



The Scottish Parliament
Pàrlamaid na h-Alba

EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

AGENDA

22nd Meeting, 2013 (Session 4)

Thursday 5 December 2013

The Committee will meet at 9.15 am in Committee Room 2.

1. **European Structural and Investment Funds (in private):** The Committee will consider draft correspondence to the Scottish Government.

Not before 10.00

2. **The Scottish Government's White Paper on Independence:** The Committee will take evidence from—

Professor Michael Keating, Professor of Politics, University of Aberdeen and Director at the ESRC Scottish Centre on Constitutional Change, Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh and Director of the Edinburgh Centre for Constitutional Law, and Dr Colin Fleming, Research Fellow, University of Edinburgh and Project Leader on Defence and Security at the ESRC Scottish Centre on Constitutional Change, Economic and Social Research Council (ESRC) programme on the Future of the UK and Scotland.

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The papers for this meeting are as follows—

Agenda item 1

PRIVATE PAPER

EU/S4/13/22/1 (P)

Agenda item 2

Note by the Clerk

EU/S4/13/22/2

European and External Relations Committee

22nd Meeting, 2013 (Session 4), Thursday 5 December 2013

The Scottish Government's White Paper on Independence

Background

1. The European and External Relations Committee will take evidence today from representatives from the Economic and Social Research Council (ESRC) programme on The Future of the UK and Scotland on the Scottish Government's White Paper on Independence.
2. The witnesses have submitted written evidence, which has also been published on the website of The Future of the UK and Scotland programme.
3. The written evidence, from each of the following, has been attached in Annexe.
 - Professor Michael Keating, Professor of Politics, University of Aberdeen and Director, ESRC Scottish Centre on Constitutional Change;
 - Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh and Director of the Edinburgh Centre for Constitutional Law;
 - Dr Colin Fleming, Research Fellow, University of Edinburgh and Project Leader on Defence and Security, ESRC Scottish Centre on Constitutional Change.

**Katy Orr
Clerk
December 2013**

Annexe – Written evidence

Written evidence from Professor Michael Keating

Scotland and the EU after independence

Admission to the European Union

At an early stage of the debate, there were two diametrically opposed views:

- that Scotland would automatically remain within the EU
- that it would be excluded immediately from the EU and would have to undergo a prolonged accession process with no guarantee of admission. Other member states, especially those with independence movements, could veto Scottish admission.

There is now wide support for the view that

- Scotland would have to apply for EU membership while rUK would be regarded as the successor state and remain in automatically.
- Scotland would not, and could not, be excluded.
- A prolonged accession process would not be necessary.

The reasons are that:

- Scotland already meets the Copenhagen criteria and the *acquis communautaire*, so a process of transition to these is not necessary.
- Following a Yes vote, the United Kingdom would recognize an independent Scotland following the Edinburgh Agreement, so that independence would be in accordance with domestic constitutional provisions.
- There is no reason for other EU states to refuse to recognize Scotland if the UK has done so.
- This would not set a legal precedent for other states since the EU would not be over-riding state constitutions. The Spanish government has been clear that it would not affect the position of Catalonia, since the Spanish constitution does not provide for secession.
- An independent, democratic Scotland, recognized by all member states and conforming with the *acquis communautaire* could hardly be excluded from the EU simply because it had exercised its democratic rights.

While this view commands wide assent in Scotland, some people in London and Brussels still cling to the old view.

Transition

It has been suggested that, even if Scotland were admitted, it might have to spend a period outside the EU and hence outwith the single market and the scope of European law. This is unlikely because:

- Independence would occur after a transition period (seen now as two years) in which details of EU membership could be negotiated.
- The *acquis communautaire* is incorporated in Scottish law and would only change if the Scottish Parliament so decided.
- It would not be in the interest of the rUK, other member states or business to disrupt the internal market or to change the status of EU citizens living, working and studying in Scotland.
- Neither Scotland nor rUK is going to erect customs posts.

- Scottish citizens are EU citizens and could not be deprived of their rights arbitrarily. EU rather than international law might be relevant here.
- A fast-track form of accession could be agreed, either by the accession process or by treaty amendment.

Political considerations are predominant here; law is usually able to accommodate them.

Terms of Membership

If Scottish EU membership is relatively unproblematic in principle, the terms are not. It has been suggested that Scotland would be obliged, as a new member state, to adopt the Euro and join the Schengen passport-free travel zone. This is unlikely.

