



The Scottish Parliament  
Pàrlamaid na h-Alba

## Official Report

# EUROPEAN AND EXTERNAL RELATIONS COMMITTEE

Thursday 23 January 2014

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**EUROPEAN AND EXTERNAL RELATIONS COMMITTEE**  
**2<sup>nd</sup> Meeting 2014, Session 4**

**CONVENER**

\*Christina McKelvie (Hamilton, Larkhall and Stonehouse) (SNP)

**DEPUTY CONVENER**

\*Hanzala Malik (Glasgow) (Lab)

**COMMITTEE MEMBERS**

\*Clare Adamson (Central Scotland) (SNP)

\*Roderick Campbell (North East Fife) (SNP)

\*Willie Coffey (Kilmarnock and Irvine Valley) (SNP)

Patricia Ferguson (Glasgow Maryhill and Springburn) (Lab)

\*Jamie McGrigor (Highlands and Islands) (Con)

**COMMITTEE SUBSTITUTES**

\*Neil Bibby (West Scotland) (Lab)

\*Gavin Brown (Lothian) (Con)

\*Aileen McLeod (South Scotland) (SNP)

\*attended

**THE FOLLOWING GAVE EVIDENCE:**

Professor Kenneth Armstrong (University of Cambridge)

Neil Bibby (West Scotland) (Lab) (Committee Substitute)

Professor Sir David Edward KCMG QC

Patrick Layden QC TD

Aidan O'Neill QC

**CLERK TO THE COMMITTEE**

Katy Orr

**LOCATION**

Committee Room 6



**Scottish Parliament**  
**European and External Relations**  
**Committee**

*Thursday 23 January 2014*

[The Convener *opened the meeting at 09:19*]

**Interests**

**The Convener (Christina McKelvie):** Good morning and welcome to the second meeting in 2014 of the European and External Relations Committee. I make the usual request that mobile phones and other electronic equipment that makes a noise are switched off. I am aware that some members use Kindles and iPads to access their papers, which is fine.

I welcome back to the table Dr Daniel Kenealy, who is the committee's adviser on its inquiry. I convey Patricia Ferguson's apologies and welcome Neil Bibby to the committee. Do you have any interests to declare, Neil?

**Neil Bibby (West Scotland) (Lab):** I have no interests to declare.

**The Convener:** We welcome back Jamie McGrigor, who has been away for a while. It is good to see you back and healthy, Jamie.

**Decision on Taking Business in**  
**Private**

09:20

**The Convener:** The first item on the agenda is to decide whether to take in private agenda item 5, which is consideration of our work programme. Do members agree to take item 5 in private?

**Members** *indicated agreement.*

## Independence: European Union Membership Inquiry

09:20

**The Convener:** We are making swift progress. Agenda item 2 is our inquiry into Scotland's membership of the European Union under the Scottish Government's proposals for an independent Scotland. We have one panel of witnesses.

We are delighted to welcome Professor Kenneth Armstrong, Professor Sir David Edward, Patrick Layden QC and Aidan O'Neill QC—thank you all for coming along. Scotland's place in Europe is a very hot topic and we are very much looking forward to your evidence. We have a very tight timescale for committee on Thursday mornings and, because I am a bit of a tyrant when it comes to timing, we will go straight to questions.

The panel will be aware that the Scottish Government's proposal is to look at article 48 of the Treaty on European Union as a way forward and that there is a lot of debate whether that is an appropriate or reasonable approach. Indeed, last week, we heard some very interesting evidence from academics on their understanding of the matter.

What are your thoughts on the benefits to Scotland of European Union membership? I ask that you cover the spirit of the treaties and what the treaties mean. Professor Sir David Edward's written submission referred to the spirit of the treaties, especially articles 2 and 4. I will give each of the panel members some time to provide their opinions on that question. Professor Armstrong is smiling, so we will start with him.

**Professor Kenneth Armstrong (University of Cambridge):** Yes, I am smiling.

It is up to the electorate in Scotland to decide whether they believe that there are benefits of EU membership. I am generally in favour of the EU and see that there are benefits for any European state seeking to be a member of the European Union. It has enormous potential economic and trade benefits. It also plays an important role in democratisation in Europe in general, as we see with the issues in Ukraine, although I know that that is different from the Scottish situation.

In general, there are good reasons for being in favour of membership of the European Union, but it is up to the electorate to make that decision. As I say in my written evidence, it would have been useful for the question to have been put in a referendum to determine the decision.

**Patrick Layden QC TD:** I agree. I am thoroughly persuaded that the European Union is a good thing from the point of view of the countries of Europe. At the most basic level it has prevented France and Germany from having a war in the past 60 or 70 years, and it has immense trade and free movement benefits.

Having said that, I agree with Professor Armstrong that, if Scotland is to become independent, it would be quite nice if people had a chance to decide whether they want to be in the EU. The Norwegians have had two referenda on that question and decided on both occasions not to join, so it is obvious that a small country on the periphery of Europe could decide that its best interests lie connected to but not in the EU. That is not a decision that it looks like we will be able to take.

**Professor Sir David Edward KCMG QC:** My position about the EU generally is that the argument about prevention of European wars was fundamental and sound at the beginning—we are now some years on—but that another consideration at the beginning was stability.

The great problem after the dissolution of the empires in the first world war was the instability of Europe. The European Economic Community was an essential element in creating a zone of stability. If we consider the potential instability that would have followed the fall of the Soviet empire and the potential instability that exists in the Caucasus, we see that the idea of having a political, financial and social entity that provides a zone of stability is of fundamental importance.

In Scotland, there was a bit of hesitation very early on. I was involved from the beginning of the United Kingdom's entry into the EEC but there were people in Scotland who did not want to be in it. I have always been in favour of Scotland being a constituent part of the European Union and I think that we have played a part in it as well.

**Aidan O'Neill QC:** There are certainly benefits for any smaller nation in being part of a much larger group such as the European Union. As has been said, there are benefits in respect of trade, political influence and the like. However, there are also benefits to the individual citizens of any member state because they become European citizens and therefore have access to a range of rights, such as being able to live, work, vote and obtain benefits in other member states. It opens up a much broader world than simply being confined to the borders of one's own state.

It is not all rosy, of course, because part of becoming a member of the European Union necessarily involves a limitation of the rights of that independent state. A state is no longer entirely free to carry out policies that it might

otherwise wish to carry out, or indeed to have a democratic mandate from its own electorate to do so. It has to be said that there is an element of democratic deficit within the European Union.

If Scotland were to become independent and to become a member state of the European Union, fisheries is a matter that will remain primarily determined at a European level, with all the other member states. One can say, "Well, that happens already", but as a member state an independent Scotland would have far fewer votes in any negotiations than it does as a part of the United Kingdom. There are definitely benefits of being part of the European Union, but there are responsibilities that go with that as well as limitations on the power of any state that is a member.

**The Convener:** Thank you. That was a pretty good opener. We seem to have reached an agreement that, in relative terms, the EU is a good thing for Scotland.

We are talking about Europe being a good thing and the good faith that that carries with it. Sir David, in your written evidence you mentioned articles 2 and 4 of the Treaty on European Union and

"the spirit of the Treaties".

I am thinking of something like the Vienna convention, which you specifically mentioned.

At last week's meeting, one of the concerns raised by the academics who gave evidence was whether there would be a situation in which Scotland would be out of Europe, negotiating its way back in, or whether some interim arrangement would be put in place to allow it to remain within the EU. In article 50, there is a condition of pre-negotiation before exit. Would panel members give me their thoughts on whether there should be a pre-negotiation period? The situation is unprecedented—there are no other examples throughout Europe that we can use. Would pre-negotiation and an interim arrangement be best for Scotland and the rest of the UK—RUK?

09:30

**Sir David Edward:** I start from a different position from that of most of the people who have discussed the issue. Most of the discussion is in terms of the rights of states and whether there will be a continuator state, a successor state, a separate state or a new state. I start from the position—which is clear in the major judgment of the European Court of Justice way back in 1963—that the treaties create rights for individuals, which, as the Court put it,

"is ... intended to confer upon them rights which become part of their legal heritage."

In my view, all the discussion about the rights of states entirely ignores the fact that people here and people who are dealing with us have what are called acquired rights. My view is that the institutions of the EU and the member states, including the United Kingdom, have an obligation, if there is a vote for independence, to ensure that those acquired rights are not abridged or terminated. That imposes an obligation to negotiate before there is any question of separation—before we get to the stage at which there is a new state.

