

SCOTTISH GOVERNMENT'S PROPOSALS FOR AN INDEPENDENT SCOTLAND: MEMBERSHIP OF THE EUROPEAN UNION

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The Road to Membership and Representation in the EU for an Independent Scotland

Summary

It is generally recognised that an independent Scotland seeking to take its place as a Member State of the European Union (EU) would represent uncharted and unforeseen territory in the history of integration. There is no provision for such a scenario within the EU Treaties, there is no relevant ruling of the European Court of Justice (ECJ), and there is no direct historical precedent that can be referenced. The debate is now focused less on whether an independent Scotland would ultimately become a Member State of the EU, and more on the political and legal dynamics that would shape the process by which Scotland would transition from being a constituent part of a Member State (the United Kingdom), to a Member State in its own right. Only a few things are certain. First, the process will be determined more by politics than by law due to the lack of provision in the Treaties; with the legal approach adapted to fit the political imperative. Second, there is no way for Scotland to become a Member State without either an Accession Treaty or amendments to the existing EU Treaties. Either process will require the unanimous consent of the existing 28 Member States. Beyond that almost everything else remains debatable and characterised by shades of grey.

Background

1. The position of an independent Scotland vis-à-vis the EU has become a key issue in the referendum campaign currently underway. The position, at the start of 2014, is as follows. The Scottish Government, in November 2013, published a White Paper in which it set out a mechanism to ensure Scotland's continuous presence within the territory of the EU in the event of a 'Yes' vote.¹ The White Paper was supplemented by a further document offering more detail on an independent Scotland's relationship with the EU.² The mechanism set out by the Scottish Government stands at odds with the official position articulated by the President of the European Commission, Jose Manuel Barroso, in December 2012.³ That position was almost verbatim identical to that of Romani Prodi

¹ Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland* (Edinburgh: Scottish Government, 2013).

² Scottish Government, *Scotland in the European Union* (Edinburgh: Scottish Government, 2013).

³ Jose Manuel Barroso, 'Scotland and the EU: Barroso's reply to Lord Tugendhat', (10 December 2012) House of Lords Economic Affairs Committee, at http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA55_Letter_to_EU_President_20121029.pdf.

delivered in 2004 during his tenure as President of the Commission.⁴ It has since been reiterated by Herman van Rompuy, the President of the European Council.⁵

2. Two inquiries by committees of UK House of Commons have touched on the issue of an independent Scotland's relationship with the EU. In May 2012 the Scottish Affairs Committee took evidence on the matter and incorporated that evidence into its report of November 2013.⁶ The Foreign Affairs Committee took evidence on the issue as part of a 2012-13 inquiry.⁷ There have also been countless public interventions by former officials of the European Commission, the European Court of Justice, the Foreign & Commonwealth Office, and numerous academic experts in the field of EU studies.
3. The picture that has emerged from all of this is a complex one. However, at the core remains a divergence of opinion over how an independent Scotland might secure membership of the EU. The Scottish Government rests its position on Article 48 of the Treaty on European Union (TEU), the article dealing with Treaty amendment. The European Commission claims that a standard accession process via the provisions of Article 49 TEU would be required.
4. Whilst the picture still lacks clarity, some progress has been made in the debate. Early discussion tended to focus on issues of state continuance and succession. In one of the UK Government Scotland Analysis papers, the eminent international law professors James Crawford and Alan Boyle identified the following as the most likely scenario: 'the rUK [remainder of the UK] would be considered the continuator of the UK for all international purposes and Scotland a new state'.⁸ Evidence submitted to various committees at Westminster, and a large body of published academic opinion, has supported this view.
5. However, in the Van Gend en Loos case the ECJ identified the EU (then the EC) as 'a new legal order of international law'.⁹ Following from this, the EU does not sit beneath international law in some neat hierarchy and the ECJ has proven willing to overrule even the hardest instruments of international law: UN Security

⁴ Romani Prodi, 'Answer given by Mr. Prodi on behalf of the Commission', 2004 O.J. C84 E/422, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:084E:0422:0425:en:pdf>.

⁵ Simon Johnson, 'Herman Van Rompuy deals EU blow to Alex Salmond's independence plans', The Telegraph, 14 December 2013.

⁶ Evidence: House of Commons, 'The referendum on separation for Scotland, Session 2012-13', at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscota/139/139i.pdf>. Report: House of Commons, 'The referendum on separation for Scotland: the need for truth', at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmsscota/828/82802.htm>.

⁷ House of Commons, 'Foreign policy considerations for the UK and Scotland in the event of Scotland becoming an independent Scotland', 6th Report of Session 2012-13 (London: HMSO, 2013), pp. 21-28.

⁸ UK Government, 'Scotland analysis: devolution and the implications of Scottish independence', Cm. 8554 (London: HMSO), p. 67.

⁹ Case 26/62, Van Gend en Loos [1963] ECR 1. The ECJ reiterated this in Case 6/64, Costa v. ENEL [1964] ECR 585.

