

HOUSE OF COMMONS  
ORAL EVIDENCE  
TAKEN BEFORE THE  
SCOTTISH AFFAIRS COMMITTEE

**THE REFERENDUM ON SEPARATION FOR SCOTLAND**

WEDNESDAY 15 JANUARY 2014

PROFESSOR IAIN McLEAN, PROFESSOR ADAM TOMKINS and  
PROFESSOR KENNETH ARMSTRONG

Evidence heard in Public

Questions 4107 - 4258

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## Oral Evidence

Taken before the Scottish Affairs Committee

on Wednesday 15 January 2014

Members present:

Mr Ian Davidson (Chair)  
Mike Crockart  
Graeme Morrice  
Pamela Nash  
Sir James Paice  
Mr Alan Reid  
Lindsay Roy

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**Examination of Witnesses**

*Witnesses:* **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, and **Professor Kenneth Armstrong**, Professor of European Law, University of Cambridge, gave evidence.

**Q4107 Chair:** Gentlemen, welcome to this meeting of the Scottish Affairs Committee. As you will be aware, we have been conducting a number of inquiries into the referendum on separation for Scotland. We have been concentrating recently on a number of issues relating to practical subjects, but today we are coming back to issues of process. We had a lot of process at the time of the debate about how the referendum was to be conducted, but we are now back to the question of process for what might happen in the unlikely event of a yes vote. I start off by asking you to introduce yourselves for the record and tell us a little bit about your background.

**Professor McLean:** I am Iain McLean, professor of politics at Oxford university, and I am one of three authors of a book called *Scotland's Choices*, which aims to be a neutral explainer of the issues for voters.

**Professor Armstrong:** I am Kenneth Armstrong. I hold the chair in European law at Cambridge. I am director of the Centre for European Legal Studies at Cambridge and a fellow of Sidney Sussex college.

**Professor Tomkins:** I am Adam Tomkins. I am the John Millar professor of public law at the University of Glasgow, and I am also one of the legal advisers to the House of Lords Constitution Committee, but it is very important that I get on the record that I am here today purely in my personal capacity, and nothing that I say to you is meant to indicate the views of any Member, official or Committee of the House of Lords.

**Q4108 Chair:** That is a great reassurance to us all. Could I ask, first, about the timetable that has been proposed by the Scottish Government? The suggestion is that an 18-month timetable between the referendum and the declaration and implementation of independence is realistic. Do you have a view on this?

**Professor Tomkins:** I have a published view on it. The Scottish Government first proposed this timetable in the spring of 2013, I think. The precise date was given for the first

time in the White Paper, but we already knew that they were thinking about March 2016. In the piece that I wrote, which was published in *The Scotsman*—you can read it on their website, if you want—I said that the proposal to move as quickly as that was risible, and I stand by that. I think it is a preposterous timetable. Unpicking a 307 year-old Union will be a mighty, difficult task. Almost all of it will be done, if we ever get there—I hope we will not—by political negotiation. The principal counterparty to those negotiations will be the rest of the United Kingdom, presumably, but perhaps not—this might be something you want to talk about in a few moments—led by the United Kingdom Government.

In between referendum day in September 2014 and proposed independence day in March 2016, we have the small matter of the United Kingdom general election. Even without that general election, the SNP's proposed timetable would be ludicrous; with it, it just becomes—what is more ludicrous than ludicrous?—preposterous. 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, and the next scheduled elections for the Holyrood Parliament are, as you know, in May 2016. Even if the SNP were to win those elections, it might be thought unrealistic to suppose that they might win them with an overall majority. It seems to me to be unrealistic, risible and partisan. Apart from that, I am quite comfortable with it.

**Q4109 Chair:** I hope the other witnesses will get off the fence and make their views absolutely clear on these sorts of matters.

**Professor Armstrong:** Purely from the perspective of synchronicity between independence and the EU membership side of things, the period that has been set is not wholly implausible. Negotiations could occur on Scottish membership of the EU within that period. The White Paper itself is clear that the negotiations will take that full run. That would lead to a situation where those negotiations would be concluded, and a treaty would be agreed, which would require ratification thereafter. Even if the timetable was met, it would imply a gap between the point at which Scotland had become independent and the point at which accession would come into force. A gap would occur, so 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.

**Professor McLean:** I do not have much to add to what Adam said, except to add a further complication to the UK general election situation. Suppose the UK general election of 2015 produces a majority Labour, or Labour-led, Government but one which depends on its Scottish seats. In that event, since the Scottish Government at least thinks that the Scottish MPs will leave on independence day, and that surely has to be the case, that Government has every incentive, acting on its own, to make the negotiations last as long as possible. Furthermore, if there is a change of UK Government, any incoming Government are going to use the claim of parliamentary sovereignty to deny anything that may have been said by negotiators on behalf of the present coalition Government, and start from scratch, so I agree with my two colleagues.

**Q4110 Chair:** Can I leave aside for a moment the question of the EU? We have another section on the EU that I want to touch on. First, I want to explore the dynamics of the period between any yes vote and the general election in the UK itself. Professor McLean, you suggested that any agreement reached during that period could potentially be rejected by the next Government. Professor Tomkins, I think you were suggesting that there would not be a willingness by any present UK Government to make concessions, given that they are facing a general election in a short period of time. As the Member representing Govan shipyards, I am

particularly concerned about the circumstances around the yards and what commitments might then be made. My anxiety is that there would be an incentive for all parties standing in and around Portsmouth to make clear commitments that, in the event of a decision on separation, they would keep shipbuilding in Portsmouth rather than give orders to the Clyde, and that pattern would happen all across the remainder of the UK in every particular location. Have I correctly understood the dynamics of that, or would some other factors come into play that would allow things to be dealt with differently?

