The Scottish Parliament’s European and External Relations Committee has invited views on this and EMiS is pleased to provide its response as follows according to the three key themes for the Committee’s inquiry.

We emphasise at the outset that as a cross-party, membership organisation, EMiS takes the position that the outcome of the independence referendum will be decided by the people of Scotland and remains neutral on the specific question posed by the Independence Referendum. We believe that EU membership will continue to be beneficial for the UK or any successor states and moreover that those benefits are, and will continue to be, mutual with the rest of Europe. Some of the responses given presuppose an independent Scotland but are not intended to anticipate the outcome of the referendum.

Theme 1 – Scotland in the European Union

The White Paper states that the “Scottish Government, supported by the overwhelming majority of Members of the Scottish Parliament, believes that membership of the EU is in the best interests of Scotland.” The Scottish Government further indicates that membership of the EU “provides the best international economic framework within which to optimise the economic and social gains of independence and tackle the global challenges that we face.”

1.1 What is the value of membership of the European Union for Scotland?

EMiS believes fundamentally that Scotland benefits substantially from EU membership through:

- the shared prosperity which arises from participation in the world’s single biggest market comprising more than 500 million people
- the opportunities afforded to individuals to live, travel, work and study in 28/29 countries
- being part of a larger, democratic unit which can assert its shared values in a world which is rapidly globalising
- living in peace with our European neighbours in a way which contrasts sharply with the previous 2,000 years
- a common coordinated response to 21st century security issues such as terrorism and organised crime
- tackling environmental challenges (most notably climate change) as part of a global player with the credibility to negotiate and take initiatives at the planetary level

1.2 What are the potential alternatives to European Union membership for Scotland, for example the European Free Trade Association?

EMiS believes that the EU represents the most powerful transnational strategy available to Scotland and that the benefits associated with each of the six
dimensions outlined in response 1.1 would be diminished if an independent Scotland were to adopt an alternative such as EFTA/EEA.

Whilst it is unwise ever to rule out a position completely when contemplating negotiation, and while it may be less costly to be in the EEA outside the EU (particularly if there is no budget rebate), Scotland would thereby deprive itself of influence at the top table. Moreover, various researchers (see section 3.1) have concluded that while smaller states can frequently accrue disproportionate benefit from international collaboration, this depends critically on committed intense engagement – which is simply not consistent with a position outside the EU.

Our overriding point is that the EU is Europe’s best hope for a successful, secure and democratic future for its citizens and in the event that Scotland becomes independent we strongly believe that every effort must be made to keep our country in the EU as it is presently constituted.

1.3 What factors determine the role that small states can take in the international sphere?

Scotland would be one of 21 states within the EU defined as “Small States” – defined as having fewer than the average number of votes in the Council of Ministers under the Nice Treaty voting system. It would therefore be relatively typical among member states.

In the wider international sphere, by population it would sit comfortably in the mid range of UN countries and in the top quartile by GDP. Nonetheless whether the context is Europe or the wider world, it is clear that Scotland could not rely on size to achieve its objectives. The emphasis must correspondingly be on collaboration with like-minded nations (see response 1.1).

Response 3.1 further outlines our views on the potential this offers and how an independent Scotland would need to behave in order extract the maximum benefit afforded by EU membership.

Theme 2 – The road to membership and Scotland’s representation in the EU

This theme relates to the process by which an independent Scotland would become a member of the European Union, the terms on which it would join and its representation in the EU following accession.

The Scottish Government has stated that its aim would be “to seek discussions with the UK, Member States and institutions of the EU to agree a process whereby a smooth transition to full EU membership can take place on the date on which Scotland becomes an independent State.”

2.1 The Scottish Government’s view that the general provisions in Article 48 of the Treaty of European Union is a “suitable legal route to facilitate the transition process”.

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EMiS subscribes to the analysis by Professor Sir David Edward (http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx) to the effect that there is no straightforwardly clear legal route and that the process by which ongoing membership of the EU would be expedited is primarily political.

Sir David goes on to argue that the matter is not a question of successor states as such and that the existence of European Citizenship and the rights which come from that and from EU membership would, under the EU legal order, require the parties to engage in negotiations before independence came into effect, and that the change would be effected by amendments to the EU treaties, rather than a new accession Treaty.

An alternative argument citing the precedent of the Republic of Ireland notes that the remaining parts of the UK were treated as the continuing state while Ireland was regarded as a new state. By that argument, the state which would be left after the withdrawal of Scotland would still identifiable be the remaining United Kingdom with Scotland being regarded as a new state.

Irrespective of which argument is correct, the difference may be one of form rather than substance. Everyone agrees that some negotiation of Scottish membership would be required and whether that negotiation is expressed as a new application (Article 49) or through amendment of existing Treaties (Article 48), it will require to be approved by the existing members.

Here the question ceases to be legal and becomes political. Whether an Application for membership or a negotiation to amend the existing Treaties, the final outcome requires approval. It is not clear at this stage whether all parties would wish for that path to be simple and smooth.

