

# How Might Other Member States React to an Independent Scotland's Application to Join the EU?

Patrick Layden QC\*

## Introduction

One of the features of the Scottish Government's approach to all the questions about the implications of Scottish independence is its apparent assumption that matters across a wide range of policy issues will be resolved in accordance with its wishes. In relation to independence from the United Kingdom, the Scottish Government's position is that Scotland would become formally independent in March 2016, 18 months after a "Yes" vote in September. In relation to the EU, the Scottish Government's policy is that Scotland would become a member of the EU at the same time. The Scottish Government has set out a list of the terms upon which they expect membership to be agreed<sup>1</sup>. These are essentially variations of, or derogations from, the "acquis communautaire".<sup>2</sup>

In this article I consider the legal risks to the successful implementation of that policy, in terms both of timescale and of substance.<sup>3</sup> In particular, I consider how the European institutions, and other Member States, might react to an attempt by the Scottish Government to negotiate Scottish membership during the period between a Yes vote and formal independence, and, if that were considered not to be feasible, how they would react to an attempt by an independent Scotland to join the EU, in both cases on the terms set out in the Scottish Government's paper.

## General risk of challenge

This is against the background that the Presidents of the Commission and of the Council have said that it would be difficult for an independent Scotland to join. Further, for their own internal reasons, it seems that some Member States would not wish that process to be a smooth one. The Spanish position has been made clear. In November last year the Spanish Prime Minister, Sr Mariano Rajoy, said:

"It is very clear to me---that a region that obtains independence which is part of a nation state of the EU will stay outside the EU.-----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 its treaties won't apply to them. This has lots of consequences — economic, currency, markets, immigration and borders. To get back what membership means and implies isn't simple. You have to be a European state, you have to ask for admission and this has to be accepted unanimously."<sup>4</sup>

I am aware that Sir David Edward, an extremely distinguished European lawyer, has said that the general EU duty of sincere cooperation, mutual respect and solidarity would require there to be pre-independence negotiation so as to maintain the "territorial and political integrity of the EU."<sup>5</sup> And others have said that the

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\* The author was for many years a senior legal advisor to the UK and, following devolution, the Scottish Governments on constitutional and European matters. This article was written in a personal capacity. This article is an expanded version of a brief talk given at the BILA on 30<sup>th</sup> July 2014.

<sup>1</sup> See "Scotland in the European Union (November 2013), pp 11-13.

<sup>2</sup> The "*acquis communautaire*" is the phrase used to describe the package of Treaty obligations, EU legislation, CJEU jurisprudence and administrative practice which govern what the EU does and how it operates, and which control the relations between its constituent parts.

<sup>3</sup> For these purposes there are two categories of legal risk – the risk of (any) challenge, and the risk of a successful challenge. If there is little risk of challenge, then the prospects of success become less important. If there is a high risk of challenge, then it is more critical to try to estimate the prospects of success.

<sup>4</sup> <http://news.stv.tv/politics/250628-mariano-rajoy-says-independent-scotland-would-stay-outside-the-eu/>

<sup>5</sup> Written evidence to the European and External Affairs Committee of the Scottish Parliament; also published in the Scottish Parliamentary Review, Vol 1, No. 2 (The Lord Rodger Memorial Issue).

fact that Scots are citizens of the EU would in some way oblige the EU to ensure that Scots did not lose that status. Nevertheless, it is clear that some of the major stakeholders in the EU would not share that view.

### **What does independence mean, legally?**

It is accepted on all sides, including by the present Scottish Government, that one of the effects of Scotland's leaving the United Kingdom would be that we would no longer be a member of any of the international bodies to which the UK belongs. At present we have the rights and obligations, the advantages and disadvantages, of membership of these bodies because we are part of the United Kingdom. If we were to leave the United Kingdom then we would no longer have those rights, obligations, advantages or disadvantages. An independent Scotland would have the freedom to choose to which of those bodies it wished to apply. It would equally have the freedom to decide not to apply to join any or all of them.

