



House of Commons
Scottish Affairs Committee

The Referendum on Separation for Scotland: Scotland's Membership of the EU

Twelfth Report of Session 2013–14



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Report, together with formal minutes

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The Scottish Affairs Committee

The Scottish Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Scotland Office (including (i) relations with the Scottish Parliament and (ii) administration and expenditure of the offices of the Advocate General for Scotland (but excluding individual cases and advice given within government by the Advocate General)).

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/scotaffcom. A list of Reports of the Committee in the present parliament is at the back of this volume. The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Rebecca Davies (Clerk), Rhiannon Hollis (Clerk), Phil Jones (Committee Specialist), Alasdair Mackenzie (Committee Specialist) Tom Barker (Assistant Policy Analyst), Helena Ali (Senior Committee Assistant) and Rosie Tate (Committee Assistant).

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Summary

Today Scotland's interests in the European Union are represented by the UK which, as one of the largest Member States, has the voting power and leverage to influence decisions to the benefit of Scotland. In leaving the UK, a separate Scotland would lose this advantage.

A separate Scotland is likely to have its application to join the EU accepted – but not within the timetable, nor with the terms, that the Scottish Government is proposing. Complex negotiations would be required, both with the UK and the EU, and any agreement would have to be ratified by 28 Member States. Indeed, it is much more likely that a separate Scotland would have an interim period outside the EU, with uncertain interim arrangements, than that the process of joining would be completed within the Scottish Government's self-imposed timetable of 18 months.

The Scottish Government's proposal that Article 48 of the Treaty on European Union could be used to provide for Scottish membership is not supported by any other EU state; senior EU figures have ruled it out and it is opposed by the United Kingdom Government – which would, under this process, have to initiate it. In any case, an Article 48 application would not necessarily be any faster than the accepted accession route under Article 49.

We do not believe it credible that the Scottish Government would be able to achieve the terms of entry that it seeks. Whether in relation to Schengen, justice, payments under the CAP, or a commitment to join the Euro, the Scottish Government does not adequately acknowledge the scale of the difficulty which would be encountered in seeking better terms than have been achieved by other recent applicants. The additional and exceptional demand for the ability to discriminate against UK students with respect to tuition fees would be voted against by the UK Government and is therefore almost certain not to be met. Furthermore, the self-imposed deadline greatly weakens the Scottish Government's position in any negotiations.

We regret that insufficient attention has been paid by the Scottish Government to the need to negotiate the UK's retention of VAT zero rating on a wide range of goods, such as food, children's clothes, books and newspapers. Even the imposition of the EU minimum rate of 5%, rather than the standard rate of 15%, would be a heavy burden on Scottish families.

The Scottish Government does not seem to understand the UK's budget rebate. As a separate Member State, not only would Scotland cease to benefit from the UK rebate (currently worth in the region of £300 million per year to Scotland) but it would have to contribute to it. Together, this would put an additional cost of approximately £900 on Scottish households over the budgetary period.

Thus we believe that the Scottish Government's objectives of achieving the wide range of opt-outs and beneficial special deals which the UK has secured are not credible and, when taken with the restricted timetable, are unachievable.

In these circumstances we believe the Scottish Government has to provide Scottish voters with a much more realistic alternative perspective of how joining the EU would be achieved, and what its likely terms and timetable would be.

Conclusions and recommendations

Becoming an EU Member State

1. In the event of separation, Scotland's future membership of the European Union, on appropriate terms, would be in the national interests of the UK. Furthermore, we have heard no evidence that any other Member State would regard it as contrary to their national interest, subject to acceptable terms. (Paragraph 25)
2. The Scottish Government's preferred route to becoming a member of the EU is through Treaty amendment under Article 48. Under this process the Scottish Government would depend on the UK Government instigating negotiations on Scotland's behalf. Not only has the UK Government described the prospect of using Article 48 as "utterly implausible" but, in the unlikely event that it is used, the UK Government could not be expected to raise issues that would be to the detriment of the citizens of England, Wales and Northern Ireland. Key objectives identified made by the Scottish Government in its White Paper would not, therefore, be realised. (Paragraph 26)
3. Under the Article 49 process Scotland would have to be outside the EU to apply for membership. For this reason, the Scottish Government favours Treaty amendment under Article 48 but it is unclear whether this is permissible under EU law or acceptable to Member States. There is therefore every likelihood that, in event of a Yes vote, if the Scottish Government continues to insist on an independence date of 24 March 2016 Scotland will temporarily be outside of the European Union – with significant implications for the Scottish people. However, we can find no evidence that the Scottish Government has communicated this risk to the people of Scotland. The Scottish Government should publish the legal advice it has received on a separate Scotland's membership of the European Union as a matter of urgency. (Paragraph 27)
4. It is misleading for the Scottish Government to claim that on 24 March 2016 Scotland could be both a separate state and a Member State of the European Union. There are a number of clear risks to the Scottish Government's strategy to gain membership of the EU, all of which are overlooked in the White Paper, and which make the 18-month timetable unbelievable. The Scottish Government's attitude to becoming a member of the EU appears based on the sentiment, as articulated by Fiona Hyslop MSP, that "where there's a political will, there will be a way". The Scottish Government has provided no proof that the will exists across Europe for Scotland's membership of the EU to be fast-tracked with a timetable of Scotland's choosing, nor can it be certain that its chosen way of achieving such a goal is legitimate or would be accepted by all Member States. To date, not a single Member State has indicated its support for the Article 48 route. (Paragraph 39)
5. We do not believe that negotiation and subsequent ratification of Scotland's membership of the EU could be concluded by 24 March 2016. The Scottish Government have to tell the Scottish people which of the alternative options available they favour. The alternative scenarios of Scotland leaving the EU and entering into

complex provisional arrangements or joining the European Economic Area are neither guaranteed nor satisfactory; they offer little benefit, but could cause significant harm to Scotland's interests. (Paragraph 45)

6. An obsession with securing membership of the European Union by a specific date has significantly weakened the Scottish Government's negotiating position. It was a mistake to have made such a commitment. The Scottish Government must clarify for the people of Scotland whether, in the event of a yes vote, its focus in any negotiations would be on getting the best outcome for Scotland or meeting an arbitrary and self-imposed timetable. (Paragraph 46)

Conditions of membership

7. A separate Scotland cannot be forced to adopt the Euro, but Member States might well insist on a commitment to do so in the future. (Paragraph 52)
8. On joining the EU, the government of a separate Scotland would have to commit to meeting the EU target of getting national debt down to 60% of GDP within 10 years. To achieve this the Scottish Government would have to impose additional spending cuts to those planned by the UK Government or raise taxes higher, or both. We will give further consideration to fiscal limitations imposed by the EU in our future work. (Paragraph 54)
9. The need to complete negotiations with the UK on key issues before Scotland can negotiate with the EU is not mentioned by the Scottish Government in the White Paper, but it is further reason to doubt the plausibility of the Scottish Government's 18-month timetable for negotiation and ratification of a separate Scotland's membership of the EU. (Paragraph 57)
10. The Scottish Government seems to believe that opting out of joining the Eurozone and Schengen would be a formality, but Member States have no reason to give in to Scotland's demands, and they each enjoy a right of veto over a separate Scotland's potential membership. The case made by the Scottish Government in the White Paper that, in the event of separation, it could and should continue to receive the opt-outs and derogations negotiated by the UK appears to us based on wishful thinking rather than legal and historical precedent. (Paragraph 58)
11. No new Member State has negotiated an opt-out from JHA measures and it is questionable that Member States would grant Scotland a greater flexibility than they themselves are able to exercise. The UK Government claims that a failure to negotiate an opt-out from EU Justice and Home Affairs measures would have major implications for a separate Scotland's legal system. This is an important matter which requires further clarification. (Paragraph 61)
12. A Scottish EU Member State would be bound by EU legislation on VAT. There is no guarantee that the Scottish Government would negotiate the opt-outs that would be required to continue zero-rates of VAT on items such as children's clothes, food and books. Failure to secure an opt-out would see costs of these basic items increase by a minimum of 5%. Like other risks surrounding separation, this threat to the pockets

of Scottish families is overlooked by the Scottish Government. The uncertainty over zero-rates of VAT does not exist if Scotland remains part of the UK. (Paragraph 64)

13. If an Article 48 route to membership were pursued, it seems highly unlikely the UK Government would seek to negotiate a position on behalf of Scotland that would see thousands of its own students disadvantaged. Under an Article 49 accession, while Scotland would be arguing its own case, it would still have to persuade the other Member States, including the UK. On this basis, it is surely time for the Scottish Government to admit that its hopes of discriminating against students from the rest of the UK on the charging of tuition fees are dead; alternative plans must now be made. (Paragraph 68)
14. If a separate Scotland's universities were unable to charge tuition fees to students from the continuing UK there would be a £150 million funding black hole in the higher education budget. The Scottish Government has failed to say how, or even if, that gap in funding would be filled. (Paragraph 69)

Contributions to and receipts from the EU budget

15. The Scottish Government appears to misunderstand how the UK's rebate is calculated. In the event of separation, the UK's rebate would be automatically adjusted to reflect the change in the UK's circumstances. There would be no Scottish share to be negotiated as the Scottish Government erroneously suggests. Instead, Scottish households would have to make an additional contribution to the EU budget, some of which would go towards paying the UK's rebate. (Paragraph 73)
16. Separation poses clear risks to Scotland's farmers. The level of funding they would receive under Pillar I of the Common Agricultural Policy is uncertain. In the event that Scotland has to accede under the Article 49 process then CAP receipts would cease for any period that Scotland is outside the EU. The Scottish Government has made no commitment to maintain levels of funding should this scenario occur. Whatever the route to membership, there are no guarantees that a separate Scotland would continue to receive the same level of payments that it does now. For this to happen Scotland would need to successfully negotiate that it should receive a higher allocation of receipts than some existing Member States, notably those that have recently acceded and had to accept the ten-year phase-in of payments that Scotland would be seeking to avoid. (Paragraph 78)
17. The Scottish Government should make clear the potential risks as well as the alleged benefits of separation. In terms of the CAP, separation would bring no improvement in funding for Scottish farmers before the end of this budgetary period in 2020 (anything beyond that is unknown) and could result in levels of funding being cut or even interrupted. (Paragraph 79)
18. Scotland currently benefits from a favourable allocation of Structural Funds by the UK Government that sees it receive an additional £186 million between 2014-2020. On separation, this uplift would be lost and, should Scotland's presence within the EU be interrupted, even temporarily, while negotiations on membership take place,

the payment of any Structural Funds would cease as there would be no treaty authority to pay them. (Paragraph 80)