Having said this, Sir David also makes the point that it would be inconceivable that the EU collectively would wish unilaterally to withdraw citizenship from 5.3 million of its citizens who have participated in the European project for 40 years. This would have extensive legal and financial implications for both individuals and businesses. There would therefore likely be a countervailing pressure to expedite a smooth path.

2.2 The implications of the Scottish Government’s proposal that it will approach EU membership negotiations on the principle of continuity of effect (i.e. that it is based on the EU Treaty obligations and provisions that the UK has previously negotiated, notably in relation to the budget rebate, Economic and Monetary Union, Justice and Home Affairs and the Schengen area).

This appears to be a common sense starting point for negotiation. However some element of negotiation should be anticipated – most likely in respect of the budget rebate as it seems that:
• Justice and Home Affairs are largely compliant currently while any changes arising from the UK government’s planned review of potential JHA opt-outs would still be fresh and readily unpicked if this were appropriate,
• it is in no one’s interests to further destabilise monetary affairs and
• significant damage would be caused to three EU member countries currently covered by the Common Travel Area if adoption of Schengen necessitated the introduction of border controls - running contrary to the spirit of the Schengen Treaty itself.

It should be noted moreover that whilst a new member of the EU may be required to agree eventual adoption of the Euro and to join Schengen when conditions permit, there is no timetable or time limit. Sweden has agreed to join the Eurozone but has not done so for many years and may never do so.

2.3 Whether eighteen months is sufficient for “the terms of Scotland’s independent membership of the EU to be agreed and all the necessary processes completed.”

The record speed for outright accession is held by Sweden at 4 years (Source: House of Commons Library Note SN/IA/6110). However, Scotland has already adopted the Acquis Communautaire as part of the UK so should be in a technical position to comfortably beat that record.

Following from politics prevailing over regulation, the duration of the negotiation will depend on the political will to reach an agreement. As noted earlier, some constituencies may wish to make the process more protracted while others will wish to bring matters to a rapid conclusion.

While these may be speculated about, precise political positions and bargaining points will not be known until after the Referendum vote has been taken (at which point previously articulated political positions may well change), will be influenced by the parallel Holyrood/Westminster negotiations, will follow a Westminster general election, will (increasingly likely) take place in the period leading up to a rUK EU in/out referendum and might even run in parallel with Westminster/EU accession discussions depending on the interpretation of what constitutes the “continuing state”.

This will be a highly dynamic context requiring excellent bargaining and positioning skills (ref. Response 3.1), where opportunities for deals will emerge as well as threats. The incoming Scottish government in 2016 will require to be alert to both positives and negatives - whether with rUK or with rEU.

We believe the 18 month timetable to be aggressive. It is, at least, vulnerable to delaying tactics by those required to give approval. In such an event, we would argue in favour of avoiding a hiatus in Scotland’s membership e.g. by leaving open the possibility of deferring the formal separation date.
2.4 Whether there are any potential obstacles to Scotland’s membership that might arise during the negotiations.

The most likely source is the political interests of other member countries. Commonly mentioned are those with their own internal independence movements e.g. Spain, while rUK’s position will only become clear in detail during the parallel Westminster negotiations. It would seem plausible that countries without specific contrary interests would favour dispatching the negotiation as quickly as possible in order to minimise disruption.

2.5 Whether the proposals for transition to full EU membership may have any implications in terms of EU citizenship.

Since the UK is currently a member of the EU, its citizens also have the status of EU Citizens under the Maastricht Treaty. That status derives from their status as citizens of a Member State and has since been reinforced by the increased emphasis on citizen rights within the Lisbon Treaty.

If negotiations extend beyond the independence date, there would be a period of uncertainty but it is here that the difference between Articles 48 and 49 becomes relevant. If Scotland were to be treated as a new applicant (under Article 49), then until the application was resolved, a Scottish Government would seek to maintain its legislation in conformity with EU law, but Scots would be denied access to the EU Institutions and the dispute resolution mechanisms (such as the Court of Justice) provided for in the Treaties, Scotland would be unable to have a say in the formulation of new EU legislation and would have no MEPs. If it is a case of transition under the existing Treaties (Article 48), then there would still be some legal uncertainty as the Treaties would not have been amended so as to cope with an independent Scotland.

While this possibility must be allowed for, EMiS regards it as unlikely, insomuch as it would run counter to the principle enshrined in the Lisbon Treaty of the EU as a union of citizens as well as a union of states. In practical terms it would cause disruption not only for Scots working in other EU countries but also for their host organisations and, for example, individually to the now large number of people drawing state pensions from more than one EU country under the umbrella of the EU treaties. A pragmatic approach would seem likely in order to avoid disruption and hardship.

