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An Independent Scotland: The Road to Membership of the European Union

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Executive Summary

- This paper addresses the road to membership of the European Union for an independent Scotland.
- The UK Government and Scottish Government each undertook in the Edinburgh Agreement of 15 October 2012 to respect the result of the referendum of 18 September and to work in the interests of the people of Scotland and the United Kingdom. In light of this, and of widespread agreement that it would be in the interests of the people of the UK to see an independent Scotland admitted to the European Union, it is likely that both governments will, in the event of a Yes vote, work to facilitate Scotland's membership of the European Union.
- There are strong reasons to believe that following a Yes vote the European Union would also be prepared to open negotiations aimed at securing the membership of an independent Scotland. Scotland is already part of a Member State, its residents are European citizens, the writ of European law already runs in Scotland and its territorial location is of importance to the European Union for strategic and resource-based reasons.
- In the event of a Yes vote we anticipate that tripartite negotiations will be established involving the Scottish Government, the UK Government and institutions of the European Union, most obviously the European Commission, working towards the accession of Scotland to full membership of the EU and any necessary adjustment of the UK's level of representation within European institutions. It is likely that in this period preparatory drafting of a formal accession treaty will take place.

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- It is highly likely that the United Kingdom will continue in membership of the European Union and that Scotland will require to be admitted as a new member state. Article 48 TEU provides a feasible route by which Scotland's membership could be realised. It is, however, more likely that Scotland will require to make an application to join the European Union by way of the Article 49 of the Treaty of the European Union procedure and that, accordingly, the unanimous agreement of all Member States to any ratification agreement will be required.
- The Scottish Government hopes that Scotland will formally accede to membership of the EU by March 2016. This timetable is ambitious. There will be a number of complex and potentially contentious substantive issues to be negotiated. It is also not possible to predict with certainty how long the ratification process in each Member State might take.
- In the event that Scotland's full membership of the European Union is not achieved by the date of Scottish independence (in particular, pending conclusion of the respective Article 48 or 49 treaty amendment/accession processes) it is likely that the EU will put temporary provisions in place to ensure that the rights and obligations arising from the EU treaties will continue to apply to Scotland in the interim period. This could be done by giving provisional effect to the core aspects of the draft accession treaty until this is finally ratified by all Member States.
- In the event of any deadlock in the process of Scotland's accession to the European Union, the European Union treaties seem to contain an implicit obligation upon the institutions of the EU and the Member States, based upon the principle of European citizenship and the treaties' fundamental rights provisions, to negotiate towards Scotland's accession to the EU. There are different grounds of action through which individual citizens could seek to enforce this duty in the Court of Justice of the European Union. There are reasons to believe that the CJEU would intervene to articulate the existence of a duty upon interested parties to negotiate Scotland's accession to membership in good faith.

I. Introduction

On 18 September 2014 Scots will be asked the question: 'Should Scotland be an independent country?'. If a majority say Yes it is the intention of the Scottish Government that Scotland will become independent of the United Kingdom in March 2016 and at that time will also become an independent member of the European Union.¹

In this paper we address the process by which Scotland's membership of the EU is likely to be achieved, considering the legal issues at stake.² We examine the background and status of

¹ The Scottish Government, 'Scotland's Future', 26 November 2013, available at <http://www.scotland.gov.uk/Publications/2013/11/9348> [accessed 12 August 2014], p.220 [hereafter '*Scotland's Future*'].

² The paper updates an earlier article (Stephen Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland', (2013) *European Constitutional Law Review* 359-390 [hereafter 'Tierney (2013)'] in light of subsequent discussions, debate etc. In particular, it also builds upon the deliberations of an ESRC workshop, '(Re)negotiating EU-Membership: Succession and Accession', held in Brussels on 13 March 2014.

EU law in Scots law before turning to the issue of negotiating Scotland's membership of the EU, considering the different views that have been expressed on this issue. We address the legal process of accession and ask whether there is any legal duty to negotiate Scotland's accession to the EU as an independent Member State in the event of a Yes vote. We conclude that there are strong grounds to believe that there is, within the treaties of the European Union, a duty on Member States to negotiate Scotland's accession to the EU in order to ensure the continuation of existing rights held by citizens and other private persons as currently derived from EU law.

II. Background: the status of EU law in Scots law

The law of the European Union has effect in Scotland. The European Communities Act 1972 provides that all rights, powers, liabilities, obligations and restrictions created by or arising under EU treaties will be recognisable and given effect to in UK law.³ The Act also ensures that courts in the UK are bound by decisions of the Court of Justice of the European Union (CJEU).⁴ The primacy of EU law, in areas of EU competence, is further reinforced by Section 2(4) of the Act which provides that any legislation passed after the entry into force of the Act should be construed and given effect to in accordance with EU law. This hierarchical relationship reflects the doctrine of the supremacy of EU law as developed by the CJEU.⁵ The domestic jurisprudence of the UK courts has also evolved in light of the Luxembourg case law, to the point where national courts are prepared to disapply primary legislation of the UK Parliament which is inconsistent with EU law.⁶ The jurisprudence of the CJEU also affords individuals the right to rely on EU law in national courts under the principle of direct effect.⁷

In Scotland, which has its own legal system, the jurisprudence of the *Factortame* and related cases has been fully accepted.⁸ Furthermore, EU law is accorded specific primacy in relation to the executive and legislative organs of Scottish government by the devolution settlement of 1998.⁹

III. After a Yes vote: Tripartite Negotiations?

It is the intention of the Scottish Government¹⁰ that, following a Yes vote on 18 September 2014, negotiations will begin to bring about an agreement with the UK Government as to the terms of Scottish independence, leading to a declaration of independence in March 2016.¹¹ The Scottish Government intends that negotiations will also take place with the European

³ European Communities Act 1972, Section 2(1).

⁴ European Communities Act 1972, Section 3.

⁵ See *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62 where the Court of Justice held that EC law constitutes a discrete system of law which operates with direct effect in Member States, and *Costa v Enel* (1964) Case 6/64 where the Court held that EC law supersedes national law including the constitutional law of Member States in cases of incompatibility between the two legal systems.

⁶ *Factortame (No 1)* [1990] 2 AC 85; *Factortame (No 2)* [1991] 1 AC 603 and *R v Secretary of State for Transport, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

⁷ *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.

⁸ *R. (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63; *Somerville v Scottish Ministers* [2007] UKHL 44, as per Lord Hope, para.17 and Lord Mance para.180.

⁹ The Scotland Act 1998 (s.29) provides that any provision of an Act of the Scottish Parliament is *ultra vires* if it is incompatible with EU law, and (s.57) that Ministers of the Scottish Government have no power to act incompatibly with EU law.

¹⁰ *Scotland's Future*, Part 4 'Transition', p.338, also pp.51-52.

¹¹ *Scotland's Future*, pp. 20, 51, 338.

