European and External Relations Committee

2nd Report, 2014 (Session 4)

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

Published by the Scottish Parliament on 23 May 2014
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Annexe A: Extract of Minutes of the European and External Relations Committee

Annexe B: Oral and Written evidence and Committee briefings
European and External Relations Committee

Remit and membership

Remit:

The remit of the European and External Relations Committee is to consider and report on-

(a) proposals for European Union legislation;
(b) the implementation of European Communities and European Union legislation;
(c) any European Communities or European Union issue;
(d) the development and implementation of the Scottish Administration’s links with countries and territories outside Scotland, the European Union (and its institutions) and other international organisations; and
(e) co-ordination of the international activities of the Scottish Administration.

Membership:

Clare Adamson
Roderick Campbell
Willie Coffey
Helen Eadie (1 Jun 2011 - 9 Nov 2013)
Patricia Fergusson (19 December 2013 - 25 February 2014)
Hanzala Malik (Deputy Convener)
Jamie McGrigor
Christina McKelvie (Convener)
Alex Rowley (25 February 2014 - )

Committee Clerking Team:

Senior Assistant Clerk
Katy Orr

Assistant Clerk
Clare O'Neill
Jenny Goldsmith
Committee Assistants

Eileen Martin
Carol Mitchell
The Committee reports to the Parliament as follows—

INTRODUCTION

1. If there is a vote in favour of independence in September’s referendum, the Scottish Government has made it clear that it would seek to become a Member State of the European Union (EU) on the day on which Scotland became independent, namely 24 March 2016, 18 months after the referendum. Following the referendum, the 28 EU Member States would therefore need to consider how they wished to respond to this situation and whether they would be willing to facilitate a seamless continuation of Scotland’s membership of the EU, which is the position of the Scottish Government. The alternative would be for the EU Member States to insist that Scotland should become an independent state before applying for EU membership through the conventional legal route of Article 49 of the Treaty on European Union (TEU), with all the resulting consequences for the acquired rights of EU citizens and the EU single market. The conventional legal basis for enlargement, where a candidate seeks membership from outside the EU, is Article 49 of the Treaty on European Union. The Scottish Government states that an independent Scotland would be starting from a different position, by virtue of already being part of the EU since 1973.¹

2. In examining the Scottish Government’s proposals in relation to EU membership for an independent Scotland, this inquiry has sought to understand more fully the position that Scotland would be in following a vote for independence. The European and External Relations Committee (the Committee) recognises that the EU institutions and decision-making processes are complex, and a key purpose of this inquiry has been to present an accessible and informative report which not only scrutinises the Scottish Government’s proposals, but also provides greater clarity for voters – to the extent that this is possible – on

¹ This last two sentences of this paragraph were agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
the question of EU membership should Scotland become independent. In trying to achieve these aims, the Committee feels that the inquiry has served to highlight the large number of issues that would need to be addressed in relation to EU membership following a vote for independence.

3. The Scottish Government states that a renegotiation of the EU Treaties under Article 48 of the Treaty on European Union might present a relevant legal basis for membership to be negotiated without any hiatus in Scotland’s membership of the EU.  

2 The Scottish Government proposes this as a means of ensuring continuity in Scotland’s membership. This inquiry set out to scrutinise the Scottish Government’s proposals as set out in its White Paper “Scotland’s Future: Your Guide to an Independent Scotland”  

3 and its more detailed paper, “Scotland in the European Union.” During the inquiry the Committee heard evidence from experts on the EU, including a range of academics and former government and European Commission officials.  

5 The Committee also received a number of responses to its call for written evidence on this inquiry.  

4. The Committee notes that representatives of the EU institutions have refrained from commenting on the specific scenario of Scottish independence. In evidence to the Committee, the Deputy First Minister (DFM) stated—

“The Commission has been very clear that it will give that opinion only on being asked to do so by a member state. Right now, the member state is the UK Government. I repeat the invitation to the UK Government.”  

5. The Committee notes that the UK has made no approach to the European Commission. Representatives of the EU institutions have consistently stated that when “part of a territory of a Member State ceases to be part of that State, ... the

2 This sentence was agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.  


5 The Committee would like to thank all of those who gave evidence to the Committee. A list of witnesses can be viewed at Annex B.  

6 The Committee would like to thank all of those who submitted written evidence. The written submissions are available at Annex B and at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/72022.aspx  

7 The order of paragraphs 3 and 4 was agreed by division (with the order being reversed): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.  


9 This is reflected in the letter from Maros Šefčovič, Vice-President of the European Commission, to Deputy First Minister Nicola Sturgeon, dated 22nd January 2013, available here: http://www.scotreferendum.com/wp-content/uploads/2013/01/CAB08_0122142752_001.pdf. The letter states that “the European Commission has consistently refrained from expressing a position on questions of internal organisation related to the constitutional arrangements in Member States.” Vice President Šefčovič also notes that the European Commission “has expressed its views in general terms in response to several parliamentary questions” and “the European Commission would only be able to express its opinion on the legal consequences under EU law if a specific situation upon request from a Member State detailing a precise scenario.”
treaties will no longer apply to that territory”.¹⁰ This is reflected in the response of Viviane Reding, Vice President of the European Commission to the Committee.¹¹¹² Under this scenario, Scotland would no longer be part of the EU on independence and would have to wait until it was a sovereign state to apply for EU membership. Representatives of the EU institutions have repeatedly identified Article 49 TEU as the appropriate legal route to entry.

6. The Committee has heard evidence testifying to the “nightmare scenario” and the “absurd” situation that would arise if there was a hiatus in Scotland’s membership of the EU. Scotland, Scottish businesses and Scottish citizens would no longer benefit from the freedoms of the EU single market and EU citizens living in Scotland would find themselves residing outside of the EU. Not a single witness to the Committee considered that this was a desirable outcome, although a number presented it as a consequence of a vote for independence.

7. In publishing this report, the Committee seeks to provide a valuable resource on the subject of EU membership to voters. While the Committee recognises that there are many questions remaining, it believes that this report will help to inform the views of those taking a decision on Scotland’s future in the referendum in September 2014. This report addresses three themes: an independent Scotland in the European Union; the Road to Membership and Scotland’s representation in the European Union; and small states in the European Union. The evidence on each of these themes is set out in the three key sections below.

THEME 1 - AN INDEPENDENT SCOTLAND IN THE EUROPEAN UNION

8. The first of the three key themes identified by the Committee for this inquiry was the value of membership of the EU for an independent Scotland. In particular, the Committee considered the Scottish Government’s statement that “Membership of the EU provides the best international economic framework within which to optimise the economic and social gains of independence and tackle the global challenges that we face.”¹³

9. The Scottish Government also argued that “supported by the overwhelming majority of Members of the Scottish Parliament, [the Scottish Government] believes that membership of the EU is in the best interests of Scotland.”¹⁴

¹² Paragraphs 4 and the first part of paragraph 5 were agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions.
The Committee sought the views not only of its expert witnesses on whether EU membership was in the best interests of Scotland, but also tried to acquire more information on public attitudes to EU membership in Scotland.

10. The Scottish Government, in its paper on “Scotland in the EU”, rejected any other alternatives to EU membership; most notably membership of the European Economic Area (EEA). The Committee decided to take evidence from officials from the European Free Trade Association in order to ascertain in more detail whether EEA membership might represent an alternative to EU membership for an independent Scotland.

### The value of EU membership for Scotland

11. The evidence heard by the Committee was overwhelmingly in support of an independent Scotland being a member of the EU regardless of the individual views of the witnesses on whether Scotland should become independent. From the evidence heard and received, a number of key reasons emerged as to why an independent Scotland should seek to continue membership of the EU. These were encapsulated in the written evidence submitted by John Edward (formerly an EU Policy Manager at Scotland Europa and Head of the European Parliament Office in Scotland)—

> “The value of participating in history’s largest and most legally-secure single market, supporting four basic freedoms of movement, cannot be underestimated. At the same time, EU membership facilitates an unparalleled level of interaction between political, professional, private, third sector and cultural bodies across the Member States of the EU that political discussion of EU membership often overlooks. A state in the European mainstream today is either defined by being in the EU, or responding to it.”

12. The importance of being part of a large international organisation, particularly from the perspective of a country like Scotland, emerged in evidence. Jim Currie (a former European Commission Director General) set out his views on why EU membership would be “not only necessary but a very useful part of what happens to be a very interconnected and globalised world”—

> “We live in a very interconnected world, in which one’s interests, whether they relate to trade, environmental standards of anything else, really depend on being part of something bigger, particularly if one is a small country on the edge of Europe.”

13. Similarly, David Crawley (a former senior civil servant and head of the Scottish Government’s Office in Brussels) stated that—

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15 John Edward. Written submission.
“As a relatively small nation state on the edge of Europe it is difficult if not impossible to imagine a context other than full membership of the EU in which Scotland could prosper economically; and to throw away the huge economic, social and cultural advantages of EU membership would in my view be a major strategic mistake.”

The EU single market

14. The European Single Market, which came into effect at the beginning of 1993, marked the culmination of a long process of merging the fragmented national markets of the then European Community to create a single market underpinned by the principle of the “mutual recognition” of laws and standards and the introduction of common European rules.

15. The single market provides for the free movement of goods, people, services and capital within the EU. This allows individuals the right to live, work, study or retire in another EU country. It is generally regarded as having provided increased competition, benefitting consumers with a wider choice of products and lower prices. It also makes it easier, and more economical, for businesses to conduct work and trade across borders.

16. The Scottish Government’s “Scotland in the European Union” paper provides considerable background information on the single market and its importance to Scotland. The Scottish Government states that the EU is “the main destination for Scotland’s international exports - accounting for around 46% of Scotland’s international exports in 2011, with an estimated value of around £11 billion.” The Scottish Global Connections Survey for 2012 (published in January 2014) shows that of Scotland’s top ten international export destinations, seven are EU Member States (Belgium, Denmark, France, Germany, Ireland, the Netherlands and Spain) and the value of exports to those countries was worth just over £9.4 billion in 2012. Furthermore, it is estimated that exports from Scotland to the EU support a total of 110,000 full-time equivalent jobs, including employment directly within organisations exporting from Scotland to the EU and indirect employment among suppliers within the supply chains of those exporting to Europe.

17. EU membership has also allowed Scotland to benefit from the bilateral free trade agreements that the EU has negotiated with over 50 partners including Chile, South Korea, Mexico, South Africa and the Central American countries. In addition, negotiations for further free trade agreements are currently taking place.

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18 David Crawley. Written submission.
20 International exports mean those to countries outwith the United Kingdom
18. In giving evidence to the Committee on “Scotland’s Future”, the Deputy First Minister identified the most significant benefits to Scotland being part of the EU as deriving from “what being a member of the single market opens up for us economically.” She argued that, “There is no doubt that being part of a market of 500 million people with free movement and free trade protects and helps to create jobs in Scotland.” She further elaborated on the benefits of the single market by highlighting the way in which it encouraged foreign direct investment—

“We have a good record on foreign direct investment and it is safe to say that that is helped considerably by our membership of the single market. Firms outside Europe can invest in Scotland in the knowledge that that gives them access to the single market. Something like 40 per cent of our foreign investment is from EU member states, and that is clearly of benefit. All that would be put at risk if we were not a continuing member of the EU.”

19. Several witnesses reiterated the importance of the single market to Scotland. For example, Patrick Layden QC highlighted the “immense trade and free movement benefits”, while Fabian Zuleeg (Chief Executive of the European Policy Centre) referred to the single market as “one of the major benefits of European Union membership.” Jim Currie emphasised the “benefits from being in the internal market from a trading point of view, with lower tariffs, the lack of boundaries and free movement for students and other people.”

20. EU membership also brings benefits to the citizens of EU Member States. Any individual who holds the nationality of an EU Member State is also an EU citizen, with EU citizenship being additional to - and not replacing - national citizenship. EU citizens have the right to move and reside freely within the territory of the EU Member States. They also have the right to vote for and stand as a candidate in European Parliament and municipal elections and be protected by the diplomatic and consular authorities of other EU Member States if their own Member State is not represented in that country. The Scottish Government

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indicates that 160,000 EU citizens from other Member States currently live, work or study in Scotland.\textsuperscript{30}

21. Aidan O’Neill QC summed up the benefits derived from EU citizenship—

“...there are also benefits to the individual citizens of any member state because they become European citizens and therefore have access to a range of rights, such as being able to live, work, vote and obtain benefits in other member states. It opens up a much broader world than simply being confined to the borders of one’s own state.”\textsuperscript{31}

22. The EU has supported the extension of social and employment rights for its citizens through the establishment of minimum standards. The move towards a European social policy started in the 1970s with an initial focus on using single market competence in an effort to avoid a dilution of rights and standards across the EU. Developments in the EU’s competence in this area have progressed and, since the Treaty of Amsterdam in 1997, the EU Treaties have enshrined principles relating to non-discrimination in the areas of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 19 of the Treaty on the Functioning of the European Union).

23. The principle of equal treatment guarantees EU citizens minimum standards in legislation including in relation to employment and, in some cases (including racial or ethnic origin and gender), in access to goods and services. The commitment to non-discrimination has also led to developments such as equal pay, and equal treatment with regard to occupational social security schemes.

24. The initial EU legislation on social policy has also been given its own legal basis in Articles 151-161 of the Treaty on the Functioning of the European Union. For instance, Article 153 of the Treaty on the Functioning of the European Union gives the EU legislative competence to set minimum standards in areas such as health and safety, working conditions, social security and social protection of workers and informing and consultation of workers. Through this competence, the EU has established minimum requirements in the field of labour rights and work organisation. These requirements concern collective redundancies, insolvency and the transfer of undertakings, the consultation and information of workers, working hours, equal treatment and pay, and posted workers. In addition to these standards, framework agreements between the European social partners has led to the introduction throughout the EU of the right to parental leave and leave for family reasons, and has facilitated part-time work and limited the use of successive fixed-term contracts.

25. The Labour MEPs, Catherine Stihler and David Martin, commented on the impact that EU social policy in the UK, commenting that, “We benefit from social protection under the EU such as paid holiday leave, paid maternity leave and decent working hours.”\textsuperscript{32}


\textsuperscript{32} Catherine Stihler and David Martin, Labour MEPs. Written submission.
Oireachtas Joint Committee on European Union Affairs highlighted this aspect of EU membership in terms of the social gains for Ireland, observing that, “Many of the changes in our labour law, such as the notion of equal pay and equal status for men and women, emanated from European directives.”

**EU Funding**

26. Over the last four decades, Scotland has benefited from both pre-allocated and competitive European funds, notably the Structural Funds and the Common Agricultural Policy. These are allocated to the UK directly, with the UK Government agreeing the allocation within the UK with the devolved administrations. Between 2007 and 2013 Scotland received around €4.5 billion of Common Agricultural Policy (CAP) funding. Between 2014 and 2020 Scotland is likely to receive around €4 billion. Between 2007 and 2013 Scotland received around €800 million in European Structural Funds. During the 2014 to 2020 Multiannual Financial Framework period, Scotland is likely to receive around €795 million in funding. In terms of other pre-allocated funds during the 2007 to 2013 programming period, Scotland received around €100 million from the European Fisheries Fund and just over €40 million from European Territorial Cooperation Programmes.

**The cost of European Union membership**

27. The contribution of each Member State to the EU budget is made up of Gross National Income (GNI) based own resources, traditional own resources (these are primarily import duties collected on behalf of the EU) and VAT-based own resources (a proportion of VAT levied in each Member State). The largest share of the revenue is drawn from GNI-based resources, equating to 70.3% of all contributions in 2012, with traditional own resource making up 11.8% and VAT-based own resources 10.7%. Within the EU, twelve Member States were net contributors in 2012, meaning that they contributed more in payments than they received back in EU funding.

28. Whilst Scotland has benefited from European funds, it has also contributed payments to the EU budget as part of the UK. A number of different projections have been produced analysing Scotland’s potential receipts from and payments to the EU budget.

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29. In 2008, as part of its National Conversation series, the Scottish Government published a paper on “Europe and Foreign Affairs”.
   This paper included an estimate of Scotland’s contribution to and payments from the EU Budget in 2007. According to the Scottish Government—
   
   “Depending on the treatment of North Sea GDP in the analysis, Scotland is estimated to have made an illustrative contribution of between €742 and €991 million before accounting for the UK rebate in 2007. When a population share of the UK rebate is included, Scotland is estimated to have made an illustrative contribution to the EU of between €263 million and €512 million in 2007.”

30. The Scottish Parliament’s Financial Scrutiny Unit has made an assessment of Scotland’s likely receipts and payments to the EU Budget between 2007 and 2013 assuming an allocation of a geographical share of the North Sea. The data suggests that Scotland was a net contributor to the EU to the tune of €1.78 billion over the course of the 2007-2013 Multiannual Financial Framework.

31. The UK Government’s Scotland Analysis paper “European Union and International Issues” included an assessment of the likely impact of Scottish independence from a EU budget perspective over the course of the 2014-2020 Multiannual Financial Framework. The UK Government’s figures include an assumption that an independent Scotland in the EU would not be able to keep a share of the UK rebate. The paper stated—
   
   “…as part of the UK, Scotland’s net contribution would be around €3.7 billion across 2014–20. This is between €2.2 billion and €4.3 billion less than its possible net contribution as an independent state over 2014–20.”

32. In “Scotland in the European Union”, the Scottish Government recognised that “an independent Scotland would be a net contributor to the EU Budget.” Government Expenditure and Revenue Scotland estimates that “Scotland made a notional net contribution to the EU budget in 2011-12 – contributing approximately

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£697m before the rebate and £402m after the rebate, when an illustrative geographical share of North Sea GDP is included.”

Public attitudes to EU membership

33. A reservation was articulated in relation to the loss of national sovereignty that membership of the EU entailed. Aidan O’Neill cautioned that—

“It is not all rosy, of course, because part of becoming a member of the European Union necessarily involves a limitation of the rights of that independent state. A state is no longer entirely free to carry out policies that it might otherwise wish to carry out, or indeed to have a democratic mandate from its own electorate to do so. It has to be said that there is an element of democratic deficit within the European Union.”

34. As noted above, the Scottish Government believes that the majority of the “members of the Scottish Parliament are in favour of membership of the European Union”. However, there is relatively little public attitudes data against which to assess whether this is also the case in the population more broadly. An Ipsos MORI poll published in February 2013 indicated that just over half of Scots (53%) would vote to stay in the EU, compared with a third who said they would vote to leave (34%). Ipsos MORI also asked participants in the February 2013 poll “regardless of how they intend to vote in the 2014 referendum, whether an independent Scotland should or should not be a member of the EU”. According to the results six in ten Scots (61%) think that an independent Scotland should be a member of the EU compared with around three in ten who think it should not (33%).

35. The 2013 Scottish Social Attitudes Survey asked a sample of 1,497 adults a question on attitudes to the United Kingdom’s membership of the EU. The analysis showed that whilst the proportion of people in Scotland wishing to leave the EU has risen since 1999 (from 10%), the proportion was still relatively low, sitting at 20% in 2013. Overall, the majority of those asked expressed a desire to remain in the EU, although 40% did express support for staying in the EU whilst looking to reduce the EU’s powers; this was an increase from 36% in 1999.

36. The 2013 Scottish Social Attitudes Survey also asked respondents whether, in the event of independence, Scotland should be a member of the EU. 34% said Scotland definitely should be a member whilst a further 34% said Scotland

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46 ScotCen Scottish Social Attitudes survey 2013 - What should Britain’s long-term policy on the European Union should be? Available at: http://whatscotlandthinks.org/questions/what-should-britains-long-term-policy-on-the-european-union-should-be#line
probably should become a member. 12% suggested that Scotland probably should not, with a further 12% suggesting Scotland definitely should not.  

37. In his analysis, Professor John Curtice suggested that this shows that Scotland has become more Eurosceptic over the last decade—

“…like the rest of the UK, Scotland is now a more Eurosceptic country than it once was...as recently as 2003 only 40% of people in Scotland wanted Britain either to leave the EU or at least to reduce its powers. Now that proportion stands at 60%. Even so, as many as 68% feel that an independent Scotland should either ‘definitely’ or ‘probably’ be a member of the European Union, an acceptance perhaps that whatever the apparent downsides of the EU in the public’s eyes, Scotland has little option than to seek to be a member.”