The treaties provide no machinery for that. They provide no machinery for the situation that is envisaged or for an interim arrangement such as the convener spoke about. As far as the treaties go, there is no solution to the problem. However, I go back to what was said to me by a very experienced Dutch foreign servant, who was the Dutch permanent representative and later the Dutch foreign minister. I asked him about the problem with the euro, and he said, "We will find a way; we always do." In my view, the reality is that, if there is a vote for independence and there is a problem, it will be for the member states and the institutions to sit down and find a way through it so that there is no termination or abridgement of acquired rights of individuals.

The fact that the treaties create rights for individuals is what differentiates the European Union from other treaty organisations. Therefore, it is beside the point to talk in terms of the conventional rules of public international law that govern relations between states, because the European Union is different in this important respect.

**Professor Armstrong:** I think that, whatever the merits are of understanding the European Union as a legal entity that confers rights on individuals, it is an international organisation composed of member states, and the identity and legal status of being a member state nonetheless remains fundamental. That is important in considering the particular legal route down which an independent Scotland might seek to exercise the rights and obligations of EU membership.

It is clear that if Scotland becomes independent it will seek to become a member state. The normal process for that is the article 49 accession process. If it did not want to go down that route and instead wanted to go through a treaty revision process through article 48, that would be a treaty revision by member states, which means that an independent Scotland would be reliant on either an existing member state or one of the institutions to pilot the process by which it would acquire membership.

Although I have a certain sympathy with Sir David's position on the status of the individual,

nonetheless the legal status of the member state remains crucial to understanding the process by which an independent Scotland might become a member state of the European Union.

**Aidan O'Neill:** In a sense, I agree with elements of what both previous speakers have said. The EU is an international organisation and a treaty among member states, but it is also a supranational organisation in the sense that the treaties create, as Sir David Edward said, rights for individuals. At some levels, there is always a constant tension in the European Union about it being a relationship between states and a relationship of individuals to a body of law that is greater than the states. Depending on which tension is highlighted, people will come up with perhaps slightly different answers.

I certainly agree with Sir David Edward that it is to misunderstand the EU to talk simply in classic public international law terms about the succession of member states or secession from states, given that the European Union has created a new kind of international legal order that is unlike any other kind of treaty organisation. As I have said previously, one issue that must be borne in mind is that, because of our being citizens of a member state at the moment, people in Scotland who are British citizens are European citizens. That is the status that they have, and they have certain rights following from that.

On the classic public international law analysis, if Scotland, as an independent entity, were to leave the EU, the citizenship of everyone in Scotland qua European citizen would remain—unless and until their former British nationality were withdrawn from them, when they might then be said to lose their European citizenship rights. However, there would potentially be an unstable situation in which a new independent state would be outside the European Union and have none of the responsibilities of membership but all the people in the new state would be citizens of the EU and have all the rights implicit in the European Union.

That is why I agree with Sir David Edward that there is not just an obligation of good faith but a commonsense requirement to try to resolve the instability of having 5 million people who are EU citizens but whose state has no status within the EU. Therefore, something will be worked out; it always is.

**Patrick Layden:** Scotland's people are citizens of the European Union because they are nationals of the United Kingdom. If they stop being nationals of the United Kingdom, they stop being citizens of the European Union. That is not going to come along by some constitutional accident; it will come along, as I said in my paper, as the result of a

considered, deliberate and—I hope—informed decision of the Scottish people.

If we decide seriously to leave the United Kingdom, one of the consequences that is reasonably clear and generally agreed is that Scotland will not be part of the European Union. We can choose not to do that or we can choose to do it; what we cannot do is say that we are going to leave the United Kingdom and be outside the European Union and then get back in but retain all the same rights all the way through. We must consider the consequences of our actions before we take them; one consequence is that we will stop being citizens or nationals of the United Kingdom and as a result stop being citizens of the European Union.

That will be our decision, and I do not see—and I suspect that certainly the European institutions and other member states will not see—that it is their duty to enable us in some way to smooth over that difficulty and carry on regardless.

I take on board entirely the idea that member states of the European Union are bound by the duty of co-operation to make the treaties work, which is absolutely true. That is what they did when German unification happened and what they did over Greenland; they all got together and said “We can fix this.” However, we will not be in that happy group, because we will have decided to come out of it. We will then have to come back in, but there is no procedure, as Sir David Edward said, for a state seceding, departing or separating itself from a member state.

There is a procedure for countries that are outside the European Union to apply to join it and, as I said in my submission and Professor Armstrong said in his, that is the procedure that other member states would be entitled to ask us to follow. Under the rules of the EU, they are entitled to say to a country that is outside the EU, “This is the way you get in.” There is no particular magic about that. If we do not want to go down that road, the solution is not to move ourselves out of the club by stopping being part of the United Kingdom.

**The Convener:** I could see that Sir David Edward was disagreeing. Do you want to come back in on that?

**Sir David Edward:** The simple fact is that there will be a gap between a vote for independence and the moment of separation. My point is that, during that period, there will be an obligation to negotiate a solution that does not lead to the absurd result that is being suggested.

Let us take an example. At the moment, I am waiting for delivery of a new car from Birmingham, which has been delayed. Let us suppose that the moment of independence occurs between my ordering of the car and the delivery of the car. Will

I have to pay customs duty on the car when it arrives because—on this theory—Scotland will be outside the customs union?

There are a huge number of problems, let alone that of individual citizenship. My view is that, assuming that there is a vote for independence, the obligation will start with the United Kingdom—which, as I have pointed out, will still be the Government of the whole of these islands, including Scotland—to propose a solution that will avoid such results. With respect, I think that all of what Kenneth Armstrong and Patrick Layden are saying assumes that nothing will happen until the moment of independence.

**Professor Armstrong:** I do not say that. I make it clear in my submission that I think that, whichever route is chosen, negotiations can begin following a yes vote. I am in complete agreement with Sir David Edward that there are good faith obligations, but a decision still has to be made about which legal route to go down. It is one thing to say that negotiations can begin, but the issue is to what end and by what legal means.

I think that we can all accept that negotiations of some sort will occur, although some people might take the view that negotiations should be held up until the moment of independence—that is not an implausible view in some other European capitals. As I said, we need to be clear about to what legal end those negotiations will take place.

**Patrick Layden:** I do not agree on that. On present indications, I do not think that there will be a requirement on the UK to propose a solution under article 48 or any other treaty article in between a yes vote and independence because, with effect from the day of the vote, the UK will be obliged to consider the interests of its own citizens.

When I say “its own citizens”, I mean its citizens apart from those of an independent Scotland. The UK cannot say that it is acting in the interests of a United Kingdom including Scotland and that it is also acting in the interests of a soon-to-be-independent Scotland and in the interests of what will be left of the UK following formal independence. If it did that, it would be wearing three hats, and a single Government cannot be asked to wear three hats in that way.

I do not regard it as being at all implausible for the UK to say, post yes vote, “We will let the ordinary course of European law take its course; as and when Scotland becomes independent, it will be in a position to apply to join the European Union.” If I were advising the UK Government, I would not think that that was an unreasonable position for it to take. As it is also the position that is taken by other member state Governments and by the institutions, I see it as seriously impractical

to think that we can start a negotiation with Europe prior to formal independence.

09:45

**Aidan O’Neill:** I disagree with Patrick Layden’s approach. He makes an assumption that there is an automaticity with the vote for independence and a loss of British citizenship. A loss of British citizenship may or may not occur, but that will be an active decision by the rest of the UK at such time as the rest of the UK is an independent entity. Because any such decision would have implications for the European citizenship of the remaining British citizens in Scotland, it would fall within the ambit of EU law and would potentially be justiciable before the Court of Justice of the European Union. Therefore, I disagree with the idea that independence would lead to an immediate loss of British citizenship. There is a gap and there would have to be an active decision about that.

Prior to independence, the UK Government would remain, as Sir David Edward has said, the representative of everyone—all British citizens—who helped to vote for it within the UK, and it has certain responsibilities. A vote for independence would not make the UK Government immediately the Government only for the rest of the UK and only for British citizens who live in the rest of the UK; it would have continuing obligations on a moral, political and constitutional basis.

**The Convener:** Jamie McGrigor has been anxious to ask a question for a wee while. I will then invite questions from other members, if they catch my eye.