Union during this interim period to bring about Scottish membership of the EU on the same date as independence from the UK is achieved.¹²

A crucial issue which will form the backdrop to the domestic negotiations between the two governments is membership of the European Union. This issue is also of some significance for the UK as a whole, given the commitment of the Conservative Party to hold a referendum on EU membership, provisionally scheduled for 2017, should it form a government following the 2015 UK General Election. This paper is concerned solely with Scotland's membership of the EU, but the uncertainty relating to the UK's commitment to the EU could be a factor in negotiations both between the two governments and in Scotland's discussions with the EU itself.

We will now address issues surrounding who will negotiate as well as the process itself.

Parties to Negotiation

In the period immediately following a Yes vote Scotland will not be an independent state and, therefore, if negotiations are to commence in relation to Scotland becoming an independent member of the EU, it is unclear who will take part in such negotiations or how they would be conducted.

The situation is unprecedented. No territory has ever joined the European Union from the inside as it were, seceding from an existing Member State.¹³ There would seem to be two main options. The first is a bilateral process conducted by the UK on Scotland's behalf with the institutions of the EU. In these negotiations Scottish representatives could attend in the name of the UK. In our view a more likely scenario is that the Scottish Government would itself be represented in these talks. It remains to be seen whether negotiations with the EU would involve only the Scottish Government negotiating for Scottish membership with EU officials, or whether they would include representatives of the United Kingdom whose membership would inevitably be affected by the transition. A tripartite process would seem the more likely scenario, particularly as it may be necessary to adjust the UK's level of representation within European institutions.

The United Kingdom's position

Of course it may be argued that it would not be in the UK's interests to help negotiate Scotland's accession to the European Union. And in the course of the referendum campaign, the UK Government has certainly set out to accentuate the potential difficulties Scotland would face in seeking to join the EU.¹⁴ But we need to distinguish positions adopted during a

¹² 'In the period between a vote for independence on 18 September 2014 and independence day on 24 March 2016 agreements will be reached with the rest of the UK, represented by the Westminster Government, and with the EU and other international partners and organisations'. *Scotland's Future*, p.338, See also: 'The UK and Scottish Governments, along with the EU institutions and Member States, will have a shared interest in working together to conclude these negotiations to transfer Scotland's EU membership from membership as part of the UK to membership as an independent Member State.' *Scotland's Future*, p.53.

¹³ In his earlier paper Tierney distinguished the Scottish situation from cases such as Algeria and Greenland: Tierney (2013), p.382.

¹⁴ In a policy paper the UK Government has argued that Scotland's negotiations to join the EU 'could be complex and long, and the outcome could prove less advantageous than the status quo'. It contends that Scotland will face difficulties in negotiating membership of the EU, in particular in any attempt to secure similar terms to the existing membership arrangements which the UK enjoys as a Member State. It also argues that Scotland would not be able to secure the same terms in relation to monetary union, Schengen, the budgetary rebate, and would no longer have the guaranteed support of the rest of the UK in relation to matters of common interest such as fisheries policy. 'Scotland Analysis: EU and International Issues', (HM Government, January

referendum campaign from those likely to be taken following a Yes vote. While it is clearly not in the interests of the UK Government prior to the referendum to suggest that the process towards Scotland's EU membership would be smooth (indeed accentuating uncertainty over Scotland's EU position is a key strategy of the Better Together campaign), following a Yes vote the UK Government would most likely consider it to be in the UK's interests to have its close neighbour inside rather than outside the EU, particularly if the two countries continue to share matters of vital interest.

The current devolution arrangements governing relations between the UK government and the devolved governments provide for a spirit of cooperation.¹⁵ The Scottish and UK administrations have tended to cooperate well over relations with the EU, even when the parties in office in Edinburgh and London have been ideologically very different. This would very likely change following a Yes vote since the principles of cooperation are based upon common interests within one state. We must note that there may well be contentious issues in the negotiations between the UK and Scotland on the terms of Scottish independence. For example, the Scottish Government proposes a currency union with the United Kingdom which has been flatly rejected by the UK Government and the main pro-Union parties. There will no doubt also be other pressure points in the UK-Scotland negotiations which could colour the level of cooperation the UK offers to Scotland in its negotiations with the EU. For example, if the Scottish Government continues with its plan to charge UK students tuition fees higher than those charged to other EU citizens.¹⁶ These factors are very important but there are still strong reasons to believe that an independent Scotland and the rest of the UK would continue to share many common interests in relation to the EU, not least a resistance to monetary union through the Euro and a common approach to border controls.

This leads also to the Edinburgh Agreement, the terms of which provide that the two governments will work together in the best interests of the people of Scotland and of the rest of the UK following the referendum.¹⁷ This does not expressly commit the UK Government to helping facilitate Scotland's membership, but it will be widely viewed that the mutual interests of both peoples would be best served by Scotland's membership of the EU.

Attitude of the European Union

The position of the EU institutions is not entirely clear. Former President of the European Commission, Jose Manuel Barroso, said it would be 'extremely difficult, if not impossible'

2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271794/2901475_HMG_Scotland_EUandInternational_acc2.pdf, p.55. The latter issues raised by the UK Government are clearly matters for political negotiation in the accession process for Scotland.

¹⁵ 'Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee', 2000, as updated in September 2012. This Memorandum also informs the approach underpinning the Edinburgh Agreement by which the UK and Scottish Governments agreed terms for the holding of the referendum: 'Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland', 15 October 2012.

¹⁶ Niamh Nic Shuibhne, 'University Fees and rUK Students - the EU Legal Framework', *Scottish Constitutional Futures Forum Blog*, 18 December 2013.

<http://www.scottishconstitutionalfuture.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/2759/Niamh-Nic-Shuibhne-University-Fees-and-rUK-Students--the-EU-Legal-Framework.aspx>

¹⁷ 'Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland', 15 October 2012, para 30.

for an independent Scotland to join the European Union.¹⁸ This view was heavily criticised by observers,¹⁹ and was neither substantiated nor elaborated upon by Mr Barroso. On the other hand, Jean-Claude Juncker, elected on 15 July 2014 to succeed Mr Barroso as the new President of the Commission (his appointment as President will take effect from 1 November 2014), is reportedly ‘sympathetic’ to an independent Scotland joining the EU.²⁰ Although Mr Juncker has taken the general view that there should be no further enlargement until 2019, clarification from EU officials indicated that this ‘ban’ on further enlargement did not apply to an application for membership by a newly independent Scotland which would be treated as a ‘special and separate case’ as it already meets ‘core-EU requirements’.²¹

One of Scotland’s MEPs, David Martin, has also suggested that the EU Commission would recommend membership for an independent Scotland and that this process towards accession could begin on an informal basis before independence.²²

IV. Treaties and Admission

It is highly likely that in the event of independence the rest of the UK will continue in membership of the European Union,²³ although there would seem to be a need for treaty amendments to accommodate a smaller UK in a proportionate way within European institutions.²⁴

How then would Scotland be admitted to membership? The European treaties do not provide for the situation of a territory joining from the inside as it were.