**Professor Tomkins:** It is enormously complex, and your understanding of the situation is a credible and plausible one. It is complex because, in this curious period between a yes vote in the referendum and independence coming into legal effect, the United Kingdom Government would be simultaneously the Government of the whole of the United Kingdom, including the Govan shipyards, and negotiating pretty damn hard, one would have thought and hoped, in the best interests of the rest of the United Kingdom to secure for the rest of the United Kingdom as good a deal in the separation negotiations as could possibly be secured, which might include saying to the shipbuilders in Portsmouth that British business with Govan will come south. No one really understands how that tension will be resolved—the tension between being simultaneously a representative Government for the whole of the United Kingdom but also, presumably, the lead partner, or a lead partner, in negotiations on behalf purely of the rest of the United Kingdom.

**Professor McLean:** I keep recurring to the Anglo-Irish discussions of 1921 when I try to focus on questions like this. We may come to that later in any case. In that event, plenipotentiaries were appointed by both Governments to negotiate. They had to report back to their principals and both Parliaments had to vote on the treaty they agreed. Indeed, both Parliaments did in 1922, and both Parliaments carried it. I cannot think of any other negotiating strategy. I just cannot see how that mechanism can work prior to the UK general election, for the reasons Adam has just said. Therefore, I would envisage it restarting from baseline on the day after the UK general election, on the rest of the UK side.

**Q4111 Chair:** If anything, it would be worse than baseline in a sense, because presumably people from the UK Government would be going into negotiations after an election, having made commitments as part of that election campaign about how they would propose to protect their areas in the event of separation and any possible detriment. If anything, positions would have hardened. Is that a fair way of looking at it?

**Professor McLean:** Certainly. On the other hand, the Scottish Government itself, and also presumably the UK Government, are clear that Scottish MPs will be elected to the 2015 UK Parliament, and therefore they will be part of the bargaining within the UK Parliament that you have just mentioned.

**Q4112 Lindsay Roy:** Gentlemen, in effect you are saying there is no incentive for the political parties in the UK to enter into detailed negotiations prior to the general election, and therefore we have a nine-month slot for detailed negotiations. Would that be a fair assessment?

**Professor Tomkins:** I don't know that it would be politically feasible for the UK simply to refuse to go to the negotiating table at all for nine full months between a yes vote in September and the UK general election nine months thereafter. It would be politically unwise if the UK were to do that, because it would look as if the commitment given in paragraph 30 of the Edinburgh agreement was being reneged upon. It is very important that we understand the nature of that commitment. It is not what the SNP has said it is. That commitment is simply a commitment on the part of both Governments to respect the outcome of the referendum—yes or no. It is not a commitment on the UK part to respect anything in that

White Paper as to the terms of independence, the meaning of independence or, as I like to put it, the meaning of dependence, which that White Paper advocates. None the less, the UK is committed to respect the outcome of the referendum.

We do not know very much about what that means, but in law I think it means that there is an obligation on the UK to come to the negotiating table. That would be consistent with what the Canadian Supreme Court said in its famous Quebec secession reference decision in, I think, 1998. A yes vote in a secession referendum or an independence referendum triggers not very much, but what it does trigger is a requirement, probably legally enforceable at some level, to come to the negotiating table. If the UK were just to say, “We’ll start negotiations in the middle of May 2015 after we’ve had our little local matter of a general election,” that would be both politically unwise and contrary to the Edinburgh agreement, and contrary to what little international or constitutional law might say about it.

However, having said all of that, I agree with what Professor McLean has suggested by way of how little could be resolved in those negotiations until the outcome of the UK general election was known, unless the way in which the UK decided to approach those negotiations was on a cross-party basis. In my remarks this afternoon I have been quite careful to say that I am merely supposing that the UK Government would be the lead player in the negotiations. They would not necessarily have to be the lead player, and they certainly would not have to be the only player. It might be, for example, that on areas where there was no party political disagreement between the Conservative party and the Labour party in the rest of the UK, negotiations on those issues could go ahead and perhaps even be resolved by the time of the next general election. For example, both Mr Osborne and Mr Balls might be of the view that a currency union with Scotland would be highly unlikely, to use the current Chancellor’s language, to be in the rest of the UK’s national interest. If Mr Balls were to agree with that, the issue might perhaps be negotiable in advance of the UK general election.

But one of the things we could expect to see the parties talking about in their manifestos for the UK general election in 2015, and indeed in the campaign for that election, is what their negotiating positions would be with regard to the separation agreement that would have to be negotiated with Scotland in the event of a yes vote in September. Some of those manifesto commitments and campaign lines might be quite different from one another. In those areas it is very difficult to see where we go, beyond coming to the negotiating table in good faith and saying, “Well, we’d like to start talking to you about this, but we really haven’t got much of a mandate to do it, and we’re going to ask our people first.” That is probably how I would see the situation.

**Q4113 Lindsay Roy:** Is there a case, as the SNP suggests, for delaying the general election for another year and having another year of Conservative-Lib Dem coalition Government?

