WRITTEN EVIDENCE FROM PATRICK LAYDEN QC TD

(The views expressed in this paper are personal, and do not reflect any position of the Scottish Law Commission. They are based on my experience as a senior legal adviser to the UK and, thereafter, the Scottish Governments on EU matters.)

Generally, I have approached the committee's questions from the perspective of a public lawyer employed by Government, and have tried to anticipate how other Governments might react to the proposals in the White Paper. I should also say that I have had the advantage of seeing the written evidence submitted by Professor Sir David Edward, Professor Armstrong and M. Jean-Claude Piris. It may be helpful if I comment on areas where there are, or appear to be, differences in the conclusions reached in those papers and this one.

Background

A vote for independence would indicate a clear and irrevocable intention on the part of the people of Scotland to separate from the United Kingdom. Following upon such a vote, there would be a complex and difficult negotiation between the Scottish and Westminster Governments as to the precise nature of the constitutional settlement, the division of assets and liabilities and the extent to which, and for how long, services currently provided at a UK level might continue to be so provided. It is to be expected that areas such as the Scottish proposal to continue with a currency union, with the Bank of England continuing to act as lender of last resort, would be particularly sensitive.

The negotiations which the Scottish Government envisages with the European Union would depend, to a greater or lesser extent, upon the resolution of some or many of the questions thrown up in the internal negotiations. Thus, for example, a failure to agree that the Bank of England should continue to be the central bank, and the lender of last resort, would have consequences for the negotiation over whether or not Scotland should undertake to move towards adoption of the euro. In any event, that is only one of a range of issues where it will be difficult for sensible negotiations to begin with the European Union before the internal position in the UK is settled. Having regard to the fact that the UK Government is going to be distracted by a General Election in the middle of the Scottish Government's suggested negotiating period, and that any agreement with the EU has to be ratified with all Member States (see below), it is difficult to see how both sets of negotiations could be concluded in time for Scotland to become a Member State of the EU at the same time as it achieves formal independence from the UK.

Looking forward to the end of the process, if Scotland were to become formally independent, that would have legal consequences. The first is that Scotland would no longer be part of the United Kingdom. The rest of the United Kingdom (RUK) would be a separate, foreign country. Its

Government's duty would be to represent, safeguard and advance the interests of its own people (as set out in the Edinburgh Agreement).

The second, for present purposes, is that it seems now to be generally agreed that an independent Scotland would no longer be within the European Union, and that amendments to the EU Treaties would be required to admit Scotland to the EU.

In that regard I note Sir David Edward's query as to whether the correct legal analysis might not lead to the conclusion that both Scotland and RUK would effectively cease to be Member States. I have some sympathy with that analysis (not least because I advanced it myself at an earlier stage). But two considerations lead me to think that it is unrealistic. First, there seems to be a general acceptance that RUK will continue as a Member State, and, in international law, general acceptance by other states carries a great deal of weight. For example, when the USSR broke up, there was general agreement, in the UN, that the Russian Federation was the successor state for the purposes of membership of the Security Council, although it might well have been argued that there was no necessary continuity. In an example nearer to home, the separation of the 26 counties in 1922 was not regarded as more than a change in the territory of the United Kingdom.[1]

Second, I would expect the internal UK legislation which recognised Scottish independence to make clear that the United Kingdom was continuing, and that Scotland was the separated entity. As the Crawford-Boyle opinion points out, at paragraph 57.2, the attitude of the state concerned has a significant effect on how other states will regard the matter.

Discussion

The questions which then arise, are how, when and on what terms could an independent Scotland join the EU? The committee wishes to look particularly at whether Article 48 of the Treaty is a suitable legal answer to the "how" question.

I should start by saying that if – and it is a substantial "if" – the United Kingdom Government and the Scottish Government were to reach agreement as to the terms upon which independence is to take place, and if, thereafter, the European institutions and the other Member States were to agree that Scotland should be allowed to join on the terms set out in the White Paper, then in my view the question of Treaty base would become of little importance. There would in effect be a new EU Treaty, which would set out the general agreement, and which could be expressed as "notwithstanding", or "having regard to" such of the Treaty provisions as seemed appropriate.