In light of the uniqueness of the Scottish situation we see a debate among commentators concerning whether Article 48 or Article 49 TEU would offer the more appropriate route. Article 49 provides the process for new applicant States, joining the EU from the outside (hereafter ‘formal accession’). By this provision a new State needs to apply for EU membership leading to an accession agreement that would require to be sanctioned unanimously and ratified by all Member States. There are a number of criteria laid down in Article 49 and if these are met then accession is effected by the unanimous decision of the Council, a majority decision of the European Parliament, and subsequent ratification of the

¹⁸ *Scottish Independence: Barroso says joining EU would be difficult*, 16 February 2014, available at <http://www.bbc.com/news/uk-scotland-scotland-politics-26215963>

¹⁹ Neil Walker, ‘Hijacking the Debate’, *The Future of the United Kingdom and Scotland (ESRC) Blog*, 21 February 2014 <http://www.futureukandscotland.ac.uk/blog/hijacking-debate>; and Sionaidh Douglas-Scott, ‘Why the EU Should Welcome and Independent Scotland’, *Scottish Constitutional Futures Forum blog*: <http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4041/Sionaidh-Douglas-Scott-Why-the-EU-Should-Welcome-an-Independent-Scotland.aspx>.

²⁰ Scot MacNab, *Juncker bans any new EU member for 5 years*, *The Scotsman*, 15 July 2014, available at <http://www.scotsman.com/news/politics/top-stories/independence-juncker-sympathetic-to-scots-eu-bid-1-3482266>.

²¹ Scot MacNab *ibid.* See also Andrew Whitaker, ‘Independence: Juncker ‘sympathetic’ to Scotland EU bid’, *The Scotsman*, 20 July 2014, available at <http://www.scotsman.com/news/politics/top-stories/row-as-juncker-bars-any-new-eu-members-for-5-years-1-3477066>.

²² Angus Roxburgh, ‘Labour MEP: ‘independence no barrier to EU membership’’, *Sunday Herald*, 18 May 2014, <http://www.heraldscotland.com/politics/referendum-news/labour-mep-independence-no-barrier-to-eu-membership.24250593>

²³ Tierney 2013. And see Case 148/77, *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787 which suggests that the limits of the territory of a Member State is for the State to define. Cited by James Crawford and Alan Boyle, ‘Referendum on the Independence of Scotland – International Law Aspects’. Opinion published in annex to the UK Government’s ‘Report on “Devolution and the Implications of Scottish Independence”’, UK Government, Cm 8554, February 2013, para 159 [hereafter ‘Crawford and Boyle’].

²⁴ Crawford and Boyle, para 150.

accession treaty by the Member States in accordance with their own respective constitutions. It has been argued by some that this is the only feasible route by which Scotland could accede to the EU.²⁵

Another possibility is that accession could be arrived at by way of treaty amendments, deploying Article 48 in a process which would be, on the face of things, less cumbersome. It would appear that both Articles 48 and 49 offer plausible routes to membership, with the Article 48 route endorsed as a possibility by, for example, Sir David Edward, former judge of the European Court of Justice.²⁶ Each of these alternative routes was discussed at some length by Tierney in his earlier paper.²⁷

In light of more recent interventions, it seems that in the end Article 49 may, however, be the more plausible route. Herman Van Rompuy, President of the European Council, in discussing the route to membership of a territory separating from an existing Member State takes this view.²⁸ Another reason is that the case law of CJEU establishes that specific articles have preference over general ones. While Article 48 provides a general route to membership, Article 49 is the only article which specifically deals with accession and admission of a State as a member of the EU. And on this basis it would seem to be the default route.

We see the expression of this view in evidence to Scottish Parliament by Jean-Claude Piris, the former Legal Counsel of the European Council and of the EU Council and Director General of the Legal Service of the EU Council (1988-2010):

‘On a formal legal point of view, the case law of the Court of Justice of the EU establishes that one cannot choose freely an article of the EU Treaties to adopt an act or make a decision. The Court refers to *«the aim and content»* of an act or decision as being the only way to determine the correct choice of its legal base. It also stresses that specific articles have priority upon general ones. Article 49 is the only article in the EU Treaties which provides the specific procedure to be followed for the admission of a State as a member of the EU. Article 49 specifically mentions that adjustments to the Treaties will be entailed by the admission procedure, and that they will be dealt with at the same time and in the same international agreement which will contain the conditions of admission. The sole aim and content of the decisions to be made in the present case would be the admission of Scotland in the EU. Article 48 does not deal with the issue of the admission of a State as a member of the EU but, in general, with possible amendments to the EU Treaties. I will thus conclude that, from a formal legal point of view, article 49, which deals specifically with admission, must be followed in any case of admission...’²⁹

²⁵ See e.g. Jean-Claude Piris, unpublished paper presented at European University Institute, 2 July 2014 (on file with the authors).

²⁶ David Edward. ‘Scotland and the European Union’, Scottish Constitutional Futures Forum blog, 17 December 2012

<http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>

See also Bruno de Witte, ‘Seamless Transition? Scottish Membership of the EU by Means of Treaty Revision Rather than Accession’, unpublished paper presented at European University Institute, 2 July 2014 (on file with the authors), who also considers the Article 48 route to be feasible, as does Sionaidh Douglas-Scott, ‘Why the EU Should Welcome and Independent Scotland’ op. cit.

²⁷ Tierney 2013.

²⁸ ‘Remarks by President of the European Council, Herman Van Rompuy, on Catalonia’, 12 December 2013, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/140072.pdf

²⁹ Written Evidence from Jean-Claude Piris to the European and External Affairs Committee of the Scottish Parliament, 23 January 2014, pp.28-29.

This is the position as Mr Piris sees it from a ‘formal legal point of view’, but it would appear that it is open to the EU to adopt a different process if it sees fit, applying Article 48 if this is preferred.³⁰ The Article 48 route may be preferred if the process is not treated as one of formal accession for example, but as a way of realigning the treaties to admit Scotland and perhaps at the same time adjusting the UK’s representation within EU institutions. Also we must not assume that formal legality will hamstring political decision-making. As Michael Keating has noted: ‘European leaders do not normally look to law to tell them what to do. They decided what they want to do politically and then find a legal means.’³¹

So while Article 49 looks the more plausible route, Article 48 remains a feasible alternative. Regardless of whether Article 48 or 49 is used, a crucial factor is that the ratification of all Member States will still be needed either for a new accession treaty or for treaty amendments. We will now turn to consider the negotiation and ratification processes.

V. Period of Negotiation and Process of Membership

As noted, it is the Scottish Government’s intention that negotiations with the EU, as well as ratification of any treaty or treaty amendments, will be concluded within 18 months in order to achieve Scotland’s full membership of the EU at the same time as independence from the UK.

