Scotland and the EU: Comment by CHRISTOPHE HILLION

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Like many participants in this stimulating symposium, I am in agreement with several of Sionaidh Douglas-Scott's contentions. But like some others, I am less persuaded by one of her conclusions: namely, that a treaty revision based on Article 48 TEU would suffice to codify an independent Scotland's membership in the EU. While admittedly unprecedented, such a situation could not in itself warrant a complete disregard of EU membership rules, *eg* Article 49 TEU. As part of 'the particular constitution and rules of the EU', they should instead be applied, given their specific function in the treaties (1), albeit in a 'pragmatic and purposive fashion' in consideration of the existing and future ties between Scotland and the EU (2). While taking such a position, I intend to stay away, insofar as this is possible, from the moral and political discussion on independence, and to restrict myself to a (EU) legal argument.

(1) In two ways, Article 49 TEU is a lex specialis. It establishes the specific EU procedure for admitting a new *state* into the Union, precluding that 'standard rules of international law govern the process'. Like Article 48 TEU and Article 50 TEU, Article 49 TEU belongs to the constitutional charter of the Union. Article 49 TEU is also a lex specialis relative to other EU provisions. Addressed to '[A]ny European state [that wishes] to become a member of the Union', irrespective of whether the aspirant comes from within or outside, its exclusive function in the system of the treaties is to alter the *state* composition of the EU by admitting a new member, and to set out 'the conditions of admission and adjustments to the Treaties on which the Union is founded, which such admission entails'. The specificity of Article 49 TEU is typified by the particular role that EU institutions play in the process.

But altering the *state* configuration of the Union is not only subject to compliance with the procedural requirements of Article 49 TEU, it also entails observance of specific substantive conditions. In addition to respecting and promoting the values of Article 2 TEU, the aspirant is expected to fulfil the so-called 'Copenhagen criteria', one of which is to demonstrate its ability, as a *state*, 'to take on the obligations of membership including adherence to the aims of political, economic and monetary union'. Undoubtedly, Scotland as an independent state would meet most such conditions. Yet, apart from the thorny question compatibility of its post-independence monetary arrangement with the EMU, the fact that its devolved administrative and judicial institutions have been involved in the application of EU law for more than 40 years would not in itself guarantee that its structures, as a state, would be in a position to implement the whole acquis from the day of independence. Specific transitional arrangements could thus have to be agreed. To be sure, Iceland, which has perhaps been the most EU-integrated of candidates, has been subject to the standard admission rules.

Moreover, the decision to increase the number of member states in the Union is contingent upon the so-called 'absorption capacity' or 'integration capacity of the Union' (eg Commission's report). This entails considering whether enlarged membership may affect the EU decision-making process, and its capacity to fulfil and finance its policy objectives. This consideration has become increasingly significant in the context of the on-going enlargement, and it is unlikely to be entirely uncared for in the case of an 'internal enlargement', particularly given that Scotland's independence would set a precedent for other potential 'internal' candidates for membership.

As it has been recalled by several participants, the procedure of Article 48 TEU, which differs from that of Article 49 TEU, including possibly in the ratification phase, has a distinct purpose, namely to allow *existing*

Member States to amend the founding treaties. Arguably, it is not purported to include new parties to the existing treaties, or to introduce the necessary legal changes to EU primary and secondary law, or transitional arrangements for making that inclusion possible. As made clear time and again by the European Court of Justice, the choice of the appropriate legal basis has constitutional significance and must rest on objective factors which are amenable to judicial review, such as, in particular, the aim and the content of the measure. Hence, the choice of the adequate avenue for Scotland's membership should not be left to political and practical expediency. To be sure, it would not be in the interest of the Union, and of the aspirant state concerned, that a perception develops whereby EU constitutional rules to acquire state membership are circumvented, particularly when they have become so entrenched in relation to other candidates.

(2) While EU membership rules should therefore be followed, they should be so in a 'pragmatic and purposive' fashion, to use Sionaidh Douglas-Scott's expression, notably to address the complex implications of Scotland's independence and considering her existing ties with, and aspirations in relation to the EU.

As she rightly points, the European integration process 'goes beyond the traditional state-based concerns of international law'. While *Van Gend* provides support for the direct link between EU law and individuals, the 'peoples' dimension of the European integration process, and incidentally of membership, is entrenched in the EU treaties themselves. Thus, the treaties' preambles still refers to the EEC based vision of 'an ever closer Union *among the peoples of Europe* (...)' and to the contracting parties' 'call(...) upon the *other peoples of Europe* who share their ideal to join in their efforts' (emphasis added) – a legal expression of Monet's expression: 'Nous ne coalisons pas des Etats, nous unissons des hommes" (Jean Monnet's Discours, Washington, 30 avril 1952). Other legal foundations tend to substantiate the peoples' facet of the EU, and of its possible bearing on the discussion at hand. Thus Article 3(1) TEU stipulates that 'the Union's aim is to promote peace, its values and the *well-being of its peoples*'.

Scots, as a people of Europe, have 'join[ed] in [the] efforts' for the last forty years, as part of the United Kingdom. In particular, they are part and parcel of the EU citizenry, integrated in its internal market and, to some extent, of its area of freedom, security and justice. As such, they have already acquired elements of EU membership, which ought to be preserved, particularly in view of their claimed aspiration of *full* membership. Similarly, the situation of EU citizens living in Scotland ought to be considered.

Against that backdrop, and as advocated by several contributors, the EU and its Member States would be under a duty to engage with Scotland, should the referendum support independence. Article 3(1) TEU, mentioned above, read in combination with Article 4(3) TEU (and Article 13(2) TEU) establishing the duty of sincere cooperation, could provide a foundation for this.

Thus, it could be argued that the Scottish government be admitted to apply for full membership immediately after a potential pro-independence vote on 18/9. In response to this application, and based on a pragmatic reading of Article 49 notion of 'Any European state', the Council could then respond by allowing the admission procedure to start, if other eligibility conditions are deemed fulfilled. Such a dynamic interpretation of the notion of 'state' has precedents in EU law, particularly with respect to the negotiation and conclusion of association agreements. Negotiations between Scotland, while in the process of formally acquiring statehood, and the EU Member States could thus begin immediately to agree on the terms of its full membership (including possible opt-outs).

In the not so unlikely scenario where the accession treaty would not be ratified by the time of Scotland's formal independence in 2016, additional measures would have to be considered to cover the intermediate period, and avoid Scotland's being cast into 'a non-EU wilderness'. The chief purpose of what would be a mutual and multifarious engagement, as alluded to in various contributions, would be to protect the integrity of the rights that are part of the

legal heritage of all individuals concerned, pending accession: *viz*. EU rights of Scots in Scotland, of Scots in the rest of the EU, as well as of EU citizens in Scotland.

'Where there is a will…'
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