### **How would independence affect EU citizenship?**

This may be the point at which to discuss the implications of that fact, in relation to EU citizenship. Scots are currently citizens of the EU. That is because we are nationals of the United Kingdom.<sup>6</sup> The Court of Justice of the European Union (CJEU) has stressed the importance of EU citizenship, and has gone to great lengths to ensure that EU citizens are able to enjoy the rights which that status confers.<sup>7</sup> But those rights depend upon a person's being a national of a Member State. A person who is not a national of a Member State is not a citizen of the EU. A Yes vote in September would lead, in due course, to Scotland's becoming formally independent of the United Kingdom. Whatever arrangements as to internal free movement might be made, it is unlikely that they would extend to Scots' continuing to be "nationals" of the UK. As noted above, formal independence would have the consequence that the territory of Scotland would be outside the EU. That would not be some unintended consequence of the operation of some abstruse law: it would be the direct, foreseeable and inevitable result of the democratic decision of the Scottish electorate.

Nor could we say that we did not know about that consequence, or how other parties would regard the matter. In March of this year there was an exchange of correspondence between Ms Christina McKelvie, the Convener of the Scottish Parliament's European and External Relations Committee, and Ms Viviane Reding, Vice President of the European Commission. In her letter of 10<sup>th</sup> March 2014, Ms McKelvie asked specifically:

"Can you confirm that there is no specific provision within the EU Treaties for the situation where, by a consensual and lawful constitutional process, the democratically determined majority view in part of the territory of an existing member state is that it should become an independent country, and that therefore there is no provision to remove EU citizens from the European Union against their will in such a circumstance?"

In her reply of 20<sup>th</sup> March 2014 to, Ms Reding said:

"The Commission's position on the issue that you raise has been stated on a number of occasions since 2004. The Treaties apply to the Member States. When part of the territory of a Member State ceases to be part of that State, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a new independent region would, by the fact of its independence, become a third country with respect to the Union and the Treaties would, from the day of its independence, not apply anymore on its territory."

Ms Reding's statement is in my view the hard legal fact, and its accuracy can be tested by examining the opposite argument. The Scottish Government assume, in their paper, that it would be in Scotland's interests to join the EU, and they may well be right. But if an independent Scotland were to decide *not* to apply to be a member of the EU, it would resist any attempt by the EU or its own citizens to force it do so by using the very arguments set out by Ms Reding. An independent Scotland which did not wish to be in the EU might well wish to negotiate transitional arrangements in relation to EU citizens currently in Scotland. But it would be doing so from *outside* the EU.

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<sup>6</sup> Article 9 of the Treaty on European Union provides: Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it."

<sup>7</sup> See, for example, the case of *Zambrano v ONEM*, Case 34/09, March 2011.

The Scottish Government's paper on Scotland in the European Union says that they would secure formal independence in the period of 18 months following a Yes vote. I do not believe that it is realistic to reach a sensible agreement on the break-up of the UK within that timescale. I would expect that it would take longer than that to separate out the unified arrangements which have developed over the last three hundred years, on a basis which would be fair to both sides. I would anticipate that, in order to reach agreement within that timescale, the Scottish Government would find themselves conceding more than they would wish.

### **Joining the EU – Article 48?**

So far as the EU is concerned, the Scottish Government say that they would seek membership on the same basis as is currently enjoyed by the UK – that is to say, with all the existing UK opt-outs – and that the necessary treaty amendments could be agreed by the existing Member States during that 18 month period, using the procedure in Article 48 of the Treaty. That Article provides for routine Treaty amendments to be agreed by the Member States.<sup>8</sup> The Scottish Government envisages that the UK would make the necessary approach to the Council.

Essentially, the Article 48 procedure is started by a Member State, or one of the EU institutions, proposing amendments to the Treaties. If that proposal is accepted by the Council then, following consultation with the Commission and the Parliament, the President of the European Council sets up a Convention composed of representatives of

- the national parliaments,
- the Heads of State or Government of the Member States,
- the European Parliament, and
- the European Commission.

That Convention considers the proposals and adopts, by consensus, a recommendation to an intergovernmental conference of the Member States. That intergovernmental conference determines, by common accord, the amendments to be made to the Treaties. All such amendments must be ratified by all Member States before they come into effect.

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<sup>8</sup> “Article 48

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.

Ordinary revision procedure

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

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

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

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.”

