

**WRITTEN EVIDENCE FROM PROFESSOR KENNETH ARMSTRONG,
DIRECTOR, CENTRE FOR EUROPEAN LEGAL STUDIES, FACULTY OF LAW,
UNIVERSITY OF CAMBRIDGE**

Summary

1. In its White Paper on Scottish independence, the Scottish Government makes the case for the use of Article 48 TEU as a legal basis for an independent Scotland to assume obligations and exercise rights as a Member State of the European Union (EU). In so doing, it rejects the use of the normal Article 49 TEU accession process. The Scottish Government's aim is to seek continuity in the application of EU law in Scotland and to achieve synchronicity between secession from the United Kingdom and accession to the EU.
2. The analysis presented here suggests that the scope of application of Article 48 TEU is limited to amending the treaties as they apply to existing Member States and cannot plausibly be used to provide the basis for an independent Scotland assuming responsibilities as a Member State of the European Union.
3. Even were it possible to resort to Article 48 TEU, when the political and procedural limits of Articles 48 and 49 TEU are compared, there is no significant advantage in seeking to resort to Article 48 TEU. Indeed, in key respects, the political and legal risks are heightened if Article 48 TEU is used, not least because opening up a treaty reform process encourages issue-linkage between Scottish membership of the EU and the political interests of other EU states including what will remain of the UK.
4. In respect of the timetable and mechanism for negotiating and concluding agreement on Scottish EU membership, the White Paper is long on aspiration and short on specification. While an 18 month period to secure EU membership is not wholly implausible for the conduct of negotiations, the ratification process in all the Member States – including the UK itself – is not in the control of the Scottish Government. Moreover, if the Article 48 TEU process is used, the Scottish Government will also be reliant on the UK government to pilot treaty revisions. Therefore, the desired synchronicity between independence from the UK and membership of the EU seems ambitious if not simply wishful thinking.
5. Whichever of the two procedures is used, there is a not inconsiderable risk of a legal hiatus between independence and EU membership. The White Paper fails to spell out how that risk might be handled and what strategies might be used to manage that risk.
6. The internal constitutional logic of a referendum on independence as an expression of democratic self-government has not been extended to the issue of whether Scotland ought to seek membership of the EU. Moreover, the logic of the internal constitutional process is that the *quid pro quo* for the rest of the UK's acquiescence with the result of the referendum is that the UK otherwise has continuity in its internal and external relationships. That leaves open, rather than resolves, the issue of the means or mechanism by which an independent Scotland might achieve continuity in its relationship with the EU.

The Choice of Legal Basis: a Legal Analysis

7. The White Paper on *Scotland's Future* and the supplementary document on *Scotland in the European Union* sets out the Scottish Government's position that an independent Scotland ought to, and would, become a Member State of the European Union (EU) and that this can be achieved in synchronicity with secession from the United Kingdom through a revision to the existing treaties. In so doing, it explicitly rejects the argument – and the position which has been expressed by the European Commission President José Manuel Barroso – that secession would result in the inapplicability of the EU treaties to Scotland unless and until an independent Scotland sought accession to the EU through the normal accession process.
8. This relatively simple statement of the main lines of argument translates into a more technical legal argument about the relative uses of Articles 48 and 49 of the Treaty on European Union (TEU) as a legal basis through which to facilitate Scottish membership of the EU. The analysis below explores the debates around these two provisions. As there is no direct precedent for the situation under discussion, the issue turns on which legal arguments are more or less plausible based upon the functional qualities of the two provisions as well as their procedural and political implications.
9. The normal mechanism by which a state seeks to undertake the obligations and exercise the rights of EU membership is through the accession process. The legal basis for this process is now to be found in Article 49 TEU. It is a process instigated by the candidate state with the accession process then following the procedure laid down in that article. It constitutes the *lex specialis* in respect of an entity voluntarily taking on the obligations arising from the EU treaties and the law made under the treaties.
10. The White Paper suggests an alternative legal basis for Scotland's membership of the EU in the form of Article 48 TEU. This is the provision by which the existing Member States alter the EU treaties to which they are already signatories as Member States of the EU. This provision has never been used as a basis for extending the rights, duties and obligations created by the treaties to an entity seeking to become a Member State. At the core of the claim to use Article 48 TEU is the idea that the treaties currently apply to the territory and institutions that would form an independent Scotland. For this reason, it is argued that an independent Scotland ought not to follow an accession process under Article 49 TEU but instead that the geographical scope of application of the existing treaties should continue to apply to Scotland through a renegotiation of the treaties under Article 48 TEU.
11. As the European Court of Justice has made clear on numerous occasions, the choice of legal basis of an EU act must be based on objective factors susceptible to judicial review. That requires there to be a connection between the functional properties of the act and the substantive objective of the legal basis. Conversely, the choice of legal basis may not depend solely on the conviction of a state or an EU institution as to the objective which the act pursues. Therefore, it is not enough that a state might prefer one legal basis over another. Rather there must