[1] For a fuller discussion of this aspect of the matter, which reaches essentially the same conclusion, see the opinion of Professor James Crawford QC and Professor Alan Boyle of 10th December 2012, appended to "Scotland Analysis: Devolution and the implications of Scottish independence" (Cm 8554), at paragraphs 53-70.

On the assumption – in my view much the more likely prospect – that the European institutions, and all the Member States, including RUK, were not prepared unanimously to agree the Scottish proposals in the White Paper, it would be necessary to look at the question of Treaty base.

Article 48

Article 48 establishes an "ordinary revision procedure" which enables the Member States to agree alterations to the Treaties by "common accord". The procedure is that a Member State or the Commission or the Parliament suggests amendments to the Treaties. The Council agrees, by a majority, to pursue them and a Convention is set up by the Parliament to consider the matter further.

The Convention is composed of representatives of the national Parliaments, the of the Heads of State or Government of the Member States, of the European Parliament and of the European Commission. It reaches a consensus on proposals to amend the Treaties. Thereafter a conference of representatives of the governments of the Member States determines, by common accord, what amendments should be made to the Treaties.

Any amendments agreed must be ratified by each Member State in accordance with its own constitutional arrangements. Unless all Member States do so ratify, the Treaties remain unamended.

There are various difficulties with a proposal to use that Article.

First, it requires there to be a proposal by a Member State, the European Parliament or the Commission, before it can be used. The assumption in the White Paper is that the UK Government would initiate the process. But it is impossible at this stage to predict that the UK Government would consider that its own interest would be served by such a course of action, particularly if the terms of settlement between itself and the Scottish Government were not settled. Even after a settlement on internal issues had been reached, the UK Government might reasonably come to the view, set out below, that it would be more appropriate for a Scottish application for membership to proceed under Article 49: if the UK Government were not prepared to initiate the Article 48 process, it is difficult to see which other Government might wish to intervene.

Second, as Professor Armstrong has pointed out, the parties to any negotiation under Article 48 are the Member States and the European institutions. The Scottish interest would, formally at least, require to be represented by the United Kingdom Government. Since it is not at all clear that everything proposed in the White Paper would be in the interests of the UK Government after independence, that might well be difficult.

Member States which, for whatever reason, were minded not to agree readily to the terms upon which Scotland sought to join the EU might be expected to insist upon a strict compliance with the terms of the Article

(assuming, for the purposes of the argument, that they were prepared to countenance the use of the procedure at all – see below). In practical terms, that would mean that the Scottish Government could have no formal role in the Convention set up to consider the question of Treaty amendments.

Third, the use of Article 48, as both the FCO paper[2] and Professor Armstrong[3] point out, and as is clear from the Article itself, opens the possibility of other Treaty amendments being sought by either the proposing State or another Member State. There would be a risk, as there is in domestic Parliaments with a miscellaneous provisions bill, that the intended aim of the measure would be hijacked by others with particular axes to grind. Such an outcome would, at the very least, extend the length of the process considerably. Such a risk would therefore tend to make other Member States and the Union institutions reluctant to agree to the use of the procedure.

Finally, as noted above, any proposals which emerged would have to be accepted unanimously by all the Member States, and thereafter ratified in accordance with 28 different sets of domestic arrangements.

Article 49

Article 49 sets out the formal procedure by which states outside the Union can apply to join, and by which the Member States can satisfy themselves that such states can properly be admitted. There is an application by the State concerned to the Council, which consults the Commission and receives the formal approval of the Parliament, and then refers the application to the Commission. On receipt of a favourable opinion from the Commission, the Council agrees, unanimously, to open negotiations and, also unanimously, agrees a framework for those negotiations. It appears that the screening process, to see whether the applicant State complies with the *acquis*, is divided into 35 separate chapters, with the Member States agreeing, unanimously, the outcome of the negotiation on each of them.

