



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Thursday 6 February 2014

Session 4

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**EUROPEAN AND EXTERNAL RELATIONS COMMITTEE**

**4<sup>th</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:**

Professor Michael Keating (Economic and Social Research Council)

Brandon Malone

Professor Baldur Thorhallsson (University of Iceland)

Associate Professor Anders Wivel (University of Copenhagen)

**CLERK TO THE COMMITTEE**

Katy Orr

**LOCATION**

Committee Room 1



## Scottish Parliament

### European and External Relations Committee

Thursday 6 February 2014

[The Convener opened the meeting at 09:17]

### Independence: European Union Membership Inquiry

**The Convener (Christina McKelvie):** Good morning and welcome to the fourth 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.

We have received no apologies.

We will have two panels of witnesses today. Our first panel comprises Professor Michael Keating, who is professor of politics at the University of Aberdeen and director of the Economic and Social Research Council Scottish centre on constitutional change programme on the future of the UK and Scotland; Associate Professor Anders Wivel from the department of political science at the University of Copenhagen; and, by videolink, Professor Baldur Thorhallsson, who is professor of political science and Jean Monnet chair in European studies at the University of Iceland. I welcome you all.

I believe that you all have brief opening statements to make, given that we have started on a slightly different topic and are looking at small states and their influence.

**Associate Professor Anders Wivel (University of Copenhagen):** I will say a few words on how small states can maximise their influence in the European Union. If we look at the traditional strategies of small states in international affairs, three have been significant. The first is hiding, which basically involves staying out of trouble by staying out of sight, usually through neutrality or non-alignment. Then there is binding, which involves preventing trouble from occurring by creating and strengthening the governance of international affairs through international rules and institutions. International organisations and institutions, including the European Union, are prominent there. The final strategy is to seek shelter and protection against financial turmoil and security threats, for example as part of NATO or the EU.

Those strategies are not obsolete, but they have lost importance as a consequence of globalisation, institutionalisation and Europeanisation, which have created in international affairs a complex network of overlapping institutions and new actors who are seeking influence. Hiding is virtually impossible today, binding is often ineffective by itself because the powers that a state wishes to bind will take their negotiations elsewhere, and seeking shelter is not really enough—it is basically a defensive strategy. What a state wants to do is to maximise its influence.

If we look at the experiences of small states in the European Union, we see that they have sought influence by using a more offensive strategy. We sometimes call it a smart state strategy, and it has three fundamental aspects. The first concerns the political substance of the strategy, which must present a solution or be part of a solution to a problem that is recognised by all or most of the relevant political actors. Small states do not have sufficient resources or political clout to pursue a political agenda that is radically different from those of the major actors, let alone one that opposes them. Small states need to tap into the dominant discourses in the institutional networks where they wish to get influence. They cannot present something that is wholly an alternative.

The second aspect concerns the form of the strategy. Here, it is important that small states focus their resources. 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.

The third aspect concerns the role of a small state. In my written submission, I mention an expression that is often used, which is "honest broker". In order to maximise its influence, the small state must aim to position itself as an honest broker, acting independently of any of the big member states' interests and working within the dominant discourse of the European Union but, at the same time, avoiding being identified too closely with any particular actor's interests. If that is to be done successfully, the small state needs to allocate sufficient resources at home and in Brussels. Moreover, initiatives need to be focused on the long term and must be well prepared. The small state must not shift its focus or its agenda all the time.

**The Convener:** Thank you, and thank you for your written evidence, which is a helpful reference.

**Professor Michael Keating (Economic and Social Research Council):** The comments in our written submission are consistent with what Anders Wivel said. 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.

When it comes to the community method, which is the traditional way of doing policy, the Commission takes the initiative and not the member states, and things are worked through a complex process of committees and consultation, member states, the Committee of Permanent Representatives, the European Parliament and so on. In those areas, the people who get their way are often those who are best prepared and have the best ideas. Small states do best in that kind of negotiation if they have an idea that is not just in their interests but in the broader general interest. That is how the European Union was supposed to work when it was set up, although it has not always worked like that; it has become a bit more intergovernmental. It is important to appeal to the general interest, to have a good idea and to be well prepared.

With the community method, it is important to get in early, because the Commission formulates the proposals. If a state is in there at the beginning, it can shape the proposals at an early stage. At the later stage, when they come to the Council of Ministers, the big states tend to take over.

It is also extremely important to be well organised. Big states have more resources to put into European policy making, whereas small states have to be more flexible and much more focused. The evidence is that some small states are much better at that than others because they are well organised and know what is going on in Europe, and their delegations in Europe—whether in the Committee of Permanent Representatives or the Council of Ministers—are in touch with the relevant people back home and can take decisions quickly.

There is a learning process. States that have been in the EU for longer tend to do better and be more influential and they know their way around. Often, they have held the presidency of the Council of Ministers, which gives them an awful lot of contacts. They have networks in place, which is extremely important in Europe because the states know where to go, they have the right people working in European institutions—the UK has been extremely bad at that in recent years, whereas Ireland has been very good at it—and

they therefore learn how European policy making works.

It is also important for small states to specialise and focus on the key issues rather than trying to cover everything, because they do not have the resources to do that.

**The Convener:** Thank you, and thank you for your written evidence as well.

Professor Thorhallsson, are you willing to give us an opening statement?

**Professor Baldur Thorhallsson (University of Iceland):** Yes, of course. Thank you for your welcome, convener and members of the committee. I am pleased to share my views with you today.

I will briefly explain my background. I studied in Britain at the University of Essex. In the past 20 years, I have taught and written about my favourite subject—small states—at several universities in Europe and the USA. Several years ago, I founded the centre for small state studies, which is a research centre here in Iceland. In my country, I am active in domestic and foreign policy, and I was an alternate member of our national Parliament—for the Social Democratic Alliance—in the most recent parliamentary term. I am a supporter of Iceland becoming a member of the EU and I regret that our assessment process has been suspended. My personal position on Scottish independence is neutral. It is for the Scottish people to decide, but I believe strongly that it would be in an independent Scotland's interests to remain in the EU. I hope that those remarks will help you to understand where I am coming from.

There are three important questions about the role of small states in the EU. Can they overcome the disadvantages of their small size? Can they defend their interests? Can they become influential and proactive in the EU's decision-making processes? Small states face economic and political problems associated with their greater vulnerability and limited capacity, and it is important for them to acknowledge those limitations. They need to accept that they do not have as much capacity as large states and must compensate for their weaknesses.

09:30

How can small states defend their interests and become active participants in the EU's decision making? First, they must prioritise, as has been mentioned. Prioritisation is the key word when we consider how small states can become active participants in the EU. Small states need to accept that they cannot take an active part in all the EU's activities; they have to focus on their main

economic and political interests and leave other interests on the side.

Secondly, small states need to make the utmost of their diplomatic skills and their limited size. They need to exploit the characteristics that are often associated with small administrations: flexibility in decision making, informality and greater room for manoeuvre. Flexibility is the key word when we consider how a small administration can cope with the burden of membership. Skilful negotiating tactics are crucial, so small states need excellent negotiators.

Thirdly, small states must have the skills to take initiatives in day-to-day decision making in the EU in order to become active members. That requires good knowledge of all the policy sectors that are important to them.

To summarise, a small state can defend its interests and be proactive within the EU if it builds on the features that I mentioned—prioritisation, diplomatic skills, initiatives and knowledge.

Next, I will mention four points that can help small states to become influential. The first is networking, coalition building and inclusion—basically, it is all about alliance formation, which is of fundamental importance. Secondly, in order to become influential, small states have to show leadership skills. Well-grounded knowledge in a particular field is required, as the trust of other members and the EU institutions needs to be gained. In order to be trusted with leadership duties, a state needs to be able to present its ideas clearly and skilfully and present solutions to problems.

Thirdly, there are structural factors. For instance, the Nordic states are seen as norm setters in the fields of environmental protection, women's rights and development assistance, and that image has been of considerable value for those states within the EU. They use that image to get issues on the agenda, build coalitions and get their issues through the EU. Some academics talk about the Nordic states as norm entrepreneurs in those fields.

Finally, there is the question of how to do more with less. In many areas, small states have fewer interests than large states and they are therefore more able to secure their interests in areas that are important to them. They can be flexible on issues that are unimportant to them in order to get what they want in their fields of interest. That is of value in the big package deals that the EU makes from time to time.

**The Convener:** Thank you very much for those comprehensive opening statements, which have given us lots of avenues to go down. You all referred to the difference between small and large states and how they are considered to influence

the EU. Is the term “small and large states” helpful, because one aspect of the term is based on population but another aspect might be based on economic growth and economic impact?

**Associate Professor Wivel:** The term is useful because, if we look at the European Parliament or at how many votes states have in the Council, there are differences between smaller states and larger states. There is no clear-cut definition, and it would not make sense to have one, but we might say that the states that are not able to shake the EU need to act within it in another way than those that are able to shake it. If Britain, France or Germany has a certain agenda, that will have an impact on the whole of Europe.