**Professor Tomkins:** Are you serious? Absolutely not; of course there is no case for that.

**Q4114 Lindsay Roy:** I take it the SNP claims to be a serious party.

**Professor Tomkins:** As I understand it, one MP representing the SNP suggested that the UK general election be postponed by a year. I have not heard the Scottish Government say that—although perhaps I haven’t been listening. I do not think that is a serious proposition, or that it is put seriously by the SNP. It would require legislation in both Houses of this Parliament to amend the Fixed-term Parliaments Act. When I last looked, the SNP did not have a majority in either House of Parliament, and I think that, if the current Government were to propose that the general election be delayed for a year in order to enable these separation negotiations to be completed, while Mr Miliband was still Leader of the

Opposition neither House of Parliament would have very much difficulty in turning down that legislation, so it is not a serious proposition.

**Lindsay Roy:** It is a pie in the sky.

**Q4115 Chair:** Possibly, it is a pig in the sky. I want to pick up the question of flippancy. This was not raised by just any old SNP MP; it was Angus Robertson, who we are told is the election mastermind. Therefore, we have to assume that it was a serious proposal by the SNP. Surely from its perspective it makes sense, because it would overcome the difficulties you raised earlier about parties in the UK bidding against each other for the position after the general election. It would free that up. I would obviously be hostile to it, because I would not want to see Scotland suffer another year of coalition Government, but, from the SNP's point of view, surely it is an entirely sensible and rational view to put forward.

**Professor Tomkins:** Perhaps—perhaps not. Even if it were the case, it would not be the first time that something the SNP took seriously was something I was unable to take seriously. I do not take this seriously as a proposition of British constitutional politics or British constitutional law for the reasons I have already articulated, which are that, in order to do this lawfully, it would require the Fixed-term Parliaments Act to be amended. That would require an Act of Parliament. Both Houses of Parliament would have to agree to it, and I do not see the prospect of that happening as being even remotely likely.

**Q4116 Chair:** I take it that silence is assent.

**Professor McLean:** I have nothing to add to that.

**Q4117 Chair:** I want to clarify two other points on the timing. One is the question of whether things could be agreed and applied individually or whether nothing would be agreed until everything was agreed. I can appreciate that there are some minor details about the implementation of social security, which are of no political consequence and could quite easily be delayed—later, there will be the DVLA and so on—but for major issues like the question of the currency, which was mentioned, or the support or otherwise for European negotiations and a whole number of other things, would it be the case in your view that they would all have to be a complete package, or could individual items be settled, resolved and implemented in the absence of an overall agreement?

**Professor McLean:** My view is the former. If you think of things that everybody round the table knows are predictably going to be sticking points—whatever the composition of the next UK Government—including currency, the EU, Faslane and Coulport, these are obviously controversial within the UK. They are controversial between the UK Government and the Scottish Government, and they are controversial between the UK political parties. I do not see how any of those could be signed off as an interim measure, because I believe that both parties—the UK Government and the Scottish Government—would want to reopen issue A if the discussions on issue B were not going the way they wanted, so it has to be all or nothing on the big issues.

**Q4118 Chair:** Is that a consensus view? We quite enjoy it if people argue among themselves, because it makes for a more interesting hearing.

**Professor Tomkins:** There is another view. I do not know that I subscribe to it, but it is possible to imagine another view, which is that there are some big issues that could be taken off the table quite quickly. It might be that the UK Treasury would come to the negotiating table and say, “Well, we said before the referendum that a currency union was highly unlikely. During the referendum campaign we had a look at it. Having had a look at it,

we've concluded that it's not in our national interest, and we're not going to do it. Now what shall we talk about?" That could happen. It is not completely inconceivable that that could happen, and then the issue of shared ownership of the Bank of England and all of that stuff is completely otiose; it is out the window, because all of a sudden, an independent Scotland will just have to shadow—use the pound in the way Panama uses the US dollar as a foreign currency—or it will have to take steps to enter the euro, or it will have to use Bitcoin or some other indigenous Scottish currency. But it will not be able to enter into a currency union, because on day one, hour one, minute one, the Chancellor—whoever he is—is sitting there saying, "I'm not doing it. End of. Let's move on." And that's the end of that. This is not exactly an agreement being concluded, but it is a position that would not be reversed later in the negotiations. If there were to be further negotiations, they would necessarily have to be about something else.

**Q4119 Chair:** That suggests that some of the issues—it could be the removal of Trident—could be unilaterally imposed by one side or the other. That would not be a negotiated settlement; it would just be a unilateral imposition by one side of some questions.

**Professor Tomkins:** That is right. If there is a yes vote, the obligation, as I understand it, is to come to the negotiating table in good faith, but then to negotiate hard in the interests of those people whom you represent. At the moment, we are assuming that the UK Government are simply representing the rest of the UK. They might have concluded, from 200 or 200,000 pages of detailed Treasury analysis, that there was no conceivable way in which a currency union with an independent Scotland would be in the national interest of the rest of the UK. I am not saying that will be the Treasury position; I am certainly not saying that it is the Treasury position, because it is not. The Treasury position at the moment is that it is merely highly unlikely. That line might harden in the immediate aftermath of a referendum.

I think what we can expect to hear between now and the referendum—and, if there is a yes vote, immediately thereafter—is that a yes vote means you have elected to leave the UK. You have elected to walk away. It is the UK's pound. If you leave the UK, you are leaving the UK's pound. The Bank of England is misnamed. It is not the Bank of England; it is a UK institution which acts in the interests of the United Kingdom as a whole. If you vote to leave the UK, you are walking away from the services, protection and obligations that are undertaken by institutions which act on behalf of the UK as a whole. These are the kinds of things we can expect to see. Some of the negotiations could be very short indeed. Other matters would require genuine agreement. For example, as I understand it, neither side would be able to impose on the other what an equitable share of the national debt would be. I could say more about that if you want.