Council Resolutions.¹⁰ In light of this, consensus does seem to have been reached that public international law is not the appropriate place to look for an answer to the question at hand.

6. Boyle and Crawford themselves state that they are not suggesting that 'it is inconceivable for Scotland automatically to be a EU member. The relevant EU organs or Member States might be willing to adjust the usual requirements for membership in the circumstances of Scotland's case. But,' they go on to say, 'that would be a decision for them, probably made on the basis of negotiations; it is not required as a matter of international law, nor, at least on its face, by the EU legal order'.¹¹

The Scottish Government's Position on the Process of Securing Membership (Article 48 TEU)

7. The Scottish Government's position on an independent Scotland's relationship with the EU has been that negotiations would be required but that such negotiations could take place during Scotland's transition to independence and thus during a period when Scotland remained within the EU by virtue of being within the UK. In 2009 the SNP stated that 'an independent Scotland would continue membership of the European Union, fulfilling the responsibilities which membership brings', going on to say that 'settling the details of European Union membership would take place in parallel to independence negotiations with the United Kingdom Government, and would cover areas such as the number of MEPs and weight in the Council of Ministers'.¹² The Deputy First Minister, Nicola Sturgeon, in a speech to the European Policy Centre in 2013, stated that immediately following a 'Yes' vote in September 2014, the Scottish Government would issue a 'notification of intent' to negotiate membership. She said: 'We would begin seeking to apply the principle of continuity of effect: in other words, on issues like the euro, Schengen and the rebate, our aim would be to retain the prevailing terms of Scotland's membership'.¹³
8. The White Paper, and the supplementary document on Scotland in the European Union, develops the previous statements by the Scottish Government [and SNP officials]. It represents the most comprehensive thinking to date on this question. The position outlined is that, immediately following a 'Yes' vote, the Scottish Government 'will immediately seek discussions with the UK, Member States and institutions of the EU to agree a process whereby a smooth transition to full EU membership can take place on the date on which Scotland becomes an independent State'.¹⁴ Specifically the Scottish Government sets out a process

¹⁰ Joined Cases C-402 & 415/05P, *Kadi & Ali Barakaat International Foundation v Council & Commission* [2008] ECR I-6351. For more see G. de Burca, 'The European Court of Justice and the International Legal Order after Kadi', *Harvard International Law Journal* 51:1 (2010), pp. 1-49.

¹¹ UK Government, 'Scotland analysis', p. 103.

¹² Scottish National Party, *Choosing Scotland's Future* (Edinburgh: Scottish National Party, 2007), p. 23; and Scottish National Party, *Your Scotland, Your Voice* (Edinburgh: Scottish National Party, 2009).

¹³ Nicola Sturgeon, Speech to the European Policies Centre, Brussels, 26 February 2013.

¹⁴ Scottish Government, 'Scotland in the European Union', p. 11.

through which membership can be secured from within the EU. Article 48 TEU is identified, as 'a legal basis that the Scottish Government considers is appropriate to the prospective circumstances'.¹⁵

9. Article 48 deals with amendments to the EU treaties and sets out two amendment mechanisms: the ordinary revision procedure and the simplified revision procedure. The latter mechanism is not relevant to the current discussion.
10. The ordinary revision procedure works as follows:

48(2). The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

48(3). If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

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

48(4). A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

11. Within Article 48 there remains a choice as to whether a full Convention needs to be called in order to enact a Treaty amendment. The two processes differ not only in terms of length and complexity but also in substance, with the less onerous mechanism placing the existing Member States in a more exclusive decision making position. The Scottish Government's documents do not specify whether they feel that a full Convention would be required in order to enact the amendments necessary to accommodate an independent Scotland within the EU.

¹⁵ Scottish Government, 'Scotland in the European Union', p. 12.

12. The broader context in which the Scottish Government frames its position is that set by Article 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. This article, the Scottish Government suggests, 'sets the general context within which the process of negotiating Scotland's independent EU membership will ensue'.¹⁶
13. Sir David Edward broadly concurs with the Scottish Government position. Writing in December 2012 Sir David observed:
- '... in accordance with their obligations of good faith, sincere cooperation and solidarity, the EU institutions and all the Member States (including the UK as existing), would be obliged to enter into negotiations, before separation took effect, to determine the future relationship within the EU of the separate parts of the former UK and the other Member States. The outcome of such negotiations, unless they failed utterly, would be agreed amendment of the existing Treaties, not a new Accession Treaty. The simplified revision procedure provided by Article 48 TEU would not apply, so ratification of the amended Treaties would be necessary'.¹⁷
14. Sir David concluded his analysis as follows: 'In short, in so far as we are entitled to look for legal certainty, all that is certain is that EU law would require all parties to negotiate in good faith and in a spirit of cooperation before separation took place. The results of such negotiation are hardly, if at all, a matter of law'.¹⁸ Since publication of the White Paper, Sir David has repeated his view that an immediate obligation to negotiate in good faith arises following a 'Yes' vote.¹⁹
15. The use of Article 48 for this purpose has been critiqued, but not rejected, by Professor Kenneth Armstrong of the University of Cambridge. Armstrong writes, 'there may be a duty on EU institutions and Member States to cooperate and negotiate in good faith in advance of Scottish separation from the UK. But that means neither that the Scottish government can fix the timetable relative to its preferred date for independence nor that the accession process as laid down in

¹⁶ Scottish Government, 'Scotland in the European Union', p. 81.