**Jamie McGrigor (Highlands and Islands) (Con):** As long ago as 2004, the then President of the European Commission, Romano Prodi, stated almost exactly the same argument as his successor, José Manuel Barroso, that upon independence Scotland would cease to be part of the EU. That was echoed by Herman van Rompuy. Since 2004, there has been 10 years for the argument to be sorted out if there is an argument against that. Today is meant to be about legal beliefs rather than saying, “It’ll be all right on the night.”

Which article holds precedence in European law—article 48 or article 49? If article 48 is used, is there a danger that article 48 would allow other EU countries to make demands on issues such as fisheries in UK waters to ensure that they get better deals for their own sovereign states?

**Professor Armstrong:** As I say in my written evidence, I take the view that article 49 is what would be called the *lex specialis*—the specific legal basis for dealing with an entity acquiring the status of being a member state of the European

Union. That seems to be the most obvious reading of the treaties. To me, the article 48 route is legally implausible, because article 48 is a way of renegotiating the treaties between existing member states and not a way of dealing with the relationship between existing member states and some other non-member state. There are other provisions of the treaties—the accession process in article 49 and the international agreement legal basis in article 218—that deal with the relationship between existing member states and non-member states.

For that reason, I do not think that the article 48 route is legally plausible. More important, it is incredibly politically risky. Even if member states were in favour of Scottish membership and the idea of a treaty amendment through article 48, that route would increase the political risks and obstacles to achieving independence within the EU according to the timetable that is set out in the white paper.

**Aidan O'Neill:** I agree with Kenneth Armstrong that the arguments that article 48 could be used are not particularly plausible. That article is to do with the revision of the treaties and either increasing or decreasing the competence of the Union or the member states—it is a matter among member states. Article 49 seems to be the more obvious option. Kenneth Armstrong's written submission looks through the possibility of having interim agreements and ways of ensuring that there is not the instability that I mentioned before.

What must not be assumed—which I think is assumed in the white paper "Scotland's Future"—is that Scotland will simply be able to take over all the opt-outs and the semi-detached status that the United Kingdom has managed to carve out for itself thus far. For example, things such as Schengen, the euro and so on will all be matters for specific negotiation by Scotland. There is no principle or notion of continuity, as a matter of EU law, that would mean that Scotland would retain all the benefits and the semi-detached basis that the UK has. It will have to argue in its own right for its own opt-outs and applications.

**Jamie McGrigor:** If independence day was on 24 March 2016, would the continuity of the rebate, Schengen and the currency be assured during the period between the referendum and that date?

**Aidan O'Neill:** During the period when Scotland is still part of the United Kingdom, they have to be assured. The issue only arises when and if Scotland is seen as a serious candidate for independent membership of the EU.

**Jamie McGrigor:** So, following independence day, those things would not be assured.

**Aidan O'Neill:** Nothing is assured.

**Jamie McGrigor:** None of that EU citizenship would be assured.

**Aidan O'Neill:** EU citizenship is a different matter. It is a matter of the relationship between the individual and the European legal order. We were talking about the relationship between the member state and the other member states, as a matter of treaty negotiations.

**Jamie McGrigor:** I was talking about things such as Schengen, the currency and the rebate.

**Aidan O'Neill:** Those are issues that would have to be subject to negotiation. One cannot assume that an independent Scotland will inherit all the benefits of the negotiations that have previously been carried out on behalf of the UK as a whole.

**Sir David Edward:** Article 48 is not limited to proposals to increase or reduce the competences. It says:

"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"—

which means "among other things"—

"serve either to increase or to reduce the competences conferred on the Union in the Treaties."

I will give you an example of what I envisage happening. My personal opinion is that, following a vote for independence, it would be the obligation of the United Kingdom to table a proposal for the amendment of the treaties to take account of the situation that will occur at the time when Scotland becomes independent from the rest of the UK.

**Patrick Layden:** I think that article 49 is the appropriate route. I agree with Aidan O'Neill that we cannot assume that we would be able to take advantage of all of the opt-outs.

Leaving aside the technical arguments, the difficulty that I see about the United Kingdom presenting a proposal for the amendment of the treaties immediately after a vote for independence is that the negotiating position of an independent Scotland will depend to a large extent on the arrangements that are agreed between the Scottish Government and the UK Government on matters such as whether the Bank of England will continue to be our central bank and lender of last resort. From the point of view of the financial negotiations with the European Union, that is an extraordinarily important matter.

I can just about see that, if the Bank of England continues to function as Scotland's central bank and lender of last resort, and if the EU is prepared to put up with the situation in which there is not an independent central bank in Scotland—it is not at all clear that the EU would agree to that—we could

argue coherently that we should stay out of the euro. If, however, we have not agreed that with the United Kingdom, what is the United Kingdom Government going to say to the European Union by way of treaty amendment? It cannot say that it wants Scotland to be exempt from article 119, which is the one that says that everyone has to be part of the euro, because at that stage we will not know whether there is a coherent plan to replace article 119. The UK has a formal opt-out from that article, but Scotland would have to argue for that.

It is impossible to work out what amendments to the treaty you would want as at September 2014. You would not know that until you had finished the process of agreeing with the UK precisely what the split would be and what the arrangements would be for separating institutions or sharing them. You would not know what package Scotland was going to put to the European Union. Even if the UK wanted to do so, it would not be able to put a coherent proposal to other member states.

**Jamie McGrigor:** I take the point that you make. Does that mean that, if article 48 was used, that would require the UK to do all the negotiations on behalf of Scotland?

**Patrick Layden:** Yes.

**Sir David Edward:** It would be on behalf of the United Kingdom—

**Jamie McGrigor:** Sorry, on behalf of the United Kingdom for part of the United Kingdom.

**Sir David Edward:** Including Scotland. On the argument that the UK ceases to have responsibility for Scotland's position if there is a vote for independence, does the Parliament of the UK cease to have legislative competence? Do the ministries responsible for non-devolved matters cease to have responsibility during this period? No, they do not. Until the moment of independence, the United Kingdom remains the United Kingdom and the institutions of the United Kingdom have responsibility vis-à-vis the whole United Kingdom, including Scotland. The idea that a vote for independence brings into birth an autonomous entity called Scotland is legally unsound.

**Professor Armstrong:** There is something incredibly curious about that result. The white paper dismisses and derides the current arrangements by which the UK Government handles European business that affects Scotland, yet suddenly when it comes to the most important issue—Scotland's independent membership of the EU—it seems content with the idea that the UK Government's arrangements will be okay for handling that. That seems rather odd.

Secondly, why would an independent Scotland want to harness its ambitions to a treaty revision

process that will be handled by the UK Government when we know that strong elements within the ruling party—the Conservative Party—would want to reopen treaty negotiations on a whole host of other things, which would be likely to bog down the entire negotiation process and may ultimately lead to its failure? That is why I said that it is not just that there are legal problems with the choice of article 48 over article 49. Even if we are in favour of article 48 as the route, the political risks are much higher.

**Jamie McGrigor:** But the committee is trying to deal with the legal side of things.

**Professor Armstrong:** But I am saying that the political risks follow directly from the legal strategy. In response to your question about the UK Government piloting the treaty amendments, my point is that that exposes Scotland to even greater political risks than were it to go down the accession route of article 49. It is about the linkage between the legal strategy and the political risks.

**The Convener:** Mr Armstrong, do you actually believe that a negotiated position worked out between the Scottish Government and the UK Government to take a proposal to Europe would not be done in good faith? Are you saying that the UK Government would organise a bad deal for Scotland out of spite or something?

**Professor Armstrong:** I said nothing of the sort. I think that the UK Government can, of course, negotiate in good faith, but it will have to deal with competing interests, one of which is its own interests, which are to open up the treaty revision process to deal with an on-going debate in the rest of the UK about the division of competences and the repatriation of competences in some areas. That whole agenda will suddenly open up. There will be an incredible risk of an issue linkage between Scottish membership of the EU and the UK's own political interests in the EU. That is not an issue of bad faith; it is a potential conflict between legitimate interests.

**The Convener:** So the biggest risk is the UK Government's position on whether it wants to be in or out of Europe and whether it wants to renegotiate treaties?

10:00

**Patrick Layden:** No. That question will no doubt be settled at some stage after the next UK election. David Edward is absolutely correct that, until the day of independence, the United Kingdom Government has a duty to represent the interests of the whole of the United Kingdom, including Scotland.