**Q4120 Chair:** Let's come to the detail of that. I understand the point that some things would require a process of haggling, and you are saying that for others it could very well be the imposition of the dominant side's view of the matter, and there is simply no movement. Is that a view with which the two other witnesses concur?

**Professor Armstrong:** I will focus only on the European side of things. Obviously it slightly depends on which way the Scottish Government want to go. If they want to go down their preferred route, which is not to go down the accession process, at the end they get bogged down with what the UK Government are prepared to facilitate by way of negotiations at European level, and particularly what the UK Government might want out of a treaty revision process, as well as what the Scottish Government might want. If the Scottish Government were in fact to go down the route they do not want to go down, which is the accession route, they would largely be in control of that process. The specific dossiers on the euro, justice and home affairs, and so on would just be negotiated on a chapter by chapter

basis, as happens with accession negotiations, and will just be signed off as and when agreement is reached. They would be far more in control of the process that they do not want to go down, and less in control if they go down the process they have said they want to go down.

**Professor McLean:** Adam's alternative scenario—in which the UK Treasury says on day one, hour one, minute one, “You cannae have the pound; that's the end of the issue,” and that is settled—I do not see as plausible, because it is very easy indeed to envisage that on day one, minute two, the Scottish negotiators will say, “In that case, what happens to Trident is what it says in our White Paper: they are out by 2020, no argument.” I see the two sides looking at each other and saying, “That's a bit silly. We've got to keep on talking.” The issues would inextricably be linked.

**Q4121 Chair:** On the question of the negotiating timetable, I want your observations on what has been suggested to us is an imbalance that will affect the turnout of those negotiations, which is that one side has a deadline and the other does not. It has been suggested that the side with the deadline—the Scottish Government—thereby finds their negotiating position considerably undercut, because the only way in which they could meet their deadline in the event of disagreement would be to concede. Presumably, the UK Government would know that all they needed to do would simply be to keep talking or decline to make concessions. Is that a reasonable assessment of the position?

**Professor Tomkins:** It seems to me that each side would, in the wholly unattractive event of any of this ever happening, have some good cards and some less good cards. Professor McLean has just referred to one of the best cards that the Scottish Government would have: clearing Trident from Faslane and Coulport. Irrespective of the deadline, there is no way that Scotland can demand the Treasury's acceptance of a currency union if the Treasury has concluded that it is not in its interest to do so. Likewise, it is very difficult for the UK to demand that Faslane is the indefinite home of Britain's nuclear deterrent, in the event of Scotland's continuing desire to see those weapons moved. I do not think the clock makes much difference to the strength of the cards that are in different players' hands.

**Professor McLean:** But in so far as it does, the key date is not March 2016 but the next Holyrood election in May 2016.

**Q4122 Chair:** Can you expand on that?

**Professor McLean:** Since the composition of the Scottish Government might change, the present Scottish Government have every reason to try to conclude negotiations before the next Scottish Parliament election.

**Q4123 Sir James Paice:** In the event that the timetable was not quite achieved and there was a change in the Scottish Government to one representing one or more of the other Unionist parties, are they under any obligation to continue the negotiations at all?

**Professor McLean:** That is a tricky one. They are under an obligation to continue the negotiations, probably under the terms of the Edinburgh agreement, but they are under no obligation to conclude them in a way which would satisfy what by construction is no longer the Scottish Government, i.e. the Scottish Government.

**Q4124 Chair:** Effectively, the Scottish election could be a second referendum, depending on the positions that the parties going into that election take.

**Professor Tomkins:** The very considerable counter to that is that both sides are very firmly agreed, as I understand it, that this referendum in September is legal, fair and decisive. This referendum decides it. It is not a “suck it and see” referendum; it is no good the Scottish

Government saying, “Vote for independence and we’ll give it a go. We’ll see how the negotiations go. If they go well, that’s great, but, if they don’t go very well, you’ve always got a chance to get out of it, either in a subsequent referendum or in a subsequent parliamentary election which looks very much like a referendum.” That is not what is on the table. That is not the process. It is emphatically not what is happening. This is a decisive referendum, and that is the key ingredient of the Edinburgh agreement. Both sides agreed that they would respect the outcome of this referendum. If it is yes, Scotland goes; it is independence around the corner. If it is no, Scotland stays. It is as simple as that. Any attempt to make the May 2016 Scottish parliamentary elections into a sort of check on the referendum, a second referendum, or a way of opting back into the UK if Scotland has voted to leave it in 2014, is absolutely off the table. That is not what we are talking about here.

**Q4125 Sir James Paice:** You are saying that the Edinburgh agreement is permanently binding on both Governments, whoever those Governments are, bearing in mind that by May 2016 it is not impossible that both Governments will have changed. You are saying they will both be bound by their predecessors.

**Professor Tomkins:** I think I am saying that, because the entire basis on which this Parliament voted for the section 30 agreement that gave Holyrood the necessary legislative power to hold the referendum in the first place was explicitly that this referendum would be legal, fair and decisive. This is not an advisory opinion poll; it is not a “suck it and see” referendum. This referendum determines the question.