19. In the context of the EU budget, the Scottish Government's plans for separation, even under the best-case scenario, would leave Scottish households at least £843 worse off. Under the worst-case scenario, that of a separate Scotland seeing its CAP receipts phased in over ten years (as has been the case with the 13 most recent Member States), then Scottish households would be £1,343 worse off than if they remained part of the UK. (Paragraph 83)

Conclusion

20. We agree with the conclusion of the House of Commons Foreign Affairs Committee that the Scottish Government "underestimates the unease which exists within EU Member States and EU institutions about Scottish independence". Not only does this mean that the period required for negotiations is longer than anticipated by the Scottish Government but, ultimately, all 28 Member States have the right to veto if they are unhappy with the terms of a separate Scotland's membership of the EU. That the Scottish Government does not take this threat seriously demonstrates a lack of understanding of the realities of international politics. (Paragraph 86)

1 Introduction

1. On 18 September 2014, the people of Scotland will vote in a referendum on whether Scotland should leave the United Kingdom and become a separate state. As part of our inquiry into the Referendum, we have taken evidence on a series of major issues which have been the focus of debate so far. In this Report we focus on the Scottish Government's aim for a separate Scotland to become a Member State of the European Union, and two specific dimensions of this debate in particular. First, we consider the possible routes by which a separate Scotland could become a member of the EU and assess whether the 18-month timetable set by the Scottish Government is realistic. Second, we evaluate the Scottish Government's position on some of the key issues, including opt-outs and derogations, that would need to be negotiated and agreed.

2. The UK is one of the largest Member States in the European Union. It has the equal highest number of votes in the Council (29) and the third largest European Parliament delegation (73 MEPs). The Minister for Europe described to us the benefits of being a large state:

My experience of the way the EU works in practice is that the greater leverage, voting power and representation that the large member states – the UK, Germany, France, Italy and Poland – have means that they are more able to make the political weather, and better able to defend and advance their national interests and set the EU agenda, than are smaller member states.¹

3. In the event of separation, Scotland would lose the leverage it is able to access by being part of the UK. Scotland has just 1% of the EU's population compared to the UK's 12%. Up until now, smaller Member States have tended to have a higher representation per capita within the EU than larger ones, but changes due to come into force in 2014 will mean that voting weights will change to favour larger states as from 2014 onwards a Member State's voting weight in the Council will directly reflect its population size.²

4. Scotland directly benefits from the UK's position as a large Member State. The Minister for Europe gave us the example of negotiations on financial services, a key industry for Scotland:

the UK Chancellor can go into a room with the German Finance Minister or the French Finance Minister and agree a deal that in practice most of the rest of the EU then accepts. It is quite difficult to see any small Member State being able to talk terms to Germany or France in quite the same way.³

5. Scotland also gains from the UK's extensive diplomatic presence in Brussels and the capitals of other Member States. With more limited resources, a separate Scotland would lack the ability to create or sustain such a network and would be unable to maintain the range of access it currently enjoys. This may limit the scope of Scotland's involvement in

1 Q5182

2 Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p73

3 Q5193

the EU as it might only have the capacity to engage on a narrow range of priority issues at any one time.⁴

6. As part of the UK, Scotland benefits from having its views represented by a large Member State that is able to exercise greater leverage, voting power and representation than Member States similar in size to Scotland. Under existing arrangements Scotland can also call upon the support and access provided by the UK's extensive and experienced diplomatic network. Both benefits would be lost in the event of separation. Scotland would have to build up its own diplomatic network and would find it more difficult to promote and defend its national interests.

7. Legal advice sought by the UK Government states that in the event of separation the continuing United Kingdom would remain a member of the European Union on existing terms.⁵ By contrast, a separate Scotland would have to negotiate to become a member of the EU because, as the UK Government's *Scotland analysis* paper on devolution sets out, "it is not legally possible for two new states to inherit the international personality of the former state".⁶ The Scottish Government disagrees and argues that a vote in favour of separation would leave both Scotland and the continuing UK as successor states.⁷ The *Scotland analysis* paper offers four reasons why this would not be the case:

- the majority of international precedent, with examples spanning the creation of an Irish state from within the UK, and the break-up of the Soviet Union;
- the retention by the continuing UK of most of the population (92%) and territory (68%) of the UK;
- the likelihood that other states would recognise the continuing UK as the same legal entity as before Scottish separation, not least because of the UK's pivotal role in the post-war world order; and
- the fact that, on the rare occasions when one state is dissolved and two new states are created peacefully from it, this tends to happen by mutual agreement.⁸

8. Within the EU, there is no precedent for what happens when a territory of an existing Member State becomes independent, and the Treaties do not provide for such an event. The process by which a separate Scotland may become a member of the EU is therefore subject to speculation. Much will depend on the attitude of the EU institutions and of the governments of the 28 Member States. What is clear, however, as both the Vice-President of the European Commission and the President of the European Council, have confirmed, "is that when part of the territory of a Member State ceases to be a part of that State, e.g.

4 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765

5 Legal Opinion published in HM Government, [Scotland analysis: devolution and the implications of Scottish independence](#), Cm 8554, February 2013, p64

6 *Ibid.*, p7

7 On 3 April 2014 Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs told the European and External Relations Committee of the Scottish Parliament: "The UK Government is arguing that Scotland would not be a successor state. Quite clearly, we think it would be, as would the UK." Evidence taken before the European and External Relations Committee of the Scottish Parliament, 3 April 2014, page 1946.

8 HM Government, [Scotland analysis: devolution and the implications of Scottish independence](#), Cm 8554, February 2013, p7

because that territory becomes an independent state, the treaties will no longer apply to that territory.”⁹

9. The Scottish Government asserts that the 18-month period between the referendum and its proposed date for independence, 24 March 2016, would be sufficient for the terms of a separate Scotland's membership of the EU “to be agreed and all the necessary processes completed.”¹⁰

10. The Scottish Government's negotiating position is that a separate Scotland's membership of the EU would be based on the same terms and opt-outs as Scotland currently enjoys as part of the UK. Those terms include:

- opt-outs on justice and home affairs issues;
- remaining outside of the Eurozone;
- remaining outside of the Schengen area;
- (a share of) the UK rebate;
- the ability to levy zero-rates of VAT.

11. The Scottish Government believes that “ensuring a seamless transition to independent EU membership will be in the best interests of Scotland, all Member States and the EU in general.”¹¹ However, despite the benefits that a seamless transition offers, there is no guarantee - as the history of the EU shows - that negotiations at an EU level are straightforward. The Rt Hon David Lidington MP, Minister for Europe, described to us how a one sentence amendment to Article 36 of the Treaty took 18 months to negotiate and implement, despite a consensus amongst all Member States in favour of the amendment.¹²

12. It is difficult to see why some Member States would be willing to grant a separate Scotland opt-outs that they themselves were unable to negotiate on their accession. Others have their own independence movements which may influence their approach to the negotiations and the notion of a “seamless transition” of Scotland becoming a member of the EU. Complex issues such as funding for Scotland's farmers through the Common Agricultural Policy (CAP) would need to be negotiated, as well as Scotland's aim to remain outside of Schengen and the Eurozone. Furthermore, as we considered in our Seventh Report of this Session, *The Referendum on Separation for Scotland: the impact on Higher Education, Research and Tuition Fees*, the Scottish Government has already indicated that it wishes to seek an objective derogation from the EU law governing freedom of movement in order to allow it to discriminate against students from the United Kingdom in the

9 [Letter from Viviane Reding](#), Vice-President of the European Council to the Convener of the European and External Affairs Committee of the Scottish Parliament, 20 March 2014; [Scottish independence: Scots EU independence plan 'now untenable'](#), *BBC News online*, 13 December 2013

10 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p220

11 [Ibid.](#), p220

12 Q5217

charging of tuition fees. It is inconceivable that some Member States, not least the UK, would not challenge this ambition during the negotiations.¹³

13. In the chapters that follow we assess the proposals put forward by the Scottish Government for a separate Scotland's membership of the EU and consider the likelihood of it achieving a seamless transition from being part of a Member State to being a Member State in its own right. We have focused on areas of the potential negotiations which have been the most high profile to date. There will be others, such as fisheries, which are of enormous significance to particular communities and where negotiations would also be complex. We hope to consider these in a future Report.

13 Scottish Affairs Committee, Seventh Report of Session 2013-14, [*The Referendum on the Separation of Scotland: the impact in Higher Education, Research and Tuition Fees*](#), HC 1144

2 Becoming an EU Member State

The route to membership: accession or amendment?

14. The accession route for a country seeking to join the European Union is via Article 49 of the Treaty of the European Union. This is the only article in the EU Treaties which provides a specific procedure for a country to become a member of the European Union.¹⁴ However, this is not the preferred route of the Scottish Government, which has stated that:

Article 49 of the Treaty on European Union provides the legal basis, and defines the procedure, for a conventional enlargement where the candidate country is seeking membership from outside the EU. As Scotland joined the EU in 1973 this is not the starting position from which the Scottish Government will be pursuing independent EU membership. Article 49 does not appear to be the appropriate legal base on which to facilitate Scotland's transition to full EU membership.¹⁵

Instead, the Scottish Government is seeking a “seamless transition” to membership of the EU through Article 48 which provides for the Treaties to be amended.¹⁶

15. At the most basic level, Scotland cannot be recognised as a member of the European Union because it is not listed in the Treaties as a Member State. In the Scottish Government's view, the Article 48 process can be used to revise the Treaties to include a separate Scotland. They believe the advantage of this process is that, should Scots vote in favour of separation, it can begin immediately after the referendum and, the Scottish Government argues, be concluded within 18 months, before the formal date which it has set for separation, 24 March 2016. As in the conventional route of accession under Article 49, negotiations and ratification of the terms of Scotland's membership would still be required. The Scottish Government has said that its approach to negotiations would be based on the Treaty obligations and provisions that currently apply to Scotland¹⁷ but it is by no means certain that a separate Scotland would receive the range of opt-outs it currently enjoys by being part of the UK - every detail could be subject to negotiation (we discuss the potential terms of Scotland's membership in the following chapter).