If Denmark has an agenda—even a negative agenda—or threatens to do something in Europe, nobody really cares but Denmark, most of the time and on most policy issues. In that sense, there are structural differences between what small member states and bigger member states can do. There are also differences in what they do. Small states rarely use their veto or threaten to do so, because they know what position they are in. In that sense, the terms make sense.

They also make sense in terms of the resources that states have on the ground in Brussels and the amount of resources that they can allocate at home. Small states can do something to make up for that. As all three of us have said, they can prioritise and focus on selected issues. If we want to make an impact on climate, fisheries or another area, we can put some resources into that in our capital and in Brussels.

Small states can also provide training and career paths for civil servants and politicians who wish to influence Europe. One challenge for all member states is that civil servants and politicians who are involved in Europe—either directly in the European Parliament or through a focus on Europe in their national Parliaments—are forgotten by the public and the system. There is a Danish saying—it might be an English saying, too—that when you are out of sight, you are out of mind. That is what sometimes happens to civil servants who pursue a career in Europe.

Small states can do things to get influence, but they must accept that there are some structural disadvantages.

**The Convener:** Professor Keating, on the issue of the influence of small and large states, and with regard to what Anders Wivel has just said, do you think that Scotland's climate change legislation, its fishing policies, its life sciences centres and its energy policy—particularly its renewable energy policy—will have an impact on whether we are described as a large state or a small state in those contexts?

**Professor Keating:** The terms “large state” and “small state” are imprecise. They are not legal terms; they are just a general way of framing things. In the past, people used to talk about the European Community, as it then was, being based on the agenda of the Franco-German axis. Following that, other people have said that it is a directorate of the big states, with the British joining the French and the Germans, and maybe the Italians and the Spanish. Those are the large states with a large amount of influence that sometimes cut deals with one another. Everybody else, more or less, is a small state, and the recent accessions have brought in more small states. Small states are clearly in the majority—that is the normal thing to be. So the terms are just rough working definitions. What do you do if you are outside that directorate?

I have noted down some of the things in which Scotland might have a particular interest, and they are precisely the ones that you mention. Obviously, competition policy is a critically important issue that is sometimes neglected. Economically, agriculture is a minor sector, but a great deal of the EU budget is spent on it. Energy is another issue in which Scotland has a particular interest, whether it be in hydrocarbons or renewable energy, and in which it has made a particular investment. The issue of higher education is also important. I do not say this just because I come from a university, but Scotland has a highly performing university and research sector—that is, in the public sector; its private research output is rather poor and unimpressive. That is something that Europe is interested in and to which Scotland could contribute.

Another issue is the whole business of dealing with nationality questions. In Scotland, we have done that rather well, because we do so democratically and peacefully. People will accept whatever the referendum outcome is, but that is not usual. The European Union, the Council of Europe and the Organization for Security and Co-operation in Europe, for example, are concerned with that, and that is something that we could export. We have modes of dealing with things that other people might be interested in.

Those are four or five issues on which Scotland might have something to teach as well as something to learn from the rest of Europe.

**The Convener:** Professor Thorhallsson, Iceland is a small state and is not part of Europe, although obviously you hope that it will be. Do you see where small states could make an impact and how that relates to the power of the large states?

**Professor Thorhallsson:** Yes. It is very important to distinguish between small and large states in the European Union, because small states need to use different methods in order to

have a say in it. First, they must identify their main economic and political interests. It then all comes down to administrative competence and using the special characteristics of small public administrations that I mentioned in my statement, such as flexibility, informality and greater manoeuvrability.

We do not get the right picture of the role of small states in the European Union if we just count the number of votes in the Council of Ministers or the numbers of MEPs, as that gives a wrong picture of their power potential. Rather, we need to look at how they use informal methods to have a say. That is of fundamental importance.

Iceland is not a member of the EU, of course, but it is part of the European Economic Area. We adopt most of the EU legislation, except for in the fields of agriculture and fisheries, because we are part of the Common Market. Iceland’s position in the EEA means that it cannot have any say in the legislation. Because of the institutional structure of the EEA agreement, we just have to accept the laws or rules that come from Brussels. I do not think that that is acceptable for an independent and sovereign state, although people may, of course, disagree with that.

**The Convener:** Okay. We will now go to questions from colleagues, who should try to catch my eye if they have questions to ask.

**Hanzala Malik (Glasgow) (Lab):** Good morning and welcome to sunny Edinburgh.

I want to tease out the issue of small and large members of the EU. My opinion is that, as large members have more MEPs, that is surely a significant factor in decisions. The smaller nations probably have to tag on to one of the larger European nations or come up with a coalition with other smaller partners if they have mutual interests. Surely it is all driven by mutual interests.

I thought that identifying small and large members is quite clear cut, so I was a little surprised to hear that there is a grey area. If there is, can someone explain what it is?

**Professor Keating:** A couple of months ago, we were in Sweden, where we started to talk about small states such as Sweden. The people there said, “No, we’re a big state because we’re bigger than Denmark and Norway.” The matter is therefore relative. Perhaps Poland and the Netherlands are big states. There is a continuum, not a clear distinction. We were interested in where Scotland, with 5 million people, would be, and there is no doubt that it would be at the small state end.

It is true that larger states have more MEPs, but smaller states have more MEPs per capita, so they are disproportionately represented. However,

the main point is that MEPs do not vote by country; rather, they vote by party group. Of course they represent constituency interests to an extent, but there is a high degree of party discipline in voting. The social democrats vote one way, the Christian democrats vote another way, the liberals vote another way and so on.

**Hanzala Malik:** So what is the suggestion? Are you saying that, despite the fact that a country may have five MEPs more than another country, they are equal?

09:45

**Professor Keating:** I am saying that the German MEPs, who are numerous, do not vote as a bloc, because the social democrats vote one way and the Christian democrats may vote another way. In fact, though, there are not many votes where the parties disagree, and the process works by consensus. It is a complication, though. However, your main point is right, because the big countries have a bigger presence in all the institutions. For example, they have more votes in the Council of Ministers, which can be critical, and they have more MEPs. As we have all said, the starting point is that the big countries have more width, so small states have to act differently. They cannot throw their weight around, because they do not have any to throw around.

**Hanzala Malik:** Would it be fair to say that smaller states will need to be more co-operative and work in partnership with people rather than try to influence them?

**Professor Keating:** Yes.

**The Convener:** Professor Wivel, do you want in on that point?

**Associate Professor Wivel:** Yes. I have two brief points on Mr Malik's important question. To add to what Professor Keating said, there are two additional ways in which members of the European Parliament matter. One is that they provide links back to their national political systems; at least, that is the evidence in a number of small states, including Denmark. There is a kind of information link, in that the MEPs tell the politicians in the national political system what is on the agenda in Brussels, what people are talking about in the hallways and what are the upcoming issues.

MEPs also matter in terms of quality rather than quantity. It is true that, when they vote, they do so by party and there is strong party discipline. However, as the European Parliament addresses the issues and the rules, negotiations are going on and MEPs play an important role in committees. Some MEPs take on the role of rapporteur, which means that they are responsible for summing up

on issues and writing reports on what is to be done on particular issues. Even though there is party discipline, it matters where an MEP comes from and whether they have a certain approach to a particular issue. For example, a parliamentarian from Denmark or Sweden will have a different approach to climate policy from a parliamentarian from one of the central or eastern European member states. So, in that sense, it matters where MEPs are from.

**The Convener:** Professor Thorhallsson, do you want to contribute?

**Professor Thorhallsson:** Yes, thank you. An important point is that small states have less interest in many areas than the large states. That helps enormously when it comes to prioritisation and the focus on certain issues. When speaking about small and large states, we have to move away from their overall influence on the EU structure or framework. For states, but especially small states, it is all about being able to have a say on their key economic issues or interests. If small states can defend their direct economic and political interests, and even become active in those areas, one could say that they are successful within the EU. It is obvious that the larger states create the overall framework of the EU. However, I share the same view as that in studies by most if not all academics, who conclude that the small states are quite efficient in working within the framework that the larger states create.

**Hanzala Malik:** That is helpful—thank you.

**Clare Adamson (Central Scotland) (SNP):** I want to examine some of the statements that have been made about how a small state positions itself within the EU. All the witnesses have talked about positioning, and we have heard the term "honest broker". Professor Thorhallsson gave a great example of how domestic politics can influence the EU when he mentioned that the current Icelandic Government has suspended Iceland's EU accession. There is quite a lot of difference between the timing of domestic elections. How much flux is there in the relationship? Is there constant negotiation with small states because domestic politics will all the time be influencing the state, as it is perceived in Europe?