38. In evidence to the Committee, Professor Laura Cram emphasised that in discussing public attitudes to EU membership, it was important to contextualise the figures. She said—

“If we contextualise the figures, it is probably safer to say that Scotland is perhaps less anti-EU than England is. However, to contextualise them with European figures, the figure for the citizens in the whole of the UK who feel that they are citizens of the European Union remains at 42 per cent, and that figure and the figure for Greece, given its current circumstances, are the lowest among EU states.... In the UK context, there is evidence that the Scots electorate is slightly more pro-EU, but in the EU context, the notion that Scotland is particularly Europhile should not be overstressed.”

39. The Cabinet Secretary for Culture and External Affairs referred to differing attitudes in England and Scotland to EU membership—

“I will reflect on the two most recent polls on EU membership that I am aware of. In November, a poll in England said that 42 per cent wanted to stay and 50 per cent wanted to leave. In February, a poll in Scotland said that 53 per cent wanted to stay and only 34 per cent wanted to leave, so there is a difference of opinion.”

40. The suggestion was made in evidence by both Professor Kenneth Armstrong and Patrick Layden QC that if Scotland was to become an independent country, then a referendum should be held on membership of the EU. Professor Armstrong commented—

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47 ScotCen Scottish Social Attitudes survey 2013 - If Scotland became independent should it be a member of the European Union? Available at: http://whatscotlandthinks.org/questions/if-scotland-became-independent-should-it-be-a-member-of-the-european-union
48 ScotCen Scottish Social Attitudes 2013 Briefing Papers "Is it really all just about economics? Issues of nationhood and welfare" by John Curtice Available at http://www.scotcen.org.uk/media/265694/ssa_is-it-really-all-just-about-economics.pdf
“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 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. The Cabinet Secretary for Culture and External Relations set out the Scottish Government’s position on the question of whether a referendum should be held in Scotland on EU membership, should there be a vote for independence. She stated—

“The Scottish National Party Government does not want a referendum on membership of the EU; we do not think that it is required because we believe that Scotland’s best interests will be best served by continuing as a member of the EU. Why on earth would we have a referendum on something that we do not agree with?”

The alternatives to EU membership: European Free Trade Association and the European Economic Area

42. Membership of the European Free Trade Association (EFTA) and the European Economic Area (EEA) is sometimes proposed as an alternative to EU membership. EFTA is an intergovernmental organisation set up in 1960 for the promotion of free trade and economic integration to the benefit of its Member States, of which there are now four: Iceland, Liechtenstein, Norway and Switzerland. In the 1970s, the EFTA States concluded free trade agreements with the European Community, and in 1994 the EEA Agreement entered into force. It brings together the 28 EU Member States and the three EEA EFTA States - Iceland, Liechtenstein and Norway - in a single market, referred to as the "Internal Market". The EEA Agreement provides for the inclusion of EU legislation covering the four freedoms - the free movement of goods, services, persons and capital - throughout the 31 EEA States.

43. The EEA Agreement does not cover the following EU policies—

- Common Agriculture and Fisheries Policies (although the Agreement contains provisions on various aspects of trade in agricultural and fish products);
- Customs Union;
- Common Trade Policy;
- Common Foreign and Security Policy;

51 Professor Kenneth Armstrong. Written submission
• Justice and Home Affairs (even though the EFTA countries are part of the Schengen area); or
• Economic and Monetary Union (EMU).

44. The Scottish Government, in its paper “Scotland in the European Union” considers the EEA as an alternative to the EU. It concludes that EEA membership would not be a desirable option either from a democratic perspective or on economic grounds—

“The argument that membership of the EEA is desirable because it allows members to gain access to the Single Market but without having to adopt all of the regulations that full EU membership requires is simply wrong. Not only are companies and other economic operators in the EEA countries obliged to adopt all aspects of legislation associated with the single market, they have only very limited input into the decision-making process from which these laws emerge.”

45. The Committee took evidence from EFTA officials, as well as discussing the alternative presented by EFTA with other witnesses. The EEA Agreement allows some access to the European Commission’s expert groups and committees, but no formal access to the Parliament or the Council which are the EU’s decision-making institutions. Marius Vahl (Senior Officer to the Standing and Joint Committee and EEA Council, EFTA) confirmed that it was generally recognised that the inability to participate in the decision-making processes in the European Parliament or the Council was “the biggest challenge of being in the EEA”. He explained further that the EEA Members got—

“…the economic and social benefits of being part of the single market, but you do not have a political voice. There are lots of little mechanisms and systems in place to allow for some participation and consultation, but the bottom line is that our member states do not have any MEPs, have no vote in the Council and do not participate in its deliberations.”

46. The EFTA officials explained the formal and informal means that the EEA-EFTA states sought to use in order to influence the decisions taken by the EU. These included the formal meetings of the EEA joint committee and the EEA council and consultation mechanisms including participation in European Commission working groups developing legislation. There are also arrangements for EEA-EFTA attendance at informal Council meetings which take place once or twice under each Presidency. Another important channel is bilateral meetings in Brussels or the Member States. Marius Vahl stated that the need for ministerial-level engagement in Brussels was recognised as a “major drawback”, observing, “We have several ministers in Brussels every week and they regularly travel round Europe to all the capitals, whether that is London, Paris or Berlin.”

47. The financial contributions of the three EEA states differ, partly because Norway contributes both via the EEA financial mechanism and the Norway mechanism. Marius Vahl provided information to the Committee on the per capita costs for the EEA states of the agreements with the EU—

“In the case of Iceland and Liechtenstein, it is about €40, and in the case of Norway it is about €70. The figures for the biggest net contributors among the EU member states are slightly higher than that, being about €100. I am not sure whether I have the latest figure for the UK, but I think that it is comparable to Norway’s contribution, or it might be slightly less than that.”

48. Other evidence heard by the Committee further reinforced the view that the cost of EEA membership was high. For instance, Fabian Zuleeg stated that there was “a political price to pay for that [EEA membership], however: a country such as Norway must accept the body of law that the EU has produced without having a political say in the design of the laws.” Similarly, the SNP MEPs, Ian Hudghton and Alyn Smith, stated—

“The EFTA nations are required to transpose all EU legislation dealing with the single market yet have no representation in any of the legislative institutions. Furthermore, because Scotland has been a full part of the EU for 40 years, our industries are fully integrated into those areas of EU competence which fall outwith the scope of the EFTA treaties. To seek EFTA membership would require complex negotiations to exit these areas of competence in return for a diminution of influence in single market decision making processes.”

49. While there were varying degrees of enthusiasm for membership of the EU among the witnesses, there was also recognition that there were no viable alternatives. Dr Paolo Dardanelli concluded that “as these alternatives are sub-optimal, the real choice facing an independent Scotland would be between EU membership and ‘the open sea.’”

THEME 2 - THE ROAD TO MEMBERSHIP AND SCOTLAND’S REPRESENTATION IN THE EUROPEAN UNION

50. The second theme of the Committee’s inquiry – the road to membership and Scotland’s representation in the European Union – was the one on which the Committee heard and received the most evidence. A large number of issues were raised concerning the route by which an independent Scotland could become a Member State of the EU. This focused specifically on the potential legal basis by which an independent Scotland might become a Member State. The Scottish Government has proposed that Article 48 of the Treaty on European Union is a relevant legal basis to allow Scotland to become a Member State at the point of independence. Others have argued that the traditional route of Article 49 would
need to be used.\textsuperscript{60} The following section of this report covers the range of issues that emerged in relation to how Scotland could become a Member State of the EU in its own right.

51. In its paper on “Scotland in the EU”, the Scottish Government set out how it considered the process for Scotland becoming a Member State of the EU would occur—

“\textquote{The Scottish Government intends that detailed negotiations to secure the transition to Scotland’s independent EU membership will begin immediately after the referendum. At that time the Scottish Government will formally request the UK Government to notify the Council of the EU … to initiate the procedure necessary to allow Scotland to assume independent membership of the EU on the date at which Scotland becomes an independent country. This will include negotiations to determine the terms, and where necessary any transitional arrangements, under which an independent Scotland will take its place as a full EU Member State. The Scottish Government intends that these negotiations will be conducted between the date of the vote on 18 September 2014 and the date on which Scotland becomes an independent state in March 2016 – a period during which Scotland will remain part of the UK. There is no point in this transition process where Scotland requires to be, or will be, outside the legal and institutional framework of the EU.}\textsuperscript{61}"

The Edinburgh Agreement

52. The Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland – known as the Edinburgh Agreement – was signed in October 2012.\textsuperscript{62} The Agreement sets out the commitment of the two governments “to work together to ensure that a referendum on Scottish independence can take place.” Specifically, the two governments agreed that the referendum should—

- “have a clear legal base;
- be legislated for by the Scottish Parliament;
- be conducted so as to command the confidence of parliaments, governments and people; and
- deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.”

53. The Edinburgh Agreement also sets out the key elements of the legislation and the process governing the holding of the referendum. The Deputy First

\textsuperscript{60} These two sentences were agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.


Minister explained its significance and drew the Committee’s attention to article 30, which includes the statement that the “two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the UK.” The Deputy First Minister said—

“...it was significant because of its commitment in article 30, which both Governments signed up to, that both Governments would respect the outcome of the referendum and would operate constructively in the light of the outcome of the referendum, whatever it might be, to best represent the people of Scotland and the people of the rest of the United Kingdom. That is a really important commitment.”

54. In response to questioning by the Committee, a number of witnesses provided their views on the significance of the Edinburgh Agreement and its relevance. For example, Professor Michael Keating observed that—

“The Edinburgh agreement is a remarkable achievement of both Governments, because it removes at a stroke most of the constitutional and legal problems that might otherwise have arisen. However, it does not resolve the details, negotiations, precise terms, and economic and financial implications, and it does not in itself answer a lot of the questions that are raised in the white paper.”

55. Professor Stephen Tierney drew the Committee’s attention to article 30 in the Edinburgh Agreement. He stated—

“The important provision is the commitment in the Edinburgh agreement to respect the result. Given that the referendum legislation has been passed—the acts are very good pieces of legislation, in my view—and is likely to lead to a fair, lawful and democratic referendum, there should not be anything about the result that would lead the UK Government not to respect it. If there were a yes vote, that would presumably include helping to facilitate Scotland’s membership of international institutions.”

56. Professor Keating also set out why he considered the Edinburgh agreement to be of relevance to Scottish membership of the EU—

“Although Europe is not in the agreement, it is implicit that, if the UK agrees on the procedure for Scotland becoming independent, it would agree on Scotland becoming a member of the European Union, because both Governments knew perfectly well that what was being proposed was membership in the European Union—it was not proposed that we vote on independence outside the European Union. It is quite clear that the UK

Government has committed itself in some way to accepting Scottish membership of the European Union.”

57. In response to a question from the Committee about whether the UK Government had a responsibility to negotiate on Scotland’s behalf in relation to Scotland’s terms to remain a member of the EU under the Edinburgh Agreement, the Secretary of State for Scotland stated that “a little more” was being read “into the Edinburgh agreement than might be justified.” The Secretary of State for Scotland suggested that he was being invited—

“…to start negotiations when many things about an independent Scotland’s constitution would be unclear. Absolutely central to any negotiation on Scotland as a potential EU member is what currency she would use and whether she would have a central bank. Those matters would need to be established first, before anything could be considered with regard to an application. Surely that is a matter of agreement.”

58. The Cabinet Secretary for Culture and External Affairs emphasised that the implications of the Edinburgh Agreement were that the UK Government would need to start working in the interests of the Scottish people immediately following any Yes vote. She stated, “That does not mean starting in March 2016; it means starting this year, on 19 September, should there be a yes vote.”

The significance of the legal basis for an independent Scotland becoming a Member State of the European Union

59. The Scottish Government recognises the silence of the EU treaties in relation to the situation that Scotland would be in following a vote for independence in September’s referendum. It “acknowledges that the EU Treaties make no special provision for the consequences for EU membership where, by a consensual and lawful constitutional process, the democratically determined majority view in part of the territory of an existing Member State is that is should become an independent country.”

60. Professor Stephen Tierney observed that there is not “a clear set of articles that we can point to on admission for such a case” and Sir David Edward clearly stated, “As far as the treaties go, there is no solution to the problem.” However, witnesses universally recognised the need for Scotland, as an independent state,

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to first become a signatory to the Treaties in order for it to become a Member State of the EU.

61. In response to questioning by the Committee, Jim Currie confirmed that there was no legal route in the Treaties and suggested that there were reasons as to why this was the case—

“...you are absolutely right that there is no clear route of entry. We are not talking about a situation that is foreseen in the treaty or one which anyone would have wanted to predict; indeed, I imagine that one of the reasons why it is not in the treaty is because people do not want to think about it and because putting it in the treaty would be quite disruptive and destabilising. In short, there is a very good political reason why it is not in the treaty but, as Patricia Ferguson is absolutely right to point out, the result is that there is no clear route of entry.”

62. Professor Michael Keating stated that, in his view, “it would not be necessary to go through a long accession process, such as Croatia has just gone through, because this is not a transition country” and because Scotland already meets “the criteria for membership as well as any member state does.” He concluded—

“Broadly, Scotland already meets the criteria and, with the way that Europe works, a way can normally be found to do such things. The European Council—the heads of states—the Council of Ministers and the European Commission would not go to the law books to see what they should do; they would decide what they wanted to do politically and then find a legal way of doing it, and there are legal ways of doing such things.”

63. Professor Laura Cram also considered that a pragmatic solution would be found. She said, “I think that the lawyers will come up with a compromise. We may have an article 49 process that, in practice, looks more like an article 48 process.”

64. James Ker-Lindsay (Senior Research Fellow in the Politics of South East Europe at the European Institute, London School of Economics and Political Science) gave specific examples of the ways in which the EU had adapted to situations without precedent—

“The European Union has traditionally proven to be extremely adept at devising innovative ways of handling anomalous situations; as seen in the case of German reunification, the accession of a divided Cyprus and Kosovo’s integration process. There seems to be little reason why an entirely new and innovative procedure could not be developed to accommodate Scotland in a parallel process.”

65. Dr John MacDonald (Director, Scottish Global Forum) also referred to the example of the unification of Germany (although it should be recalled that the

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75 James Ker-Lindsay. Written submission.
German Democratic Republic was not a new sovereign state, but was unified with an existing EU Member State). He stated—

“The acceptance of the unified Germany into the EU was a triumph of common sense, can-do politics and it remains a striking reminder of the EU’s capacity – and willingness – to ‘find a way’. In the absence of regulatory articles which clearly legislate for a situation in which Scotland were to secede democratically from the UK, this precedent is something that we should reflect upon and take seriously.”[Dr MacDonald’s emphasis]76

66. Jim Currie’s view was that “the conditions under which Scotland currently practices its membership would inevitably be taken into account in the equation. They have to be.” He observed that the situation when the German Federal Republic expanded to include the former German Democratic Republic provided “some kind of parallel” with Scotland as it represented a situation “in which the EU had to be pragmatic. The politics of the situation were what was important, and a way was found.”77 Although he cautioned against any expectation that there would be “any easy slide into the future”, stating that while “a pragmatic approach would be taken to the matter,… it would inevitably involve rather tough negotiations.”78

67. Jim Currie also questioned the extent to which the lack of clarity in the Treaties was significant. He said—

“One of the questions that I keep asking myself is this: does it matter that much? This is going to have to be worked out in a pragmatic way, bearing in mind that we will be dealing with a territory that is currently part of a full member state, and with people who have, as EU citizens, rights that would be very difficult to take away—not that anyone would want to. A pragmatic approach would be taken in the talks without anyone necessarily saying, “Right. The Scottish Government has its view, and it’s only natural that its view is that there is a relatively easy route and a seamless way of conducting this process.” I suspect that others—the legal services of the Commission, say—might take the view that it is not quite as easy as that and that some other route will have to be followed. I do not know whether that would be the case, but it would be interesting to find out.”79

68. Similarly, Dr John MacDonald stressed that “we should not become too fixated upon legislative prescriptions” as “There are no articles which clearly legislate for a situation which would arise from Scotland’s democratic secession from the UK.”80

69. Some of the evidence from the legal experts also suggested that a pragmatic solution would be found to prevent any situation whereby there would be a hiatus

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76 John MacDonald, Director, Scottish Global Forum. Written submission.
80 Dr John MacDonald, Director, Scottish Global Forum. Written submission.
in the single market after Scotland became independent if membership of the EU had not been secured. Sir David Edward argued—

“In my view, the reality is that, if there is a vote for independence and there is a problem, it will be for the member states and the institutions to sit down and find a way through it so that there is no termination or abridgement of acquired rights of individuals.”

70. There was also a suggestion that the focus on a legal route represented the search for a certainty that does not exist. Professor Michael Keating emphasised that “…all that we can do is make a reasonable judgement on the balance of interests and how the legal questions can be dealt with. We cannot give guarantees.”

71. In evidence to the Committee the Secretary of State for Scotland underlined that he could not “offer certainty where no certainty exists.” In response to questioning on whether “Europe will always find a way”, he emphasised that the EU “is a treaty-based organisation and that, in order to get accession, it is necessary to have the agreement of all 28 member states.” The Secretary of State also cautioned that the EU found flexibility “not so much when it needs to but when it wants to.”

72. The Cabinet Secretary for Culture and External Affairs considered that political interests would act as a motivation to finding a solution to Scotland’s continuing membership of the EU. She stated—

“As the committee acknowledges—and everyone acknowledges—the situation is unprecedented, so negotiation will have to evolve at a political level. Where there is a political will, there will be a way. The EU is a past master at dealing with unprecedented situations, which have happened on a number of occasions. It can make sure that common sense prevails and that we have a process that makes sense for everyone, in mutual self-interest.”

What would be required for Scotland to become a European Union Member State?

Amendments to the Treaties

73. Scotland is currently a part of the United Kingdom, which is a Member State of the EU. The relevance of this to the process by which Scotland as an independent and sovereign state could become a Member State of the EU was a

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subject of discussion in evidence, with differing views posited as to its significance. However, it was clear that, as a minimum, there would be a requirement to amend the treaties in order for Scotland to become a Member State. The Law Society of Scotland stated, “Whether Scotland would remain or become a member of the EU, amendments to the treaties would be needed regarding matters such as the number of MEPs or number of votes in the Council.”

74. The EU Treaties govern the relationship between a Member State, the EU institutions and the other Member States. Both Article 48 and Article 49 have been proposed as legal bases for Scotland becoming a Member State of the EU. Article 48, which the Scottish Government considers could be used as a legal basis for Scotland’s membership, relates to the ordinary revision procedure for the Treaties. Article 49 relates to the accession process for new Member States and has provided the legal basis for the most recent enlargements of the EU. Notwithstanding whether an Article 48 or an Article 49 route – or a version of one of these routes – was to be used, there would need to be amendments to the Treaty on European Union and the Treaty on the Functioning of the European Union which would need to be agreed unanimously, and ratified, by all 28 Member States.

75. Under the Article 49 route, once an application for membership has been accepted unanimously by the Member States in the Council, following consultation with the European Commission and after receiving the consent of the European Parliament (by a majority), an agreement in the form of an accession treaty is negotiated between the applicant state and the Member States on the terms of admission and the consequential changes to the treaties. The accession treaty is then ratified by all of the Member States and the acceding state.

76. This accession treaty amends the Treaty on European Union and the Treaty on the Functioning of the European Union to include the new Member State in the Treaties (thereby binding it legally to the provisions in the Treaties) and providing for changes to the Treaties in the articles relating, inter alia, to the number of MEPs and votes in Council. The accession treaty also represents an opportunity to include other conditions relating to the admission of the acceding state to the EU.

77. In evidence to the Committee, Sir David Edward made the point that the number of treaty changes required to include an independent Scotland as a Member State would be relatively limited and that, in his view, this could be done through the ordinary treaty revision procedure set out in Article 48. He stated—

“For the sake of legal clarity, I add that the number of things in the treaties that would have to be amended is relatively small. A lot of the discussion that we have had has been about things that do not necessarily require a treaty amendment. If we look at the accession of Croatia, we see that the accession treaty is enormous but that the amendments to the treaty articles that are required by the accession are small in number, relatively speaking. Whether

87 Law Society of Scotland. Written submission.
this would be by article 48 or 49, the revisions required would be the same and would require to be agreed unanimously by all 28 Member States.”