¹⁷ Sir David Edward, 'Scotland and the European Union', Scottish Constitutional Futures Forum, 17 December 2012, at <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>.

¹⁸ Edward, 'Scotland and the European Union'. Sir David Edward reiterated this in his paper submitted as evidence for the committee session on 23 January 2014, stating that 'the obligation of all parties, including the Member State in the process of separation, to negotiate in good faith and in accordance with the principles of sincere cooperation, full mutual respect and solidarity'. He goes on: 'the existence of an obligation to negotiate does not, of course, imply anything as to the outcome of those negotiations, except that their purpose would be to avoid the consequences of the Barroso/Van Rompuy theory'.

¹⁹ Severin Carrell, 'Independent Scotland should stay in the EU, says judicial expert', The Guardian, 28 November 2013.

Article 49 TEU can be completely bypassed as is suggested in the White Paper'.²⁰

16. Armstrong makes the point that 'there is nothing that obliges any other EU state or EU institution to instigate the revision process', effectively stating that whilst there is nothing intrinsically wrong with the Article 48 proposal it would be wrong to 'expect those institutions or Member States of their own will to initiate a treaty amendment process'.²¹ Armstrong also makes the point that, whether Scotland pursued Treaty amendment through Article 48, or followed the Accession process through Article 49, it would face the same set of veto players, namely the other Member States and their domestic ratification requirements. Armstrong also argues that the 'spirit and wording' of Article 50(5)²² 'would seem to push very strongly against the White Paper's assumption that Article 49 TEU can simply be avoided'. Professor Armstrong elaborates on this argument in his written submission to the committee.
17. Patrick Layden, in his evidence to the Committee, argues that in the event of independence 'Scotland would no longer be within the European Union' and that the Article 48 route would present 'various difficulties', including: ensuring sufficient Scottish representation in the process (before the point at which Scotland had become a sovereign state); ensuring that a Member State would bring forward, in effect on behalf of Scotland, a proposal to amend the Treaties using Article 48; and the possibility that the Article 48 route would open up the possibility of introducing other Treaty amendments, in effect hijacking a process designed to deal with one specific issue (Scottish membership) and using it for other ends. Layden identifies Article 49 as having 'practical advantages' and states that 'as a matter of European Union law [it is] the correct Treaty base'.
18. Jean-Claude Piris, former Legal Counsel to the European Council, in his written evidence to the committee also states that Article 49 is the appropriate route. Piris states that in formal legal, substantive legal, and constitutional terms Article 49 would provide for 'a suitable legal route'. He also observes that the Article 48 route may not necessarily be more rapid than the Article 49 route as once the Treaties are opened for amendment the possibility for Member States to raise additional issues cannot be entirely discounted.
19. What must also be considered, however, is that a strict reading of Article 49 suggests that Scotland would have to wait until the moment of independence to apply for EU membership, thus creating a limbo scenario, precisely what the Article 48 route is designed to avoid. Given the need to negotiate a complex set of opt-outs Armstrong sees Article 49 as the 'more plausible' route. This paper returns to the issue of opt-outs below.

²⁰ Kenneth Armstrong, 'Scotland's Future in the EU', EUTOPIA Law, 28 November 2013, at <http://eutopialaw.com/2013/11/28/scotlands-future-in-the-eu/>.

²¹ Armstrong, 'Scotland's Future in the EU'.

²² Article 50(5): 'If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49'.

The European Commission's Position on the Process of Securing Membership (Article 49 TEU)

20. The position of the European Commission, as articulated by its current President Barroso, is clear: 'if part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the [EU] Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU'.²³ The Commission's position thus suggests that, upon independence, Scotland would cease to be a part of the EU and would have to apply for membership under the Article 49 TEU process.
21. Herman Van Rompuy has, since the publication of the White Paper, reiterated this assertion using almost identical language.²⁴ It is thus fair to speak of an 'EU' position on the matter, consistent since 2004, that stands in contrast to the position set out in the White Paper.
22. The response from other EU Member States has varied. The BBC has collated their responses.²⁵
23. It is important to note, however, that the European Commission is not the final arbiter of these matters. Nor is the President of the European Council. The decision rests with the Member States of the EU and must be achieved by unanimity. Additionally, the European Court of Justice (ECJ) is charged with interpreting the Treaties and is the institution responsible for adjudicating the limits of EU competence as against the Member States.²⁶ We consider the potential role of the ECJ below.
24. To reiterate, however, at present the positions of the Scottish Government and the European Commission on the question at hand do not align. Two crucial questions remain concerning the Article 49 route. The first is when would Scotland be able to submit an application for EU membership? Article 49 TEU states, 'any European state ... may apply to become a member of the Union' (emphasis added). Read literally this implies that Scotland could not submit an application until the moment of its independence. Of course, a more flexible interpretation of the phrase 'European state' may be applied thus allowing the process outlined in Article 49 to commence soon after a 'Yes' vote. In the event that a strict definition was applied then the second question arising is what bridging/transitional arrangement, if any, would be reached to avoid creating a hole in the single market? Several experts have raised this issue and the possibility of interim/bridging arrangements.