- No state has ever been obliged to join the Euro against its will. Sweden, unlike the UK and Denmark, does not have an opt-out but has not joined.
- The legal requirement for joining the Euro is subject to meeting the criteria, which Scotland as part of the Sterling zone, is unlikely to do.
- It is difficult to see the Commission taking the UK and Scotland to court for failing to join Schengen, forcing a new border between them.

It is not, obvious, however, that Scotland could, or would want to, match all the other UK opt-outs.

- Scotland may want to sign up to the Treaty on Stability, Coordination and Governance, signed in 2012 by all member states except the United Kingdom and the Czech Republic; there may be pressure to do so.
- The United Kingdom has a provision to opt in or out of the provisions of the Area of Freedom, Security and Justice but must decide in 2014 whether to opt in or out definitively. It has indicated that it will opt out and selectively opt back into some of them. The view of the Scottish Government on this is already different.
- Scotland may or may not want to continue UK opt-out on a range of social provisions.
- There is a question of whether Scotland would be entitled to a share of the UK budget agreement negotiated as part of the Fontainebleau accord.
- Scotland's budgetary contribution and share of agricultural and structural spending would be determined partly by a standard formula but also by political negotiation.
- In these matters, member states facing internal independence movements may want to raise the price as a deterrent to others trying to follow Scotland.

Longer-term prospects

In the longer term, it is likely that the EU will move towards greater policy and institutional integration, especially in the light of the Euro crisis. It is also likely that the UK will stand aloof from much of this. The question then arises as to whether Scotland will shadow UK policy or will opt into greater measures of integration.

- There is a possibility that the rUK might even leave the EU following the proposed referendum in 2017. This would pose a series of problems for Scotland, assuming that it opted to stay in. It is likely that the remaining EU states would proceed to closer monetary and fiscal union, including a banking union and European financial regulation. This would make it impossible for Scotland to continue using the Pound sterling, as that would mean different and conflicting rules of financial regulation.

- Short of withdrawal, the UK Conservative Party proposes to negotiate further opt-outs from existing treaty provisions. I am very sceptical as to whether this would be possible and, indeed, the emphasis seems to have shifted to securing allies for a general repatriation of powers to all member states. Were the rUK somehow to secure opt-outs, however, it would pose a challenge to Scotland as to whether it would follow, given the close trading, monetary and labour-market links to rUK.
- More generally, Scotland faces a choice as to whether to follow the UK's semi-detached attitude to Europe or whether to engage fully in the European project. There is a danger that it could end up with the worst of both worlds, bound to UK policy but losing influence in Europe.

Small States in the EU

Small states can exercise influence within the EU but not in the same way as large states. There are some lessons from the experience of successful small states:

- They rarely use their veto powers but seek to cast themselves as constructive players.
- They seek alliances with like-minded states and those sharing common interests on individual issues.
- They contribute actively to policy-making rather than only lobbying for themselves.
- They select the issues on which they will focus since they cannot cover everything
- They organize their administration and policy-making structures to as to be aware of European issues and be ready to respond.
- They are good at networking in European institutions and encouraging their nationals to work in the institutions.

Short papers on this issue are available from:

Graham Avery, Professor Neil Walker, Professor Diane Panke for the Royal Society of Edinburgh/ British Academy seminar

http://www.royalsoced.org.uk/1062_ScotlandandtheEU.html

Professor Sir David Edward, for the Scottish Constitutional Futures Forum

<http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>

The views in this paper are those of the author alone.

Written evidence from Professor Stephen Tierney

Accession of an Independent Scotland to the European Union: A View of the Legal Issues

In this paper I offer my view of some of the legal issues involved in the accession of an independent Scotland to the European Union.¹

Background

In its White Paper published on 26 November 2013, the Scottish Government states:

‘Following a vote for independence, the Scottish Government will immediately seek discussions with the Westminster Government and with the member states and institutions of the EU to agree the process whereby a smooth transition to full EU membership can take place on the day Scotland becomes an independent country.’²

The way in which an independent Scotland would arrive at membership of the European Union has been a source of particularly heated debate on account both of the centrality of EU membership to the Scottish Government’s plans for independence and the indeterminate nature of the question. This debate has also become somewhat dislocated by an attempt to arrive at a definitive account of the legal position. It would seem that insufficient attention is being paid to the conditioning political factors that will come into play in the event of a majority Yes vote in the referendum; factors which could feasibly lead to negotiations to bring Scotland into the European Union at the time of its independence from the UK, thereby avoiding the lengthy accession process designed for new States joining from outside the Union.