78. Patrick Layden QC observed in written evidence that—

“I should start by saying that if – and it is a substantial “if” – the United Kingdom Government and the Scottish Government were to reach agreement as to the terms upon which independence is to take place, and if, thereafter, the European institutions and the other Member States were to agree that Scotland should be allowed to join on the terms set out in the White Paper, then in my view the question of Treaty base would become of little importance. There would in effect be a new EU Treaty, which would set out the general agreement, and which could be expressed as “notwithstanding”, or “having regard to” such of the Treaty provisions as seemed appropriate.”

79. In written evidence, Jean-Claude Piris drew attention to the basic requirement to amend the Treaties (and the Protocols attached to them) to include Scotland in the list of EU Member States—

“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.”

Signature of an Accession Treaty

80. The other issue that emerged in evidence in relation to an accession treaty was the need for the Head of State or Government of a sovereign Scotland to sign its accession treaty to the EU.

81. An accession treaty is a treaty between all of the Member States, listed and signed individually by the respective Head of State or Head of Government, and the new Member State concerning its accession to the EU. All previous accession treaties have been signed, in accordance with international law, by sovereign states. Following the signature of the accession treaty, each of the Member States ratifies the treaty in accordance with its own constitutional arrangements, which usually requires parliamentary ratification. The acceding country will also need to ratify the treaty.

82. In written evidence to the Committee, Lord Kerr of Kinlochard raised the question of how Scotland could sign an accession treaty before independence. If Scotland did have to wait until the date of independence to sign an accession treaty, and the other Member States could not start the process of ratification until

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89 Patrick Layden. Written submission.
90 Jean-Claude Piris. Written submission.
this point, it would cause a hiatus in Scotland’s membership of the EU. Lord Kerr stated —

“The EU remains a Treaty-based Union of sovereign states. Only sovereign states can sign its Treaties. It follows that a Scottish signature would have to await full Scottish independence, and formal recognition of independent Scotland by all member-states. In addition, the necessary amendments to the Treaties would not take effect immediately, but only after ratification by all member-states. It follows that Scotland could not be a member-state from the date of its independence.”

83. The issue of the need for an accession treaty was also linked to Scotland’s status vis-à-vis the EU following independence if it was not a Member State by that point. In response to questioning from the Committee in relation to which “article in the Treaty on European Union sees Scotland leaving the EU”, the Secretary of State explained—

“The Treaty on European Union lists the countries that are member states by virtue of having acceded to membership. The United Kingdom is listed in the treaty as a member of the European Union; Scotland does not appear as a member. As a legal entity or personality, it is not listed as a member, other than as a part of the United Kingdom. That is why I say that, should Scotland choose to walk away from the United Kingdom, it would be walking away from the institutions and the treaty obligations of the United Kingdom, of which the Treaty on European Union is just one.”

84. The Cabinet Secretary for Culture and External Relations confirmed that, in her view, “There are 5 million people here and there is no treaty provision for Scotland not to be part of the EU.” She also referred specifically to the Secretary of State’s comments about Scotland not being a member of the EU in its own right, stating “We are very much part of the fixtures and fittings of the EU, and I do not understand the secretary of state’s arguments as to how that would not continue to be the case because our name is not on the tin.”

**The selection of a legal base**

85. The lack of an existing legal basis or process for the scenario by which a part of a Member State of the EU decides to become a sovereign state and wishes to continue as member of the EU, resulted in a divergence of views among those providing evidence as to the appropriate legal basis for Scotland to become a Member State. Some of those providing evidence considered that article 49 should be accorded pre-eminence from the legal perspective as it would be consistent with the jurisprudence of the European Court of Justice and would not be open to challenge in the Court.

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91 Lord Kerr of Kinlochard. Written submission.
86. In written evidence to the Committee, Jean-Claude Piris argued 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 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 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.” 95

87. Similarly, Professor Kenneth Armstrong took the view that “article 49 is what would be called the lex specialis—the specific legal basis for dealing with an entity acquiring the status of being a member state of the European Union” and that this should therefore inform the decision as to the choice of the appropriate legal basis, rather than any view held by the country seeking accession—

“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.” 95

88. Lord Kerr of Kinlochard stated—

“The Scottish Government's preference (2) for Article 48 TEU, which sets out general procedures for considering treaty amendments, does not seem to be widely shared; and use of a general Article for a matter specifically addressed elsewhere in the Treaty would conflict with ECJ jurisprudence.” 97

89. The Scottish Government recognised that the question of the approach to the legal base rested with the Member States. It stated—

“...it will be for the EU Member States meeting under the auspices of the Council to take forward the most appropriate procedure to facilitate Scotland’s transition to independent membership of the EU. The Scottish Government would however stress that Article 48 (TEU) presents a legal path for the necessary amendments to the EU Treaties to be made to allow

95 Jean-Claude Piris. Written submission.
96 Professor Kenneth Armstrong. Written submission.
97 Lord Kerr of Kinlochard. Written submission.

90. The Scottish Government also stated that if there were a vote for independence in the referendum, it would “immediately seek discussions with the UK, the Member States and institutions of the EU to agree a process whereby a smooth transition to full EU membership can take place on the date on which Scotland becomes an independent State.”\footnote{Scottish Government. (2013) \textit{Scotland in the European Union}, page 11. Available at \url{http://www.scotland.gov.uk/Resource/0043/00439166.pdf} [Accessed April 2014.]}  

91. Sir David Edward took a different perspective on the issue of how to approach any problem for “which the Treaties do not expressly provide” arguing that a solution “must be sought first within the system of the Treaties, including their spirit and general scheme.”\footnote{Sir David Edward. Written submission.} He also emphasised that the scope of Article 48 was not limited to proposals to increase or reduce the competences of the EU. He stated—

“Article 48 is not limited to proposals to increase or reduce the competences. It says:

“The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia”—  

which means “among other things”—  

“serve either to increase or to reduce the competences conferred on the Union in the Treaties.”\footnote{Scottish Parliament European and External Relations Committee. \textit{Official Report, 23 January 2014}, Col 1696.}  

92. Sir David Edward gave his opinion that, by using Article 48, “following a vote for independence, it would be the obligation of the United Kingdom to table a proposal for the amendment of the treaties to take account of the situation that will occur when Scotland becomes independent from the rest of the UK.”\footnote{Scottish Parliament European and External Relations Committee. \textit{Official Report, 20 January 2014}, Col 1696.}  

93. In response to questioning as to whether the UK Government had considered obtaining a legal opinion from the European Commission on the use of Article 48, the Secretary of State for Scotland explained—

“We know that the view of the Commission is that article 49 is the correct procedure. We have that from the President of the Commission. The Deputy First Minister already has a letter from the Commission saying that there would need to be a specific proposal. We do not have a specific proposal to put to the Commission. We do not agree on article 48. The view of the United Kingdom Government is that the only way to seek accession to membership
of the European Union is through article 49. In any event, and as I have indicated already, we are well short of the sort of specification that we would be able to seek an opinion on.

Article 49: the evidence on this legal basis

The European Union Institutions’ position on Article 49

94. The European Commission, dating back to 2004 when the then President - Romano Prodi - first articulated an institutional position on the question, has been consistent in arguing that Article 49 would be the legal basis for a new Member State. The initial Prodi position is the most detailed pronouncement of the European Commission on this subject. It stated—

“…When a part of the territory of a Member State ceases to be a part of that state, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory.

Under Article 49 of the Treaty on European Union, any European State which respects the principles set out in Article 6(1) of the Treaty on European Union may apply to become a member of the Union. An application of this type requires, if the application is accepted by the Council acting unanimously, a negotiation on an agreement between the Applicant State and the Member States on the conditions of admission and the adjustments to the treaties which such admission entails. This agreement is subject to ratification by all Member States and the Applicant State.”

95. More recently, the current President of the European Commission – José Manuel Barroso - has reiterated this position, stating “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.” The President of the European Council – Herman Van Rompuy – expressed an almost identical view in December 2013—

“If a part of the territory of a member state ceases to be a part of that state because that territory becomes a new independent state, treaties will 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

Union and the treaties would, from the day of its independence, not apply anymore on its territory.”

96. During the course of the Committee’s inquiry José Manuel Barroso, President of the European Commission, made a comment on the “The Andrew Marr Show” regarding Scotland’s membership of the European Union, commenting that it would be “extremely difficult, if not impossible” for an independent Scotland to join the European Union. Mr Barroso also drew a parallel between an independent Scotland and Kosovo.

97. In response to questioning by the Committee on President Barroso’s comments, Jim Currie stated—

“He was unwise to express the opinion that he expressed with regard to the apparent virtual impossibility of an independent Scotland becoming a member of the EU—I think that that was extremely unwise and I do not think that he was correct. Furthermore, I do not think that his opinion is shared either among the member states or even within the commission.”

98. Dr. Fabian Zuleeg stated that comparisons with Kosovo “did not help the debate” and expressed that he was “uncomfortable” that Mr Barroso had made a “political point”—

“The suggestion that there are potential parallels between the situation of Kosovo and that of Scotland perhaps did not help the debate. In my view, the comments could simply have been about the process and the timing, and I am a bit uncomfortable that they made a relatively political point”.

99. The European and External Relations Committee wrote to the Vice President of the European Commission, Viviane Reding, in the context of her portfolio responsibility for Citizenship, and to Štefan Füle, the Commissioner for Enlargement and European Neighbourhood Policy. The response received from Vice President Reding reiterated the European Commission’s position that article 49 would present the legal route for an application to the EU.
100. Hugh McLean (a former European Commission official) drew attention to a different historic position that had been taken in relation to the 1979 referendum for devolution in Scotland. He explained that at that point in time, the Secretary General of the European Commission had considered there to be two successor states—

“During the late 70s in the run up to the referendum in 1979 to establish a Scottish Assembly Mr. Émile Noël, the original and highly respected Secretary General of the European Commission, was asked what would happen in the event that one day Scotland and England would separate (Wales and Northern Ireland were considered as “provinces” of England). He stated quite clearly that both nations were and would remain members of the European Economic Community but obviously there would have to be modifications both for administrative and judicial reasons. These two aspects would be the subject of negotiations for both nations. Since 1979 both Scots and English have acquired rights and as yet no legislation has ever been passed to expel a nation, whose citizens have been European citizens for decades not to mention those of us who were employed in the European institutions over that period.”

101. Lord Kerr of Kinlochard recognised that while there was “no secession precedent to follow,”—

“…the general view, as explained by the Presidents of the European Council and Commission, and by those member-states (including the UK) who have commented, is that the necessary negotiations would be conducted under the specific procedures set out in Article 49 TEU for the admission of new member-states.”

102. The Secretary of State for Scotland expressed the view that “the pretty widely accepted position is that Scotland would be removing itself from EU membership and then applying to re-enter, which is the clear statement that we have had from Barroso, Van Rompuy and others.”

103. The Cabinet Secretary for Culture and External Affairs considered that Scotland (as well as the rest of the UK) would be a successor state. She stated—

“The UK Government is arguing that Scotland would not be a successor state. Quite clearly, we think that it would be, as would the UK. That is a point of differentiation between where we are and where the UK Government is, in terms of the legal advice.”

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112 Hugh McLean. Written submission.
113 Lord Kerr of Kinlochard. Written submission.
104. The Labour’s MEPs, in written evidence to the Committee, noted that, “The institutions responsible for handling any negotiation and application for Scotland to join the EU are clear that Article 49 would be the article through which an independent Scotland could apply for EU membership.”

105. In written evidence to the Committee, Sir David Edward suggested that both President Barroso and President Van Rompuy were “singing from the same hymn sheet”, which appeared 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.” Sir David Edward further questioned, “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?” In his written evidence, Sir David Edward stated that—

“Treaties of the European Union "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). The autonomy of the EU legal order has repeatedly been affirmed by the Court of Justice.”

106. Sir David Edward notes that “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.” Professor Dardanelli also made this point. He said “the EU is a new legal framework with its own particular rules and values.”

107. Sir David Edward also observed “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.”

108. Sir David Edward also told the Committee that he thought the opinions provided by the European Commission failed to take account of the Scottish Government’s plan to negotiate membership from within the EU:

“My disagreement with Jean-Claude Piris and with everybody else who discusses this arises because they assume that the moment of the vote is the moment of independence. They fail to note the difference between voting for independence and actual separation.”

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116 Sir David Edward. Written submission.
117 Sir David Edward. Written submission.
118 Sir David Edward. Written submission.
119 Sir David Edward. Written submission.
120 Paragraphs 105 and 106 were agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
121 Sir David Edward. Written submission
109. James Ker-Lindsay questioned the extent to which the President of the European Commission’s view was a personal one and pointed out that there would be a new College of Commissioners later in 2014. He stated—

“… it is not clear the extent to which this opinion is based on hard and fast legal assessments or represents a more personal opinion. In this latter regard, it is perhaps worth bearing in mind that following European Parliament elections this year, a new Commission will be appointed. This could well see a change of thinking on the question of Scotland’s membership of the European Union in the event that there is a vote in favour of independence.”

110. Hugh McLean observed that—

“The statements made by Mr. Herman van Rompuy and Mr. José Manuel Barroso, Presidents of the European Council and European Commission respectively, are completely understandable if misleading. These gentlemen are politicians and it is their duty to prevent the fragmentation of the EU. Nonetheless the domestic arrangements for governance of the two nations making up the United Kingdom are outside the competence of the EU, whose credibility would be destroyed completely if it chose to ignore the democratically arrived at decision of the Scottish people.”

111. The Cabinet Secretary for Culture and External Relations drew the Committee’s attention to Article 2 of the Treaty on European Union which sets out the core values of the European Union and pointed out that Scotland was “an excellent example of democracy.” She also observed that—

“Both Mr Barroso and Mr Van Rompuy have made political comments for political reasons. I do not think that the role of the President of the European Commission is to reflect on the internal workings of any member state.”

The use of article 49 as the legal basis for accession to the European Union

112. Article 49 of the Treaty on European Union has been the legal basis of all accessions to the EU since the 1992 Treaty of Maastricht, when it was introduced in anticipation of the enlargement of the central and eastern European countries. It provides for the state seeking accession to initiate the process. The text of Article 49 is as follows—

Article 49

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council,

123 James Ker-Lindsay. Written submission.
124 Hugh McLean. Written submission.
which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

113. The Scottish Government describes Article 49 as providing the legal basis and defining the procedure “for a conventional enlargement where the candidate country is seeking membership from outside the EU.” The Scottish Government argues that—

“By virtue of having joined the EU in 1973 this is not the starting position from which the Scottish Government should be pursuing independent EU membership. Accordingly the Scottish Government at present, does not consider this as the appropriate route to independent membership.”

114. In addition to the points referred to previously about Article 49 representing the legal basis consistent with European Court of Justice jurisprudence and the “lex specialis” for an accession process, there was further evidence provided to the Committee on reasons why Article 49 would represent a suitable legal route. Jean-Claude Piris argued that Article 49 should be the legal basis as it relates to the Copenhagen criteria and the two sets of legal provisions that need to be approved for an accession. He explained his view in the following terms—

“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

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State‖. Article 49 provides that the same agreement will also contain the second set of legal provisions to be approved, i.e. “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.”

115. Professor Kenneth Armstrong also argued that “…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.” While he recognised that EU law has application in Scotland, “as a constituent territory of an EU state, and a territory with its own legal and devolved political system”, and that “its institutional structures play a role in the implementation of EU law”, he observed that—

“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.”

116. Professor Stephen Tierney emphasised that Article 49 had been developed for the accession of countries from outside the EU. He pointed out that—

“The lengthy and involved process associated with Article 49 might well be considered unsuitable for Scotland’s accession since Scotland is already part of a member state, meets the Copenhagen criteria and is fully compliant with the acquis communautaire.”

117. Patrick Layden QC, in his written evidence, emphasised the procedural advantages from the perspective of the Member States and the EU institutions of following the Article 49 route. He stated—

“There are clear practical advantages to the Member States, and the institutions, in following this procedure. It has been tried and tested in previous accessions. It gives a coherent structure to the process of assessment of whether an applicant State meets, or is prepared to comply with, the acquis. It is focussed on the single question of accession, and runs no risk of being distracted by extraneous considerations.”

129 Jean-Claude Piris. Written submission
130 Professor Kenneth Armstrong. Written submission.
131 Professor Stephen Tierney. Written submission.
132 Patrick Layden. Written submission.
118. In written evidence, the SNP MEPs, Ian Hudghton and Alyn Smith argued that “rigid application of Article 49 would run counter both to historical trends and the spirit of Article 2”\(^\text{133}\), which sets out the democratic values of the EU. They also suggested that arguments for the use of Article 49 implied that Scotland would need to apply for EU membership upon becoming independent, thus meaning there would be a period when Scotland was outwith the EU. They stated—

“These arguments ignore the vital fact that there is no provision for the expulsion of an existing part of the EU and that the EU, throughout its evolution, has tended towards both pragmatism and expansionism. The only mechanism which exists for exit from the EU is Article 50 TEU, through which a Member State may withdraw. Aside from the fact that Scotland has shown no intention to withdraw from the EU, application of Article 50 itself requires negotiation.”\(^\text{134}\)

119. The Cabinet Secretary for Culture and External Affairs explained why she considered that Article 49 would not be necessary for the case that Scotland would present—

“Article 49 is the traditional accession route—what might be called the Croatia route—for a country that has never implemented European legislation, that has not been a member for 40 years already and which does not have citizens who are currently members of the European Union. That position would be taken for a country such as Croatia, but it is not the position that we think would need to be taken for Scotland.”\(^\text{135}\)

120. The Cabinet Secretary also regretted that the UK Government had not presented a position on Article 48 to the EU for consideration and stressed that “the EU has not taken a view on Scotland because it has not been presented with a request to do so.”\(^\text{136}\)

The Copenhagen Criteria

121. In addition to Article 49, criteria for membership of the EU were agreed at the European Council in Copenhagen in 1993\(^\text{137}\) and later strengthened at the Madrid European Council in 1995. The revised treaty article for membership introduced by the Treaty of Maastricht and these criteria were developed in light of the “big enlargement”, notably in relation to the accession of the former Central and Eastern European countries. The “Copenhagen criteria”, as they are known, require a candidate country/accession country to meet the following three criteria—

\(^{133}\) Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.
\(^{134}\) Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.
• **political:** stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;

• **economic:** existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;

• **acceptance of the Community acquis:** ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.\(^{138}\)

122. During the accession process, the candidate country’s adoption, implementation and enforcement of the acquis are assessed. Each of the 35 chapters is negotiated separately, with the candidate country agreeing on how to adopt and implement the acquis. This process is monitored by the European Commission, which makes reports to the European Council and the European Parliament on progress.

123. The Scottish Government argues that the 18-month period between the referendum and formal independence “provides sufficient time for the Scottish Government to undertake the necessary legal and institutional preparations for independent EU membership, albeit a large part of this is already in place.”\(^{139}\)

124. In evidence to the Committee there was a general consensus that Scotland would meet the Copenhagen criteria and the acquis in terms of the body of law, but a question was raised in relation to the institutional and administrative structures required, which include - inter alia - a regulatory framework for public and private broadcasting; implementing, enforcement and administrative capacities for taxation; a competition authority; a central bank, and a national statistical institution. Patrick Layden QC stated that while he agreed that, technically, Scotland already complies with its European obligations”, he made the point that—

“…the European institutions expect to deal with independent authorities in member states on matters such as finance. In every member state, they expect to find a central bank to which their bankers can talk. They expect to find independent authorities on a range of national institutional matters, so that they have a responsible contact point in each member state.”\(^{140}\)

125. Graham Avery, an Honorary Director General of the European Commission, stated—

“It has been suggested that negotiations under Article 48 would need to include procedures associated with Article 49, such as an Opinion of the Commission and detailed ‘screening’ and intergovernmental examination of


Scotland’s capacity to implement each of the 35 chapters of the EU’s acquis. This would hardly be necessary in the case of Scotland, which has applied the EU’s policies and legislation for 40 years, and it would have little interest for other member states, who would be content to consider the matter on the basis of a report and proposals from the Commission. On the question whether Scotland would be able to fulfil the ‘Copenhagen criteria’ for EU membership, the Commission could be asked to give an Opinion, and such an exercise would be relatively simple since Scotland is already in the EU.”

126. David Crawley was of the view that there would be a role for the European Commission in producing an assessment of Scotland’s candidature for EU membership. He said, “Whatever the basis, the Commission will have to produce a detailed and lengthy assessment that will have to go to the Council before really serious discussions can start.”