There are practical and legal difficulties with that the Scottish Government's proposal to use Article 48. For the sake of brevity, I mention only the most important here. The first relates to timing. It will not be possible for any approach to the Council to be made on, say, financial matters, until the Scottish and UK Governments have reached – or failed to reach – agreement. The Scottish Government proposes to continue to use Sterling in a currency union, and all the major parties in the UK have said that they will not agree to that. Failing such agreement, the Scottish Government's position is, apparently, that they will continue to use Sterling anyway. Whatever the result of that negotiation may be, it is difficult to see how any approach could be made to the EU until it was clear whether Scotland's central financial authority was the Bank of England or a separate, purely Scottish body.

The second difficulty is how any proposal would be put to the Council. It is unlikely that the European institutions would do so. Their view is that it is only European states which can apply for membership of the EU, and that would not occur in Scotland's case until we were formally separated from the UK. It is difficult to see how the UK could do it. In the period between a Yes vote and formal independence, they would continue to be responsible for the whole of the present UK, including an (unseparated) Scotland. (The Edinburgh Agreement would not oblige the UK Government to make any approach to the EU Council: its obligation under the Agreement is to act in the best interests of the rest of the UK.) There would be a serious conflict of interest if the UK Government were to attempt to represent the present UK, Scotland post-independence, and the UK post Scottish independence.

Third, the Scottish Government would have no right to attend either the Convention or the intergovernmental conference. There would therefore be no-one present at either gathering who could represent the Scottish position. The UK Government could not represent the interests of the Scottish Government as well as its own.

Fourth, the Convention reaches its outcome by "consensus", and the conference of Member States must act "by common accord". Any single Member State could effectively block the process at either of those stages. Whatever the position of the UK Government, it is in the highest degree unlikely that there would be general agreement among other Member States to the Scottish Government's proposals on membership, which would run a coach and horses through important aspects of the *acquis communautaire*.

Fifth, it is not a quick process. Every Member State must separately ratify the Treaty amendments before they take effect, and Article 48 allows 2 years for that to happen. Whenever it started, it could not be expected to finish in time for any amendments to be in force by the Scottish Government's planned date of March 2016. And there is the potential difficulty that if the agreed amendments did not meet the Scottish Government's wish list the Scottish Parliament might not ratify them.

Finally, and leaving aside the procedural and practical problems, there is an important legal difficulty. As an institution the European Union, guided by the Court of Justice, is scrupulous about conducting its affairs on the correct legal base. An attempt to use an incorrect Treaty base can be challenged in the CJEU, and if the challenge is well-founded it will be upheld. As M. Jean-Claude Piris<sup>9</sup> put the matter, in his evidence to the Scottish Parliament's European and External Affairs Committee:<sup>10</sup>

"On a formal legal point of view, the case law of the Court of Justice of the EU establishes that one cannot choose freely an article of the EU Treaties to adopt an act or make a decision. The Court refers to the "aim and content" of an act or decision as being the only way to determine the correct choice of its legal base. It also stresses that specific articles have priority upon general ones. Article 49 is the only article in the EU Treaties which provides the specific procedure to be followed for the admission of a State as a member of the EU ...I will thus conclude that, from a formal legal point of view, article 49, which deals specifically with admission, must be followed in any case of admission."

These arguments are strengthened by the fact that the Article 48 procedure gives the European Parliament only a right to be *consulted* on any Treaty amendments which may be proposed. By contrast, Article 49 gives the European Parliament a *veto* on a proposal that a new state should be admitted to the EU.<sup>11</sup> Moreover, the

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<sup>9</sup> Former Legal Counsel of the European Council, Director General of the Legal Service of the EU Council 1998-2010;

<sup>10</sup> Written evidence for session of the Committee of 23<sup>rd</sup> January 2014.

<sup>11</sup> "Article 49

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of

importance of that provision is emphasised by the fact that the consent of the Parliament is required to be demonstrated by a majority of its members, not a majority of those voting on a particular occasion.

There is therefore, in my opinion, a very high risk that, whatever its view on the merits of Scotland's becoming a member of the EU, the European Parliament would challenge the attempted use of Article 48 in the European Court of Justice, on the ground that the use of that Article would deny it the right to agree or disagree that Scotland should be admitted to the EU.<sup>12</sup> That challenge would almost certainly be supported by the Commission and a number of Member States. There is in my view a very high risk that such a challenge would be successful. Whether or not it was successful, the litigation would certainly prevent any political decision on Scottish membership from taking place within the timescale which the Scottish Government would want.