Precedents?

There is no clear precedent here. The cases of Algeria and Greenland are often referred to, but both are very different from that of Scotland. The territory of Algeria, as part of France, was subject to the Treaty of Rome. When it became independent in 1962, however, it ceased to be so while France continued as a Member State of the EEC. Greenland joined the EEC as part of Denmark’s accession in 1973. Greenland was later accorded home rule by Denmark and at this time (1982) a referendum was held in which the people of Greenland voted to leave the Communities. Denmark negotiated Greenland’s withdrawal from the EEC, and after lengthy negotiations Greenland left in 1985 while Denmark’s membership continued otherwise unchanged.³ However, neither the independence of Algeria which was in effect a French colony, nor the withdrawal of Greenland which is itself not an

¹ A longer paper addressing also the referendum process, international law and admission to other international institutions, including the United Nations has been published in (2013) *European Constitutional Law Review* 359-390.

² ‘Scotland’s Future: Your Guide to an Independent Scotland’, Scottish Government, 26 November 2013, p13.

³ Frederik Harhoff, ‘Greenland’s Withdrawal from the European Communities’, (1983) 20 *Common Market Law Review* 13.

independent State, offer a direct analogy to the Scottish case.⁴ The really novel situation should Scottish independence come about is that Scotland, unlike Algeria or Greenland, would be seeking not to leave the EU but to achieve membership, and the challenge posed is whether it would be possible, or indeed desirable, for the European Union and its Member States to effect this without any interim period of non-membership.

Treaty of European Union, Article 49

The EU Treaties do not provide for a situation of secession and then purported accession to membership by part of a Member State. This has led some to argue that Scotland would indeed be treated in the same way as any applicant State and would require to follow the accession route laid down in Article 49 of the Treaty of European Union (TEU) (hereafter 'formal accession'). By this provision a new State needs to apply for EU membership leading to an accession agreement that would require to be agreed unanimously and ratified by all Member States. There are a number of criteria laid down in Article 49 and if these are met then accession is effected by the unanimous decision of the Council, a majority decision of the European Parliament, and subsequent ratification of the Accession Treaty by the Member States in accordance with their own respective constitutions. This seems to be the route envisaged by the President of the European Commission Jose Manuel Barroso who in a letter to the House of Lords Economic Affairs Select Committee on 10 December 2012 suggested that the Treaties would no longer apply to a territory which leaves an existing Member State and such a territory would need to apply for membership by the ordinary Article 49 route.⁵ If Scotland requires to go through the general accession route it could be a very time-consuming process.⁶

Other Paths to Membership?

It seems open to question whether formal accession is the only feasible interpretation of the legal path Scotland would be required to follow, or whether in fact there are other options available to the EU through which to effect Scottish membership more quickly, which would in political terms be preferable since they might avoid an interim period of non-membership. In the first place it can be argued that the formal accession approach places excessive weight upon the extent to which European Union membership rules are dependent upon principles of general public international law. The European Communities/European Union have, for over fifty years, been defined by their own judicial organ as *sui generis*. The Union is conceived not as a classical international organisation but rather a new legal order, creating rights and obligations not only for its Member States, but also for its

⁴ James Crawford and Alan Boyle, 'Referendum on the Independence of Scotland – International Law Aspects'. Opinion published in annex to the UK Government's 'Report on "Devolution and the Implications of Scottish Independence"', UK Government, Cm 8554, February 2013, para 146. (The Opinion is hereafter cited as 'Crawford and Boyle').

⁵ 'Economic Implications for the United Kingdom of Scottish Independence', House of Lords Economic Affairs Committee, Second Report, 19 March 2013, para 112.