The difficulty in the period between a vote and formal independence is that the white paper

contemplates that the United Kingdom Government will, in effect, go to Europe and say that it wishes to propose treaty alterations that will have an effect after formal Scottish independence. In other words, the UK Government will say that it wants to set up the terms on which an independent Scotland will be part of the European Union. However, once Scotland is formally independent, the rest of the UK will be another foreign European country and it is not at all clear that the things that an independent Scotland will want out of the EU will be things that the rest of the UK will wish to agree to.

One of the examples in the white paper is that Scotland will get a share—which will be negotiated—of the UK rebate. Let us suppose that the Scottish Government and the UK Government can come to an agreement before March 2016 that Scotland will get a 10 per cent share of the EU rebate. Contrary to what it says in the white paper, as a matter of EU law, practice and treaties, an independent Scotland will have to go to the 28 member states of the EU and say, “Please can we have a rebate that is equivalent to 10 per cent of that enjoyed by the United Kingdom prior to independence? We think that is what we are entitled to.” I do not know what the figures are—I have seen one estimate that suggests that 10 per cent of the rebate might be £500 million—or it could be €500 million—a year. In effect, Scotland would be saying to the other member states, including the UK, “Please give us a rebate of £500 million, and the rest of you will have to make that up.”

Under what circumstances could a United Kingdom Government, acting in the interests of the rest of the United Kingdom, agree to accept such an obligation? If we try to bring that negotiation to the point before independence, how could a United Kingdom Government put a proposal to other member states that it simply could not agree to in light of its future responsibilities? That is impractical. Legally speaking and, for that matter, from a commonsense point of view, I do not see how any UK Government could advance a position on the rebate—to take that as an example—prior to formal independence that would deal with Scotland’s interests and its own post-independence interests. I just do not see how any person could represent two points of view that are diametrically opposed.

**Aidan O’Neill:** I agree with Patrick Layden on the point that the UK Government has to continue to represent not only Scotland but the rest of the United Kingdom. It is not a question of the UK Government acting in bad faith if it does not do everything that the Scottish Government would like it to do.

For example, one suggestion in the white paper is that, post independence, Scotland should be able to charge university fees for people from the rest of the UK. Post independence but with continued membership of the EU, that would be direct discrimination on grounds of nationality, which is prohibited as a fundamental principle of EU law. It would be a possibility only if there were a specific treaty amendment to allow Scottish universities to discriminate on grounds of nationality against people from the rest of the UK as opposed to other EU nationals. Without such an amendment, the Scottish Government would be very hard pressed to maintain the policy—which it says it will do—of charging students from England university fees but not home students and not students from the rest of the EU.

How can one expect the United Kingdom Government to say in any pre-negotiations, “We would like you, on behalf of Scotland, to allow a treaty amendment that will in effect allow a discrimination against all the other people we happen to represent in the rest of the United Kingdom”? That is not going to happen. There are therefore clear tensions around the suggestion of going down the route of article 48, because there are competing interests of what are potentially two different member states.

**The Convener:** I appreciate your position on that, but we are trying to focus on the elements of the white paper that have a bearing on this committee’s remit. If you do not mind, we would therefore rather stick to the criteria that have been set for this inquiry.

**Clare Adamson (Central Scotland) (SNP):** I have a load of issues that I would like to ask about, but I guess that I will be restricted by time. I am intrigued by Mr Layden’s comment about the ordinary course of European law, because there does not seem to be anything ordinary about the situation at all; rather, it seems to be an exceptional situation that was not envisaged in the treaties. Is it not more likely that, given the Edinburgh agreement—I would like to hear your opinion on the portions of that agreement on negotiation—a political solution would be found if there were a yes vote and that the political will would take precedence over what would happen in the legal route?

**Patrick Layden:** I agree with you entirely. As I said in my written evidence, if the United Kingdom and the Scottish Government reached agreement as to the terms on which independence would be achieved and if, following that, all the other member states and the European institutions agreed that Scotland should become a member state on the terms that are proposed in the white paper and were prepared to ratify such an agreement within the 18 months between the vote

and Scottish formal independence, I do not think that the detailed question of treaty base matters. If everybody agrees, they will make a new treaty. In the drafting of it, they will tip their hats to articles 48 and 49, article 2 and article 4, or any of the fluffy things that the front of the treaty has in it, and they will do what they want to do politically.

I therefore agree with you entirely on that. However, before you get to that point, you have to assume that all the things in the white paper are going to turn out the way that the Scottish Government wants them to and that all the things that it wants out of the continuity arrangement with Europe are going to be acceptable to all the other member states. If you assume all those things then, yes, the political will will overcome the detail in the treaty. The difficulties arise when you begin to wonder what will happen if everybody else does not agree with our position. I entirely accept your premise that it would be possible for a political decision to overrule all the quibbles about treaty base, but you have to start from the premise that everyone is going to agree with everything that we want.

**Sir David Edward:** For the sake of legal clarity, I add that the number of things in the treaties that would have to be amended is relatively small. A lot of the discussion that we have had has been about things that do not necessarily require a treaty amendment. If we look at the accession of Croatia, we see that the accession treaty is enormous but that the amendments to the treaty articles that are required by the accession are small in number, relatively speaking.

It is important to bear in mind the distinction between what amendment of the treaties must be negotiated simply to provide for Scotland as a state that is separate from the rest of the UK and all the other attendant matters that would have to be negotiated but that do not necessarily require treaty amendment.

**Clare Adamson:** I was also intrigued by the timescale and some of the assertions about how difficult negotiations would be. The UK Government's position at the moment seems to be that it can successfully renegotiate its terms of the treaty and hold a referendum by 2017. That timescale does not seem particularly different and the negotiation for Scottish independence would, in some ways, be far less complex because we want the status quo rather than a change to any of the existing arrangements for the UK.

**Professor Armstrong:** Two implausible timescales do not one plausible timescale make, so that does not quite cut it.

The question that you raised earlier is important because we are in unknown legal territory. It is a question of what seems more legally plausible

than implausible—that is the territory that we are in.

When it comes to the negotiation timescale, we are back to what looks more or less plausible. It is not wholly implausible that the timescale that is set out in the white paper could be met, but we must be realistic about the potential obstacles. One of the disappointments in the white paper is that it does not candidly canvass what might be obstacles along the way and what would happen if the timescale was not met. It is simply a large aspiration that the timescale that has been set by the Scottish Government will be met. I cannot recall any accession process in which the entity that was seeking to become a member state set the timescale itself or determined the date upon which its membership would occur. That seems unusual.

Aidan O'Neill talked about the things that would have to be negotiated. One of the difficulties with setting yourself a specific date by which you wish to acquire independence and Scottish membership of the EU is that you are then under a great deal of pressure to ensure that the negotiations fit that timescale. The question for the Scottish electorate is then: what concessions will have to be made along the way to meet that timescale?

There are great risks in the achievability of the timescale and what concessions may result along the way.

**Clare Adamson:** We are trying to consider the legal issues, but we keep straying into the politics of how it might happen.

I will ask about the EU nationals who live in Scotland at the moment. Earlier, Mr O'Neill mentioned the democratic deficit within the EU. We will have European elections shortly, and there are EU nationals in Scotland who will vote for representatives to represent them in the European Parliament. If we vote for independence and the citizenship of Scottish nationals changes, will the nationality of EU nationals in Scotland remain with their member state? What will happen to them? Will their relationship with Europe go into some sort of limbo at that time?

**Aidan O'Neill:** That is a very interesting question. Let us posit the possible—I was going to say “nightmare”—scenario of Scotland being independent but outside the European Union and, as Patrick Layden suggested, British nationality no longer being afforded to Scottish citizens. Under that scenario, European Union nationals who are here would no longer be within the EU and would no longer have claims against an independent Scotland for the protection of their EU rights.

More important and, perhaps, more stunning, Scottish nationals—we are told that Scottish-born

non-residents will automatically be given Scottish citizenship—who are working elsewhere in the EU—which by then would, I presume, include working in London—would lose all their rights as EU citizens and become extra-communitarians. That would put them in the same category as Americans, Russians and Australians as opposed to the privileged category that includes Romanians, Bulgarians and even Turks because Turkey has an association agreement with the European Community.

One does not want to contemplate such a situation. It would mean a massive change in the rights of EU citizens living in Scotland and, perhaps more important, of Scottish citizens living in the rest of the UK and elsewhere in the EU.

10:15

**Clare Adamson:** Given the implications of what would, in effect, be a hole in the EU, as we would see it—you have just described it as a “nightmare” scenario, which is quite apt—and what was said earlier about stability, would such a situation be not only not in Scotland’s interests, but not in the interests of other EU member states at all?