A number of commentators are sceptical of this time frame, although they tend also to point out that EU rights and obligations in relation to Scotland could be protected by way of interim measures. For example, Nick Barber of Oxford University has argued that the proposed timescale of 18 months is ‘unrealistically tight, and likely to harm Scotland in a number of ways’ as Scotland will be negotiating from a place of ‘comparative weakness’ with both the UK and the EU within a restrictive timeframe. Barber predicts that Scotland would be more likely to be able to negotiate EU membership by 2020 with an international agreement in place to preserve Scotland’s legal position in the interim period:

‘Whilst the timeframe of Scotland’s Future is unrealistic, it is highly likely that Scotland would be able to join the EU before 2020. It is in no-one’s interest to exclude Scotland from the Union. If, as is almost certainly the case, Scotland cannot complete the Article 48 process before the 2016 deadline, it is conceivable that some sort of international agreement could be reached between Scotland and the EU to preserve Scotland’s legal position. Perhaps Scotland would then be treated a little like Norway: possessing many of the privileges and duties of EU membership, but not able to return MEPs to the European Parliament or appoint Commissioners.’³²

A similar view has been expressed by Professor Kenneth Armstrong of the University of Cambridge. He argues that accession could not occur until after independence and suggests

³⁰ See de Witte op. cit.

³¹ M. Keating, ‘Would an Independent Scotland be in the European Union, in ‘Scotland Decides’ Jeffrey and Perman eds (David Hume Institute, 2014), 47, <http://www.futureukandscotland.ac.uk/papers/scotlands-decision-16-questions-think-about-referendum-18-september>. See also Graham Avery: ‘If Scotland votes for independence, the decision on how to proceed will not be taken by lawyers, but by the EU’s leaders in the European Council, and they will decide on the basis of practical and political considerations.’ Graham Avery, ‘Could an independent Scotland join the European Union?’ European Policy Centre, Policy Brief, 28 May 2014.

³² ‘Nick Barber, ‘After the Vote’, *Scottish Constitutional Futures Forum blog*, 14 January 2014 <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4004/Nick-Barber-After-the-Vote-the-Citizenship-Question.aspx>

that 18 months is unrealistic. Although again, like Barber, he considers it conceivable that core substantive aspects of the accession treaty could be agreed as having provisional effect pending formal ratification through an interim international agreement under Article 218(5) TFEU.³³ Again, David Martin MEP, who dismisses the suggested period of 18 months as ‘nonsensical’ (bearing in mind that he represents the Labour Party which is opposed to Scottish independence), concedes that ‘temporary solutions could be found to smooth the transition.’³⁴

On the other hand James Crawford, co-author of a report for the UK government setting out the constitutional and international implications of Scottish independence,³⁵ expressed the view in a BBC Radio 4 interview that the ‘Scottish estimate is about 18 months, and that seems realistic’.³⁶

In our view it is impossible to predict how quickly negotiations might be concluded but an 18 month period would appear to be ambitious. There are a number of initial steps in setting up negotiations. These are:

- A request to the EU to open negotiations;
- Planning how these will proceed, and establishing terms;
- Working out relations between Scotland and the UK vis-à-vis these negotiations, how each would be represented etc.
- formulating negotiating teams on all sides; establishing mandates for each etc.

As noted above, the UK Government clearly has an interest in emphasising that negotiations could be difficult and has stated that Scotland’s negotiations to join the EU ‘could be complex and long, and the outcome could prove less advantageous than the status quo’.³⁷ To some extent this is of course campaign posturing but it is also the case that Scotland would face significant challenges in seeking opt outs from the single currency and in relation to the Schengen agreement. There is also the question of the budgetary rebate which the UK currently enjoys but which is due for review in 2020.³⁸

Finally, there will be a need to secure the ratification of all Member States to any accession treaty or treaty amendment. Some have argued that certain states might oppose Scottish membership and if so they might try to use the ratification process either to delay their consent or to refuse it altogether. Spain is an obvious case since it would not want to set a precedent for its own sub-state nations, in particular Catalonia, which has a strong ‘independence in Europe’ movement. Michael Keating has observed however that Spanish

³³ Written Evidence from Professor Kenneth Armstrong, European and External Affairs Committee of the Scottish Parliament, 23 January 2014, paras 38-39.

³⁴ As quoted by Angus Roxburgh, “Labour MEP: ‘independence no barrier to EU membership’”, Sunday Herald, 18 May 2014, <http://www.heraldscotland.com/politics/referendum-news/labour-mep-independence-no-barrier-to-eu-membership.24250593>

³⁵ Crawford and Boyle.

³⁶ Professor James Crawford, *Today Programme*, Radio 4, 11 February 2013.

³⁷ ‘Scotland Analysis: EU and International Issues’, (HM Government, January 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271794/2901475_HMG_Scotland_EUandInternational_acc2.pdf, p.55

³⁸ The Scottish Government’s aspirations in respect of each of these issues are set out in *Scotland’s Future*, see e.g. p223.

Ministers when invited to do so have declined to state that Spain would veto Scottish accession, and instead have distinguished the Scottish case from that in Spain, where, in the central government's view the constitution does not permit either acts of secession or referendums on secession.³⁹ Graham Avery also cites Spain's Foreign Minister García-Margallo who has stated: 'the attitude of the United Kingdom would be the determining factor at the time of deciding our vote'.⁴⁰ Avery observes: 'That is logical, for Spain wants its own voice to be determinant in the case of Catalonia.'⁴¹ A veto by any Member State does seem highly unlikely. If the UK Government is prepared to recognise an independent Scotland and work towards its membership of the EU with the cooperation of the EU institutions and the overwhelming majority of other Member States, then it is simply unforeseeable that this would be vetoed by an individual Member State.

That does not mean of course that the ratification process will be concluded quickly. It could be done in a short period of time or there could be lengthy delays for administrative or political reasons. Therefore, we also need to consider the situation where either negotiations are not concluded or ratification of all Member States has not been achieved by the projected Scottish independence day of 24 March 2016.

VI. Scotland outside of the European Union?

In the event that the negotiation or ratification processes are not complete by March 2016, what then?

One option would be for Scotland to delay a declaration of independence. This would seem to be unlikely. The Scottish Government is keen for formal independence to be declared before the Scottish Parliament elections scheduled for May 2016. Any proposed delay may also face the opposition of the UK Government which may well take the view that if the decision has been taken by Scotland to go then it is in the best interests of the UK if this is done as quickly as possible to end the period of constitutional limbo.

In this event would Scotland, in declaring independence, find itself cut off from the rights and obligations that come with membership of the European Union?

For a number of reasons this seems an unlikely scenario. Scotland is already part of the EU, it is of economic, strategic and territorial importance to the EU, it is integrated into its institutions, its territory is subject to EU law, and residents of Scotland enjoy the rights of EU citizenship. For these reasons it seems that it is in the interests of the EU to ensure that the jurisdiction of EU law and the rights and responsibilities of citizenship continue to apply to Scotland in any intervening period between independence and full EU membership rather than deal with the administrative upheaval which the removal of Scotland from the writ of EU law would bring.

This is also a time of uncertainty for the European Union in light of the economic crisis and problems in Ukraine. As Keating puts it: 'It is difficult to see why either the European institutions or the Member States would want to add to their troubles by seeking to exclude

³⁹ M. Keating, 'Would an Independent Scotland be in the European Union', in 'Scotland Decides' Jeffrey and Perman eds (David Hume Institute, 2014), 47, <http://www.futureukandscotland.ac.uk/papers/scotlands-decision-16-questions-think-about-referendum-18-september>.