be a genuine and objective connection between the purpose of the legal basis and that of the act adopted.

12. Applied to the context of an independent Scotland seeking membership of the Union, the argument for the use of Article 49 TEU would seem substantially more legally plausible than resort to Article 48 TEU for three main reasons.
13. Firstly, the objective which is pursued by Article 49 TEU is to allow for verification that the applicant state can fulfil its obligations arising under EU law. Of course, it is the case that as a constituent territory of an EU state, and a territory with its own legal and devolved political system, EU law currently has application in Scotland and its institutional structures play a role in the implementation of EU law. However, on the policymaking side, certain important policy fields are reserved to the UK government but which are coordinated at EU-level. An independent Scotland would be assuming new domestic policy responsibilities – after all, that is part of the case for independence – in areas within the scope of application of the treaties. It is, therefore, appropriate that other EU Member States and institutions have the opportunity to assess how an independent Scotland would, institutionally and politically, exercise its domestic competences in their European context, including those competences which were hitherto reserved to Westminster.
14. Secondly, the Article 48 TEU procedure is a means for altering the legal relationship between existing Member States. Whatever may be the territorial scope of application of the resulting agreements, they are agreements between 'Member States'. Agreements reached between Member States and non-Member States are regulated elsewhere in the treaty, whether through the accession process under Article 49 TEU or the conclusion of international agreements in terms of Article 218 TFEU. In this way, the personal scope of application of Article 48 TEU would appear to exclude its application to any negotiated agreement between Member States and a non-Member State.
15. Existing Member States may wish to alter the territorial scope of application of the treaties via Article 48 TEU. For example, the pre-Lisbon equivalent of Article 48 TEU (Article 236 EEC Treaty) was used by the Member States to alter the territorial scope of application of the treaties to deal with Greenland's changed relationship with Denmark and the European Communities. Although in fact no formal treaty revision process was triggered, a formal revision to the treaties might have been undertaken to deal with German unification.
16. However, what both the Greenland and German unification situations highlight is actually the limited scope of application of Article 48 TEU to manage the territorial scope of application of the treaties in respect of existing Member States. In neither circumstance was a new entity created with obligations as a new Member State of the EU. There is a world of a difference between, on the one hand, a treaty ceasing to apply to a territory (Greenland) or extending to a territory within the responsibility of an existing Member State (Germany) and, on the other hand, the application of a treaty to a new legal entity which seeks to undertake and independently exercise the obligations and rights of EU membership.

17. As highlighted above, the existing Member States have every reason to seek to verify that a new entity meets the normative requirements of membership; has the capacity and means to fulfil its obligations; and that membership will not be to the detriment of its own national interests. The Article 49 TEU accession process is designed for that purpose. All of which reinforces that Article 48 TEU is a means for changing the treaties between existing Member States and is not itself a mechanism through which a state can become a Member State.
18. Thirdly, any analysis of Articles 48 and 49 TEU has to give due regard to Article 50 TEU which now contains the 'withdrawal clause'. Introduced by the Lisbon Treaty, there is a mechanism and procedure for an existing EU state to withdraw from the EU and to cease fulfilment of its obligations. The drafters of the treaty envisaged that a state that had exercised the right to withdraw might later seek to rejoin the EU. In such a case, Article 50(5) TEU is explicit that the state in question must follow the procedure laid down in Article 49 TEU, presumably to allow for verification that the state is, at the time of accession, capable of properly assuming the rights and obligations of EU membership. It is, therefore, arguable that the same rationale would hold true in the case of a territory seceding from an existing Member State and seeking to exercise the rights and obligations of EU membership on its own account.
19. For the reasons given above, it can be said that Article 49 TEU is the *lex specialis* for an agreement that would extend the obligations and rights of EU membership to a new Member State and that Article 48 TEU would be an inappropriate legal basis through which to secure Scotland's membership of the EU.