²³ See note 3.

²⁴ See note 5.

²⁵ See BBC, 'Scottish Independence: Scotland and EU Membership', 7 March 2013, at <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21601242>

²⁶ The power to decide such an issue lies within the 'rules of Community law as interpreted and applied by the Court of Justice'. See Robert Lane, 'Scotland in Europe: an Independent Scotland in the European Community', in W. Finnie et al. (eds.), *Edinburgh Essays in Public Law* (Edinburgh: Edinburgh University Press, 1991), p. 149.

Other Positions on the Process of Securing Membership

25. The positions of the Scottish Government and the European Commission represent the two major positions on the process of securing membership. The UK Government position, as stated in the Scotland Analysis paper, leans towards that of the European Commission but stops short of fully embracing it:

'The UK's EU membership would continue automatically. For an independent Scottish state, negotiations would be needed. Rather than being purely a matter of law, the mechanism for an independent Scotland to become a member of the EU would depend on the outcome of negotiations and on the attitude of other EU institutions and Member States. It is likely to be a process requiring unanimity across all Member States of the EU. Since an independent Scotland would be a new state there is a strong case that it would have to go through some form of accession process to become a member of the EU. This is the view expressed by the President of the European Commission'.²⁷

26. Patrick Layden presented an alternative view in his evidence to the House of Commons Scottish Affairs Committee in 2012.²⁸ However, by the time of his appearance before the Committee in January 2014 his position had shifted.

The Scottish Government's Position on Negotiations: the Principle of 'Continuity of Effect'

27. Supplementing its position that Scotland's membership could be secured through Article 48 TEU, the Scottish Government affirms that it 'will approach EU membership negotiations operating on the principle of continuity of effect: that is a transition to independent membership that is based on the EU Treaty obligations and provisions that currently apply to Scotland under its present status as part of the UK'.²⁹ This would involve specific provisions to ensure continuity of effect being included in the EU Treaties as part of the overall amendment process under Article 48. Three specific policy areas are targeted for continuity of effect: the budget rebate; the opt-out on Eurozone membership; and the opt-out on membership of the Schengen area along with broader flexibility on policies under the Area of Freedom, Justice and Security (AFJS).

28. The Scottish Government has stated that it would 'seek to retain the current exemptions regarding the Schengen acquis as provided for under Protocols 19 and 20 of the Treaty on the Functioning of the European Union (TFEU)', that it would 'seek to retain the flexibility to opt in to new measures provided by Protocol 21 [dealing with UK participation in Area of Freedom Security and Justice (AFSJ)], in a new Protocol to the TFEU', and that 'the transition to full EU membership will include specific provisions that ensure Scotland's participation in

²⁷ UK Government, 'Scotland Analysis', p. 8.

²⁸ See <http://www.publications.parliament.uk/pa/cm201213/cmselect/cm Scotaf/139/139i.pdf>. Oral evidence at pp. 5-18, written submission at pp. 144-46. Layden is a Scottish Law Commissioner but was submitting evidence in a personal capacity as an expert on constitutional and EU matters.

²⁹ Scottish Government, 'Scotland in the European Union', p. 12, also pp. 87-8.

the sterling currency area does not conflict with wider obligations under the EU Treaties'.³⁰

29. On the budget rebate³¹ the Scottish Government states that the specific outcome will be the result of negotiations.³² Taking 2011-12 as an illustrative example the Scottish Government's paper suggests that the rebate could account for as much as £295m difference in Scotland's net position vis-à-vis the EU budget.³³ Research by SPICe suggests an indicative value of €2.75 billion for the rebate over the course of the 2007-13 EU financial programme.³⁴ This is a significant issue in terms of any cost/benefit analysis of an independent Scotland's EU membership. Patrick Layden, in his appearance at the Scottish Affairs Committee at Westminster, made the point that other EU Member States may use the scenario of Scottish independence to 'get rid of this ridiculous rebate' for both an independent Scotland and r-UK.³⁵
30. On Eurozone membership³⁶ the Scottish Government states that 'an independent Scotland will not seek to participate in the Eurozone', and goes on to state that an independent Scotland would not be forced to adopt the euro, pointing to both the existence of 11 EU Member States who do not use the euro and the prerogatives of Member States to determine whether and when it might be appropriate for them to adopt the euro as supporting evidence.³⁷
31. There are clear criteria that any Member State seeking Eurozone membership must meet (the so-called 'Convergence Criteria', see Article 140 TFEU). Crucially, a decision to place their currency within the Exchange Rate Mechanism (ERM II) – membership of which, for two consecutive years without a devaluation of the currency, is one of the criteria for Eurozone membership – remains one for the Member State. The decision to join ERM II 'is voluntary for non-euro area

³⁰ Scottish Government, 'Scotland in the European Union', p. 13.

