

## WRITTEN EVIDENCE FROM JEAN-CLAUDE PIRIS

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

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

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

This written evidence is limited to one legal question:

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

-or would there be a legal obligation for Scotland to apply to become a Member of the EU by addressing an application to the EU Council, and then for the EU institutions to follow the procedure described in article 49 of the same Treaty, which deals with the accession of a new Member State ?<sup>1</sup>

One may give an answer to that question on three reasoning methods:

- on a formal legal point of view;
- on a substantive legal point of view;
- on a constitutional point of view.

**On a formal legal point of view**, the case law of the Court of Justice of the EU establishes that one cannot choose freely an article of the EU Treaties to adopt an act or make a decision. The Court refers to «*the aim and content*» of an act or decision as being the only way to determine the correct choice of its legal base. It also stresses that specific articles have priority upon general ones. Article 49 is the only article in the EU Treaties which provides the specific procedure to be followed for the admission of a State as a member of the EU. Article 49 specifically mentions that adjustments to the Treaties will be entailed by the admission procedure, and that they will be dealt with at the same time and

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<sup>1</sup> I observe that following the procedure of article 48 rather than that of article 49 would not necessarily mean gain in time. It is a lengthy procedure, even in the case of a general agreement on the limits of a possible revision. If a request opens the entire EU Treaties for other revision requests, the initial request could be delayed.

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

**On a substantive legal point of view:**

- **First**, the admission of a State as a member of the EU is conditioned by the fact that the applicant State does respect the requirements listed in article 49: respect of the values referred to in article 2 of the Treaty on EU and commitment to promote them. The conditions of eligibility agreed upon by the European Council (the so called «*Copenhagen criteria*», adopted in June 1993, among which the acceptance and capacity to implement the «*acquis communautaire*») shall be taken into account. If the procedure prescribed in article 49 was to be ignored in each case when an applicant country was the result of the splitting of a current EU Member State, that would mean that any fraction of a Member State would always be regarded as automatically fulfilling all these conditions, which is by no means a given fact. This would ignore the requirements of the Treaty.
- **Second**, two set of legal provisions have to be approved for each admission. The first set of provisions to be approved are the legal obligations to be imposed on the new Member State in the treaty of admission. This is what is referred to in article 49 as «*the conditions of admission*», which are «*the subject of an agreement between the Member States and the applicant State*». Article 49 provides that the same agreement will also contain the second set of legal provisions to be approved, ie «*the adjustments to the Treaties on which the Union is founded*» which are entailed by the admission. It is provided by article 49 that «*this agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements*». I therefore conclude that, on a substantive legal point of view as well, an agreement based on article 49 is necessary, and that it is also sufficient, as it has to contain both sets of legal provisions which are necessary.

**Finally, from a constitutional point of view**, the fact that the EU gets one additional Member State is a major political change. It alters the composition and the internal political balance of each EU institution. It changes the Union itself. It is why the Treaty provides for strict conditions, not only the consultation of the Commission and a unanimous vote in the Council, but also the consent of the European Parliament, to be given, exceptionally, by a majority of its component members, a condition which is not required by article 48 for any revision of the EU Treaties. Therefore, any admission of a member of the EU legally has to respect this requirement. Besides, each Member State will have to sign and then to ratify the admission agreement, and their Constitution may provide for specific requirements for that ratification. In the case of France, the Constitution provides that, in principle, the ratification of an admission treaty must be authorised by a referendum, and not by a vote of the French Parliament<sup>2</sup>.

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<sup>2</sup> «Any Government Bill authorizing the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.

Notwithstanding the foregoing, by passing a motion adopted in identical terms in each House by a three-fifths majority, Parliament may authorize the passing of the Bill according to the procedure provided for in paragraph three of article 89». (Article 89(3) reads: «However, a Government Bill to amend the Constitution shall not be submitted to referendum where the President of the Republic decides to submit it to Parliament

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

12th January 2014,

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convened in Congress; the Government Bill to amend the Constitution shall then be approved only if it is passed by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly.»).