The Procedural, Political and Legal Risks of Using Article 48 TEU

20. It should be stated clearly at the outset that regardless of whether an Article 48 TEU treaty amendment or an Article 49 TEU accession process is initiated, both procedures entail the same fundamental risks. Both procedures require the unanimous consent of European governments for the treaty amendment or the treaty to be concluded. That gives each national government a potential veto. Further, a treaty amendment or an accession treaty requires ratification once it is completed. Failure by a state to ratify would prevent the entry into force of the treaty amendment or the accession treaty. Neither of these risks should be ignored.
21. If it were to be accepted that Article 48 TEU could provide a legal basis for Scotland's membership of the European Union, there is an important procedural difference between the treaty revision process under Article 48 TEU and the accession process under Article 49 TEU. As the treaty makes clear, what initiates the Article 49 TEU process is a request from the state wishing to join the European Union. To this extent, it is the acceding state which begins the accession process. A revision to the treaties under Article 48 TEU, by contrast, can only be initiated by an existing Member State, the European Commission or the European Parliament.

22. If the Article 48 TEU route were to be favoured by the Scottish Government, it would be wholly reliant on the initiative of other Member States or other EU institutions to instigate and manage the proposed treaty revision. It would seem that the Scottish Government would look to the United Kingdom government to pilot this process on its behalf. It is a central tenet of the case for independence that an independent Scotland would no longer have its position in the EU mediated through another party. Paradoxically, adopting the Article 48 TEU route rather than the Article 49 TEU route would deprive an independent Scotland of the autonomy to make the request to join the EU on its own initiative.
23. Moreover, if the Article 48 TEU route is taken significant problems and political risks emerge that might be avoided were the normal accession process to be utilised.
24. Firstly, it would seem that any opening of the treaty revision process would have to be negotiated and handled by the UK government as a Member State of the EU. To the extent that the Scottish negotiating team – however that might be composed – was involved, it would likely be in a similar manner to that in which Scottish ministers are consulted under existing arrangements for the formation of a UK position on European matters. It is precisely these arrangements that the White Paper derides and dismisses. Any alternative arrangement would itself have to be negotiated with the United Kingdom prior to any request to initiate the treaty revision process. It is unclear whether the UK General election in 2015 would affect the timing and outcome of such a negotiation. If instead, an independent Scotland sought admission to the EU through the Article 49 TEU process, the request would be initiated by Scotland and negotiated by a Scottish negotiating team.
25. Secondly, opening up a treaty revision process creates an enormous risk of the process becoming bogged down in unrelated attempts to revise the treaties. The clearest and most obvious risk arises from the Scottish Government's dependence on the UK Government to initiate the treaty revision process. As is clear to every observer of contemporary British politics, the issue of Europe and the UK's relationship with the EU is growing in political saliency. Within the Conservative Party, there is unprecedented pressure building for a renegotiation of the treaties, with a consequential referendum to settle the issue of continuing UK membership of the EU. It is hardly conceivable that a Conservative Prime Minister would simply open up a treaty revision process on behalf of the Scottish Government and fail to respond to the demands within his own party to seek a more widespread renegotiation of the treaties. It may even be the case that a treaty revision ostensibly to manage Scotland's membership of the EU could act as a Trojan horse through which the UK might obtain the opening of a treaty revision process that it might otherwise struggle to achieve. In this way, UK acquiescence in a Scottish request for a revision to the treaties under Article 48 TEU creates a very significant risk of issue-linkage between the constitutional position of Scotland in the EU and that of the UK in the EU that could cause significant delay and damage to the negotiation process. If that were to occur there is every reason to believe that, at best, the negotiating process at EU level would be lengthened, and at worst, the process could become intractable leading to failure. Even if a Prime Minister did manage to force through a single-

issue treaty revision, it may well be that the ratification process within the UK parliament might punish a Prime Minister that did not meet the aspirations of some of his own MPs for a more wide-ranging treaty revision.