³¹ Background: The UK budget rebate (or abatement) was secured in 1984, at a time when the UK was the third poorest Member State and yet on course to be the biggest net contributor to the budget (due in large part to its relatively small agricultural sector, distortions arising from VAT-based contributions, and trade patterns). The rebate is broadly equivalent to 66% of the UK's net contribution to the EU budget in the previous financial year. For further details see the SPICe briefing attached to the Committee papers from 16 January 2014.

³² Scottish Government, 'Scotland in the European Union', p. 12.

³³ Scottish Government, 'Scotland in the European Union', p. 66.

³⁴ See SPICe briefing from committee papers

³⁵ See <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscota/139/139i.pdf>, at Ev. 10.

³⁶ Background: the euro was adopted in 1999 as an electronic currency, with notes and paper entering circulation on 1 January 2002. During negotiations over the Treaty on European Union (more commonly the Maastricht Treaty) – when the decision to move towards Economic and Monetary Union was taken – the UK and Denmark each negotiated an opt-out from Treaty provisions pertaining to the euro. The UK (in the words of the TFEU) is not 'obliged or committed to adopt the euro without a separate decision to do so by its government and parliament'. Denmark has a similar provision, albeit worded differently (see Protocol 16 TFEU).

³⁷ Scottish Government, 'Scotland in the European Union', p. 92.

Member States. Nevertheless, Member States with a derogation³⁸ can be expected to join the mechanism'.³⁹

32. Sweden is the oft-cited example of a Member State that opts to remain outside of ERM II. However, since the enlargements of 2004 and 2007 the following Member States have elected not to join ERM II: Romania, Bulgaria, Czech Republic, Hungary, Poland, and Croatia. However, according to Article 119(2) TFEU all Member States without an explicit opt-out are obliged to make progress towards membership of the Eurozone. The Accession Treaties of all new Member States from 2004 have reiterated this obligation, as did the Accession Treaty that brought Sweden (along with Austria and Finland) into the EU. The European Central Bank, in its May 2012 convergence report reiterated that all Member States that are not currently in the Eurozone (and are not Denmark or the UK) are 'committed under the Treaty ... to adopt the euro, which implies that they must strive to fulfil all the convergence criteria'.⁴⁰ In the absence of an explicit opt-out an independent Scotland would be in the same position.

33. In relation to membership of the Schengen area, the Scottish Government indicates that it does 'not intend to join ... the Scottish Government's position to remain within the CTA [Common Travel Area] is based on valid practical considerations of geography and working arrangements that predate the EU ... The Scottish Government does not consider there is any reason to believe its decision to remain part of the CTA and forego Schengen area membership would be challenged by the European Commission'.⁴¹

34. Article 7 of Protocol 19 of the Treaties states: 'For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission'. The UK and Ireland have negotiated three related opt-outs.⁴²

35. The first pertains to the Schengen acquis and is contained in Protocol 19. The UK and Ireland 'may at any time request to take part in some or all of the provisions of the Schengen acquis. The Council shall decide on the request with the unanimity of its members referred to in Article 1 [that is the other 26 EU Member States] and of the representative of the Government of the State concerned'.

³⁸ Having a derogation means that a Member State has not yet met the conditions for the adoption of the euro and it is therefore exempt from some, but not all, of the provisions which normally apply from the beginning of Stage Three of EMU. Upon joining the EU, Member States without an opt-out are given a derogation.

³⁹ Agreement of 16 March 2006 between the European Central Bank and the national central banks of the Member States outside the euro area laying down the operating procedures for an exchange rate mechanism in stage three of Economic and Monetary Union, see section 3, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006X0325%2801%29:EN:NOT>.

⁴⁰ European Central Bank, Convergence Report May 2012, p. 5, at <https://www.ecb.europa.eu/pub/pdf/conrep/cr201205en.pdf>.

⁴¹ Scottish Government, 'Scotland in the European Union', p. v, 99.

⁴² S. Peers, 'British and Irish opt-outs from EU Justice and Home Affairs (JHA) Law', 3 November 2009, at <http://www.statewatch.org/euconstitution.org>.

