

WRITTEN SUBMISSION FROM LORD KERR OF KINLOCHARD

I am honoured to be invited to submit Evidence to the Committee's Inquiry into issues concerning an independent Scotland's membership of the European Union.

My general views on these questions remain broadly as set out in a paper published in January 2013 on the Scottish Constitutional Futures Forum (1). In the light of the Scottish and UK Governments' White Papers of November 2013 and January 2014 (2 and 3), it may be helpful now to draw the Committee's attention to 10 specific points on procedure and timing: this Note does not comment further on the substantive issues which negotiations would have to cover.

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

2. On procedure, there is no secession precedent to follow, but the general view, as explained by the Presidents of the European Council and Commission, and by those member-states (including the UK) who have commented, is that the necessary negotiations would be conducted under the specific procedures set out in Article 49 TEU for the admission of new member-states. The Scottish Government's preference (2) for Article 48 TEU, which sets out general procedures for considering treaty amendments, does not seem to be widely shared; and use of a general Article for a matter specifically addressed elsewhere in the Treaty would conflict with ECJ jurisprudence.

3. Use of Article 49 (and 48) TEU procedures entails reaching unanimous agreement: nothing is agreed until everything is agreed by every member-state. (Applications under Art 49 also require approval by a majority of Members of the European Parliament.) Concern to deter domestic secession movements could make certain member-states reluctant to agree, or disposed to drive a hard bargain: their motive would be to demonstrate, to those in their states considering following Scotland's example, that the road would be long and rocky.

4. The UK Government's White Paper (3) implies (at paragraph 3.92), and the Scottish Government's (2) asserts, that negotiations could start after a Referendum decision for independence. The Scottish Government also assert that negotiations could be completed before actual independence in March 2016. This would clearly be desirable, in order to minimise the hiatus consequent on Points 1 and 2 above. But it is not certain that it would be possible, and the matter is not just Scotland's, nor the UK's, to decide.

5. Three potential obstacles would need to be overcome. First, just as Scotland could not submit a formal membership application until independent, so the EU institutions might stick to the letter of the law, and refuse to open prior negotiations with a non-state entity. They might be encouraged in that approach by certain

member-states: see point 3 above. One member-state objection, if sustained, would be sufficient to block the procedure, preventing formal negotiations.

6. Second, on certain of the issues central to the negotiation, in particular the Euro and Schengen, it might be difficult to take matters very far until the future relationship between Scotland and the rest of the UK had been established. Divorce terms, e.g. on currency and border arrangements, would be relevant. It follows that agreement between Edinburgh and London on a precise secession scenario would have to precede negotiations in Brussels,

7. Third, the UK Conservative Party is currently contemplating, and the UK government might from 2015 be conducting, negotiations to change the terms of UK membership, and a subsequent referendum on whether to leave the EU. This could cause some member-states (and not just those with domestic secession movements) to prefer to take the Scottish dossier slowly. Enthusiasm for parallel negotiations on Scottish and UK requests might be muted: some might think it more convenient, and logical, to take them sequentially. Similarly, the UK government might not necessarily prioritise Scottish negotiating objectives over its own; and Scottish aims might in turn be affected by possible, or actual, changes to the terms of the UK's membership, or a UK secession.

8. A solution to the problem outlined at Point 5 above might be informal (post-referendum, pre-independence) "pre-negotiations", conducted between the EU Institutions and the UK Government, who might field a delegation operating under instructions from Edinburgh. But this too would of course require the acquiescence of all EU member-states. And it is not clear that such informal "pre-negotiations" could be completed in the 18 month period envisaged in the Scottish Government's White Paper (2): Points 6 and 7 above would be as relevant to informal as to formal negotiations.

9. What is clear is that even if the terms of Scotland's future membership had been fully "pre-negotiated", and accepted by all member-state governments, there would still be some delay following independence: informally agreed terms would need to be formalised, and the Treaty signed in Brussels and ratified in every member-state capital.

10. Concern to mitigate a gap's adverse effects of on individuals (Scots would no longer be EU citizens: Art 9 TEU defines EU citizens as nationals of a member-state), and on business would not be confined to Scotland. To minimise the hiatus, Scotland might, before independence, and again with the UK acting on its behalf, seek informally to negotiate transitional terms, to have effect on signature of the Treaty and until the last national Instrument of Ratification had been deposited. But, as with substantive membership terms, use of such a procedure, and approval of its product, would need the agreement of every member-state, including the less sympathetic.

21 January 2014

References.

- (1). "The Other Union : Scotland and the EU". 30 January 2013. www.scotlandsconstitutionalfuture.org
- (2). "Scotland's Future: Your Guide to an Independent Scotland. November 2013
- (3) "Scotland Analysis: EU and International Issues". January 2014