26. Alternatively, it may be that other EU states will wish to instigate a treaty revision process to deepen economic and monetary union (EMU). Nonetheless, Member States may not wish to enlarge the focus of an EMU-oriented treaty amendment for fear that it might imperil the timely conclusion of treaty amendments. Moreover, it might prove difficult to resist pressures from the UK for a wider treaty revision process if an EMU-oriented treaty reform became linked to Scottish membership of the EU. Indeed, it would be highly problematic if EU Member States were seen to be responsive to one set of constitutional issues arising from the UK (Scotland's EU ambitions) while ignoring other, perhaps less convenient, claims from a UK government representing a much more sizeable proportion of the UK population.
27. Thirdly, in procedural terms a decision of the European Council would be necessary to instigate a revision of the treaties. The voting threshold is only a simple majority rather than unanimity and in that way, it might be possible to persuade a sufficient number of Member States to back a treaty revision. However, if we assume that, for its own domestic reasons, a Spanish government was not minded to support Scotland's membership of the EU, even without being able to exercise a veto at the point at which the European Council decided to open an Article 48 TEU treaty revision process, it might, nonetheless choose to litigate under Article 263 TFEU. That is to say, and for the reasons set out above in respect of the legality of Article 48 TEU as a legal basis, Spain might choose to bring legal proceedings before the European Court of Justice challenging a European Council Decision to open up the Article 48 TEU process, arguing that the incorrect legal basis had been selected through which to secure Scottish membership of the EU. That would give the Court of Justice the opportunity to clarify the legality of the use of Article 48 TEU. It would also introduce uncertainty and delay pending its decision. It is difficult to state in advance how quickly the Court of Justice might deal with such a legal challenge. A broad analogy might be the recent judgment of the Court in the *Pringle* case where a challenge was brought in the Irish courts, *inter alia*, to the legality of the treaty amendment to make provision for the European Stability Mechanism. Judgment by the Court of Justice was given in under five months from the referral from the Irish Supreme Court using an accelerated procedure. There is, in terms of Article 133 of the rules of procedure of the Court of Justice, the capacity for an expedited procedure also to be applied to a direct action under Article 263 TFEU. If a request for an expedited procedure was accepted, judgment within six months would be conceivable. Nonetheless, much depends upon how the urgency of the issue would be viewed by the Court.

The Envisaged Timetable for EU Membership

28. One of the central weaknesses of the White Paper is its simple unwillingness to canvass, let alone examine, the potential risks to achieving a timely Scottish membership of the EU. In a document that is long on aspiration and short on specification, there is a carelessness with which these risks are simply ignored

with a consequential lack of candour and clarity as to how such risks might be managed. Substantively, negotiations will have to tackle the issues of the Euro, Schengen and the range of opt-outs and opt-ins that the UK currently has obtained in the area of justice and home affairs. These create potential sticking points in the negotiations and with the straightjacket of a self-imposed timetable for completing negotiations, there might well be a danger that a Scottish Government will be forced to make concessions that it might otherwise have sought to avoid.