**Associate Professor Wivel:** Small states have tended to have the most influence on issues on which there is a wide political consensus in domestic politics, because in that case there are not fluctuations and they can work on an issue continuously. They need to build expertise and networks, so they cannot choose issues where there are a lot of fluctuations. Small states are most successful when there is continuation from Government to Government on an issue and, even though the Government shifts from conservative to

labour or whatever, they continue to work on the same policies.

What is particular to small states compared with larger member states is that the issue is not only about the domestic politics of their own societies, because the domestic policies of their larger coalition partners also matter. For example, in Denmark we have experience of working with the United Kingdom on labour market policies in the European Union. On one particular issue, a change in domestic politics in the United Kingdom meant that all the nice preparation and work that Denmark had put in did not matter any more, because we were the junior partner. Small states must be aware of that.

**Professor Keating:** We need to make a distinction between the Nordic countries and the southern and eastern European countries. There is a lot of literature on the Nordic countries, which are seen as being exemplary in many ways, but there are also the eastern European countries. In the Nordic countries, entering the European Union was quite controversial to begin with. There were referendums in which the margin of victory was quite narrow, and Norway and Iceland decided to stay out. However, once countries were in, there was a consensus about how to act in Europe. That is not the case in central and eastern Europe, where there was enormous support for going in but not the same commitment or the same degree of organisation once the countries were in. Domestic politics therefore gets in the way all the time, which is one reason why those countries are less effective in Europe than the Nordic countries are.

**Professor Thorhallsson:** It is important to bring in domestic politics. As you know, the small states are not the same. Some are very pro-European but others tend to be quite Eurosceptic. That said, we sometimes overlook the fact that different political parties work across borders. For example, the social democrats work quite closely across borders, and the social democrats in Denmark can be quite influential if they work with all the social democrats across Europe. The conservatives and liberals do the same, so there are many channels through which small states can have a say. It is not only about the state and the bureaucracy; there are other channels, including political parties, business and labour organisations.

**Jamie McGrigor (Highlands and Islands) (Con):** Your opening statements implied that small states have less influence. Does that mean that an independent Scotland, if it were a member of the EU, would have less influence than it does now as part of the UK?

**Professor Keating:** That depends on whether an independent Scotland would want to pursue different policies. That is a political question. If

Scotland were to perceive that it has different interests, it would clearly be better off on its own. If it were to end up simply going along with the UK, independence would not have made much difference.

The last time that I was here, I mentioned that we have yet to hear about the strategy for an independent Scotland in Europe. The white paper is a bit vague about that; it says that Scotland will accept the UK opt-outs and the same terms, but there is no vision about what an independent Scotland might do that is different. If you think that an independent Scotland will have the same interests as the rest of the United Kingdom, obviously it will be better as part of a bigger state; if you think that it might have distinct interests, it would want to pursue those separately. That is a question of political judgment.

**Jamie McGrigor:** Thank you. That brings me to my second question. If Scotland were able to be independent and an independent member of the EU, and to keep the existing opt-outs and the UK currency, would that not lead to her simply being pulled along in the UK direction?

**Professor Keating:** Yes. We make that point in our written submission. If Scotland had the same terms and the same opt-outs as the United Kingdom, and Europe were moving in a different direction, Scotland would be dragged along with the rest of the UK. That is why we want to see what the vision of an independent Scotland in Europe would be and how it might be different from what the UK does at present.

**Jamie McGrigor:** May I keep going, convener?

**The Convener:** I think that Professor Thorhallsson would like to answer your first two questions.

**Professor Thorhallsson:** As I have already stated, even though small states face structural problems within the EU, it is difficult to speak about states having less or more influence in the Union. Day-to-day decision making for any state is all about having a say in their direct economic interests. For example, in Luxembourg it is all about the financial sector. If Luxembourg is able to shape the EU financial legislation in its favour, that basically is it for Luxembourg. I am not sure that talking about more or less influence or overall influence helps in assessing the role of small states in the EU. We need to pinpoint the state's main interests.

**Jamie McGrigor:** On small states, Professor Keating's written submission states that

"some research suggests that they are more likely to end up on the winning side in votes."

Can you give us examples of where that has happened?

**Professor Keating:** I would have to search my brain. Although I cannot remember a particular example, that has been demonstrated by statistical analyses. The analysis is statistical and does not tell us why it happens, but it seems to reflect the idea that small states will try to get what they can out of a package with the big states and then go along with that. Whatever their votes are worth, they will accept the majority in exchange for concessions, rather than trying to lead an opposition group and be on the losing side.

That makes sense: it is true generally in international relations that a state is better off on the winning side than the losing side. That seems to be part of the issue. The question that would need to be explored is what small states get in return for being on the winning side. It seems that they get various kinds of concessions and are taken seriously. The dominant coalition—the winning states—appreciate that they create a good reputation.

While I am talking about reputation, I should say that the reputation for being a good European, and not being obstructionist, is also important. That might also explain why small states would tend to find a place within the winning coalition rather than continue to try to resist and end up on the losing side.

**Jamie McGrigor:** Professor Wivel, in your written submission you suggest that small states have a tendency to hide and keep out of trouble. When you made your opening statement, you said that that was a thing of the past. Does that mean that an independent Scotland would have to shy away from taking difficult decisions, out of a sense of not rocking the boat?

**Associate Professor Wivel:** In the European Union, the small states that have been most successful in getting influence are those that tapped into the dominant political discourse and worked with the big member states. In that sense, we could say that they have not rocked the boat, or that they rocked only a small part of the boat, in which they have particular interests.

Another side of working successfully and gaining influence in the European Union is defining your political bastions—what you think is of the utmost political importance, what you are willing to fight for and where you are willing to be flexible—and signalling those to the world. Small states have an advantage in that, because they are small, they are sometimes allowed to do things that big states would never be allowed to do. As I said, small states must signal what is very important for them and on what issues they will negotiate. They can also pick a few issues on which they are not willing to negotiate.

**Jamie McGrigor:** Thank you.

10:00

**Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab):** Good morning, gentlemen. I think that it is fair to say, if I summarise the opinions of the three panellists, that you believe that a small state needs to specialise, to build knowledge and leadership in that area, to network and build alliances and to prioritise the issues in which it wants to be involved. That sounds as if it would be quite resource intensive. What resources do some of the smaller states that are successful in working in that way devote to their presence and influence in the EU?

**Associate Professor Wivel:** The other side to that is that you would focus on some narrow areas so, although the work is resource intensive, that intensity would not be across a broad spectrum but on selected issues. The issues that you select would be those that you typically have not only an interest but an expertise in. If you do not have that expertise, you will not be able to influence others. In that sense, the resources that are required by most small states are not insurmountable because they pick the issues on which to focus.

As I have touched on, 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.

**Professor Thorhallsson:** I do not have exact numbers, but the permanent representations of small states in Brussels tend to be much smaller than the permanent representations of the large states. I am often amazed by how much the small permanent representations achieve. How do they do that? In the larger public administrations, things tend to be much more formal—all decisions need to be taken in formal meetings. For example, France has a very strict bureaucracy; the same is basically true for the UK. However, when it comes to small states, the administrations must work informally and be flexible—and manoeuvre their officials, as I have mentioned. That is of fundamental importance in order for them to cope with the EU burden.

**Patricia Ferguson:** I understand perfectly the points that are being made. However, if we take Professor Thorhallsson's example of Luxembourg concentrating on the financial sector and wanting to prioritise the benefit that it gets from any protection or measures that are put in place around that sector, does that imply that small states that have such specific interests must almost forgo having any impact on other areas that are dealt with in the EU?

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

**Professor Keating:** That is true, but it is also important for small countries to have their domestic administration Europeanised, because they cannot afford to have a separate group of people to look after Europe. That might even help them to learn a bit more about Europe. In addition, getting involved in European networks allows countries to learn a lot about policy issues. Because small countries need to do that, they are sometimes very good at it. That is not just because they are small, because some small countries do it badly. However, as well as contributing to Europe, well-organised small countries can use Europe as a policy resource back home.

That does not alter Ms Ferguson's main point, which is absolutely valid: there is a resource cost.

**Patricia Ferguson:** I have a question on an issue that is related but at a slight tangent. On small states and the allocation of commissioners, I think that I am right in saying that small states and big states all get to have a commissioner. However, given the weight that the larger states have, it seems to me that they might pick the most interesting and important areas to have their commissioners in. Is that right, or does the system not operate like that? I do not know, so I am really interested to know what the story is on that.

**Associate Professor Wivel:** If we look at the history of the Commission, we can see that small states have sometimes held some of the most important posts in the Commission. One of the important factors, of course, is how much clout a state has in the European Union, and the big member states have more than the small ones do. In that sense, we can say that a small state is disadvantaged from the start.