36. The second pertains to border controls and is contained in Protocol 20. This Protocol is framed in broad terms, in order to preclude Treaty rules or international agreements concluded by the EU from impinging on the UK's control over its borders. It recognises 'the existence for many years of special travel arrangements between the United Kingdom and Ireland'. It goes on to state that 'the United Kingdom and Ireland may continue to make arrangements between themselves relating to the movement of persons between their territories (the 'Common Travel Area'), while fully respecting the rights of persons referred to in ... this Protocol'. Thus, in the absence of an opt-out (which could in theory be gained by seeking to amend Protocols 19 and 20 to add in reference to Scotland), an independent Scotland would be required to accept the Schengen acquis and would not be exempted from the provisions of Articles 26 and 77 TFEU.
37. However, this is not the same as being a part of the Schengen area. Membership of the Schengen area requires, similar to the Eurozone, a set of criteria to be met and the unanimous agreement of all existing members.
38. The third pertains to policies under AFSJ and is contained in Protocol 21. The Lisbon Treaty preserved and extended the scope of the Protocol such that the default position now is that the UK and Ireland are not bound by any measures adopted under AFSJ. It remains open for either state to signify that they wish to take part in a proposed measure. Once again, in the absence of this Protocol being amended to include Scotland, an independent Scotland would have no flexibility on measures adopted under AFSJ; it would be in the same position as the other 26 Member States.
39. The Scottish Government paper on Europe makes no reference to Protocol 36, which enables the UK Government to exercise an opt-out from Police and Criminal Justice (PCJ) measures adopted before the Treaty of Lisbon entered into force in 2009. The UK Government has signalled its intent to opt-out of such measures (approximately 130 in total) and then seek to opt back in to those that it deems most valuable and effective and the "opt-out" situation in relation to these measures is therefore fluid.⁴³
40. Ultimately, on each of these specific opt-outs there is recognition by all observers that they would be subject to negotiations that would be determined more by politics than law. Opt-outs and special provisions in the history of European integration are almost always the result of political accommodation and compromise. There are numerous ways that such negotiations could ultimately play out and this briefing will not attempt to second-guess that process.
41. In closing this section it is important to note an important distinction between the Article 48 and Article 49 routes. There is a fundamental difference between the underpinning philosophies. Article 48 is underpinned by a notion that Scotland's position within the EU would be being altered from that of a constituent part of a Member State, to a Member State in its own right. This underpinning philosophy flows the concept of 'continuity of effect'. Article 49, by contrast, suggests a break in Scotland's membership, even though in reality the transition may be seamless

⁴³ 'Theresa May outlines scope of UK opt-out of EU justice measures', Financial Times, 9 July 2013.

and Scotland might not have to spend even a single day outside of the EU. The signature of its own Accession Treaty would represent the restarting of its relationship with the EU, albeit it with a different status. It is logically more problematic to apply the concept of 'continuity of effect' to this latter scenario. It is reasonable to conclude that if the Article 49 scenario framed negotiations after a 'Yes' vote, Scotland would find it far more difficult to press for a continuation of the status quo on these various opt-outs.

Issues of Timing and Negotiation

42. The Scottish Government has stated that it feels the period of time between 19 September 2014 and 24 March 2016 is sufficient for 'the terms of Scotland's independent membership of the EU to be agreed and all the necessary processes completed'.⁴⁴ Experts are divided as to the feasibility of this.
43. While no direct parallels can be made with previous enlargements, it is nevertheless relevant to consider the timescales involved. If we consider the 1995 enlargement it took 23 months for Austria, Sweden, and Finland to move from formally opening accession negotiations (1 February 1993), to joining the EU (1 January 1995). Each of these states was already compliant with much of the *acquis* by virtue of their membership of the European Economic Area. More recent cases of accession have taken longer with timescales ranging from 4 to 7 years from the formal opening of accession negotiations to the date of accession (see Annex A for full details on the accession process since 1995).
44. Focusing solely on Member State ratification of the accession treaties, as opposed to the entire negotiation process, it took 9 months following the conclusion of accession negotiations to ratify the membership of Austria, Finland, and Sweden (30 March 1994 to 1 January 1995). More recent cases of ratification have taken longer. Croatia's accession negotiations ended on 30 June 2011, with accession on 1 July 2013 (see Annex A for full details on the accession process since 1995).
45. At the negotiation stage a question arises as to how Scotland would be represented. Assuming that negotiations, on whatever terms, commence between 19 September 2014 and 24 March 2016 then Scotland would still be part of the UK, which as the Member State would represent Scotland in the negotiations. Questions therefore arise as to the extent to which the UK Government would delegate negotiating authority to a team representing the Scottish Government and how any potential conflicts of interest might be managed.
46. Following any negotiations – whether under the auspices of Article 49 with the result being an Accession Treaty or under the auspices of Article 48 with the result being an amendment to the Treaties – a process of ratification would be required. All 28 Member States would have to ratify according to their relevant domestic requirements. No Member States held referendums on the enlargements of 1995, 2004, 2007, or 2013. Ratification processes would thus tend to be through parliamentary approval.

⁴⁴ Scottish Government, 'Scotland in the European Union', p. 11.

