



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Thursday 30 January 2014

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - [www.scottish.parliament.uk](http://www.scottish.parliament.uk) or by contacting Public Information on 0131 348 5000

---

**Thursday 30 January 2014**

**CONTENTS**

|  | <b>Col.</b> |
|--|-------------|
| <b>DECISION ON TAKING BUSINESS IN PRIVATE .....</b>          | 1729        |
| <b>INDEPENDENCE: EUROPEAN UNION MEMBERSHIP INQUIRY .....</b> | 1730        |

---

**EUROPEAN AND EXTERNAL RELATIONS COMMITTEE**

**3<sup>rd</sup> Meeting 2014, Session 4**

**CONVENER**

\*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

**DEPUTY CONVENER**

\*Hanzala Malik (Glasgow) (Lab)

**COMMITTEE MEMBERS**

\*Clare Adamson (Central Scotland) (SNP)

\*Roderick Campbell (North East Fife) (SNP)

\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

\*Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)

\*Jamie McGrigor (Highlands and Islands) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Graham Avery

**CLERK TO THE COMMITTEE**

Katy Orr

**LOCATION**

Committee Room 2



**Scottish Parliament**  
**European and External Relations**  
**Committee**

*Thursday 30 January 2014*

[The Convener *opened the meeting at 09:06*]

**Decision on Taking Business in**  
**Private**

**The Convener (Christina McKelvie):** Good morning and welcome to the third meeting in 2014 of the European and External Relations Committee. I make the usual request that mobile phones be switched off.

I again welcome to the table Dr Daniel Kenealy, who is the committee's adviser in our inquiry into aspects of the Scottish Government's white paper that relate to the European Union.

I also welcome the winners of the audio Europa competition, which was organised by the Scottish Youth Parliament. I see a few well-kent faces in the audience. The competition, which was also organised by the European Parliament office in Edinburgh, was designed to give young people across Scotland the chance to share their views on why it is important to vote in the European elections. The winners will get the chance to meet the committee in a brief suspension after the evidence session. We look forward to that.

We have received no apologies.

Agenda item 1 is a decision on taking item 4 and future discussions of the report in question in private. Do members agree to that?

**Members** *indicated agreement.*

**Independence: European Union**  
**Membership Inquiry**

09:07

**The Convener:** Agenda item 2, which is the main item on the agenda, is our continuing inquiry into the Scottish Government's proposals for an independent Scotland and its membership of the European Union. Graham Avery is our one witness, so he is in the hot seat. We will continue from where we left off last week.

I will briefly introduce Mr Avery. Graham Avery is a senior member of St Antony's College at the University of Oxford, a senior adviser at the European Policy Centre in Brussels and honorary director general of the European Commission. Welcome to the committee, sir. I thank you for your written submission, which has caused a wee flutter of attention. We look forward to your oral evidence. I believe that you would like to make an opening statement.

**Graham Avery:** Yes. Thank you for your welcome. I am very pleased to share my views with the committee. I will not repeat what is in my written evidence, which is in front of members, but if I may, I will explain my approach to the question of how Scotland would join the European Union if its people vote for independence in September.

I underline that I try to remain neutral on the question of Scottish independence. I was born in Wales and my mother was Welsh—so, believe me, I am Welsh. My father, who was English, was a minister in the Methodist Church, and his last two circuits were in Scotland. I have therefore lived in this country for a few years and I have lots of affection for it. After some years working in the British Government's service in London, I spent most of my professional life in the European Commission in Brussels, from which I retired eight years ago. I am no longer employed by and no longer represent the European Commission.

I am sorry to say that we Welsh, like you Scots, are constantly described by foreigners as English. In self-defence, I usually say that my nationality is Welsh, my passport is British and my citizenship is European. Those three strands of my identity are not conflictual; they reinforce each other.

I insist that, although my point of view on the procedure for joining the European Union, as expressed in my written evidence, is similar to that of the Scottish Government and I believe strongly that it would be in the interests of an independent Scotland to be in the European Union, I do not have a personal view on whether Scotland should be independent. That is for the people of Scotland

to decide, and I do not think that you need advice from outsiders such as me.

Let me explain how I got involved in the question of Scottish independence. During my career as a public servant, I had a lot of experience of the enlargement of the EU. I was a junior member of the British team that negotiated British membership and, later, in Brussels, I took part in one way or another in every round of enlargement that brought in the various countries. If I have any claim to expertise, it is on how to join the EU. Further, if I have any claim to be in the Guinness book of records, it is that I wrote the Commission's opinions on the membership applications of 14 countries and drafted the general negotiating framework that the EU has used in 19 accession negotiations.

Excuse me for saying all this about myself, but I think that it is useful to help you to understand where I am coming from.

Two years ago, when I was listening to and reading what senior figures in London were saying and writing about Scottish independence, I got quite perplexed. They were saying that an independent Scotland would first have to leave the European Union and then apply for membership and spend some time coming back in. That seemed absurd to me from both a political and a practical point of view. Those arguments were accompanied by others that seemed to portray the European Union as a huge obstacle to Scottish independence. It is obvious that the commonsense solution would be for Scotland's membership of the EU to be effective on the same day as its independence, and it is obvious that 5 million Scottish citizens, who have been European citizens for 40 years, should not be treated in the same way as people of non-member countries, or third countries as they are called in the Euro-jargon.

