The Scottish Parliament
Pàrlamaid na h-Alba

EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

AGENDA

2nd Meeting, 2014 (Session 4)

Thursday 23 January 2014

The Committee will meet at 9.15 am in Committee Room 6.

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

2. **The Scottish Government's proposals for an independent Scotland: membership of the European Union:** The Committee will take evidence from—

   Professor Kenneth Armstrong, Director, Centre for European Legal Studies, Faculty of Law, University of Cambridge;

   Professor Sir David Edward KCMG, QC, FRSE;

   Patrick Layden QC TD;

   Aidan O'Neill QC.

3. **Brussels Bulletin:** The Committee will consider the latest edition of the Brussels Bulletin.

4. **The Scottish Government's proposals for an independent Scotland: membership of the European Union (in private):** The Committee will consider the evidence heard during the meeting.

5. **Work programme:** The Committee will consider its work programme.

EU/S4/14/2/A

Katy Orr
Clerk to the European and External Relations Committee
Room Tower 1 T3.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5234
Email: Katy.Orr@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda item 2

Cover paper	EU/S4/14/2/1
PRIVATE PAPER	EU/S4/14/2/2 (P)
PRIVATE PAPER	EU/S4/14/2/3 (P)

Agenda item 3

Brussels Bulletin	EU/S4/14/2/4

Agenda item 5

PRIVATE PAPER	EU/S4/14/2/5 (P)

European and External Relations Committee

2nd meeting, 2013 (Session 4), Thursday 23 January 2014

The Scottish Government's proposals for an independent Scotland: membership of the European Union

Introduction

1. The Committee agreed its approach to its inquiry into Scotland in the European Union at its meeting on 12 December 2013. The following remit for the inquiry has been agreed—

An inquiry to examine the Scottish Government's proposals for an independent Scotland's membership of the European Union as set out in "Scotland's Future" and "Scotland in the European Union".

Evidence

Call for written evidence

2. On Monday 16 December, the Committee launched its call for views on the inquiry. The deadline for receipt of written submissions is **24 January 2014.**

3. To date, five submissions have been received from I B Campbell, Economic and Social Research Council, European Movement in Scotland, Catherine Stihler MEP and David Martin, MEP and Professor Stephen Tierney.

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/72022.aspx

Oral evidence

4. This is the second oral evidence session, the first session was held on 16 January 2014, where the Committee will hear from Professor Kenneth Armstrong, Professor Sir David Edward KCMG QC FRSE, Patrick Layden QC TD and Aidan O'Neill QC.

5. Written evidence has been received from Professor Sir David Edward KCMG QC FRSE, Professor Kenneth Armstrong and Jean-Claude Piris, who was unable to attend the Committee, but wished to provide written evidence for the session. The written evidence is attached at Annexe A to this note. Transcripts from all the oral evidence sessions will be published on the Committee's website.

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/29814.aspx

Next steps

The Committee will continue to take evidence on its inquiry at its next meeting on 30 January 2014.

Katy Orr
Clerk to the Committee

Annexe A

WRITTEN EVIDENCE FROM PROFESSOR SIR DAVID EDWARD KCMG QC FRSE[1]

SCOTLAND'S POSITION IN THE EUROPEAN UNION

In the event of an affirmative vote in the Referendum on 18 September 2014, Scots will confront a myriad of issues, domestic, regional and international. One very important question is whether and on what terms an independent Scotland would or could become a Member State of the European Union (EU), and whether citizens of Scotland would continue to enjoy their existing status as citizens of the EU with all the attendant rights and responsibilities.

This article, the substance of which has already been published elsewhere,[2] seeks to clarify the legal issue from the point of view of EU law insofar as that can be stated with any degree of certainty.

I should first make my own position clear, since I am a Scot living in Scotland, and I will be one of those entitled to vote in the Referendum. I am a moderate unionist in the sense that I still believe in the United Kingdom and believe that Scotland should remain part of it, but I also respect the sincerely held views of moderate separatists, like the late Professor Sir Neil MacCormick, who believed in Scottish independence.

Personally, I hope very much that the issue of an independent Scotland's place in the EU will not arise, but the issue is important for the integrity of the EU and, I would say also, the credibility of its institutions. It affects other countries as well, and, the people are entitled to know, as far as possible, where they stand.

The President of the European Commission, José Manuel Barroso, in a letter to the Chairman of the House of Lords Economic Affairs Committee of the United Kingdom Parliament, has stated:

> The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.
>
> Under Article 49 of the Treaty on European Union, any European state which respects the principles set out in Article 2 of the Treaty on European Union may apply to become a member of the EU. If the application is accepted by the Council acting unanimously, an agreement is then negotiated between the applicant state and the Member States on the conditions of admission and the adjustments to the Treaties which such

[1] This is an article that will be published in The *Scottish Parliamentary Review*, Vol. I, No. 2, (The Lord Rodger Memorial Issue)

[2] See *Fordham International Law Journal* Vol. 36, No. 5 (July 2013), pages 1151-68.

> admission entails. This agreement is subject to ratification by all Member States and the applicant state.[3]

The same has been said by the President of the European Council, Herman Van Rompuy, in almost identical terms, suggesting that they are singing from the same hymn sheet.[4] Mr Van Rompuy and others also advance a form of moral argument against separation, saying that it goes against the grain of European integration and, on a wider plane, against the inevitability of globalism. The separatist movement in Catalonia has even been described by one Euro-guru as 'irredentist Euro-tribalism'.[5]

Such arguments seem to me to ignore the fact that a more than insignificant number of people support the movements for separation or independence (whichever is the preferred description). Article 2 of the Treaty on European Union ('TEU') affirms the belief that the Union is founded on certain core values, including respect for human dignity, freedom and democracy.[6] If the majority vote for independence, it is difficult to see why those core values should not be respected.

In any event, there is nothing 'tribalist' in the belief (whether it be right or wrong) that small political entities are more in tune with the aspirations of their citizens than large ones. That, after all, is what subsidiarity is supposed to be about - another of the Union's core principles set out in Article 5 TEU.[7]

In short, the moral arguments are ambivalent and it seems more fruitful to focus on the legal issues. Before doing so, however, it is necessary to highlight important differences between the three cases of Scotland, Flanders and Catalonia, where separatist movements are strongest. In each case, there are complex and mutually incompatible arguments at the national level.

SCOTLAND

In the case of Scotland, the Government and the Parliament of the United Kingdom have accepted (not without opposition) that the devolved Government and Parliament of Scotland may call a referendum in 2014 on the issue of Scottish independence and that the result of that referendum will be 'definitive'—that is to say, that the United Kingdom as a whole will accept that, in the event of an affirmative vote, Scotland should become an independent State, separate from the rest of the United Kingdom ('RoUK'). The necessary legislation to give effect to separation would be passed by the United Kingdom Parliament in the same manner as, in 1707, the Parliaments of England and Scotland passed Acts to give effect to the Treaty (or Articles) of Union between the two countries.

---

[3] http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf

[4] The hymn sheet seems to be an unpublished opinion written some time ago (before the Lisbon Treaty came into force) by a former Director of the Legal Service of the Council of Ministers.

[5] Joseph H.H. Weiler, *Catalonian Independence and the European Union*, 23 EJIL Vol.23/4 (2012), page 909 *ff.*

[6] *See* Consolidated Version of the Treaty on European Union art. 2, 2010 O.J. C 83/17 [hereinafter TEU].

[7] *See id.* art. 5(3); David Edward, *Subsidiarity as a Legal Concept*,… in Pascal Cardonnel et al. (eds.) *Constitutionalizing the EU Judicial System: Essays in Honour of Pernilla Lindh* (2012) pages 93-103.

On that basis, the separation of Scotland from RoUK would be brought about by what are agreed to be constitutional means and would, on that basis, be entitled to international recognition.

However, lawyers and politicians differ as to the effect in international law. The government of the United Kingdom, supported by public international lawyers,[8] contends that RoUK would be the 'successor' or 'continuator' State, and that Scotland would be a 'new' State, which would inherit neither the rights nor the obligations of the former State from which it had seceded.[9]

There is statistical support for the view that RoUK would be the successor State. The land area of Scotland as compared with RoUK is about 78,400 as against 165,000 square kilometers (about 50%), while the population is about 5.25 million as against 57.87 million (about 10%). There is thus a considerable difference in population, though less in terms of land area. The centre of government for the United Kingdom is in London which is also the capital of England.

The argument from size and existing geographical distribution of power is not definitive. The United Kingdom is, by its very name and nature, the union of Great Britain and Northern Ireland. Great Britain is the entity created in 1603 by the union of the crowns of England (and Wales) and Scotland and fortified by the Union of the Parliaments in 1707. Article 1 of the Treaty of Union (1706) provided:

> "That the Two Kingdoms of Scotland and England shall upon the 1st May next ensuing the date hereof, and forever after, be United into One Kingdom by the name of GREAT BRITAIN."

Therefore, it can be argued, the separation of Scotland from England and Wales would dissolve the entity known as Great Britain and thus dissolve the essence of the United Kingdom of Great Britain and Northern Ireland. (Incidentally, the words 'and forever after' have not been invoked as excluding separation in the 21st century.)

According to this argument, a continuing union between England, Wales and Northern Ireland (erroneously referred to as RoUK) would be a 'new' State, as would Scotland. Neither could claim to be the successor State, or perhaps both could do so. The result would be akin to the situation that arose on the dissolution of the former Czechoslovakia into two new States, the Czech Republic and Slovakia (the so-called 'velvet divorce'). In that case, both States were recognised as successor States.

There is yet a further argument – that, even if separation were to result in the existence of two States (in the sense understood by international law), the 'United *Kingdom*' would not disappear because Scotland and RoUK would continue to share the same monarch. (A comparable distinction between monarchy and legislature was advanced by some of the American colonists who wished to maintain the link with the British Crown, but disputed the right of the British Parliament to make laws for the self-governing colonies.)[10]

---

[8] Professors James Crawford of Cambridge University and Alan Boyle of Edinburgh University.

[9] *Scotland Analysis : Devolution and the implications of Scottish Independence,* Cm 8554, Chapter 2, http://www.official-documents.gov.uk/document/cm85/8554/8554.pdf.

[10] See Charles H. McIlwain in Pound, McIlwain, Nichols, *Federalism as a Democratic Process* (1942), page 34, and Jack P. Greene, *The Constitutional Origins of the American Revolution* (2011), page 91 ff.

Whichever of these views is correct, the question remains whether it is public international law or EU law that would determine the effect of separation on membership of the EU; and if it is EU law, what that law requires.

FLANDERS

Flanders is part of the Kingdom of Belgium which separated from the Kingdom of the Netherlands in 1830. Belgium consists of three Regions: the Flemish (Dutch-speaking) Region (Flanders); the Walloon (French-speaking) Region (Wallonia); and the multilingual Brussels-Capital Region where most of the EU institutions are based.[11] The German-speaking communities round Eupen, Malmedy and Sankt Vith were administered by Belgium after the First World War and became fully part of Belgium in 1925. They form part of the Walloon Region but constitute a separate linguistic Community.[12]

The Walloon Region has a larger land area than the Flemish Region (11,500 as against 8,000 square kilometers), but the Flemish has the larger population (about 6.25 as against 3.5 million). Brussels-Capital has a population of about 1 million, and the German-speaking Community about 75,000.