16. One reason why the Scottish Government favours the Article 48 process is that application for membership of the EU via Article 49 would cause a gap in Scotland's presence within the EU. Professor Kenneth Armstrong, Director of the Centre for European Legal Studies at the University of Cambridge, explained: “it could carry out all the background negotiations and all the rest of it beforehand; it could have substantially done the deal, but it could only formally trigger the Article 49 process once it was an independent state.”¹⁸ Even if preliminary negotiations were completed before separation, the time required for formal sign-off on the terms of membership and subsequent

14 [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament, 12 January 2014 [Professor Armstrong]

15 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p221

16 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p220

17 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p221

18 Q4201

ratification process would still mean a gap in membership and the legal and economic problems that would ensue.

17. An interruption in the application of the EU Treaties would have serious implications for people of Scotland. As Professor Sir David Edward, a former judge at the European Court of Justice, points out:

The logical consequence in law would be that, from that moment, the *acquis communautaire* would no longer, as such, be part of the law of the separating State. [...] Erasmus students studying there would become 'foreign students' without rights. Migrant workers would lose their rights under EU law to social security. And the whole land and sea territory of the separating State would cease to be within the jurisdiction of the EU. (In the case of Scotland, which probably has the largest sea area in the EU, that is an important security consideration quite apart from other considerations.)¹⁹

Other serious issues caused by a gap in EU Membership would include interruption in funding from the Common Agricultural Policy. The Foreign and Commonwealth Office (FCO) expect that in the event of an exit from the EU, funding from the CAP would cease and any continuation of existing levels of support to Scottish farmers would require funding from a Scottish national budget of an estimated €550-€600 million per year based on 2011 prices (though during this period Scotland would also not be making any contribution to the EU budget).²⁰

Disagreement

18. Experts are divided on whether Article 48 can be used to increase the membership of the European Union as the Scottish Government suggests. Jean-Claude Piris, former Legal Counsel of the European Council and Director General of the Legal Service of the EU Council, argues that:

it would not be legally correct to try and use Article 48 of the Treaty on European Union for the admission of Scotland as a member of the European Union. Only Article 49 of the same Treaty would provide for a suitable legal route.²¹

Professor Armstrong told us that, because its purpose is as a means to renegotiate the Treaties between existing Member States, "straightforwardly and legally it is implausible to use Article 48".²² In February 2014, Jose Manuel Barroso, President of the European Commission, stated that "in the case there is a new country, a new state, coming out of a current Member State it will have to apply".²³

19 [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament

20 Letter from Rt Hon David Lidington, Minister for Europe to the Chair of the Committee, 30 April 2014

21 [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament

22 Q4197 and evidence taken before the European and External Relations Committee of the Scottish Parliament, 23 January 2014, p1695

23 Mr Barroso was referring to application through the formal accession route under Article 49.

19. Graham Avery, Honorary Director General of the European Commission, contends that, in making a decision about the process of Scotland gaining membership, EU leaders would take account of the implications of requiring Scotland to apply as an external state. He argues that political and practical considerations would cause a solution to be found because Scotland being outside the EU would not be in the interests of the EU or its Member States, particularly the UK:

The scenario of an independent Scotland outside the EU and not applying EU rules would be a legal nightmare, create social and economic difficulties for EU citizens, and deprive the EU of benefits of Scotland's membership (its budgetary contribution, fisheries resources etc.)²⁴

The Scottish Government agrees with Graham Avery that the EU would find a solution, as Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs, told the Scottish Parliament's European and External Affairs Committee "where there is a political will, there will be a way. The EU is a past master at dealing with unprecedented situations."²⁵

20. In Professor Sir David Edward's view, Article 48 can be used to provide for a separate Scotland becoming a member of the European Union.²⁶ Mr Avery points out that negotiations concerning a separate Scotland's membership could begin after the referendum and therefore Scotland would not at that time be a new state (and therefore Article 49 need not apply). Sir David Edward also argues that, because Scotland is already compliant with the *acquis communautaire* (the body of EU law)²⁷ a protracted accession process with detailed scrutiny of all 35 Chapters of the EU's *acquis* would not be necessary. However, as Professor Armstrong reminded us, Scotland is not exercising the same competencies under devolution as it would be exercising were it to become a separate state:

Therefore EU Member States will have to be satisfied that they understand how an independent Scotland would institutionally and politically manage [...] 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.²⁸

The Article 48 process

21. The Article 48 treaty revision process which provides, among other things, for a 'convention' to be convened including national Governments, national Parliaments and the European institutions, can only be instigated by a Member State, the European Commission or the European Parliament and the proposal must be agreed by the other

24 [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament

25 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 3 April 2014, p1947

26 See [oral evidence and written evidence](#) given to European and External Relations Committee of the Scottish Parliament.

27 *Acquis Communautaire* refers to the cumulative body of European Community laws, comprising the EC's objectives, substantive rules, policies and, in particular, the primary and secondary legislation and case law – all of which form part of the legal order of the European Union (EU). This includes all the treaties, regulations and directives passed by the European institutions, as well as judgments laid down by the [European Court of Justice](#).

28 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 23 January 2014, p1714

Member States.²⁹ In the event of separation, the Scottish Government would depend on the United Kingdom to open up the treaty revision process and initiate the negotiations on Scotland's behalf.³⁰ The Article 48 process would therefore be entirely out of the hands of the Scottish Government.³¹

22. While the UK Government could be expected to act in good faith, it is hard to believe that the UK Government would put forward Treaty amendments on areas that would adversely affect citizens of a continuing UK – it is unlikely, for example, that the UK Government would want to open up discussions on the UK rebate or Scottish Government plans to discriminate against UK students over tuition fees. As Aidan O'Neill QC explained to the European and External Relations Committee of the Scottish Parliament:

How can one expect the United Kingdom Government to say in pre-negotiations, “We would like you, on behalf of Scotland, to allow a treaty amendment that will in effect discriminate 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.³²

23. Rt Hon David Lidington made it very clear that the UK was not in favour of the Article 48 route: “I think it is utterly implausible, and we do not think that is the purpose of Article 48”, “our view is that Article 49 is the right [process]”.³³

24. Ultimately, as the Scottish Government itself recognises, it is up to the organs of the EU and the Member States to decide the most appropriate procedure under which a separate Scotland would become a member of the European Union.³⁴ This process of deciding the procedure is itself completely new and will not necessarily be a speedy one. Indeed, because of the precedent that might be created, it may well be approached cautiously and require wide consultation and unanimity. If Article 48 were chosen and there were doubts about whether it was the correct legal base to effect Scottish membership, then the legitimacy of the process, or if concluded, the legitimacy of Scotland's membership of the EU, could be challenged through the European Court of Justice.³⁵ Professor Armstrong writes that, in the Court's eyes, it is not enough that a Member State may prefer one legal basis to another, but “rather there must be a genuine and objective connection between the purpose of the legal basis and that of the act adopted.”³⁶ As Courts tend not to deal in hypothetical situations this issue cannot be brought before the Court before the referendum and thereafter only if the vote were in favour of separation. Any challenge would significantly

29 The European Council, with the consent of the European Parliament, can dispense with the requirement for a convention but an intergovernmental conference would still need to be convened to adopt the treaty amendments by unanimity and with ratification by all member states consistent with their national constitutional requirements. [source: Professor Armstrong, Scotland's future in the EU, www.eutopialaw.com]

30 Scottish Government, [Scotland and the European Union](#), November 2013

31 [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament

32 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 23 January 2014, p1700

33 Q5223-5

34 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p221

35 Q5229

36 [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament

impact on the timetable for membership. In May, Fiona Hyslop MSP confirmed that legal advice on a separate Scotland's membership of the EU had been sought and received, but, despite repeated requests the Scottish Government has refused to reveal its contents.³⁷

25. In the event of separation, Scotland's future membership of the European Union, on appropriate terms, would be in the national interests of the UK. Furthermore, we have heard no evidence that any other Member State would regard it as contrary to their national interest, subject to acceptable terms.

26. The Scottish Government's preferred route to becoming a member of the EU is through Treaty amendment under Article 48. Under this process the Scottish Government would depend on the UK Government instigating negotiations on Scotland's behalf. Not only has the UK Government described the prospect of using Article 48 as "utterly implausible" but, in the unlikely event that it is used, the UK Government could not be expected to raise issues that would be to the detriment of the citizens of England, Wales and Northern Ireland. Key objectives identified made by the Scottish Government in its White Paper would not, therefore, be realised.

27. Under the Article 49 process Scotland would have to be outside the EU to apply for membership. For this reason, the Scottish Government favours Treaty amendment under Article 48 but it is unclear whether this is permissible under EU law or acceptable to Member States. There is therefore every likelihood that, in event of a Yes vote, if the Scottish Government continues to insist on an independence date of 24 March 2016 Scotland will temporarily be outside of the European Union – with significant implications for the Scottish people. However, we can find no evidence that the Scottish Government has communicated this risk to the people of Scotland. The Scottish Government should publish the legal advice it has received on a separate Scotland's membership of the European Union as a matter of urgency.

Timetable

28. In the event of a vote in favour of separation, the Scottish Government aims to achieve membership of the European Union within 18 months. This is the period between the Referendum on 18 September 2014 and the proposed date for independence, 24 March 2016. The deadline of 24 March 2016 is one of the Scottish Government's own choosing; it would allow the elections to the Scottish Parliament, scheduled for 5 May 2016, to be the first for the new country. No other country wishing to become a Member State of the European Union has tried to dictate the timetable of its membership in such bold terms.

Pressures on the timetable

29. The 18-month timetable assumes many things. First, that it would be accepted that Scotland could seek membership through the treaty amendment process under Article 48 which, as we outlined above, is highly unlikely. If accepted, however, the Article 48 process is still not a route to fast-tracked membership, negotiations would still have to take place,

37 [Legal advice on Scotland and EU exists but will remain secret](#), stv news, 6 June 2013

and ratification would still be required.³⁸ The ratification of Austria, Sweden and Finland's membership took six months, after the conclusion of the negotiations and revision process, and only 12 Member States were involved in that process. Following the completion of the processes of negotiation, ratification of Scotland's membership would need to be undertaken by all 28 Member States; although they would do it simultaneously (under their individual constitutional processes), the risk of delay is much greater than it was in the early 1990s and the timetable proposed by the Scottish Government should, but does not, take account of that.