**Aidan O’Neill:** Absolutely. I agree with what Sir David Edward said on the matter. The European Court of Justice is very keen on the idea that people acquire rights independently of the member states, as part of their relationship with EU law, and the Court would not particularly wish such a situation to arise even if some member states think that it is not a bad thing to cause such chaos or difficulties.

It is interesting that the notion of EU citizenship affects the ways in which member states can withdraw their own citizenship from their existing citizens, precisely because withdrawal of citizenship—such as British nationality—would have an effect on people and cause a loss of EU nationality. The Court of Justice says that such withdrawal must be subject to review by the courts and to a proportionality analysis and test. The case of *Rottmann v Bavaria* addresses the matter.

From a classic public international law point of view, one would think that who does or does not get citizenship would be a matter wholly and purely for an individual member state. However, once a country is a member state of the European Union, citizenship becomes a matter for the courts—precisely because of the effects that it has on individuals and their EU rights—and, ultimately, for the Court of Justice.

**Patrick Layden:** I do not understand the implications of that argument. It seems to suggest that, because we are citizens of the EU now, we will, even after formal independence, remain citizens of the EU. The scenario might, as Clare

Adamson said, leave a hole in the EU, but we will have dug that hole. We will not fall into it by accident; we will have taken the decision to come out of the UK. If that happens, unless some exceptional political will is evidenced between the vote and formal independence, our citizens will, on Scotland’s achieving formal independence, not be citizens of the EU.

I am not particularly impressed by the idea of chaos in those relationships and citizens walking along the roads and suddenly finding themselves bereft of their right to do so. There are a lot of countries in Europe that are not in the EU but in which EU citizens can move quite freely. If you visited Norway, you would go outside the EU but that would not affect your ability to walk around the place and buy things in the shops, and so on. It would affect your ability to vote in elections—Norwegian citizens here cannot vote in EU elections—but that could be sorted out if we wanted to sort it out, which we probably would through some sort of agreement with the EU as an institution.

We could agree, as a matter of international law between an independent Scotland and the EU, that for a certain period—however long we thought that it would take to achieve formal membership—nationals of Scotland would have certain rights in the EU and vice versa. That agreement would not affect contractual arrangements, and we could suspend or arrive at an interim solution, so Sir David Edward would still get delivery of his car without paying large amounts of excise duty on it. That is the way in which I would approach it.

**Sir David Edward:** Can I ask Patrick Layden what article of the treaty permits one to give temporary concessions to citizens of countries outside the EU?

**Patrick Layden:** I think that, if the European Union were minded to have a treaty with an independent Scotland, just as it is minded to have a treaty with an independent Norway, it could do so. I do not see that such a treaty would include voting rights, but I do not think that the right to vote in local and European elections is the most important part of our ability to move around the rest of Europe.

Otherwise, I do not see why excise matters would affect goods and fishing rights, for instance. Other countries that have rights over fishing make arrangements with the EU so that EU fishing boats can go and use their waters. Norway and Iceland do that and we could do it, pending a formal negotiation by which Scotland would become part of the EU. If I were in the position between the vote for independence and formal independence, I would put my energy into making sure that the existing arrangements, in so far as they are

important to us, would continue. I do not see any particularly technical difficulty with that.

**The Convener:** I am conscious that colleagues are not getting to ask as many questions as they would like, even though your evidence is very interesting.

**Neil Bibby:** As has been said, the white paper states that Scotland's transition to membership of the EU would be secured under article 48. This morning, we have heard that that is not plausible. As Jamie McGrigor has said, President Barroso of the European Commission indicated that article 49 would be the route taken. President Van Rompuy of the European Council said:

"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 Treaties would no longer apply to that territory."

The Spanish Prime Minister has said:

"I know for sure that a region that would separate from a member state of the European Union would remain outside the European Union and that should be known by the Scots and the rest of the European citizens."

The Croatian Prime Minister said:

"Croatia strictly adheres to the position that all prospective EU members have to undergo a thorough, strict and fair negotiating process, fully adapting to the body of legislation, the rules and procedures of the EU"

and

"there can be no short-cuts".

Different things could happen but, given what is being said in the EU, it looks highly likely to me that article 49 would be the route in and not article 48 as is stated in the white paper. Given what is being said in the EU, what would make Scotland's entry to the EU go down an article 48 route? Would anyone suggest that if President Barroso, President Van Rompuy, the Spanish Prime Minister and any other prime minister want it to be done under article 49, it cannot and will not happen?

**Sir David Edward:** I will just say this. I was a judge at the European Court of Justice for 14 years, and I remember repeated occasions on which politicians asserted particular positions that the Court found to be wrong.

**Neil Bibby:** There are two sets of politicians asserting two different things, so that could apply to the Scottish Government as well.

**Sir David Edward:** Of course. I am not suggesting otherwise. My position has always been very limited. There will be a gap in time between the vote and the moment of independence. In that period of time, you will have an obligation to negotiate a solution to the

problem. That has been ignored by Barroso, Van Rompuy and all those who talk about it.

My belief is that you could mount a case before the European Court of Justice, although whether you would get an answer within the 18 months is an entirely separate question. Am I going to lose my rights at the moment of independence? I do not know what the answer will be, but I am prepared to bet that it will not be the Van Rompuy answer.

**Professor Armstrong:** If you put a bunch of lawyers in a room—well, there are four of us here, so you will probably get at least eight opinions on what might happen. It is very easy to get caught up in the arguments around whether the route should be article 48 or article 49. For the reasons that I gave earlier, it is clear to me that article 49 is the correct route. Whichever route you take, whether it be a treaty amendment or an accession process, the same legal requirements will arise, which are the unanimous consent of the existing member states and the ratification by the member states of whatever is agreed.

Both of those requirements create risks. The first risk is that one or more member states will decide to exercise their right of veto. Whatever we may say about the rights of individuals and citizens and all the rest of it—those are important claims, and they give rise to obligations to negotiate in good faith, as Sir David Edward articulated very clearly—none of that can deviate from the hard legal truth of the treaty, which is that any state can veto the process. Let us not forget that France held the UK out of the European Economic Community through the 1960s. When the UK sought to join in 1963 and 1967, de Gaulle said, "Non." We should not be surprised if, at some point, another member state—it may well be Spain—decides either to exercise a veto or at least to threaten to exercise the veto.

The second risk is around ratification. We ought to assume that ratification should occur without too much difficulty. However, if we go down the article 48 route of a treaty revision, and if that treaty revision deals with more issues than Scottish membership of the EU, that may create potential ratification problems in member states if, for whatever reason, they do not like the treaty revision that is being proposed.

The timescale for ratification itself needs to be factored into the overall timescale. There is a real difference between what the white paper says and what the supplementary paper on Scotland in the EU says. The white paper discusses the negotiations and all other processes being completed within 18 months. The supplementary document refers only to the negotiations being completed within 18 months. If we require ratification on top of that, it could delay the

process for another six or 18 months. Some form of legal hiatus is a risk.

**Willie Coffey (Kilmarnock and Irvine Valley) (SNP):** I would like Kenneth Armstrong on my side when we are doing risk assessments and so on, to pinpoint the potential negatives and pitfalls that might arise. Sometimes we forget that a democratically expressed vote by a nation state for its independence could give rise to such negative and hostile reaction—against Scotland—within Europe, but I do not see that one would cause the other.

It is clear from what we have heard this morning that three of our guests favour the article 49 route, and one of our guests favours the article 48 route. I ask those who favour the article 49 route to explain the legal basis on which Scotland would find itself outside the European Union. Could you explain that to me, and whether it is your opinion or whether there is a legal basis to casting Scotland out of the European Union? I also ask Sir David, who expressed the alternative view that article 48 could be deployed, for his view on that.

**Aidan O'Neill:** Article 49 states:

“Any European State which respects the values referred to in Article 2 ... may apply to become a member of the Union.”

Scotland would be a European state that respected the values of article 2, so that would seem to sit squarely within the terms of article 49.

It is certainly not a European state at the moment, because it is part of the United Kingdom. Something new is going to be created upon independence—we are all agreed on that. If something new is created upon independence and we are to have a new member state, there is a requirement, as Sir David says, to have at least some amendment of the treaties to allow for representation at the Council and by members of the European Parliament, and on the voting weight that is to be accorded to that new, independent member. Clearly, change has to happen in the treaties. As Professor Armstrong said, that requires unanimity among all the existing member states. Those are simple legal facts—whether they are politically welcome is not for me to judge or give any view on.