However, what is also important in the Commission is who a state puts forward to become a commissioner. Is it someone who has a proven record of international expertise, is an effective negotiator or has an important standing in a particular area, be it fishing, agriculture, trade or whatever? In that sense, expertise matters, too. Is it somebody who has previously held posts of importance? Is it somebody with experience that shows that they will probably fit nicely into the Commission? That aspect matters, too. There is also an implicit gender balance in the Commission, and some small states think strategically about that when putting forward a candidate for the Commission.

You are right to say that, all things being equal, a big member state has a better chance than a small member state of getting an important post. Fortunately, however, all things are not always equal. Small states do stuff that means that they sometimes get important posts in the Commission. The balance between the big member states means that they might sometimes be more willing to let a commissioner from a small member state hold an important post than a commissioner from another big member state.

It is important to remember that the commissioners are not representative of member states. As soon as they are in the Commission, they are expected to act in the interests of Europe rather than in the interests of their home country.

**Professor Keating:** I think that that is right. There is an informal rule about balancing big and small states and the big states not taking all the big positions. At the moment, the President of the Commission and the President of the Council are from small states because the big states could not agree that another of them would get the position.

There is also the question of ideological and party balances becoming more important. The next President of the Commission will reflect in some vague way the result of the European elections, which will be between the centre left and the centre right; there is an effort to get a balance there as well.

**Patricia Ferguson:** In other words, as with most situations in politics, connections are almost as important as expertise.

**Professor Thorhallsson:** If a very small state sends a trusted, knowledgeable expert in the field of interest to Brussels, he or she stands a good chance of getting the post that their Government really wants. For example, when Norway made an accession treaty with the EU, it had been decided that Norway would get the fisheries commission. That was the field that Norway really wanted and it had been promised it.

**Patricia Ferguson:** That is interesting; thank you.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** I want to pursue the discussion about the ways in which smaller states seek to gain influence within the European Union. Some time ago, I had the opportunity to ask Ireland's current Minister of State for European Affairs, Paschal Donohoe, about Ireland's relationship with the European Union and with the United Kingdom from the historical perspective. His statement to me was that, in his country's view, Ireland had benefited greatly from its independence as a state. It had enhanced its relationship with the United Kingdom, and its participation with a small state in Europe gave it further advantages because of the

necessity of engaging and interacting with other small states within the EU. In your view, is that more prevalent in Europe now because smaller states have to negotiate with one another and make connections? Do they do that much more systematically than the bigger states do?

**Professor Keating:** Ireland does it pretty well. When it went in at the same time as the United Kingdom, it was tied in to British markets in all sorts of ways. Europe allowed Ireland to diversify its export markets. In that sense, membership enhanced Ireland's independence. It had been formally independent since 1922 but still highly tied to the United Kingdom.

On the other hand, Ireland faced huge challenges and it had an awful lot of learning to do. It was a successful example of a country sending people to Brussels, knowing its way around Europe, and reorganising its domestic policy. Europe was probably a dynamic force in improving the quality of Ireland's domestic administration.

Some other countries in central and eastern Europe have not done all that and they have performed very badly. It therefore depends on the individual country and how well prepared it is to deal with Europe.

**Professor Thorhallsson:** In the day-to-day decision making in the EU, alliance formation is based on economic interests. However, when it comes to treaty negotiations and intergovernmental conferences, in the past few years we have seen a split between the large states on the one hand and the small states on the other. It has been very important for small states to stand together to prevent what I would call attacks from the large states and enhance their status within the Union.

**Associate Professor Wivel:** The experience is that coalition building is typically issue specific and based on economic and political interests. For example, Denmark will work with Germany on climate issues, but with Britain on labour market issues, because those are the most natural coalition partners in terms of their political consensus.

Only when it comes to some institutional issues will small states form a broader coalition because they have common interests, but even then political ideas may sometimes play a role: some might want a stronger role for the European Commission than others, some have a more intergovernmental approach and some have a more supranational approach.

It is not so much whether a nation is small or big but, I would say, more political and economic interests that tend to play a role in coalition building.

10:15

**Willie Coffey:** Okay. Many comments have been made about numbers being important or not important. It is my understanding that, when Scotland becomes an independent state, the number of our members of the European Parliament will almost double to be on a par, perhaps, with Denmark's representation.

Professor Keating, you talked about what exactly Scotland's agenda in Europe will be and whether it will diverge from, or be the same as, the UK's. However, when we get to the Council of Ministers, I presume that we will have one member each: the UK will have one member and Scotland will have one member.

**Professor Keating:** In the Council of Ministers?

**Willie Coffey:** Aye.

**Professor Keating:** An independent Scotland would send a minister to the Council of Ministers, depending on the subject. As I note in my submission, the system of qualified majority voting is being changed: as of November 2014 it will be a qualified majority of countries with a qualifying majority of population; countries will no longer have a fixed number of votes. It remains the case, however, that bigger countries will continue to have more votes because they have bigger populations.

**Willie Coffey:** Over recent years, there have been some examples of our interests diverging on fishing, agriculture and the common agricultural policy. It is fair to say that, on those matters, some people in Scotland have the view that our interests were not served well by negotiations that the United Kingdom carried out on our behalf. An independent Scotland would surely have an influence and a voice whereas, previously, we had none.

**Professor Keating:** Indeed. At present, when the Council of Ministers meets as the council of agriculture ministers, a Scottish minister is usually present but as part of a British delegation. After independence, the Scottish minister would represent Scotland and could present a distinctive Scottish case. The outcome would then depend on the balance of forces—the balance of power.

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.

**Willie Coffey:** Absolutely. I presume that that is when the relationships that a small member state can develop and build when it is in the country's interests to do so become very important.

You also talked about some of the main strengths that Scotland could bring to the table in Europe. You mentioned fishing, agriculture, oil and gas and higher education. What might Scotland's contribution to Europe be in terms of those relative strengths? Are we well positioned to make a good offer to Europe as a member state, relative to our size? I suppose that I am asking whether we can make a positive contribution.

**Professor Keating:** That is what we have all been saying. It depends 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.

We have the grand European research frameworks. A lot of money is going into research, and Scotland might have something to contribute to that because it has an effective research sector that is well internationalised—much more so than the sector in some other European countries—and there is a lot of expertise in the universities.

People have been trying to reform the common agricultural policy ever since it was set up—it is an extremely slow process. However, within the UK, Scotland has had a disproportionate number of people working on agricultural policy going back to the days of the Scottish Office, and that might be what it wants to contribute.

In energy, there is, of course, the oil and gas experience, but there is also all the work on renewable energy in Scotland, which tends to be supported across the parties, so at least that is not a partisan issue. Scotland is seen to have an advantage in that area. However, that can be pursued only at a European level because a lot of the framework and rules are set by Europe. There are competition rules and so on. It is therefore 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.

**Willie Coffey:** May I please have a view from the other two professors on what strengths Scotland could bring to the European Union as an independent member state?

**Associate Professor Wivel:** Obviously, I do not know as much about Scotland as Professor Keating or members of the committee. In general, Scotland has not only expertise, knowledge and resources in state administration and politics, but the resources that the third sector or the private sector is willing to send to Brussels, which should also be considered. It matters that you have interest groups on the ground in Brussels and that

they are willing and able to network. That is certainly something to consider as part of the package.

**Professor Thorhallsson:** It would depend on who was in power—who governed—in Scotland. If Scotland were an independent state, the Scottish National Party might prioritise very differently from Labour or the Liberals in a coalition in the Scottish Parliament. It would depend on the governing coalition back home—it is important to keep that in mind.

The Scottish National Party might like to focus on the environment, closer co-operation with the Nordic states, peacekeeping missions or development assistance, for example, whereas the Conservatives might align more with the rest of the UK and be a bit more Eurosceptic—I do not know. There are options and, as a member state, Scotland would not always have to follow the same path. In the end, the voters will decide what the Scottish priorities in Brussels will be.

**Willie Coffey:** Thank you for that illuminating point of view.

**Jamie McGrigor:** Ireland has been mentioned. We know that Ireland did very well when she joined the EU, albeit that she has suffered rather badly lately. If she was joining the EU today, would she benefit in the same way that she did then, or are the benefits now rather diluted?

**Professor Keating:** In the 1990s, Ireland benefited from the agricultural spending and, to a lesser extent, from the structural funds. At one point, those accounted for 6 per cent of Ireland's gross domestic product—I have that figure in my head because I looked it up yesterday for other reasons. That has tailed off because Ireland is prosperous now and is not eligible for that kind of spending.

The other benefits for Ireland were exports, being part of the single market and attracting inward investment from American and Asian firms, which went there because it was part of the single market. Had Ireland not joined the European Union, a lot of that investment would not be there.

The Irish economy collapsed because of some very bad decisions that Irish Governments took and a failure to adapt to the implications of adopting the euro. A boom was therefore allowed to get out of hand. That was a very bad way of dealing with the particular European policy of the euro. However, despite the crash and the Irish economy's terrible problems, most people would accept that, recently, Ireland has been a lot better off within the European Union than it would have been outside it.