In September 2012, in the interests of injecting a bit of common sense into the debate, I submitted a memorandum to the House of Commons, which you have before you as an annex to my written evidence. I used to describe my approach to the question of Scotland joining the European Union as the commonsense solution, but it is now known more prosaically as the article 48 solution.

I am not a lawyer. I was a policy adviser. I worked for many politicians and I acquired a good deal of experience of how politics works, particularly the politics of the EU and the practical realities of international negotiations. That has led me to analyse questions such as that of Scottish independence on the basis of interests. Let me put it in this way: when you prepare for a negotiation of this kind, you should not spend too much time listening to what the other party says; you should try to figure out what his or her real interests are,

because it is interests that will determine the outcome of the negotiations.

You have heard from a number of lawyers in your sessions. Lawyers are there to help, but not to decide. Law is very important for the European Union. Without the treaties and the legislation that flows from them, the EU could not function. However, when it comes to important decisions, the EU's leaders take decisions on what to do on the basis of practical considerations and national and European interests, and they then ask the lawyers to put them into legal shape.

I do not want to explain again about articles 48 and 49. I see from the *Official Reports* of your previous sessions that your committee is on the way to getting an unrivalled knowledge of those articles. However, I will mention one other topic that is not covered in my written evidence: whether Scottish independence is a good thing or a bad thing for the European Union. Naturally, a lot of effort is being devoted to whether independence is good or bad for Scotland, and in London a lot of analysis is being done of whether it is good for the rest of the United Kingdom, but no one seems to have addressed whether it is good for the European Union as such. I have tried to reflect a bit on that and, at an appropriate moment, perhaps I could share my ideas with you.

09:15

**The Convener:** Thank you very much. I was interested to hear your point that interests will determine the outcome of any negotiation and that, in a general sense, we should look at the interests of the people with whom we negotiate.

One of the questions that I asked the lawyers from whom we took evidence last week concerned the relevance of article 2 of the Treaty on European Union. That is of particular interest to me. Article 2 is about respect for democracy, the will of the people of a nation, the right to free trade, the right to free movement of workers and all the aspects that make up the treaty. How would it affect any negotiations that might take place in the future?

**Graham Avery:** You should be a bit careful about asking me legal questions because I am not a lawyer. That is not my pay grade. However, to reply to your question, I note that article 2 is not a legal basis for action under the treaty; it is a set of principles. They are good and solid principles, but they do not include the principle of self-determination. The treaties are silent on the question that we are discussing, which is the idea that one part of a member state would become independent of the member state. The principles that the treaty mentions—mutual co-operation and

acting in good faith—are important, but the legal basis is the procedural question.

**Roderick Campbell (North East Fife) (SNP):** Good morning, Mr Avery. I kick off with something that is touched on in your response to the first question that the committee asked. In relation to article 48, you state:

“Yes ... negotiations on the terms of Scottish membership should take place in the period following the referendum and before the date of independence.”

We heard from four lawyers last week, and although there was a difference of opinion as to whether articles 48 and 49 are appropriate, at least three of the four said that negotiations could commence following the referendum. Indeed, Professor Armstrong also seemed to accept that, as Sir David Edward said, there are good-faith obligations in that respect. We had reasonable unanimity on that question last week, but will you give us a flavour from the political point of view of how you foresee the negotiations developing?

**Graham Avery:** I have always said that Scotland would have to apply for membership of the European Union, and it is plain that it is not possible for a state formally to apply for membership until after it is independent, but it is equally clear to me that there are less formal ways of applying for membership. I imagine that, the day after the referendum, if the answer was yes, the Scottish Government would write a letter saying that it wanted to begin the negotiations.

As I think you know well, in the period that we are talking about—before Scottish independence—Scotland would not have a direct voice in intergovernmental negotiations or indeed decisions in the European Union, so its request for the opening of some kind of negotiations would be conveyed to the member states, and there would be a discussion in the Council of Ministers and perhaps the European Council on how to proceed. My guess is that they would ask the Commission to present some ideas and perhaps even an opinion on Scottish membership. The European Commission can be asked to give an opinion at any time on practically anything. That does not have to be done under article 49.

For me, the crucial political and practical question, which would have to be addressed quite soon after the referendum, is whether it is the European Union's aim for Scotland's independence to coincide with its membership of the European Union or whether it conceives another approach in which Scotland would have to leave and come back in. That is the basic practical question.

As far as negotiations are concerned, my view—as I explain in my written submission—is that the other member states would not be interested in

delving deeply into the technical questions around Scotland's application of the so-called *acquis*—all 80,000 pages of it—of the European Union. After all, Scotland already applies that, and the member states would not want to sit round a table with 28 Government representatives looking into all of that for five or six years, as they do for ordinary candidatures. The procedure could be simplified.