127. The Secretary of State for Scotland stated that there was a need to establish that as a member state “in her own right, Scotland was sufficiently compliant with all 35 chapters of the acquis communautaire in order to be admitted to the EU.” He observed—

“It is true that, as part of the United Kingdom, we meet all the conditions of the acquis. It would, of course, be for an independent Scotland to satisfy the other members of the European Union that, as an independent country, it satisfied all the conditions of the acquis. .. In those areas in which Scotland does not have legislative competence in its devolved Parliament, the legislation is done at Westminster. If those areas—such as regulation of the financial services sector, which is significant and very important to Scotland’s economy—are to be transferred to an independent Scotland, we will need to satisfy the European Union that, as an independent country, we meet the conditions that are required from the acquis communautaire in all 35 chapters.”

Article 48: the evidence on this legal basis

Article 48: the Scottish Government’s position

128. As noted above, the Scottish Government has indicated that it does not consider Article 49 as an appropriate route for Scotland, which, in its view, would not be starting from the same position as candidate countries seeking membership from outside the EU. It states that—

“The alternative to an Article 49 procedure, and a legal basis that the Scottish Government considers is appropriate to the prospective circumstances, is that Scotland’s transition to full membership is secured under the general provisions of Article 48 TEU. Article 48 provides for a Treaty amendment to

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141 Graham Avery. Written submission.
be agreed by common accord on the part of the representatives of the governments of the Member States.”

129. Article 48 of the Treaty on European Union makes provision for the amendment of the EU Treaties and sets out two procedures for doing this: the ordinary revision procedure and the simplified revision procedure. The Scottish Government considers that the EU Treaties could be amended to provide for Scotland’s membership through the “ordinary revision procedure initiated by the United Kingdom Government with assistance from the Scottish Government before Scotland becomes independent to enable it to become a Member State at the point of independence.”

Article 48: the legal basis

130. The provisions in Article 48 relating to the ordinary revision procedure are the following:

Ordinary revision procedure

48.2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

48.3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

48.4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

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The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirement.\textsuperscript{147}

Article 48: avoiding a hiatus in Scotland’s EU membership
131. Sir David Edward has suggested that Article 48 could provide an alternative route for Scotland to become a Member State of the EU that would avoid any period in which Scotland was outside of the EU. He proposed that an approach could be adopted whereby a Treaty could be prepared, agreed and ratified to provide for continuity in Scotland’s membership of the EU by making provision for Scotland to become a Member State on the date of independence. He explained that relatively few amendments would be needed—

“I envisage that it would be necessary to have a treaty agreed, certainly with unanimity and ratification, which might or might not be possible within the 18-month period set out in the white paper. What might the treaty say? It might, for example, say, “Considering that it is agreed that Scotland and the rest of the UK shall be separate states as from a date to be determined, therefore”—and this would be article 1—“as from that date article 52 of the Treaty on European Union shall be amended to the following effect. The Treaty shall apply to the Kingdom of Belgium, the Kingdom of Scotland and the United Kingdom of England, Wales and Northern Ireland.” That is the treaty amendment that I would envisage, which could be agreed long before the moment of independence and would take effect at the moment of independence.”\textsuperscript{148}

132. Sir David Edward also explained to the Committee that he took a different position from most, who discussed the issue within the parameters of a conventional international public law approach, that is “in terms of the rights of states and whether there will be a continuator state, a successor state, a separate state or a new state.” He explained—

“I start from the position—which is clear in the major judgment of the European Court of Justice way back in 1963—that the treaties create rights for individuals, which, as the Court put it, ‘is ... intended to confer upon them rights which become part of their legal heritage.’ In my view, all the discussion about the rights of states entirely ignores the fact that people here and people who are dealing with us have what are called acquired rights. My view is that the institutions of the EU and the member states, including the United Kingdom, have an obligation, if there is a vote for independence, to ensure that those acquired rights are not abridged or terminated. That imposes an obligation to negotiate before there is any question of separation—before we get to the stage at which there is a new state.”\textsuperscript{149}


133. Brandon Malone, WS (a Solicitor Advocate) reiterated the argument for using Article 48 as a means of avoiding any gap in Scotland’s membership of the European Union. He stated—

“My view is that the article 48 route is suitable and is the only realistic way of ensuring Scotland’s membership of the EU on a continuing and uninterrupted basis in order to ensure continuity of effect of the existing arrangements. That route is clearly in the best interests not only of the people of Scotland but of the rest of the former UK … and of the other EU members.”

134. Graham Avery also identified the Article 48 route as a means of responding to the challenge of ensuring that Scotland became a Member State of the European Union on the date of independence, thereby avoiding a situation where there was a hiatus in the single market. He stated that—

“...negotiations on the terms of Scottish membership should take place in the period following the referendum and before the date of independence. For that purpose, Article 48 would be the legal basis: this approach is sometimes described as ‘internal enlargement’. The alternative would be the traditional procedure for EU enlargement, under which non-member countries are admitted; this approach, which means that Scotland would have to leave the EU and then apply for membership under Article 49, would be undesirable for practical and political reasons.”

135. The Secretary of State for Scotland recognised that it was “in the United Kingdom’s interest that there should be a single market and that the single market should be completed” but stressed that—

“...we are considering a scenario that would arise not at the hand of the UK but as a result of the people of Scotland choosing to remove themselves. The scenario would arise from the people of Scotland voting to remove themselves from the rest of the United Kingdom. That is not something over which the rest of the UK has control; it is a decision for us as Scots to make.”

136. Professor Stephen Tierney observed that the Article 48 route could be “less laborious than the Article 49 route” but that it “could still require a convention of Member States to be convened to adopt recommendations on the proposed treaty amendments.”

**Negotiations under an Article 48 procedure**

137. Some witnesses identified potential hazards linked to the Article 48 route, with a particular focus on the likely role that the UK would adopt in the negotiating process. In particular, questions were posed as to how the

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151 Graham Avery. Written submission.
153 Professor Stephen Tierney. Written submission.
Professor Stephen Tierney stated—

"The Article 48 amendment route requires to be initiated by a Member State, the European Commission or the European Parliament, and not, as under Article 49, by the state seeking accession. In this case, a proposal by the United Kingdom would be the most likely route. This would of course depend upon the willingness of the UK to nominate Scotland for membership. The terms of the Edinburgh Agreement suggest that the UK will recognize an independent Scotland in the event of a majority Yes vote. From this we might deduce a willingness to facilitate the Article 48 process, but this has not, to my knowledge, been confirmed by the UK Government.‖

Patrick Layden QC also drew the Committee’s attention to the potential role of the UK Government in relation to negotiations. He commented that—

"The assumption in the White Paper is that the UK Government would initiate the process. But it is impossible at this stage to predict that the UK Government would consider that its own interest would be served by such a course of action, particularly if the terms of settlement between itself and the Scottish Government were not settled. Even after a settlement on internal issues had been reached, the UK Government might reasonably come to the view that it would be more appropriate for a Scottish application for membership to proceed under Article 49: if the UK Government were not prepared to initiate the Article 48 process, it is difficult to see which other Government might wish to intervene."

Sir David Edward argued that the UK Government would continue to have a responsibility for Scotland until the date of independence. He questioned—

"On the argument that the UK ceases to have responsibility for Scotland's position if there is a vote for independence, does the Parliament of the UK cease to have legislative competence? Do the ministries responsible for non-devolved matters cease to have responsibility during this period? No, they do not. Until the moment of independence, the United Kingdom remains the United Kingdom and the institutions of the United Kingdom have responsibility vis-à-vis the whole United Kingdom, including Scotland. The idea that a vote for independence brings into birth an autonomous entity called Scotland is legally unsound."

Professor Kenneth Armstrong indicated that negotiations could start after a Yes vote, and that there would be good faith obligations on the UK Government to engage in those negotiations. He stated—

"I think that we can all accept that negotiations of some sort will occur, although some people might take the view that negotiations should be held up until the moment of independence—that is not an implausible view in

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154 Professor Stephen Tierney. Written submission.
155 Patrick Layden QC. Written submission.
some other European capitals. As I said, we need to be clear about to what legal end those negotiations will take place.‖

141. Dr John MacDonald suggested that if there was a vote for independence, then the “uncooperative stance of the UK would cease”. He stated—

“It is worth repeating that it would make no sense whatsoever for rUK to obstruct the most seamless EU transition possible for a newly independent Scotland. Firstly – as noted above – it would be very much in Downing Street’s political, economic and security interests to see Scotland up and running as quickly as possible. Secondly, any obstructiveness on London’s part would introduce an entirely unhelpful mood of resentment into the transition period. This would not only affect the dynamic between Edinburgh and London as they negotiated independence terms; it would also be viewed negatively by the international community.‖

142. In evidence to the Committee, Graham Avery stated—

“Between now and the referendum, there is an important amount of tactics that relate to these factors. We know well that the main parties at Westminster are against Scottish independence. If and when the referendum result is one that is in favour of an independent Scotland, it seems to me perfectly clear that the Westminster Government and the Whitehall machine will move into action very smartly to try and find a reasonable solution to the consequences. How can I put this? I need to be a bit diplomatic. As I think I said somewhere, when you prepare for such negotiations, you should listen to what the other party says, but you should also spend a good deal of time analysing what the interests are. I repeat that a situation in which Scotland was outside the European Union and not applying EU laws would be a legal nightmare for the rest of the United Kingdom, and the British Government must take account of that.‖

143. In response to questioning by the Committee about whether it would be his duty, as the Secretary of State for Scotland, to negotiate and argue for Scotland’s interests, the Secretary of State commented—

“I always promote Scotland’s case, and I will certainly respect the Scottish people’s view. However, surely you have to accept that, if Scotland votes to be an independent country, that will have implications for other parts of the United Kingdom and the European Union and there can be no certainty in that regard. I presume that that is why, as part of the Edinburgh agreement,
the Scottish Government and the United Kingdom Government said that there should be no pre-negotiation.”

144. The Cabinet Secretary for Culture and External Affairs emphasised that it was important for both the UK and the Scottish Governments—

“...to ensure, particularly from day 1 after the referendum, that there are productive and constructive relationships and that we all accept the importance of the legitimacy of the Scottish people in their decision. That relationship and that discussion are very important in terms of how the Governments act at that point, particularly in relation to the European Union.”

145. The Cabinet Secretary for Culture and External Affairs also stressed that it would be in the UK Prime Minister’s interest—

“...to facilitate a situation in which one part of the British isles, at his instigation, is somehow not part of the European Union. It will be in his self-interest to make sure that those discussions and that agreement take place. We will expect to take a key lead in our discussions with the European Union, but we recognise the role of the UK as the member state between the period of 19 September and March 2016.”

146. Professor Kenneth Armstrong argued that the UK Government piloting treaty amendments on behalf of Scotland “exposes Scotland to even greater political risks than were it to go down the accession route of article 49.” He considered that it was “curious” that the Scottish Government should propose that the UK Government would take on the role of initiating a treaty revision—

“The white paper dismisses and derides the current arrangements by which the UK Government handles European business that affects Scotland, yet suddenly when it comes to the most important issue—Scotland’s independent membership of the EU—it seems content with the idea that the UK Government’s arrangements will be okay for handling that. That seems rather odd.”

147. Patrick Layden QC argued that the changes required to the Treaties would not be known until negotiations with the UK on independence more generally had been concluded and that this would undermine the potential to use Article 48. He pointed out that—

“It is impossible to work out what amendments to the treaty you would want as at September 2014. You would not know that until you had finished the

process of agreeing with the UK precisely what the split would be and what the arrangements would be for separating institutions or sharing them. You would not know what package Scotland was going to put to the European Union. Even if the UK wanted to do so, it would not be able to put a coherent proposal to other member states.  

148. The Secretary of State for Scotland raised the potential for a legal challenge to the use of an Article 48 route. He stated that—

“The committee might also wish to have regard to the fact that, although a simple majority on the Council can, I think, undertake an article 48 process, the outcome requires unanimous agreement. Spain is already saying that an article 49 procedure would be the correct route. The difficulty with insisting on an article 48 procedure if member states do not unanimously agree that it is appropriate is that it would be open to legal challenge. If any party were to bring a legal challenge to a decision to go down the article 48 route, it would become ever more difficult to work against what is already a very tight timescale. That is another consideration that would, in practical terms, make an article 48 procedure—even if one was able to undertake it—fraught with difficulty.”

EU Citizenship

149. The issue of EU citizenship also emerged in evidence. The EU is an international organisation based on the principles of democracy and human rights. The EU Charter of Fundamental Rights, which has the same legal status as the Treaties, sets out the values and objectives of the EU in the following words—

“The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.”

150. Under Article 20 of the Treaty on European Union, every person holding the nationality of a Member State shall be a citizen of the Union, with attendant rights including that of moving and residing freely within the territory of the Member States of the EU. As previously mentioned, there are 160,000 EU citizens resident in Scotland, and the number of Scots living in other EU countries, including the rest of the UK, is likely to be in excess of that number.

151. Patrick Layden QC explained how Article 20 was given effect in relation to Scotland—

“Scotland’s people are citizens of the European Union because they are nationals of the United Kingdom. If they stop being nationals of the United Kingdom, they stop being citizens of the European Union. That is not going to come along by some constitutional accident; it will come along, as I said in my paper, as the result of a considered, deliberate and—I hope—informed decision of the Scottish people.”

152. Aidan O’Neill QC highlighted the issue of what would happen to Scottish citizens if Scotland was not a Member State of the European Union on the date of independence—

“European Union nationals who are here would no longer be within the EU and would no longer have claims against an independent Scotland for the protection of their EU rights. More important and, perhaps, more stunning, Scottish nationals—we are told that Scottish-born non-residents will automatically be given Scottish citizenship—who are working elsewhere in the EU—which by then would, I presume, include working in London—would lose all their rights as EU citizens and become extra-communitarians. That would put them in the same category as Americans, Russians and Australians as opposed to the privileged category that includes Romanians, Bulgarians and even Turks because Turkey has an association agreement with the European Community.”

153. Aidan O’Neill QC argued that the risks of this happening meant that there was “not just an obligation of good faith but a commonsense requirement to try to resolve the instability of having 5 million people who are EU citizens but whose state has no status within the EU.” He explained why he took a different view on this issue to one based on public international law—

“On the classic public international law analysis, if Scotland, as an independent entity, were to leave the EU, the citizenship of everyone in Scotland qua European citizen would remain—unless and until their former British nationality were withdrawn from them, when they might then be said to lose their European citizenship rights. However, there would potentially be an unstable situation in which a new independent state would be outside the European Union and have none of the responsibilities of membership but all the people in the new state would be citizens of the EU and have all the rights implicit in the European Union.”

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154. Aidan O’Neill QC also argued that as any loss of British citizenship would be “an active decision by the rest of the UK at such time as the rest of the UK is an independent entity” and because it “would have implications for the European citizenship of the remaining British citizens in Scotland, it would fall within the ambit of EU law and would potentially be justiciable before the Court of Justice of the European Union.”\(^{174}\) Thus, while Article 20 confers EU citizenship on anyone who is a national of an EU Member State, the withdrawal by a Member State of national citizenship may be within EU law and subject to a ruling of the Court of Justice of the EU as the ultimate guardian of the legal rights of EU citizens.

155. Graham Avery stated—

“I think that I also described the situation in which Scotland was outside the EU and was not applying EU rules, while the rest of the UK was applying them, as a legal nightmare. The issue is not just about fisheries—it is about the whole system of the single market and the network of trade and economics. Unless Scotland continues to apply EU rules, life will become diabolically complicated for firms and citizens, not just in the rest of the UK, but in Germany, Spain and elsewhere. It is well known that citizens and firms in member states other than the UK have rights in Scotland, by virtue of Scotland being a member of the EU and, if Scotland no longer applied EU rules and no longer had EU obligations, they would be in a right mess.”\(^{175}\)

156. The Secretary of State for Scotland took a classic public international law approach to the issue of citizenship. He considered that one of the consequences of a Yes vote in the referendum would be that “the rights of Scottish citizens as members of the European Union and the advantages that come to the people of Scotland as a consequence of the United Kingdom’s membership of the EU would go if Scotland voted to leave the United Kingdom.”\(^{176}\) He also explained what he considered would be the impact on EU citizens living in Scotland if Scotland became independent without being an EU Member State—

“The issue of the rights of people who are here already as part of their entitlements in the European Union—under the free movement of workers provision, for example—and the students who are here under a scheme such as the Erasmus scheme is interesting. It is their right to be in the United Kingdom. If the United Kingdom is then redefined by the people of Scotland choosing to remove themselves from it, such people would still, on paper, have the same right to be in the United Kingdom; it would just not include Scotland any more.”\(^{177}\)


\(^{176}\) This paragraph was agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

157. The Cabinet Secretary for Culture and External Affairs expressed her concern about this position. She referred to the possibility of "5 million European citizens to suddenly go from being part of the EU on day 1 to not being part of the EU on day 2" as absurd because Scotland was not a signatory to the EU Treaties—

“There are 5 million people here and there is no treaty provision for Scotland not to be part of the EU. A significant part of the debate is those 5 million citizens and what their rights as individuals are. Scotland has been a member of the EU for 40 years, and we have been applying laws in terms of the acquis communautaire and its chapters. … We are very much part of the fixtures and fittings of the EU, and I do not understand the secretary of state’s arguments as to how that would not continue to be the case because our name is not on the tin. We are citizens as individuals, which is important.”

158. The Cabinet Secretary for Culture and External Affairs referred to the importance of Scotland remaining within the EU as also being for the benefit of EU citizens of other Member States. She remarked—

“We should remember that Scotland has a great deal to contribute to the EU. Many European citizens live and work in Scotland; for example, the last national census indicated that more than 60,000 Poles live and work here. Continuity of effect with regard to Scotland’s membership of the EU will be important to other member states as well as to us.”

Attitudes of other Member States to negotiations for Scotland to become a Member State

159. As stated above, notwithstanding whether a legal route based on Article 48 or Article 49 were to be used, there would be a need for unanimity among the existing Member States on Scotland becoming an EU Member State and the treaty changes would need to be ratified by all of the Member States. These treaty changes would cover not only the inclusion of Scotland in all parts of the Treaties that make reference to the Member States, but also in relation to any specific conditions resulting from the negotiation of any exemptions for Scotland in key policy areas. The Scottish Government has indicated it would seek membership of the EU on the basis of “continuity of effect”, meaning a retention of the “opt-outs” negotiated by the UK Government during the course of the UK’s membership of the EU.

160. The potential attitudes of other Member States, both to Scotland’s membership of the EU and the terms of that membership was discussed in evidence to the Committee. Professor Michael Keating emphasised that, “None of the member states has said that it would veto, nor has any even threatened to do
However, he suggested that the attitudes to Scottish membership might impact upon the negotiations—

“It comes back to negotiating. Some member states would be very unhappy about Scottish independence, so they might be unco-operative. They might try to increase the price, just to show their own minorities how costly independence would be and to tell them, “You might do it, but there is a price to pay.” That would be part of the negotiations. On the question whether any of those countries would say that it was a matter of principle, I point out that, in the interrogation of the Spanish Prime Minister he refused, when he was offered the opportunity to do so, to say that Spain would veto Scottish independence. It is not a question of vetoes; it is a question of tough negotiations and how strong Scotland’s position would be to get the terms that it might want.”

161. David Crawley had greater concerns about the attitudes of other Member States, most notably Spain, but indicated that if unanimity could be achieved that it would facilitate any membership process—

“If there is complete unanimity on what should be done, of course the process would become a little easier. We have a fair amount of evidence to suggest that complete unanimity will be a struggle. We have heard Spain’s position. Whether that will change, I do not know, but we know that it is a big item to be dealt with and it will take time.”

162. Dr Paolo Dardanelli stressed the politics that were at play. He stated—

“It seems that a bit of a game is being played. A number of nationalist parties across Europe want to use the argument that their countries can be directly independent member states of the European Union in order to shift the politics of independence within their states. The European institutions do not want trouble, as far as that is possible, so the line of warning people that if they leave the member state they will be outside the EU is played out precisely for that reason. I am not entirely sure that that is the view that would prevail if the situation were to present itself.”

163. James Ker-Lindsay suggested that it was “noticeable just how little has been said”. He observed, “Thus far few countries have explicitly addressed the issue of Scotland’s independence, let alone its path to EU membership.” He attributed this “to an extreme reluctance on the part of most member states to become

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186 James Ker-Lindsay. Written submission.
embroiled in what is so obviously a very sensitive and important issue for a Union partner.”

