idea of Scottish independence, and a move to prevent the country from gaining the same set of opt-outs as the UK - indeed a readiness to see it leave the bloc altogether – then it is due to the current fragmentation of the EU and the fear of having two tricky, peripheral members rather than one. Thus it is not only states with breakaway regions, but also members like Germany at the vanguard of EU integration which find the prospect of Scottish independence particularly worrying. For them, diversity has become synonymous with marginal states shirking their duties of participation and core members pressing ahead with divisive and exclusive forms of cooperation. With the EU discussing sensitive policies of taxation and redistribution, the situation is unsustainable.

In this context, a good dose of British-style constitutional thinking on flexibility could prove useful in reducing the bloc's difficulties with asymmetry and thus its hostility towards Scottish independence. For the British, flexibility is a key component in building a political community. This is because their starting point is rather different from most nation-states on the mainland continent. The UK is a pluri-national political community, and one that does not necessarily have a sense of shared destiny. Flexibility is thus a legitimate tool in the

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19. Agata Gostynska, "The Fiscal Compact and European Union economic governance: An institutional and legal assessment", in: *The Polish Quarterly of International Affairs*, 2012, no 2, pp.27-45.

process of building an organic community. The EU, by contrast, has tended to take on the constitutional practice of 'classic' nation-states, in which flexibility is a challenge to the presumption of a shared political destiny, and should be contained and punished.

The decisions made at this juncture will be key to the EU's future. Who knows: the recovery of the Euro area may see an independent Scotland keen to join this club, rather than maintaining a lop-sided currency union with the rUK. But this will only be the case if commitment is not demanded now. The EU's current obfuscation on the question of Scotland's position in the EU could thus have a happy ending, if used consciously. As for the rUK, the loss of Scotland could actually herald a more positive approach to the EU. Not only would the country be smaller, it would also gain flexibility by loosening those political institutions that have traditionally bound the UK together and to the maintenance of which the process of European integration has always posed a threat. That tantalising possibility makes it important for the EU to develop constitutional practice to keep the UK on board in the near term, and to avoid the emergence of permanent structures of exclusion.

Of course, Edinburgh's current moves for independence are not exactly an endorsement of the British mode of governance. Yet the orderly break-up of the voluntary union of the United Kingdom, and its integration into a broader regional system, would speak in its favour. And besides, the EU has the opportunity to learn from the UK's mistakes: the omission of a workable exit clause in the union of Scotland and England, Britain's increasingly formalistic and mechanistic constitutional practice, and the disappearance of a sense of common project, are widely deemed to lie at the heart of the current Scottish independence movement. These are precisely the mechanisms of flexibility that the EU could usefully introduce.



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