A very important question is how Scotland's views would be taken into account given that, in the period before independence, it would not have a seat in the institutions. Scotland has members of the European Parliament, but it does not have a seat in the Council of Ministers or the European Council. It is clear to me that the Commission would, as it did in the case of German reunification, ensure that there were effective means whereby the Scottish Government could be consulted at every stage in the process. In the case of German reunification, the Commission held talks not only with Bonn, which was the capital of the Federal Republic of Germany, but with Berlin. I am quite sure that, whatever package the Commission came up with, it would be scrupulously careful to ensure that Scotland's views were taken into account.

The treaty would then have to be modified. It is sometimes not well understood that the modification of the treaty that is needed for the accession of a country is quite brief—it involves only three or four articles. There is a massive annex on secondary legislation, but the treaty as such is an extremely simple document. To allow Scotland to join the EU on the first day of independence, the treaty would need to provide for Scotland's seats in the EU institutions. After all, that is the most important thing that countries get with membership of the European Union—they get not just the money from Brussels, but a seat and a direct say in the decision making.

It is difficult to predict how long ratification would take, but given that, in my analysis, Scotland's continuing membership of the European Union is not a controversial question among member states, I would think that they could ratify such a treaty quite rapidly.

**Roderick Campbell:** I move on slightly from negotiations to the point that you made at the end of your opening statement. Do you believe that it is in the interests of the rest of the European Union for Scotland to become—or to continue to be—an EU member?

**Graham Avery:** We are talking about the European Union as such, rather than this or that member state, as states can have different opinions. There are several ways in which we can address that question. We should be clear that the basic question of whether Scotland should join the

European Union is different from the question of how it would join.

**Roderick Campbell:** Yes, but it seems that that might be the background to negotiations. If a state was keen on retaining Scotland in the European Union, that would influence the negotiations in political terms, would it not?

**Graham Avery:** As far as I can see, no member state is opposed in principle to the idea that Scotland should join the European Union if its people vote for independence. I have not encountered anyone in government anywhere—in Spain or in London—who takes that view. There is a question about how it would join, but ultimately I have not met anyone who is against Scotland being or remaining in the European Union.

**Hanzala Malik (Glasgow) (Lab):** Good morning, Mr Avery, and thank you for your opening remarks. I have a couple of questions, but I will start by saying that I respect your knowledge—you come with an incredible background, which is valuable to us.

You said in your submission that an agreement on joining could take two to three years to be reached. You also said—it is probably a popular view in some political circles—that EU membership could happen on the same day as Scotland declared itself independent, if that were to happen. The two statements do not tie up neatly, because there would surely be issues with the currency that Scotland ultimately used and how the EU would perceive that. I will ask my second question after you have addressed that point.

**Graham Avery:** To be correct, I did not say in my submission that the process would take two or three years. I said that the process of negotiating membership between the referendum and the date of independence would take

“not more than one or two years”.

Subsequently, the Scottish Government has fixed on a negotiating period of 18 months. My view is that that target is tough but realistic.

I quoted some figures in my written evidence for how long other countries took to complete such a process. I mentioned Finland, which holds the record for the most rapid accession—it was only 31 months from the day of its application to the day of its membership. Finland was negotiating membership from outside the EU, through article 49. However, within those 31 months, only 13 months were required to open the negotiations, properly speaking, and sign a treaty. In fact, the negotiations took less than 12 months, properly speaking. Therefore, 18 months is realistic for the time span that is needed to sort out all the questions.

The questions that you mention in relation to currency—the budget is another question—are difficult and did not arise, at least not in the same form, in Finland’s case. There were other problems in relation to Finland. However, it is not impossible to solve such problems in 18 months—with good will.

**Hanzala Malik:** I agree that, if there were a will to do that, that period would perhaps be realistic. However, I go back to the important question of the EU’s opinion. I know that that is a difficult call but, with your experience, you might be able to share some insight—you have already done that by saying that you have come across no opposition to Scotland joining the EU. I would probably agree with that sentiment.

However, the EU will also have to weigh up and take into account the issue of other areas in the EU wanting to break up. In that scenario, although you say that there is no visible opposition from Spain or London, at the end of the day, might it be right and the Germans are very strong in the EU. How would Germany and its fellow EU members perceive new membership applications or the break-up of many countries in the EU? Is there a will to stomach that?

**Graham Avery:** Of course I cannot speak for the Germans, but I can predict, if you like, in the same way as I can for Spain and London. Let us begin with London and Madrid. As far as I understand it, the British Government’s position is that, if Scotland votes for independence, the British Government will not try to stop Scotland joining the EU. It is pretty obvious, if we think about it for a moment, that it is manifestly in the interests of the rest of the United Kingdom for Scotland to be a member of the EU on the first day of independence; otherwise, the relationship between Scotland and the rest of the UK could become chaotic.

I argue that, if there is one member state above all that will want article 48 to be used, it is the rest of the UK. As I said in my written evidence, I predict that, if the result of the referendum is yes, London will become a vigorous advocate of the use of article 48.

09:30

We all know that the Spanish Government in Madrid is very concerned about independentism; that is about more than Catalonia, because there are also the Basques. However, Spain also has every interest in Scotland joining and not staying outside the European Union on independence. Madrid would surely reflect that it would not be very interesting or amusing for Spain if, from the day of independence, the common fisheries policy no longer applied to Scotland. There is also the

question of the Scottish budget contribution. Excuse me for mentioning those vulgar things, but I am talking about interests.