30. There are two revision processes under Article 48, a 'simplified revision process' and an 'ordinary revision process'. An amendment to the treaty such as that sought by the Scottish Government would fall under the ordinary revision process which Rt Hon David Lidington described to us as being very long and drawn-out.³⁹ As mentioned above, a small amendment under the simplified revision process (a quicker process than the ordinary revision process) which involved little negotiation took close to 18 months to be agreed.⁴⁰ There is no guarantee that an Article 48 process is any quicker than accession under Article 49. Professor Armstrong told us that, "there is this erroneous belief that [Article 48] would somehow be quicker. I do not think it would be."⁴¹

31. As well as being susceptible to legal challenge, which would cause delay and uncertainty, opening up a treaty revision process through Article 48 risks the matter of Scotland joining the EU as a Member State becoming bogged down in matters relating to the UK, such as efforts to reopen the size, or very existence, of the UK rebate, or entirely unrelated attempts to revise the Treaties.⁴² For example, Professor Armstrong argues that:

UK acquiescence in a Scottish request for a revision to the treaties under Article 48 TEU creates a very significant risk of issue-linkage between the constitutional position of Scotland in the EU and that of the UK in the EU that could cause significant delay and damage to the negotiation process. If that were to occur there is every reason to believe that, at best, the negotiating process at EU level would be lengthened, and at worst, the process could become intractable leading to failure.⁴³

If opening up of the treaty revision process results in more wide-ranging amendment to the Treaties, there is a heightened risk that ratification of the resulting Treaty might trigger a referendum in a Member State, risking further delay, if not failure.

32. We consider the key aspects of negotiations in the following chapter but the second point worth consideration when discussing the timetable is the considerable challenge of trying to run two separate sets of negotiations simultaneously – on the terms of Scotland's separation from the UK and on its membership of the EU. A number of areas of

38 Ratification is the process of agreement by individual Member States. It can be carried out by national parliaments or through referenda.

39 Q5217

40 Q5217

41 Q4242 [Professor Armstrong]

42 [Written](#) evidence to the European and External Relations Committee of the Scottish Parliament [Professor Armstrong]

43 [Written](#) evidence to the European and External Relations Committee of the Scottish Parliament

negotiation on Scotland's membership of the EU will depend on the outcome of separate negotiations between Scotland and the rest of the United Kingdom. Breaking up a 307-year old union would not be straightforward. Professor Adam Tomkins, John Millar Chair of Public Law, University of Glasgow, told us that the idea that negotiations for separation alone could be concluded within 18 months was ludicrous:

It is completely unrealistic. It seems to me to have been set for purely party political reasons. The reason why the SNP want independence day to occur in March 2016 is that they want it to occur while they still have a majority in Holyrood.⁴⁴

35. Negotiations with the EU on whether Scotland should be permitted to opt out of Schengen, for example, could not take place until the UK, Ireland and Scotland agreed whether, and on what terms, Scotland might join the Common Travel Area as a separate country. Similarly, negotiations with the EU on economic issues, including membership of the Eurozone, could not take place until the currency arrangements of a separate Scotland were clear. It is also presently unclear whether the negotiations would be conducted on the basis that nothing is decided until everything is decided. Such an arrangement, which weakens the Scottish Government's negotiating position because of its self-imposed timetable, is likely to itself be the subject of negotiations and thus delay.

36. The Scottish Government also appears to underestimate the complexity of the negotiations, as Jim Currie, a former Director General of the European Commission, told the Scottish Parliament's European and External Relations Committee:

The terms of an independent Scotland's membership would not simply involve a seamless move into the EU. Tough negotiations would revolve around a number of things and specifically the opt-outs that the UK has [...] I think there will be tough negotiations around these things. Other Member States will have the right to challenge the position and ensure that the conditions under which Scotland would become a full Member State of the EU are fully negotiated.⁴⁵

37. Finally, the 18-month period the Scottish Government is allowing for negotiations on separation from the UK and membership of the European Union includes a General Election in the UK and the appointment of a new European Commission. The imminence of the General Election, which by the referendum will be less than eight months away, is likely to considerably inhibit the UK negotiators since parties competing for the votes of the citizens of England, Wales and Northern Ireland are unlikely to be focused on the needs of Scotland or competing as to which can be most generous to Scotland. The prospects for speedy progress, even for parts of a final deal, are not good.

38. Even with no distractions it would be highly unlikely for Scottish membership to be agreed and ratified within an 18-month period,⁴⁶ but, given the number of challenges to overcome, we do not believe that the process could be concluded by 24 March 2016. It is

44 Q4108

45 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 20 February 2014, p1811

46 See for example: [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament by Graham Avery, and comments made by Professor James Crawford (source: Daily Record, [Legal expert says Scotland could become an independent country within 18 months of yes vote](#), 12 February 2013)

worth noting, as Graham Avery points out, that with regard to the variability of the date of separation, “it is not hugely important to other Member States.”⁴⁷

39. It is misleading for the Scottish Government to claim that on 24 March 2016 Scotland could be both a separate state and a Member State of the European Union. There are a number of clear risks to the Scottish Government's strategy to gain membership of the EU, all of which are overlooked in the White Paper, and which make the 18-month timetable unbelievable. The Scottish Government's attitude to becoming a member of the EU appears based on the sentiment, as articulated by Fiona Hyslop MSP, that “where there's a political will, there will be a way”.⁴⁸ The Scottish Government has provided no proof that the will exists across Europe for Scotland's membership of the EU to be fast-tracked with a timetable of Scotland's choosing, nor can it be certain that its chosen way of achieving such a goal is legitimate or would be accepted by all Member States. To date, not a single Member State has indicated its support for the Article 48 route.

What happens after 18 months?

40. As set out above, it is unbelievable that a separate Scotland would be a Member State of the European Union by 24 March 2016. Professor Armstrong told us that “the idea that all of this could be completed within that period is wishful thinking. I do not know of any example where an entity seeking to become a Member State of the European Union had itself set the date on which that would occur.”⁴⁹ Not only has no other Member State set such a target for its membership application to be completed but the other Member States have little reason to meet it.

41. Should it look likely that Scotland's deadline for membership be missed then three courses of action are readily identifiable: (i) Scotland leaves the European Union; (ii) a provisional arrangement is made to continue aspects of Scotland's existing relationship with the EU; (iii) the date for independence is postponed. Other choices may be available and under consideration by the Scottish Government, if so, they should share these with Scottish voters.

42. There is no evidence to suggest that any Member State regards Scottish membership of the EU, on the right terms, as contrary to their national interest but this does not mean that Member States would fast-track Scotland's request for membership simply because this is what Scotland demands. Were Scotland to insist on separation without the matter of EU membership resolved then, in Graham Avery's words, the situation would become a “legal nightmare”:

Unless Scotland continues to apply EU rules, life will be become diabolically complicated for firms and citizens, not just in the UK, but in Germany, Spain and elsewhere. It is well known that citizens and firms in Member States other than the

47 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 30 January 2014, p1737

48 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 3 April 2014, p1947

49 Q4109

UK have rights in Scotland, by virtue of Scotland being a member of the EU and, if Scotland no longer applied EU rules and no longer had EU obligations, they would be in a right mess.⁵⁰

It is therefore possible that the EU might make efforts to continue Scotland's presence on a provisional basis.

43. Graham Avery indicated that Scotland could apply to become a member of the European Economic Area (EEA). States in the EEA participate in the EU's internal market but the EEA does not cover fisheries and agriculture. Therefore, if Scotland went down this route some form of customs controls would need to be introduced in these areas.⁵¹ A country in the EEA also has no say in decisions taken by the EU. Membership of the EEA would need to be negotiated and ratified, not just with the 28 EU Member States but also with Norway, Iceland and Liechtenstein. Given the First Minister's recent threats to block access to Norwegian waters if Scotland did not receive EU membership, Norway's assent may now be more difficult to get.⁵²

44. Professor Armstrong explained that, if membership was pursued through the accession route (Article 49) then, if the accession treaty had been agreed but not yet ratified:

It is not inconceivable that that treaty could provide for the provisional application of certain aspects of the treaty, pending ratification. Precisely what those would be is a matter for negotiation. It might be that they would deal largely with ensuring continuity of free movement within the single market, but when it came to more difficult issues of receipt of funds, or participation in institutions, that would not be possible.⁵³

45. It is clear that any provisional arrangements would leave Scotland in a poorer position and with less influence in the EU than it currently enjoys as part of the UK. Such arrangements would also not provide any certainty over a date for membership. Graham Avery concludes:

For me, the alternative ideas that people talk about for the interim period are not very convincing. Candidly, from the point of view of the legal ingenuity needed to put them in place, they would be just as complicated as putting in place an accession treaty from day 1 – probably more so.⁵⁴

We do not believe that negotiation and subsequent ratification of Scotland's membership of the EU could be concluded by 24 March 2016. The Scottish Government have to tell the Scottish people which of the alternative options available

50 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 30 January 2014, p1743

51 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 30 January 2014, p1744

52 See Speech made by the [First Minister at the College of Europe in Bruges](#), 28 April 2014, "Should Scotland not be able to secure unbroken membership of the EU the First Minister has threatened "the fishing fleets of 12 countries being denied access to Scottish waters and as a consequence, their access to Norwegian waters".

53 Q4201

54 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 23 January 2014, p1744

they favour. The alternative scenarios of Scotland leaving the EU and entering into complex provisional arrangements or joining the European Economic Area are neither guaranteed nor satisfactory; they offer little benefit, but could cause significant harm to Scotland's interests.

46. An obsession with securing membership of the European Union by a specific date has significantly weakened the Scottish Government's negotiating position. It was a mistake to have made such a commitment. The Scottish Government must clarify for the people of Scotland whether, in the event of a yes vote, its focus in any negotiations would be on getting the best outcome for Scotland or meeting an arbitrary and self-imposed timetable.