29. The aspiration set out in the White Paper is that Scotland's membership of the EU would be negotiated in parallel with internal negotiations on secession from the Union. The White Paper suggests that the terms of Scottish EU membership and 'all the necessary processes' could be completed within the 18 month period following a referendum. However, the supporting document on *Scotland in the European Union* only refers to the terms of membership being settled within this period. The point is crucial. If the goal is simply to conclude negotiations on the terms of membership within 18 months (in parallel with the internal negotiations on separation), then Scotland would not become a Member State of the EU on the same date as independence because the resulting treaty amendment would require ratification in all the EU Member States including the United Kingdom.
30. An ambition both to conclude negotiations and secure ratification of a treaty amendment within 18 months is not wholly implausible were the process to run smoothly and without encountering obstacles. But for the reasons given previously, any decision to seek membership through an Article 48 TEU amendment significantly increases the risks of delay or even failure in the negotiation process. Moreover, if the opening of the treaty revision process results in a more wide-ranging amendment to the treaties, taking in issues that go further than Scottish membership of the EU, there is a heightened risk that the resulting treaty might attract a referendum in one or more Member States with consequential risks of delay and failure. By contrast, as the recent accession of Croatia illustrates, ratification of an accession treaty will normally be conducted through parliamentary processes.
31. Considering the Article 48 TEU process itself, with the changes made by the Lisbon Treaty, there is now a more elaborate, and potentially lengthier, process that precedes the conclusion and ratification of a treaty amendment. The ordinary revision process entails the convening of a Convention to consider the proposed amendments, followed by an intergovernmental conference to adopt the amendments. This will undoubtedly lengthen the procedure and introduce a wider range of veto players than just the national governments. The Convention can be dispensed with but it requires the consent of the European Parliament. There has been no suggestion that the simplified revision procedure introduced by the Lisbon Treaty could be used given the nature of what would be proposed. Even if the revision process could be confined to the single issue of extending the application of the treaties to an independent Scotland, when we consider the procedure now laid down in Article 48 TEU together with the need for ratification among what is now 28 Member States, the self-selected timetable of the Scottish Government begins to look ambitious if not simply wishful thinking.

The Article 49 TEU Accession Process

32. The White Paper rejects the use of the Article 49 TEU accession process on the assumption that it (a) require Scotland to 'leave' the EU and (b) join a queue of applicant states waiting to join. As Scotland is not itself a Member State of the EU, it would clearly not be leaving the EU. However, as it is the United Kingdom which is a Member State of the EU, and as Scotland would be leaving the United Kingdom, as of the date of independence, the treaties would no longer apply to an independent Scotland.
33. It is unclear on what basis it is asserted that an independent Scotland would be forced to join the back of a queue of candidate states. The issue is more directly one of the readiness of an applicant state to assume the obligations of EU membership. As is clear from the accession of those countries that were previously affiliated to the European Free Trade Association (EFTA) and through EFTA were members of the European Economic Area (EEA), long-standing familiarity with the structures and processes of European cooperation facilitate an expedited accession process under what is now Article 49 TEU. Considering the enlargement of the EU to fifteen Member States when Austria, Sweden and Finland joined the EU, the accession treaty negotiations lasted just over a year and the accession treaty was ratified and came into force some six months later. Given Scotland's experience of EU membership derived from being a constituent part of an existing Member State, there are good grounds for believing that substantive negotiations on the terms of its membership could be undertaken relatively quickly.
34. It also seems clear that negotiation in advance of independence is in no way limited to the Article 48 TEU process. It is disingenuous to give the impression that were an accession process under Article 49 TEU to be pursued that no negotiations could take place until after independence. While formally Article 49 TEU sets out the mechanism and process for accession, there is no reason why substantive negotiations could not take place informally in advance of a formal act being adopted under Article 49 TEU. The obvious analogy is the EU's own ordinary legislative process. The practice of co-legislating bears very little resemblance to the procedural steps set out in the treaty. There is an active process of informal negotiation and 'trialogues' between the institutions all of which aim to achieve consensus, with the formal legislative process subsequently adopting the texts which have been negotiated. In other words, that the treaty lays down a sequenced process of steps for formal accession to the EU does not mean that negotiations could not be conducted or even concluded in the same way as is envisaged in the White Paper using the Article 48 TEU mechanism. That said, there would need to be a willingness by all parties to engage in such informal negotiations in advance of independence and it might be the case that political pressures might prevent such negotiations commencing until after independence.
35. Even if substantive negotiations are undertaken in advance of accession, an accession treaty could only be signed once Scotland became independent. The treaty itself would require ratification before it entered into force thus delaying Scotland's membership of the EU. If we consider the most recent accession –

Croatia – the final ratification took place 18 months after the accession treaty was agreed. However, if we look again at the more relevant enlargement of the EU12 to EU15, ratification took place within 6 months of the agreement of the accession treaty.