“... there would appear to be little reason why the majority of member states would want, or try, to prevent an independent Scotland from joining, or retaining its place within, the EU. As long as the process leading to independence is seen to be democratic and reflects the views and wishes of all relevant actors, and that independence is freely accepted by the rest of the United Kingdom, there would appear to be no reason to suppose that the large majority of the 28 current members of the EU would raise an objection to Scotland’s independence or its admission into the European Union.”

164. Catherine Stihler and David Martin, the Labour MEPs, quoted the position of the Croatian Prime Minister in their written evidence to the Committee. They noted—

“As the Croatian Prime Minister stated in a recent letter: “As a matter of policy, Croatia strictly adheres to the position that all prospective EU members have to undergo a thorough, strict and fair negotiating process, fully adapting to the body of legislation, the rules and procedures of the EU. There can be no short cuts. The negotiations are, on the EU side, a consensus-based process; there needs to be necessary unanimity among the Member-States for all decisions regarding enlargement.”

165. The Secretary of State for Scotland referred to the need to have “regard to some of the politics.” He suggested: “it would not be in the Spanish national Government’s interests to make it look too easy for a part of a member state to secede from that state and to walk right back into the EU.” He also referred to the potential attitudes of some of the new Member States—

“Twenty-eight EU leaders, many of whom have only recently had to make tough policy choices to meet the requirements of membership, would need to agree to the process and, critically, they would need to agree the outcome. Ratification would need to be secured from 28 member states, which in many cases would involve votes in Parliaments.”

166. The Cabinet Secretary for Culture and External Affairs considered that there would be an obligation on not just the UK Government, but also the other EU Member States to start negotiating as soon as a Yes vote had taken place to ensure a smooth transition to EU membership without any hiatus period—

“That obligation is not only for the United Kingdom, as Sir David Edward sets out, but for other member states. What does that mean? It means that they have an obligation to Scots as citizens of the European Union from 19
September 2014 until March 2016. What is the obligation? It is to ensure a smooth transition and to act in the interest of the Scottish people as European citizens during the transition period.\(^\text{192}\)

167. The Cabinet Secretary observed that “a country that is cooperative and positive about its European membership is an asset to the European Union.”\(^\text{193}\) She also argued that Scotland’s membership of the EU was in the interests of other Member States as Scotland would be a net contributor. In relation to the other Member States, she also pointed out that “the risk to them of not having Scotland is a big one.”\(^\text{194}\) She referred specifically to the example of fisheries and argued that “there is a big self-interest in the fishing fleets of other countries continuing to have uninterrupted access to our waters” and argues that this would act as “an imperative for a timescale.”\(^\text{195}\)

Continuity of effect

168. The UK has a series of derogations from the EU Treaties (as do some other Member States), meaning that it has secured agreement to opt not to enforce some of the specific provisions in the Treaties. These opt-outs\(^\text{196}\) include—

- the single currency opt-out in Protocol 15;
- the opt-outs relating to the Schengen acquis in Protocol 19;
- the opt-out on the prohibition of border controls under Protocol 20;
- the Justice and Home Affairs opt-in in Protocol 21; and
- the provision under Protocol 36 for the UK to notify the Council that it does not accept ECJ jurisdiction and Commission powers of infraction in relation to the remaining Third Pillar police and criminal judicial cooperation measures.

169. The Scottish Government has indicated that it “will approach EU membership negotiations operating on the principle of continuity of effect: that is a transition to independent membership that is based on the EU Treaty obligations and provisions that currently apply to Scotland under its present status as part of the UK.”\(^\text{197}\) If the Scottish Government was successful in its negotiations, the Scottish Government has acknowledged that this would require additional amendments to the EU Treaties to make specific provision in relation to a series of opt-outs for Scotland.

170. The Scottish Government presents its reasons for seeking to take this approach in the following way—

\(^{192}\text{Scottish Parliament European and External Relations Committee. Official Report, 3 April 2014, Col 1945.}\)
\(^{196}\text{A table of the UK opt-outs is included at Appendix A.}\)
“The Scottish Government’s objective in negotiating Scotland’s transition to independent Scotland EU membership will be to ensure, post-independence, continuity of effect with regard to the rights and obligations that currently prevail in Scotland consequential upon the UK’s membership of the EU. The Scottish Government believes this approach best secures the legitimate national interest of Scotland and its citizens, as well as the rest of the UK and indeed the EU in general.”\(^{198}\)

171. In evidence, caution was expressed about assuming that Scotland could secure the same terms for its membership of the EU as the UK benefited from in the context of successive treaty and budget negotiations. Aidan O’Neill QC pointed out that—

“Those are issues that would have to be subject to negotiation. One cannot assume that an independent Scotland will inherit all the benefits of the negotiations that have previously been carried out on behalf of the UK as a whole.”\(^{199}\)

172. David Crawley considered that the position of the Scottish Government in seeking “certain derogations from the standard framework of the European treaties” would impact upon the timetable for membership and the attitudes of other Member States—

“…if Scotland wants to take on United Kingdom derogations—if it wants to take on, as it were, a share of the UK rebate or to develop special protections for Scottish fisheries—those are significant issues that will require time to negotiate and will discourage some of our European partners from wanting to hasten the whole thing along.”\(^{200}\)

173. In written evidence, Dr Arman Sarvarian (Director of the Surrey International Law Centre) suggested that the Scottish Government could not guarantee it would retain all the opt-outs it currently enjoys as part of the UK. He wrote—

“..the fundamental flaw in the programme set out in the White Paper is that it fails to acknowledge that the EU membership of an independent Scotland would require the agreement of the EU institutions and Member States, which may well decide not to offer Scotland opt-outs comparable to those that the UK would continue to enjoy from the Eurozone, Schengen Area, Justice and Home Affairs as well as the budget rebate. This does not provide a realistic assessment of a probable and foreseeable outcome of the accession negotiations.”\(^{201}\)

174. Jim Currie emphasised that he considered that negotiations on securing the UK opt-outs for Scotland would be “tough”. He stated—


\(^{201}\) Dr Arman Sarvarian. Written submission.
“...negotiation about the terms of an independent Scotland’s membership would not simply involve a seamless move into the EU. Tough negotiations would revolve around a number of things and specifically the opt-outs that the UK has—the Schengen opt-out, the budget abatement and the opt-out from justice and security measures. I think that there will be tough negotiations around these things. Other member states will have the right to challenge the position and ensure that the conditions under which Scotland would become a full member state of the EU are fully negotiated.”

175. In relation to the Scottish Government’s position on “continuity of effect”, the Scottish Labour MEPs, Catherine Stihler and David Martin, stated in written evidence—

“The concept of “continuity of effect” may be the position of the Scottish Government, but there is little support from other Member States to allow Scotland to benefit from UK’s opt-outs on fundamental policy areas, especially when Scotland would be approaching the negotiating table from a position of relative weakness as an applicant, not an existing Member State.”

176. The SNP MEPs stated—

“The values outlined in Article 2 TEU and the EU’s pragmatic nature would also suggest that application of the principle of continuity of effect would seem reasonable. In the event of the people of Scotland democratically opting for independence, to apply any other principle would amount to the EU erecting unnecessary barriers to achieving that democratic goal.”

177. Some evidence was more positive about the likelihood of securing “continuity of effect”. Graham Avery submitted: “in respect of EU policies and legislation Scotland’s citizens have a legitimate expectation of the maintenance of the status quo in terms of economic and social conditions on the accession of Scotland to the EU.” The European Movement in Scotland affirmed that it considered the Scottish Government’s approach in terms of seeking to negotiate on the basis of continuity of effect to be a “common sense starting point for negotiation”. The SNP MEPs state in written evidence that, “In the field of opt-outs, the Treaties already acknowledge special circumstances and there is no logical reason to suppose that these would be denied to Scotland.”

178. The Secretary of State for Scotland suggested that negotiations could be problematic and questioned whether the opt-outs could be secured. He stated—

203 Catherine Stihler and David Martin, Labour MEPs. Written submission.
204 Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.
205 This paragraph was agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor)
Abstentions 0.
206 Graham Avery. Written submission.
207 The European Movement in Scotland. Written submission.
208 Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.
“This is where we get into more practical terms. The issue is not the legalities of article 48 or 49 but the terms of membership. The people of Scotland will wish to have serious regard to and concern about that. As part of the United Kingdom, we have over the years built up a favourable body of terms and conditions. We have the rebate on our budget contribution, to which I have referred. We have an opt-out from the Schengen arrangements, which I understand from the white paper that the Scottish Government would wish to continue in an independent Scotland. We have an opt-out from the euro and, when it is considered to be appropriate, from justice and home affairs legislation.”

179. The Secretary of State for Scotland also suggested that instead of simultaneous negotiations taking place on independence with the UK and membership with the EU—

“…the sensible approach would be first to establish what the bilateral arrangements would be between Scotland and the rest of the United Kingdom and then to have the negotiation with the rest of the European Union members. However, that is only my view. You will see the complexity and difficulty of the undertaking that we are being offered.”

180. The Cabinet Secretary for Culture and External Affairs recognised that there would “be lots of discussions and negotiations on different areas.” She argued that continuity of effect was in the interests of other Member States and the rest of the UK—

“It might have been advantageous for us if we wanted to renegotiate everything, but we do not. In the interests of the smooth transition I talked about and in the interests of other countries and the rest of the UK, during the discussions in that 18-month period we will need to achieve continuity of effect.”

181. The Cabinet Secretary also emphasised the importance of negotiations with the UK in certain key areas—

“Those negotiations are within the current UK position and, as other countries have acknowledged, if we can resolve internally within the British isles within that 18-month period the split in terms of responsibilities, contributions and assets, it will be easier to move forward. That makes sense from lots of different points of view, and it is what is set out in “Scotland’s Future”."

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The Budget Abatement

182. The UK budget abatement (rebate) was agreed in 1984 at the Fontainebleau European Council. The UK argued for an abatement to its contribution to the then European Community budget on the basis that its agricultural sector represented a significantly smaller proportion of its economy than was the case in other Member States and it therefore did not benefit to the same extent as other countries did from the Common Agricultural Policy (CAP). In 2005, the UK Government agreed a 20% reduction in its budget abatement for the 2005-13 funding period on the condition that these funds were not used for the CAP. However, there was no reduction to the UK abatement in the Multiannual Funding Framework for the 2014-20 period. Nevertheless, the steady diminution of CAP spending as a proportion of the EU budget has underpinned arguments against the UK continuing to receive this abatement.

183. The UK’s abatement is broadly equal to 66% of the difference between its gross contribution and its receipts in terms of EU funding. As a consequence, this reduces the incentive for the UK to seek additional EU funding. Other net contributor Member States have forms of abatements, known as generalised correction mechanisms, which are the subject of negotiation when the budget is being agreed for each seven-year funding period.

184. The Scottish Government recognises that an independent Scotland would be a net contributor to the EU budget, but considers that Scotland would still benefit from an abatement for the current financial period. It states—

“The net budget contribution will reflect the outcomes of the negotiations on issues such as the rebate and an independent Scotland’s share of EU spending programmes. The current EU budget has been agreed until 2020 and as such the Scottish Government would not intend to re-open budget discussion until the next financial period post 2020. Scotland and rUK will be required to negotiate the division of the UK’s contribution up to 2020.”

185. The Council Regulation on the Multiannual Financial Framework for 2014-20 states that “should a revision of the Treaties with budgetary implications occur between 2014 and 2020, the MFF shall be revised accordingly.” It also states that, “If there is an accession or accessions to the Union between 2014 and 2020, the MFF shall be revised to take account of the expenditure requirements resulting therefrom.” Therefore there is a provision for changes to the MFF.

186. In written evidence David Crawley referred to attitudes among other Member States towards the UK budget abatement and the Scottish Government’s anticipation that it would aim to secure a proportion of this rebate in accordance with the principle of “continuity of effect.” He observed—

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“It is interesting in this context that the Scottish Government has stated that it expects to retain a share of the UK rebate (an objective which it is very hard to see being achieved in the light of the strong and continuing resentment which most other member states feel for the current arrangement).”

187. Professor John Bachtler also referred to other Member States attitudes to the UK abatement and suggested that the use of a generalised correction mechanism might be the more likely approach for any abatement for Scotland—

“It is difficult to see a scenario where other member states would agree to a replication of the rebate because the UK is constantly isolated in almost every batch of negotiations. More reasonable would be for Scotland to benefit from what are called generalised correction mechanisms, which Austria, the Netherlands and Germany benefit from but which do not have a permanent status. They have to be renegotiated every seven years. That is perhaps the most likely scenario.”

188. Jim Currie questioned whether the UK abatement could be regarded as a permanent agreement or whether it would be the subject of negotiations in the future—

“As to the question of whether Scotland would lose the abatement and whether it would be subjected to the same conditions as those that the rest of the UK would have or have its rebate put on a kind of time-limited basis, again I do not see that the negotiations would necessarily demand that things change overnight. The question is about what kind of derogation Scotland would have and how much time the UK and Scotland would have to deal with the rebate situation. Is it a permanent thing? I do not think that a lot of people in the EU Council of Ministers would necessarily regard it as a permanent feature of UK membership. Again, those things are up for negotiation.”

189. Dr Fabian Zuleeg suggested that a transitional agreement might be found between the UK and Scottish governments until budget negotiations for the post 2020 budgetary period commenced. He was of the view that there would be “intensive pressure on the UK about its rebate” in future budgetary negotiations. He stated—

“My view is that in the end a solution would be found at the London-Edinburgh level that includes an agreement about EU finances. That would be a transitional arrangement, which would be accepted in other countries. However, it is clear that it would be a transitional arrangement, which would last until the end of the current financial programming period in 2020, and

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215 David Crawley. Written submission.
there would be no right to continue to have a rebate indefinitely. I cannot see that being granted to another country.”218

190. Graham Avery highlighted the importance of the role of the other Member States in any eventual decision on Scotland’s payments to the EU budget—

“The Scottish government’s view that the division of the UK rebate would be a matter for negotiation between the Scottish and British Governments is not correct, while the British government’s suggestion that the rebate would be adjusted automatically is misleading. Other member states would take a very close interest in these budgetary matters.”219

191. The Secretary of State for Scotland expressed doubt as to whether Scotland would benefit from a rebate and observed that, “It would be deeply ironic if Scotland walked away from the United Kingdom and its rebate but the taxpayers in an independent Scotland then ended up paying their share towards the rebate for the continuing United Kingdom that it had just walked away from.”220

Eurozone
192. Protocol 15 recognises that the UK is under no treaty obligation to adopt the single currency. Under Article 119(2) TFEU all Member States without an explicit opt-out are obliged to make progress towards membership of the Eurozone. Furthermore, the accession treaties with all of the new Member States since 2004 have reiterated this obligation. Scotland, from a legal perspective, would need to secure the same legal opt-out that the UK has under Protocol 15 to ensure that it would not be under a legal obligation to adopt the single currency.

193. The Scottish Government has indicated that “sterling will remain the currency of an independent Scotland.”221 It rejects any suggestion that “Scotland would have no choice but to become a member of the Eurozone and adopt the Euro as its currency following independence.”222 It points out that eleven Member States (now ten) do not currently use the euro and that the UK and Denmark secured an “opt-out” from the Treaty provisions relating to the Euro. The Scottish Government also argues that a Member State has the prerogative to determine “whether, and when it is appropriate – in terms of their economic self-interest – to adopt the Euro, and the economic pre-conditions that Member States must satisfy (under EU law) before being allowed to join the Eurozone.”223

194. The Law Society of Scotland set out the situation that the Scottish Government might face in relation to Scotland’s currency—

219 Graham Avery. Written submission.
“The terms of … a currency union would be the subject of negotiation with the UK. If those negotiations proved to be unsuccessful, an independent Scotland would be left with a number of currency options such as: unilateral use of the pound sterling outside the scope of a currency union; unilateral use of the Euro outside the scope of monetary union; or adoption of a new Scottish currency. The outcome of the negotiations with the EU would determine whether an independent Scotland would be legally committed to join the Euro – as are all Member States with the exception of the UK and Denmark – or benefit from the same derogations as the latter. An independent Scottish Government may be legally committed to join the Euro but still decide not to meet and sustain the membership criteria over a certain period of time, as is the case with Sweden.”

195. Dr Fabian Zuleeg emphasised the significance of having an opt-out from provisions in the Treaty on European Union and suggested that a new Member State might have difficulty in securing such an explicit opt-out. He stated—

“There is a big difference between having an explicit opt-out and having an implicit opt-out, which Sweden is practising. A new member is unlikely to get an explicit opt-out, such as the kind of arrangement that exists for Denmark or the UK, in which it says in law that a country has the choice of joining or not. However, the reality is that there is nothing in the legal framework of the European Union that could force a country to join the exchange rate mechanism so, although there might be pressure on a country to eventually join the exchange rate mechanism, that condition cannot be enforced by law.”

196. Dr Zuleeg also stressed the significance of the “convergence criteria” for the Eurozone, which require a Member State to meet four tests (these relate to the inflation rate; Government finance and deficit and debt ratios; prior membership of the Exchange Rate Mechanism II for a two year period; and long-term interest rate levels). Dr Zuleeg explained his view on the Eurozone—

“It is clear that, in the current framework of the European Union, no country can be forced into the eurozone. It is difficult to see how it would be in the interests of the eurozone or the member states to drag a reluctant country into it—I find that difficult to envisage. Although there is an obligation to accept that there is a commitment eventually to join economic and monetary union, in practical terms, a country can stay outside—that is the reality. Sweden has shown that for a long time, so there is no timeframe attached. By not joining the exchange rate mechanism, which is one of the preconditions for euro membership, a country can in effect choose to stay outside the euro indefinitely.”

197. Jim Currie set out the implications of an independent Scotland seeking to retain sterling as its currency. He stated—

224 Law Society of Scotland. Written submission.
“...it is perfectly reasonable for Scotland to say that it is disruptive to assume
that we would want to go into the euro overnight and that that is not going to
happen. On the other hand, there is the question of making entry to the euro
too much of a red-line issue. I think that it will come up in the negotiation as
an issue and that there will be pressure from some people for it to be
recognised, but I honestly think that, in the negotiation, it would be for
Scotland to explain the need for stability and continuity of currency, which is
quite important and needs time if nothing else.”

198. The European Movement in Scotland suggested that of the opt-outs Scotland
currently enjoys as part of the UK the one which might be difficult relates to
membership of the Eurozone. On Schengen and the Euro, EMiS stated:

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

199. Graham Avery was of the view that Scotland would not be obliged to join the
Euro. He stated—

“I have said already that even if you accept the basic treaties, which say that
in principle you accept economic and monetary union, in practice no new
member state is permitted to use the euro on accession, and if you do not
want to join the euro, there is no way that the EU can or would obliged you to
do so. People sometimes say, “Yes, but you need an opt-out,” to which the
simple answer is that Sweden does not have an opt-out, and nobody
suggests that Sweden is behaving in contradiction of European law.”

200. In oral evidence, Professor Michael Keating drew the Committee’s attention
to commitments to greater fiscal co-ordination and a form of banking union as
evidenced in the Treaty of Stability, Co-ordination and Governance (which was
signed by all Member States except the UK and the Czech Republic). In reference
to the Treaty, he stated—

“That is pointing towards greater monetary and fiscal co-ordination with,
eventually, some kind of banking union. It even includes states that are
outside the euro. The UK Government said that it is going to opt out of that,
but I would want to ask the Scottish Government whether it wants to opt into
that. A small state is extremely vulnerable, and we may need a rescue
package at some time in the future—the UK may, too. Who will our friends
be? Will we look to the UK and the Bank of England for bail-outs, or is there a

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228 European Movement in Scotland. Written submission.
229 Scottish Parliament European and External Relations Committee. Official Report, 30 January
2014, Col 1745.
European framework for that? Do we want to go towards a European banking union? If we do, can we keep the pound?”

201. In relation to membership of the Eurozone, the Secretary of State for Scotland stated—

“Given the bold and categoric statement that has been made, I wonder how the negotiation will proceed when it is put to the negotiators on behalf of an independent Scotland—however the negotiation is done—that we should join the euro. If they give that undertaking in principle, one would really have to question whether that is a good-faith undertaking. If the other 28 member states come to the conclusion that undertakings that the Government of an independent Scotland had given were not given in good faith, one has to think that that would colour the conduct of the other negotiations. Once we get past the procedural issues and start to look at the challenges that would be faced in the negotiations that would be required, that has a bearing.”