⁶ Crawford and Boyle seem to envisage the Article 49 route (para 154). However, they do leave open the possibility that through negotiations the 'accession process could be varied in Scotland's case' (para 156).

citizens.⁷ On the one hand, the EU has declared its commitment to ‘contribute to’ the strict observance and the development of international law,⁸ but on the other, the Court of Justice of the European Union (CJEU) seems to question the supremacy of international law when it comes into possible conflict with EU law.⁹ This could well have implications for EU membership rules. As Crawford and Boyle note, while ‘public international law... is the proper law for answering questions of state continuity and succession outside the specific context of the EU’, there might be ‘a distinction between the position in public international law generally and the position in the EU legal order’.¹⁰

This has led a number of commentators to argue that the CJEU would be very reluctant to see Scots lose their EU citizenship for any period of time, and would adapt its rules to try and avoid such a scenario if possible. Arguments that a specific process could, and even should, be tailored to facilitate the membership of an independent Scotland rely both upon the flexibility that comes with the EU’s *sui generis* nature, and the importance the Union ascribes to the concept of citizenship, culminating in its entrenchment in the Treaties in 1993.¹¹

One radical argument is that so important is this concept of citizenship in the eyes of the CJEU that the Court might be expected to intervene to ensure that Scotland did not in fact leave the EU at all: ‘Scotland and [the remaining UK] should *each* succeed to the UK’s existing membership of the EU, but now as two States rather than as one’.¹² This citizenship-based argument for ‘dual succession’ to membership does not, however, appear to be plausible. First, EU citizenship is contingent on EU membership: an individual requires to possess the nationality/citizenship of a Member State if he or she is to benefit from Union citizenship.¹³ Also Article 50 permits states to leave the EU. It cannot realistically be argued that the nationals of a state leaving the EU would continue to be treated by the CJEU as EU citizens.¹⁴ One complication here is that the United Kingdom would still be a member of the EU and Scots would not lose their EU citizenship unless either Scotland or the UK deprived them of UK nationality. There is no requirement in international law that nationals of a new state automatically lose the nationality they previously enjoyed. But this is a different issue from the idea that since Scots are currently citizens of the EU, this would lead the CJEU to bring about the succession

⁷ See for example, *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) ECR 1 and *Flaminio Costa v ENEL* [1964] ECR 585 (6/64).

⁸ Treaty on European Union, Article 3(5).

⁹ *Joined cases C-402/05P & C-415/05P Kadi & Al Barakaat International Foundation v. Council and Commission*, [2008] ECR I-6351.

¹⁰ Crawford and Boyle, para 184.

¹¹ Treaty on the Functioning of the European Union, Article 20.

¹² Aidan O’Neill, ‘A Quarrel in a Faraway Country?: Scotland, Independence and the EU’, *Eutopia law blog*, 14 November 2011. <http://eutopialaw.com/2011/11/14/685/> Accessed 23 July 2013.

¹³ ‘Citizenship of the Union shall be additional to and not replace national citizenship.’ Article 20(1) TFEU.

¹⁴ The issue is not so much one of the primacy of international law but the fact that statehood is as a matter of logic an anterior condition to membership of a particular international organization, and by definition, to any rights and obligations which attend such membership. Crawford and Boyle acknowledge this: ‘Of course, there might be a distinction between the position in public international law generally and the position in the EU legal order. Public international law (as already discussed) is the proper law for answering questions of state continuity and succession outside the specific context of the EU. Even if the ECJ were to take a different approach, that would not affect the status of the rUK and Scotland generally. It would only affect their position within the EU legal order.’ Crawford and Boyle, para.184.

of Scotland itself to membership. Also the dual succession argument does not address the following issues that must be settled for Scotland to *accede* to membership: on what terms would Scotland find itself a member of the EU? Would it be required to adopt the Euro or not? Would it be required to join the Schengen area? Would it ‘succeed’ with or without existing UK Treaty opt-outs? How many seats in the European Parliament would it have, how many votes in the Council, etc.? These cannot be matters of succession but inevitably of accession, which the EU by the unanimous consent of its members would require to agree upon. Thirdly, there are also obvious question marks over the legitimacy of the CJEU intervening in this way. To do so would arguably elevate the prerogatives of European citizenship above those of the Union’s own Member States. It would also ‘effectively usurp the role of the Member States in negotiating a political solution.’¹⁵ In this light a judicially manufactured route to automatic succession to EU membership seems untenable. Notably the Scottish Government does not suggest such a route as a route to membership in the November White Paper.