**Willie Coffey:** Is there a component part or mechanism in any of the treaties that says that Scotland shall be expelled at some point in this journey? Is there anything in any of the treaties that says that explicitly?

**Aidan O'Neill:** It is not a question of Scotland being expelled. Scotland is part of the European Union as part of a member state. The question is: how will Scotland become an independent member state in its own right? That is a different matter.

**Willie Coffey:** I am talking about the presumption that article 49 can be deployed only for a state that is outside trying to get in. At what point does Scotland become an outside state, and what mechanism in any of the treaties gives rise to that?

10:30

**Aidan O'Neill:** The wording of article 49 simply refers to

“Any European State which respects the values”

of the EU. The question is: what is meant by “European State”? From the evidence that we have got thus far, one clear tension is that, in normal international organisations, politics trumps law, but in the European Union, law trumps politics, and the ultimate arbiter of what is meant by “European State” for the purposes of article 49 would be the European Court of Justice.

I do not think that it would have been envisaged before, and it would be stretching things a bit to say that Scotland in nuce, as it were—in embryo—while still formally part of the United Kingdom is a European state for the purposes of article 49, but I agree with what Professor Armstrong and Patrick Layden said. There could well be pre-negotiations with a view to trying to ensure that, on independence, there will not be the nightmare scenario that I outlined of Scotland no longer being represented in the EU, but people still retaining European citizenship in so far as they retain British citizenship.

Patrick Layden said that he does not understand that. I am not quite sure why, because the decision to withdraw British citizenship has to be a separate decision by the Government of the rest of the UK. It does not follow automatically that, simply because a territory is no longer part of the UK, the people in it are no longer British citizens. There are some parallels with what happened in Ireland with the creation of the Irish Free State. British citizenship is a strangely organic thing that has developed over time. It used to be the case that anybody in the empire was entitled to a British passport. We did not really have a notion of citizenship at all; it was about being a subject of Her Majesty the Queen-Empress, from Victorian times onwards. The idea of British citizenship has evolved over time in association with European citizenship, but now the two are interlinked and intertwined, and one cannot make the classic public international assumption that, because a territory is no longer part of a particular state, the citizens will and can automatically be deprived of their previous citizenship.

**Willie Coffey:** I ask you again to clarify what mechanism in the treaties would see Scotland pushed out of the European Union.

**Professor Armstrong:** Scotland is not a member state of the European Union. Scotland is a constituent part of the United Kingdom, which is a member state of the European Union, so the premise of your question is simply wrong. It is not a question of Scotland as a member state being expelled and then Scotland as a member state seeking to rejoin. At the moment at which Scotland becomes independent from the United Kingdom, which is the member state, the treaties cease to apply to Scotland.

**Patrick Layden:** The point that Aidan O'Neill makes is that citizenship does not stop, so we might still be British citizens. The arrangements between an independent Scotland, or a soon-to-be-independent Scotland, and the rest of the United Kingdom about free movement of the people north and south of the border are a matter for us. We can decide—and I hope that we would, as the UK did with the Irish in the 1920s—that people can move freely back and forth, and might have voting rights and so on.

The test for European citizenship is that you are a national of a member state; every national of a member state shall be a citizen of the union. If, following independence, we say that our nationals are still nationals of a member state—the United Kingdom—and are therefore citizens of the European Union, I do not see what we are gaining from independence, because the only European member state at present is the United Kingdom, which represents the whole of the United Kingdom, as Sir David Edward said. The whole point about independence, as I understand it, is that we are able to represent our own interests in the European Union, and not have our interests submerged in those of the wider UK. I understand that perfectly.

The process of becoming independent of the UK logically entails being outside the European Union because the only way we are in the EU is by being part of the UK. If we come out of the UK, we come out of the EU. One follows the other. Obviously, we can decide to do that or not to do that, but if we do it the consequence of not being part of the UK is that we are not part of the European Union.

**Willie Coffey:** You used the phrase “logically entails”. What is the legal basis for your point of view?

**Patrick Layden:** The legal basis is that the new state that will be called Scotland is not a member state of the European Union. When you look at the list of states set out in the treaty, you will see that Scotland does not appear. There is no Scottish judge appointed as such to the European Court of Justice, there is no Scottish commissioner and there is no Scottish seat at the Council. There are Scottish MEPs—or MEPs from Scotland—in the European Parliament but they are there not as

Scottish MEPs but as UK MEPs. If we came out of the EU, those things would have to be sorted. If we leave aside all the opt-outs and things, we would be talking about minor amendments to the treaty. However, they would still have to be made and any treaty amendment requires unanimity.

The legal point is that the white paper's whole essence and aspiration are to take Scotland out of the UK and enable it to join or become a member of the EU as a separate independent state. The process of leaving the UK necessarily involves Scotland coming out of the EU, because if it did not and one argued, as Aidan O'Neill has done, that citizenship would continue, you would have to ask about the basis on which Scotland was part of the EU. We know that Scottish citizens are citizens of the EU because that is an inalienable right that we cannot get out of, but how do we then move directly to the treaty amendments? What duty is there on the other member states to agree the treaty amendments that are necessary to get us into the Council and the Court? There is a logical and legal gap between saying that, because its citizens are part of the EU, Scotland itself must be part of the EU, and sorting out the practical arrangements to make that work. That, of course, assumes that there is no dispute over the terms on which we are EU members—and there will be a lot of dispute over that because we want what the UK currently has, and other member states are unlikely to accept all that.

**Aidan O'Neill:** I did not and have never argued that the continuing European Union citizenship of Scottish nationals would mean that Scotland would be a member of the EU. What I am saying is that having a large group of European citizens outside the EU would create an unstable situation, and that political reality would encourage the idea of passing with unanimity treaty amendments to the effect that Scotland with its 5 million EU citizens who are outwith the EU should actually have to take on some of the responsibilities of EU membership by coming on board and being a full independent member of the EU. However, the citizenship issue is a separate matter and an important weighing factor that will affect the legal and political realities.

**Willie Coffey:** Does Sir David have any views on the matter?

**Sir David Edward:** I will have to give a clearer explanation of my thinking on article 48.

I envisage that it would be necessary to have a treaty agreed, certainly with unanimity and ratification, which might or might not be possible within the 18-month period set out in the white paper. What might the treaty say? It might, for example, say, “Considering that it is agreed that Scotland and the rest of the UK shall be separate states as from a date to be determined,

therefore”—and this would be article 1—“as from that date article 52 of the Treaty on European Union shall be amended to the following effect. The Treaty shall apply to the Kingdom of Belgium, the Kingdom of Scotland and the United Kingdom of England, Wales and Northern Ireland.” That is the treaty amendment that I would envisage, which could be agreed long before the moment of independence and would take effect at the moment of independence.

That is a different question entirely from the 1,001 other things that would have to be negotiated and the perils that would be encountered on the way because of difficulties with other member states. However, if we are talking simply about the law, it is perfectly possible to have a treaty amendment agreed that would take effect at a moment in the future.

**Willie Coffey:** To finish off, I have a question for the three gentlemen who favour the article 49 route. Are you saying that it is impossible, legally, to use article 48 as Sir David Edward set out?

**Patrick Layden:** I do not say that it is impossible. I say—as I said earlier—that if everyone agrees on the result that we want to achieve, the question of treaty base becomes one of little importance. The problem arises if an attempt is made to use an existing treaty base that is not the appropriate one. In that case, as well as facing the very serious practical and political problems that Professor Armstrong mentioned, we would be liable to challenge in the European Court of Justice. As Monsieur Piris said in his written evidence, the European institutions like to have things done in accordance with the appropriate treaty base. The very fact of having a challenge in the Court of Justice of the European Union would knock out the timetable, because the timetable will work only if everyone agrees.

Many things will need to be decided in the 18-month period. A serious deal will have to be done internally between Scotland and the rest of the UK. That will be a lot of work, and I think that it is pretty optimistic to think that it could be done in 18 months. If we add on to that a negotiation with Europe, it becomes extremely optimistic to think that that could be done in 18 months, and if we include every nation's ratification process, it becomes a hopelessly optimistic view, but if all those things could be done, the timetable would work.

The risk is that, if we or the UK tried to use an existing treaty base such as article 48 in circumstances in which there was not complete unanimity and we were met with an objection from another member state or from the European Parliament, which has rights under article 49, that would, in effect, block the process.