**Jamie McGrigor:** That was not quite my question. I asked whether, if Ireland joined today, it would get the same benefits.

**Professor Keating:** It would not be the same Ireland. If Ireland voted to join today, it would have stayed out for the past 40 years and it would be in a much worse state.

There is a lot of Euroscepticism in Ireland, as there is everywhere, but the notion that Ireland would be better off outside the EU altogether would, I think, be accepted by very few people. Would Ireland favour joining the EU were there a vote today? Would a referendum on Europe produce a yes vote anywhere in Europe? Europe is in a very bad position; however, most people who have studied the matter would say that the correct decision would still be to join.

The reason that the Irish joined is that they felt that they had no choice because Britain had joined and they were tied to the British market. However, that is no longer the case. Were Britain to come out, Ireland would stay in—there is no doubt about that—because the Irish see that they gain a great deal, right across the board, from Europe.

**The Convener:** Hanzala Malik has a quick supplementary question on that point. We will then finish off with a question from Rod Campbell.

**Hanzala Malik:** I have a few supplementary questions. The panel was asked whether joining the European Union would bring strength to Scotland. I will balance that by asking whether that would bring any weaknesses.

**Professor Keating:** Are you asking about an independent Scotland in the European Union as opposed to Scotland as part of the UK?

**Hanzala Malik:** Yes.

**Professor Keating:** Yes, there would be weaknesses. We have talked about the disadvantages of being a small state—having less weight in some of the big negotiations and not having the capacity to operate right across the board. The question is whether it is worth losing that weight and capacity in favour of the advantages of independence, and that is a political judgment. Small states can succeed but they are constrained. If they are to succeed, they must know how to do that because they will not succeed automatically. How well or badly they do depends on how well organised they are.

**Professor Thorhallsson:** It takes years for all new member states to adapt to the reality of the EU and to work within its decision-making process. That said, Scotland is a member of the European Union and several Scottish officials are working on EU matters right now. Scotland is in a very different position compared with the member states that have joined in the past. I would say that

Scotland is much better prepared for membership than other countries were. We have, however, mentioned that there are certain weaknesses, and those need to be tackled. It then all comes down to administrative competence.

**Associate Professor Wivel:** 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 you have some policy preferences that are very different from UK policies you might benefit because you could pursue those policy preferences more directly.

**Roderick Campbell (North East Fife) (SNP):** Because there has been lots of succession to the EU, a lot of the questions on the issue have been answered. A lot of the questions that I would have asked have also now been commented on by the panel. In particular, the comment was made that we would not be starting from point zero.

I will start with what Professor Keating said to Willie Coffey about the position in the Council of Ministers and voting. If an independent Scotland were closely allied with the rest of the United Kingdom, it would choose to vote with it on the issue of agriculture; if, however, Scotland has a different view—I accept that we might need to prioritise, do the networking and address all the other issues that you have raised—it would be in a better position to get what it wants as a priority than is the case currently. In that sense, we would not be any worse off than we are now—that is right, is it not?

**Professor Keating:** I need to get my mind round that. Let me think about that.

**Roderick Campbell:** If we had the same interest as the rest of the UK, we would vote with the rest of the UK; if we did not, with all your caveats about our needing to network, prioritise and influence, we would be in a position to represent our interests in a different way—our interests would diverge.

10:30

**Professor Keating:** In essence, that is true, but there is a complication in that, in the preparation for the Council of Ministers, there are all kinds of trade-offs. The Council of Ministers does not vote an awful lot because deals are done before the formal vote comes about: "I'll give you something, you'll give me something and you'll give them something." There are all kinds of negotiations. It is not simply a case of saying, "We differ from you on this issue, so we'll vote in a different direction."

Ministers normally work out some compromise in advance.

Would Scotland be better off doing that on its own rather than as part of the United Kingdom? Going back to the point that has just been made, it depends on whether you think that Scotland has different interests. The debate on independence is really all about whether Scotland wants to do things differently or whether things are more appropriately done for the UK as a whole. Translate that into Europe and the question is the same.

**Roderick Campbell:** I refer you to another academic, who is not here. The opinion of Professor Diana Panke from the University of Freiburg seems to be very much in line with the comments that have been made this morning. However, she emphasises that

“levels of activity and levels of influence are closely connected, and again not attributable to size alone. Small states with active diplomats are more likely to influence EU directives than states with less active diplomats.”

Do you have any comments on that?

**Associate Professor Wivel:** That is very true. The experience of small states in the European Union shows that those that are well prepared, that have the expertise and that are flexible enough to act fast and tap into the policy process very early on will gain influence. That does not mean that the structural disadvantages that we have pointed to are without importance but it means that, on selected issues, those disadvantages can be overcome.

**Professor Thorhallsson:** Part of the description is accurate. 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.

**The Convener:** That concludes the evidence from our first panel this morning. I thank the two witnesses who have come to the committee today, and I thank Professor Thorhallsson for joining us from Iceland. We really appreciate the effort that you have all made to attend the committee and to inform us as we continue our inquiry.

10:34

*Meeting suspended.*

10:39

*On resuming—*

**The Convener:** Welcome back to the continuation of our evidence on Scotland's place in Europe under the proposals in the Scottish Government's white paper. Our next witness is Brandon Malone, who is a solicitor advocate.

**Brandon Malone:** Thank you for the invitation to give evidence to the committee. I will set out my background and my interest in the subject to give context to my evidence. As you said, I am a lawyer. My background is in commercial dispute resolution. I am a partner in a commercial law firm with offices in Scotland and London; I am the chairman of the Scottish Arbitration Centre; I have a strong interest in constitutional law; and I am a member of the Law Society of Scotland's constitutional law sub-committee.

My main interest is dispute resolution. I am an honorary lecturer at the University of Dundee and an external examiner on arbitration at the Robert Gordon University. I am also a visiting lecturer on dispute resolution at the universities of Edinburgh, Aberdeen and Strathclyde. I feel that dispute resolution has a direct bearing on the matter at hand. I stress that I am appearing this morning in a purely personal capacity—I am not representing any of the organisations that I have mentioned.

I declare up front that I am a supporter of Scottish independence, in case that was not already obvious from my note, which is appended to the Business for Scotland submission. The note is an adaptation of an article that was published in the *Journal of the Law Society of Scotland* in November, so it is not a direct response to the call for evidence. However, it has a bearing on what we are considering today, which is whether article 48 or article 49 of the Treaty on European Union would be the correct route for a transition to European Union membership for Scotland. I am happy to expand on my views on that.

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—as it would be by then—and of the other EU members.

I was going to set out in detail why I consider the article 48 route to be appropriate, but then I read Graham Avery's written and oral evidence. He has expressed my thinking on the issue far more authoritatively than I could, so I will simply endorse his reasoning. I do not have much to add to what he said. My thinking has also been greatly influenced by the evidence of Sir David Edward QC.

I have five points to make. I am happy to be questioned on those points and on any points in relation to my paper. First, the UK Government and many commentators on the EU question are looking at the issue from the wrong end of the telescope. They are looking at how international law would apply to a Scotland that is already independent, when in reality the main issues are the relationship between Scotland and the rest of the UK between a yes vote in the referendum and the date of independence; the principles that would govern the division of assets and liabilities; how international relationships would be dealt with; and the UK Government's duties towards Scotland in the period between the vote and independence. That situation has come about because of how the UK Government papers on those questions have been framed.

Secondly, from the perspective of the EU and its member states, there is a major difference in principle between the accession of a new state that has not been part of Europe and the division of an existing member state.

Thirdly, there is also a major difference in principle between the unilateral secession of part of an existing member state and the democratic and constitutional division of a state into two parts by an act of Parliament of the original state, which is what would happen in Scotland's case.

Fourthly, the people of Scotland ought to be entitled to assume that the UK Government would support Scotland's membership of the EU and that, during the period between a yes vote and independence, the UK Government would take steps to facilitate the seamless entry of Scotland into the EU so far as that was within its power.

10:45

That takes me to my final point, which is that the UK Government ought to approach the question of Scotland's membership of the EU on the basis that the UK has been a joint endeavour and that Scotland ought to be entitled to share as far as possible the benefits of that joint endeavour, which would include holding EU membership on the terms that the UK currently enjoys. The UK should approach the EU with a view to obtaining continuity of effect of the existing UK position, including the current opt-outs and a continuing rebate for Scotland.

For all those reasons, the UK Government should, prior to the referendum—as I mentioned in my article—state whether in principle it wants Scotland to be an EU member at the point of independence; whether in principle it will make an application to the EU under article 48 with a view to achieving that; and whether in principle it supports Scotland obtaining the same opt-outs as

the UK and a rebate on the same basis as the UK. As part of that, and because of the necessity of setting out the position on the currency, the UK Government should also state in principle whether it is in favour of or opposed to a sterling zone.