Nonetheless, Crawford and Boyle do still suggest that the CJEU ‘might be expected to resist allowing part of a current EU Member State to withdraw automatically from the EU, especially insofar as it would affect the individual rights of current EU citizens.’¹⁶ This seems to imply that the Court would look to the other institutions and Member States to try to resolve the issue through negotiations. As I have observed, they also concede the possibility that the EU might, in negotiations, be willing to adjust the usual requirements for membership in the circumstances of Scotland’s case.¹⁷

Obligation on the EU institutions and Member States to negotiate the admission of an independent Scotland to the European Union?

David Edward, formerly the United Kingdom’s judge on the Luxembourg court, has also entered the debate in the context of negotiations and in doing so offers a more nuanced and plausible suggestion for how Scotland’s accession might be managed than the ‘dual succession’ account. In his view Scotland would not automatically accede to membership but a combination of the *sui generis* nature of the Union and the importance of citizenship to the European project should lead to a more limited, but for an independent Scotland still potentially significant, outcome, namely an obligation on the part of the EU institutions and all the Member States including the UK to negotiate the admission of an independent Scotland to the European Union.¹⁸

Given that the EU is a new legal order, the first port of call in addressing the relationship between the United Kingdom, the EU institutions and the other Member States is, according to Edward, the Treaties themselves, and only if they do not offer

¹⁵ Crawford and Boyle, para 183.

¹⁶ Crawford and Boyle, para 167.

¹⁷ Crawford and Boyle, para 164. Although it should be repeated that the overall sense of the Crawford and Boyle Opinion seems to be the Article 49 route is the more likely road to accession for Scotland.

¹⁸ David Edward, ‘Scotland and the European Union’, Scottish Constitutional Futures Forum blog, 17 December 2012.

<http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>.

an answer should resort be had to public international law. He then turns to Article 50 of the TEU. He observes that, under this provision, the withdrawal of a State from the EU requires negotiation of the terms of this act, and withdrawal will take effect only on the date agreed or two years after notification. This time is needed to unravel ‘a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations.’¹⁹ These obligations are multilateral and often reciprocal. In the case of Scottish independence and the potential withdrawal of the territory of Scotland from the Union, this would involve not only the rights of Scots but also of nationals of other Member States, for example foreign students in Scotland and fishermen trawling its territorial waters.

So significant are these rights and relationships that Edward believes Article 50 could plausibly be extended and adapted to the Scottish situation: ‘in accordance with their obligations of good faith, sincere cooperation and solidarity, the EU institutions and all the Member States (including the UK as existing), would be obliged to enter into negotiations, before separation took effect, to determine the future relationship within the EU of the separate parts of the former UK and the other Member States.’²⁰ One objection of course is that Article 50 is only intended to apply to the withdrawal of Member States and not of parts of their territory in the form of new States. But Edward suggests that it would be illogical to conclude that those who drafted the Treaty ‘intended that there must be prior negotiation in the case of withdrawal but none in the case of separation’.²¹ It is possibly in this context that the CJEU might be asked to intervene, and were it to do so, this would be an opportunity to test Edward’s argument concerning a duty to negotiate.²²

EU citizenship is central to Edward’s argument. The Article 50 duty to negotiate can and should be extended to the Scottish case because of a presumption that the Union has a concomitant duty to avoid a situation where, for a period of time, Scots would be deprived of their rights as citizens of the EU while others in the reciprocal arrangements Edward mentions would see their rights adversely affected. To emphasise the plausibility of his argument he questions the tenability of the alternative scenario, namely that:

‘at the moment of separation (or on some other unspecified date), and solely by operation of conventional doctrines of public international law without regard to the provisions of the EU Treaties - Scotland, its citizens and its land

¹⁹ David Edward, ‘Scotland and the European Union’.

²⁰ Crawford and Boyle take the view that negotiations to ‘adjust the usual requirements for membership in the circumstances of Scotland’s case’ would not be required ‘at least on its face, by the EU legal order’ (para 164). But notably Edward does not seem to be suggesting an adjustment to the requirements of membership, but rather an alternative process by which that membership could be effected. Another issue is whether the EU and the UK would have an obligation to negotiate also because the UK, after Scotland’s independence, would be over-represented in the EU organs despite becoming a smaller state. This would be unfair to other Member States. The terms of Scotland’s admission could be bound up also with these negotiations. I am grateful to Jure Vidmar for discussion of this point.

