Scotland and the EU: Comment by JO MURKENS

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What would be the characteristics of an 'independent' Scotland? And what kind of a Member State would it be? Intriguingly, the pro-independence Yes Scotland campaign promises continuity on key issues, such as the currency, the Queen, and the European Union. In a recent paper, Sionaidh Douglas-Scott claims that the process of continuing EU membership for an independent Scotland will be 'relatively smooth and straightforward' – a claim that has been taken up by Yes Scotland. (Given the at best ambivalent and at worst antagonistic attitude of the UK, the promise of continuity is not necessarily good news for the European Union). The strength of this claim rests on Douglas-Scott's preference for Article 48 TEU (the Treaty revision procedure) rather than Article 49 TEU (the Treaty accession procedure). In other words, she assumes that the EU would welcome Scottish independence with a simple and internal procedural change, rather than with an insistence on a cumbersome accession process.

There are two problems with using Article 48. First, it is the provision by which existing member states organise their relationships with non-Member States and international organisations. Unlike Article 49, it was not designed to bring about the institutional changes needed to accommodate a new Member State. Second, in his evidence to the House of Commons, Prof. Kenneth Armstrong exposes the 'smooth and straightforward' claim as fallacious by highlighting the risky nature of Article 48. For starters, the Scottish Government would have to rely on the UK government to initiate and manage the negotiation process. But in addition, Article 48 would create an opportunity for the UK government to hijack the process in order to renegotiate the UK's own relationship with the European Union. Even assuming goodwill from the other Member States about the principle of membership of an independent Scotland, the UK's renegotiation strategy in particular, and the negotiation process as a whole, may very well meet with fierce resistance. Far from being 'smooth and straightforward', Prof. Armstrong points to a danger that:

> *'...the process [under Article 48] becomes lengthened rather than shortened. If it was a normal accession process under Article 49, there is every reason to believe it possible that the negotiation element could be conducted by the preferred date for independence. That would still leave open the ratification of that agreement, which might take several months, if not longer, to do.'*

Douglas-Scott's paper is further marked by an absence of political context. She is correct to note that the EU is not the slave of public international law, and that it is capable of reacting in 'pragmatic and purposive' fashion to current affairs unregulated by the Treaties, as it did for example in 1990 when Germany unified. But she does not discuss the current politics of secession in the EU, which is very different from the situation in 1990. German reunification did not result in immediate Treaty change. East Germany acceded to West Germany, and Germany accepted the (unchanged!) Treaty rules relating to the institutions, the weighting of Council votes, and the allocation of seats in the European Parliament. From the perspective of the European Community in 1990, reunification did not change the way it operated and was, therefore, waved through.

By contrast, Germany, France, Italy, and Spain can have no interest in witnessing the diminution of the United Kingdom and in setting a precedent for other European secessionist movements. Experience shows that the international community as a whole shows an interest in the activities of states especially in cases of break-ups. Spain, Slovakia, Romania, Greece, Cyprus did not recognise Kosovo's unilateral declaration of

independence in 2008 in order not to set a precedent for separatists in their own countries.

That said, Douglas-Scott is correct to assume that there will be Member States who will be supportive of Scottish independence, especially if clear support for it was demonstrated in a referendum. If the United Kingdom resolves the matter in a procedurally fair and transparent manner, the attitude of the Commission and the other Member States may be positively influenced and Scotland's application could be fast-tracked. The UK's attitude may in turn depend on how Scotland behaves during the independence negotiations, and whether the negotiations have been conducted co-operatively and amicably, or the reverse.

Finally, an independent Scotland will not be fully compliant with the EU's acquis communautaire. As Daniel Kenealy has noted, 'Scotland is only compliant by virtue of being part of the UK and thus covered by the UK's institutions and regulatory structures'. The loss of membership status following separation means that Scotland would no longer benefit from the UK's derogation from the single currency and from the Common Travel Area (Schengen Agreement). An independent Scotland would not inherit the opt-outs the UK negotiated for the Treaty of Maastricht. The formal position is as follows. All Member States (except UK and Denmark, who secured opt-outs in the Maastricht Treaty) are expected eventually to join the Mechanism and to adopt the Euro. All the new Member States since 2004 are legally obliged to adopt the Euro at some future point, with no opt-out clauses. If Scotland wishes for membership to be 'smooth and straightforward', should it not better prepare itself to adopt the Euro and to sign up to Schengen?

In sum, Douglas-Scott's reliance on Article 48 is far from persuasive on technical legal grounds (is it the correct legal basis to accommodate a new Member State?) as well as for strategic reasons (the negotiation process may well be dominated by the UK's negotiating team pursuing its own agenda). But even if an independent Scotland's continued membership in the EU were 'smooth and straightforward', Douglas-Scott provides no answer to the question as to what kind of member an independent Scotland would be (Europhile? Eurosceptic? Europhobic?) and what the terms of membership would be. Instead, her contribution perpetuates the language of continuity for membership and for citizenship which, given the UK's often fractious relationship with the EU, is not necessarily a good thing. The outside observer is none the wiser as to the characteristics, indeed the meaning, of 'independence', and completely in the dark as to whether an independent Scotland would welcome the EU.

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