None of that constitutes pre-negotiation; it simply involves setting out a principled position so that voters can make an informed choice, which many bodies—including the Law Society of Scotland in its submission—have called for. Those are my initial thoughts, and I am happy to take questions on them or on our submission.

**The Convener:** You mentioned briefly articles 48 and 49, which have also come up in the other evidence that the committee has heard and in blogs that various people have written. The articles are pretty silent on the situation in which Scotland finds itself, which is unprecedented in Europe, whether in terms of successions or accessions or—as with Greenland—leaving the EU. Do you see any challenges stemming from the silence in the articles or do you see an opportunity to fill that silence?

**Brandon Malone:** The situation is without precedent—there is no direct precedent, regardless of what people are saying. As Graham Avery and Sir David Edward discussed in some detail, the EU is a flexible body, and I expect that it would find a solution.

The obvious solution is article 48, because article 49 would involve Scotland being outwith Europe and applying to get in. Under article 49, the process would not even begin until Scotland was independent, which would leave a period in which Scotland was outside Europe. As Mr Avery clearly set out, that would be in no one's interests, and I do not think that it would be the way to go.

On the face of it, article 48 allows something like what I am suggesting. It is fair to say that the article was not drafted with this situation in mind, but it allows member states to apply for a revision of the treaties.

The committee will have heard—as I have read—in evidence that the revisions that would be required to amend the treaties would not be terribly great. Sir David Edward has basically drafted an amendment to the Treaty on European Union. The Treaty on the Functioning of the European Union is slightly more difficult, but Mr Avery set out the relatively few areas in which there would have to be a difference.

That brings me back to my point that we are talking about the division of an existing state, so the impact—financially or in voting terms—on the other states ought not to be nearly as great as that from the accession of a new member. There would obviously have to be an adjustment in representation.

**The Convener:** You made the point that the UK Government taking a principled position would not be pre-negotiation. If the UK Government complies with the Edinburgh agreement—particularly the last paragraph—in good faith, would that principled position be a pragmatic way for the UK to set at rest some of the minds that are claiming uncertainty?

**Brandon Malone:** What I suggest goes beyond the Edinburgh agreement and the question whether it creates an obligation to act in good faith or however one wants to interpret it. The overriding principle is that, for the past 300 years, Scotland has been in a union in which a number of intangible assets have been built up over that period. I use the term “assets” in a broad sense; I am not referring to physical or cash assets.

One of those assets comprises the international relationships that the UK enjoys. The UK’s membership of the EU and the basis of that membership are plainly one of the assets, and that has significant value. I see no reason in principle why that ought not to be divided up fairly, and that principle ought to inform the discussions that would take place between a yes vote and independence day.

**The Convener:** We will move to questions from members.

**Roderick Campbell:** Good morning, Mr Malone, and thank you for your comprehensive opening statement. I would like you to recap a little what you said about the matters that the UK Government could clarify that would not constitute pre-negotiation. First, however, do you agree that some of the comments from the UK Government—particularly in relation to the currency, for example—constitute an opening shot in negotiations?

**Brandon Malone:** The comments constitute a negotiating position. The UK Government’s current position serves two purposes—it preserves the negotiating position without giving anything away and it creates a great deal of uncertainty. Uncertainty is a benefit to the UK Government, as people want certainty and there is a great call for certainty from business, the Law Society of Scotland and various bodies, such as the Electoral Commission.

As I set out in my paper, it is unfortunate that people are not being provided with that principled position. I do not see why the UK Government cannot say in principle—although one would not expect it to negotiate on the detail—whether it is in favour of a sterling zone or of Scotland continuing to have membership of the EU. Frankly, I am disturbed that there has been no immediate confirmation of the position—certainly in relation to

the EU—that the UK would be in favour of Scotland inheriting the current set of rights.

**Roderick Campbell:** Will you recap—for my benefit, if for no one else’s—the matters on which you think that the UK Government should make a clear statement?

**Brandon Malone:** My point was that the UK Government should state prior to the referendum date whether in principle it wants Scotland to be an EU member at the point of independence; whether in principle it will make an application to the EU under article 48 with a view to achieving that; whether in principle it supports Scotland obtaining the same opt-outs as the UK and a rebate on the same basis as the UK; and—because the currency question is tied to the practicalities—whether in principle it is in favour of a sterling zone. I appreciate that that probably goes slightly beyond the remit of articles 48 and 49, but those things are tied pretty closely together.

**Roderick Campbell:** In view of the time, I will let other members come in.

**Willie Coffey:** Good morning, Mr Malone. At a previous committee meeting, there was considerable discussion of articles 48 and 49 with some of your learned colleagues. I asked three of those colleagues who prefer the article 49 route to indicate clearly which article in the Treaty on European Union provides for Scotland to leave the EU, and I was not clear what article they were referring to. I would appreciate your view. My view is that no such article sees Scotland outside the EU. Will you comment on that?

**Brandon Malone:** The treaty does not provide for part of a member state to leave; that is not envisaged. The argument that is advanced by those who say that Scotland would be outwith the EU is, in a way, semantic. They say that an independent Scotland would not be part of the member state and would not then be part of the Union. That is the start and finish of their argument.

I think that Graham Avery said that that might be true in that context, but there is a much wider question. The problem is that, if we allow that to proceed with no effort on the UK’s part to maintain continuity, we end up in a position in which arguably—there are counter-arguments—Scotland would be outwith the EU, although its citizens would remain EU citizens. That has been described as unthinkable and absurd—Mr Avery and Sir David Edward described it as absurd—and I tend to agree.

I saw that the proponents of the article 49 route—particularly Professor Armstrong—suggested that there could be a provisional arrangement after an application was made. Of

course, an application can be made only after reaching the date of independence, because it can be made only by a state. Equally, one could say that article 49 is not designed to deal with an entity that has been in Europe for the past 40 years. Its procedures are clearly directed at countries that have never been part of Europe, so it is not directly suited to the situation.

The interim period would be the problem and would create the absurdity. Professor Kenneth Armstrong suggested that there could be an interim arrangement between Scotland and the EU, but Mr Avery suggested that working that out would be as difficult a process, if not more difficult, and that it would have more difficult consequences in the areas not covered by Europe than getting membership under article 48 would.

There are competing views and the task is difficult. As I said, I am involved in dispute resolution. I have to weigh up such things as an arbitrator; I weigh up experts' views, which is difficult. Committee members are all well able to evaluate evidence and come to a view. When I do that, I look at factors such as relevant experience, authority and impartiality. I do not claim to be impartial—I said that up front. However, when I read all the evidence, it struck me that in Sir David Edward and Graham Avery the committee had the benefit of two witnesses who were at the heart of Europe for a long time. They both have great authority and, unlike me, they are impartial for this purpose. Mr Avery made it clear that he does not favour either side and Sir David said that he is a moderate unionist. To the extent that they are arguing in favour of a smooth transition for Scotland, I would attach a lot of weight to those witnesses if I was evaluating the evidence.

**Willie Coffey:** For a wee moment, I will use your expertise to pursue the notion that article 49 is the route, although I do not believe that it is. The assumption is implicit that Scotland could be put out of the EU very quickly—almost overnight—but that it could take years to come back in. I do not understand that. In effect, there are two processes—going out and coming back in—and there has been no discussion of what the terms of going out might be. I believe that there is no provision for that to happen.

Nevertheless, people who propose article 49 as a solution have to articulate what the going-out process might mean. The only precedent is the case of Greenland, which took six or seven years to get out of the European Union. Given that, I do not understand how those who support the article 49 route can claim that Scotland's exit from the European Union, prior to coming back in, could be a very quick process, whereas the process of coming back in could be very long.

11:00

**Brandon Malone:** That would be a horrendous mess, for the clear reason that Sir David Edward and Graham Avery set out—it would be a logistical nightmare. The preparation for going out and for reapplication and the covering of the interim procedures would involve much more work than simply obtaining a smooth transition and ensuring continuity of effect would.

I have no doubt that member states in the rest of Europe have their own interests. However, for continuity, if the existing UK situation was simply switched over and divided up, as it were, the only real impact on other European members in the shorter term would be a change in voting patterns, with an increase in representation for Scotland and the former UK as compared with the previous position. Scotland's weighting as an independent state would mean that it would have proportionately more voting rights.

**Willie Coffey:** Many thanks for that. I will let others come in, convener.

**Hanzala Malik:** You have said that, in principle, the UK Government would need to do several things. However, the British Government seems to be taking the view that because there has not been a yes vote yet it does not need to do anything. The European Union, too, is refusing to speak to the Scottish Government on the issue, so nothing will happen until after the referendum takes place. Even then, if there was a gap of time in which things needed to be done, the British Government would not have to do anything, despite what you say about it in principle having to do something. The worrying point is that the British Government might even say, "We don't want you to join the European Union." If it does that, we will not get into the EU, whether we like it or not. Is that factual?