²¹ David Edward, ‘Scotland and the European Union’. Michael Waibel also argues: ‘Negotiations, with respect to currency arrangements and all of the complex legal issues raised by Scottish independence, would offer the only sensible way forward.’ EJIL: Talk! 12 February 2013 <http://www.ejiltalk.org/boyle-and-crawford-on-scottish-independence/#more-7611>. Accessed 23 July 2013.

²² Although another issue is how this question might come before the CJEU. Speculation on this is beyond the scope of this paper.

and sea area would be cast out into legal limbo vis-à-vis the rest of the EU and its citizens, unless and until a new Accession Treaty were negotiated.

Until that moment, Scotland would remain an integral part of the EU; the Scottish people and all EU citizens living in Scotland would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with Scotland.

Then, at the midnight hour, all these relationships would come abruptly to an end. The *acquis communautaire* would no longer, as such, be part of the law of Scotland. Scotland would cease to be constrained in relation to the rates of VAT and corporation tax. Erasmus students studying in Scotland would become “foreign students” liable to pay full third country fees, as would students from England, Wales and Northern Ireland. Non-Scottish fishermen would be excluded from Scottish waters. And all the waters between Scotland and Norway would cease to be within the jurisdiction of the EU – an important security consideration quite apart from fishery rights.²³

This scenario also presupposes that ‘there would be no legal obligation upon the UK, the EU or the other Member States to enter into any negotiations before separation with a view to avoiding such a situation coming to pass.’ He considers this alternative, carried to this logical conclusion, to be unconvincing.

But this still stops well short of a dual succession argument. Edward does not consider it feasible that there will be ‘a seamless transition from membership as part of the UK to membership as an independent State, subject to negotiation of a few details.’ Instead, and given the unprecedented nature of the situation, with ‘no express provision in the Treaties to deal with it’, we must look for a third, and more plausible, scenario based upon ‘the spirit and general scheme of the Treaties’. And it is in this context that he arrives at a *via media* by way of the duty to negotiate per Article 50. ‘In my opinion, the obligations of good faith, sincere cooperation and solidarity, which are incumbent on the EU institutions and all the Member States including the UK, would require them all, *before separation took effect*, to enter into negotiations to determine the future relationship within the EU of the separate parts of the UK and the other Member States. The outcome of such negotiations, unless they failed utterly, would be amendment of the existing Treaties, *not* a new Accession Treaty.’²⁴

The force of the argument comes in part from the fact that the author was himself immersed in the highest level decision-making within the EU for so long. Its significance hangs on the final sentence of this last quote. The transition to membership would not be seamless. But it would be categorically different from the Article 49 route which has been advanced by others.

²³ David Edward, ‘Scotland and the European Union’. The final point is questionable: the 200 mile exclusive fishing zone under international law arguably has no relevance, in legal terms, to security, but the other issues do raise searching questions.

²⁴ David Edward, ‘Scotland and the European Union’ (emphasis in original).

Issues to be Negotiated

Of course, even if we do take this to be the most plausible scenario by which an independent Scotland would move to membership of the EU, this still leaves open a number of issues, as Edward himself acknowledges. First, who would be involved in such negotiations, how would they take place, would the UK negotiate for Scotland since before independence Scotland would not be a State, or would the UK allow Scotland to negotiate on its behalf? And what of the interim period? What if negotiations within the EU were still on-going after Scotland had achieved independence but before its formal accession to the Union? Here a possible answer is provided by Crawford and Boyle. They do not address Edward's Article 50/citizenship argument, but they do suggest that in the interim period of negotiations, before an independent Scotland accedes to membership of the EU, EU law could continue to have effect in Scotland by virtue of the *European Communities Act 1972* s2(4).²⁵ Notably the November White Paper provides that existing UK law which applied to Scotland would continue to do so after independence until altered by the Scottish Parliament.

Another issue which flows from the route Scotland would require to take to membership is the conditions of that membership. It seems clear that Scotland would require to adopt the *acquis communautaire*, but this is already a facet of UK membership and implicitly of the terms of the Scotland Act 1998.²⁶ There are also the questions raised above such as the Treaty opt-outs to which the United Kingdom is party. Would Scotland be able to maintain these? Would it be required to adopt the Euro, become part of the Schengen arrangement etc.? The Scottish Government sets out its desired position on these issues in the November White Paper. For plausible answers to some of these questions I refer to the Briefing issued by Michael Keating on 22 November.²⁷ These issues would be subject to negotiation and the outcome would depend in part upon the attitude of other EU Member States and institutions.