3 Conditions of membership

47. In the White Paper, *Scotland's Future*, the Scottish Government states that its negotiating position on the terms of its membership of the EU would be based on the EU Treaty obligations and provisions that currently apply to Scotland under its present status as part of the UK. The Scottish Government further asserts that its membership of the EU would cause no detriment to other Member States.⁵⁵ This belief, that Scotland would simply “inherit the position that the UK has”,⁵⁶ masks the complex negotiations that would be required for Scotland to become a Member State of the EU. Jim Currie, former Director General at the EU, told the Scottish Parliament's European and External Relations Committee:

I do not think that you can assert before any treaty negotiation on the terms of new membership what would happen automatically. I think that the negotiations will be tough.⁵⁷

48. While it is reasonable to assume, given Scotland's present situation within the EU, negotiations about each of the 80,000 pages of *acquis* would not be required,⁵⁸ nevertheless careful consideration of each page would be necessary because, as noted earlier in this Report, Scotland is not exercising the same competencies under devolution as it would be exercising were it to become a separate state. Certain key aspects of Scotland's proposed terms of membership would almost certainly be subject to detailed consideration (irrespective of the chosen route to membership). Such conditions include the opt-outs that Scotland currently enjoys by being part of the UK, in particular opt-outs from the Eurozone, Schengen and Justice and Home Affairs measures, as well as the complicated matter of the UK rebate.⁵⁹ We consider these key terms of a separate Scotland's membership of the EU below. It should also not be forgotten that negotiations on the terms of Scotland's membership would be contingent upon the outcome of the necessary internal negotiations on Scotland's separation from the UK.⁶⁰

Opt-outs

49. The Scottish Government has stated that a separate Scotland would seek to retain the opt-outs it currently benefits from by being part of the UK. While there is no legal reason why Scotland should not, or could not, seek to negotiate membership on these terms, the Scottish Government has not set out the potential problems that stand in the way of securing such a favourable outcome. A fundamental challenge, as the Minister for Europe

55 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p220, Speech made by the [First Minister at the College of Europe in Bruges](#), 28 April 2014

56 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 3 April 2014, p1958

57 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 20 February 2014, p1813

58 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 23 January 2014, p1739

59 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p222

60 Q5242

told us, is that the EU is institutionally resistant to the principle of opt-outs.⁶¹ Only Ireland, the United Kingdom, Denmark (all of whom acceded in 1973) and Poland (acceded in 2004) have been able to secure major exemptions for the long-term. On a more practical level, all new Member States are obliged to sign up to the *acquis communautaire*—the core body of EU law—which, for example, includes a commitment to join both the Euro and the Schengen zone.⁶² The UK Government has opt-outs from both of these areas.

50. In addition, the UK Government, who would be likely to lead negotiations with the EU under an Article 48 process, could not be expected to negotiate certain special terms and opt-outs on Scotland's behalf if it felt they would be disadvantageous to its interests as the successor state. Most significantly, however, regardless of whether an Article 48 or 49 route is pursued, *all* Member States must agree to the terms of Scottish membership before it can join, including any favourable terms or opt-outs Scotland wishes to be granted. This would mean other Member States agreeing to opt-outs for Scotland that they themselves do not possess.

The Euro

51. The Scottish Government has made clear its intention not to join the European single currency:

While the Scottish Government recognises the political and economic objectives of the Eurozone, an independent Scotland will not seek, nor will we qualify for, membership of the Eurozone. Scotland's participation in the Sterling Area will not conflict with wider obligations under the EU treaties.⁶³

As part of the *acquis*, all new Member States must make a binding commitment to join the Euro.⁶⁴ It is not clear whether in not seeking membership of the Eurozone the Scottish Government intends a separate Scotland to seek a formal opt-out. Only the UK and Denmark, both members of the community since 1973, have secured such an opt-out.⁶⁵ The Minister for Europe pointed to the experience of recent EU accessions:

If you look at those member states who have come into the European Union since the Euro was created, all of them as part of their accession negotiations and accession treaty had to accept a binding obligation to join the Euro—not immediately, because they have to commit themselves to reaching the economic criteria necessary for joining the single currency, but they have to accept a binding treaty commitment, binding in international law, to join the Euro.⁶⁶

61 Q5191

62 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p65

63 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p222

64 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, pp68-69.

65 Sweden has still not adopted the Euro, despite having joined the EU in 1995 and having made a binding commitment to do so. See HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p68.

66 Q5189

No other Member State has sought an opt-out from the Euro, which would make the Scottish case unique if it were to pursue such a course.⁶⁷ Furthermore, it is difficult to see how Scotland could negotiate an opt-out from the Euro before having negotiated its preferred currency option—the retention of Sterling in a formal currency union—with the rest of the UK. In this regard, it is pertinent to note that both coalition parties in the UK Government, and the Labour Party, have already ruled out the possibility of a separate Scotland sharing the pound.⁶⁸ Any commitment to join the Eurozone, even if it was in the long term, would undermine the basis of any formal currency union as markets would not think the arrangement permanent. The lack of clarity over a separate Scotland's economic future would almost certainly delay Scotland's bid to become a Member State.

52. In reality, the EU could not force a separate Scotland to join the Euro. Before becoming a member of the Eurozone, a separate Scotland would first have to join the exchange rate mechanism, such a step is voluntary. Dr Fabian Zuleeg, Chief Executive of the European Policy Centre, told the European and External Relations Committee of the Scottish Parliament that “there is nothing in the legal framework of the European Union that could force a country to join the exchange rate mechanism so, although there might be pressure on a country to join the exchange rate mechanism, that condition cannot be enforced by law.”⁶⁹ **A separate Scotland cannot be forced to adopt the Euro, but Member States might well insist on a commitment to do so in the future.**

53. In the event that Scotland was able to obtain an opt-out from the Eurozone, it would still have to comply with other EU economic and fiscal recommendations. Failure to do so could lead to the suspension of budget payments under what is known as macro-conditionality. The UK has an opt-out from these arrangements.⁷⁰ In addition, EU Member States have to comply with the Stability and Growth Pact (SGP) which sets limits for Government debt and deficit. Under the SGP Member States' debt-to-GDP ratio must be less than 60% or, if above, be clearly declining to less than 60%. Member States that fail to comply with this obligation face economic sanction.

54. A separate Scotland's debt-to-GDP ratio is predicted to be in the region of 86%.⁷¹ According to the National Institute for Economic and Social Research (NIESR) this means that, “an independent Scotland is likely to require a more restrictive fiscal stance than proposed by the Coalition government for many years.”⁷² **On joining the EU, the government of a separate Scotland would have to commit to meeting the EU target of getting national debt down to 60% of GDP within 10 years. To achieve this the Scottish Government would have to impose additional spending cuts to those planned by the UK Government or raise taxes higher, or both. We will give further consideration to fiscal limitations imposed by the EU in our future work.**

67 HM Government, *Scotland analysis: EU and international issues*, January 2014, Cm 8765, p63

68 *Scottish independence: 'Yes vote' means leaving pound, says Osborne*, BBC News Online, 13 February 2014,

69 *Evidence* taken before the European and External Relations Committee of the Scottish Parliament, 20 February 2014, p1829

70 HM Government, *Scotland analysis: EU and international issues*, January 2014, Cm 8765, pp69-70.

71 *Independent Scotland would face immediate £23bn debt – thinktank*, *Guardian*, 8 April 2014; NIESR, *Public sector debt, borrowing, taxation and fiscal rules: evidence presented to the Scottish Parliament's Finance Committee*, 25 April 2014

72 *Independent Scotland would face immediate £23bn debt – thinktank*, *Guardian*, 8 April 2014

Schengen

55. Another major feature of the EU *acquis* the Scottish Government wishes to opt-out of is the Schengen travel area.⁷³ The Scottish Government instead prioritises membership of the Common Travel Area (CTA) that currently exists across the UK, Ireland, Isle of Man and Channel Islands:

There are no circumstances in which the Scottish Government would countenance any measure being taken that jeopardized the ability of citizens across the rest of the UK and Ireland to move freely across our borders as they are presently able to do. It is for this reason that following independence Scotland will remain part of the Common Travel Area (CTA), which dates back to the 1920s.⁷⁴

The Scottish Government states that, “there are absolutely no grounds to believe that the EU would challenge Scotland remaining part of the CTA rather than joining the Schengen area.”⁷⁵ This assertion is completely without foundation, since all new Member States are required to commit to joining the Schengen area, an obligation that has been in place since 1999.⁷⁶ Once again, an opt-out would be required for a separate Scotland to remain outside the Schengen zone in the long-term, something only long-standing Member States of the EU—Ireland and the UK—have been able to negotiate.⁷⁷ No new Member State has sought an opt-out from Schengen, so Scotland’s attempt to do so would be unprecedented.⁷⁸

56. Negotiations over the Common Travel Area would have to take place between Scotland and the UK, before Scotland could begin negotiations over an opt-out with the EU. One potential flash-point for dispute between Scotland and the UK is immigration. The CTA operates on the basis that members have broadly similar immigration policies (as the UK and Ireland presently do) but, it is the stated aim of the Scottish Government to promote greater immigration into Scotland as a post-separation policy. In his evidence to the Committee, Minister for Immigration and Security, James Brokenshire MP stated that it would be “wide of the mark” for a separate Scotland to run a markedly different immigration policy from the continuing UK and expect there to be no implications regarding a common travel area.⁷⁹

57. In the event of the Scottish Government being unable to negotiate an opt-out and having to participate in Schengen as part of its terms of accession, the Minister for Immigration and Security described how the current regime of free and uninterrupted travel between Scotland and the rest of the UK could change:

73 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p223

74 *Ibid.*

75 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p224

76 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, pp70-71

77 The UK has chosen to opt-in to police co-operation aspects of Schengen but has the right to opt-out of measures building on this, See HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765

78 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p63. Both Rt Hon David Lidington MP and James Brokenshire MP indicated in their oral evidence to the Committee that the continuing UK would be supportive of Scotland seeking an opt-out from Schengen, however, as Mr Lidington pointed out, “I do not think it is the UK that the Scottish Government in those circumstances would have to worry about.”[Q5253]

79 Q5276

If Scotland were part of the EU and part of Schengen, in those circumstances it would be under an obligation to secure the external Schengen border. Therefore, it could itself be under obligations to put in place border checks, border controls and everything that that brings with it.⁸⁰

The need to complete negotiations with the UK on key issues before Scotland can negotiate with the EU is not mentioned by the Scottish Government in the White Paper, but it is further reason to doubt the plausibility of the Scottish Government's 18-month timetable for negotiation and ratification of a separate Scotland's membership of the EU.