**The Convener:** I want to pick up on your point about timescale. There will be a lot of discussion about timescale, whether legal or political. Last week, we took evidence from two members of the European Free Trade Association, who gave us an insight into the position that was arrived at with Austria, Sweden and Finland. Sir David Edward has provided us with evidence on the 35 articles that we would need to meet, but some of us—indeed, probably all of us—would contend that, to be compliant with EU law and EU institution procedure and process, we probably already comply with all those articles, pending negotiation on some of the opt-outs. That is the position that we are in.

Last week, EFTA said that Austria, Sweden and Finland were probably about 70 per cent there when it came to meeting all the conditions of the articles, but the whole negotiation process took only 13 months, so I do not think that it would be unrealistic for the suggested timescale to be met, given the precedent that has been set by Austria, Sweden and Finland.

**Patrick Layden:** I agree that, technically, Scotland already complies with its European obligations and that, on the technical aspects of whether we could implement EU legislation, we would have little trouble persuading people that we were perfectly able to do that.

However, there are two other aspects. The first is that the European institutions expect to deal with independent authorities in member states on matters such as finance. In every member state, they expect to find a central bank to which their bankers can talk. They expect to find independent authorities on a range of national institutional matters, so that they have a responsible contact point in each member state.

One of the questions that we are going to have to discuss with the UK Government, following a yes vote, is how Scotland sets those up in Scotland—or, in the case of the Bank of England, whether we can carry on in a sterling area with the Bank of England as the lender of last resort and our central bank.

10:45

I do not know whether, if we managed to secure that agreement with the UK Government, the EU would accept that as a sufficient discharge of our duty to have an independent financial authority in Scotland. I know that you could not open a negotiation with Europe on that matter until you had secured an agreement—or a disagreement—with the UK Government. Therefore, part of the 18-month period will be spent reaching an agreement with the UK Government on that matter and the terms on which the arrangement would

operate. Even assuming that the arrangement were agreed on, there would be a period of negotiation in order to arrive at the solution. At that point, you could go to the EU and say, "We have a central bank, which is the Bank of England. That is how things are going to work. Would you please agree to that being our independent financial authority?" However, one thing has to happen before the other thing can take place. Leaving aside the issue of all of the other things that we will have to negotiate with the UK Government before independence, that is why I think that a timetable that involves settling with Europe at the same time as settling with the UK is impractical.

If you look at the matter in critical path analysis terms, there are various things that we could talk to Europe about while we were negotiating with the UK Government, but there are other things that we cannot talk to Europe sensibly about until we have finished negotiating those particular matters with the UK Government. That is why I think that the timetable is challenging.

**The Convener:** Some would say that the impracticality is the UK's insistence that it will not negotiate on some of the matters that could be negotiated before the referendum.

**Patrick Layden:** You may well be right but, at present, that seems to be a political fact. Applying such legal judgment as I have to the facts, I can say that, if the negotiations on either basis—either with the EU or with the UK Government—cannot start until after a yes vote, the position is, as I have said, that there are some discussions that will have to wait until we have reached agreement with the UK Government. I entirely agree with you that, if we could get agreement in principle with the UK Government now, that would make things much easier.

**Professor Armstrong:** The convener gave a useful example of the accession of Austria, Sweden and Finland, but there are four points of differentiation. One is that that example involved an enlargement from an EU of 12 to one of 15, which meant that the ratification process, which took another six months, was relatively quick. We might expect that process to take longer in the case of an enlargement from 28 to 29.

Secondly, for the reasons that Patrick Layden gave, you are talking about conducting parallel negotiations at the EU level and domestically, with regard to unpicking the union. That will be challenging.

Thirdly, Austria, Sweden and Finland were independent states that exercised powers already as EFTA states.

Fourthly, Scotland is not exercising the same competencies under devolution as it would be exercising were it to become independent.

Therefore, EU member states will have to be satisfied that they understand how an independent Scotland would institutionally and politically manage the areas that Patrick Layden highlighted—foreign policy and economic policy. The accession procedure under article 49 is there to verify how an independent state would exercise its responsibilities under the treaties.

**Roderick Campbell (North East Fife) (SNP):** I refer members to my entry in the register of members' interests, which notes that I am a member of the Faculty of Advocates.

Sir David, I would like to follow through the question of continued membership of the EU and whether, after a yes vote, a reference could be made to the European Court of Justice. Given some of the matters that we have discussed, will you speak about the pros and cons of an early reference to the European Court of Justice?

**Sir David Edward:** If we look at precedent, there are examples of cases being brought before the European Court of Justice on the basis of an action in a national court for a declaratory judgment. In some cases, particularly affected businesses have sought a declaration—or what we in Scotland call a declarator—that, if something is done, certain results might follow that would be illegal.

I do not exclude the possibility that a declarator could be sought that, for example, asserts that I—a Scot living in Scotland and currently a national of the United Kingdom—claim the right to continued citizenship of the EU from the moment of independence. Alternatively, a business could seek a declarator that asserts that its right to import goods free of customs duties from other member states should continue. In that event, I envisage that a national court might make a reference to the European Court in Luxembourg.

The procedure for references provides for an accelerated procedure, so it is possible, but not certain, that a judgment on the issue could be got from the European Court relatively quickly. That is another problem in the timescale that has been discussed. However, I am not discussing timescales; I am discussing what is legally possible. I do not know whether that has answered your question.

**Roderick Campbell:** What impact might that have on any political discussions that were going on at the same time? Could that assist in concentrating political minds?

**Sir David Edward:** Political minds would be concentrated in a number of ways because, if we assume that a reference was made and that the Court in Luxembourg accepted it, the institutions and the member states could be represented in the discussion about that reference. The United

Kingdom, the Kingdom of Spain, the Commission, the Council and the European Parliament would have a right to intervene and make their position clear. They would then have to decide what position they would take, quite apart from the position that the Court took at the end.

The raising of such an action and the acceptance of such a reference could focus minds very effectively on the position that bodies were going to take. However, I do not say that all that could be done in 18 months. That is a totally different question.

**Roderick Campbell:** Does anyone else on the panel want to comment?

**Aidan O'Neill:** Much as I would love to argue such a point, I think that there are fairly big problems. First, a reference is a matter solely for the national court; it is not for the parties to say, "We want this to go to Europe." The court has to be convinced.

Courts—not just Scottish courts—are not keen on anticipating matters and considering what might be hypothetical questions. In particular, they are not keen on highly sensitive political issues. There would have to be a real decision that had absolutely foreseeable impact, which could be judicially reviewed, and the Scottish courts—I presume—would have to be persuaded that making a reference was necessary. Scotland has not been at the forefront of the countries that make references to the Court of Justice.

The hurdle then has to be got over of persuading the Court of Justice that this is a real question and not some kind of manufactured legal question to make a political point. It is conceivable that such a challenge could be made, but fairly large hurdles would have to be got over even to get to Luxembourg.

**Professor Armstrong:** If the wider theme of Roderick Campbell's question is about what litigation might do in the process, then if the article 48 process were opened and a treaty amendment was proposed, that would need to go to the European Council for a decision that would be taken by a simple majority. If the UK in good faith wanted to open that negotiation, the European Council would have to make that decision.

At that point, it is not inconceivable that another member state might want to challenge the legal basis of the use of article 48 as the means to effect Scottish membership. That is one way to avoid the issue of hypothetical questions that Aidan O'Neill mentioned and it would bring the case to the European Court of Justice directly rather than indirectly through the national courts. If Spain, for example, felt that it would be in its national interest to query the use of article 48 as the legal basis, it would be well within its power to

bring a legal challenge to the European Council decision on opening the treaty revision process.

**Roderick Campbell:** I have a question for Mr Layden. You have moved some distance from the evidence that you gave to the House of Commons Scottish Affairs Select Committee in May 2012. Will you clarify why you now take a different view from your view then?

**Patrick Layden:** Is that on whether there would be one successor state or two?

**Roderick Campbell:** Yes.

**Patrick Layden:** I looked further into the matter and, as I said in my written evidence, national practice and political acceptance of the situation have a great deal to do with the effect in international law. If Scotland became independent of the United Kingdom, it would be possible, as Sir David Edward has said, to say that there are two successor states. If there were two successor states, both would be out of the European Union and both would have to apply to get back in.

I agree with Sir David Edward that that is a tenable view. However, it is not the view that the UK, other member states or the European institutions seem to be taking. If that view is accepted, that involves not just the European Union but lots of other international organisations in the same difficulty over who the successor state is.