⁴⁰ Avery op. cit. p3.

⁴¹ Ibid.

Scotland, disrupting the internal market and discrediting an eminently democratic means of resolving a self-determination dispute.’⁴²

As we discussed in relation to the period for negotiations, a more likely prospect is an interim arrangement which would secure rights and privileges of European citizens in relation to Scotland, but would delay formal membership by Scotland until negotiations and/or the ratification process are concluded. Professor Armstrong has suggested this as a possible interim solution:

“[C]ore substantive aspects of the accession treaty could be agreed as having provisional effect pending formal ratification. This could be written into the treaty itself and include important aspects of EU law relating to the Single Market. While there is no direct precedent for this in the context of accession – Austria, Sweden and Finland had the continuing benefit of their EFTA membership of the EEA pending their formal EU accession – it is far from being an implausible legal strategy to avoid certain disruptions in Scotland- EU relations. Moreover, there is specific provision in Article 218 (5) TFEU for international agreements between the EU and third countries or international organisations to have provisional application pending the entry into force of the agreement. By analogy this might also apply in an accession context.’⁴³

Jean-Claude Piris, whom we have seen is strongly of the view that an Article 49 process would be needed to bring about accession, seems also to consider that an interim arrangement would preserve Scotland’s position in relation to the EU:

‘the duty of the EU and of its Member States would be to try and reach a swift agreement with the new State, in order to avoid complex legal situations and negative economic effects, as well as disrupting the lives of many individuals. The delay between the date of the political decision on independence and its entry into force could be used in order to try and reach such an agreement, at least on provisional arrangements during a period of transition.’⁴⁴

See also Graham Avery of the University of Oxford:

‘From a practical point of view, no Member State has a material interest in Scotland remaining outside the EU, even for a short time. This would deprive the EU of the benefits of Scotland’s membership (budgetary contribution, fisheries resources, etc.). Scotland outside the EU, and not applying EU rules, would be a legal nightmare for EU Member States, whose citizens and enterprises would lose their rights in Scotland. No Member State, particularly not the rest of the UK, would have an interest in creating such an anomaly.’⁴⁵

⁴² Ibid., 48.

⁴³ Kenneth Armstrong, Written Evidence from Kenneth Armstrong to the European and External Affairs Committee of the Scottish Parliament, 24 January 2014 para.39.

⁴⁴ Piris op. cit. p.6.

⁴⁵ Avery op. cit. p.2. See also the blog by David Edward op. cit. in which he discusses what he sees as the absurdity of the following situation:

‘Until the moment of separation, Scotland would remain an integral part of the EU; the Scottish people and all EU citizens living in Scotland would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with Scotland. Then, at the midnight hour, all these relationships would come abruptly to an end.

The logical consequence in law would be that the *acquis communautaire* would no longer, as such, be part of the law of Scotland. Scotland would cease to be constrained in relation to the rates of VAT and

And Sionaidh Douglas-Scott, Professor at the University of Oxford:

‘it is likely that, if legal challenges were made to Scottish membership, or if negotiations over Scotland’s membership were not completed by March 2016, or even if the Art 49 accession route were to be followed, then a provisional arrangement would be made to continue Scotland’s existing relationship with the EU, to ensure that EU citizens’ rights and obligations were respected, and the Single Market not compromised. This would not be the same thing as a Scotland ejected from the EU... The very nature of EU law, and its pragmatic and purposive approach, lead me to be skeptical as to any alternative result, other than continuity and respect of acquired rights and obligations.’⁴⁶

Such provisional measures at EU level could be bolstered by domestic legislation reaffirming Scotland’s commitment to EU law. The Scottish Independence Bill which sets out the Scottish Government’s plans for an interim constitution to take effect upon independence in March 2016 reasserts this commitment.⁴⁷

The Bill also seeks to link Scottish citizenship to EU citizenship in the period after independence. It is of course the case that EU citizenship is derived from citizenship of a Member State (Article 20.1 TFEU) – ‘Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’

Scottish citizenship is defined under section 18 of the Scottish Independence Bill and Section 25 of the Bill seeks to extend EU citizenship to all those who hold Scottish citizenship in accordance with Article 20.1 TFEU: ‘A person holding Scottish citizenship is also, in accordance with Article 20.1 of the Treaty on the Functioning of the European Union, a citizen of the European Union.’ It seems to be the Scottish Government’s intention that Section 18 of the Bill would commence before independence day meaning EU citizenship rights would be engaged, at least in Scots law, at the start of independence day under the provisions of the Bill. Of course this in itself does not secure EU citizenship if Scotland is not a Member State at this point. But even if the accession of Scotland as a member state had not been concluded, there would be a domestic template in place to allow EU citizenship rights to continue for Scottish citizens in an independent Scotland either by their holding dual nationality (if UK citizenship has not been removed from Scottish citizens at that point) or by virtue of the provisional effect of any draft accession treaty, which, as we have discussed in this section, could be activated in EU law in the interim period before formal accession of Scotland as a new Member State.

VII. Legal Position in relation to negotiations

Although it seems highly unlikely that the European Union would not be willing to open negotiations to bring about the accession of Scotland to membership, it is also worth

corporation tax. Erasmus students studying in Scotland would become “foreign students” liable to pay full third country fees, as would students from England, Wales and Northern Ireland. Non-Scottish fishermen would be excluded from Scottish waters. And all the waters between Scotland and Norway would cease to be within the jurisdiction of the EU – an important security consideration quite apart from fishery rights.’

⁴⁶ Douglas-Scott op. cit.

⁴⁷ ‘The Scottish Independence Bill’ s24, contained in The Scottish Government, ‘The Scottish Independence Bill, A Consultation on an Interim Constitution for Scotland’, 16 June, 2014.

considering if there are legal rules or principles which might apply in the event that there is such a refusal to negotiate towards Scotland's membership, or to deal with a deadlock in these negotiations which seems likely to lead to Scotland being excluded from the European Union upon its independence from the UK.

In his earlier paper Tierney concluded that there are grounds within the treaties to suggest a duty on the part of the EU institutions and Member States to negotiate Scotland's accession.⁴⁸ It is useful to elaborate on this issue addressing the following two factors:

- the source of such a duty to negotiate (causes of action);
- the possible routes towards enforcing such a duty or the rights which give effect to it.

Duty to negotiate

When we address the salience of the concept of citizenship to the EU and the growing emphasis on the protection of citizens' rights then it seems that there is a strong argument that there would be a *prima facie* duty on EU institutions and Member States to negotiate Scottish accession to the EU in the event of a Yes vote.