**Brandon Malone:** There are two questions there. You seem to be assuming that the UK will not take a position on any of the issues prior to the referendum. I think that that would be very unfortunate—

**Hanzala Malik:** That is the line that it is pursuing.

**Brandon Malone:** That is the line. I simply make the point that I do not think that it is credible or can be continued. If the Government continues with that line and we get to the point at which you say it refuses to support Scotland's application to become a member of the European Union—

**Hanzala Malik:** I appreciate that that is hypothetical.

**Brandon Malone:** It is hypothetical and I find it very unlikely. It is possible, but I think that it would be entirely wrong. As I see it, the UK Government

is looking at the issue through the wrong end of the telescope. We can see that from the Government's papers. When the Government commissioned advice from Professors Crawford and Boyle, it asked them to advise on

"the status of Scotland and the rUK in international law after Scottish independence, in particular '(a) the strength of the position that the rUK would be treated as a continuation of the United Kingdom as a matter of international law and an independent Scotland would be a successor state'; and ...

after Scottish independence '(b) the principles which would apply to determining the position of the rUK and an independent Scotland within international organisations...'"

Those questions are framed in terms of what will happen after independence. The professors were not asked what the position would be between a yes vote and independence, or what principles ought to apply during that period, or what the UK's obligations are towards Scotland during that period. If the UK's position towards Scotland is, "We will do nothing for you at all," people are entitled to know that now. I would find that an extreme position for the UK to take.

**Hanzala Malik:** Let us be realistic. At the end of the day, you are talking about nations looking at the best interests of their population. They do not need to do anything if they do not want to. You cannot force them to do anything. You can rely on people's good will, but you are not in a position to force people to do anything. You cannot assume that people will play the nice guy. Let us get with the real world. The UK will not be the only state that has the opportunity to say whether it wants us to be a member; other European nations will have to decide that, too, and they might want to add caveats to the circumstances in which they would want us to be a member of the European Union. The situation is not as straightforward as you are suggesting that it could be. It could be straightforward, but it will not be. In the real world, it does not happen that way.

**Brandon Malone:** I do not have the gift of foresight that would enable me to tell you exactly what will happen; I am saying what ought to happen, having regard to—

**Hanzala Malik:** It is a little naive to expect people to roll over and be good. It does not happen that way in the real world.

**Brandon Malone:** I disagree. I am not being naive. With respect, I think that you are being very cynical.

**Hanzala Malik:** I am not; I am just being realistic.

**Brandon Malone:** There are, clearly, a range of possible outcomes, but I do not believe that the UK will try to drive Scotland into the ground. The UK Government is fond of describing the union as

a marriage. If it is a marriage, it is one that was formed in the 18th century and does not seem to have moved on. Is the UK now saying to us, "We want you to stay but, if you're going, we're keeping the house, the pension and all our friends"? I do not think that that is what it is saying or what it will say. I do not think that that would be remotely equitable under international law.

**Hanzala Malik:** I am testing your evidence. You are saying what ought to happen. I am saying that it is all very good wishing that something ought to happen but, in the real world, it does not happen that way. When you have a divorce, you do not say, "It was nice being with you for 20 years but cheerio." It does not happen that way. It gets quite nasty.

You are saying that the UK should do this or that in principle, but there is no principle for doing this or doing that. It is a simple matter of negotiation and, in that negotiation, people will act in accordance with their interests. One should therefore not assume that we will have the good will of anyone in Europe, including the UK.

**Brandon Malone:** There are principles. First, assets should be divided equitably. Obviously, there is room for argument on how that should go. Secondly, you have had evidence, from Mr Avery and others, that it is in the best interests of the UK and the rest of the EU to allow a smooth entry for Scotland into Europe on the terms that it already enjoys.

**Hanzala Malik:** I agree with that. It is in their best interests. I am suggesting that what is hoped for in principle might not pan out in reality. I am disagreeing with what you are suggesting.

**Brandon Malone:** I agree that there is a wide range of possible outcomes. I have no issue with that suggestion. I am dealing in the realms of probability, likelihood and principle. That is where I and a number of other witnesses are coming from.

I accept your point. The UK could take an extreme position in relation to Scotland. As I say, if that is the view, it would be useful for Scottish voters to know that now. I think, however, that it is extremely unlikely to do so.

**Jamie McGrigor:** You referred to the testimony of Mr Avery and Sir David Edward. We have that on record, along with the testimony of many other witnesses.

As long ago as 2004, the then President of the European Commission, Romano Prodi, stated almost exactly the same argument as was made by his successor, José Manuel Barroso, which is that, on independence, Scotland would cease to be part of the EU. I hope that you agree that that argument is coming from people with some experience. Why do you think the Scottish

Government has not examined arguments that go back a decade?

**Brandon Malone:** I am sure that it has done so, although I cannot speak for the Scottish Government and I do not purport to do so. The argument, however, is the same as that which is being advanced now and, as Mr Avery said, it is not the complete picture. Sir David Edward, who was a European court judge, says he thinks that it is incorrect.

**Jamie McGrigor:** I am asking for your opinion.

**Brandon Malone:** I am giving it; as I say, it coincides.

**Jamie McGrigor:** Forget the Scottish Government—have you examined this?

**Brandon Malone:** Yes, of course.

**Jamie McGrigor:** Why do you come to that conclusion? We accept that we are in uncharted waters. How do we know that Spain, for example, would not say no to Scottish membership?

**Brandon Malone:** To date, no EU member has said that it would say no. They might do so; we do not know. I think that it is extremely unlikely. We can only go on the basis of probabilities.

**Jamie McGrigor:** Is it not likely that article 49 would have to be the route taken on this issue?

**Brandon Malone:** No, for the reasons that I gave earlier. That would involve Scotland applying from outwith Europe, which, as I say, is in no one's interests. It would be an absurdity, as Mr Avery and Sir David Edward suggest. I keep going back to them because they are much more experienced than I am in these matters. They are also impartial, which I do not claim to be.

I am trying to be objective in all this. I think that you are entitled to ask yourself whether other comments being made by various people are entirely impartial or whether those people are looking to other interests. We can listen to what individuals say or look at how Europe actually operates. Again, we have a lot of evidence from Mr Avery and Sir David Edward on how Europe operates. To summarise, it is that Europe finds a way forward; a solution will be found.

**Jamie McGrigor:** On another subject, if internal UK negotiations fail to reach a currency agreement, will Scotland be forced to apply to join the euro, and if it does not meet the euro criteria to join, where would it go?

**Brandon Malone:** We are now straying into economics and interesting areas like that. There is a lot of evidence to show that Scotland cannot be forced to join the euro: it would not have its own currency to join the European exchange rate mechanism and would not meet the criteria. As of

day 1 of independence, that is not going to happen.

On the question of the currency generally, it is clearly overwhelmingly in the interests of the continuing former UK and Scotland to be in a currency union. We can ask what would happen if that were not agreed. My view is that it is extremely likely to be agreed; it is what businesses want, both north and south of the border. The overarching consideration is stability and continuity. Ultimately, those considerations will rule the day.

In all this, my concern is that Scotland would somehow be punished if its people decided to exercise their right of self-determination and that they would be out of the club and out of the currency—all those things. That is quite wrong. I do not think that that is what people think, but people are creating a great deal of uncertainty because ultimately that benefits the no campaign.

**Jamie McGrigor:** The uncertainty is being created by the fact that, to some extent, there is a difference of opinion within the SNP about what currency it would like to use. Would you agree with that?

**Brandon Malone:** I am aware of a difference of opinion within the yes campaign. I do not know about the SNP internally; I cannot speak for the party.

**Jamie McGrigor:** Dennis Canavan, for example, who was, I think, head of the yes—

**Brandon Malone:** He is part of the yes campaign. I am sorry; I am distinguishing between the SNP and the yes campaign. I know that Mr Canavan and, I think, the Green Party—

**Jamie McGrigor:** Okay. Dennis Canavan is not a member of the SNP, but there is a difference of opinion in the yes campaign on what currency it would use. That is why I am asking you what currency would be used if the pound was not used.

11:15

**Brandon Malone:** I do not think that that is a question that I can answer. That is ultimately a matter for the Scottish Government of the day, which will be voted in on the basis of policies that it has put forward. However, as I said, I find it extremely unlikely that it would reach that position because, as with Scotland's European Union membership, the UK Government has not ruled out a UK currency. No one has ruled that out. The UK Government says, "Oh, it'll be a difficult negotiation" and all the rest of it, but no one is ruling that out. It will not say yes or no, or whether it is in favour of it or against it in principle. It is

simply maximising the uncertainty around the question.

**Patricia Ferguson:** I am sorry to begin with this question, Mr Malone, but I have to admit that I am slightly confused. Are you representing Business for Scotland this morning?

**Brandon Malone:** No. I have provided it with my opinion, but I am not representing it. I am here in a personal capacity.