**Q4126 Mr Reid:** Let’s say that negotiations have not been completed by the 2016 Scottish election and that, for example, the Labour party, which is not a party to the Edinburgh agreement, publishes a manifesto for that election which says, “If we win the election, we will call off the negotiations and stay in the UK,” and on that manifesto the Labour party gets an overall majority in that election. Surely, it then would have the mandate, and in fact the duty, to implement its manifesto and call everything off.

**Professor Tomkins:** It is because of complications like these that the SNP is saying that the thing needs to be concluded before the Scots get a chance to change their minds.

**Q4127 Mr Reid:** That is right. But say agreement has not been reached, and the UK Government are not happy with the state of negotiations or SNP demands as of March 2016, and the UK Government refuse to put legislation through the UK Parliament and refuse to sign an agreement. What do the Scottish Government do in that scenario in March 2016?

**Professor Armstrong:** If the Scottish electorate, in a very short space of time, come up with two completely contradictory views, you have to resolve them somehow. The answer might have to be that you would have to hold another referendum on the constitutional question, if they decided to change their mind in the election.

**Q4128 Mr Reid:** Let’s take this forward to 24 March 2016, which the SNP have said is independence day. As of that date, the UK Government have not signed an agreement and have not put legislation through the UK Parliament. What are the options open to the Scottish Government on 24 March 2016?

**Professor Tomkins:** I do not know the answer to that question. Perhaps I can go back to the previous one.

**Chair:** Because you like that one much better.

**Q4129 Mr Reid:** What would you say to a student who gave you an answer like that?

**Professor Tomkins:** I am not going to answer that question either. How this pans out will depend very much on what the public mood is in 2016. If the public mood in Scotland is, “Oh, my God, we’ve made a terrible mistake; it must be reversed,” of course political parties will react to that, so in that sense if, for example, a May 2016 incoming Labour-led Administration in Holyrood had been elected overtly on that commitment and in that sort of mood, that would be one thing. If, however, the reaction in Scotland after the referendum, yes or no, is, as I suspect it will be, “Thank God that’s over. We can now get on with some proper politics,” either as an independent state or as a continuing part of the United Kingdom, the constitutional question has been put to bed. So far as I can detect it at the moment, the mood in Scotland is that, come September, this will all be over: “We can get on with some proper left-right politics rather than this endless constitutional debate.” I think that the question you are trying to get to will depend on what the public mood is after the referendum.

**Q4130 Mr Reid:** I think your assessment of the public mood in Scotland is correct. People want the referendum to settle the matter one way or another once and for all, but the question none of you seems able to answer is what options are open to the Scottish Government if they are sitting on midnight on 24 March 2016 and no agreement has been reached. What options are available?

**Professor Tomkins:** I do not know why Iain cannot answer that question. The reason why I cannot answer that question, and I suspect the reason why Kenneth can’t answer it, is that there is no legal answer to it. We are in extra-constitutional or non-constitutional, or extra-legal, territory.

**Q4131 Mr Reid:** I am not asking you what happens; I am asking you what options are available.

**Professor Tomkins:** Unilateral declaration of independence.

**Q4132 Mr Reid:** What does that mean in practice?

**Professor Tomkins:** I don’t know. Chaos.

**Q4133 Chair:** It might not be as good as that.

**Professor McLean:** I am struggling too, because all I can see is that in the scenario Mr Reid is putting forward the Scottish Government have a very weak hand. They have only got two months left before the election. This then goes into the possibility Adam mentioned. It could be that there would be a tide of outrage in Scotland that the UK Government were behaving like this, which could boost the current governing party in Scotland. If that becomes common knowledge, it bounces back to pressure on the UK Government not to be as hard line as, by construction, the hypothesis you are asking us to comment on has it.

**Q4134 Mr Reid:** I stress this is only a hypothesis. Say we have a UK Labour Government elected in 2015 who depend on Scottish MPs for their majority. Surely it is in their best interests to block every effort to negotiate. Remember that they were not a party to the Edinburgh agreement.

**Professor McLean:** Which they might do in a more or less diplomatic way. They might call on the House of Lords to help, for instance.

**Sir James Paice:** That would stick in the craw.

**Chair:** That is assuming we have not already abolished it by then, but leave that aside for the moment.

**Q4135 Mr Reid:** Is Professor Tomkins’s answer of chaos the general view?

**Professor McLean:** It is not necessarily my view. There would be huge pressure on both Governments, because chaos means chaos in the financial markets, and that really matters to both Governments.

**Q4136 Chair:** Why should there be chaos in the UK financial market if these issues are not resolved in Scotland? The UK will continue with sterling and the Bank of England irrespective of whether there has been an agreement. The question will be whether or not a separate Scotland continues with sterling and the Bank of England, either on the Panamanian model or as a joint currency area. It is an imbalanced potential for chaos, surely.

**Professor McLean:** Maybe so, but I can still see chaos on the UK side. Consider, as Members might have in mind anyway, yesterday's announcement from the Treasury about how current UK debt would be handled in the event of a yes. The shadow would still be there; you will all have seen the plan for the UK to remain the counterparty of all current debt and then go to Scotland to get back Scotland's share of it. Market participants can think two moves ahead. They could think, "But what if no agreement is reached about the terms on which Scotland pays its share?" Then, in spite of the pre-emptive strike by HM Treasury yesterday or the day before, that raises potential chaos over the UK's existing stock of debt, so chaos for both sides would be in prospect.