I often say to my Spanish friends that their problem in Madrid is not with Edinburgh but with London, because London agreed with Edinburgh to have the constitutional referendum process, whereas in Spain, the Government in Madrid said simply that such a referendum and independence for Catalonia would be against the constitution. As the committee probably knows, the Spanish constitution states:

“The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards”.

Words such as “indissoluble” and “indivisible” are quite strong language. I will go no further into the Spanish debate, but the Spanish situation is a result of its constitution.

I have always argued that the European Union scrupulously respects its member states’ constitutional arrangements and procedures. I hope that it does not happen but, if Catalonia made a unilateral declaration of independence, it is pretty clear that the rest of the EU would not recognise it. For the rest of the EU, Catalonia would still be in the EU in such a scenario.

It is not really a problem for the Spanish if Scotland joins the European Union, because their argument vis-à-vis their regions is different. I am not naive—the Spanish will not make it easy—but, when the moment of decision comes, they will take a decision on the basis of their own interests.

**Hanzala Malik:** Your response was helpful. I have a final small point. We were presented with the scenario that, if the time between a yes vote and Scotland going independent increased and Scotland was not an EU member, that could hurt our industry. What is your opinion?

**Graham Avery:** I do not think that the European Union would have a strong opinion on that. As I have understood it—but this is a political matter for you—the date of March 2016 relates to the next elections in Scotland. I shall not say too much about the variability of the date of independence, except that I do not think that it is hugely important to other member states.

**Clare Adamson (Central Scotland) (SNP):** I have a brief supplementary question on your comments about the constitution. Can you give an opinion on the significance of the Edinburgh agreement for the constitutional arrangements in the UK leading up to the referendum and in the post-referendum negotiating period, when the UK remains the member state?

**Graham Avery:** To be honest, I am not sure that I have an opinion on that and on what might

be called the British constitution, which as we know is unwritten. I limit myself to saying—and repeating—that it is the EU’s practice to respect member states’ constitutional arrangements. Up to now, I have not noticed any Governments saying that they dispute the United Kingdom’s right to have the referendum. There might be views on how an independent Scotland would join the EU, but no one has disputed that what has been agreed between London and Edinburgh is constitutionally okay.

**Jamie McGrigor (Highlands and Islands) (Con):** Mr Avery, I bow to your superior knowledge on Europe. I should perhaps tell you where I am coming from; although I am a Conservative, I would never be described as a Eurosceptic. However, the committee wants to ascertain how easy or difficult it would be for Scotland to stay in or rejoin the European Union to ensure that, when people vote in the referendum, they have a clear picture of the situation.

It worries me to some extent that, at last week’s evidence session with the four lawyers, three of them seemed to be saying that article 49 would have to be used, while the other said that article 48 would be all right. My first question is about that. Do you agree that this is not a question of it’ll be all right on the night and that it will all come down to legal issues?

You said that Finland joined the EU quickly. I note from a list that we have, entitled “Recent History of EU Enlargement”, that from the beginning of negotiations to accession Croatia took eight years to join, Bulgaria seven, Romania seven, Lithuania four and then a number—including Hungary, Poland, the Czech Republic, Estonia and Slovenia—all took six years. I see only three—Austria, Sweden and Finland—that took two years to join, or in Finland’s case less than two years. If it took Bulgaria seven years, how will Scotland achieve membership in 18 months? Perhaps I am being naive, but that is what the list told me.

**Graham Avery:** I read the *Official Report* of the committee’s previous evidence session and found some of the discussions interesting. However, although I naturally respect the eminent lawyers who gave evidence, I have to say that I did not find any convincing argument that article 48 could not be used. I could accept that, from a legal point of view, article 49 might be neater but, as I have said more than once, when it comes to making important and difficult decisions the European Union has, like national Governments, a habit of addressing the basic issues and deciding what is the best thing to do. I argue that it would not be in any member state’s interest to have a gap between independence and EU membership.

In my humble opinion, the time that it has taken third countries to join the European Union is not relevant, because Scotland is currently in the EU, so a series of questions that need to be addressed with third countries are in Scotland's case practically irrelevant. Do we need a detailed page-by-page examination of the 80,000 pages of the *acquis*? The answer is no. Do we need an opinion on whether Scotland would fulfil the so-called Copenhagen criteria? The European Commission could be asked for an opinion on that, and I do not think that the task of providing it would be difficult or lengthy. After all, Scotland is already in the European Union. I persist in thinking that, although it is quite tough, 18 months is a realistic period.

**Jamie McGrigor:** Can you guarantee that article 48 would be used?

**Graham Avery:** No. It is clear from my evidence that the European institutions would have to choose between articles 48 and 49, and it is not for me as a private citizen to give any such guarantee.

**Jamie McGrigor:** Would Scotland still be able to enjoy opt-outs such as the various justice and Schengen opt-outs and, in particular, the rebate that the UK enjoys?

**Graham Avery:** The rebate is not an opt-out; it is something else. As I said repeatedly in my written submission, in technical and political terms, that is the most difficult question.