These considerations would be as obvious to the UK Government as they would be to the EU institutions and to the other Member States; it therefore seems unlikely that the UK Government would agree to make a proposal under Article 48.

To sum up, on the procedural aspects, I am of the view that, sooner or later, the Scottish Government would realise that the only feasible method of joining the EU within the EU Treaties would be by way of an application under Article 49. Such an application could not be made until after formal independence had been secured.

### **Use of Article 49**

On the substance of the Scottish Government's position, their policy would be to seek the same list of opt-outs as is currently enjoyed by the UK. It would therefore be sensible to try to assess the risks of challenge, and of successful challenge, to that policy.

The starting point of that assessment is a recognition that countries wishing to join the EU are expected to agree to the whole of the *acquis communautaire*, Sometimes transitional arrangements are put in place, but formal exemptions from basic Treaty obligations are rare, and difficult to negotiate. The Scottish Government's paper recognises that, in order for it to secure its wish list, other Member States would require to agree substantive Treaty amendments.

It may be sensible to make a general point at this stage. The United Kingdom has, over the years, used a considerable amount of political and negotiating capital to secure a variety of opt outs to the EU Treaties, most notably in financial matters (the rebate and the euro) and in free movement matters (the maintenance of the Common Travel Area, and the limited application of the Schengen arrangements). While these opt outs are now recognised in EU law, it does not follow that they are popular with other Member States, where there is a perception that the UK is always slightly out of step with the general aspirations of the Union as a whole. To put the matter in more basic terms, the UK is often seen as a one-nation "awkward squad". What the Scottish Government would be asking for is that the other Member States agree to doubling the size of that "awkward squad". It is against that background that I turn to consider the most important items on the Scottish Government's wish list.

#### *Opt out from economic and monetary union*

First, the Scottish Government would not, for obvious reasons, want to join the euro. They would, as noted above, prefer to continue using Sterling, whether or not in a formal currency union with the UK. But the euro is

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this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and ***after receiving the consent of the European Parliament, which shall act by a majority of its component members.*** The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements." (emphasis added)

<sup>12</sup> Paragraph 2 of Article 263 of TFEU expressly confers on the European Parliament competence to raise an action in the CJEU on grounds of "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."

not an optional extra in the EU system, which Member States decide whether or not to join. Participation in the euro is a formal, specific obligation under Article 119 of the EU Treaty. It is an essential part of the system of economic and monetary union. Certainly, there are Member States whose economies are not in a state which would enable them to comply with the conditions attached to membership of the euro. They are referred to in the Treaty on the Functioning of the European Union (TFEU) as “Member States with a derogation”. Those Member States are under a continuing obligation to work towards a situation in which they *will* be able to comply with those obligations; the European Commission and the European Central Bank must report, at least every two years, on “the progress made by the Member States with a derogation in **fulfilling their obligations regarding the achievement of economic and monetary union.**”<sup>13</sup> (emphasis added). Whether or not the Scottish Government were to reach an agreement with the UK as to a currency union, the EU and its institutions would expect an independent Scotland to agree to the Treaty provisions on economic and monetary union. There must be a high risk that Member States such as Spain, Portugal, Greece and Ireland, which have endured considerable financial pain in maintaining the euro during the financial crisis, would veto any proposed Treaty amendment which would enable an independent Scotland to opt out of economic and monetary union, and the euro.<sup>14</sup>

#### *Opt out from Schengen*

Second, the Scottish Government would wish to continue with the current Common Travel Area with the UK and Ireland; that is, they would not wish to join the Schengen area. That would have obvious administrative attractions from Scotland’s – and from the UK’s – point of view. We do not know what the position of Ireland would be. But all Member States, including the UK and Ireland, agreed, in Protocol 19 to the Lisbon Treaty, that any new Member State must accept the Schengen *acquis* in full.<sup>15</sup> It might be possible, as envisaged in the Scottish Government’s paper, to negotiate a continuation of the present arrangements. But it would not be an easy negotiation. There must be a substantial risk that other Member States would refuse to agree to a variation of that Protocol.