As a matter of realpolitik, when the Soviet Union broke up, the Russian Federation said, "We are the successor. We are the continuing state." The United Nations Security Council and other international organisations were happy to accept that, because it gave stability and predictability and enabled business to carry on. In the same way, as a matter of domestic law, EU law and—I suspect—international law, if the separation of Scotland from the United Kingdom is portrayed in United Kingdom legislative terms as Scotland being made independent but the United Kingdom continuing, which is what happened with Ireland, I suspect that other European states and international organisations will accept that.

As you said, I have moved on. I now think that, as a political/legal fact, the position will be that the UK will remain a member state of the EU and Scotland will be outside the Union.

**Roderick Campbell:** I would be grateful for Sir David Edward's comments on that.

**Sir David Edward:** The discussion about what happens under other international treaties is entirely by the way in the discussion of the EU position. It may perfectly well be the case that the United Nations would accept rest of UK, whatever that may mean—as I pointed out, it could be said

that there was no longer a Great Britain of which there could be the United Kingdom.

However, be that as it may, let us make an assumption. My position is and always has been that we do not get away from the existing situation, in which a vast number of reciprocal rights and obligations have been created, there are acquired rights and there is an obligation to avoid the disruption of those rights. As I have pointed out, it would be possible to achieve a situation in which we do not arrive at the discussion in the EU context of successor state and new state.

11:00

**Hanzala Malik (Glasgow) (Lab):** Good morning, and thank you for your deliberations so far. I am interested to know which is the best route to go down. The mission of accomplishing EU membership within 18 months is a very large ask, and I am realistic enough to realise that that will probably not happen.

Whether or not Scotland becomes independent, I will retain my British nationality. Companies that operate out of Scotland today are British companies—they may call themselves a Scottish enterprise or whatever, but they are British. In the gap between Scotland's not being an EU member state and its becoming a member state, would it be possible—given that we would technically still be British—for such trade and those companies' British nationality to continue until Scotland's EU membership was established?

**Sir David Edward:** Certainly, that could continue. However, the example that I gave of the customs union was not a trivial point. The customs union was the first thing to be established by the EEC. If there is a customs frontier, the decision must be made on whether goods that pass across that frontier are passing within, into or out of the customs union—it is not a matter of choice. Of course, we can get interim solutions, but we must have a treaty method of getting them. There can be an agreement, but there is nothing to have an agreement with until Scotland becomes an entity that it is possible to have an agreement with. It is a catch-22 situation.

**Hanzala Malik:** I am speaking of that interim period—if there is a yes vote, there will be an interim period. The UK Government and the European Union are both refusing to enter into discussions so, whether we like it or not, there would be a period of insecurity about how we deal with such issues. That is why I am toying with the idea that, if our companies remain British—they are obviously British now, as are we—we may be able to use that as a tool to continue to trade legally.

**Sir David Edward:** Until the moment of separation, nothing will change. There will be no need to make special arrangements because the arrangements are already in place. It is only on the assumption that a separation will occur that the problem arises.

**Aidan O'Neill:** One must make a distinction between European citizenship for natural persons, or real people, and the European trading rights that legal persons—companies—might have. For the reasons that I have outlined, I think that the notion of individuals continuing to have citizenship might be relied on in any period of hiatus or interim. However, I think that specific treaty measures would have to be made on an interim basis to enable legal companies to continue to trade despite the fact that they would still be based and registered in Scotland.

If Scotland becomes independent and is not—as Sir David Edward said—at that point part of the EU, it will be necessary to set up customs barriers and the like, precisely because the EU is a customs union. Anything outside the EU is outside that customs union, so there are restrictions on movement of goods, services and the like. A decision has to be made either way. There must either be an agreement to keep things as they are in the interim, or else active steps would have to be taken to set up customs posts to maintain the integrity of the EU at Berwick-upon-Tweed and down to Carlisle.

**Hanzala Malik:** Surely it will put us in grave danger of losing our industry if we cannot come up with a solution. Is there anything in law to protect us from that?

**Aidan O'Neill:** No. The rest of the UK would have an obligation under EU law to maintain the integrity of the customs union. It is not a matter that Scotland could do anything about.

**Hanzala Malik:** Yes, but that is only up until the independence date. If and when that arrives, that is when there could be a problem for us if we do not have anything in place.

**Aidan O'Neill:** Yes. There are rules under the World Trade Organization, the general agreement on tariffs and trade and things like that, but Scotland would also have to join those.

**Patrick Layden:** That is why I suggested that in the 18-month period between a yes vote and actual independence—supposing that the period is 18 months—the Scottish Government could attempt to negotiate an interim treaty, not as a member state of the European Union, but between a soon-to-be independent Scotland and the European Union. That would have the effect, depending on how it was negotiated, of maintaining our customs links, on the basis not that we are a member state of the European Union

but that we are an external state with a particular trade arrangement with the European Union. I do not think, sitting here now, that that would be at all impossible.

**Sir David Edward:** There is no entity called “Scotland” that is capable of making such an agreement with the European Union.

**Patrick Layden:** I agree. We would not be talking at that stage about membership of the EU, but we could have informal negotiations with the EU so that on the date when Scotland became independent—as Sir David Edward said earlier in relation to possible change—an international treaty between Scotland and the EU would come into effect. The practical result would be that arrangements such as customs unions, companies trading and so on could carry on during that interim period on the same basis as between member states of the EU. I do not think that it would be easy to do, but neither do I think that it would be technically impossible.

**The Convener:** I have a very quick last question. I know that we have begged your indulgence for a very long time this morning, but your evidence has been very interesting. Sir David Edward’s written submission refers to

“singing from the same hymn sheet.”

You give a reference for that in a footnote, which states that

“The hymn sheet seems to be an unpublished opinion written some time ago (before the Lisbon Treaty came into force) by a former Director of the Legal Service of the Council of Ministers.”

My understanding is that that refers to Jean-Claude Piris. Is that correct?

**Sir David Edward:** That is my understanding.

**The Convener:** Do you agree with the premise that he put forward in his submission last week to the committee, which was disappointingly used in a very political manner before the committee saw it this week? I would like a brief insight into what you think his position is and where you disagree.

**Sir David Edward:** I have never seen the opinion—I have simply been told that he gave it a considerable time ago and that it was the origin of all the statements that have been made ever since by the leaders of the European institutions, who have a very good political reason for wishing to make such a statement.

My disagreement with Jean-Claude Piris and with everybody else who discusses this arises because they assume that the moment of the vote is the moment of independence. They fail to note the difference between voting for independence and actual separation. He does not engage at all with the problem of acquired rights and how that is

to be resolved; he simply assumes that the public international law relating to secession applies in this context. My point is that it does not, because we are talking in a treaty context, which is totally different.

**The Convener:** I thank you all very much for your evidence. We have found it very interesting and I have overextended the time—the clerks are worried about timing for the rest of the committee. We will break for a few minutes.

11:11

*Meeting suspended.*

11:15

*On resuming—*

### **“Brussels Bulletin”**

**The Convener:** Welcome back to the European and External Relations Committee. We had a long but—I think that members will agree—interesting evidence-taking session.

We move on to agenda item 3, which is consideration of the “Brussels Bulletin”. Members have the bulletin in their papers. Are there any issues, comments, questions or queries on it?

**Jamie McGrigor:** I have a question about the paragraph on state aid for agriculture. I see that the de minimis aid, which is the aid that does not need to come under state-aid rules, has been doubled. That will be good news for crofters and small farmers, but do we know in what ways it can be used? I can check that with NFU Scotland.

**The Convener:** We can get Scotland Europa to give us a more detailed analysis.

**Jamie McGrigor:** It is good news for a lot of people that the amount has been doubled.

**Clare Adamson:** I will comment on the horizon 2020 report. It is interesting that the European Parliament has published the internal report on the research and innovation potential, but I note that the bulletin says that awareness of horizon 2020 among small and medium-sized enterprises throughout Europe is increasing. Would it be possible to investigate whether there are any Scottish statistics on that and how the research to get to that conclusion was conducted?

**The Convener:** If there are no more questions or comments, do we agree to refer the “Brussels Bulletin” to the subject committees and committees of interest?

**Members** *indicated agreement.*

**The Convener:** Thank you very much. We now move on to agenda item 4, which we have previously agreed to take in private.

11:18

*Meeting continued in private until 11:31.*



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