**Q4137 Mike Crockart:** I am going to take advantage of the fact that, as we have at least two professors of law, we can ask a basic, and hopefully straightforward, legal question, although it is one politicians have had some debate on. The question is about whether or not the UK is a continuing state. In the event of separation, would Scotland be a completely new country, and the rest of the UK a continuing state with no need to renegotiate any international obligations or memberships?

**Professor Tomkins:** That is absolutely right. If there is a yes vote in the referendum in September, in international law terms it means that Scotland will become a new state and the rest of the UK will be what international lawyers call the continuator state, or continuing state—rest of UK. That is what happened in 1922 when the Irish Free State came into being. The United Kingdom of Great Britain and Ireland continued as the United Kingdom of Great Britain and Northern Ireland. We might need to change the name of our state. We might need to change the flag. There may be minor consequential amendments to be made to some treaties in terms of how much representation we would have in the European Parliament, or what our voting rights would be in the Council of Ministers, but the treaty obligations that the United Kingdom currently has would become the treaty obligations of the rest of the United Kingdom.

That is the easy bit. It gets more difficult quite quickly, however. It follows from that that the institutions of the UK become the institutions of the rest of the UK, as I mentioned a few minutes ago. This Parliament is currently the UK Parliament; it becomes the Parliament of the rest of the UK. The Bank of England is a UK institution which becomes an institution of the rest of the UK. Even though the NHS is devolved in Scotland, the internal organisation of UK institutions does not matter as far as international law is concerned, so the NHS, which is a UK institution, becomes an institution of the rest of the UK. The same goes for the Royal Mail, the BBC, the security and secret intelligence services and Her Majesty's armed forces. These are all institutions of the UK, and each of them, upon independence, would become an institution of the rest of the UK. Scotland would have to create institutions such as these for herself, either from scratch or by inheriting whatever they were able to negotiate in the separation negotiations.

The third element—progressively these become slightly more difficult—is the apportionment of assets and liabilities. Here, all that international law will tell you is that the

assets and liabilities need to be apportioned equitably, but what equitable apportionment actually means is to be determined through political negotiations.

These principles are relatively easy to state, but they would be enormously difficult to apply in some contexts—for example, in figuring out what to do with the armed forces. You could take the view that armed forces personnel based in Scotland are integral to the defence of the United Kingdom as a whole and, therefore, upon Scottish independence they become part of the institution of Her Majesty's armed forces for the rest of the UK, because they are integral to the defence of the UK as a whole at the moment. In that case, Scotland would have to do rather more in terms of developing its own armed forces than it would if you were to take a different view, which is that armed forces personnel based in Scotland become the armed forces personnel of Scotland. I think that is implied in the White Paper, although I have not checked that.

There are different views one can reasonably take about how apportionment might be negotiated equitably, but, on your core question, it is absolutely right that the position of the UK Government in its first Scotland analysis paper, reached on the basis of published legal advice obtained from Professors James Crawford and Alan Boyle, is, as far as I understand it, the correct position.

**Q4138 Mike Crockart:** I am going to return to the negotiations. There is a lot of talk about negotiations to sort out the equitable balance. We have two lawyers in the room, which usually means we have two opinions. Let's see whether that is the case here.

**Professor Armstrong:** One can imagine circumstances in which a multinational state dissolves and each constituent element succeeds to the obligations of the entire entity, but one needs to look at the exact constitutional process at play. The constitutional process at play here is clearly designed to be one in which Scotland secedes from the rest of the UK. The UK Government have said they will accept the result of the referendum. If it were any other way, the rest of the United Kingdom would be fully entitled to hold a referendum itself on what would be the legal consequences for it, were the rest of the UK not to have continuity in its legal obligations. The nature of the constitutional process itself—the nature of the independence referendum solely in Scotland, with the rest of the UK acquiescing in it—is one which argues very strongly in favour.

**Q4139 Mike Crockart:** Effectively, this distinguishes what is happening in the UK from what happened in the break-up of Czechoslovakia, for example.

**Professor Armstrong:** Yes.

**Q4140 Mike Crockart:** Professor McLean, do you have a comment?

**Professor McLean:** It is not really a question for me. I was just checking on what the White Paper says about Scottish forces, to pick up a small theme. If Members want me to comment on that point I can, but maybe that is a different question.

**Q4141 Mike Crockart:** We probably have enough things that we want to get through. We may return to that at a later stage.

We have comprehensively dealt with the continuing state side of things, but what about the other side of the equation? Are there any obligations or treaties with other countries that Scotland would inherit, or is it a completely blank sheet and you start from scratch?

**Professor Armstrong:** One of the issues depends on whether the entity is going to become a member of an international organisation, in which case, as with the EU example, you are looking at new obligations being taken on by a new entity.

**Q4142 Mike Crockart:** My question does not necessarily relate to that, because then there is a negotiation to join that international organisation, which then gives them obligations, but is there anything inherited as part of the accession process that remains, despite that process?

**Professor Tomkins:** My expertise is not in public international law but in constitutional law, but my understanding is that the answer to that question is no. The principle is that, if Scotland votes to leave, that is exactly what happens. Scotland leaves and it becomes a new state. That is one of the themes of the campaign that is going to become increasingly prominent. What is at stake here? This is exactly what is at stake here. Scotland is currently part of the UK, and a yes vote means it leaves the UK. It goes off on its own as a new state in a brave new world.