Currently, the pressure for separation comes from the people of Flanders, which is economically stronger, the people of Wallonia being by and large content to remain in union with Flanders (and, the Flemish would say, dependent on Flemish subsidy). While it might be possible for Flanders to force separation, Flanders could not be said to 'secede', since the two entities are of roughly comparable size and population and together form the Kingdom of Belgium. Neither Flanders nor Wallonia has previously existed as a State or Kingdom separate from the other.[13]
It would be natural for an outsider to assume that the separation of Flanders and Wallonia would result in the emergence of two new States and that the Kingdom of Belgium would in consequence cease to exist. Some Flemish nationalists argue, however, that this is not their aim, but rather to create a Belgian Confederation of separate States under a single monarch (similar to one version of the Scottish argument).

Whatever the outcome, it can probably be assumed that separation would be achieved by constitutional means and would consequently be entitled to international recognition.

CATALONIA[14]

Having been ruled as an autonomous entity by the Counts of Barcelona, Catalonia became a principality of the Kingdom of Aragon in 1137, which in turn united with the Kingdom of Castile to form the Kingdom of Spain. It enjoyed its own laws, taxes and privileges until they were removed after the War of the Spanish Succession in the

[11] Geographically, the Brussels-Capital Region is an 'island' within the territory of the Flemish Region.
[12] Belgium is a federal State, with powers distributed between the Regions, the linguistic Communities and the federation.
[13] The Prince-Bishopric of Liège was autonomous until it was annexed by Napoleon. The Belgian Province of Luxembourg was part of the Grand Duchy of Luxembourg, of which the King of the Netherlands was Grand Duke, until 1839, when the primarily French-speaking parts were annexed to Belgium under the Treaty of London 1839.
[14] I am grateful to Professor Miquel Strubell i Trueta of the Universitat Oberta de Catalunya for help with this section.

eighteenth century. With the Basque Country and Galicia, Catalonia lost such autonomy as remained at the end of the Spanish Civil War of 1936-39. It has now become an Autonomous Community of the Kingdom of Spain.

Article 2 of the Spanish Constitution of 1978 provides that "The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to self-government of the nationalities and regions of which it is composed, and the solidarity amongst them all."[15]

Catalonia is one of the 'nationalities' so recognised. The Preamble of its Statute of Autonomy of 2006, like the previous Statute of 1979, was drawn up by the Parliament of Catalonia, approved and sanctioned by the Parliament of Spain and ratified by a referendum in Catalonia. The Preamble states that "Reflect[ing] the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality."[16]

The constitutionality of the statement that Catalonia is a 'nation' was contested before the Spanish Constitutional Court (*Tribunal Constitucional*). In its judgment of 28 June 2010, the Court held that:

> "It is indeed possible to speak of nation as a cultural, historic, linguistic, sociological and even religious reality. But the nation of importance here is solely and exclusively the nation in its legal and constitutional sense. And in that specific sense, the Constitution does not recognize anything other than the Spanish Nation, the mention of which opens its preamble, on which the Constitution is based (Article 2 CE) and with which it expressly qualifies the sovereignty that, when exercised by the Spanish people as its sole acknowledged holder (Article 1.2), has been manifested as the wish to constitute the State in the positive provisions of the Spanish Constitution . . . .
> "Under no circumstances can any nationality be claimed other than the one specified in the Constitution proclaimed by the will of that Nation, nor through an ambiguity that is completely irrelevant in the judicial/constitutional context, the only guide that this Court can follow, by referring the term 'nation' to any other subject that is not the people holding that sovereignty."[17]

The government of Spain contends that it would be constitutionally impossible for Catalonia to separate from the Kingdom of Spain. In addition to Article 2 of the Constitution, it relies on Articles 8 and 92.[18]

Catalans who argue for separation maintain that the Constitution of 1978 cannot be set up against Article 1.1 of the International Covenant on Civil and Political Rights

---

[15] C.E., B.O.E. art. 2, Dec. 27, 1978 (Spain).
[16] Statute of Autonomy of Catalonia, Preamble (2006, 6) (Spain).
[17] S.T.C., June 28, 2010 (S.T.C., No. 31, § II ¶ 12) (Spain).
[18] C.E., B.O.E. art. 2, 8(1) Dec. 29, 1978 (Spain). (providing "The mission of the Armed Forces, comprising the Army, the Navy and the Air Force, is to guarantee the sovereignty and independence of Spain and to defend its territorial integrity and the constitutional order"); C.E., B.O.E. art. 92 (1-2), Dec. 29, 1978 (Spain) (Article 92(1) providing "Political decisions of special importance may be submitted to all citizens in a consultative referendum[,]" Article 92(2) providing "The referendum shall be called by the King on the President of the Government's proposal after previous authorization by the Congress[,]" and Article 92(3) providing "An organic act shall lay down the terms and procedures for the different kinds of referendum provided for in this Constitution.").

which was ratified by Spain in 1977: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[19] Some Catalans also argue that Article 95 of the Constitution provides a 'toe in the door'.[20]

On 23 January 2013, the Parliament of Catalonia passed, by a two-thirds majority, a Declaration of Sovereignty and of the Right to Decide of the People of Catalonia.[21] This sets out a number of principles, of which the first is "The people of Catalonia, for reasons of democratic legitimacy, has the character of a sovereign political and juridical subject [of law]". The Spanish government, following an opinion of the Council of State (*Consejo de Estado*),[22] has contested the constitutionality of the Declaration before the Constitutional Court which has provisionally suspended its validity and application.[23] Judge Santiago Vidal of the *Audiencia Provincial de Barcelona* has cited the Advisory Opinion of the International Court of Justice in the *Kosovo Case*,[24] as supporting the lawfulness of the Declaration.[25]

On 11 September 2013, supporters of independence formed a human chain stretching 400 km across the region, following the example of the people of the Baltic Republics n 1989 and 1991. On 12 December 2013, the President of the Generalitat of Catalonia, with the support of parties representing two-thirds of its population, announced the intention to hold a independence referendum on 9 November 2014. This was met by the response from Madrid that "the referendum will not happen" since only the government of Spain can call a referendum.

For present purposes, it would be safer to assume that a unilateral declaration of independence by Catalonia would be declared unconstitutional. In that event, it is not clear by what mechanism, even after a vote in favour of separation in Catalonia, separation could be negotiated at the national level, nor how or when Catalonia could achieve international recognition as a sovereign State.

ANALYSIS

At least three quite different scenarios can therefore be envisaged for purposes of discussion.

In two cases (Scotland and Flanders) we can assume that separation would be accepted as constitutionally admissible under national law. In the other case

---

[19] International Covenant on Civil and Political Rights art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 14668.

[20] C.E., B.O.E. art. 95, Dec. 29, 1978 (Spain) (providing. « 1. The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment. 2. The Government or either House may request the Constitutional Court to declare whether or not such a contradiction exists.").

[21] For the original text, see , and for a translation, see http://www.vilaweb.cat/noticia/4076896/20130124/declaration-of-sovereignty-and-of-the-right-to-decide-of-the-catalan-nation.html.

[22] For the text of the advice and dissenting opinion, see

http://www.aelpa.org/actualidad/201303/ConsejoCatalunya.pdf

[23] http://www.boe.es/boe/dias/2013/05/10/pdfs/BOE-A-2013-4859.pdf.

[24] *See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, 2010 I.C.J. 403, ¶¶ 79, 84 (July 22).

[25] See report of interview with Judge Santiago Vidal and video link at

http://www.directe.cat/noticia/276141/el-jutge-santiago-vidal-mostra-la-clau-de-volta-de-la-independencia-de-catalunya.

(Catalonia) separation would be contested, not simply as unconstitutional but as constitutionally impossible.

The cases of Scotland and Flanders can then be distinguished from each other as far as public international law is concerned. It would be difficult, if not impossible, to identify Flanders or Wallonia as the successor State. In that event, on the analogy of Czechoslovakia, Flanders and Wallonia would each succeed to the international rights and obligations of Belgium.

On the other hand, in the case of the United Kingdom, it is at least arguable that RoUK would be recognised as the successor State and Scotland as a 'new' State. In that event, RoUK would succeed to all the international rights and obligations of the former United Kingdom. Scotland would not do so but would correspondingly be able to choose the treaty obligations by which it would continue to be bound.

It should, however, be kept in mind that there is no doctrine of public international law that *requires* either result. The treatment of 'separating States' is to be deduced from State practice, which is not wholly uniform and may, in contemporary conditions, depend as much on political as on legal considerations.

The issue here is whether and to what extent EU law provides a legal solution to the issue of EU membership, irrespective of the general rules of public international law (whatever they may be).

It can be seen at once that the theory advanced by Presidents Barroso and Van Rompuy ('the Barroso/Van Rompuy theory') cannot provide a sufficient answer. It is suggested that "If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory."[26]

Plainly that could not apply if Flanders and Wallonia were to become separate States and the Kingdom of Belgium ceased to exist. The same would arguably be true if the true effect of separation of Scotland and England were held to be that the United Kingdom ceased to exist.

Three basic points should be made at this stage.

First, it is a general rule of international law that, where States have agreed to regulate their mutual relations by a Treaty, then (in the absence of any peremptory rule of international law[27]) any issue between them is to be resolved by reference to that Treaty. The solution to any problem for which the Treaty does not expressly provide must first be sought within the system of the Treaty.

In that connection, the Vienna Convention on the Law of Treaties provides that

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[28]

---

[26] Barroso Letter, *supra* note 3.

[27] So-called *ius cogens* - see Article 53 of the Vienna Convention on the Law of Treaties (1969).

[28] Vienna Convention, Artiocle 31.1.

Second, it is clear that, in the event of a Yes vote in the Scottish referendum, that vote would not, by itself bring about separation between Scotland and RoUK. The Scottish Government envisages that this would occur on 24 March 2016[29] but that is thought by some to be unduly optimistic having regard to the myriad intra-UK issues that would have to be negotiated and resolved before the moment of separation – notably the issue of Currency Union and continuance of the Common Travel Area.

We are concerned here with what would be a negotiated constitutional outcome and not with anything in the nature of a Unilateral Declaration of Independence. It is indeed questionable whether it is appropriate to use the word 'secession' in this context, which again throws doubt on the applicability in this context of conventional rules of international law including doctrines of state succession.

Third, it follows from the second point that, until the moment of separation (i) the government of the UK would remain the government of Scotland for all reserved matters including relations with the European Union[30] and (ii) *vis-à-vis* the other Member States and the institutions of the EU, the UK would remain the Member State with responsibility for matters affecting Scotland, its territory and its inhabitants, including (and perhaps especially) the dissentient minority who voted No.

It follows, further, that during the period between the vote and the moment of separation, there would be no separate and autonomous entity called 'Scotland' that could enter into negotiations with the EU or the other Member States, nor for that matter, a separate autonomous entity that could do so for the interests exclusively of 'RoUK' and its inhabitants.

The Legal Nature of the EU.

From the beginning, the Treaties have imposed three basic obligations on the Member States, which are now formulated as follows:[31]

- (positively) "to take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties",
- (negatively) "to abstain from any measure which could jeopardise the attainment of the Union's objectives"; and
- "not to submit any dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".