36. While the hiatus in legal obligations which would be associated with an accession process may inspire the search for an alternative legal strategy, for the reasons given above, there is simply no guarantee that even if a treaty revision process under Article 48 TEU could be used, that it would be conducted, concluded and ratified by the date selected for Scottish independence from the UK. Moreover, the mere inconvenience of an accession procedure does not itself transform Article 48 TEU into the correct legal basis for Scotland's membership of the EU.

Avoiding a Hiatus in Scotland's Relationship with the EU

37. If there is a risk of an interruption in legal relationships whichever route is taken, then some thought ought to be given as to how this might be minimised.
38. Taking the example of an accession treaty, there is an inevitable legal gap between its conclusion and its entry into force after ratification by all Member States. In the case of Scotland, it would not be possible to conclude the accession treaty until Scotland became independent. The ratification process would then take place. The gap need not be a long one as intimated earlier, albeit that in the context of a modern EU of 28 Member States, expedited completion of the ratification process may have become more difficult.
39. It is, however, conceivable that core substantive aspects of the accession treaty could be agreed as having provisional effect pending formal ratification. This could be written into the treaty itself and include important aspects of EU law relating to the Single Market. While there is no direct precedent for this in the context of accession – Austria, Sweden and Finland had the continuing benefit of their EFTA membership of the EEA pending their formal EU accession – it is far from being an implausible legal strategy to avoid certain disruptions in Scotland-EU relations. Moreover, there is specific provision in Article 218 (5) TFEU for international agreements between the EU and third countries or international organisations to have provisional application pending the entry into force of the agreement.¹ By analogy this might also apply in an accession context.

A Referendum on Scottish Membership of the EU?

40. The White Paper simply asserts that membership of the EU is in an independent Scotland's best interests. Whereas Scotland's relationship with the UK is to be the matter of a referendum, no equivalent referendum is proposed or suggested in respect of Scotland's membership of the EU. The White Paper instead assumes a coincidence in political preferences between rejection of the Union with the United Kingdom and a wish to become a constituent Member State of

¹ I am grateful to Professor Marise Cremona, European University institute for drawing this to my attention

the European Union. Given that other smaller European states have held referendums on EU membership and given that these have led, for example in Norway and Switzerland, to a rejection of membership, it ought not to be assumed that the Scottish electorate would favour EU membership particularly if alternative relationships with the EU were canvassed.

41. Switzerland manages its relationship with the EU through a series of bilateral agreements whereas Norway's relationship with the EU is mediated in large part through its membership of the European Free Trade Agreement. In short, a range of legal relationships have emerged to manage the relationship between the EU and its neighbourhood European non-Member States. European integration takes multiple legal forms and while it has a particular and intense legal character in the context of the European Union, European integration since the 1950s has taken on a variety of legal forms, with a tendency towards differentiated legal approaches. The European dimension of the White Paper is, therefore, rather one dimensional. It lies in associating continuity of the United Kingdom with anti-Europeanism, with a consequential linkage of secession with pro-Europeanism manifested only through membership of the European Union. While this may reflect certain, even dominant, political narratives of the relationship between nationhood and European integration, it is evident that there are counter-narratives and alternative legal arrangements.
42. Had the question of Scottish membership of the EU been put in parallel with the question on independence, and if both were answered in the affirmative, then the argument for EU institutions and Member States to engage constructively in dialogue with the Scottish Government to prepare the way for Scotland's EU membership would be that much stronger.
43. Moreover, if the Scottish electorate rejected independence but voted for EU membership this might go some way towards changing the nature of political discourse within the UK concerning the future of the UK in the EU. The White Paper seeks to bolster the case for independence on the back of a fear that a popular vote in the UK might reject EU membership. Nonetheless, that a constituent nation of the UK had voiced its desire to remain part of the European Union could not simply be ignored by the rest of the United Kingdom without further threatening the constitutional unity of the UK itself. This might, helpfully, draw attention to the related internal and external constitutional dynamics at play.
44. As it now stands, it would seem paradoxical that the only potentially foreseeable way in which the Scottish electorate would have a direct and specific say on membership of the EU would be if Scotland remains part of the United Kingdom and if a referendum is held following the next Westminster elections.