I will put that another way, given my earlier insistence on the need to address interests. It is not in the interests of the 27 other member states for Scotland's membership of the EU to cost €1 more; indeed, they would probably like to find some way for it to cost a few euros less. The committee can be sure that other member states would pay close attention to the budget rebate and that that would not just be a question of what London could agree with Edinburgh.

As for the opt-outs from membership of the eurozone and the Schengen zone, it is clear to me that, first, the other member states would be reluctant to give Scotland an opt-out if it asked for one and, secondly, an opt-out is not necessary. There is no way in which the European Union can oblige new members to join the euro or the Schengen zone.

**Jamie McGrigor:** Another point that was made at last week's evidence session was that using article 48 could open a Pandora's box with regard to other countries. For example, to go back to fisheries, which you mentioned, I note that it is the common fisheries policy that keeps most Spanish fishermen out of the North Sea. I presume that they would or might well be looking to get into the North Sea. If Scotland or the UK on its behalf could toy with the treaties under article 48, is it not

possible that other countries would want to do the same thing?

**Graham Avery:** You are right to say that countries such as Spain might want to profit, so to speak, or gain something from Scotland's independence and membership. However, on your specific question, it is not the treaty that lays down the common fisheries policy, the quotas and so on—

**Jamie McGrigor:** It is the *acquis communautaire*.

**Graham Avery:** Those matters are decided from year to year or every X years at the Council of Ministers. On joining the European Union, Scotland would in accordance with the traditional method adopt the *acquis* as it existed on the day of accession—

**Jamie McGrigor:** It is equal access to a common resource, is it not?

**Graham Avery:** Excuse me; I am not quite sure that I understand what you mean.

**Jamie McGrigor:** I believe that, as far as fisheries are concerned, the original *acquis* refers to equal access to a common resource.

**Graham Avery:** You will have to excuse me—I do not know the fisheries policy by heart. However, I think that the answer to your question, as far as I understand it, is that the Scottish Government's policy is to accept the common fisheries policy and make it better.

**Jamie McGrigor:** That is fine, convener.

**Clare Adamson:** You have talked about whether it would be in the EU's interests to have Scotland as an independent member. The fact is that we face two futures. On the one hand, we could have an independent Scotland with a clear directive about wanting to stay in Europe and, on the other, we could have an in/out referendum in the UK. Are you willing to give your opinion on where Scotland's interests would lie, given that we could be out of the EU in the event of a no vote in the EU referendum and that Scotland could vote to come out of the UK in its own referendum?

**Graham Avery:** Gosh—that is a double hypothetical. I will not take a position on what might happen if the Scottish people voted for independence and if the Conservative Party won the next election, but I will try to answer your question.

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.

09:45

**Clare Adamson:** Are you willing to venture an opinion about whether it would be in Scotland's long-term interests, in either scenario, to be part of the EU?

**Graham Avery:** That is a tricky one, is it not? I do not think that I will answer that question.

**Clare Adamson:** That is fine.

**The Convener:** As is your privilege.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** Good morning, Mr Avery. First, I thank you for the clarity and the brevity of your submission. It is a very difficult issue not only for the public but for members to get their heads around at times. You have confirmed that you think that the 18-month timetable is perfectly realistic. You mentioned that, in Finland's case, the point from the beginning of treaty negotiations to the signing of the treaty was a matter of 13 months. That certainly gives encouragement to people such as me who support Scotland's case for independence and remaining in the European Union.

What is your view on the British Government's position on those negotiations from 19 September onwards, were Scotland to vote yes? You say in your submission, in response to question 5, that

"the British Government would represent Scotland"

in those negotiations from that point to independence. The British Government refuses to enter any negotiations or discussions with the Scottish Government to prepare the ground for that possibility. Is it realistic for the United Kingdom to do no work whatsoever on the matter and for it only to assume the driving seat and begin negotiations from 19 September onwards?

**Graham Avery:** I do not believe that it is true that the UK Government is not doing any work on the matter. It may be sharing that work with you to a very limited extent, but I think that people are certainly thinking about the issue in London—they are handling the question professionally.

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.

You asked a slightly different question about the way in which the British Government would represent Scotland during the period between the referendum and independence and what its position and motives would be. That situation would be quite difficult for the Westminster Government because while it would be representing the United Kingdom as a whole, in prospect it would be representing the rest of the United Kingdom. That is what is called in moral philosophy a deontological problem. However, I will give a concrete answer, which goes like this.

I have worked in such accession negotiations in the European Commission. Technically, the European Commission was—and is—the servant of the 28 member states vis-à-vis the third country, but we always took the view that it was also the responsibility of the European Commission to take account of the future new member. Therefore, any decent and intelligent approach to such negotiations takes account not only of the existing responsibilities, but of the future responsibilities. I rather hope that the people in Westminster and Whitehall would understand that they have no interest in making things more difficult than necessary for a future independent Scotland. That is not to say that they would make it easy for you, but I repeat that I think that it would be extremely unfortunate for the rest of the United Kingdom if Scotland were not a member of the EU on day 1 of independence.

**Willie Coffey:** So, given that everyone's interests are at stake, it is in the UK's interests for those negotiations to be initiated and commenced as quickly as possible. You have said that a few times.