In its judgment in *Van Gend en Loos,*[32] the Court of Justice had to resolve the question whether the EEC Treaty conferred legally enforceable rights on individuals (including companies) as well as the Member States. The Court followed the rule of customary international law, now enshrined in the Vienna Convention (quoted above), and considered "the spirit, the general scheme and the wording" of the Treaty. Under the first head, the Court considered the objective of the Treaty and concluded that:

---

[29] See the White Paper *Scotland's Future*, page 51.

[30] Scotland Act 1998, Schedule 5, Part I, paragraph 7(1).

[31] Now set out in Article 4.3 of the Treaty on European Union (TEU) and Article 344 of the Treaty on the Functioning of the European Union (TFEU).

[32] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration,* [1963] E.C.R. 1

> "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community." [33]

Thus, while the EU is certainly a creature of public international law, the Treaties create a "new legal order" of international law" which differs from conventional international law in that its subjects are not only the Member States, but also their nationals (now also citizens[34]). The autonomy of the EU legal order has repeatedly been affirmed by the Court of Justice.[35]

The relationship between a Member State, the EU institutions and the other Member States is governed by the Treaties. So, the solution to any problem for which the Treaties do not expressly provide must be sought first within the system of the Treaties, including their spirit and general scheme.

The EU Treaties, as amended by the Treaty of Lisbon—the Treaty on European Union ('TEU') and the Treaty on the Functioning of the European Union ('TFEU')—contain no provision dealing with the case of separation of a Member State. So we must look to the spirit and general scheme of the Treaties to see whether they provide an answer.

A few additional citations will suffice.

Article 2 TEU (already cited in part) provides (emphasis added):

> "The Union is founded on the values of respect for human dignity, freedom, *democracy*, equality, the rule of law and respect for human rights, including *the rights of persons belonging to minorities*. These values are common to the Member States in a society in which pluralism, *non-discrimination*, tolerance, justice, *solidarity* and equality between women and men prevail."[36]

Article 4 TEU provides (emphasis added):

> "2. *The Union shall respect* the equality of Member States before the Treaties as well as their national identities, *inherent in their fundamental structures, political and constitutional*, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

---

[33] ***Van Gend en Loos,*** **fourth paragraph under head** II(B).
[34] TFEU Article 20
[35] See, for a recent example, Joined Cases C-402/05P & C-415/05P, *Kadi v. Council of the European Union,* [2008], E.C.R. 1225, §§ 21-25.
[36] TEU, *supra* note 7, art. 2.

> "3. Pursuant to the *principle of sincere cooperation*, the Union and the Member States shall, *in full mutual respect*, assist each other in carrying out tasks which flow from the Treaties."[37]

Article 20 TFEU establishes citizenship of the Union which, in the words of the Court of Justice, is "destined to be the fundamental status of nationals of the Member States".[38]:

> "1. … Every person holding the nationality of a Member State shall be a citizen of the Union . . . .
>
> "2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
> (a) the right to move and reside freely within the territory of the Member States . . . ."

Article 50 TEU provides for the case of a Member State's withdrawal from the EU (a situation for which the Treaties did not previously provide):

> "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> "2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
>
> "3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."[39]

The Treaties also contain highly detailed provisions for free movement of goods, persons, services and capital, which have resulted over time in a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations. These relationships, liabilities and obligations are multilateral and, in general, reciprocal. The nationals of each Member State have acquired rights of citizenship and free movement *vis-à-vis* all the others - their territory, their institutions, their economic structures and their people. They include (to take only four out of hundreds of possible examples) investors in the corporate sector, Erasmus and other students, migrant workers, and fishermen operating in the waters of other Member States.

The reason why the Treaties provide for an extended period of negotiation before withdrawal takes effect is precisely in order to overcome the difficulties inherent in unraveling that skein of relationships in the event of withdrawal of a Member State.

---

[37] TEU, *supra* note 7, art. 4.

[38] See Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I- 6193 at paragraph 31.

[39] TEU, *supra* note 7, art. 50.

The question of Treaty interpretation that arises here is whether the same would apply to the far less drastic situation where an existing Member State separates into two parts and both parts wish to continue membership? Do the spirit and scheme of the Treaties really offer no solution, so that we have to resort to conventional public international law as the Barroso/Van Rompuy theory suggests?

Application of EU law to the case of separation

It is useful to begin by considering the legal and practical implications of the Barroso/Van Rompuy theory.

First, at the level of principle, the theory seems to assume that - contrary to the principles asserted in Articles 2 and 4 TEU (as well as the Preamble of the Treaty) - EU law does not recognise the democratic right of the inhabitants of one part of a Member State to dissolve their constitutional union with those of the other part(s) unless they are prepared to accept *automatic* loss of the rights they have acquired as citizens of the EU.

Second, the theory seems to assume that—at the moment of separation or on some other unspecified date—the 'separating State', its citizens and its land and sea area would find themselves in some form of legal limbo *vis-à-vis* the rest of the EU and its citizens, unless and until a new Accession Treaty were negotiated. Until the moment of separation, they would remain an integral part of the EU; all EU citizens living in the separating State 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 that State. Then, at the midnight hour, all these relationships would come abruptly to an end.

The logical consequence in law would be that, from that moment, the *acquis communautaire* would no longer, as such, be part of the law of the separating State. The State would cease, for example, to be constrained by the Treaty rules in relation to the rates of VAT and corporation tax. Erasmus students studying there would become 'foreign students' without rights. Migrant workers would lose their rights under EU law to social security. And the whole land and sea territory of the separating State would cease to be within the jurisdiction of the EU. (In the case of Scotland, which probably has the largest sea area in the EU, that is an important security consideration quite apart from other considerations.)

Third—apparently—there would be no legal obligation upon the State concerned, the EU institutions or the other Member States to enter into any negotiations before separation took effect in order to avoid such a remarkable, and potentially uncontrollable, situation coming to pass. (It is significant that, in another context, the Vienna Convention provides expressly for a situation where interpretation of a treaty according to the normal rules "leads to a result which is manifestly absurd or unreasonable".[40])

On closer examination, it can be seen that the Barroso/Van Rompuy theory is workable only in a situation, like Scotland and RoUK, where one entity is significantly larger than the other, and it can plausibly be suggested that one of them is the successor State and the other the 'seceding' or separating State. In the case of

[40] Vienna Convention, Article 32.

Flanders and Wallonia (assuming the extinction of the Kingdom of Belgium), the logic of the theory suggests that both would have to be classified as 'new' States, so that the political institutions of the EU (including Mr Barroso's and Mr Van Rompuy's own offices) would find themselves in a 'third country'!

It might be suggested that this would produce such 'absurd and unreasonable' results that the EU would accept both Flanders and Wallonia as successor States which would then be entitled automatically to the status of Member States in their own right. The case of Scotland and RoUK would, by contrast, be treated according to the Barroso/Van Rompuy theory. That might be a political solution, but hardly adequate as a legal one, nor for that matter consistent with the fundamental principle of non-discrimination.

Moreover, such a solution would ignore the necessity to settle matters such as the number of members of the European Parliament and the contribution to the EU budget to mention only two. On these and other issues, there would be scope for substantial disagreement, not only between Flanders and Wallonia, but also between them and the other Member States. In short, even in that case, pre-separation negotiation would be essential.

Looking to the presumed intention of the Treaty-makers, can they reasonably be supposed to have intended that there must be prior negotiation in the case of withdrawal but none in the case of separation? Can they really have intended the paradoxical legal consequences of automatic exclusion or, at a more practical level, that the complex skein of relationships, liabilities and obligations created by EU law should be allowed to unravel without measures being taken to prevent it?

The answer, surely, is No. In order to avoid the disruption that would otherwise ensue, negotiation would be necessary *before* separation took place—precisely as the Treaty requires in the case of withdrawal.

The purpose of pre-separation negotiation would be to agree the necessary amendments to the existing Treaties to accommodate the new situation and not, as Barroso and Van Rompuy suggest, one or more Accession Treaties. Accession Treaties are huge documents covering all the points that are necessary, amongst many other things, to bring the law of the acceding State into line with the *acquis communautaire*. In the case of separation of an existing Member State, already compliant with the *acquis,* this would not be necessary.

It may be objected that negotiations might fail and that Treaty amendment would in any event require ratification by the Member States. But the fact that the outcome of negotiations cannot be predicted does not alter the obligation of all parties, *including the Member State in the process of separation*, to negotiate in good faith and in accordance with principles of sincere cooperation, full mutual respect and solidarity. Maintaining the territorial and political integrity of the EU and the vested rights of its citizens is surely of greater importance than blind acceptance of doctrines of public international law whose application is in any event open to question.

That is as far as the Treaties can take us, but it is at least a solution more rational and consistent with the spirit of the Treaties than the Barroso/Van Rompuy theory. (It does not resolve the case of Catalonia since, as noted above, it is to be assumed that Spain would regard the separation of Catalonia as constitutionally impossible. Even in that case, however, it is difficult to see how an acceptable solution could be

found without negotiation in which the EU might reasonably claim to have a part to play.)

The existence of an obligation to negotiate does not, of course, imply anything as to the outcome of those negotiations, except that their purpose would be to avoid the consequences of the Barroso/Van Rompuy theory. There would not be a 'seamless transition' for Scotland, but there might not be a seamless transition for RoUK either. To mention only one thorny problem, there would be the matter of the budget rebate which other Member States might well wish to reopen.

For that reason, it is important to keep in mind that, as already noted, it would be the government of the United Kingdom (as existing) that would be responsible for negotiating on behalf of the whole UK and all its inhabitants, including all the inhabitants of Scotland whether they voted Yes or No, as well as the inhabitants of England, Wales and Northern Ireland. To arrive at a satisfactory negotiating position for the UK to adopt in the EU negotiations would clearly require complex and difficult internal negotiations.

The necessary sequence of negotiations within the UK, and between the UK and the rest of the EU, can perhaps be illustrated by reference to the question whether (as is sometimes suggested) an independent Scotland would be obliged to join Schengen and adopt the Euro. The legal basis for that suggestion is questionable. But, as a practical matter, it would clearly be necessary first to determine whether (as the Scottish Government claims) Scotland could remain part of a Currency Union with RoUK and part of the Common Travel Area with RoUK and Ireland. The other Member States could reasonably refuse to discuss the matter until that question had been resolved.

If internal agreement on either or both of these points were achieved (a big 'if', at least as regards a Currency Union), it is not credible that the other Member States and the EU institutions would refuse to accept that solution and insist on Scotland joining Schengen and/or adopting the Euro, even if they could do so as a matter of EU law. On the other hand, if the intra-UK negotiations were to fail, then Scotland would (or at any rate might) have to look for refuge in Schengen or the Euro.

That illustrates the high degree of uncertainty that remains, even if, as argued here, there is a duty to negotiate in good faith to achieve a rational and acceptable solution. Indeed, as far as EU law is concerned, the only certainty (apart from the obligation to negotiate) is uncertainty. But that, at least, the people are entitled to know.

Finally, the question has been raised whether the issue of continued membership of the EU could be brought before the European Court of Justice before the moment of separation. This could not be done before the Referendum and thereafter only if the vote were in favour of independence, since the question would until then be purely hypothetical.