**Q4143 Mike Crockart:** I am fairly clearly getting that it does not retain anything; it is a blank sheet, so lots of negotiations would happen. I would like to move on to who then carries out those negotiations, because an awful lot needs to be done there. The White Paper does have something to say about this. It says that those negotiations between Scotland and RUK would be “led by the First Minister, and the process will include figures from across Scottish public life and Scotland’s other political parties.” That seems quite vague. Can you shed any light on that, or does a set of negotiations have to happen first to sort out who the negotiating team is?

**Professor Tomkins:** If I may be partisan about this for a second, the SNP does not have a very good track record when it comes to this kind of thing, does it? It set up Yes Scotland as a cross-party, non party-funded campaign group in favour of independence, and it turned out to be almost entirely run by the SNP. The distinction between the Scottish Government, SNP and Yes Scotland is shrinking all the time. I do not know whether they would be any more successful post a yes vote in setting up a cross-party and genuinely national campaign. That is what it says it wants to do. How hard would it really try? I do not know. Would those who have just lost a long and bitter fight to keep Scotland in the United Kingdom be in the mood, ready and willing to serve in campaign teams led by the First Minister they have just been battling for the last however many years? I don’t think any of us knows. Certainly, the answer to the question is that there is no law in any of this. A lot will depend on the party mood. If there is a yes vote in the referendum and everybody says, “Right, that’s fine. We’ve voted for independence. Now let’s all get on with it,” and there is a coming together and a very quick healing process, so be it. We will all get on with it and that is what we will do. But the divisions in Scottish politics, especially the tribal divisions between the SNP and some of the others, run deep, and it might be quite difficult to get to that place on 19 September, if on 18 September we have got the answer to the question wrong.

**Q4144 Mike Crockart:** Can I confirm that there is nothing in the Edinburgh agreement that specifies who should be carrying out these negotiations?

**Professor Tomkins:** No.

**Professor Armstrong:** When you look at the experience of accession negotiations for candidate countries, they set up very specific teams, usually quite big teams, to manage the complex dossiers that will have to be negotiated. It strikes me as implausible that you could just have an all-purpose negotiation team that is going to be negotiating everything internally and everything externally. You would need a very experienced team of experts, particularly civil servants with expertise in the areas, who could conduct those negotiations. In some of those areas it is clear that, given Scotland’s experience in Europe already, those people would be there, but for some of the reserved powers that would become part of the Scottish Government’s portfolios they would not necessarily have the relevant European experience to

conduct those negotiations. There may be a certain expertise gap on certain areas, and that would need to be plugged.

**Q4145 Mike Crockart:** The question I asked was more about the negotiations between the UK Government and Scottish Government, in which case it is up to the Scottish Government, in association with others, to construct that negotiating team in whatever way they see fit. Are there any more legal requirements in terms of negotiations at EU level? Is anything laid down as to who is allowed to conduct those negotiations?

**Professor Armstrong:** Again, it depends largely on which routes they decide to go down. If they go down the accession route, where it would be a candidate state, the Scottish Government would be in control of that, but, if they go down their preferred route of seeking a revision to the treaties, they are entirely reliant on the UK Government handling it. We know already from the White Paper that the Scottish Government do not like the process by which European business is negotiated via Westminster and the UK Government. Paradoxically, they would find themselves, on the most crucial constitutional questions, having to embrace the very process that the White Paper rejects. We have concordats, memorandums and so on that deal with how European business is handled under the devolved arrangements. We do not have, as far as I am aware, any parallel documents that would say how that constitutional negotiation would run, and the White Paper rejects the whole idea of that sort of mediated relationship in the first place.

**Q4146 Mike Crockart:** How would that renegotiation work, with UK Government representation arguing Scotland's case? Would you have to have a Scottish representative sitting behind them telling them what they wanted them to say? I cannot understand how that would work, given that you would be expecting representatives to argue somebody else's case when they do not support it or agree with it.

**Professor Armstrong:** You may well take that view, and it may be one of the problems of the route that the White Paper prefers.

**Q4147 Mike Crockart:** Professor McLean, do you have anything to add on the particular things to do with the two levels of negotiations?

**Professor McLean:** The only thing I would put on the table in relation to the last several questions is again to reflect on what happened in 1921-22. Éamon de Valera chose his plenipotentiaries with full negotiating powers. He chose a delegation which he believed was split three-two in favour of his party, as the Irish party system was then emerging. He then, as he saw it, stiffened the delegation to make it three-three by appointing Erskine Childers as the non-voting secretary to the delegation. The way it panned out was not the way President de Valera had expected, and I think that is all we can say about any parallel here. The First Minister can appoint his negotiating team, and I would like to think that, in the event of a yes, and in the event of the First Minister approaching people from other parties, they would agree to serve, but it seems to me that what happens thereafter—on the 1921-22 precedent—is not in the hands of the First Minister.

**Q4148 Mike Crockart:** What do you see as the role of Scottish MPs in any negotiations which happen thereafter? There is an argument that, given the relative turnouts in elections for the Scottish Parliament and for Westminster, many of the Scottish MPs and the parties they represent have a larger mandate, and therefore more of a claim to be the voice of the people of Scotland in those negotiations?

**Professor Tomkins:** That is a small part of a bigger question: what is the role of Parliament in the negotiation? Professor McLean has just talked about how the negotiating

teams might be appointed, based on 1921-22, but, when they are doing their negotiations, to whom do they report, and to whom are they accountable? Presumably, if they are appointed by the First Minister, they report to the First Minister. Does the First Minister then report to the Scottish Parliament in respect of what the negotiating teams are doing? What if the negotiations take a turn that is not supported by a majority of MSPs in Holyrood? We are talking at the moment about the Scottish negotiating team. What is the role of a Parliament in holding a negotiating team such as this to account? I pose this as a question; I have no answer for you.