Constitutional Processes in the UK

45. Much is made in the White Paper of the fidelity of the UK constitutional process for Scottish independence with the values of the EU as expressed in Article 2 TEU, in particular, the democratic principle. It is, of course, true, that the electorate in Scotland will vote in a referendum on independence and the result

of that vote will be respected by the United Kingdom government. The constitutional and democratic nature of the internal constitutional process justifies external international recognition of the new legal entity.² However, that does not in itself determine the precise manner in which that entity becomes a Member State of the European Union. Indeed, the internal constitutional process neither implies nor dictates that an Article 48 TEU process would be appropriate as the White Paper tends to suggest. Rather, the *quid pro quo* for UK acquiescence with the result of the referendum is necessarily that what will remain of the UK will enjoy continuity in its legal relationships both internally and externally. In other words, it is inherent in the domestic constitutional process that Scotland will secede from the UK rather than each constituent nation of the Union voluntarily dissolving the union in a manner which might justify each component entity severally enjoying continuity in their international obligations. That leaves open rather than resolves the issue of the means by which a new legal entity, recognised in international law, assumes the obligations and exercises the rights associated with membership of an international organisation like the EU.

46. It is also worth considering more specifically the UK constitutional process which would give effect either to an accession treaty or a treaty amendment. Accession treaties and treaty amendments require to be ratified in accordance with the constitutional traditions of Member States. Whichever legal route is taken, the resulting legal act will require to be ratified in the United Kingdom.
47. In considering the UK's constitutional process for treaty ratification, the effect of the European Union Act 2011 must be taken into account. The Act was designed to trigger a domestic referendum in respect of certain forms of treaties and treaty amendment. A treaty that provides for the accession of a new Member State does not of itself trigger the requirement to hold a referendum (see section 4(4)(c) European Union Act 2011). Nor does a treaty amendment under Article 48 TEU unless it falls within one of the scenarios envisaged in section 4(1) of the Act. The fact that a treaty amendment has consequences for the UK, including constitutional consequences, is not itself enough to trigger a referendum.
48. Nonetheless, as the recent example of Croatia's accession to the EU demonstrates, an amendment to the treaties requires approval via an Act of Parliament (see the European Union (Croatian Accession and Irish Protocol) Act 2013). Whatever negotiations may take place between the Scottish and UK governments, it is the UK Parliament that is vested with the constitutional authority to approve or not to approve the treaty amendment.
49. The issue arises not merely of whether parliamentary approval will be forthcoming but more specifically of how that Parliament will be constituted depending on the timing of such a vote. Considering first the ratification of an accession treaty negotiated under Article 49 TEU, on the assumption that formal signature of such a treaty could only be undertaken after Scotland became independent, it would follow that the Westminster parliament would not at that

² See *inter alia*, D. Edward, 'EU Law and the Separation of Member States' [2013] 36(5) *Fordham International Law Journal* 1151.

stage include representation from Scottish MPs. If instead an amendment is made to the existing treaties under Article 48 TEU, the hypothesis expressed in the White Paper is that the amendment would be negotiated and concluded in advance of independence in which case it will fall to the UK Parliament – with representation from Scottish MPs – to adopt the relevant Act of Parliament. The political composition of that Parliament will, of course, depend upon the outcome of the 2015 General Election. Nonetheless, if the ambition is simply to conclude negotiations by the date of independence then again, the ratification procedure will be handled by a reconstituted UK Parliament without Scottish representation.

50. Given the absence of a constitutional process by which the rest of the United Kingdom expresses a view on the future of the Union, the parliamentary processes which will give effect to Scottish independence and which will ratify Scotland's membership of the EU will likely become the focal points for political and even legal contestation. The Scottish Government's White Paper underplays this dimension by simply treating the constitutional claim to self-government as a trump card that demands acquiescence by all affected interests whether internal or external to the UK. Yet the key to a successful management of the independence process lies in recognising some inconvenient legal and political truths and it is regrettable that the White Paper fails to provide a more candid analysis of the legal and political risks associated with Scottish membership of the EU.

16 January 2014