There are clear practical advantages to the Member States, and the institutions, in following this procedure. It has been tried and tested in previous accessions. It gives a coherent structure to the process of assessment of whether an applicant State meets, or is prepared to comply with, the *acquis*. It is focussed on the single question of accession, and runs no risk of being distracted by extraneous considerations.

48 or 49?

Leaving aside the practical advantages of using Article 49, I am in no doubt that it is, as a matter of European Union law, the correct Treaty base. As a matter of general interpretation, if a legal document provides a route for achieving a particular end, then that is the route which should be used. That is indeed the general position under EU law: as M. Piris points out, the case

[2] "Scotland analysis: EU and international issues; Cm 8765; January 2014, at paragraph 3.16
[3] At paragraphs 25 and 26.

law of the Court of Justice attaches great importance to the use of the correct Treaty base, which must be justified on the basis of the aim and content of the act concerned. Further, this is not a case (if there are any such cases) where successive Treaties have produced overlapping and conflicting provisions on the same subject. These two Articles first appeared, together, in the Maastricht Treaty in 1992.

Having regard to these considerations, it is difficult to avoid the conclusion that Article 49 is the only correct Article to use. The corollary of this conclusion is that if there were an attempt to use Article 48 as a Treaty base, then that attempt could be challenged in the Court of Justice. Such a challenge would in my view be very likely to succeed; but – whatever its outcome – it would have serious implications for the Scottish Government's proposed timetable.

Application under Article 49

I turn to consider how matters would proceed under Article 49. A formal application under that Article could not be made until after Scotland had formally become independent because, until that point, Scotland would not be "a European State", as mentioned in the Article. Since, as noted above, the opening of negotiations with applicant states requires unanimity in the Council, any Member State could prevent any substantive negotiations before then.

So far as timing is concerned, Sir David Edward, in his written evidence to the Committee (at page 13), expresses the view that it would be the duty of the EU institutions and of all the Member States to enter into negotiations during the period between a vote and formal separation, to determine the future relationship. Professor Armstrong[4] also envisages the possibility of informal negotiations prior to the submission of a formal application under Article 49. Having regard to the legal position under the Treaties, and the present attitude of the institutions, I do not think that informal negotiations would be likely to occur.

So far as Sir David's view is concerned, he points out, very reasonably, that Article 50 of the Treaty contemplates that States wishing formally to withdraw from the Union will enter into a process, lasting up to two years, before final separation takes place. He suggests that the absence of provision in the Treaties to deal with the present situation is, effectively a *lacuna* which the institutions and the Member States are obliged, by general obligations of EU solidarity, to fill.

Whether or not there is a *lacuna*, the legal position is clear – and apparently generally agreed. One of the consequences of Scotland's becoming independent of the UK is that Scotland will not be part of the EU. That position will not be the result of some unforeseeable occurrence, like the unexpected unification of Germany: it will be the result of a considered,

[4] At paragraph 34.

deliberate, informed decision of the Scottish people. The EU Institutions, and the Member States, would in my view be wholly justified in applying the normal procedures to any application on our part to join the EU. That would not be inconsistent with the general obligations of co-operation which are incumbent upon Member States among themselves. The position would be that Scotland would have put itself outside that group. From that perspective, I note the reported view of the Prime Minister of Spain, that:

> "If a region or territory of a Member State breaks away and becomes a new independent country they will become a third country, with respect to the EU, and the treaties won't apply to them---------This is the law – and the law as it is in all Member States – and it is natural that it is applied."[5]

That would appear to indicate that, in the view of the Spanish Government, at least at present, Scotland would be required to apply formally, under Article 49, to join the EU. If even one Member State takes the view outlined by the Spanish Prime Minister, it is difficult to see how negotiations could be opened, on behalf of the European Union, prior to such an application.

With regard to Professor Armstrong's view, that informal negotiations could begin prior to the achievement of formal independence, it is certainly the case that in most processes such negotiations are the norm. The European institutions are practised in the art of testing ideas by means of "non-papers" which float an idea on an unattributable basis. It is an extremely useful means of making progress on issues before they become "live".