But if the answer were Yes, then it is possible to envisage that an individual or company could raise a declaratory action seeking to ascertain the extent of his, her or its continuing rights and obligations after the moment of independence. A national judge faced with that issue could refer the question to the Court of Justice, and it is at least possible that the Court would accept the reference and answer the question. But even that remains uncertain!

9 January 2014

WRITTEN EVIDENCE FROM PROFESSOR KENNETH ARMSTRONG, DIRECTOR, CENTRE FOR EUROPEAN LEGAL STUDIES, FACULTY OF LAW, UNIVERSITY OF CAMBRIDGE

Summary

1. In its White Paper on Scottish independence, the Scottish Government makes the case for the use of Article 48 TEU as a legal basis for an independent Scotland to assume obligations and exercise rights as a Member State of the European Union (EU). In so doing, it rejects the use of the normal Article 49 TEU accession process. The Scottish Government's aim is to seek continuity in the application of EU law in Scotland and to achieve synchronicity between secession from the United Kingdom and accession to the EU.

2. The analysis presented here suggests that the scope of application of Article 48 TEU is limited to amending the treaties as they apply to existing Member States and cannot plausibly be used to provide the basis for an independent Scotland assuming responsibilities as a Member State of the European Union.

3. Even were it possible to resort to Article 48 TEU, when the political and procedural limits of Articles 48 and 49 TEU are compared, there is no significant advantage in seeking to resort to Article 48 TEU. Indeed, in key respects, the political and legal risks are heightened if Article 48 TEU is used, not least because opening up a treaty reform process encourages issue-linkage between Scottish membership of the EU and the political interests of other EU states including what will remain of the UK.

4. In respect of the timetable and mechanism for negotiating and concluding agreement on Scottish EU membership, the White Paper is long on aspiration and short on specification. While an 18 month period to secure EU membership is not wholly implausible for the conduct of negotiations, the ratification process in all the Member States – including the UK itself – is not in the control of the Scottish Government. Moreover, if the Article 48 TEU process is used, the Scottish Government will also be reliant on the UK government to pilot treaty revisions. Therefore, the desired synchronicity between independence from the UK and membership of the EU seems ambitious if not simply wishful thinking.

5. Whichever of the two procedures is used, there is a not inconsiderable risk of a legal hiatus between independence and EU membership. The White Paper fails to spell out how that risk might be handled and what strategies might be used to manage that risk.

6. The internal constitutional logic of a referendum on independence as an expression of democratic self-government has not been extended to the issue of whether Scotland ought to seek membership of the EU. Moreover, the logic of the internal constitutional process is that the *quid pro quo* for the rest of the UK's acquiescence with the result of the referendum is that the UK otherwise has continuity in its internal and external relationships. That leaves open, rather than resolves, the issue of the means or mechanism by which an independent Scotland might achieve continuity in its relationship with the EU.

The Choice of Legal Basis: a Legal Analysis

7. The White Paper on *Scotland's Future* and the supplementary document on *Scotland in the European Union* sets out the Scottish Government's position that an independent Scotland ought to, and would, become a Member State of the European Union (EU) and that this can be achieved in synchronicity with secession from the United Kingdom through a revision to the existing treaties. In so doing, it explicitly rejects the argument – and the position which has been expressed by the European Commission President José Manuel Barroso – that secession would result in the inapplicability of the EU treaties to Scotland unless and until an independent Scotland sought accession to the EU through the normal accession process.

8. This relatively simple statement of the main lines of argument translates into a more technical legal argument about the relative uses of Articles 48 and 49 of the Treaty on European Union (TEU) as a legal basis through which to facilitate Scottish membership of the EU. The analysis below explores the debates around these two provisions. As there is no direct precedent for the situation under discussion, the issue turns on which legal arguments are more or less plausible based upon the functional qualities of the two provisions as well as their procedural and political implications.

9. The normal mechanism by which a state seeks to undertake the obligations and exercise the rights of EU membership is through the accession process. The legal basis for this process is now to be found in Article 49 TEU. It is a process instigated by the candidate state with the accession process then following the procedure laid down in that article. It constitutes the *lex specialis* in respect of an entity voluntarily taking on the obligations arising from the EU treaties and the law made under the treaties.

10. The White Paper suggests an alternative legal basis for Scotland's membership of the EU in the form of Article 48 TEU. This is the provision by which the existing Member States alter the EU treaties to which they are already signatories as Member States of the EU. This provision has never been used as a basis for extending the rights, duties and obligations created by the treaties to an entity seeking to become a Member State. At the core of the claim to use Article 48 TEU is the idea that the treaties currently apply to the territory and institutions that would form an independent Scotland. For this reason, it is argued that an independent Scotland ought not to follow an accession process under Article 49 TEU but instead that the geographical scope of application of the existing treaties should continue to apply to Scotland through a renegotiation of the treaties under Article 48 TEU.

11. As the European Court of Justice has made clear on numerous occasions, the choice of legal basis of an EU act must be based on objective factors susceptible to judicial review. That requires there to be a connection between the functional properties of the act and the substantive objective of the legal basis. Conversely, the choice of legal basis may not depend solely on the conviction of a state or an EU institution as to the objective which the act pursues. Therefore, it is not enough that a state might prefer one legal basis over another. Rather there must

be a genuine and objective connection between the purpose of the legal basis and that of the act adopted.

12. Applied to the context of an independent Scotland seeking membership of the Union, the argument for the use of Article 49 TEU would seem substantially more legally plausible than resort to Article 48 TEU for three main reasons.

13. Firstly, the objective which is pursued by Article 49 TEU is to allow for verification that the applicant state can fulfil its obligations arising under EU law. Of course, it is the case that as a constituent territory of an EU state, and a territory with its own legal and devolved political system, EU law currently has application in Scotland and its institutional structures play a role in the implementation of EU law. However, on the policymaking side, certain important policy fields are reserved to the UK government but which are coordinated at EU-level. An independent Scotland would be assuming new domestic policy responsibilities – after all, that is part of the case for independence – in areas within the scope of application of the treaties. It is, therefore, appropriate that other EU Member States and institutions have the opportunity to assess how an independent Scotland would, institutionally and politically, exercise its domestic competences in their European context, including those competences which were hitherto reserved to Westminster.

14. Secondly, the Article 48 TEU procedure is a means for altering the legal relationship between existing Member States. Whatever may be the territorial scope of application of the resulting agreements, they are agreements between 'Member States'. Agreements reached between Member States and non-Member States are regulated elsewhere in the treaty, whether through the accession process under Article 49 TEU or the conclusion of international agreements in terms of Article 218 TFEU. In this way, the personal scope of application of Article 48 TEU would appear to exclude its application to any negotiated agreement between Member States and a non-Member State.

15. Existing Member States may wish to alter the territorial scope of application of the treaties via Article 48 TEU. For example, the pre-Lisbon equivalent of Article 48 TEU (Article 236 EEC Treaty) was used by the Member States to alter the territorial scope of application of the treaties to deal with Greenland's changed relationship with Denmark and the European Communities. Although in fact no formal treaty revision process was triggered, a formal revision to the treaties might have been undertaken to deal with German unification.

16. However, what both the Greenland and German unification situations highlight is actually the limited scope of application of Article 48 TEU to manage the territorial scope of application of the treaties in respect of existing Member States. In neither circumstance was a new entity created with obligations as a new Member State of the EU. There is a world of a difference between, on the one hand, a treaty ceasing to apply to a territory (Greenland) or extending to a territory within the responsibility of an existing Member State (Germany) and, on the other hand, the application of a treaty to a new legal entity which seeks to undertake and independently exercise the obligations and rights of EU membership.

17. As highlighted above, the existing Member States have every reason to seek to verify that a new entity meets the normative requirements of membership; has the capacity and means to fulfil its obligations; and that membership will not be to the detriment of its own national interests. The Article 49 TEU accession process is designed for that purpose. All of which reinforces that Article 48 TEU is a means for changing the treaties between existing Member States and is not itself a mechanism through which a state can become a Member State.

18. Thirdly, any analysis of Articles 48 and 49 TEU has to give due regard to Article 50 TEU which now contains the 'withdrawal clause'. Introduced by the Lisbon Treaty, there is a mechanism and procedure for an existing EU state to withdraw from the EU and to cease fulfilment of its obligations. The drafters of the treaty envisaged that a state that had exercised the right to withdraw might later seek to rejoin the EU. In such a case, Article 50(5) TEU is explicit that the state in question must follow the procedure laid down in Article 49 TEU, presumably to allow for verification that the state is, at the time of accession, capable of properly assuming the rights and obligations of EU membership. It is, therefore, arguable that the same rationale would hold true in the case of a territory seceding from an existing Member State and seeking to exercise the rights and obligations of EU membership on its own account.

19. For the reasons given above, it can be said that Article 49 TEU is the *lex specialis* for an agreement that would extend the obligations and rights of EU membership to a new Member State and that Article 48 TEU would be an inappropriate legal basis through which to secure Scotland's membership of the EU.

<u>The Procedural, Political and Legal Risks of Using Article 48 TEU</u>

20. It should be stated clearly at the outset that regardless of whether an Article 48 TEU treaty amendment or an Article 49 TEU accession process is initiated, both procedures entail the same fundamental risks. Both procedures require the unanimous consent of European governments for the treaty amendment or the treaty to be concluded. That gives each national government a potential veto. Further, a treaty amendment or an accession treaty requires ratification once it is completed. Failure by a state to ratify would prevent the entry into force of the treaty amendment or the accession treaty. Neither of these risks should be ignored.

21. If it were to be accepted that Article 48 TEU could provide a legal basis for Scotland's membership of the European Union, there is an important procedural difference between the treaty revision process under Article 48 TEU and the accession process under Article 49 TEU. As the treaty makes clear, what initiates the Article 49 TEU process is a request from the state wishing to join the European Union. To this extent, it is the acceding state which begins the accession process. A revision to the treaties under Article 48 TEU, by contrast, can only be initiated by an existing Member State, the European Commission or the European Parliament.

22. If the Article 48 TEU route were to be favoured by the Scottish Government, it would be wholly reliant on the initiative of other Member States or other EU institutions to instigate and manage the proposed treaty revision. It would seem that the Scottish Government would look to the United Kingdom government to pilot this process on its behalf. It is a central tenet of the case for independence that an independent Scotland would no longer have its position in the EU mediated through another party. Paradoxically, adopting the Article 48 TEU route rather than the Article 49 TEU route would deprive an independent Scotland of the autonomy to make the request to join the EU on its own initiative.

23. Moreover, if the Article 48 TEU route is taken significant problems and political risks emerge that might be avoided were the normal accession process to be utilised.

24. Firstly, it would seem that any opening of the treaty revision process would have to be negotiated and handled by the UK government as a Member State of the EU. To the extent that the Scottish negotiating team – however that might be composed – was involved, it would likely be in a similar manner to that in which Scottish ministers are consulted under existing arrangements for the formation of a UK position on European matters. It is precisely these arrangements that the White Paper derides and dismisses. Any alternative arrangement would itself have to be negotiated with the United Kingdom prior to any request to initiate the treaty revision process. It is unclear whether the UK General election in 2015 would affect the timing and outcome of such a negotiation. If instead, an independent Scotland sought admission to the EU through the Article 49 TEU process, the request would be initiated by Scotland and negotiated by a Scottish negotiating team.