**Patricia Ferguson:** Right. So you are here in a personal capacity and are a specialist in construction and dispute arbitration.

**Brandon Malone:** Yes. Those are my principal areas of interest.

**Patricia Ferguson:** Thank you. You mentioned that your view and that of the two experts whom you quoted is that article 48 is the preferred method of joining or maintaining membership of the EU and that that is the most valid method.

**Brandon Malone:** Yes.

**Patricia Ferguson:** Given that Scotland is not a signatory to any of the EU treaties and that article 49 is designed to accommodate a new state that wishes to become a member of the EU, why is article 49 dismissed so thoroughly, as you seem to think it is?

**Brandon Malone:** As I said, article 49 envisages a process in which an applicant state starts from ground zero and works up through candidate membership to become a full member of the European Union. I am not dismissing it in its entirety; I am saying that Scotland would have to be outside Europe to adopt that route, as a country has to be a state before it can apply under article 49. That is all fine, but it means that there would be an interim period of absurdity in which European citizens would lose their rights in relation to Scotland's territory and institutions and Scottish citizens would potentially lose their rights—although potentially they would not, as they would still have UK passports and therefore may still enjoy UK citizenship. There would be what various people have described as an absurdity and a legal nightmare, which is not desirable.

What is desirable is the article 48 route, which could allow for continuity of effect, stability and common sense. However, Scotland cannot make an application under article 48—that would have to come from the UK Government. My position is that the UK Government could and ought to make that application.

**Patricia Ferguson:** That is where your argument falls down. Scotland cannot make an application under article 48, either.

**Brandon Malone:** I said that the UK Government would have to do that.

**Patricia Ferguson:** Yes. In either situation, Scotland would depend on the UK Government to make the application. I think that those who argue for article 48 are making a big error in many ways, because I think that, under article 49, it is entirely possible to make accommodations that would allow Scotland to become a member of the EU in its own right in a similar way to under article 48. Europe is particularly good at accommodations. I find it very difficult to understand why people get hung up on article 48.

As you said, we have to consider how Europe operates. At the end of the day, the European Union is a political entity, and there are political movers in it who would not necessarily be keen to see Scotland having a swift passage into it as a member state. I cite the vote that took place in the Committee of the Regions—not, I would be the first to admit, a representative vote—in which the representatives of legislative organisations throughout the EU voted overwhelmingly that the method of accession for a region or a state seceding from another member state would be article 49. If we are looking at the practicalities and at how Europe operates, in reality, is article 49 not the best way to do it?

**Brandon Malone:** No, for the reasons I set out earlier. I hear what you are saying about the Committee of the Regions and, with respect, I would say that that is not strictly relevant to what we are talking about here.

**Patricia Ferguson:** It is; it is actually very relevant.

**Brandon Malone:** That committee would not determine the issue; it would be the Council and, ultimately, the members who would do that and, as I say, none of them has said that they will veto. In his evidence to this committee, Sir David Edward said:

“My personal opinion is that, 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 at the time when Scotland becomes independent from the rest of the UK.”—[*Official Report, European and External Relations Committee*, 23 January 2014; c 1696.]

I whole-heartedly agree with that. The key point that many are missing—and I exclude Sir David Edward, Graham Avery, Professor Keating and many others from this—is that according to UK constitutional theory, in the event of a yes vote, nothing happens until the date of independence. For external purposes, the UK is still a unitary state and it is still the legal person for international purposes. It still has responsibility for Scotland vis-à-vis Europe. Just as important, nothing happens internally in terms of strict UK constitutional theory.

The Edinburgh agreement does not empower the Scottish Parliament to then trot off and make a unilateral declaration of independence.

The constitutional reality in UK terms is that the day after the yes vote, nothing changes and the Westminster Parliament is still sovereign, albeit that one would expect it to respect the outcome of the referendum and make it work, as it has signed up to do.

That leaves two possible scenarios for between the referendum and the date of independence. The UK can engage positively, as it has already undertaken to do, and ask for amendments to the treaty to recognise the fact that, by its own constitutional process, it is dividing itself into two states, which is an application under article 48. Alternatively, it could do nothing, as it has been suggested it might do. Since Scotland would not have the competence to engage directly with Europe and make a formal application—it would have no legal personality for international purposes—then at the point at which it became independent it would make an application under article 49. However, that is hugely undesirable for reasons that have been set out in some detail by others.

**Patricia Ferguson:** We have had the evidence of others, and we are considering that evidence, so it would be helpful to have your responses to the questions that are being posed. However, let me ask just one more question. Do you disagree with any of the points that are made in the chapters of the white paper on independence that talk about EU relations?

**Brandon Malone:** You would have to guide me to it; I do not have it before me.

**Patricia Ferguson:** Perhaps you might like to read it and give us your thoughts in written form.

**Brandon Malone:** I do not disagree with the points that are made within the white paper, but if you have a specific point in mind, perhaps I could answer that.

**Patricia Ferguson:** No. If you had a specific point of disagreement, that would be the one I would want to hear about.

**Clare Adamson:** Mr Malone, you mentioned that you were involved in the Law Society's constitutional committee. Has that committee examined this issue?

**Brandon Malone:** It has. I am not here to speak for the Law Society or its committee. It is looking at the issue and I understand that a submission will be made.

**Clare Adamson:** Thank you. I go back to the points made by Hanzala Malik and his assertions and the discussion about how the negotiations

might go. The assets of the UK were mentioned; are the liabilities not the other side of that coin?

**Brandon Malone:** Yes. Under strict international law, there are a variety of possible outcomes as regards division of assets and liabilities. However, as I said earlier, I think that we are approaching the problem from the wrong end if we say that the argument about that division will happen after independence.

Again, it comes back to dispute resolution and whether we want to try to reach a consensual position, which is clearly in everyone's interests, or whether we want to let things go and end up in some sort of adjudicatory dispute process in which a third party imposes a decision. At that stage, everything becomes a hostage to fortune for both sides, which is not in anybody's interests. The general principle of an equitable division ought to rule the day.

**Clare Adamson:** To go back to what Mr Malik was saying, it would not be a case of the rest of the UK working against Scotland's interests; rather, it would be in the interests of both the rest of the UK and Scotland to reach a consensual agreement in the negotiation process.

**Brandon Malone:** Yes.

**Clare Adamson:** In earlier evidence to the committee, Aidan O'Neill described the idea of a possible human rights hole being created with regard to existing EU citizens in Scotland if Scotland came out of the EU as being a "nightmare scenario". If Scotland came out of the EU at any point, what impact would that hole have on other EU nationals and businesses and existing EU agreements, such as that on fisheries?

**Brandon Malone:** It would be very problematic. If nothing was in place and we got to the midnight hour on the day of independence and EU citizens in Scotland suddenly lost all their entitlement under the EU regime, it would be incredibly problematic.

As regards Scottish territorial waters, if we are suddenly out of Europe and no longer part of the common fisheries policy, that could mean that all EU fishermen would have to leave Scottish waters. That might suit some people, but from an EU citizen's point of view, that would be disastrous.

For those reasons, continuity of effect would suit everyone all round—it would suit Scotland as well as the other EU members, including the former UK.

**Clare Adamson:** In earlier evidence, Professor Cram stated in relation to whether the route would be through article 48 or 49:

"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."—[*Official Report, European and External Relations Committee*, 16 January 2014; c 1660.]

In your experience and given the evidence from other people—including Mr Avery's evidence last week—do you believe that a pragmatic approach will be taken and that a solution will be found to prevent that hole in the EU?

**Brandon Malone:** Yes, I do. That is consistent with how the EU operates and with what the EU does. A number of examples have been talked about where rules that on the face of it are strict have become flexible to accommodate reality because, ultimately, the EU is a political organisation and there will be a political reality that needs to be addressed and fixed.

The black hole of rights problem is clearly difficult and would need to be fixed. I do not agree that article 49 is appropriate because it is a more formal process that would necessarily involve an accession period, therefore there would be that hiatus. Also, as Mr Avery said—and I agree with him—the process of negotiating the interim position and then negotiating a new accession would be far more complicated than simply, in effect, dividing up the current position. In many ways, what we are talking about can be seen as an internal reorganisation within the EU.

**The Convener:** That completes our evidence session. I thank Mr Malone for coming along—we are continuing our inquiries and every piece of evidence is helpful and informative.

## "Brussels Bulletin"

11:29

**The Convener:** We move on to agenda item 2, which is consideration of the "Brussels Bulletin". Members will see that we are extremely short of time.

You will have noticed that the bulletin is getting a bit lighter in content. That is because less is happening in Europe as they wind down for the forthcoming elections. Katy Orr, the clerk, asked the bulletin's authors to focus on specific issues and this week's bulletin covers the elections and election process. As no members have any comments or questions, do we agree to pass the bulletin to other committees for their consideration?

**Members indicated agreement.**

11:30

*Meeting continued in private until 11:39.*

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