I suspect, however, that such negotiations proceed upon the basis of a general acquiescence on the part of those responsible in the institution concerned. If there were a formal prohibition on such negotiations in relation to a particular issue, then I imagine that that would preclude any informal communications. In that regard I note the stated views of the President of the European Commission, quoted at page 1 of Sir David Edward's written evidence, and the identical views expressed by the President of the European Council. Even if those views are wrong (and, for the reasons given above, I do not think that they are) they are liable to make it impractical for representatives of the Scottish Government to conduct informal negotiations with the Union institutions prior to the achievement of formal independence.

The Article 49 process

If the Article 49 route is followed, then the process of seeking membership could not begin until after formal independence was achieved. How long it would take after that would depend upon the extent to which Scotland was able to persuade the Commission and the Member States that its negotiating position was acceptable. As set out in the White Paper, that

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[5] http://news.stv.tv/politics/250628-mariano-rajoy-says-independent-scotland-would-stay-outside-the-eu

position is that an independent Scotland would expect to maintain either the effect, or in the case of the UK rebate a *pro-rata* share, of any derogations to the Treaties negotiated by the UK Government over the years.

The difficulty with this position is that while it is certainly in accordance with the present position with regard to the United Kingdom, it is directly in conflict with the general position of the other Member States, and the institutions, that applicant states must comply with the whole of the *acquis communitaire*, the general body of law and practice accepted by all Member States. I will give four examples, briefly.

First, the Schengen Protocol (Protocol 19) expressly provides, at Article 7:

> "7. 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."

However sensible it may be, as a matter of practice, for Scotland to remain within the UK-Ireland Common Travel Area, it would be necessary to persuade other Member States to dispense with the requirements of Article 7.

Second, with regard to the euro, the Treaty provides, at Article 119:

> "119 [T]he activities of the Member States and the Union shall include----------a single currency, the euro----------".

The Scottish Government's position is that it would retain the Bank of England as its central bank, and as its lender of last resort, and would not require to join the euro, or to commit itself to doing so. But an agreement to use the euro is not seen as an optional extra by other Member States and the EU institutions: it is a fundamental part of the *acquis*.

Third, in relation to Justice and Home Affairs, there were a number of measures agreed, prior to the Treaty of Lisbon, and essentially on an inter-Governmental basis. This had the advantage, from the UK's point of view, that agreement had to be unanimous and that the jurisdiction of the Court of Justice could where appropriate be excluded. One of the provisions of the Treaty was that these measures, after a transitional period, would become subject to the ordinary, qualified majority procedural rules, and to the jurisdiction of the Court of Justice.

The UK accordingly negotiated a derogation enabling it to opt out of all these measures (and then to opt in again to such of them as it considered appropriate).[6] The UK has now exercised that opt-out. The result is that all those JHA measures do not apply to the UK. So far as the other Member

[6] See Protocol 36 to the Treaty of Lisbon, at Article 10(4).

States are concerned, however, they form part of the *acquis*. The Scottish Government's position is that it would not wish to be bound by those measures, and would to that (considerable) extent not accept the *acquis*.

Fourth, there is the matter of the UK rebate. This was negotiated in 1984, when very many decisions at EU level had to be unanimous, and when there were only 9 Member States. As time has gone by, and more States have joined, it has become more contentious among other Member States. Let us suppose that Scotland were to agree, with the UK Government, an entitlement, as between those two Governments, to a share of the rebate. We would then require to persuade the other EU Governments, including the RUK Government, that our contribution to the EU budget should be reduced by that amount.

Conclusion

I express no view as to the negotiability of any or all of these aspects of the Scottish Government's policies. Nor do I express any view as to whether any or all of them would be in the best long-term interests of other Member States, not least because that determination is for each of those States.

My point simply is that if an independent Scotland is determined to become a member of the EU, then, as a matter of law, both the timing and the terms of our entry lie in what the other Member States are prepared to agree. Both of those matters are therefore outwith the control of the Scottish Government.

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