TEU Article 48: 'Ordinary Revision Procedure'

In any event it seems that a new treaty amendment would be needed to provide, at the very least, for distinctive Scottish membership of European institutions, the allocation of parliamentary seats etc., in the absence of the full Article 49 accession process. And such a treaty amendment would still need the ratification of all Member States. In its November White Paper the Scottish Government states: 'a legal basis that the Scottish Government considers is appropriate to the prospective circumstances, is that Scotland's transition to full membership is secured under the general provisions of Article 48. Article 48 provides for a Treaty amendment to be agreed by common accord on the part of the representatives of the governments of the member states.'²⁸ It seems plausible that this route could be used, but we should note David Edward's view that the simplified revision procedure provided by Article 48 would not apply, implying that Scottish

²⁵ Crawford and Boyle, para 165.

²⁶ Scotland Act 1998, ss. 29(2)(d) and 57(2).

²⁷ M Keating, 'Scotland and the EU after independence', ESRC Briefing Paper, 22 November, 2013.

²⁸ 'Scotland's Future: Your Guide to an Independent Scotland', Scottish Government, 26 November 2013, p221.

admission would require the ‘ordinary revision procedure’ under Article 48; in other words, ‘ratification of the amended Treaties would be necessary’.²⁹ Such a process would also require to be initiated by a Member State, the European Commission or the European Parliament, and not, as under Article 49 by the state seeking accession. So, while this route to admission would certainly seem to be simpler than the Article 49 process, Article 48 could still mean that a convention of Member States would be convened to adopt recommendations on the proposed treaty amendments (although this could be circumvented by the European Council with the consent of the European Parliament). Furthermore, the unanimous consent of Member States would still be needed by way of ratification by Member States in line with their own domestic constitutions.

Also there are contingencies involved, most crucially the preparedness of the institutions and Member States to use the Article 48 mechanism for this purpose,³⁰ the nature of the negotiations and the terms upon which the EU Member States are prepared to admit Scotland to membership.

Finally, we might reasonably assume that the United Kingdom would be treated as a continuing member of the EU.³¹ But even here there would surely be a need for treaty amendments, again to accommodate a smaller UK in a proportionate way within European institutions.³² Another complication which is beyond the scope of this paper is the Conservative Party commitment to hold a referendum in the UK on membership of the European Union should the Conservative Party be returned to office in the General Election of 2015.³³ The prospect of such a vote would no doubt form an important backdrop to any negotiations on transition to membership for an independent Scotland.

Conclusion

The status of an independent Scotland under international law in general should not present many difficulties. It seems that the UK will be the continuing State and an independent Scotland will be seen as a territory aspiring to new statehood. In the event that a negotiated move to independence is agreed between Scotland and the UK, the widespread recognition of Scotland as a State and its succession to international obligations should be straightforward. Scotland would, however, need to apply for membership of international organisations. The example of the United Nations suggests that this too should not be excessively challenging. The really indeterminate case is that of the European Union. Different views have been voiced in this paper. That which seems most consistent with the Treaty commitments, most particularly to citizenship, is that, since the EU is at liberty to set its own membership rules, a process of negotiations to facilitate Scotland’s membership without a period of exit from the Union would seem to be flow from the spirit of Article 50. However, a number of political factors would also come into play, not least the attitudes of other

²⁹ David Edward, ‘Scotland and the European Union’.

³⁰ For further discussion, and indeed scepticism regarding the Article 48 route, see Kenneth A Armstrong, ‘Scotland’s Future in the EU’, Eutopia blog 28 November 2013 <http://eutopialaw.com/tag/kenneth-a-armstrong/>

³¹ Case 148/77, Hansen v Hauptzollamt Flensburg [1978] ECR 1787 which suggests that the limits of the territory of a Member State is for the State to define. Cited by Crawford and Boyle, para 159.

³² Crawford and Boyle, para 150.

³³ http://www.conservatives.com/Policy/Where_we_stand/Europe.aspx. Accessed 23 July 2013.

Member States, including those which would not like to encourage sub-state nationalists within their own States with the idea that rapid entry to the EU is a realistic possibility. Certain important issues remain unclear. There seems no doubt that an independent Scotland would be a welcome member of the EU, but we cannot be certain as to how and on what terms such membership will be effected.