European citizenship was first enshrined in the Treaty of European Union (Article 20). Since then it has taken on totemic as well as substantive resonance. In symbolic terms it represents a transformation in the very idea of the EU. The concept that all Europeans share a common citizenship founded in the institutional reality of the European project can be seen as a reformulation of the EU from an international treaty system promoting primarily economic goals into an aspiring polity with state-like social and political ambitions. Since the TEU was ratified significant strides have been taken to cement this new status through, for example, the Charter of Fundamental Rights (discussed below). It is also the case that the Court of Justice of the European Union has taken this principle very seriously and in a series of landmark cases has worked to protect what it sees as the rights of European citizens.⁴⁹

How then is citizenship protected in the treaties? The key provisions are Articles 20-25 TEU. Article 20(2) provides that citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. The rights of citizenship include *inter alia*:

- (a) the right to move and reside freely within the territory of the Member States;
- (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
- (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
- (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

⁴⁸ Tierney (2013).

⁴⁹ Case C-135/08, *Rottmann v. Freistaat Bayern* [2010] ECR I-1449; Case C-34/09, *Zambrano v. Office national de l'emploi* [2011] [2011] 2 CMLR 46, [2012] 2 WLR 886, [2011] All ER (EC) 491, [2012] QB 265 [2011] INLR 481, [2011] Imm AR 521, [2011] INLR 481, [2011] 2 FCR 491, [2011] EUECJ C-34/09, [2012] QB 265, Judgment of Mar. 8, 2011; Case C-256/11, *Dereci & Ors* [2011] EUECJ C-256/11, EU:C:2011:734, ECLI:EU:C:2011:734, Judgment of Nov. 15, 2011; and Case C-434/09, *McCarthy v. Secretary of State for the Home Department* [2011] INLR 450, [2011] EUECJ C-434/09, [2011] All ER (EC) 729, [2011] 3 CMLR 10, [2011] Imm AR 586, Judgment of May 5, 2011.

As noted, the notion of citizenship now combines with another strand in the development of the EU treaties: human rights. Fundamental rights have formed part of the EU legal order from as early as 1969⁵⁰ and are a growing feature of the EU constitutional fabric under the Treaty of the European Union (TEU)⁵¹, the Treaty on the Functioning of the European Union (TFEU)⁵² and the European Charter of Fundamental Rights (the Charter).⁵³ Article 6(3) TEU confirms the continuing relevance of fundamental rights as general principles of Union law⁵⁴ and Article 6(1) of the TEU incorporates the EU Charter of Fundamental Rights into the EU legal order as a matter of primary law holding the same status as the TEU and the TFEU. Article 6(3) of the TEU also provides that the EU shall accede to the ECHR and negotiations on this have culminated in a draft accession agreement.⁵⁵

Rights protection elides with the principle of citizenship. Of particular relevance to citizens who would be affected by Scotland's removal from the EU are Articles 2 and 4, each of which forms the foundationalist framework of the renewed EU constitutional legal order.

Art 2 TEU provides:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Article 4 TEU provides:

‘...’

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere co-operation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

⁵⁰ *Stauder v City of Ulm* (29/69) [1969] E.C.R. 419; [1970] C.M.L.R. 112.

⁵¹ European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01.

⁵² European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, 2012/C 326/47.

⁵³ European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union* (2007/C 303/01), 14 December 2007, C 303/1.

⁵⁴ Allan Rosas, ‘When is the EU Charter Applicable at National Level?’ [2012] 19 *JURISPRIDENCE* 1269, p.1281.

⁵⁵ ‘Draft Agreement on Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’. The text of the draft accession agreement, its explanatory report as well as related instruments are annexed to the report from the last negotiation meeting between the CDDH ad hoc negotiation group and the *European Commission on the accession of the EU to the ECHR* (April 3–5, 2013), at: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp. This was agreed at negotiators’ level on April 5, 2013.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

It is on the basis of these two provisions, together with Articles 20 and 50, that former Judge of the Court Sir David Edward considers there to be a duty to negotiate the accession of an independent Scotland in good faith: 'in order to avoid the disruption that would otherwise ensue, negotiation would be necessary before separation took place – precisely as the treaty requires in the case of withdrawal.'⁵⁶ In the absence of any specific procedure or article dealing with the unique position of Scotland as part of an existing Member State seeking re-entry as a newly independent state, Sir David Edward invokes the spirit and general scheme of the Treaties, referencing Articles 2, 4, 20 and 50 as indicative of a duty to secure Scotland's membership to avoid the absurd consequences (referred to in his blog cited above) should Scotland not be readmitted.⁵⁷

This duty, he argues, arises from the principles of sincere cooperation, full mutual respect and solidarity, and the original intentions of the Treaty-makers.⁵⁸ Furthermore, the duty rests with all parties, including the Member State in the process of separation. Even if the outcome of the negotiations cannot be predicted, the duty to negotiate in good faith remains a substantive requirement underpinning the negotiation process:

'the fact that the outcome of negotiations cannot be predicted does not alter the obligation of all parties, *including the Member State in the process of separation*, to negotiate in good faith and in accordance with the principles of sincere cooperation, full mutual respect and solidarity.'⁵⁹

But what of the objection that any presumed duty to negotiate membership for an independent Scotland would run counter to the duty incumbent on the EU to respect the territorial integrity of its Member States (Article 4)? In a case of contested secession this

⁵⁶ Sir David Edward, Written Evidence to European and External Affairs Committee, Scottish Parliament, 9 January 2014, p.13. Sir David points to the procedure provided for under Article 50 in relation to voluntary withdrawal from the EU – a process that the Treaty drafters envisaged would require negotiations over a period of up to two years or possibly longer (Article 50(3)). Article 50 imposes a duty to negotiate withdrawal from the EU and from this he concludes that there is incumbent within the Treaty a duty to negotiate Scotland's re-entry in order to avoid the disruption which Article 50 seeks to avoid [the Article 50 issue is returned to below].

⁵⁷ Sir David Edward, Written Evidence to European and External Affairs Committee, Scottish Parliament, 9 January 2014, p.13 pp.11-15.

Sionaidh Douglas-Scott also emphasises the salience of citizenship in arguing that there should be no question of Scotland exiting the European Union:

'If Scotland were to lose its EU membership on date of independence, its citizens would still be EU citizens, because they will still hold UK nationality (unless, for whatever reason, they choose to revoke and disown their UK nationality, or the UK decides to revoke their UK nationality, which seems unlikely).

To be sure, the doctrine of EU citizenship cannot by itself engender automatic membership of the EU for an independent Scotland. It would be necessary for the treaties to be amended. However, we should not underestimate the central importance of EU citizenship to the issue of an independent Scotland's EU membership... Given this importance, it is unlikely that the European Court would consider that Scottish independence deprived Scots of their acquired rights as EU citizens.' Sionaidh Douglas-Scott, 'Why the EU Should Welcome and Independent Scotland' *op. cit.*

⁵⁸ Sir David Edward, Written Evidence to European and External Affairs Committee, Scottish Parliament, 9 January 2014, p.13.

⁵⁹ Sir David Edward, Written Evidence to European and External Affairs Committee, Scottish Parliament, 9 January 2014, p.13.

would indeed be a very strong objection. However, the UK has consented to the referendum process in Scotland by transferring power, by way of secondary legislation, to the Scottish Parliament to hold the referendum and by entering into the Edinburgh Agreement with the Scottish Government in which both parties agree to accept the result of the referendum and to work to give effect to it in the best interests of the people of Scotland and the rest of the United Kingdom.