58. **The Scottish Government seems to believe that opting out of joining the Eurozone and Schengen would be a formality, but Member States have no reason to give in to Scotland's demands, and they each enjoy a right of veto over a separate Scotland's potential membership. The case made by the Scottish Government in the White Paper that, in the event of separation, it could and should continue to receive the opt-outs and derogations negotiated by the UK appears to us based on wishful thinking rather than legal and historical precedent.**

Justice and Home Affairs

59. The UK has negotiated flexibility to opt in to EU measures relating to Justice and Home Affairs (JHA), in light of what it considers to be within its national interests. The UK Government's *Scotland Analysis* paper on EU and international issues gives the following example:

The UK has used this power to protect the nation from measures that it does not wish to take part in, such as those that would require changes to UK immigration law, while participating where it is in UK interests to do so; for example, the UK participates in measures against human trafficking.⁸¹

60. Scotland benefits from this provision of UK EU membership and the Scottish Government is consulted on all decisions on whether or not to participate in specific JHA measures.⁸²

61. It is the stated aim of the Scottish Government to seek to retain this current flexibility in the event of negotiations to seek separate EU membership.⁸³ Only the UK, Ireland and Denmark—all members for over 40 years—have managed to negotiate flexibility in the area of Justice and Home Affairs.⁸⁴ The *Scotland Analysis* paper suggests that failure to negotiate an opt-out would mean Scotland having to adopt the JHA portion of the *acquis* in full, requiring “major changes to its legal system.”⁸⁵ However the paper does not provide detail on the exact nature of these changes. **No new Member State has negotiated an opt-**

80 Q5267

81 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765

82 *Ibid.*, p71

83 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p224

84 Q5189

85 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p71

out from JHA measures and it is questionable that Member States would grant Scotland a greater flexibility than they themselves are able to exercise. The UK Government claims that a failure to negotiate an opt-out from EU Justice and Home Affairs measures would have major implications for a separate Scotland's legal system. This is an important matter which requires further clarification.

VAT

62. The rates at which Member States can charge VAT is dictated by the European Union's VAT legislation (Directive 2006/112). The Directive sets out the basic framework within which Member States are afforded a degree of flexibility. However, the Directive stipulates that Member States must have a standard rate of at least 15% while allowing for some reduced rates of not less than 5%. Some Member States, such as Malta, Ireland and the UK, have been able to negotiate the ability to charge a zero-rate of VAT and out of those the UK makes the most use of this ability, with 54 items listed by HMRC as attracting zero-rates of VAT. Items range from food, children's clothes, books and newspapers and equipment for the disabled, to parts of the shipbuilding and aircraft repair sectors.⁸⁶

63. In the event of a vote in favour of separation, the Scottish Government would have to negotiate derogations from the VAT Directive if it wished to continue to benefit from zero-rates of VAT. However much the Scottish Government repeats the mantra of 'continuity' and claims that a smooth transition would benefit everybody, there remains no guarantee that other Member States would agree to grant a separate Scotland flexibilities that they are not able to exercise themselves. Furthermore, the granting of a derogation to Scotland would go against the objective of the VAT Directive of simplification and rationalisation. From 1 January 2013 Croatia replaced its zero-rate of VAT by a minimum rate of 5% ahead of its becoming an EU Member State six months later.

64. **A Scottish EU Member State would be bound by EU legislation on VAT. There is no guarantee that the Scottish Government would negotiate the opt-outs that would be required to continue zero-rates of VAT on items such as children's clothes, food and books. Failure to secure an opt-out would see costs of these basic items increase by a minimum of 5%. Like other risks surrounding separation, this threat to the pockets of Scottish families is overlooked by the Scottish Government. The uncertainty over zero-rates of VAT does not exist if Scotland remains part of the UK.**

Student fees

65. In the White Paper, *Scotland's Future*, the Scottish Government sets out plans to maintain the current arrangements on university tuition fees.⁸⁷ Article 18 of the Treaty on the Functioning of the European Union, which forbids discrimination against other EU citizens on the grounds of nationality, provides that the Scottish Government's present policy of free access to higher education for citizens domiciled in Scotland must also apply to students from all EU Member States, as they must be treated the same as students of the

86 European Commission, [VAT Rates Applied in the Member States of the European Union](#), 13 January 2014

87 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, pp197-200

host country. The regulations governing discrimination *between* Member States do not apply to students from Wales, England and Northern Ireland, as, at present, they are *within* the same Member State. Scotland's higher education institutions are therefore free to - and do - charge students from the rest of the UK up to £9,000 per year in tuition fees.

66. In the event of separation and membership of the EU, plans to continue to charge tuition fees to students from the rest of the UK would clearly be contrary to Article 18 as Scotland would be overtly discriminating against students from another EU Member State. The Scottish Government's position is that it would seek a derogation from this fundamental part of EU law. As we discussed in our Report *The Referendum on Separation for Scotland: the impact on higher education, research and tuition fees* it is unlikely that the European Court of Justice would accept Scotland's position; the possibility of the Scottish Government achieving such a derogation is therefore remote.⁸⁸

67. Unlike other areas from which Scotland would be seeking an opt-out, such as Schengen, in the case of student tuition fees the UK has a direct interest in making sure Scotland does not secure special dispensation. The Minister for Europe was forthright on this point:

I cannot see it as probable that any UK Government would accept that students in Scotland from the UK should be disadvantaged in that way, and should lose out on a right that they would have under European law.⁸⁹

68. It is appropriate to consider what this stance might mean for Scottish negotiations on terms of EU membership. **If an Article 48 route to membership were pursued, it seems highly unlikely the UK Government would seek to negotiate a position on behalf of Scotland that would see thousands of its own students disadvantaged. Under an Article 49 accession, while Scotland would be arguing its own case, it would still have to persuade the other Member States, including the UK. On this basis, it is surely time for the Scottish Government to admit that its hopes of discriminating against students from the rest of the UK on the charging of tuition fees are dead; alternative plans must now be made.**

69. **If a separate Scotland's universities were unable to charge tuition fees to students from the continuing UK there would be a £150 million funding black hole in the higher education budget. The Scottish Government has failed to say how, or even if, that gap in funding would be filled.**

88 Scottish Affairs Committee, Seventh Report of Session 2013-14, [The Referendum on the Separation of Scotland: the impact in Higher Education, Research and Tuition Fees](#), HC1144

89 Q5235

4 Contributions to and receipts from the EU budget

The rebate

70. One of the most difficult negotiations of Scotland's separation and membership of the EU is likely to be on the question of the budgetary rebate. The UK rebate is currently worth around €3 billion a year;⁹⁰ in 2012 its value to Scotland was approximately €354 million.⁹¹ The Scottish Government asserts that after separation from the UK, Scotland could expect to retain a share of the British EU rebate:

Scotland is likely to be a net financial contributor to the EU, subject to negotiation on issues such as the rebate and Scottish take up of EU funding programmes. The EU budget has been agreed until 2020. We see no reason for re-opening current budgetary agreements. Prior to 2020, we consider that the division of the share of the UK rebate would be a matter for negotiation between the Scottish and Westminster Governments.⁹²

However, the UK Government's *Scotland Analysis* paper on EU and international issues suggests that, in the event of separation, the rebate would be automatically recalculated to take account of the change in circumstances of the United Kingdom:

The rebate is not a constant, annual lump sum amount that can be divided or shared. It is a function of the UK's respective shares in the EU economy and receipts. Any change in the size of the UK economy and receipts (for example as a result of Scottish independence) would be automatically reflected in the rebate calculation, with the new amount relating to the UK, excluding Scotland.⁹³

71. The Minister for Europe told us that the Scottish Government's claim was unfounded: "The most charitable explanation is that it is based upon a complete misunderstanding of how the UK rebate is calculated and embodied in EU law."⁹⁴ The Minister argued that, far from retaining a 'share' of the UK rebate, as a separate member of the EU, Scotland would have to contribute to the rebate like other Member States.⁹⁵ The Minister put the net cost to Scotland of the loss of the rebate at €2.9 billion (€1,100 or £895 per household in 2014 prices) for the seven-year period 2014-2020: €2.3 billion for the loss of the rebate and €640 million for Scotland's contribution to the continuing UK's rebate.⁹⁶

90 HM Treasury Press Release, [Chief Secretary to the Treasury Danny Alexander on Scotland analysis: EU and international issues](#), 17 January 2014

91 New Direction, [Three EU-related impacts of Scotland leaving the UK](#), January 2014

92 Scottish Government White Paper, [Scotland's Future: your guide to an independent Scotland](#), November 2013, p222

93 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p75

94 Q5248

95 *Ibid.*

96 Letter from Rt Hon David Lidington MP, Minister of Europe to the Chair of the Committee, 30 April 2014

72. In order to try and make up the shortfall, a separate Scotland could seek to negotiate a rebate of its own. However, as the Minister explained, this would be extremely difficult:

I can see no circumstance whatsoever, knowing how tough the budget negotiations were last year, in which other Member States who are contributing to the UK's rebate would happily agree to Scotland not only being spared such a contribution, but then being entitled to a rebate of her own.⁹⁷

The Analysis paper further describes how no other Member State has ever negotiated a rebate upon its accession, and that doing so would be extremely difficult: "if it did, this would necessarily be at the expense of securing particular treatment in other areas."⁹⁸ Furthermore, according to recent research, all EU Member States would gain financially from Scotland losing the rebate, with those most to gain being France (€110m per annum) and Italy (€85m per annum).⁹⁹ It is open to question whether they would agree to let Scotland inherit the UK rebate or negotiate one of its own. Under an Article 48 process Scotland would also be asking the UK to open negotiations on its behalf and it is hard to believe that the UK would reopen discussions of budgetary corrections given the unpopularity of its rebate amongst other Member States.

73. The Scottish Government appears to misunderstand how the UK's rebate is calculated. In the event of separation, the UK's rebate would be automatically adjusted to reflect the change in the UK's circumstances. There would be no Scottish share to be negotiated as the Scottish Government erroneously suggests. Instead, Scottish households would have to make an additional contribution to the EU budget, some of which would go towards paying the UK's rebate.

CAP payments

74. In the event of separation, the Scottish Government has stated that it does not propose to re-open EU budget negotiations. Scottish farmers will therefore be no better off under a separate Scotland. In fact, there is a risk that they could be worse off. The amount that Scotland would receive as a separate Member State would depend on the negotiations on the terms of its membership. While the recent CAP deal concluded that all Member States should receive €196 (£159) per hectare by 2020, the approach taken to new members has been that CAP receipts are phased in over ten years. Under this scenario, a separate Scotland could see its CAP receipts cut from the €3.6 billion it receives as part of the UK, to €2.4 billion over 2014-2020. The Minister for Europe told us that it would be "hard to envisage Member States that do not have 100% access to their CAP entitlements agreeing that Scotland should over-leap them".¹⁰⁰

75. The Scottish Government argues that Scottish farmers receive the third lowest payment rate in the EU and that, had Scotland been a separate Member State, it would have seen an increase in the allocation of funds under rules that guarantee all Member States payments

97 Q5247

98 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p76

99 New Direction, [Three EU-related impacts of Scotland leaving the UK](#), January 2014, p11.

100 Q5232

of no less than €196 (£159) per hectare by 2020; Scotland currently receives €130 (£106) per hectare. One reason why Scotland's average per hectare rate is low is because it includes a payment rate of €20-25 per hectare on vast areas of relatively unproductive land, some of which is not actively farmed. The payment rate for arable/permanent grassland is much higher at €200-250 (£163-£203).