The Role of the European Court of Justice and the Issue of EU Citizenship

47. One institution that has been largely absent from the discussion is the ECJ. Yet it is the ECJ that is charged with interpreting the Treaties. It is thus prudent to consider how the ECJ may become involved, or seek to involve itself, in this situation.
48. Sir David Edward, in the paper submitted as evidence to the committee, states: 'It is possible to envisage that an individual or company could raise a declaratory action seeking to ascertain the extent of his, her or its continuing rights and obligations after the moment of independence. A national judge faced with that issue could refer the question to the Court of Justice, and it is at least possible that the Court would accept the reference and answer the question, but even that remains uncertain'.
49. Patrick Layden has also commented on how any involvement of the ECJ might come about: 'I would see the Court of Justice becoming involved if, say, the European Commission took the view that both parts of the UK remained members of the European Union, that no treaty alteration was required and all that was left was some minor housekeeping. If that was the position taken by the European Commission, then another member state could challenge that in the European Court of Justice. That is how the matter would come before the Court.' Alternatively, if Scotland found itself excluded, or threatened with exclusion it 'would maintain that it was in the EU. Since that was the question it would be asking the court, the court would assume jurisdiction'. But, crucially, Layden added: 'I doubt whether any of the parties would want to go off to the Court of Justice, because all that does is hold up the whole thing for months while the lawyers do their work'.⁴⁵
50. In the event of the Article 48 route being agreed to by a majority of Member States in the European Council it would be possible for any dissenting Member State to bring a case to the ECJ on the grounds that an inappropriate Treaty article had been used. The ECJ would then have to consider specifically the issue of whether the use of Article 48 would be legal and appropriate.
51. The issue of EU citizenship offers an alternative perspective on the question of an independent Scotland's relationship to the EU. The debate surrounding Article 48 versus Article 49 relates implicitly to an independent Scottish state and what its rights and obligations may be vis-à-vis the EU. Citizenship does not begin with an independent Scottish state but rather the individual citizens of that state. Aidan O'Neill has raised the issue.⁴⁶ For O'Neill 'the fact of continuing EU citizenship of

⁴⁵ See <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmsscotaf/139/139i.pdf>, at Ev. 4.

⁴⁶ Aidan O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU', *EUtopia Law*, 14 November 2011, at <http://eutopialaw.com/2011/11/14/685/>; and Aidan O'Neill, 'Scotland, Independence and the EU: the Barroso intervention', *EUtopia Law*, 12 December 2012, at <http://eutopialaw.com/2012/12/12/scotland-independence-and-the-eu-the-barroso-intervention/>.

the formerly British national residents of an independent Scotland seems ... to be a trump card in any negotiation for the territory of Scotland remaining in the EU'.⁴⁷

52. The Treaty on European Union (the Maastricht Treaty) established EU citizenship.⁴⁸ In the Treaties (Article 9 TEU): 'every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship'. Article 20 TFEU reiterates this. On the basis of a strict and literal reading of these Treaty provisions Barroso, in a response to a European parliamentary question, has stated that EU citizenship does not complicate the stated position of the Commission.⁴⁹

53. However, the jurisprudence of the ECJ and extensive work by academic lawyers has taken EU citizenship far beyond what is stated in the Treaties. We have arrived at a situation where EU citizenship as it exists in the jurisprudence of the ECJ has diverged from what is written in the Treaties.⁵⁰ Recent jurisprudence of the Court has brought into question the derivative nature of EU citizenship and it is clear that the Court no longer regards EU citizenship as being subordinate to Member State citizenship.⁵¹ It is on the basis of several high-profile judicial decisions that O'Neill constructs his argument that EU citizenship could prove decisive.

54. O'Neill writes: 'While the conferral on individuals of rights associated with national citizenship remains wholly within the exercise of the sovereign power of the Member States, the ECJ has held that the purported withdrawal of a Member State of national citizenship rights or status once conferred may bring matters within the ambit of EU law'.⁵² Indeed in the Rottmann case the ECJ found that Member States must act in ways compatible with EU law when taking decisions that may deprive individuals of their nationality.⁵³

55. In the event that any existing EU citizen was faced with the loss that citizenship then it is conceivable that a case may come before the ECJ. While the issue of EU citizenship may cast a shadow over any political negotiations taking place in the Council, and between that institution and both the Commission and Parliament, it remains unclear how the extension of EU citizenship rights to Scottish citizens could be generative of membership of the EU for the state of

⁴⁷ Aidan O'Neill, 'Scotland, Independence and the EU: the Sturgeon Response', *EUtopia Law*, 14 December 2012, at <http://eutopialaw.com/2012/12/14/scotland-independence-and-the-eu-the-sturgeon-response/>.

⁴⁸ Maastricht asserted: 'Citizenship of the Union is hereby established,' Article 20 TEU. See C. Closa, 'The Concept of Citizenship in the Treaty on European Union', *Common Market Law Review*, 29:6 (1992), pp. 1137-69; S. O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows', *Yearbook of European Law*, 12:1 (1992), pp. 353-84.

⁴⁹ Answer given by Mr Barroso on behalf of the Commission, OJ C 228 E, 28 August 2012, at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN>.

⁵⁰ See, e.g., Dimitry Kochenov, 'The Right to Have What Rights? EU Citizenship in Need of Clarification', *European Law Journal* 19:4 (2013), pp. 502-16.