202. The Cabinet Secretary for Culture and External Affairs argued that “it would be in the interests of the rest of the UK to have a currency union, which would mean Scotland retaining the pound.” In relation to the exchange rate mechanism, the Cabinet Secretary stated that “we would not voluntarily be part of the ERM” and observed—

“Leaving to one side the fact that Scotland would not be an applicant country in the traditional way—through article 49, or the Croatian route—I point out that, under article 140, applicant countries should have been a member of the exchange rate mechanism II for two consecutive years and should not have devalued their currency during those two years. Of course, everybody knows that membership of the exchange rate mechanism is voluntary. There is also a further point about long-term interest rates. Therefore, even under the terms of the euro itself—the various conditions, membership of the ERM and so on—there is no reason why Scotland would ever be in a position in which we would have to accept the euro.”

The Schengen Area

203. The UK and Ireland have negotiated opt-outs in relation to the Schengen area. Currently, in accordance with Article 7 of Protocol 19 of the Treaties, “For the purposes of the negotiations for admission of new Member States into the European Union the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission.”

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204. The opt-outs that the UK and Ireland have relate principally to border controls. These preclude any Treaty rules or international agreements concluded by the EU from impinging on the UK’s control over its borders. It recognises the “existence for many years of special travel arrangements between the United Kingdom and Ireland”. It further states that “the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the ‘Common Travel Area’).”

205. The Scottish Government states that it would “seek to retain the current exemptions regarding the Schengen acquis as provided for under Protocols 19 and 20 of the Treaty on the Functioning of the European Union” and therefore not seek membership of the Schengen area. It explains that—

“While endorsing the objectives underpinning the Schengen Agreement, protecting the integrity of the UK and Ireland social union means that an independent Scotland will remain within the Common Travel Area (CTA) presently comprising the UK, the Channel Islands, the Isle of Man and the Republic of Ireland.”

206. In written evidence, the SNP MEPs, Ian Hudgton and Alyn Smith, referred to Protocol 20 to the Treaties—

“Protocol (No 20) dealing with the Common Travel Area (CTA), for example, refers to “the existence for many years of special travel arrangements between the United Kingdom and Ireland” and goes on to exempt the two states from the Schengen zone. Given that the Protocol expressly recognises the particular circumstances involved in the CTA, it seems unlikely that Scotland’s special relationship with the remaining UK and Ireland would be denied by a mandatory imposition of Schengen rules.”

207. Professor Michael Keating argued that, “There is no question of being forced into Schengen unwillingly, because countries must be willing to meet all the obligations of membership.” He said—

“Remaining outside Schengen and in the single travel area would be a lot easier to negotiate than getting into Schengen. If Scotland were to adopt Schengen, which it would be open to it to do, it would be really complicated. Maintaining the present free travel area and the Schengen border would be a great deal simpler.”

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238 Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.
208. David Crawley observed that “I do not think that anyone would be in the slightest bit surprised or particularly concerned if the Scottish Government wished to retain the Schengen opt-outs because that is consistent with Ireland’s current position.”

“He also said —

“In order to get into Schengen, a country has to meet certain conditions anyway. It might be that, in general, it would be assumed that an accession state would join Schengen in due course, but only once a series of conditions were met, which could take a very long time in the case of some new member states. If Scotland wants common travel arrangements within the UK, it has no option but to keep out of Schengen.”

209. The Secretary of State for Scotland suggested that the Scottish Government’s position would have “implications for the conduct of the bilateral negotiation between Scotland and the rest of the United Kingdom.” He explained that—

“For example, we know from the white paper that the Scottish Government wishes to enter into the common travel area with the rest of the United Kingdom, Ireland, the Isle of Man and the Channel Islands. I have concerns about that because, at the same time, the white paper tells us that Scotland would have a radically different immigration policy, and I do not think that those things are necessarily compatible. Parking that concern for the moment, if Scotland is to be part of a common travel area with the rest of the United Kingdom, the Republic of Ireland, the Isle of Man and the Channel Islands, we will not be able to join Schengen. We can either have Schengen or the common travel area.”

Justice and Home Affairs

210. Protocol 21 of the Treaties relates to Area of Freedom, Security and Justice (AFSJ) provisions. Following the Lisbon Treaty changes, the UK and Ireland are effectively not bound by any of the measures adopted under AFSJ, although either state can participate in measures if it so wishes. The Scottish Government indicates that it “will seek to retain the flexibility to opt in to new measures provided by Protocol 21, in a new Protocol to the TFEU.”

This would require a Treaty amendment to include Scotland in this Protocol, along with the UK and Ireland. It further explains—

“We anticipate that an independent Scotland would recognise the significant benefits such measures bring to our citizens and the whole of the EU. There

may, however, be instances where the specific characteristics of Scot’s law mean that it would not be in Scotland’s best interests to do so.” 245

211. The UK Government has exercised an opt-out from the Police and Criminal Justice measures adopted before the Treaty of Lisbon entered into force in 2009. The UK Government has indicated that it will opt-out of approximately 130 measures and then take a decision about whether it will opt back in to any of these measures before 31 May 2014.

212. Patrick Layden QC explained the background to the UK’s opt-out in relation to JHA measures under Protocol 36 and that as the measures form part of the acquis communautaire, Scotland would need to seek a formal opt-out—

“The UK ... negotiated a derogation enabling it to opt out of all these measures (and then to opt in again to such of them as it considered appropriate). The UK has now exercised that opt-out. The result is that all those JHA measures do not apply to the UK. So far as the other Member States are concerned, however, they form part of the acquis. The Scottish Government’s position is that it would not wish to be bound by those measures, and would to that extent not accept the acquis.” 246

213. Professor Michael Keating said—

“There is also an issue in the area of freedom, security and justice, which is in the justice and home affairs field. The UK opted out of that and then adopted several of the EU measures. The UK had to decide whether to opt in or out completely by 2014 and it decided to opt out completely but to try to negotiate its way into some of the provisions. The Scottish Government’s position was quite different—it did not want to opt out. However, in the white paper it says that it will opt out and opt back in again, so it is adopting the same view as the UK Government on that. There may be some practical reasons for that, but the issue needs to be addressed.” 247

Timetable for negotiation and ratification

214. As indicated above, accession to the EU has required the amendment of the Treaties through an accession treaty between the acceding country and the other Member States. The accession treaty then needs to be ratified by each of the other Member States, as well as the acceding country, in line with their own respective constitutional arrangements. The table attached in Appendix B shows the period of time it has taken both for the completion of negotiations and for the ratification process.

215. The Scottish Government has indicated that it considers that the 18 month period between a vote for independence in the referendum and the 24 March 2016, which it has set as the date for independence, is sufficient for “the terms of

246 Patrick Layden QC. Written submission.
Scotland’s independent membership of the EU to be agreed and all the necessary processes completed.” 248

216. In evidence to the Committee, the Deputy First Minister said—

“If you are talking about traditional accession to the European Union—which I argue is not the position that Scotland would be in—to the best of my knowledge the ratification process has never been difficult or controversial. It has never been blocked by a member state and it has never occasioned a referendum in a member state, so I do not consider that that would be required for Scotland even if we were in a traditional accession situation, which we are not because of the situation that we have laid down through article 48.” 249

217. In the evidence heard and received by the Committee, a number of concerns about the timetable for negotiation and ratification were raised. Professor Kenneth Armstrong noted the lack of reference in the White Paper and the Scottish Government’s paper on “Scotland in the EU” to the ratification process—

“The timescale for ratification itself needs to be factored into the overall timescale. There is a real difference between what the white paper says and what the supplementary paper on Scotland in the EU says. The white paper discusses the negotiations and all other processes being completed within 18 months. The supplementary document refers only to the negotiations being completed within 18 months. If we require ratification on top of that, it could delay the process for another six or 18 months. Some form of legal hiatus is a risk.” 250

218. Patrick Layden QC drew attention to the need for negotiations within the UK on some issues before they could be negotiated with the Member States—

“Many things will need to be decided in the 18-month period. A serious deal will have to be done internally between Scotland and the rest of the UK. That will be a lot of work, and I think that it is pretty optimistic to think that it could be done in 18 months. If we add on to that a negotiation with Europe, it becomes extremely optimistic to think that that could be done in 18 months, and if we include every nation’s ratification process, it becomes a hopelessly optimistic view, but if all those things could be done, the timetable would work.” 251

219. Professor Michael Keating also drew attention to the EU membership negotiations being linked to other negotiations. He stated—

“There would not just be negotiation about the EU—it would be about the whole package. It strikes me that 18 months is too ambitious. The original idea was that it would take two years, which would be more realistic, but it came down to 18 months in the white paper. It might actually take a bit more than 18 months, given the complexity of such things.”

220. David Crawley referred to the series of steps that needed to take place in relation to EU membership and concluded, “When I look at the series of iterations that are liable to take place, I must say that I find an 18-month timetable unrealistic.” He also said that “two to three years is much more realistic.”

221. Dr Paolo Dardanelli was of the view that the length of time for negotiations would depend on the process followed—

“On the timetable, we need to think about whether the process would be one of accession or, as has been said, a reframing of membership. I find the scenario of a reframing of membership not unreasonable, because it would be very problematic to, in a sense, expel Scotland upon independence. I do not find the course that the Government has charted to be an unreasonable one, but it would be entirely based on political negotiations and on the agreement of the other member states.”

222. Jim Currie drew attention to the number of issues that would impact upon the negotiating process and the need to take into consideration the time for the ratification process—

“The questions that come up are related to what precisely the arrangements would be for Scotland in dissociating itself from the rest of the UK. What would Brussels be negotiating with? What are the terms under which Scotland would become a member state? That will involve a period of negotiation between Edinburgh and Whitehall, and there is some uncertainty about that; it is not entirely clear what the deal would end up being like. In addition, there are questions relating to the opt-outs, … In addition to the negotiation, there will be a period of ratification involving 28 member states and their Governments and/or Parliaments, which will have to be part of the timetable.”

223. James Ker-Lindsay highlighted the length of time that the ratification process alone might take, referring to the most recent accession of Croatia—

“Going on past experience, just this ratification process could take a considerable period of time. For example, in the case of Croatia, the most recent acceding state, the first state to ratify the accession treaty was Malta, ...
on 1 February 2012. The last was Germany, on 16 May 2013. This represents a gap of over 15 months. Even in the event that a concurrent accession process is put in place, it may be difficult to meet the projected timeframe for independence.\footnote{James Ker-Lindsay. Written submission.}

224. The Law Society of Scotland suggested that the Scottish Government should consider what action might be necessary if the negotiations were not concluded within 18 months—

“Nowithstanding that the Scottish Government believes that EU membership would be settled within 18 months, the Government needs to detail what it would propose in the event that negotiations for admission were not concluded in the 18 months window between a ‘yes’ vote and “Independence Day”. Would Independence Day be moved back to allow for conclusion to negotiations or would “Independence Day” be a fixed date requiring Scotland to leave the EU and re-join when the negotiations were concluded? Is there a middle way which would allow discussions on fundamental issues to be concluded prior to “Independence Day” with other less significant matters being left until afterwards?\footnote{Law Society of Scotland. Written submission.}

225. The European Movement in Scotland suggested that the date of independence should be changed, if necessary, to avoid a hiatus in Scotland’s membership of the EU—

“We believe the 18 month timetable to be aggressive. It is, at least, vulnerable to delaying tactics by those required to give approval. In such an event, we would argue in favour of avoiding a hiatus in Scotland’s membership e.g., by leaving open the possibility of deferring the formal separation date.”\footnote{European Movement in Scotland. Written submission.}

226. Ian Hudghton and Alyn Smith, SNP MEPs argued that “previous timescales offer little guidance to Scotland given our longstanding participation in the EU.” They argued that the negotiations could be completed within the 18 month timescale—

“… in the case of Austria negotiations for membership began in February 1993 and were completed in April 1994, whilst Sweden began negotiations in February 1993 and finished March 1994. Both of these countries were entering from outwith the Union, and both had significantly more complex negotiations to undertake than Scotland will, for example in areas such as agriculture. Nevertheless, both managed to complete negotiations well within the 18 month timescale envisaged by the Scottish government.”\footnote{Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.}

227. Graham Avery was the only witness to state explicitly that the 18 month timetable was realistic in terms of both negotiations and ratification. He stated in written evidence—

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\footnote{James Ker-Lindsay. Written submission.}
\footnote{Law Society of Scotland. Written submission.}
\footnote{European Movement in Scotland. Written submission.}
\footnote{Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.}
“Although the target of 18 months would require intense activity, it is realistic. In the annexed memorandum, I estimated that not more than one or two years would be needed. By way of comparison, the Slovaks and Czechs took only 6 months to become independent, while the most rapid accession to the EU was that of Finland, which took 31 months.”

228. The Secretary of State for Scotland said—

“According to the Scottish Government, that can all be done in just 18 months and, in that time, we could secure not just membership but favourable terms that would deliver, according to the Scottish Government, a rebate that is equivalent to the United Kingdom’s, even though no other state has managed to negotiate anything comparable. In that respect, I have always thought that 18 months seemed to be an ambitious timescale, especially as we do not yet know the answers to some of the most fundamental questions, such as those about the currency and central bank.”

229. The Cabinet Secretary for Culture and External Affairs argued that the period between the referendum and the date of independence would be sufficient, “Because for those 18 months we would have the opportunity to deliver continuity of effect and to negotiate and deliver a route under article 48.” She also pointed out that Scotland would “be one of the most prepared countries to be in the position of moving to independence” and the transition period of 18 months would allow the Scottish Government to “ensure that difficult areas – not only domestic but international – can be dealt with.”

THEME 3 - SMALL STATES IN THE EUROPEAN UNION

230. The third theme that the Committee considered was that of small states in the EU. The Committee examined the Scottish Government’s view that there is a growing body of evidence that the smaller EU Member States “are relatively more successful in Council negotiations by achieving legislative outcomes closer to their preferred position than are the larger Member States.” This theme also covered the Scottish Government’s vision for Scotland’s membership of the EU.

231. The European Movement in Scotland noted that “Scotland would be one of 21 states within the EU defined as “Small States” – defined as having fewer than the average number of votes in the Council of Ministers under the Nice Treaty voting system.”

260 Graham Avery. Written submission.
265 European Movement in Scotland. Written submission.
232. Membership of the EU entitles Member States to send their Head of State or Government to the regular meetings of the European Council\(^{266}\) of which there are at least two during each six month Presidency period. In addition Government Ministers from each of the Member States attend meetings of the Council of the European Union (also known as Council of Ministers meetings),\(^{267}\) which meets in ten configurations.\(^{268}\)

233. Decisions are made in the European Council by consensus. This means each Member State effectively has a veto on European Council decisions such as changes to the Treaties and agreement of the Multi-annual Financial Framework. Decision making in the Council of Ministers (where legislation is agreed) is achieved by unanimity or qualified majority voting depending on the process agreed in the Treaties. For qualified majority voting, the number of votes each Member State has is determined by population size and as a result qualified majority voting is based on the principle of the weighting of votes. Under the current weighting system, the Member States with the largest populations have 27-29 votes, the medium-sized countries have 7-14 votes and the small countries three or four votes. A decision requires at least 255 out of 345 votes for it to be adopted.

234. Under the Treaty of Lisbon a new system known as “double majority” was introduced, which will enter into force on 1 November 2014 (though until 31 March 2017, Member States can demand the application of the previous weighting rules). In accordance with the Treaty, the new qualified majority corresponds to at least 55% of the members of the Council, comprising at least 15 of them and representing at least 65% of the European population. A blocking minority may be formed comprising at least four members of the Council.\(^{269}\)

235. In “Scotland in the European Union”, the Scottish Government addresses the issue of size under the heading “the Fallacy that ‘size matters’ in EU decision-making”, and identifies what it considers to be three basic fallacies in the “size matters” argument.\(^{270}\)

236. The first “fallacy” that the Scottish Government identifies is “the assumption that the UK Government will always agree outcomes in EU negotiations that are in Scotland’s interests, and that these outcomes could not be secured if Scotland

\(^{266}\) The European Council is the meeting of Member States Heads of State or Government. The European Council generally meets twice every six months though further meetings can be convened by the President when deemed necessary.

\(^{267}\) The Council of the European Union ministerial meetings consist of a representative of each Member State at ministerial level, who may commit the Government of the Member State in question and cast its vote (under Article 16 Treaty of the European Union (TEU)). Which ministers attend a meeting depends on which topic is on the agenda. The Council is responsible for working with the European Parliament to exercise legislative and budgetary functions.

\(^{268}\) The ten Council configurations are: General Affairs; Foreign Affairs; Economic and Financial Affairs; Justice and Home Affairs; Employment, Social Policy, Health and Consumer Affairs; Competitiveness; Transport, Telecommunications and Energy; Agriculture and Fisheries; Environment; and Education, Youth and Culture.


becomes an independent Member State.”

The Scottish Government uses the Common Agricultural Policy (CAP) budget as an example to argue that an independent Scotland would be able to work with “other like-minded Member States and develop alliances to help deliver better outcomes for Scotland” and that an independent Scotland would have benefited from additional CAP funding for the current budgetary period if Scotland had been able to negotiate in the Council of Ministers as an independent Member State.

237. The Secretary of State for Scotland highlighted the benefits that he considered Scotland was afforded by being part of the UK and the votes that the UK could exercise in the Council—

“Scotland benefits by being part of a large member state. The UK’s 29 votes in the Council of the European Union and 73 members of the European Parliament mean that the UK has delivered for people and communities in Scotland. We have secured important changes to the common fisheries policy on discards and other issues that will benefit Scottish fishermen for many years to come. Last year, the UK negotiated the first-ever real cut to the EU’s multi-annual budget, and we have defended the UK budget rebate, which is worth more than £3 billion each year to UK taxpayers.”

238. The Secretary of State for Scotland provided some specific examples of areas in which he considered Scotland had benefited from being part of a larger Member State in terms of negotiations—

“Pressure from the UK led to the first-ever EU-wide exemption from new EU red tape for microbusinesses. We intervened in recent common agricultural policy reform negotiations to ensure that the new CAP can be implemented in the UK in line with our constitutional arrangements, and we have secured many other Scottish priorities, such as allowing a smoother transition from historical to area-based payments. We have succeeded in ensuring that, in international trade talks, the EU prioritises protection for Scotch whisky and other important Scottish exports.”

239. In evidence to the Committee, Associate Professor Wivel suggested that the results achieved by an independent Scotland in the EU would be related to the extent to which its policy preferences diverged from the UK. He stated—

“It is important to remember that how much an independent Scotland, rather than Scotland as part of the United Kingdom in the European Union, will benefit or cost depends on how your policies diverge from the future position of the United Kingdom. On one hand, as a small state, you have some structural disadvantages that you need to overcome; on the other hand, if

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you have some policy preferences that are very different from UK policies
you might benefit because you could pursue those policy preferences more
directly.”

240. Professor Michael Keating recognised that independent representation at
Council of Ministers meetings would allow the presentation of a distinctive Scottish
case, but emphasised that the outcome would be dependent on “the balance of
forces—the balance of power”. Using the example of agricultural policy, he said—

“I suspect that Scotland might adopt a different line from the rest of the
United Kingdom on agriculture. UK Governments have been in favour of
cutting back agricultural and regional policy spending, but Scotland would
probably have a slightly different preference on that. Whether the Scots
would represent themselves effectively would depend on how many other
countries were prepared to agree with them. That is when we get into the
politics that we have been talking about.”

241. The Committee took evidence from Members of the House of the Oireachtas
Joint Committee on the EU. Dara Murphy TD, the Vice-Chair of the Joint
Committee, explained that the UK was Ireland’s closest ally within the EU as it
represented Ireland’s only natural ally and shared many of the same interests—

“It is fair to say that our best relationship in the EU is with the UK. There are
many reasons for that. We share so many objectives and targets with the UK,
and on most issues Ireland and the UK share a common position. Why has
our relationship with the UK strengthened? The reasons are largely historic.
We all know the history, but now when we go into Europe, we go in as equal
partners and member states.