If the UK accepts Scottish independence, and if it is willing to cooperate with Scotland's application to join the EU, the duty on the EU to respect the territorial integrity of the UK is no longer at issue. If the UK accepts the secession of Scotland, then, according to Sir David Edward, it is more likely that the EU's focus will shift towards protecting the territorial integrity of the whole of the EU by facilitating the entry of Scotland as a new Member State: 'Maintaining the territorial and political integrity of the EU and the vested rights of its citizens is surely of greater importance than blind acceptance of doctrines of public international law whose application is in any event open to question.'⁶⁰

Others have taken a similar line. See for example, Jean-Claude Piris above ('the duty of the EU and of its Member States would be to try and reach a swift agreement with the new State'⁶¹); and Graham Avery who, like Sir David Edward, refers to Article 50 as the source of such a duty, a point to which we return shortly.⁶²

But is it really feasible to argue that a generally expressed set of principles within the treaties can lead to a specific and legally enforceable duty to negotiate Scotland's EU membership? Here a useful comparison can be made with the approach taken by the Supreme Court of Canada in the *Reference re Secession of Quebec* where the court, on the basis of unwritten constitutional principles (democracy, constitutionalism and the rule of law, federalism and minority rights), identified a duty on the part of Canada – based primarily upon the principle of democracy - to negotiate secession on the basis of the popular will of Quebec expressed in a referendum. The written constitution of Canada was, and continues to be, silent on the issue of secession. But the court argued that the constitution had an unwritten as well as a written dimension. Based upon long-standing relationships and the accepted understandings of the purposes of the constitution, the court stated that the people of Quebec had the democratic right to express a desire to leave the Canadian federation. They could not do so unilaterally because the principles of constitutionalism and federalism meant that it was necessary to negotiate agreement with the other provinces. At the same time, however, these other provinces were required to respect the view of the citizens of Quebec and this meant a duty to negotiate secession in good faith.

The situation regarding Scotland and Europe is of course different. The EU is not a state like Canada and does not have a history of some 130 years of confederation. However, on the other hand, Article 2 TEU makes explicit reference to the principle of democracy, which the Supreme Court of Canada had to find implicitly within the Canadian constitution in support of Quebec's right to decide. Furthermore, if the CJEU were to address the issue of negotiations it would do so in the context of a territory which is part of the EU and which wishes to remain part of the EU. In other words, it would seem easier to assert an obligation on partners in a union to negotiate the continued membership of a component part than an

⁶⁰ Ibid.

⁶¹ Piris op. cit.

⁶² Avery op. cit.

obligation to negotiate its secession where the constitution is silent on both issues as it was in Canada.

Notably, in the *Secession Reference* the duty was not simply to negotiate but to do so towards achieving the outcome of Quebec's secession. In other words, it was not a licence to enter negotiations with no intention of achieving the outcome sought by the people of Quebec as expressed in a referendum:

'we are unable to accept the... proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.'⁶³

By analogy, a Yes vote in the referendum can reasonably be seen as the expression of the will of the people of Scotland not only to be an independent state but to be part of the EU. A commitment to EU membership is part of the Scottish Government's proposal for independence; it is contained in the White Paper, 'Scotland's Future' for example.⁶⁴ It can be argued strongly that voters are aware that to vote Yes to independence is also to vote for Scotland becoming an independent member of the EU. Partly based upon this Professor Neil Walker of Edinburgh University has argued that the principles contained in the preamble of the TEU should commit the EU to full acceptance of such a democratic decision. He asks:

'How, precisely, is the EU, still resolved by common commitment of the Member States in the preamble to the Treaty on European Union "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity", to justify the exclusion of an independent Scotland? Why should a country of 5 million citizens, who have also been EU citizens for 40 years and who have expressed no desire to leave the European Union, be treated less generously than the 110 million new EU citizens - over 20% of the EU's total population - who have joined from Central and Eastern Europe since 2004? Why should Scottish citizens instead be placed in the same category of Kosovo, or any other potential candidate from beyond the Union's distant borders?'⁶⁵

⁶³ *Reference re Secession of Quebec* [1998] 2 SCR 217, para 92.

⁶⁴ *Scotland's Future* pp.216-224.

⁶⁵ Neil Walker, 'Hijacking the Debate', *Scottish Constitutional Futures Forum* blog, 18 February 2014.

Professor Douglas-Scott also turns to the principle of democracy in arguing that the EU is committed by its own principles to retaining Scotland as a member:

'Democracy is proclaimed as one of the EU's values in Art 2 TEU and the EU is eager to vaunt its adherence to these values. As such, the EU's very *raison d'être* is at issue here. How could an

In this context, the commitment to the ‘principle of sincere cooperation’ under Article 4(3) would suggest that the duty to negotiate requires also good faith, and with it a genuine attempt to secure an outcome that respects the continuing exercise of rights currently conferred by EU law, including the right to democratic self-government of Scots as recognised by the UK in the Edinburgh Agreement. This is emphasised again in Article 4(3) in the obligation on the Member States to take: ‘any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.’ (emphasis added).

Professor Douglas-Scott again places heavy emphasis on the EU’s commitment to rights: ‘The EU’s respect for fundamental rights also provides a further argument. There exists a compelling school of thought in international law that human rights treaties automatically bind successor states. The European Court in *van Gend* stressed the importance of rights. While the TEU and TFEU may not be predominantly human rights treaties, the EU Charter of Fundamental Rights is most certainly one, and, under Art 6(1) TEU, it has the same legal value as the Treaties. Moreover, in the 2008 *Centro Europa 7* case, Advocate General Maduro asserted that, ‘Protection of the common code of fundamental rights accordingly constitutes an existential requirement for the EU legal order.’ In *Kadi*, the European Court stated that respect for fundamental rights is an integral part of the EU legal order. So there is a strong argument to be made that, as a Union based on human rights, EU law requires the recognition of the invocability of EU fundamental rights by Scottish citizens, rather than their termination by independence.

In any case, at the very time that members of the UK Parliament are trying to pass legislation to disapply the Charter of Fundamental Rights in the UK, there is a dignity, if not an irony, in calling on fundamental rights as an added ground for Scotland’s continuing membership of the EU.

Therefore the EU and its member states should have regard to the values and principles of the EU, and indeed its very reason for existence, instead of making statements that counter and undermine its character. The case of Scottish independence makes very clear the need for the EU to self-interrogate as to its values, and to use arguments with a public reason character that take it beyond an instrumental economic rationale or a grounding in international law..⁶⁶

Finally, another relevant factor already mentioned is that the EU discourages exit from the EU. Such a route is possible for Member States under Article 50 TEU but this same article imposes a duty on a state seeking to leave to notify the European Council of its intention, leading to negotiations and an agreement. On this basis Sir David Edward argues that it would be inconsistent with the purpose of Article 50 if any part of EU territory could be automatically excluded with immediate effect simply upon the separation of an existing

organization such as the EU, that has promoted the cause of democracy at home and abroad, act in such a way as to dispossess Scots of their acquired rights and EU citizenship as a result of Scotland using the democratic right to vote for independence? Such a move would seriously undermine the EU’s claim to be a promoter of democracy.’ Douglas-Scott op. cit.