⁵¹ Case C-315/08 Janko Rottman v Freistaat Bayern [2010] ECR I-01449.

⁵² O'Neill, 'Quarrel'.

⁵³ Case C-315/08 Janko Rottman v Freistaat Bayern [2010] ECR I-01449.

Scotland. It would be more likely in that event that Scotland would simply become a state with a very large number of EU citizens living in it.

56. Of course should decisions be taken that allow Scotland to become a Member State of the EU on the day of its independence then issues of citizenship become null and void, as all Scottish citizens would automatically be EU citizens under the terms of Article 9 TEU.

As a Member State, what representation would Scotland have in the EU?

57. The issue of representation in the EU for an independent Scotland can perhaps be divided into two core elements. First is the formal representation afforded to Scotland in its capacity as a Member State. Second is the representation Scotland would have by virtue of the resources allocated to EU policy and diplomacy by the government of an independent Scotland.

58. On the former issue Scotland would, presumably and upon securing full membership be entitled to: a European Commissioner; a justice on the ECJ; representation in the European Council and Council of Ministers; representation in COREPER I and II, as well as the various Council working groups.

59. In the Council of Ministers the most common decision rule is Qualified Majority Voting (QMV) in which each Member State is given a weighted vote. Scotland would most likely be granted a weighted vote of 7 in the Council of Ministers. The current system of QMV requires 260 out of a total of 352 votes representing a majority of the Member States, and representing at least 62% of the EU population (although that final requirement is only verified upon the request of a Member State). As of 1 November 2014 a new system of QMV will be implemented in which weighted votes cease to exist (however, the current system can be applied up to 31 March 2017 if a Member State demands it). QMV decisions from that point forward will require 55% of the members of the Council, comprising at least 15 of them, and representing at least 65% of the EU population. A blocking minority may be formed comprising at least 4 members of the Council.

60. An independent Scotland that was a full Member State of the EU would also require representation in the European Parliament. At present Scotland, as part of the UK, elects 6 Members of the European Parliament (MEPs) out of a UK total of 73. Member States of roughly comparable population (e.g. Finland, Slovakia) elect 13 MEPs each. It is thus reasonable to conclude that an independent Scotland would have additional MEPs. These would either (a) have to be created by reallocating existing seats in the European Parliament to Scotland or (b) amending the Treaties to lift the existing cap on seats in the Parliament, thus allowing additional seats to be granted to Scotland upon accession.

61. On the issue of timing we can look to the recent example of Croatia, which joined the EU on 1 July 2013. On that date the Croatian minister Neven Mimica assumed the post of European Commissioner for Consumer Protection (assuming half of the portfolio held by Tonio Borg). In addition Croatia held European Parliament elections on 14 April 2013 to elect 12 MEPs to serve in the

remainder of the 2009-14 European Parliament session. Croatia was also assigned 7 weighted votes in the Council. In order to ensure such representation from the date of accession the cap on European Parliament seats (currently set at 750 plus the president, but note that this could be amended) was temporarily breached. It will return to 751 following the 2014 European elections in which Croatia's representation will fall from 12 to 11 seats, with 11 Member States each losing one seat to make up Croatia's allocation. As for QMV in the Council, the proportion of weighted votes required to pass a measure was simply recalculated to take account of the increase in votes from 345 to 352.

62. Beyond formal representation in the EU's institutions remains the question of the size and type of resource that a Member State must invest in its bureaucracy (home civil service and diplomatic service) in order to be able to secure its interests and ensure effective representation in Brussels. It is often said that smaller Member States of the EU can 'punch above their weight' but thought must be given to what characteristics of national bureaucracies facilitate that, what level of investment may be required, what sort of skills are required, etc.

Annex A: Recent History of EU Enlargement

Member State	Accession Negotiations Start	Accession Negotiations End	Accession
Austria	February 1993	March 1994	January 1995
Sweden	February 1993	March 1994	January 1995
Finland	February 1993	March 1994	January 1995
Cyprus	March 1998	December 2002	May 2004
Hungary	March 1998	December 2002	May 2004
Poland	March 1998	December 2002	May 2004
Czech Republic	March 1998	December 2002	May 2004
Estonia	March 1998	December 2002	May 2004
Slovenia	March 1998	December 2002	May 2004
Malta	February 2000	December 2002	May 2004
Slovakia	February 2000	December 2002	May 2004
Latvia	February 2000	December 2002	May 2004
Lithuania	February 2000	December 2002	May 2004
Romania	February 2000	December 2004	January 2007
Bulgaria	February 2000	December 2004	January 2007
Croatia	October 2005	June 2011	July 2013

Sources: Ulrich Sedelmeier, 'Enlargement'. In H. Wallace, M. Pollack, and A. Young (eds.), *Policymaking in the European Union*, 6th ed. (Oxford: Oxford University Press, 2010), pp. 404-5; and <http://www.croatia-in-the-eu.eu/en/croatia-and-eu-relations>. From SPICe briefing.