Will you confirm that it is your opinion that the British Government is currently working on the possibilities of independence for Scotland but is not sharing that with anyone?

**Graham Avery:** I am just guessing—I do not talk to the British Government about that but, as someone who worked in the Whitehall machine, I can tell you that it plans quite carefully.

**Willie Coffey:** For me, that is an important point, because on 19 September, following a yes vote, the British Government will assume that responsibility. I expect it to be prepared for that and hope that it will not start with a blank sheet on 19 September. Surely it must have been working up plans and proposals, even if it has not been discussing them with the Scottish Government. Surely it will, at least, have been doing work internally in the departments at Whitehall to prepare the ground.

Would it not be in the common interests of the United Kingdom and Scotland for the UK Government to hold discussions and negotiations with the Scottish Government on the matter now?

**Graham Avery:** Forgive me, convener, but I am not going to respond yes or no to that question, because it is a political question, on which I will not take a position.

**Willie Coffey:** Okay. That is fair enough.

I turn to the point that you made in your opening remarks about the prospect of Scotland being pushed out of the EU only to have to renegotiate its way back in. You described how absurd that possibility was. Will you expand on that, please, and tell us about some of the absurdities that could arise if that scenario were to unfold? You gave the example of the common fisheries policy.

**Graham Avery:** 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.

It might help if I were to reflect a little on the solution that people sometimes talk about to the problem of the interim period, by which I mean the period between Scotland becoming independent and its joining the EU. I do not call it a transitional period, because that is another concept. Of course, it would be possible, if it were necessary, to devise a relationship between Scotland and the EU during such a period. In view of the risk of the legal nightmare, something would have to be done. A template for that already exists—the European Economic Area, which I think that the committee has examined. At present, Norway, Iceland and Liechtenstein are in it, and perhaps

the EU could offer Scotland membership of the EEA as an interim measure.

Even that solution, in my view, is not so simple. First, people sometimes ignore the fact that to join the EEA, a country first has to join the European Free Trade Association. Although I guess that our Norwegian friends would not say no to that, they must be consulted on it.

Secondly, the EEA in its present form does not cover the whole single market—agriculture and fisheries are excluded. I guess that some member states, including the rest of the United Kingdom, would not be too keen on the prospect of Scotland being outside those parts of the single market and outside the common fisheries policy for a few years, although I understand that that might be popular in Scotland.

Thirdly—this follows the other point—customs controls could be necessary for agricultural and fisheries products during the interim period. We exercise the right to restrict imports of fisheries products from Norway.

Next—this is a more political point—in the EEA a country has no effective say in the decisions taken by institutions in Brussels, although it still has to accept a lot of those decisions. That would be quite difficult for the Parliament of an independent Scotland to swallow, although of course the Norwegians have swallowed it. Finally, even in such an interim period you would not have any certainty about the date of Scotland's membership under article 49.

For me, the alternative ideas that people talk about for the interim period are not very convincing. Candidly, from the point of view of the legal ingenuity needed to put them in place, they would be just as complicated as putting in place an accession treaty from day 1—probably more so.

**Willie Coffey:** Thanks for that.

**Jamie McGrigor:** I will ask the sort of question that constituents ask me. If Scotland was independent and, I hope, somehow a member of the European Union, but did not get the UK rebate—which appears to be highly likely—would it be more expensive for Scotland to be a member of the EU than it is at the moment? Presumably, she would be a net contributor.

**Graham Avery:** The simple answer is that Scotland should expect to be—and I think accepts that it will be—a net contributor, in relative terms. Scotland is relatively rich, so it would be a net contributor.

**Jamie McGrigor:** I would imagine that Ireland is, for example.

**Graham Avery:** I can predict confidently that Scotland will be a net contributor.

The second answer is that I cannot say what the result of the budgetary negotiations would be. I have said repeatedly that it would be one of the most difficult and important aspects of the negotiations. I could not prejudge the result.

**Jamie McGrigor:** Do you have a view on what currency we would have? Would Scotland have to use the euro?

**Graham Avery:** No. 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 oblige 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.

**Jamie McGrigor:** Am I not right in thinking that Croatia is being forced to join the euro?

**Graham Avery:** No. Croatia has accepted the basic treaties and so in principle has accepted joining the euro, but in practice Croatia, like every other member state, will join the euro if and when it is ready to do so.

**Jamie McGrigor:** Is a date not set for that?

10:00

**Graham Avery:** No—absolutely not. A complicated series of criteria has to be met. I think that there are four or five criteria, some of which are purely voluntary for the member state concerned.

Excuse me, but I do not think that I should go more deeply into the euro question. However, it is quite plain to me that the Swedish case is a very simple answer to the question whether a country can be a member state and not apply the euro if it does not have an opt-out. That is the case with Sweden.

**Roderick Campbell:** I go back to the use of the word "absurd", if I may. For the record, last week Sir David Edward suggested that

"there will be a gap between a vote for independence and the moment of separation. My point is that, during that period, there will be an obligation to negotiate a solution that does not lead to the absurd result that is being suggested."—[*Official Report, European and External Relations Committee*, 23 January 2014; c 1692.]