Having said that—this is my own observation—I believe that one reason for
our closeness to the UK relates to alliances. You mentioned the smaller
states, the blocs and the relationships. We are disadvantaged in that regard,
because there are alliances within the EU such as the Benelux alliance,
some eastern alliances, northern European alliances and the Mediterranean
alliance, which we hear a lot about now, but we have no natural alliance
other than with the UK, which is a little more informal, although it is very
strong nonetheless.”

242. The Secretary of State for Scotland made specific reference to CAP
receipts—

“The question of a CAP application is interesting. I think that Croatia started
on 25 per cent CAP receipts, to be phased in over a number of years. In
practical terms, you have to wonder why Croatia would offer a better deal to
Scotland, as a new entrant country, than she had got for herself. The CAP

275 Scottish Parliament European and External Relations Committee. Official Report, 6 February
2014, Col 1780.
276 Scottish Parliament European and External Relations Committee. Official Report, 6 February
2014, Col 1776.
277 Scottish Parliament European and External Relations Committee. Official Report, 27 February
2014, Col 1860.
settlement that we currently have runs until 2020. If Scotland were to get all that extra money out of it, that would mean other member states giving up money that they currently have for their farmers, agriculture and food-producing industries. That gets us into the granular detail of what a negotiation would actually involve. It is not just about Scotland’s interests; each one of the 28 member states will have a national interest of its own that it wishes to promote. Sadly—it does not always work to the benefit of the European Union as a whole—and especially when times are tough, national interests tend to trump the wider collective interests."\(^{278}\)

243. Ian Hudghton and Alyn Smith, SNP MEPs, stated—

“Opponents of Scottish independence overstate the power of the “big” UK. The UK regularly takes positions in the Council which are defeated by the other Member States. In recent times the UK has voted against legislation targeting bankers’ bonuses - but was defeated. David Cameron famously failed to achieve his desired concessions on financial services regulation – and left the UK isolated by walking out."\(^{279}\)

244. Dr Paolo Dardanelli stated—

“On whether small countries can prosper in the EU, I would definitely say yes. I do not think that there is any reason to worry about that. There are many examples, such as Denmark, Finland and Ireland, so there is absolutely no reason why a small country cannot do well in the EU. If anything, small countries punch above their weight in the EU because they are overrepresented in the institutions and they are treated almost as equals to the large member states which was not the case in traditional international relations. Although Germany, France and some other countries have greater weight, the small countries certainly do well."\(^{280}\)\(^{281}\)

245. The second “fallacy” identified by the Scottish Government is “the presumption that the decisions taken by the Council tend to favour the preferred position of the larger Member States – i.e. that the larger Member States consistently achieve more of what they want from Council negotiations than do smaller Member States."\(^{282}\) The Scottish Government states that—

“…it is clear that population difference per se (i.e. size) is not translated into any systematic advantage, or disadvantage, when it comes to the outcomes of EU level negotiations. Instead a range of factors other than size are found to be more significant in determining negotiated outcomes.”\(^{283}\)


\(^{279}\) Ian Hudghton and Alyn Smith, SNP MEPs. Written submission.


\(^{281}\) Hanzala Malik dissented from this paragraph.


246. The Scottish Government proceeds to state that it is “one of many myths surrounding the EU legislative and policy process that the few relatively “large” EU Member States (such as France, Germany, the UK) tend to dominate EU legislative and policy negotiations – especially in the Council of the EU – with the smaller Member States having little effective influence in these discussions and outcomes.”

247. However, the Committee heard evidence countering the Scottish Government’s position that small states did not have the same influence as large Member States. Professor Michael Keating observed that this was linked both to economic and political factors—

“Small states do not have the same economic or political weight as large states. When it comes to intergovernmental bargaining, large states have the advantage of economic power and more votes in the Council of Ministers. Small states rarely use the veto or threaten to do so, because there are huge costs in doing that. When it comes to big intergovernmental issues, the big states often sort things out—sometimes outside the formal institutions—and present a fait accompli.”

248. Dara Murphy TD commented on the benefits that larger Member States derived from their higher number of votes in Council, using the UK as an example—

“It might be too strong to say that we are jealous of the UK’s strong voting bloc, but it is unquestionably a fact of life that having a larger voting bloc allows greater influence. That is down to population sizes. When votes are used well, they can benefit the bigger countries. That is broadly democratic and as it should be.”

249. In evidence to the Committee, the Secretary of State for Scotland observed that, “Everybody who sees EU negotiations up close, be they farmers or fishermen or any trade interest, will tell you that there is a palpable advantage from being part of one of the big countries.”

250. The Committee also heard evidence relating to the capacity of smaller Member States to operate across the large range of EU policy areas. Professor Baldur Thorhallsson explained how lower levels of resources could restrict influence—

“Small states simply have to decide to set aside a number of issues. Some small states in the EU do not even send officials to some meetings in the Commission. They do not want to admit to that publicly, but the fact is that

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they simply do not have the manpower. That said, that might not hurt the small states' interests, because they simply prioritise meetings of importance.”

251. Associate Professor Anders Wivel stressed the importance of small states focussing their resources. He stated that—

“They need to have a fairly narrow agenda because they do not have the resources to pursue broad political agendas. They need to be aware of where they add value to the political process, where they have something to add and where they will therefore be able to speak with confidence and get influence.”

252. Dara Murphy TD, recognised the need for small states to prioritise—

“…small states do need to prioritise. In fact, I think that large states need to prioritise, but to a lesser extent...In order to achieve, it is far better to target a couple of areas. We certainly prioritised the recent common agricultural policy negotiations as part of the broader European budgetary talks, and we feel that we got quite a good outcome in that.”

253. The third “fallacy” identified by the Scottish Government is “the erroneous assumption that the smaller Member States do not exercise leadership and influence over the legislative and policy direction taken by the EU.”

254. In evidence to the Committee, Professor Baldur Thorhallsson highlighted the way in which the UK could exercise influence in certain policy areas as a large Member State. He said—

“The UK, as one of the big players in the EU, is able to exercise some influence in, for example, the fields of security and defence and can inform the framework of the EU. However, Scotland, as an independent state within the EU, would have difficulties in informing the overall framework. That said, I do not see any reason why Scotland should not do as well as Denmark, Sweden or Finland.”

255. Professor Michael Keating observed that Scotland’s contribution to the EU would depend “on the quality of the policy that you produce and whether that policy is not only lobbying for Scotland but offering something to Europe as a whole.” He also highlighted the importance of cooperation in key policy areas such as energy for Scotland, stating that it was “important for the renewable energy

sector in Scotland that there is co-operation with the rest of the UK and the rest of Europe, because Scotland cannot do that work on its own.”

256. David Crawley emphasised the resource implications of Scotland playing an active and effective role in the EU. He said—

“Scotland has always made a significant contribution to EU debate both through involvement in UK led negotiations and through direct involvement in commission working groups, with the European Parliament and other institutions. But we have been able to be selective and play to our strengths. An independent Scotland will need to devote – and pay for – much more capacity in breadth and depth in order to deal effectively with the EU. Comprehensive diplomatic representation in Brussels and across Europe and consistent ministerial and official engagement with emerging policies and proposals will be required. The Scottish Government will need to employ a much wider range of expertise than it has at present to cover all the domestic and international policy issues dealt with at European level. Consideration will have to be given to where that expertise may be found.”

257. John Edward also referred to the importance of resources, emphasising the importance of small states being adept and skilful at—

“…securing the services of the brightest and best from within the government administration, and beyond, to form the core of their governmental, parliamentary and non-governmental representation in Brussels (and Strasbourg) and provide the best possible advice to Ministers and other bodies in their negotiations. It should go without saying that this requires not only an experience of, and affinity for, the EU institutions, but a (sadly uncharacteristic) enthusiasm for modern languages.”

258. In response to questioning from the Committee in relation to which countries were models of small nations that share resources and co-operate with one another across Europe, Jim Currie stated—

“Ireland is a very good example of how an independent Scotland should operate. It shares resources in countries where it does not need full-blown ambassadorial or diplomatic representation, and it chooses its targets very carefully.”

259. Professor Michael Keating stressed the importance of small states using their domestic administrations to cover European issues, noting “it is also important for

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294 David Crawley. Written submission.
295 John Edward. Written submission.
297 This paragraph was agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
small countries to have their domestic administration Europeanised, because they cannot afford to have a separate group of people to look after Europe.”

260. Associate Professor Wivel did not consider the resource issue to be insurmountable for small states as “they pick the issues on which to focus.” He also observed that “the real challenge is to find talented people, get them to go to Brussels and to signal that that is a career path that is important for both politicians and civil servants.”

261. John Edward also highlighted the value of holding the rotating Presidency of the European Council for small Member States. He stated—

“Smaller member states were traditionally those that “made the most” of the rotating Presidency of the Council of Ministers, seeing it as an uncommon opportunity to put key national issues in the EU limelight.”

262. In relation to Ireland’s Presidency of the Council of the European Union in the first half of 2013, Eric Byrne TD, a Member of the Houses of the Oireachtas Joint Committee on European Union Affairs, told the Committee that—

“It is fascinating to note ... that our most recent presidency was internationally acclaimed as showing very fine leadership both within Europe and in the progress that we made in assisting other countries to develop and strengthen their partnership with Europe.”

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

263. The Scottish Government indicates that “An independent Scotland will play a full and constructive role as a Member State of the European Union, working with its partners to address common economic and social challenges on a basis of mutual respect in cooperation in accordance with the terms and spirits of the EU Treaties.”

264. In evidence to the Committee, Professor Michael Keating observed that “In the longer term, it is likely that the EU will move towards greater policy and institutional integration, especially in the light of the Euro crisis.” In light of these developments, he questioned whether the Scottish Government would shadow UK policy or whether it would opt into greater measures of integration. In relation to the Scottish Government’s White Paper and paper on “Scotland in the EU”, Professor Keating said—

“that I do not see in it a vision of Europe that is substantively different from the UK vision of Europe. That is what I would have expected to be offered as

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300 John Edward. Written submission.
part of the independence package. There are political reasons for that, because there are divisions in Scotland about Europe, just as there are in the rest of the UK.\footnote{Scottish Parliament European and External Relations Committee. \textit{Official Report, 5 December 2013}, Col 1568.}

**UK REFERENDUM ON EU MEMBERSHIP**

265. A number of witnesses made reference to the commitment on the part of the UK Conservative and Unionist Party to hold a referendum on UK membership of the EU should it be returned to government in the 2015 UK general election. This issue was raised in evidence in relation to the impact that it might have on any ongoing negotiations on Scotland’s membership of the EU, should there be a Yes vote in the independence referendum. Graham Avery stated—

“If, after the next Westminster election, there is a process of renegotiation that leads up to an in/out referendum on British membership of the EU, that will complicate the situation, but I would have to say that it is not easy to draw the balance on whether that would work against or for an independent Scotland’s interests. Some people might say that an independent Scotland with, let us say, a more positive attitude to the European Union than London would be more welcome; some people might say, “For heaven’s sake, let us deal with the British question before we deal with the Scottish question.” The truth is that that scenario would introduce an element of complication whose results are difficult to predict.”\footnote{Scottish Parliament European and External Relations Committee. \textit{Official Report, 30 January 2014}, Cols 1741-2.}

266. Fabian Zuleeg referred to the impact on Scotland if it became a EU Member State and the rUK left in terms of currency and the single market—

“The other point that I want to make at the outset about the potential for an independent Scotland to be an EU member state is that we should also take into account the significant probability that there will be a UK referendum on EU membership that might return a no to EU membership. When we look at the question of an independent Scotland in the EU, we have to look at the question of the role of the UK in the EU and whether the UK will likely continue to be a member state in the longer term. For me, the two referenda are linked when it comes to EU issues.

“If the UK were to leave at a later point, it would have a significant impact on the Scottish-EU relationship as well, given access to the single market and issues around currency, Schengen and the financial support that an independent Scotland would receive from the European Union.”\footnote{Scottish Parliament European and External Relations Committee. \textit{Official Report, 20 February 2014}, Cols 1827-8.}

267. The Cabinet Secretary for Culture and External Relations stated—

“The reality is that there is a choice of two futures facing the Scottish people. There will be certainties and uncertainties whether people vote yes or no.
Increasingly, on the rest of the UK’s position on Europe, I have real concerns that the in/out referendum on membership that David Cameron has proposed is creating a situation in which we are careering towards a potential exit. I do not think that that is in anybody’s interests.\textsuperscript{306}\textsuperscript{307}

CONCLUSION

268. This report has set out a considerable amount of evidence on the Scottish Government’s proposals for independence and membership of the EU, as well as on the value of EU membership to Scotland and the role of small states in the EU. While the Committee believes that this report has taken the debate further on, it also recognises that some of the witnesses felt that there is still a lack of certainty as to how Scotland would become a EU Member State, that the process is likely to be complex, and that the timescales could be challenging.\textsuperscript{308} The Committee also notes that the evidence of other witnesses who agreed that Article 48 of the EU Treaty offers a suitable legal route for an independent Scotland’s membership of the EU, that an independent Scotland should approach EU membership negotiations on the principle of “continuity of effect” and that an independent Scotland’s membership of the EU can be agreed within eighteen months.\textsuperscript{309} The weight of the evidence heard by this Committee agreed that continuing in the European Union would be in Scotland’s best interests. Some witnesses considered that a pragmatic solution would be found.\textsuperscript{310} The Committee recognises that individual voters may find some strands of the evidence presented more persuasive than other strands, but hopes that the report helps to inform voters on issues relating to an independent Scotland’s membership of the EU in advance of September’s referendum on Scottish independence. The evidence on small states was largely positive. Small states, it was accepted, have a role to play in the EU. Indeed, the Committee notes that the majority of EU Member States would be defined as small states. Small states were thought to benefit from networking, prioritising and forming alliances with other states.\textsuperscript{311}\textsuperscript{312}

\textsuperscript{307} The section on the UK Referendum on EU Membership was agreed to (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
\textsuperscript{308} This sentence was agreed to by division (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
\textsuperscript{309} This sentence was agreed to by division (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
\textsuperscript{310} This sentence was agreed to by division (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
\textsuperscript{311} These three sentences was agreed to by division (by division): For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor) Abstentions 0.
\textsuperscript{312} Hanzala Malik MSP, Jamie McGrigor MSP and Alex Rowley MSP dissented from the report.
### CURRENT OPT-OUTS/INS

<table>
<thead>
<tr>
<th>Treaty Reference</th>
<th>Nature of derogation, Opt-out or Opt-in</th>
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<tbody>
<tr>
<td><strong>Protocol 15.</strong> on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland¹</td>
<td><strong>Single currency opt-out:</strong> recognises that the UK is under no EC Treaty obligation to adopt the single currency and that a separate decision to do so would be required by the UK government and parliament. Establishes procedures to enable the UK to <strong>opt-in</strong> to the single currency—it is for the UK government alone to initiate procedure for moving to 3rd stage of EMU</td>
</tr>
</tbody>
</table>
| **Protocol 19.** on the Schengen *acquis* integrated into the framework of the European Union | Art 2 provides for UK (and Irish) **opt-out** of Schengen  
Arts 4&5 provide for UK (and Irish) **opt-in** to some or all of the existing Schengen *acquis* (by unanimity) or to measures building on it on a case by case basis                                                                                                                                                                                                 |
| **Protocol 20.** On the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland | Art. 1: authorises the UK to maintain border controls on persons seeking to enter the UK from other Member States (thus opting-out of prohibition of internal border controls)  
Art. 2: provides for UK and Ireland to maintain their Common Travel Area  
Art. 3: provides for other MS to exercise equivalent controls on persons entering their territories from the UK and Ireland                                                                                                                                                                                                 |
| **Protocol 21.** On the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice | Referred to as the UK’s JHA Opt-In Protocol.  
Arts 1&2: provide for the non-application to the UK (and Ireland) of measures concerning border controls, visas, asylum and temporary protection, immigration policy, judicial co-operation in civil matters and family law having cross-border implications based on Title V of the TFEU  
Arts 3&4: provide for UK (and Irish) **opt-in** to any of the above measures at the stage of negotiation or after adoption                                                                                                                                                                                                 |
| **Amendment to Protocol 21**                                                    | Amends Amsterdam Protocol on the Position of the UK and Ireland (the UK Opt-In) to *extend its scope of application to all JHA measures* in the field of freedom, security and justice, including police and criminal judicial co-operation. A new Article 4a in the Protocol makes explicit that the... |

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³¹³ Table contained in a letter from Tim Hemmings, Head, Future of Europe Department, Europe Directorate, Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee. Available at [http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaff/87/87we14.htm](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmfaff/87/87we14.htm) [Accessed April 2014].
**Treaty Reference**

**Nature of derogation, Opt-out or Opt-in**

Opt-In applies to *amending measures*. Amends Amsterdam Protocol Integrating the Schengen *Acquis* into the Framework of the EU to make clear that the UK is *not* bound to take part in any measures building on parts of the Schengen *acquis* in which the UK already participates. The effect is to ensure that the UK’s JHA Opt-In applies to all Schengen-building measures.

**Protocol 36, Article 10**

The Protocol provides that, 5 years after the Lisbon Treaty enters into force, any remaining Third Pillar police and criminal judicial co-operation measures that have not been repealed, replaced or amended will be subject to ECJ jurisdiction and Commission powers of infraction. A special provision enables the UK to *notify the Council* that it does not accept ECJ jurisdiction and Commission powers of infraction in respect of such measures. In the event of such notification, the remaining Third Pillar measures will *cease to apply* to the UK. The UK may subsequently apply to opt back in on a case-by-case basis.
### Appendix B: Recent History of EU Enlargement

<table>
<thead>
<tr>
<th>Member State</th>
<th>Accession Negotiations Start</th>
<th>Accession Negotiations End</th>
<th>Accession</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>February 1993</td>
<td>March 1994</td>
<td>January 1995</td>
</tr>
<tr>
<td>Finland</td>
<td>February 1993</td>
<td>March 1994</td>
<td>January 1995</td>
</tr>
<tr>
<td>Cyprus</td>
<td>March 1998</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Hungary</td>
<td>March 1998</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Poland</td>
<td>March 1998</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>March 1998</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Estonia</td>
<td>March 1998</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Slovenia</td>
<td>March 1998</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Malta</td>
<td>February 2000</td>
<td>December 2002</td>
<td>May 2004</td>
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<tr>
<td>Slovakia</td>
<td>February 2000</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Latvia</td>
<td>February 2000</td>
<td>December 2002</td>
<td>May 2004</td>
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<tr>
<td>Lithuania</td>
<td>February 2000</td>
<td>December 2002</td>
<td>May 2004</td>
</tr>
<tr>
<td>Croatia</td>
<td>October 2005</td>
<td>June 2011</td>
<td>July 2013</td>
</tr>
</tbody>
</table>

15th Meeting (2013) Session 4, 19 September 2013

Inquiry into the aspects of the Scottish Government’s White Paper on Independence relating to the European Union: The Committee agreed to appoint an adviser in connection with its forthcoming inquiry, to seek the necessary approval of the Parliamentary Bureau and agreed the specification/job description for the adviser.

18th Meeting (2013) Session 4, 7 November 2013

Inquiry into the aspects of the Scottish Government's White Paper on Independence relating to the European Union: The Committee considered candidates for the post of adviser in connection with its forthcoming inquiry and agreed to consider the issue further at a future meeting.

19th Meeting (2013) Session 4, 14 November 2013


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

The Scottish Government's White Paper on Independence: The Committee took evidence from—

Professor Michael Keating, Professor of Politics, University of Aberdeen and Director at the ESRC Scottish Centre on Constitutional Change;

Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh and Director of the Edinburgh Centre for Constitutional Law;

Dr Colin Fleming, Research Fellow, University of Edinburgh and Project Leader on Defence and Security at the ESRC Scottish Centre on Constitutional Change, Economic and Social Research Council (ESRC) programme on the Future of the UK and Scotland.

23rd Meeting (2013) Session 4, 12 December 2013

The Scottish Government's White Paper on Independence: The Committee took evidence from—
European and External Relations Committee, 2nd Report, 2014 (Session 4) — Annexe A

Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, Russell Bain, Interim Head, and Miranda McIntosh, Senior Policy Executive, External Affairs Policy Team, Scottish Government.