⁶⁶ Douglas-Scott op. cit.

Member State.⁶⁷ Given that there is a duty to negotiate when states intend to leave, it would seem odd if there were no duty to negotiate in circumstances where not doing so could lead to the exit of Scotland from the EU, a state of affairs which Scots will have expressly disavowed in the referendum and which the Scottish Government will be strenuously seeking to avoid.

Graham Avery also articulates this point:

‘Automatic ejection certainly stands in contrast to the formal procedure for withdrawal from the EU in Article 50 TEU... The presence of Article 50 acknowledges that acquired EU rights and mutual dependencies cannot be immediately extinguished. For example, nationals of other EU Member States have directly enforceable EU law rights in Scotland regarding free movement of workers, free movement of goods, and freedom of establishment. Scottish nationals possess corresponding rights in other Member States. If Scotland’s membership were automatically terminated they would become illegal immigrants. The existence of Art 50 evidences the lack of any capacity in EU law automatically to terminate such rights, and Art 4(3) illustrates the obligation of EU institutions and states to recognise acquired rights and obligations through a duty of sincere cooperation.’⁶⁸

Enforcing this duty in court

Professor Douglas Scott believes that the CJEU may well intervene to enforce the duty to negotiate:

‘I believe that the European Court, given its past record for purposive and expansive rulings that stress the importance of individual rights, provides in the rich body of EU case-law an ally for Scotland in its search for a smooth transition to EU membership in its own right. The EU is very much a creature of law and the law is working in Scotland’s favour.’⁶⁹

Following a referendum, and if the result is a majority Yes vote, there are at least two identifiable routes to a judicial remedy depending on the particular circumstances of the negotiating process. First, an individual could seek a preliminary reference under Article 267 TFEU as a citizen of the EU, requesting a declaratory order in relation to the continuing operation of EU citizenship rights post-independence. Sir David Edward points out that it is still uncertain whether the CJEU would accept such a reference or answer such a question.⁷⁰ This might be particularly difficult in a scenario where negotiations are underway, both internally (negotiations between the UK Government and the Scottish Government) and externally, (tripartite EU, UK Government, Scottish Government negotiations), and the court is faced with the prospect of imposing conditions on the substantive outcome of negotiations which might be seen to impinge upon the negotiation process itself.

In this instance, the Court may well be more hesitant to intervene until negotiations are concluded. It might be more likely that the Court would answer a preliminary reference in an

⁶⁷ Sir David Edward, Written Evidence to European and External Affairs Committee, Scottish Parliament, 9 January 2014, p.13.

⁶⁸ Avery op. cit.

⁶⁹ Douglas-Scott op. cit. For a more radical argument that the CJEU might be expected to intervene to ensure that Scotland would in fact succeed to membership of the EU automatically on the basis of citizenship rights see: Aidan O’Neill, ‘A Quarrel in a Faraway Country?: Scotland, Independence and the EU’, Eutopia law blog, 14 November 2011. <http://eutopialaw.com/2011/11/14/685/>. In his earlier paper Tierney did not consider this likely (Tierney 2013, p.384), a position we maintain here.

⁷⁰ Sir David Edward, Written Evidence to European and External Affairs Committee, Scottish Parliament, 9 January 2014, p.14.

assessment of citizenship rights as they stand in a concluding agreement, or if negotiations reach stalemate before independence day, raising the prospect of Scotland and its citizens falling outside of the EU. In this scenario the Court could seek to protect citizenship rights through an interim remedy, securing the continuation of EU citizenship for European citizens resident in Scotland and for Scottish citizens resident in the rest of the EU should the outcome of negotiations risk undermining such rights by a temporary failure to arrive at formal accession.

An alternative route would be for a citizen or private legal person to seek judicial review of an act of an EU institution that contravenes EU law, including the protection of EU fundamental rights. In the case where the Council, Commission, Parliament, bodies, offices or agencies of the Union actively prepare for Scotland's exit, a natural or legal person could seek judicial review of that act under Article 263 TFEU, arguing that such an act would be contrary to the objectives of EU law and risk impacting on them directly. Where the act does not impinge on the private or legal person directly (rendering an action outwith the scope of A263) then the CJEU has declared in case law that, based on the duties in Article 4, the domestic courts must find a way of enabling private parties to challenge the legality of any national measure applying an EU act of general application, on the grounds that the EU act is invalid, even if they could not challenge the EU act directly under Article 263 (see *Union de Pequenos Agricultores v Council*⁷¹). This means that Article 4 obliges national courts if necessary to develop procedures to protect rights provided by EU law. The broad and encompassing application of Article 4 means that it would be possible to seek a remedy in a domestic court if negotiations risked undermining EU rights conferred on an individual or private person, including companies and businesses in the private sector concerned about the continuation of business arrangements etc., or if the negotiations do not reflect the principles of effectiveness and equivalence enshrined in the constitutional arrangement of the EU legal order.

In *Kofisa Italia Srl v Ministero delle Finanze*⁷² the CJEU held that no national legislative provision can restrict the right to effective judicial protection of EU law in national courts. Article 4 must therefore ensure the legal protection which private persons derive from the direct effect of rules of EU law. A national court dealing with EU law must be able to grant interim relief to ensure the full effectiveness of the judgment to be given on EU rights. The similar judgments in *Zuckerfabriek*⁷³ and *Factortame*⁷⁴ determine that there is an obligation to make interim or interlocutory remedies available when necessary to protect rights given under EU law, even if national law does not confer these powers.

As with so much in the discussion over the consequences of a Yes vote, we are in new terrain where much is uncertain. There is however an argument that, given the EU's commitment to citizenship and to human rights, the importance of preserving its own territorial integrity, its commitment to the principles of democracy and subsidiarity, and in light of the unique situation where a majority of Scots who are already European citizens have expressed a

⁷¹ *Pequenos Agricultores v Council* Case C-50/00 P, [2002] ECR I-6677 [2002] - in this case the court confirmed that that Art230 (now Art 263) required an applicant to be directly and individually concerned by a Community act, but added that national courts have a duty under Art 10 (now Art 4) to provide a remedy in the protection of fundamental EU rights even if there is no direct impact on the applicant.

⁷² *Kofisa Italia Srl v Ministero delle Finanze* Case C-1/99 [2001] ECR I-207.

⁷³ Joined cases C-143/88 and C-92/88 [1991 ECR I-415.

⁷⁴ Case C-213/89, [1990] ECR I-2433.

desire for independent statehood within the European Union, should there be any realistic prospect that an independent Scotland seeking full accession to the EU might find itself outside of the EU because of a failure by the EU institutions and/or the Member States to make political arrangements to advance this goal, the CJEU could intervene to declare a duty on both the institutions of the EU and the Member States to negotiate, in a spirit of sincere cooperation, to secure Scotland's full accession and to protect the interests of European citizens in the interim period prior to this formal accession.