76. Exclusion of land that is not actively farmed from payment, as the Scottish Government argued for in the latest round of CAP negotiations, would see an increase in the per hectare rate of payment allocated to productive land. On the one hand the Scottish Government does not want to see payment made on unproductive land that is not actively farmed but it is content to include that land in calculations to suggest it receives an unfair deal from the UK. Another way of looking at CAP receipts is in terms of payment per farm. Under this scenario the average payment per farmer is £25,700 in Scotland, compared with £17,400 in England, £16,200 in Wales and £7,300 in Northern Ireland. The average annual payment received by Scottish farmers is also one of the highest in Europe.¹⁰¹ The argument that Scottish farmers receive a low share of funding from the UK is therefore not as clear-cut as the Scottish Government makes out.

77. As with Structural Funds, should Scotland's presence within the EU be interrupted, even temporarily while negotiations on membership take place, CAP receipts would cease as there would be no treaty authority to pay them. Any continuation of current levels of support would require funding from the Scottish national budget of between €550 and €600 million per annum. However, as mentioned earlier, Scotland's contributions to the EU budget would also cease during this period.

78. Separation poses clear risks to Scotland's farmers. The level of funding they would receive under Pillar I of the Common Agricultural Policy is uncertain. In the event that Scotland has to accede under the Article 49 process then CAP receipts would cease for any period that Scotland is outside the EU. The Scottish Government has made no commitment to maintain levels of funding should this scenario occur. Whatever the route to membership, there are no guarantees that a separate Scotland would continue to receive the same level of payments that it does now. For this to happen Scotland would need to successfully negotiate that it should receive a higher allocation of receipts than some existing Member States, notably those that have recently acceded and had to accept the ten-year phase-in of payments that Scotland would be seeking to avoid.

79. The Scottish Government should make clear the potential risks as well as the alleged benefits of separation. In terms of the CAP, separation would bring no improvement in funding for Scottish farmers before the end of this budgetary period in 2020 (anything beyond that is unknown) and could result in levels of funding being cut or even interrupted.

101 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765

Structural Funds

80. Structural and Cohesion Funds are the financial tools the EU uses to implement its policy of reducing disparity between regions.¹⁰² The recent deal on the Multi-Annual Financial Framework (MFF) provides that more than two-thirds of EU funds for the period 2014-2020 are allocated to Structural and Cohesion Funds (SCFs) and the CAP.¹⁰³ The *Scotland Analysis* paper states that for the 2014-2020 period Scotland would have received €567 million under an EU-level formula if the UK Government had not chosen to use national level flexibility and increased Scotland's allocation to €795 million.¹⁰⁴ **Scotland currently benefits from a favourable allocation of Structural Funds by the UK Government that sees it receive an additional £186 million between 2014-2020. On separation, this uplift would be lost and, should Scotland's presence within the EU be interrupted, even temporarily, while negotiations on membership take place, the payment of any Structural Funds would cease as there would be no treaty authority to pay them.**

Net position of a Scottish Member State

81. The Scottish Government acknowledges that a Scottish Member State would be a net contributor to the EU.¹⁰⁵ In its *Scotland Analysis* paper on the EU and international issues, the UK Government estimates that a separate Scottish state would make a gross contribution of "around €12.9 billion per year over the period of the next MFF. As part of the UK, over the same period, the gross contribution would be €10.0 billion".¹⁰⁶ The increase of €2.9 billion (€1,100 or £895 per household) is a combination of €2.3 billion for the loss of the rebate and €640 million for Scotland's contribution to the continuing UK's rebate.

82. Should Scotland remain part of the UK its receipts are estimated to be €6.3 billion between 2014-2020 – its current net contribution to the EU over this period is therefore €3.7 billion. A separate Scotland would lose the €228 million uplift in Structural and Cohesion funds allocated by the UK. It could also lose €1.2 billion in CAP receipts if EU Member States demand that Scotland's direct payments are phased in over ten years as has happened with the last three countries to have acceded. Taking into account the loss of the rebate, a separate Scotland's net contribution to the EU would therefore be in the region of €6.4 billion in the most optimistic scenario and €8 billion in the worst case scenario – an increase of between €2.7 billion and €4.3 billion (€1,036-€1650 per household or £843-£1343 in today's prices).

102 Europa website, [glossary](#)

103 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p76

104 This equates to an additional €228 million or £186 million

105 Scottish Government, [Scotland in the European Union](#), November 2014

106 HM Government, [Scotland analysis: EU and international issues](#), January 2014, Cm 8765, p77

83. In the context of the EU budget, the Scottish Government's plans for separation, even under the best-case scenario, would leave Scottish households at least £843 worse off. Under the worst-case scenario, that of a separate Scotland seeing its CAP receipts phased in over ten years (as has been the case with the 13 most recent Member States), then Scottish households would be £1,343 worse off than if they remained part of the UK.

5 Conclusion

84. Scotland is unlike other European countries that wish to join, or have joined, the European Union. It has been present within the EU, as part of the UK, for the last forty years and is home to five million people who are currently EU citizens. This does not mean Scotland's bid for membership of the EU as a separate state would be straightforward. Substantial, difficult and wide-ranging negotiations would still need to take place – on whatever issues the existing Member States raise. As Jim Currie, former Director General at the EU Commission, commented, nothing should be assumed:

There is a sense in which, on one hand, Scotland's right to membership is clear. The conditions under which membership is gained would be up for negotiation and those negotiations would be tough and perhaps even lengthy.¹⁰⁷

85. The accession negotiations for Croatia, the most recent country to join the EU, lasted six years. Scotland's circumstances are different and aspects of its bid for membership could proceed relatively smoothly. For example, because Scotland already transposes and works within EU law, it would be unrealistic to envisage negotiations about each page of the 80,000 pages of *acquis* (though some consideration would be required as explained in para 48). But, unlike Croatia, Scotland would be demanding opt-outs in a number of key areas that are fundamental to the aspirations of the European Union, such as universal Justice and Home Affairs measures, Schengen and the single currency. The Scottish Government asserts that, as a separate Scotland, "we can and we should" continue to benefit from the opt-outs negotiated by the UK, but there is no reason why the Member States should just accept Scotland's demands particularly when they are unable to exercise similar arrangements themselves: Jim Currie said, "it will not be a matter of the doors being opened and Scotland sailing through".¹⁰⁸

86. All Member States will have a say in Scotland's membership and several of those have separatist movements within their own boundaries. Member States may object to a Scottish state securing favourable terms or for its passage to membership of the EU passing smoothly because of the precedent this would set for other separatist aspirations. **We agree with the conclusion of the House of Commons Foreign Affairs Committee that the Scottish Government "underestimates the unease which exists within EU Member States and EU institutions about Scottish independence". Not only does this mean that the period required for negotiations is longer than anticipated by the Scottish Government but, ultimately, all 28 Member States have the right to veto if they are unhappy with the terms of a separate Scotland's membership of the EU. That the Scottish Government does not take this threat seriously demonstrates a lack of understanding of the realities of international politics.**

87. It is understandable that a country securing independence would not want the process of separation to drag on indefinitely but, in setting a timeframe of just 18 months from the

107 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 20 February 2014, p1812

108 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 20 February 2014, p1824

Referendum to the date of separation, the Scottish Government has weakened its hand in negotiations, not just with the UK but also with the EU, with potentially damaging consequences for Scotland. By setting such a deadline, the Scottish Government has put itself under a great deal of pressure to ensure that the negotiations fit the timescale. As Aidan O'Neill QC explained to the European and External Affairs Committee of the Scottish Parliament, "the question for the Scottish electorate is then: what concessions will have to be made along the way to meet that timescale?"¹⁰⁹

88. Eighteen months is an implausible timeframe for negotiations to be complete and treaties ratified. Scotland leaving the UK would alone require complex and difficult negotiations. Key discussions on the conditions of Scotland's membership of the EU would be contingent upon the outcome of negotiations with the UK on budgets, borders, currencies and financial regulation to name but a few. It would be impossible for the UK to put forward coherent treaty amendments to other Member States until these arrangements had been finalised. The only way separation and EU membership might be achievable within 18 months is if the Scottish Government accepted significant concessions at every sticking point in the negotiations – doing so, just to meet a timetable of its own devising, would be irresponsible and to the detriment of Scotland in the long term.

89. It is clear that a separate Scotland's conditions of EU membership would not be as favourable as they are now, not least because the cost per household of Scotland's contributions to the EU would rise significantly as Scotland ceased to benefit from the UK's rebate. The cost of basic items such as food, books and children's clothes could also increase and payments to farmers could be cut.

90. There is a great deal of uncertainty surrounding the Scottish Government's plans for EU membership, the process Scotland must use to become a Member State being a prime example. As Sir David Edward commented, "as far as EU law is concerned, the only certainty (apart from the obligation to negotiate) is uncertainty. But that, at least, the people are entitled to know."¹¹⁰

109 [Evidence](#) taken before the European and External Relations Committee of the Scottish Parliament, 23 January 2014, p1702

110 [Written evidence](#) to the European and External Relations Committee of the Scottish Parliament

Appendix 1: Correspondence from Rt Hon David Lidington

Letter from Rt Hon David Lidington, Minister of State for Europe, 30 April 2014

EVIDENCE SESSION ON THE EU AND INTERNATIONAL ISSUES RAISED BY THE SCOTLAND REFERENDUM: FOLLOW UP

Thank you for the opportunity to appear before your Committee to outline the FCO's paper on the EU and international issues raised by the referendum on Scottish independence. Your Committee has taken on an important role in relation to this subject, and I am sure you will continue to make an influential contribution to the debate as we approach the vote in September.

I promised to write on the financial impact of independence on aspects of the Scottish economy and the ability of an independent Scotland to maintain the opt-outs and derogations currently enjoyed by the UK.