25. Secondly, opening up a treaty revision process creates an enormous risk of the process becoming bogged down in unrelated attempts to revise the treaties. The clearest and most obvious risk arises from the Scottish Government's dependence on the UK Government to initiate the treaty revision process. As is clear to every observer of contemporary British politics, the issue of Europe and the UK's relationship with the EU is growing in political saliency. Within the Conservative Party, there is unprecedented pressure building for a renegotiation of the treaties, with a consequential referendum to settle the issue of continuing UK membership of the EU. It is hardly conceivable that a Conservative Prime Minister would simply open up a treaty revision process on behalf of the Scottish Government and fail to respond to the demands within his own party to seek a more widespread renegotiation of the treaties. It may even be the case that a treaty revision ostensibly to manage Scotland's membership of the EU could act as a Trojan horse through which the UK might obtain the opening of a treaty revision process that it might otherwise struggle to achieve. In this way, UK acquiescence in a Scottish request for a revision to the treaties under Article 48 TEU creates a very significant risk of issue-linkage between the constitutional position of Scotland in the EU and that of the UK in the EU that could cause significant delay and damage to the negotiation process. If that were to occur there is every reason to believe that, at best, the negotiating process at EU level would be lengthened, and at worst, the process could become intractable leading to failure. Even if a Prime Minister did manage to force through a single-

issue treaty revision, it may well be that the ratification process within the UK parliament might punish a Prime Minister that did not meet the aspirations of some of his own MPs for a more wide-ranging treaty revision.

26. Alternatively, it may be that other EU states will wish to instigate a treaty revision process to deepen economic and monetary union (EMU). Nonetheless, Member States may not wish to enlarge the focus of an EMU-oriented treaty amendment for fear that it might imperil the timely conclusion of treaty amendments. Moreover, it might prove difficult to resist pressures from the UK for a wider treaty revision process if an EMU-oriented treaty reform became linked to Scottish membership of the EU. Indeed, it would be highly problematic if EU Member States were seen to be responsive to one set of constitutional issues arising from the UK (Scotland's EU ambitions) while ignoring other, perhaps less convenient, claims from a UK government representing a much more sizeable proportion of the UK population.

27. Thirdly, in procedural terms a decision of the European Council would be necessary to instigate a revision of the treaties. The voting threshold is only a simple majority rather than unanimity and in that way, it might be possible to persuade a sufficient number of Member States to back a treaty revision. However, if we assume that, for its own domestic reasons, a Spanish government was not minded to support Scotland's membership of the EU, even without being able to exercise a veto at the point at which the European Council decided to open an Article 48 TEU treaty revision process, it might, nonetheless choose to litigate under Article 263 TFEU. That is to say, and for the reasons set out above in respect of the legality of Article 48 TEU as a legal basis, Spain might choose to bring legal proceedings before the European Court of Justice challenging a European Council Decision to open up the Article 48 TEU process, arguing that the incorrect legal basis had been selected through which to secure Scottish membership of the EU. That would give the Court of Justice the opportunity to clarify the legality of the use of Article 48 TEU. It would also introduce uncertainty and delay pending its decision. It is difficult to state in advance how quickly the Court of Justice might deal with such a legal challenge. A broad analogy might be the recent judgment of the Court in the *Pringle* case where a challenge was brought in the Irish courts, *inter alia*, to the legality of the treaty amendment to make provision for the European Stability Mechanism. Judgment by the Court of Justice was given in under five months from the referral from the Irish Supreme Court using an accelerated procedure. There is, in terms of Article 133 of the rules of procedure of the Court of Justice, the capacity for an expedited procedure also to be applied to a direct action under Article 263 TFEU. If a request for an expedited procedure was accepted, judgment within six months would be conceivable. Nonetheless, much depends upon how the urgency of the issue would be viewed by the Court.

<u>The Envisaged Timetable for EU Membership</u>

28. One of the central weaknesses of the White Paper is its simple unwillingness to canvass, let alone examine, the potential risks to achieving a timely Scottish membership of the EU. In a document that is long on aspiration and short on specification, there is a carelessness with which these risks are simply ignored

with a consequential lack of candour and clarity as to how such risks might be managed. Substantively, negotiations will have to tackle the issues of the Euro, Schengen and the range of opt-outs and opt-ins that the UK currently has obtained in the area of justice and home affairs. These create potential sticking points in the negotiations and with the straightjacket of a self-imposed timetable for completing negotiations, there might well be a danger that a Scottish Government will be forced to make concessions that it might otherwise have sought to avoid.

29. The aspiration set out in the White Paper is that Scotland's membership of the EU would be negotiated in parallel with internal negotiations on secession from the Union. The White Paper suggests that the terms of Scottish EU membership and 'all the necessary processes' could be completed within the 18 month period following a referendum. However, the supporting document on *Scotland in the European Union* only refers to the terms of membership being settled within this period. The point is crucial. If the goal is simply to conclude negotiations on the terms of membership within 18 months (in parallel with the internal negotiations on separation), then Scotland would not become a Member State of the EU on the same date as independence because the resulting treaty amendment would require ratification in all the EU Member States including the United Kingdom.

30. An ambition both to conclude negotiations and secure ratification of a treaty amendment within 18 months is not wholly implausible were the process to run smoothly and without encountering obstacles. But for the reasons given previously, any decision to seek membership through an Article 48 TEU amendment significantly increases the risks of delay or even failure in the negotiation process. Moreover, if the opening of the treaty revision process results in a more wide-ranging amendment to the treaties, taking in issues that go further than Scottish membership of the EU, there is a heightened risk that the resulting treaty might attract a referendum in one or more Member States with consequential risks of delay and failure. By contrast, as the recent accession of Croatia illustrates, ratification of an accession treaty will normally be conducted through parliamentary processes.

31. Considering the Article 48 TEU process itself, with the changes made by the Lisbon Treaty, there is now a more elaborate, and potentially lengthier, process that precedes the conclusion and ratification of a treaty amendment. The ordinary revision process entails the convening of a Convention to consider the proposed amendments, followed by an intergovernmental conference to adopt the amendments. This will undoubtedly lengthen the procedure and introduce a wider range of veto players than just the national governments. The Convention can be dispensed with but it requires the consent of the European Parliament. There has been no suggestion that the simplified revision procedure introduced by the Lisbon Treaty could be used given the nature of what would be proposed. Even if the revision process could be confined to the single issue of extending the application of the treaties to an independent Scotland, when we consider the procedure now laid down in Article 48 TEU together with the need for ratification among what is now 28 Member States, the self-selected timetable of the Scottish Government begins to look ambitious if not simply wishful thinking.

The Article 49 TEU Accession Process

32. The White Paper rejects the use of the Article 49 TEU accession process on the assumption that it (a) require Scotland to 'leave' the EU and (b) join a queue of applicant states waiting to join. As Scotland is not itself a Member State of the EU, it would clearly not be leaving the EU. However, as it is the United Kingdom which is a Member State of the EU, and as Scotland would be leaving the United Kingdom, as of the date of independence, the treaties would no longer apply to an independent Scotland.

33. It is unclear on what basis it is asserted that an independent Scotland would be forced to join the back of a queue of candidate states. The issue is more directly one of the readiness of an applicant state to assume the obligations of EU membership. As is clear from the accession of those countries that were previously affiliated to the European Free Trade Association (EFTA) and through EFTA were members of the European Economic Area (EEA), long-standing familiarity with the structures and processes of European cooperation facilitate an expedited accession process under what is now Article 49 TEU. Considering the enlargement of the EU to fifteen Member States when Austria, Sweden and Finland joined the EU, the accession treaty negotiations lasted just over a year and the accession treaty was ratified and came into force some six months later. Given Scotland's experience of EU membership derived from being a constituent part of an existing Member State, there are good grounds for believing that substantive negotiations on the terms of its membership could be undertaken relatively quickly.

34. It also seems clear that negotiation in advance of independence is in no way limited to the Article 48 TEU process. It is disingenuous to give the impression that were an accession process under Article 49 TEU to be pursued that no negotiations could take place until after independence. While formally Article 49 TEU sets out the mechanism and process for accession, there is no reason why substantive negotiations could not take place informally in advance of a formal act being adopted under Article 49 TEU. The obvious analogy is the EU's own ordinary legislative process. The practice of co-legislating bears very little resemblance to the procedural steps set out in the treaty. There is an active process of informal negotiation and 'trialogues' between the institutions all of which aim to achieve consensus, with the formal legislative process subsequently adopting the texts which have been negotiated. In other words, that the treaty lays down a sequenced process of steps for formal accession to the EU does not mean that negotiations could not be conducted or even concluded in the same way as is envisaged in the White Paper using the Article 48 TEU mechanism. That said, there would need to be a willingness by all parties to engage in such informal negotiations in advance of independence and it might be the case that political pressures might prevent such negotiations commencing until after independence.

35. Even if substantive negotiations are undertaken in advance of accession, an accession treaty could only be signed once Scotland became independent. The treaty itself would require ratification before it entered into force thus delaying Scotland's membership of the EU. If we consider the most recent accession –

Croatia – the final ratification took place 18 months after the accession treaty was agreed. However, if we look again at the more relevant enlargement of the EU12 to EU15, ratification took place within 6 months of the agreement of the accession treaty.

36. While the hiatus in legal obligations which would be associated with an accession process may inspire the search for an alternative legal strategy, for the reasons given above, there is simply no guarantee that even if a treaty revision process under Article 48 TEU could be used, that it would be conducted, concluded and ratified by the date selected for Scottish independence from the UK. Moreover, the mere inconvenience of an accession procedure does not itself transform Article 48 TEU into the correct legal basis for Scotland's membership of the EU.

Avoiding a Hiatus in Scotland's Relationship with the EU

37. If there is a risk of an interruption in legal relationships whichever route is taken, then some thought ought to be given as to how this might be minimised.

38. Taking the example of an accession treaty, there is an inevitable legal gap between its conclusion and its entry into force after ratification by all Member States. In the case of Scotland, it would not be possible to conclude the accession treaty until Scotland became independent. The ratification process would then take place. The gap need not be a long one as intimated earlier, albeit that in the context of a modern EU of 28 Member States, expedited completion of the ratification process may have become more difficult.

39. It is, however, conceivable that core substantive aspects of the accession treaty could be agreed as having provisional effect pending formal ratification. This could be written into the treaty itself and include important aspects of EU law relating to the Single Market. While there is no direct precedent for this in the context of accession – Austria, Sweden and Finland had the continuing benefit of their EFTA membership of the EEA pending their formal EU accession – it is far from being an implausible legal strategy to avoid certain disruptions in Scotland-EU relations. Moreover, there is specific provision in Article 218 (5) TFEU for international agreements between the EU and third counties or international organisations to have provisional application pending the entry into force of the agreement.[41] By analogy this might also apply in an accession context.

A Referendum on Scottish Membership of the EU?

40. The White Paper simply asserts that membership of the EU is in an independent Scotland's best interests. Whereas Scotland's relationship with the UK is to be the matter of a referendum, no equivalent referendum is proposed or suggested in respect of Scotland's membership of the EU. The White Paper instead assumes a coincidence in political preferences between rejection of the Union with the United Kingdom and a wish to become a constituent Member State of the European Union. Given that other smaller European states have held

[41] I am grateful to Professor Marise Cremona, European University institute for drawing this to my attention

referendums on EU membership and given that these have led, for example in Norway and Switzerland, to a rejection of membership, it ought not to be assumed that the Scottish electorate would favour EU membership particularly if alternative relationships with the EU were canvassed.