Transitional measures could be taken in order to overcome these otherwise damaging impacts to the EU collectively and to several million of its citizens. The political will to enact these would be important and could potentially involve measures in conjunction with rUK e.g. deferral of the separation date, as well as or instead of temporary legislation through the EU.

The precedent of Greenland’s withdrawal from the EU despite still remaining part of Denmark is noted where “the Commission [showed it could] respond pragmatically, adapting EC legal theory to the economic and geographic realities of Greenland,
rather than rigidly applying various treaty provisions. The Member States accepted Greenland’s modified status despite the fact that the EC Treaties did not really make provision for such a change in status.” (Source: House of Commons Library Note SN/IA/6110). There are, of course, no guarantees.

2.6 Whether there might be the potential for the Court of Justice to rule in relation to any aspects of the transition process.

It seems unlikely that no detail would arise during negotiation with Westminster which would not require a ruling. The maritime border and its impact on North Sea reserves may be one such area.

2.7 Who would conduct the negotiations for EU membership on behalf of Scotland and how would the negotiations be managed.

It is inconceivable that any party other than Scottish Government would directly engage with the negotiations without compromising democratic legitimacy. If negotiations became protracted, then it is possible that a new administration would be elected to Holyrood in 2016 and that a change of stance might occur then. In that event, it might be expected that the negotiation logjam would have figured prominently in the 2016 Holyrood election with the result that the incoming Holyrood administration would have an enhanced mandate to progress the negotiations.

2.8 What level of representation is Scotland likely to have in EU institutions following accession.

Especially if Scotland were to go through the full Article 49 process, it should expect comparable treatment to any other similar sized member state i.e. Finland or Slovakia. Under the voting system to be adopted from 2014, Scotland would have a single vote like all other countries in the Council of Ministers, 13 MEPs (versus 6 at present) and a single Commissioner (versus nil at present). It would also participate in appointing senior legal judges to the Court of Justice.

Theme 3 – Small states within the EU

This theme concerns the influence that small states can have in the European Union. It examines the Scottish Government’s view that there is a growing body of evidence that the smaller EU Member States “are relatively more successful in Council negotiations by achieving legislative outcomes closer to their preferred position than are the larger Member States.” It also covers the Scottish Government’s vision for Scotland’s membership of the European Union.

3.1 The ways in which small member states can influence decision-making in the EU.

Analysis by Professor Dr. Diana Panke (University of Freiburg) supports that of Professor Golub (cited in the “Scotland’s Future” White Paper) that, overall, smaller countries can achieve disproportionate success in negotiation within the EU. She outlines some of the challenges and strategies
The obvious challenges identified include lack of voting power and disproportionate workload for relatively smaller staffing levels. Lack of EU knowledge is also identified as an issue for small members but in Scotland’s case there is already a history of engagement as part of the UK and further mitigation may be possible by recruitment from the current UK pool of EU-facing staff.

However she identifies significant variability within that. Success is not automatic and depends at least as much on knowledgeable judicious selection of bargaining strategies as on level of effort. Insightful prioritisation is also crucial and an independent Scotland should expect to place its emphasis differently than the UK as a whole and therefore require its own positioning strategy.

3.2 How Scotland might position itself within the European Union.

Panke emphasises the importance of early engagement and the damaging effect of slow reactions. The Scottish delegation to the EU should be seen as an investment in leveraging its membership. It will therefore be very much in Scotland’s interests to be, and be seen as, an active participant in all EU matters. Survey work suggests that Scotland is less Europhobic than the UK as a whole.

Concerning specific issues, it should be expected that Scotland will align according to the issue. It seems likely that Scotland’s interests will correspond quite commonly with those of rUK but there will undoubtedly be occasions when this is not the case and other alliances are appropriate. In certain areas, while interests may align, the priority assigned will differ.

Panke and others (e.g. David Skilling)

http://www.davidhumeinstitute.com/images/stories/Spring_2013/Small-countries.pdf) emphasise that the more-successful-than-average track record of small states does not accrue automatically. Their inherent advantages of nimbleness must be leveraged and, in general terms, this might be expected to place greater emphasis on freer markets. Scotland’s traditional values emphasising social welfare and labour rights will require to balance that equation.

3.3 What an independent Scotland’s vision and agenda should be in the European Union.

EMIS supports the White Paper position which prioritises economic recovery across the EU and identifies liberalisation of the services sector as one means towards that. Likewise it supports the prioritisation of the specific agendas of energy and climate change, marine environment (including fisheries), research/creativity, freedom, security and justice.

But participation ought not to be solely about extracting value. The White Paper acknowledges a perceived “democratic deficit”. While some of this is undoubtedly
perception, to the extent that democratic representation is not recognised by the population, it is damaging. Scotland could and should make a useful contribution in correcting both perception and the underlying reality.

Scotland and its values have much to offer European partners as well as much to gain. Membership of a union involves obligations to contribute to the common good as well as deriving benefit from that. In the final analysis, we believe that the return on investment from full engagement and effort will pay considerable dividends.

January 2014