Written evidence from Dr Colin Fleming

White Paper Reflection: Defence

The White Paper sets out a comprehensive and sensible defence blueprint in the event of Independence. Some of the Scottish Government (SG) defence aspirations would be shaped through negotiation with the rest of the United Kingdom (rUK) and cannot be fully answered before a Yes vote. However, on NATO membership its proposed defence structure, the division of assets and its commitments to serving personnel, the Scottish Government has provided information as to how it envisages Scotland's defence policies and the structure of Scottish Defence Forces following a 'Yes' vote in next year's independence referendum. It has sought to reassure the Scottish people, the rest of the United Kingdom and potential allies that it will take its defence responsibilities seriously.

Issues such as Trident, the division of assets, NATO, and EU membership will require negotiation. The UK government will not pre-negotiate on these issues and it is therefore impossible to have exact certainty on what Scottish Defence will look like in the early years of Independence. However, the White Paper sets out in some detail how the Scottish Government wishes to approach these negotiations. On NATO, the SG has committed to signing the alliance Strategic Concept, stripping away the main barrier to membership of that organisation. Again, on NATO and on a host of other non-defence areas, the removal of the nuclear deterrent will be hotly debated. However, Scotland will not be made to host nuclear weapons on Scottish soil against its will. Indeed, only 3 of the 28 members of the alliance have a nuclear capability. Having a constitutional ban on nuclear weapons would not preclude Scotland from joining the alliance. Indeed, NATO's updated Strategic Concept (2010) underlines that it has an 'open door' policy regarding new members – membership of the alliance is conditioned on acceptance of the Strategic Concept and a states ability to meet NATO capabilities. The commitments made in the White Paper signal the SG willingness to fulfil these criteria.

Regarding NATO membership, it is more likely that a problem would arise on the timescales regarding the removal of Trident. The Scottish Government has been attacked by its opponents on this issue, and it is true that if Scotland forced the rUK into nuclear disarmament then this would be a significant obstacle both to membership of NATO and close defence cooperation with rUK. The White Paper deals with this issue, and states that the SG has a 'view' to remove Trident by the end of the first parliamentary term of an independent Scotland. This would give 6-7 years from a 'Yes' vote, but suggests that this would be open to negotiation. The exact time needed to remove nuclear weapons is keenly contested; Scottish CND have suggested as little as two years, while some defence analysts have suggested a period of 10-15 years. The Scottish Government position takes a middle ground between these different opinions. This is essentially a pre-negotiation position and there may be trade-offs along the way that provide the UK government with more time to find a solution to its own Trident question (it is important to note that the White Paper makes no mention of forcing the nuclear disarmament of rUK, something that has been suggested over the last week). Nevertheless, if the Scottish Government provided a workable transitional period then this would further benefit Scotland's membership into NATO and would provide a solid basis from which

Scottish – rUK defence cooperation could proceed. Indeed, in the event of Independence, the government of the United Kingdom has stated (through the terms of the Edinburgh Agreement) that it will respect the outcome. With the eyes of the world on the transition to independence, the government of rUK would not want to be perceived to be bullying a new state, which has democratically opted for independence. The prospect of a negotiated settlement is thus in everyone's best interests.

The White Paper's emphasis on shared responsibilities, and a continued defence relationship with what would become the remainder of the United Kingdom is sensible and would be of benefit to both Scotland and rUK – again, this should factor in the removal of the nuclear deterrent. This would provide both Scotland and rUK with defence continuity and should allay fears that security might be jeopardised in the years immediately after independence. It is important to note that defence cooperation is now commonplace: the UK currently cooperates with a range of states and it is hard to imagine a scenario where it would not want to do so if Scotland became Independent.

The phased transition to a fully functioning Scottish Defence Force will take time and should be welcomed. It is important that if Scotland becomes an independent state that it fully assesses its defence assets, the future procurement required to equip its armed forces, and perhaps most importantly, makes sure that it takes time to tailor a robust defence apparatus that suits Scotland's security requirements. The argument that Scotland would have difficulty recruiting is overplayed, and omits to highlight the major problems associated with recruitment and retention in the British Armed Forces. Defence and Security negotiations and a future Strategic and Security Review would thus be a priority. That the Scottish Government has articulated that it would follow this path in the White Paper is a welcome and common sense approach and should provide the public with a better sense of what security and defence would look like if Scotland votes Yes next September.