41. Switzerland manages its relationship with the EU through a series of bilateral agreements whereas Norway's relationship with the EU is mediated in large part through its membership of the European Free Trade Agreement. In short, a range of legal relationships have emerged to manage the relationship between the EU and its neighbourhood European non-Member States. European integration takes multiple legal forms and while it has a particular and intense legal character in the context of the European Union, European integration since the 1950s has taken on a variety of legal forms, with a tendency towards differentiated legal approaches. The European dimension of the White Paper is, therefore, rather one dimensional. It lies in associating continuity of the United Kingdom with anti-Europeanism, with a consequential linkage of secession with pro-Europeanism manifested only through membership of the European Union. While this may reflect certain, even dominant, political narratives of the relationship between nationhood and European integration, it is evident that there are counter-narratives and alternative legal arrangements.

42. Had the question of Scottish membership of the EU been put in parallel with the question on independence, and if both were answered in the affirmative, then the argument for EU institutions and Member States to engage constructively in dialogue with the Scottish Government to prepare the way for Scotland's EU membership would be that much stronger.

43. Moreover, if the Scottish electorate rejected independence but voted for EU membership this might go some way towards changing the nature of political discourse within the UK concerning the future of the UK in the EU. The White Paper seeks to bolster the case for independence on the back of a fear that a popular vote in the UK might reject EU membership. Nonetheless, that a constituent nation of the UK had voiced its desire to remain part of the European Union could not simply be ignored by the rest of the United Kingdom without further threatening the constitutional unity of the UK itself. This might, helpfully, draw attention to the related internal and external constitutional dynamics at play.

44. As it now stands, it would seem paradoxical that the only potentially foreseeable way in which the Scottish electorate would have a direct and specific say on membership of the EU would be if Scotland remains part of the United Kingdom and if a referendum is held following the next Westminster elections.

<u>Constitutional Processes in the UK</u>

45. Much is made in the White Paper of the fidelity of the UK constitutional process for Scottish independence with the values of the EU as expressed in Article 2 TEU, in particular, the democratic principle. It is, of course, true, that the electorate in Scotland will vote in a referendum on independence and the result of that vote will be respected by the United Kingdom government. The

constitutional and democratic nature of the internal constitutional process justifies external international recognition of the new legal entity.[42] However, that does not in itself determine the precise manner in which that entity becomes a Member State of the European Union. Indeed, the internal constitutional process neither implies nor dictates that an Article 48 TEU process would be appropriate as the White Paper tends to suggest. Rather, the *quid pro quo* for UK acquiescence with the result of the referendum is necessarily that what will remain of the UK will enjoy continuity in its legal relationships both internally and externally. In other words, it is inherent in the domestic constitutional process that Scotland will secede from the UK rather than each constituent nation of the Union voluntarily dissolving the union in a manner which might justify each component entity severally enjoying continuity in their international obligations. That leaves open rather than resolves the issue of the means by which a new legal entity, recognised in international law, assumes the obligations and exercises the rights associated with membership of an international organisation like the EU.

46. It is also worth considering more specifically the UK constitutional process which would give effect either to an accession treaty or a treaty amendment. Accession treaties and treaty amendments require to be ratified in accordance with the constitutional traditions of Member States. Whichever legal route is taken, the resulting legal act will require to be ratified in the United Kingdom.

47. In considering the UK's constitutional process for treaty ratification, the effect of the European Union Act 2011 must be taken into account. The Act was designed to trigger a domestic referendum in respect of certain forms of treaties and treaty amendment. A treaty that provides for the accession of a new Member State does not of itself trigger the requirement to hold a referendum (see section 4(4)(c) European Union Act 2011). Nor does a treaty amendment under Article 48 TEU unless it falls within one of the scenarios envisaged in section 4(1) of the Act. The fact that a treaty amendment has consequences for the UK, including constitutional consequences, is not itself enough to trigger a referendum.

48. Nonetheless, as the recent example of Croatia's accession to the EU demonstrates, an amendment to the treaties requires approval via an Act of Parliament (see the European Union (Croatian Accession and Irish Protocol) Act 2013. Whatever negotiations may take place between the Scottish and UK governments, it is the UK Parliament that is vested with the constitutional authority to approve or not to approve the treaty amendment.

49. The issue arises not merely of whether parliamentary approval will be forthcoming but more specifically of how that Parliament will be constituted depending on the timing of such a vote. Considering first the ratification of an accession treaty negotiated under Article 49 TEU, on the assumption that formal signature of such a treaty could only be undertaken after Scotland became independent, it would follow that the Westminster parliament would not at that stage include representation from Scottish MPs. If instead an amendment is

[42] See *inter alia*, D. Edward, 'EU Law and the Separation of Member States' [2013] 36(5) *Fordham International Law Journal* 1151.

made to the existing treaties under Article 48 TEU, the hypothesis expressed in the White Paper is that the amendment would be negotiated and concluded in advance of independence in which case it will fall to the UK Parliament – with representation from Scottish MPs – to adopt the relevant Act of Parliament. The political composition of that Parliament will, of course, depend upon the outcome of the 2015 General Election. Nonetheless, if the ambition is simply to conclude negotiations by the date of independence then again, the ratification procedure will be handled by a reconstituted UK Parliament without Scottish representation.

50. Given the absence of a constitutional process by which the rest of the United Kingdom expresses a view on the future of the Union, the parliamentary processes which will give effect to Scottish independence and which will ratify Scotland's membership of the EU will likely become the focal points for political and even legal contestation. The Scottish Government's White Paper underplays this dimension by simply treating the constitutional claim to self-government as a trump card that demands acquiescence by all affected interests whether internal or external to the UK. Yet the key to a successful management of the independence process lies in recognising some inconvenient legal and political truths and it is regrettable that the White Paper fails to provide a more candid analysis of the legal and political risks associated with Scottish membership of the EU.

16 January 2014

WRITTEN EVIDENCE FROM JEAN-CLAUDE PIRIS

This written evidence is submitted on a personal basis by Jean-Claude Piris (Piris Consulting SPRL), the former Legal Counsel of the European Council and of the EU Council and Director General of the Legal Service of the EU Council (1988-2010), at the request of the European and External Relations Committee of the Scottish Parliament (e-mail dated 7th and 9th January 2014).

I was invited to give an oral evidence to the Scottish Parliament on Thursday 23rd January. The purpose of the Scottish Parliament is to seek evidence from legal experts on the process by which an independent Scotland might become a member of the European Union, with particular reference to the Scottish Government's proposition that the general provisions in Article 48 of the Treaty on European Union would provide a «suitable legal route». As I will not be able to attend the 23rd January session, I was invited to submit a written submission, which had to be received by 16th January. This is my submission.

Despite some affirmations in the past, it seems that it has now been agreed that Scotland, if and when becoming independent, could not legally «*continue automatically as an EU Member State*». One of the obvious reasons is that the EU Treaties do not include Scotland in the list of the EU Member States. Therefore, they should at least be modified on this point, as well as on other points, both in the Treaties themselves and in the Protocols attached to them.

This written evidence is limited to one legal question:

-could the issue be settled by modifying the EU Treaties, following the procedure described in article 48 of the Treaty on European Union, which deals with the procedure of revision of the Treaties ?

-or would there be a legal obligation for Scotland to apply to become a Member of the EU by addressing an application to the EU Council, and then for the EU institutions to follow the procedure described in article 49 of the same Treaty, which deals with the accession of a new Member State ?[43]

One may give an answer to that question on three reasoning methods:
-on a formal legal point of view;
-on a substantive legal point of view;
-on a constitutional point of view.

On a formal legal point of view, the case law of the Court of Justice of the EU establishes that one cannot choose freely an article of the EU Treaties to adopt an act or make a decision. The Court refers to «*the aim and content*» of an act or decision as being the only way to determine the correct choice of its legal base. It also stresses that specific articles have priority upon general ones. Article 49 is the

[43] I observe that following the procedure of article 48 rather than that of article 49 would not necessarily mean gain in time. It is a lenghty procedure, even in the case of a general agreement on the limits of a possible revision. If a request opens the entire EU Treaties for other revision requests, the initial request could be delayed.

only article in the EU Treaties which provides the specific procedure to be followed for the admission of a State as a member of the EU. Article 49 specifically mentions that adjustments to the Treaties will be entailed by the admission procedure, and that they will be dealt with at the same time and in the same international agreement which will contain the conditions of admission. The sole aim and content of the decisions to be made in the present case would be the admission of Scotland in the EU. Article 48 does not deal with the issue of the admission of a State as a member of the EU but, in general, with possible amendments to the EU Treaties. I will thus conclude that, from a formal legal point of view, article 49, which deals specifically with admission, must be followed in any case of admission.

On a substantive legal point of view:

- **First**, the admission of a State as a member of the EU is conditioned by the fact that the applicant State does respect the requirements listed in article 49: respect of the values referred to in article 2 of the Treaty on EU and commitment to promote them. The conditions of eligibility agreed upon by the European Council (the so called «*Copenhagen criteria*», adopted in June 1993, among which the acceptance and capacity to implement the «*acquis communautaire*») shall be taken into account. If the procedure prescribed in article 49 was to be ignored in each case when an applicant country was the result of the splitting of a current EU Member State, that would mean that any fraction of a Member State would always be regarded as automatically fulfilling all these conditions, which is by no means a given fact. This would ignore the requirements of the Treaty.

- **Second**, two set of legal provisions have to be approved for each admission. The first set of provisions to be approved are the legal obligations to be imposed on the new Member State in the treaty of admission. This is what is referred to in article 49 as «*the conditions of admission*», which are «*the subject of an agreement between the Member States and the applicant State*». Article 49 provides that the same agreement will also contain the second set of legal provisions to be approved, ie «*the adjustments to the Treaties on which the Union is founded*» which are entailed by the admission. It is provided by article 49 that «*this agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements*». I therefore conclude that, on a substantive legal point of view as well, an agreement based on article 49 is necessary, and that it is also sufficient, as it has to contain both sets of legal provisions which are necessary.

Finally, from a constitutional point of view, the fact that the EU gets one additional Member State is a major political change. It alters the composition and the internal political balance of each EU institution. It changes the Union itself. It is why the Treaty provides for strict conditions, not only the consultation of the Commission and a unanimous vote in the Council, but also the consent of the European Parliament, to be given, exceptionally, by a majority of its component members, a condition which is not required by article 48 for any revision of the EU Treaties. Therefore, any admission of a member of the EU legally has to respect this requirement. Besides, each Member State will have to sign and then to ratify the admission agreement, and their Constitution may provide for specific requirements for that ratification. In the case of France, the Constitution provides that, in principle,

the ratification of an admission treaty must be authorised by a referendum, and not by a vote of the French Parliament[44].

For all these reasons, it would not be legally correct to try and use article 48 of the Treaty on European Union for the admission of Scotland as a member of the European Union. Only article 49 of the same Treaty would provide for a «suitable legal route».