Inquiry into the aspects of the Scottish Government’s White Paper on Independence relating to the European Union (in private): The Committee considered its approach to this inquiry and agreed a remit and terms of reference; a schedule for taking evidence; to delegate the approval of any additional or alternative witnesses to the Convener in consultation with the clerks; to seek a Chamber debate on the inquiry; to delegate to the Convener responsibility for arranging for the SPCB to pay any expenses of witnesses in the inquiry; and to take consideration of oral evidence and of the draft report in private at future meetings.


The Scottish Government’s proposals for an independent Scotland: membership of the European Union: The Committee took evidence from—

David Crawley, Former Senior Civil Servant;
Professor Laura Cram, Professor of European Politics, University of Edinburgh;
Dr Paolo Dardanelli, Senior Lecturer in Comparative Politics, University of Kent;
Professor John Bachtler, Director, European Policies Research Centre, University of Strathclyde;
Marius Vahl, Senior Officer to the Standing and Joint Committee and EEA Council and Johanna Jonsdottir, Officer, Services, Capital Persons and Programmes Division, European Free Trade Association.

The Scottish Government’s proposals for an independent Scotland: membership of the European Union (in private): The Committee agreed to seek the necessary approvals in accordance with Rule 12.10 for a proposed visit in the context of this inquiry.

The Scottish Government’s proposals for an independent Scotland: membership of the European Union (in private): The Committee considered the evidence heard during the meeting.


The Scottish Government’s proposals for an independent Scotland: membership of the European Union: The Committee took evidence from—

Professor Kenneth Armstrong, Director, Centre for European Legal Studies, Faculty of Law, University of Cambridge;
European and External Relations Committee, 2nd Report, 2014 (Session 4) — Annexe A

Professor Sir David Edward KCMG, QC, FRSE;

Patrick Layden QC TD;

Aidan O’Neill QC.

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


The Scottish Government's proposals for an independent Scotland: membership of the European Union: The Committee took evidence from—

Graham Avery, Senior Member of St. Antony’s College, Oxford University, Senior Adviser at the European Policy Centre, Brussels, and Honorary Director-General of the European Commission.

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

4th Meeting (2014) Session 4, 6 February 2014

The Scottish Government's proposals for an independent Scotland: membership of the European Union: The Committee took evidence from—

Professor Michael Keating, Professor of Politics, University of Aberdeen and Director at the ESRC Scottish Centre on Constitutional Change, Economic and Social Research Council (ESRC) programme on the Future of the UK and Scotland;

Associate Professor Anders Wivel, Department of Political Science, University of Copenhagen;

Professor Baldur Thorhallsson, Professor of Political Science and Jean Monnet Chair in European Studies, University of Iceland;

Brandon Malone, WS, Solicitor Advocate.

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

The Scottish Government's proposals for an independent Scotland: membership of the European Union (in private): The Committee agreed to consider its approach at the next meeting.
5th Meeting (2014) Session 4, 20 February 2014

The Scottish Government's proposals for an independent Scotland: membership of the European Union: The Committee took evidence from—

Jim Currie, former Director General, European Commission;

Dr Fabian Zuleeg, Chief Executive, European Policy Centre.

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

The Scottish Government's proposals for an independent Scotland: membership of the European Union (in private): The Committee considered correspondence received.


The Scottish Government's proposals for an independent Scotland: membership of the European Union (in private): The Committee considered its approach to the inquiry and agreed correspondence.

The Scottish Government's proposals for an independent Scotland: membership of the European Union: The Committee took evidence from —

Dara Murphy TD, Vice-Chair, Timmy Dooley TD, Eric Byrne, TD, and Sean Crowe, TD, Houses of the Oireachtas Joint Committee on European Union Affairs.

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


The Scottish Government's proposals for an independent Scotland: membership of the European Union: The Committee took evidence from—

Rt Hon Alistair Carmichael MP, Secretary of State for Scotland and Chris Flatt, Deputy Director, Scotland Office.

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

9th Meeting (2014) Session 4, Thursday 3 April 2014

The Scottish Government's proposals for an independent Scotland: membership of the European Union: The Committee took evidence from—
The Scottish Government's proposals for an independent Scotland - membership of the European Union (in private): The Committee considered correspondence received and agreed to seek further information.

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

10th Meeting (2014) Session 4, Thursday 24 April 2014
The Scottish Government's proposals for an independent Scotland - membership of the European Union (in private): The Committee considered a draft report and agreed to consider a revised draft, in private, at its next meeting.

11th Meeting (2014) Session 4, Thursday 1 May 2014
The Scottish Government's proposals for an independent Scotland - membership of the European Union (in private): The Committee considered a draft report and agreed to consider a revised draft, in private, at their next meeting.

12th Meeting (2014) Session 4, Thursday 8 May 2014
The Scottish Government's proposals for an independent Scotland - membership of the European Union (in private): The Committee considered a draft report. Various changes were proposed and decided upon (12 by division).

Record of divisions in private:

Alex Rowley MSP proposed that the Committee should agree the draft report without any proposed changes. The proposal was disagreed to by division: For 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Against 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Abstentions 0.

Clare Adamson MSP proposed that the following text be inserted at the end of paragraph 1:

The conventional legal basis for enlargement, where a candidate seeks membership from outside the EU, is Article 49 of the Treaty on the European Union (TEU). The Scottish Government states that an independent Scotland would be starting from a different position, by virtue of already being part of the EU since 1973.

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.
Willie Coffey MSP proposed that the following text at the beginning of paragraph 3 be deleted:

3. In recognition of the impact that the situation of Scotland being outside the European Union would have, the Scottish Government has suggested that a renegotiation of the EU Treaties under Article 48 of the Treaty on European Union might present an alternative route…

and that the following text be inserted:

3. The Scottish Government states that a renegotiation of the EU Treaties under Article 48 of the Treaty on European Union might present a relevant legal basis for…

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Clare Adamson MSP proposed that the order of paragraphs be changed so that the paragraph beginning “The Scottish Government states” (now paragraph 3) comes before the paragraph beginning “The Committee notes that” (now paragraph 4). The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Clare Adamson MSP and Roderick Campbell MSP proposed that the following text be inserted at paragraph 4:

4. The Committee notes that representatives of the EU institutions have refrained from commenting on the specific scenario of Scottish independence. In evidence to the Committee, the Deputy First Minister (DFM) stated—

“The Commission has been very clear that it will give that opinion only on being asked to do so by a member state. Right now, the member state is the UK Government. I repeat the invitation to the UK Government.”

5. The Committee notes that the UK has made no approach to the European Commission. Representatives of the EU institutions have consistently stated that when “part of a territory of a Member State ceases to be part of that State, … the treaties will no longer apply to that territory”. This is reflected in the response of Viviane Reding, Vice President of the European Commission to the Committee.

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.
Willie Coffey MSP proposed that the following text in paragraph 50 be deleted:

The Scottish Government has proposed that Article 48 of the Treaty on European Union, while others argued that the traditional route of Article 49 would be used.

and proposed that the following text be inserted:

The Scottish Government has proposed that Article 48 of the Treaty on European Union is a relevant legal basis to allow Scotland to become a Member State at the point of independence. Others have argued that the traditional route of Article 49 would need to be used.

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Clare Adamson MSP and Roderick Campbell MSP proposed that the following text be inserted after paragraph 95:

96. During the course of the Committee’s inquiry José Manuel Barroso, President of the European Commission, made a comment on the Andrew Marr programme regarding Scotland’s membership of the European Union, commenting that it would be “extremely difficult, if not impossible” for an independent Scotland to join the European Union. Mr Barroso also drew a parallel between an independent Scotland and Kosovo.

97. In response to questioning by the Committee on President Barroso’s comments, Jim Currie stated—

“He was unwise to express the opinion that he expressed with regard to the apparent virtual impossibility of an independent Scotland becoming a member of the EU—I think that that was extremely unwise and I do not think that he was correct. Furthermore, I do not think that his opinion is shared either among the member states or even within the commission.”

98. Dr. Fabian Zuleeg stated that comparisons with Kosovo “did not help the debate” and expressed that he was “uncomfortable” that Mr Barroso had made a “political point”—

“The suggestion that there are potential parallels between the situation of Kosovo and that of Scotland perhaps did not help the debate. In my view, the comments could simply have been about the process and the timing, and I am a bit uncomfortable that they made a relatively political point”

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.
Clare Adamson MSP proposed that the following text be inserted at the end of paragraph 105:

In his written evidence, Sir David Edward stated that—

“Treaties of the European Union “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). The autonomy of the EU legal order has repeatedly been affirmed by the Court of Justice.”

106. Sir David Edward notes that “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.” Professor Dardanelli also made this point. He said “the EU is a new legal framework with its own particular rules and values.

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Clare Adamson MSP proposed that the following text be inserted after paragraph 141:

142. In evidence to the Committee, Graham Avery stated—

“Between now and the referendum, there is an important amount of tactics that relate to these factors. We know well that the main parties at Westminster are against Scottish independence. If and when the referendum result is one that is in favour of an independent Scotland, it seems to me perfectly clear that the Westminster Government and the Whitehall machine will move into action very smartly to try and find a reasonable solution to the consequences. How can I put this? I need to be a bit diplomatic. As I think I said somewhere, when you prepare for such negotiations, you should listen to what the other party says, but you should also spend a good deal of time analysing what the interests are. I repeat that a situation in which Scotland was outside the European Union and not applying EU laws would be a legal nightmare for the rest of the United Kingdom, and the British Government must take account of that.”

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Willie Coffey MSP proposed that the following text be inserted after paragraph 154:

155. Graham Avery stated—
“I think that I also described the situation in which Scotland was outside the EU and was not applying EU rules, while the rest of the UK was applying them, as a legal nightmare. The issue is not just about fisheries—it is about the whole system of the single market and the network of trade and economics. Unless Scotland continues to apply EU rules, life will become diabolically complicated for firms and citizens, not just in the rest of the UK, but in Germany, Spain and elsewhere. It is well known that citizens and firms in member states other than the UK have rights in Scotland, by virtue of Scotland being a member of the EU and, if Scotland no longer applied EU rules and no longer had EU obligations, they would be in a right mess.”

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Willie Coffey MSP proposed that the following text be inserted after paragraph 175:

176. The SNP MEPs stated—

“The values outlined in Article 2 TEU and the EU’s pragmatic nature would also suggest that application of the principle of continuity of effect would seem reasonable. In the event of the people of Scotland democratically opting for independence, to apply any other principle would amount to the EU erecting unnecessary barriers to achieving that democratic goal.”

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Roderick Campbell MSP proposed that the following text be inserted after paragraph 257:

258. In response to questioning from the Committee in relation to which countries were models of small nations that share resources and co-operate with one another across Europe, Jim Currie stated—

“Ireland is a very good example of how an independent Scotland should operate. It shares resources in countries where it does not need full-blown ambassadorial or diplomatic representation, and it chooses its targets very carefully.”

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.
The Scottish Government’s proposals for an independent Scotland - membership of the European Union (in private): The Committee considered a draft report. One change was proposed and agreed to by division.

Record of divisions in private:

Christina McKelvie MSP proposed the following text be inserted after paragraph 264:

UK REFERENDUM ON EU MEMBERSHIP

265. A number of witnesses made reference to the commitment on the part of the UK Conservative and Unionist Party to hold a referendum on UK membership of the European Union should it be returned to government in the 2015 UK general election. This issue was raised in evidence in relation to the impact that it might have on any ongoing negotiations on Scotland’s membership of the European Union, should there be a Yes vote in the independence referendum. Graham Avery stated—

“If, after the next Westminster election, there is a process of renegotiation that leads up to an in/out referendum on British membership of the EU, that will complicate the situation, but I would have to say that it is not easy to draw the balance on whether that would work against or for an independent Scotland’s interests. Some people might say that an independent Scotland with, let us say, a more positive attitude to the European Union than London would be more welcome; some people might say, “For heaven’s sake, let us deal with the British question before we deal with the Scottish question.” The truth is that that scenario would introduce an element of complication whose results are difficult to predict.”

266. Fabian Zuleeg referred to the impact on Scotland if it became a EU Member State and the rUK left in terms of currency and the single market—

“The other point that I want to make at the outset about the potential for an independent Scotland to be an EU member state is that we should also take into account the significant probability that there will be a UK referendum on EU membership that might return a no to EU membership. When we look at the question of an independent Scotland in the EU, we have to look at the question of the role of the UK in the EU and whether the UK will likely continue to be a member state in the longer term. For me, the two referenda are linked when it comes to EU issues.

“If the UK were to leave at a later point, it would have a significant impact on the Scottish-EU relationship as well, given access to the single market and issues around currency, Schengen and the financial support that an independent Scotland would receive from the European Union.”

267. The Cabinet Secretary for Culture and External Relations stated—
“The reality is that there is a choice of two futures facing the Scottish people. There will be certainties and uncertainties whether people vote yes or no. Increasingly, on the rest of the UK’s position on Europe, I have real concerns that the in/out referendum on membership that David Cameron has proposed is creating a situation in which we are careering towards a potential exit. I do not think that that is in anybody’s interests.”

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

14th Meeting (2014) Session 4, Wednesday 21 May 2014

The Scottish Government's proposals for an independent Scotland - membership of the European Union (in private): The Committee considered a draft report. Various changes were proposed and decided upon (five by division), and the report was agreed for publication.

Record of divisions in private:

Willie Coffey MSP proposed the insertion of “some of the witnesses felt that” after “it also recognises that” in the second sentence in paragraph 268.

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Willie Coffey MSP proposed that the following sentence be inserted in paragraph 268 after “challenging.”—

The Committee also notes that the evidence of other witnesses who agreed that Article 48 of the EU Treaty offers a suitable legal route for an independent Scotland’s membership of the EU, that an independent Scotland should approach EU membership negotiations on the principle of “continuity of effect” and that an independent Scotland’s membership of the EU can be agreed within eighteen months.

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Christina McKelvie MSP proposed that the following sentences be inserted in paragraph 268 after “eighteen months”—

The weight of the evidence heard by this Committee agreed that continuing in the European Union would be in Scotland’s best interests. Some witnesses considered that a pragmatic solution would be found.
The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Roderick Campbell MSP proposed that the following sentences be inserted at the end of paragraph 268—

The evidence on small states was largely positive. Small states, it was accepted, have a role to play in the EU. Indeed, the Committee notes that the majority of EU Member States would be defined as small states. Small states were thought to benefit from networking, prioritising and forming alliances with other states.

The proposal was agreed to by division: For 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Against 3 (Hanzala Malik, Alex Rowley, Jamie McGrigor), Abstentions 0.

Hanzala Malik MSP, Jamie McGrigor MSP and Alex Rowley MSP proposed that the draft of the report submitted to the Committee for consideration on 24 April 2014 and comments submitted by Hanzala Malik, Jamie McGrigor and Alex Rowley be included in an annexe as a minority view/statement.

The proposal was disagreed to by division: For 3, (Hanzala Malik, Alex Rowley, Jamie McGrigor), Against 4 (Christina McKelvie, Clare Adamson, Roderick Campbell, Willie Coffey), Abstentions 0.
ANNEXE B: ORAL AND WRITTEN EVIDENCE AND COMMITTEE BRIEFINGS

The European and External Relations Committee would like to thank all of those who provided oral and written evidence to the Committee in the context of this inquiry.

The Committee would also like to thank Dr Daniel Kenealy, the Committee’s adviser, for his work on this inquiry.

Committee briefings

16 January 2014 meeting

- SPICe briefing - Scotland in the European Union (131KB pdf)

23 January 2014 meeting

- Briefing paper from the Adviser, Dr Daniel Kenealy (78KB pdf)

6 February 2014 meeting

- SPICe briefing - The Role of Small States in the European Union (152KB pdf)


In December 2013, prior to agreeing a remit for its inquiry, the Committee took evidence on the Scottish Government's White Paper on issues falling within the remit of the Committee. The evidence from these sessions has been drawn on in this report as it was very pertinent to the remit of the inquiry.

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

Oral evidence

Professor Michael Keating, Professor of Politics, University of Aberdeen and Director at the Economic and Social Research Council (ESRC) Scottish Centre on Constitutional Change

Professor Stephen Tierney, Professor of Constitutional Theory, University of Edinburgh and of the Edinburgh Centre for Constitutional Law

Dr Colin Fleming, Research Fellow University of Edinburgh and Project Leader on Defence and Security at the ESRC Scottish Centre on Constitutional Change, Economic and Social Research Council (ESRC) programme on the Future of the UK and Scotland
**Oral evidence**

Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities, Russell Bain, Interim Head, External Affairs Policy Team and Miranda McIntosh, Senior Policy Executive, External Affairs Policy Team, Scottish Government

**Supplementary written evidence**

- [Deputy First Minister to Convener 26 January 2014 (2559KB pdf)](#)

**Oral evidence**

David Crawley, Former Civil Servant

Professor Laura Cram, Professor of European Politics, University of Edinburgh

Dr Paolo Dardanelli, Senior Lecturer in Comparative Politics, University of Kent

Professor John Bachtler, Director, European Policies Research Centre, University of Strathclyde

Marius Vahl, Senior Officer to the Standing and Joint Committee and EEA Council and Johanna Jonsdottir, Officer, Services, Capital Persons and Programmes Division, European Free Trade Association

**Written evidence**

- [David Crawley (27KB pdf)](#)
- [Dr Paolo Dardanelli (23KB pdf)](#)

**Oral evidence**

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

**Written evidence**
3rd Meeting (Session 4), Thursday 30 January 2014

Oral evidence

Graham Avery, Senior Member of St. Antony’s College, Oxford University, Senior Adviser at the European Policy Centre, Brussels, and Honorary Director-General of the European Commission

Written evidence

- Graham Avery (204KB pdf)

4th Meeting (Session 4), Thursday 6 February 2014

Oral evidence

Professor Michael Keating, Professor of Politics, University of Aberdeen and Director at the ESRC Scottish Centre on Constitutional Change, Economic and Social Research Council (ESRC) programme on the Future of the UK and Scotland

Associate Professor Anders Wivel, Department of Political Science, University of Copenhagen

Professor Baldur Thorhallsson, Professor of Political Science and Jean Monnet Chair in European Studies, University of Iceland

Brandon Malone, WS, Solicitor Advocate

Written evidence

- Professor Michael Keating, (ESRC) Scottish Centre on Constitutional Change (46KB pdf)
- Brandon Malone (Business in Scotland submission) (126KB pdf)
- Associate Professor Anders Wivel (51KB pdf)

5th Meeting (Session 4), Thursday 20 February 2014

Oral evidence

Jim Currie, former Director General, European Commission

Dr Fabian Zuleeg, Chief Executive, European Policy Centre
European and External Relations Committee, 2nd Report, 2014 (Session 4) — Annexe B

6th Meeting (Session 4), Thursday 27 February 2014

Oral evidence

Dara Murphy, Vice-Chair, Timmy Dooley TD, Eric Byrne, TD and Sean Crowe, TD, Houses of the Oireachtas Joint Committee on European Union.

8th Meeting, 2014 (Session 4), Thursday 20 March 2014

Oral evidence

Rt Hon Alistair Carmichael MP, Secretary of State for Scotland, and Chris Flatt, Deputy Director, Scotland Office.

9th Meeting, 2014 (Session 4), Thursday 3 April 2014

Oral evidence

Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs, Russell Bain, External Affairs Policy Manager, and Colin Imrie, Deputy Director, Head of Europe and UK Relations, Scottish Government.

Written submissions

- Business for Scotland (126 KB pdf)
- I B Campbell (46KB pdf)
- John Edward (123KB pdf)
- ESRC Scottish Centre on Constitutional Change (46KB pdf)
- European Movement in Scotland (33KB pdf)
- J Ker-Lindsay (18KB pdf)
- Lord Kerr of Kinlochard (16KB pdf)
- Law Society of Scotland (79KB pdf)
- Hugh McLean (10KB pdf)
- MEPs Catherine Stihler and David Martin (59KB pdf)
- MEPs Ian Hudghton and Alyn Smith (29KB pdf)
- Scottish Global Forum (121KB pdf)
- Arman Sarvarian (119KB pdf)
- Professor Stephen Tierney (35KB pdf)

Please note that all oral evidence and associated written evidence are published electronically only, and can be accessed via the European and External Relations Committee’s webpages, at:

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/70496.aspx

Inquiry Correspondence

- Convener to Viviane Reding Vice President of the European Commission
  10 March 2014 (47KB pdf)
Annexe B

- Letter from Viviane Reding Vice President of the European Commission 20 March 2014 (1.01MB pdf)
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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland

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ISBN 978-1-78457-468-0