#### *Opt out from Justice measures*

Third, the Scottish Government would wish to have the same opt outs as are currently enjoyed by the UK on the old, pre-Lisbon, Justice and Home Affairs measures. These were over 100 measures agreed by unanimity before the Lisbon Treaty was negotiated. That Treaty provided for a transitional period, after which these measures would become subject to the ordinary legislative procedures under the new Treaty. The UK negotiated an opt-out from those measures. The opt out had to be, and was, exercised during the transitional period. Those measures do not therefore apply to the UK (which is now negotiating to opt back in to some of them).

But for the purposes of negotiations between an independent Scotland and the Union, the point is that the transitional period is ended. All those measures are now part of the *acquis* so far as every Member State (other than the UK) is concerned. There is no reason, from the perspective of the other Member States, why an independent Scotland should have special treatment in that area.

#### *Share of UK Budget rebate?*

Fourth, it would appear – the point is not completely clear in the Scottish Government’s paper – that the Scottish Government would seek to negotiate a share in the current UK rebate, as between an independent Scotland and the UK, and would then seek to secure its own rebate, equivalent to that share, in its discussions with the EU. There must be a very high risk that all other Member States, including the UK (post Scottish independence), would oppose that suggestion.

#### *University fees*

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<sup>13</sup> See Article 140(1) of TFEU.

<sup>14</sup> It is possible, but in my view unlikely, that other Member States would agree to Scotland’s joining the EU without our specifically agreeing to join the euro. They would not wish any other Member State to follow the Swedish example.

<sup>15</sup> See Article 7 of Protocol No. 19 to the Lisbon Treaty: “For the purposes of the negotiations for the admission of new Member States to 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.”

Fifth, there is one matter where the Scottish Government's position goes further than that currently secured by the UK. The Scottish Government currently pays the fees of Scottish and EU students at Scottish Universities. They charge fees to students from the rest of the UK, as they are entitled to do, in terms of EU law. Following independence they would apparently intend to continue to charge fees to students from the UK (which would be a separate Member State). That would be seen, by the UK and by the Commission, as discrimination, and as a clear breach of the free movement provisions of the Treaties. It would be entirely justifiable for the UK and other Member States, and the Commission, to seek suitable assurances from the Scottish Government, during the accession negotiations, that they would not seek to pursue that policy. Alternatively, if the other Member States were minded to allow the Scottish Government to continue with its present policy, that too would require a Treaty amendment.

### *Timings*

Finally, there is the question of how long the process would take. It is certainly the case that, across a wide range of EU matters, Scotland is currently responsible for implementing EU obligations. But it is one thing for a part of a Member State to be responsible for implementing obligations negotiated by its central Government: it is quite another thing for that part to undertake the obligations of a Member State itself. Other Member States are entitled to satisfy themselves that potential new Member States are in fact capable of carrying out the obligations of membership. That is why the process under Article 49 involves detailed negotiations on 35 separate subjects, each of which must be signed off by all the existing Member States. The process takes some time (normally measured in years). And whatever is finally agreed requires to be ratified by all the existing Member States and the acceding state, a process which itself takes some time.

Since the Scottish Government would be seeking opt outs or derogations from some of the fundamental parts of the Treaties, the process would not be quick. Existing Member States would certainly be likely, and be entitled, to object to any material variations of the *acquis communautaire*.

Further, a number of existing European countries are currently in the process of seeking membership of the EU. From the perspective of other Member States, there is no reason why Scotland, which would have deliberately chosen to leave the EU by virtue of having left the UK, should be preferred to any of them.

I return to the question raised at the beginning of this article, as to whether there would be some higher European duty, on the part of the Union institutions and the other Member States, to smooth an independent Scotland's path to EU membership. In my view, none of the risks of challenge which I have identified above would involve other Member States in action which would be in any way inconsistent with their EU obligations. There is no general EU obligation which would require others to diminish the natural legal consequences of Scotland's leaving the UK.

### **Conclusion**

The result, in my view, is that an independent Scotland would not be a member of the EU with effect from its independence from the UK; that the process of joining would take some time – probably measured in years – after formal independence; and that it is highly unlikely that it would be secured on the terms currently set out by the Scottish Government.