12th January 2014

[44] «Any Government Bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.
Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the Bill according to the procedure provided for in paragraph three of article 89».(Article 89(3) reads: «However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly.»).

European and External Relations Committee

2nd Meeting, 2014 (Session 4), Thursday 23 January 2014

Brussels Bulletin

Introduction

1. The latest Brussels Bulletin – Issue 2014/1 - is attached in **Annexe A**.

2. **Annexe B** contains a letter from Commissioner Vassiliou in response to the Committee's inquiry on foreign language learning in primary schools.

Recommendation

3. **The Committee is invited to indicate whether it would like any follow-up actions for any of the items contained in the Brussels Bulletin and to agree to forward it on to relevant committees for their consideration.**

4. **The Committee is invited to note the letter from Commissioner Vassiliou.**

Katy Orr
Clerk

The Scottish Parliament
Pàrlamaid na h-Alba

BRUSSELS BULLETIN

ISSUE 2014/1, JANUARY 2014

NEWS IN BRIEF

European Council

EU Leaders met in Brussels 19-20 December for the winter European Council meeting. Notably on the agenda was first thematic debate on EU's Common Security and Defence Policy as well as Economic and Monetary Union, after the 18 December agreement on the Single Resolution Mechanism.

Fisheries

At the Agriculture and Fisheries Council on 16-17 December, Ministers reached political agreement on fishing opportunities for 2014 for the main commercial fish stocks of the Atlantic, the North Sea and the Black Sea.

Public Procurement

Members of the European Parliament's International Trade Committee have voted in favour of draft legislation that proposes to prevent non-EU firms from tendering for public procurement contracts in the EU, unless their home countries allow reciprocal access for EU firms to their public procurement markets. The full Parliament is voted on the proposal on 15 January 2014 and final negotiations can now begin with the Member States, which adopted their position on the dossier in December 2012.

ALSO IN THIS ISSUE:

European Structural and Investment Funds

The European Commission has adopted a common set of standards to improve consultation, participation and dialogue with partners during the planning, implementation, monitoring and evaluation of projects financed by the European Structural and Investment Funds (ESIF).

Agriculture – State Aid

As of 1 January 2014 a new Regulation (directly applicable in Member States) applied, aimed at raising the ceiling and clarifying the definition of small amounts of aid (de minimis aid) in the primary agriculture production sector that can be considered not to constitute state aid.

December European Council. EU Leaders met in Brussels 19-20 December for the winter European Council meeting.

Notable on the agenda was first thematic debate on EU's Common Security and Defence Policy (CSDP) since the entry into force of the Lisbon Treaty on 1 December 2009. Although the EU's Member States agreed to 'deepen defence cooperation,' there was some disagreement over how to go about doing so, in particular between the big three Member States of France, Germany and the UK.

Leaders did however highlight Europe's need for a more integrated, sustainable, innovative and competitive defence technological and industrial base (EDTIB) to develop and maintain defence capabilities. In particular, the development of the necessary skills and the retention of research & technology expertise in defence – especially in critical defence technologies – were acknowledged

Economic and Monetary Union was also on the agenda, and the Council reviewed the economic situation in Member States as well as taking stock of progress in implementing the Compact for Growth, Jobs and Competitiveness. Although EU Leaders heralded the agreement reached between Economic and Finance Ministers on 18 December regarding the Single Resolution Mechanism – the second element of the future Banking Union establishing a common fund to bail out failing eurozone banks – difficult negotiations with the European Parliament are now expected before the mechanism is fully adopted.

Greek Presidency. From 1 January 2014 Greece took over the six month rotating role of the EU Presidency. As the European Parliament will be dissolved ahead of the elections in May this year, the Presidency has a shorter than usual timescale in which to achieve its priorities. Unusually, the Greeks intend to hold four European Council meetings, as opposed to the usual two, during their tenure. It is expected that many of the issues discussed at the final European Council Summit of 2013 will be revisited in 2014.

Maritime policy will be a cross-cutting theme through the Presidency's three main fields of action: growth, jobs and cohesion; further integration of the EU and of the Eurozone; and migration, borders and mobility. The Presidency has made public its prioritisation of the Social Union and cohesion aspects to the deepening of the Economic and Monetary Union. It intends to bring a proposal on this before Member States for ratification in the first half of the Presidency.

Fisheries. At the Agriculture and Fisheries Council on 16-17 December 2013, Ministers reached political agreement on fishing opportunities for 2014 for the main commercial fish stocks of the Atlantic, the North Sea and the Black Sea.

With the quotas decided during this Council the number of stocks fished at Maximum Sustainable Yield can be increased by another two stocks, namely nephrops in west of Scotland and in the North Sea. Scottish fishermen have retained their current days at sea allocation.

The talks also secured some important flexibilities between the North Sea and the West of Scotland for monkfish allowing vessels to catch 10 per cent of their North Sea quota in the West of Scotland where the stocks are healthier. This is a doubling of the current arrangements.

The UK was represented by:

- Owen Paterson – UK Government Secretary of State for Environment, Food and Rural Affairs
- George Eustice – UK Government Parliamentary Under Secretary of State for Natural Environment, Water and Rural Affairs
- Richard Lochhead – Scottish Government Cabinet Secretary for Rural Affairs and the Environment
- Alun Davies – Welsh Government Deputy Minister for Agriculture, Food, Fisheries and European Programmes
- Michelle O'Neill – Northern Ireland Executive Minister for Agriculture and Rural Development

Agriculture – State Aid. As of 1 January 2014 a new Regulation (directly applicable in Member States) applied, aimed at raising the ceiling and clarifying the definition of small amounts of aid (de minimis aid) in the primary agriculture production sector that can be considered not to constitute state aid. Previously, aid in the agriculture sector that did not exceed €7,500 per beneficiary over a period of three years or 0.75% of the value of agricultural output established for each Member State was deemed not to distort or threaten to distort competition. This has been raised to €15,000 per beneficiary over three years, or 1% of the value of agricultural production.

Public Procurement. The European Parliament voted in favour of draft legislation that proposes to prevent non-EU firms from tendering for public procurement contracts in the EU, unless their home countries allow reciprocal access for EU firms to their public procurement markets. The proposal seeks to tackle the current imbalance in world trade which allows big multinationals from newly-industrialised countries to benefit from the EU market, while being protected from global competition at home.

If adopted, it is expected that this 'international public procurement instrument' would strengthen the EU's negotiating position in trade talks and assist EU firms wishing to bid for third country contracts.

The proposed instrument would apply to big public tenders worth €5 million or more and to tenders in which goods or services originating outside the EU exceed 50% of the total value of the goods or services involved. To lessen the risk that developing countries could become unintended victims of this new instrument, MEPs backed the proposed exclusion of Least-Developed Countries from the scope of legislation.

The legislation was agreed with the Member States in June 2013, and will enter into force 20 days after publication in the Official Journal of the European Union. After this date, Member States will have 24 months to implement the provisions of the new rules into national law.

European Structural and Investment Funds. The European Commission has adopted a common set of standards to improve consultation, participation and dialogue with partners during the planning, implementation, monitoring and evaluation of projects financed by the European Structural and Investment Funds (ESIF). These Funds comprise the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund (CF), the European Agricultural Fund for Rural Development (EAFRD) and the European Maritime and Fisheries Fund (EMFF).

This European Code of Conduct on the Partnership Principle takes the form of a legally-binding and directly applicable Commission Regulation and sets out objectives and criteria to ensure that

Member States implement the partnership principle. This means that Member States are required to:

- Ensure transparency in the selection of members in the monitoring committees of the programmes.
- Provide partners with adequate information and sufficient time as a prerequisite for a proper consultation process
- Ensure that partners must be effectively involved in all phases of the process, i.e. from the preparation and throughout the implementation, including monitoring and evaluation, of all programmes
- Support the capacity building of the partners for improving their competences and skills in view of their active involvement in the process
- Create platforms for mutual learning and exchange of good practice and innovative approaches.

The Regulation establishes the principles Member States must apply but leaves ample flexibility to Member States to organise the precise practical details for involving relevant partners in the different stages of the programming.

Executive Agency for SMEs. The European Commission has created a new Executive Agency for SMEs (EASME), building on the current Executive Agency for Competitiveness and Innovation. The Agency will manage on behalf of the Commission most parts of the Programme for the Competitiveness of Enterprises and SMEs (COSME), as well as the LIFE Programme for Environment and Climate Action and the SME instrument within the Horizon 2020 programme. Later in 2014 the agency will also be responsible for significant parts of the European Maritime Fisheries Fund (EMFF).

Horizon 2020 launched. On 11 December, following the programme's adoption by Member States on 3 December, the Commission launched the first calls for Horizon 2020 – the new EU 2014-2020 Framework Porgramme for Research and Innvoation. The publication marks the official indication of the Commission's funding priorities over the first two years, which will be focused on the three key pillars of Horizon 2020:

- **Excellent Science**: Around €3 billion, including €1.7 billion for grants from the European Research Council for top scientists and €800 million for Marie Skłodowska-Curie fellowships for younger researchers.

- **Industrial Leadership**: €1.8 billion to support Europe's industrial leadership in areas like ICT, nanotechnologies, advanced manufacturing, robotics, biotechnologies and space.

- **Societal challenges**: €2.8 billion for innovative projects addressing Horizon 2020's seven societal challenges, namely; health; agriculture, maritime and bioeconomy; energy; transport; climate action, environment, resource efficiency and raw materials; reflective societies; and security.

This adoption in Council brought to a conclusion two and a half years of negotiations on the programme. In total, Horizon 2020 will be equipped with a budget of almost €80 billion for 2014-2020.

Erasmus+. On 12 December the Commission published call dates and detailed guidance for the Erasmus+ programme for Education, Training, Youth and Sport. Under the Multi-annual Financial Framework, Erasmus+ will receive around €14.7 billion in total for the 2014-2020

period. This represents a 40 per cent increase on the budget of the current Lifelong Learning Programme, which came to an end in December 2013. The application process to the programme is due to start at the end of January.

Research and SMEs. The European Parliament has published an internal report broadly looking at the research and innovation potential of European SMEs and considering the opportunities and benefits for SMEs in 2014-2020 funding period. The report notes that SMEs in Europe constitute the backbone of the European economy and account for more than 98 per cent of all enterprises, 67 per cent of employment and 58 per cent of gross value added (GVA).

Also noted is that awareness of Horizon 2020 is increasing amongst European SMEs, partly due to the effects of awareness-raising activities across Europe. It is also thought that SMEs which hitherto were not eligible for support through the programme are being 'mobilised' somewhat due to the attractiveness of the new SME instrument.

The report also conducts an analysis of SME participation during the 2007-2013 funding period (including FP7, Eurostars and Competitiveness and Innovation Programmes) as well as SME participation rates since the Fourth Framework Programme (FP4). It further finds that:

- Across the Framework Programmes industry participation has largely decreased vis-à-vis University participation, accounting for 25 per cent in FP7, within which the Cooperation and Capacities programmes were of most relevance to SMEs.
- The average project size and number of participants has varied greatly across the programmes since FP4, as has the sectoral composition of those participants involved.