I presume that you agree with that.

**Graham Avery:** I think so. Yes.

**Roderick Campbell:** Aidan O'Neill suggested that—

**Graham Avery:** Excuse me, but I cannot easily hear what you are saying. Forgive me.

**Roderick Campbell:** Sorry. I was quoting from the evidence that Sir David Edward gave last week on the necessity of negotiating a solution to avoid absurd results and Scotland somehow being out of the European Union at the point of independence.

**Graham Avery:** Sir David Edward argues from a legal point of view. I am not a lawyer; I argue as an ex-practitioner from the point of view of interest. I persist in saying that it is against the interests of the other member states for Scotland not to be a member of the European Union on day 1 of independence.

**The Convener:** I have a brief final question, Mr Avery, if you could indulge us a wee bit. We have views from President Barroso and President Van Rompuy in the statements that they made. What is your opinion on their opinion that article 49 would be the way to go? You are quite firmly in the article 48 camp.

**Graham Avery:** I discussed that question on page 2 of my written evidence. As members can imagine, I try to be quite diplomatic on the matter. My analysis of what Mr Barroso and Mr Van Rompuy have said is that it is true, but it is not the whole truth. They repeat a sort of litany. A legal text has been prepared for them, and they say exactly the same thing. I sometimes describe what they say as elliptical. The meaning is rather obscure and partly hidden.

Let me put my point another way. If a travel agent was asked the best way to get from Edinburgh to Brussels, and that travel agent said, "Well, first of all, you should take a flight to Oslo, spend a few nights there, and then take another flight to Brussels," it could not be said that that was false, but it would not be very helpful and certainly would not be the complete story.

An element is missing in the replies. It is not insignificant that, although President Barroso has been asked in the European Parliament to comment on the use of article 48, he has entirely refrained from doing so.

**The Convener:** Thank you for that. I should apologise to Patricia Ferguson—I did not realise that she wanted in.

**Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab):** I did. Thank you, convener.

Good morning, Mr Avery. I want to ask a question that is supplementary to the convener's question. In your paper, you quote the comments

by Mr Van Rompuy and Mr Barroso. They have said:

“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 ... become a third country with respect to the EU”.

You suggest that, although that is the truth, it is not the whole truth, and that, if the treaties were adjusted in an appropriate manner in advance of independence, they could apply to the new state, which would mean that article 48 could be used. However, is that not the point? Mr Barroso and Mr Van Rompuy are clearly saying that article 48 would not be an option and that article 49 would be the methodology that would apply.

**Graham Avery:** Plainly, that is the widespread impression that has been created. You ought to ask Mr Barroso and Mr Van Rompuy themselves what exactly they mean. I limit myself to saying that I read with interest the written evidence that you received from Mr Piris. He made a number of arguments in favour of article 49, some of which I found less than convincing, and he concluded, as a lawyer, that the use of article 48 would be incorrect—he did not say that it would be inapplicable. Therefore, like Sir David Edward, I persist in considering that article 48 would be applicable, and I confidently predict that, if there is a yes vote in the referendum, the European institutions will consider whether to use it.

**Patricia Ferguson:** I think that you would concede that Mr Van Rompuy and Mr Barroso are experienced politicians. If, as you say, the impression has been given that the use of article 49 would be correct, do you not think that that is the impression that they wish to give because that is where they see this matter going?

**Graham Avery:** I do not think that I should interpret what they think that they were trying to say. I limit myself to saying that the replies that we should have been given to these questions about Scottish independence are incomplete replies.

**Patricia Ferguson:** Have Mr Barroso and Mr Van Rompuy said that this is not the end of the matter? Have they said that they have not told you the whole story or that they have given us a part answer? I think that they both thought that they were being quite specific on that issue.

**Graham Avery:** It is quite interesting that, from time to time, Mr Barroso, for example, says that he is not in a position to reply to a hypothetical question.

**Patricia Ferguson:** Indeed.

**Graham Avery:** There is a certain—what should I say?—difference between saying that you will not reply to a hypothetical question and then

replying to it. In my opinion, the use of article 48 is still a possibility.

**Patricia Ferguson:** I am sure that it is a possibility. My assertion would be that both of those senior members have, in effect, ruled it out by their comments. However, let us move on to the issue of the rebate.

Do you think it would be possible, as the Scottish Government asserts that it would be, for Scotland to have the same rebate as the UK currently has?

**Graham Avery:** Could you repeat the question?

**Patricia Ferguson:** The Scottish Government has asserted that it would have the same rebate as the UK has. Do you think that that is a certainty? Do you think that it is a possibility?

**Graham Avery:** I have said already that I cannot guarantee, and I find it difficult to predict, the result of the complicated budget negotiation that would take place between London, Edinburgh and the other member states. Excuse me, but I do not want to venture into territory where I cannot guarantee a result.

**Patricia Ferguson:** Okay, but, from your experience, do you think that that would be a difficult negotiation?

**Graham Avery:** Yes—negotiations about money are always difficult and tough. The negotiations on the British rebate were extremely tough. It is clear that, if it comes to a negotiation between Westminster and Edinburgh about those budgetary questions, Westminster is likely to be tough.