EU Budget

On the financial impact of independence, you asked for clarity on the losses to Scottish agriculture that could occur if there were to be a gap between leaving the UK and joining the EU. In the short term, if an independent Scottish state did not become a Member State immediately after becoming independent of the UK, then CAP receipts would be interrupted. Any continuation of existing levels of support to farmers would require funding from a Scottish national budget; somewhere between €550 million and €600 million per year (2011 prices), depending on the year in question. These numbers reflect the level of UK CAP receipts allocated to Scotland for the period 2014-2020, which has been set at €3.6 billion for Pillar 1 receipts.

You also asked for more detail on how certain figures were arrived at. I thought it would be most helpful to explain the various elements that are factored in to the Government's analysis.

The accession date for an independent Scottish state is uncertain. So, to illustrate the effect of independence from an EU budget perspective, the impacts have been analysed over the course of 2014-20. If Scotland's share of North Sea oil revenue is determined on a geographical basis, and assuming that an independent Scottish state was a member of the EU from 2014, the analysis presented in the FCO's January 2014 paper gives the following results.

The rebate: Without a budgetary correction, there would be a total additional direct cost to Scottish taxpayers of around €2.9 billion (€1,100 per household). This figure consists

of the loss of the benefit from the UK rebate (€2.3 billion), with the rest (about €640 million) arising from the Scottish contribution to the UK rebate.

Receipts - uncertainties around the CAP: An independent Scottish state's receipts from the EU budget are uncertain and would depend on the terms of accession, which would have to be agreed by all 28 Member States. In particular, it is unclear whether CAP receipts would transit from current levels to €196 per hectare by 2020, or whether, in common with all 13 Member States that have joined the EU since 2004, full treatment in respect of CAP receipts would be phased in over ten years. The analysis therefore presents CAP receipts, total receipts and net contributions for an independent Scottish state as a range of numbers, reflecting both of these scenarios, and all possibilities in between, which might potentially be negotiated. Following the decision to allocate Scotland €3.6 billion in CAP Pillar 1 receipts for 2014–20, an independent Scottish state's CAP Pillar 1 receipts could range from around €1.2 billion less to around €950 million higher over 2014–20.

Net contributions: However, the total impact of different levels of receipts is dwarfed by the impact of losing the benefit of the UK rebate. In short, even under the most optimistic scenario for CAP receipts, an independent Scottish state's net contribution would be around €2.2 billion (€840 per household) worse than it would be if Scotland were to remain part of the UK. Under less optimistic scenarios, an independent Scottish state could see its CAP (and total) receipts fall substantially, with the deterioration in net contributions over 2014–20 rising to as much as €4.3 billion (€1,650 per household) compared with the situation if Scotland were to remain part of the UK.

All of these euro figures are expressed in terms of 2011 prices. So, as noted above, under the most optimistic scenario for CAP receipts, an independent Scottish state's net contribution would be around €840 (2011 prices) worse per household than it would be if Scotland were to remain as part of the EU. The Chief Secretary noted at the launch of the paper in January that this would be around £750 (this figure is expressed in 2014 prices). Under the worst case scenario in respect of CAP receipts, the additional net cost per Scottish household would be almost double that.

Derogations and Opt-Outs

We discussed the question of specific opt-outs. I confirmed that the UK government would have no problem, in principle, with an independent Scotland attempting to negotiate opt-outs and derogations.

However, I also indicated that all other Member States would have to agree to allow such variable geometry in Scotland's case.

As promised to your committee, the list of opt-outs and derogations that are written into the treaties and protocols is as follows:

- Protocol 15: The single currency opt-out. This recognises that the UK is under no Treaty obligation to adopt the single currency and that a separate decision to do so would be required by the UK government and parliament. This protocol also establishes procedures to enable the UK to opt in to the single currency.
- Protocol 19: The Schengen opt-out. This provides for the UK (and Irish) opt-out from elements of Schengen, and provides for the UK (and Irish) opt-in to some parts of the Schengen acquis, or measures building on these parts, on a case-by-case basis and by unanimity.
- Protocol 20: The opt-out from the prohibition of internal border controls. This authorises the UK to maintain border controls on persons seeking to enter the UK from other Member States. The protocol allows the UK and Ireland to maintain the Common Travel Area. It also allows other Member States to impose equivalent border controls on persons entering their territories from the UK and Ireland.
- Protocol 21: The JHA opt-in. This protocol provides for the UK's (and Ireland's) non-participation in justice and home affairs measures and establishes procedures to enable the UK (and Ireland) to opt in to those measures in which it does wish to participate, either during negotiation or after the adoption of those measures.
- Protocol 36: The JHA opt-out. This protocol sets out transitional provisions for third-pillar justice and home affairs measures adopted prior to the Lisbon Treaty, making these measures subject to CJEU jurisdiction and Commission infraction powers. The protocol allows the UK to opt out from these measures en masse.

There are also a number of derogations from customs and excise rules, most noticeably on VAT. You asked for more information on VAT derogations enjoyed by the UK, and on whether newly acceding Member States have been able to obtain similar conditions.

Zero rates of VAT for items such as food and children's clothing apply to Scotland as part of the UK. These zero rates are specific to the UK and are maintained under long-standing EU agreements – they are not available to all Member States under the VAT Directive. Whether an independent Scotland would be able to secure similar derogations from the VAT Directive, which stipulates a minimum reduced rate of VAT of 5% for certain products and services, and a minimum standard rate of 15% elsewhere, would be a matter for negotiation between the government of an independent Scotland, and the EU and its Member States. An independent Scotland would also need to secure a derogation to continue with the existing reduced rate of VAT for domestic fuel and power.

Some Member States that have recently acceded to the EU, such as Malta, have secured zero rates of VAT for certain items, such as food. In terms of the Member States which have joined since 2004, none has secured zero rates on as wide a range of goods and services as the UK. Further details on VAT rates and special conditions applied in the EU can be accessed at:

http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/how_vat_works/rates/vat_rates_en.pdf.

As I made clear in the evidence session, derogations may also be written into pieces of EU legislation. An example of such a derogation appears in the Working Time Directive – any Member State may opt out from the 48-hour per week limit. The UK has done this.

Further points

I would like to clarify the timescales involved in Croatian accession. I stated in the evidence session that the Croatian accession negotiations lasted around six years. This refers only to the period between October 2005 and June 2011 during which screening and negotiations on accession chapters took place. The wider accession process takes significantly longer; eight years passed between the opening of negotiations to the moment of accession, while the entire process, from the point of Croatia submitting its application to the moment of accession, took ten years.

During the evidence session I stated that a separate EU Member State would require a financial regulatory authority and a central bank of its own. Although a financial regulatory authority is required, a central bank of its own is not. Additionally, I indicated that the Scottish contribution to the UK rebate would be around £1.9 billion over the period from 2014-2020. I would like to clarify that this figure in fact refers to the additional net contribution to the entire EU budget that an independent Scotland would have to make compared to its net contribution as part of the UK over the same period. As stated above, the Scottish contribution to the UK rebate is estimated at around €640 million over the period 2014-2020.

Formal Minutes

Tuesday 13 May 2014

Members present:

Mr Ian Davidson, in the Chair

Mike Crockart
Jim McGovern
Graeme Morrice
Pamela Nash

Sir Jim Paice
Simon Reeve
Mr Alan Reid
Lindsay Roy

Draft Report (*The Referendum on Separation for Scotland: Scotland's Membership of the EU*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 90 read and agreed to.

Summary agreed to.

A paper was appended to the Report.

Resolved, that the Report be the Twelfth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned until Wednesday 14 May at 12.30 pm]

Witnesses

The following witnesses gave evidence. The transcript can be viewed on the Committee's inquiry page at www.parliament.uk/scotaffcom.

Wednesday 15 January 2014

Question number

Professor Iain McLean, Professor of Politics, Official Fellow, Nuffield College, University of Oxford, **Professor Adam Tomkins**, John Millar Chair of Public Law, University of Glasgow, **Professor Kenneth Armstrong**, Professor of European Law, University of Cambridge

[Q4107 - 4256](#)

Wednesday 9 April 2014

Rt Hon David Lidington MP, Minister for Europe, Foreign Office, **James Brokenshire MP**, Minister for Immigration and Security, Home Office

[Q5179 - 5318](#)

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

| | | |
|----------------|--|------------------|
| First Report | Postal Services in Scotland | HC 669 (HC 884) |
| Second Report | Video Games Industry in Scotland | HC 500 (Cm 8067) |
| Third Report | UK Border Agency and Glasgow City Council | HC 733 |
| Fourth Report | The Scotland Bill | HC 775 |
| Fifth Report | Student Immigration System in Scotland | HC 912 (Cm 8192) |
| Sixth Report | The Referendum on Separation for Scotland: Unanswered Questions | HC 1806 |
| Seventh Report | The Crown Estate in Scotland | HC 1117 |
| Eighth Report | The Referendum on Separation for Scotland: Do you agree this is a biased question? | HC 1942 |

Session 2012–13

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| First Report | A Robust Grid for 21 st Century Scotland | HC 499 |
| Second Report | The Referendum on Separation for Scotland: making the process legal | HC 542 |
| Third Report | The Referendum on Separation for Scotland: a multi-option question? | HC 543 |
| Fourth Report | The Referendum on Separation for Scotland: Terminating Trident—Days or Decades? | HC 676 (HC 861) |
| Fifth Report | The Future of HM Coastguard in Scotland | HC 583 |
| Sixth Report | The Referendum on Separation for Scotland: The proposed section 30 Order—Can a player also be the referee? | HC 863 |
| Seventh Report | The Referendum on Separation for Scotland: Separation shuts shipyards | HC 892 |
| Eighth Report | The Referendum on Separation for Scotland: How would Separation affect jobs in the Scottish Defence Industry? | HC 957 (HC 257) |
| Ninth Report | Blacklisting in Employment: Interim Report | HC 1071 |

Session 2013–14

| | | |
|---------------|---|--------|
| First Report | Remploy Marine Fife | HC 454 |
| Second Report | The Referendum on Separation for Scotland: The Need for Truth | HC 828 |
| Third Report | The Referendum on Separation for Scotland: A Defence Force for Scotland—A Conspiracy of Optimism? | HC 842 |
| Fourth Report | The impact of the Bedroom Tax in Scotland: Interim Report | HC 288 |

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