A recent report published by the Commission's Directorate General for Research and Innovation on SME Participation in FP7 found that the Cooperation Programme awarded 16.9 per cent of its available funding to SMEs; exceeding its initial 15 per cent target. According to the Parliament's report, until 2012 the desired rate of SME participation in the Cooperation programme was not reached. However, this apparent contradiction may be due to the Parliament's report's being based on data available until 2012, and not 2013.

Public-Private Partnerships. On 17 December the European Commission launched eight new contractual Public-Private Partnerships (cPPPs) as part of the Horizon 2020 programme. Complementing the Joint Technology Initiatives (JTIs), the cPPPs are structured partnerships with the private sector in areas of strategic industrial relevance to the Union which will input directly into the preparation of the Horizon 2020 Work Programmes.

Chosen to represent large parts of the European economy, each cPPP is expected to develop a research and innovation roadmap, which is also to outline its expected impact in terms of growth and jobs and expected impact on overall EU industrial competitiveness.

The eight cPPPs are:

- Factories of the Future (FoF)
- Energy-efficient Buildings (EeB)
- European Green Vehicles Initiative (EGVI)
- Sustainable Process Industry (SPIRE)
- Photonics
- Robotics

- High Performance Computing (HPC)
- Advanced 5G networks for the Future Internet (5G)

The cPPPs are one of the forms of public private partnership within the Horizon 2020 programme. In contrast to the JTIs, the cPPPs do not organise their own calls, and instead funding will be delivered through open calls as part of the Horizon 2020 Work Programmes.

European Research Council. On 11 December 2013 the European Commission formally announced a €1.7 billion budget for the European Research Council (ERC) in 2014 and the publishing of the 2014 Work Programme. In 2014 the ERC aims to provide funding to around 1,000 top scientists to pursue cutting-edge research in Europe. Excellent researchers working in any field (Physical Sciences and Engineering, Life Sciences, and Social Sciences and Humanities) can now apply for ERC 2014 Starting Grants and Consolidator Grants. These calls are part of the Excellent Science pillar of Horizon 2020.

Innovation Union. On 2 December the European Commission published the 2013 edition of its Innovation Union Competitiveness Report. The report, published every two years, is based on a broad range of indicators and covers all 28 EU Member States, as well as six countries associated to the EU research framework programme. The report finds that:

- Half of the world's scientists and engineers now live outside the EU, US and Japan.
- The EU is facing ever-increasing world competition in terms of global value chains.
- The EU is not as strategic in its research and innovation efforts as Asia and the United States; with Europe's being focused more on established and traditional industries as opposed to transformative technologies oriented toward emerging global markets.
- As well as being an attractive centre for R&D investment, the EU remains the main centre for knowledge production in the world; accounting for almost a third of the world's science and technology production.

In-line with the Commission's recent Communication on the establishment of an Innovation Indicator, the report does however find that the strongest innovation output in Europe emanates from Sweden, Germany, Ireland, Luxembourg, Denmark, Finland, the United Kingdom and France, whereas the strongest countries for research excellence are Sweden, Switzerland, Denmark, the Netherlands and Israel. As well as detailing Europe's competitive position in research and innovation, the report also suggests six 'lessons' for innovation-driven growth:

- Focusing on the markets of the future.
- Believing in high-growth firms, and creating the framework conditions which generate high-growth, innovative enterprises.
- 'Building on people', through the creation of R&I policies which emphasise incentives for researchers and inventors.
- Innovating in solutions, with cluster policies' encouraging partnership-building between public and private sectors.
- 'Thinking' Single Market and increasing the intensity and speed of the circulation of knowledge.
- Building alliances and networks in order to accelerate the progress towards a European Research Area; improving transnational access to research infrastructure and a completing a digital European Research Area.

Food Labelling. The European Commission has published a report which explores the possibility of introducing 'product of island farming' as a new optional quality term, as requested by the current legislation on quality schemes for agricultural products. The report presents the advantages and disadvantages of creating a new EU label as the right solution to help island producers to communicate the added value of their products.

The report concludes that it would be unrealistic to establish specific characteristics common to all island products. The new quality term proposed could help to protect island farming products against misuse. However as the majority of island products are sold locally or nationally, the regulation may be better addressed at Member State level, the report adds. The report will now be forwarded for discussion in Council and in the European Parliament.

The Commission has also published a report on the possibility to extend mandatory origin labelling for all meat used as an ingredient. The report investigates three scenarios: maintain origin labelling on a voluntary basis; introduce mandatory labelling on the basis of EU/non-EU/specific third country indication or; introduce mandatory labelling indicating the specific EU Member State or third country. Following discussions with EU Member States and the European Parliament, the Commission will decide whether any actions should be taken.

Internal Energy Market. On 12 December national Energy Ministers adopted a report on the completion of the EU internal energy market, covering issues such as removing bottlenecks and ending isolation of ´energy islands´ within the EU. This latest report follows earlier Council Conclusions on the issue from June 2013 and identifies three outstanding priorities in order to achieve the 2014 deadline:

- Full implementation of the 2009 package of measures on the internal gas and electricity markets (the deadline for this was in March 2011, but 12 Member States have not fully implemented the laws)
- Rapid development of energy infrastructure, notably moving to implementation of the new Trans-European Energy Network (TEN-E) guidelines adopted in November 2013 and the accompanying Connecting Europe Facility to finance priority projects.
- Application of rules on market integration and energy efficiency, and especially elaboration and adoption of EU-level network codes to allow cross-border flows of energy.

The European Commission will present its report on progress towards completion of the internal energy markets in early 2014, alongside a report on energy prices. These will be addressed by EU Leaders at their 13-14 February European Council summit.

Maritime Spatial Planning. The European Parliament has made a number of amendments to the draft Directive on maritime spatial planning and integrated coastal management (ICM). The amendments made by the Parliament include more flexibility for Member States to choose how to implement ICM, taking into account land-sea interactions. The dossier has now been sent back to the responsible Transport Committee for re-consideration, after which it will be brought to the plenary for a vote. The Directive must also be approved by the Member States.

Urban Mobility. On 17 December the European Commission's Directorate-

General for Transport and Mobility published a package of initiatives and measures on Urban Mobility. The package includes including the Communication "Together towards competitive and resource efficient urban mobility" and specific documents calling for action on urban logistics, urban access regulations, intelligent transport systems and road safety. The package contains no legal proposals, but recommendations to Member States.

In 2014 the Commission will launch an expert group (of national Government representatives) on urban mobility and will establish a stakeholder platform on sustainable urban mobility planning.

Bees. A number of environmental NGOs have applied to the European Court of Justice to defend an EU-wide partial ban on three neonicotinoid pesticides, which chemical companies Syngenta and Bayer are seeking to overturn. The ban came into force on 1 December 2013.

Learner Mobility. The European Commission has published its first ever 'mobility scoreboard', focusing on the key factors which influence young people's motivation to study or train abroad. The scoreboard, entitled 'Towards a Mobility Scoreboard: Conditions for Learning Abroad in Europe', which covers all 28 EU Member States (as well as Iceland, Norway, Liechtenstein and Turkey), has been prepared by the Eurydice Network and contains draft proposals for a set of five indicators to measure learner mobility in higher education:

- Information and guidance about mobility opportunities
- Portability of student aid, enabling students to receive public grants and loans in another country on the same terms as when they study at home.
- Knowledge of foreign languages: This is often an important factor for deciding to study abroad.
- Ease of recognition of studies abroad (for example, through the European Credit Transfer System).
- Support for students from disadvantaged backgrounds.

The report finds that although no single country scores highly across all motivational factors, it highlights Germany, Belgium and Spain as making particularly strong efforts in their implementation of recognition tools and the provision of guidance and support to students.

Scotland scores well overall on some of the proposed indicators, in particular on provision of information and guidance, as well as support and portability of student aid. Scotland is also highlighted as performing well in terms of EU cross-border qualification recognition.

China. In a speech at the Development Research Centre in Beijing EU Internal Market and Services Commissioner Michel Barnier emphasised the importance of continuing EU-China dialogue. The EU is China's largest trading partner and China is the EU's second largest. The EU-China Summit in November 2013 adopted the EU-China Strategic Agenda, setting the framework for improved cooperation until 2020.

Commissioner Barnier said that better cooperation between the EU and China will enable them to push for progress on:

- **Financial Services**: implementing the Basel rules on banking supervision, addressing the risks associated with shadow banking and promoting long-term investment.

- **Trade, investment, market access and reciprocity.**
- **Environmental issues and green growth.**
- Protecting **intellectual property rights** and exploiting their value as a real asset and driver of economic progress.

Barnier stated that a strong euro is an important contributor to a more diverse Chinese economy, and welcomed recent Chinese pilot projects to further open markets.

UPCOMING EVENTS & MEETINGS

	January		**February**
21	General Affairs Council	3-6	European Parliament plenary
27	Eurogroup	10	Foreign Affairs Council
28	Economic and Financial Affairs Council	11	General Affairs Council
		13-14	European Council Summit
		17	Eurogroup
		17	Agriculture and Fisheries Council
		20-21	Competitiveness Council
		24-27	European Parliament plenary
		24	Education, Youth, Culture and Sport Council

CONTACT DETAILS

The Scottish Parliament
EDINBURGH
EH99 1SP
UK

Tel: 0044 131 348 5226

ANNEXE B

ANDROULLA VASSILIOU
MEMBER OF THE EUROPEAN COMMISSION

Brussels, 17 12. 2013

Dear Ms McKelvie,

Thank you very much for your letter, forwarded through an e-mail from 23 October, and for submitting your Committee's languages inquiry report to the European Commission.

My services have been following language teaching in Scotland closely and have reported on your progress. The 1+2 languages model is certainly in line with the European multilingualism policy.

I would like to congratulate your Committee for having taken this initiative. I am heartened by the positive resonance from the side of the Scottish Government and the fact that some extra funding for language teaching could be secured in this year's budget.

Scotland was among the early adopters of language learning in primary schools, pointing the way for other Member States. In recent years, there has been a clear trend towards an early start for the first foreign language all over Europe. The percentage of pupils learning at least one foreign language at primary level thus went up from 64.6 % in 2005 to 74.9 % in 2011. The second language however is not introduced before late secondary in most countries, and we are still very far from the objective of enabling all pupils to learn at least two foreign languages from an early age agreed by the Heads of State and Government in Barcelona eleven years ago.

The press release mentioned in your mail announced a conference organised by the European Commission in London on 18 October of this year in connection with the London Language Show. The purpose of the conference was to promote language teaching and learning in Britain and to introduce Erasmus+, the European Commission's new funding programme for education, training, youth and sport.

As you probably know, I have proposed a European benchmark for language competences in order to stimulate progress in the teaching and learning of two foreign languages across Europe, which I hope will be adopted by the Council in 2014.

Your report, as well as recent reforms concerning language education in England, shows that there is ample awareness of the need for action in this field. I am hopeful that the negative trend of the past decade in the United Kingdom can now be reversed and that we shall see considerable change in the coming years.

I wish you success with the continued implementation of the 1+2 model in Scotland.

Yours sincerely,

A Vassiliou

Ms Christina McKelvie
European and External Relations Committee
Scottish Parliament
Edinburgh EH99 1SP

EUROPEAN COMMISSION, B-1049 BRUSSELS - TEL.: 00.32.2.298 87 00 - FAX: 00.32.2.298 84 73 - E-MAIL: androulla.vassiliou@ec.europa.eu