**Patricia Ferguson:** If the negotiations that would ensure Scottish membership of the EU were predicated on the rebate being retained in its current form, would that make them harder and longer?

**Graham Avery:** That is a political question for you and Scotland to decide.

**Patricia Ferguson:** I was asking you to say, based on your experience of negotiation, whether the rebate is the kind of issue that would make the negotiations more difficult and longer than they would be if there were no request to have the rebate.

**Graham Avery:** I have already given my opinion in my written evidence that the most difficult element of the negotiations would be the budgetary questions, but I do not think that the process would require more than 18 months—and it could be completed in a considerably shorter time.

**Patricia Ferguson:** I asked the question because it is clear from looking at the table that we

have in front of us that the shortest period of time that has passed between the end of accession negotiations and accession is nine months, and in some other examples it is many years. After those complicated negotiations take place, we would have a minimum of nine months between that point and accession, which seems to be extremely tight.

**Graham Avery:** Yes, it is a tight timetable, but where there is a will there is a way. If it is a fact—as I believe it to be—that it is not in the interests of any member state to create a hiatus between Scottish independence and Scottish membership, I think that it would be done rather quickly. We should not forget that we are talking about ratification by 27 other member states.

**Patricia Ferguson:** Indeed.

**Graham Avery:** They do it not consecutively but simultaneously, so in effect the length of time depends on the slowest. The Belgians are usually the slowest, because they have at least three—if not five—Parliaments, but I think that they would do it in time.

**Patricia Ferguson:** That is very interesting—thank you.

**The Convener:** We have a quick supplementary from Rod Campbell.

**Roderick Campbell:** Mr Avery might be able to help us on a point of clarification. When does the term of office for the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso, come to an end?

**Graham Avery:** I think that it is in September or October this year, so it is quite soon.

**Roderick Campbell:** So they might not, as individuals, be involved in crucial further discussions.

**Graham Avery:** I am not going to say anything about the future careers of those two respected gentlemen.

**The Convener:** Okay.

**Graham Avery:** Convener, can I develop further my point with regard to whether what we are discussing is a good or bad thing for the European Union?

**The Convener:** Yes—we have a few more minutes left, but not a lot of time.

**Graham Avery:** Okay. I will try to put the question on a more general level. Is it a good or bad thing for the European Union if a member state divides into two independent states and both of them remain in the European Union? I am trying

to abstract from the specific case in Scotland and consider the situation more generally.

There is not much use in asking what the European Union's policy is on the situation—on independentism, if I may call it that. There is nothing in the treaties that prevents member states from altering the geographical definition of their territory. That has happened quite a lot of times. Algeria left France and left what was then the European Communities, Greenland left Denmark, and East Germany joined West Germany. Therefore, there is nothing in the treaties that sanctifies the geographical definition of the member states. It is fair to say that, on the question of independentism, the policy of the European institutions is not to have a policy. To be more precise, the policy is to respect the constitutional arrangements of member states.

It seems that the case that we are considering, in which the EU would continue to have the same number of citizens but one more member state, would have quite a limited effect on the operation of the European Union as such. It would not alter the EU's influence on world affairs, and its population and economic weight would remain the same.

One could even argue that it would be a plus for the European Union to have an additional seat on the United Nations and other international organisations. On the other hand, one could argue that it would be a minus because decision making becomes more complicated every time a new member is added, although that has not prevented the European Union from enlarging successively. On balance, it is difficult to argue that independentism—member states splitting—is bad for the European Union as such.

Of course, another way of addressing the question is to consider whether the European Union prefers big or small states. It does not have a policy on that—or it has an institutional set-up that tries to balance the interests of big and small states. In the context of the institutional framework, it is clear that the EU favours small states in certain ways. As members will know, smaller states, through the principle of degressive proportionality, get a bigger voice in the institution than their population would justify.

It is also clear that the number of small states in the European Union has continually increased. It now has 20 states that have fewer than 12 million people and, of those states, nine have fewer than 5 million people. I do not think that one can sustain the argument that independentism is of itself a bad thing for the function of the European Union; I think that it is neutral.

**The Convener:** On behalf of the committee I thank you very much, Mr Avery, for your evidence

today. As has been the case in taking evidence from all the witnesses in our inquiry, we have come up with more questions than answers, but I thank you for your answers. We really appreciate your coming along to the committee.

We are well over our deadline but, before we move into private for item 3, we will have a brief suspension. I ask the winners of the competition to stay behind, as they will get to meet the committee as their prize, and get a photograph as well.

10:16

*Meeting suspended until 10:30 and continued in private thereafter until 10:48.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

---

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on  
the Scottish Parliament website at:

[www.scottish.parliament.uk](http://www.scottish.parliament.uk)

For details of documents available to  
order in hard copy format, please contact:  
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact  
Public Information on:

Telephone: 0131 348 5000  
Textphone: 0800 092 7100  
Email: [sp.info@scottish.parliament.uk](mailto:sp.info@scottish.parliament.uk)

e-format first available  
ISBN 978-1-78392-624-4

Revised e-format available  
ISBN 978-1-78392-641-1

---

Printed in Scotland by APS Group Scotland

---