Equally, in London, if the mirror image is applied and the Prime Minister appoints an all-party team to negotiate on behalf of the rest of the United Kingdom, what is the role of the United Kingdom Parliament in holding either the Prime Minister or that negotiating team to account for the way in which the negotiations work? There are no clear constitutional or legal answers to these questions. How much of the negotiation will take place behind closed doors? How much of the negotiation will take place in a way that is subject to media scrutiny and the scrutiny of parliamentarians? There are no clear answers to these things. People say that it is normally much more difficult to negotiate with all of your cards on the table than without them all being on the table, so presumably there will have to be a degree of secrecy or privacy, but how you square that off against the constitutional fundamental of democratic and accountable government, I do not know.

**Q4149 Mike Crockart:** Professor McLean, could I add another question? You could take the last one as well. Another complication that shows itself is the role of Scottish MPs who are part of the UK Cabinet, which surely would be a major part of the negotiations. Is it effectively the case that, post a yes vote, Scottish MPs could not serve within a residual UK Parliament, because they would be compromised in some way?

*Professor McLean:* In so far as this is a question about how the Prime Minister chooses his team, he would be entirely free to choose Scottish MPs as part of his negotiating team. We then hit the problem that came up at the beginning of this discussion, which is that in May 2015 we may get a new Prime Minister and a new team. We know we will have Scottish MPs elected, and the new Prime Minister faces the same question. To reprise what Adam said a moment ago, the terms will have to be put before this Parliament, so at an absolute minimum Scottish MPs who were still serving in this Parliament get to vote on the terms, and, as it is common knowledge that this is part of what happens, I can only guess that negotiating teams will shape their proposals in the knowledge of that, but it is terribly unclear.

**Q4150 Mike Crockart:** You would end up with Scottish MPs voting on whether the deal was acceptable to the remainder of the UK.

*Professor McLean:* They have to, because they are still Members of Parliament and Parliament has to sign off the treaty.

**Mike Crockart:** The ultimate West Lothian question.

**Q4151 Chair:** Unless I am mistaken, you seem to be suggesting that, in the event of a yes vote, ownership of the negotiations on behalf of Scotland lies with the First Minister and the Scottish Parliament. Surely that is not the case, because I and Scottish MPs have a mandate, if I remember correctly, from just under 2.5 million people who voted for Scottish MPs, whereas MSPs have a mandate from under 2 million people. The principle of the Edinburgh agreement is about acceptance of the result. Therefore, if people like myself are democrats and accept the result, we have a role to play in the formulation of the Scottish negotiating position. To whom the delegation responds should surely be a body that includes people like myself. For example, I want to defend Govan shipbuilders after the result of the

referendum. If it is yes, I want to be in a position to defend Govan from the Scottish end, as it were, to make sure it is not sold off or given away as a concession. Surely there has to be some role in defending Scotland's interests and arguing Scotland's case after a yes vote for Scotland's MPs.

**Professor McLean:** All I can say is that at this point the Irish analogy breaks down, because, apart from Ulster Unionists, Irish MPs, although elected to the Westminster Parliament, were not taking part in it, so that particular dilemma did not come up in 1921-22. All I can do beyond that is go to one of Adam's earlier answers and say that the referendum is decisive per the Edinburgh agreement. It seems to me that the Scottish Government negotiate on behalf of Scotland and the UK Government negotiate on behalf of the rest of the UK, and it is for the respective First Minister and Prime Minister to choose their negotiating teams for deals which will be put to the two Parliaments.

**Q4152 Chair:** I understand right up to the point when you referred to the two Parliaments. Political opinion in Scotland is not represented solely by the Scottish Parliament. The single party that has an overall majority in the Scottish Parliament is representative of only, if I remember correctly, 23% of the Scottish electorate. Labour MPs got a higher percentage of the Scottish electorate, and, therefore, if there is to be any reporting back, it has to be to a forum that goes beyond the Scottish Parliament. Obviously, they have to play a role in it, but surely it cannot solely be the Scottish Parliament that is the sounding board for these things.

**Professor Tomkins:** I absolutely see the force of your argument, but I am afraid I just do not think it will work that way. It would work in the way Professor McLean has outlined, which is to say that the Prime Minister of the United Kingdom and the First Minister of Scotland would establish their negotiating teams. This would be done as an ordinary part of Government business, in respect of which those two Governments would be accountable to their respective Parliaments. It would be the Scottish Parliament holding the First Minister to account for what his negotiating team is doing, and it would be the UK Parliament holding the Prime Minister to account for what his negotiating team is doing. I am afraid I think that is how it would work.

**Q4153 Chair:** In those circumstances, coming back to a point Alan made earlier, you can understand why, running into the Scottish Parliament elections after a negotiated settlement, those not in the majority in the Scottish Parliament would not necessarily have any allegiance to the agreement that was struck or proposed, and could very well run forward with a manifesto which said, "We reject entirely this proposed settlement," and, if elected, would presumably then proceed to unscramble it and start negotiating a completely different set of agreements.

Unfortunately, nodding does not get registered by the *Hansard* lady, so if you have a view, rather than nodding enthusiastically or not, you have to express an opinion.

**Professor Tomkins:** Let the record state that we nodded.

**Professor McLean:** I think that analysis is correct, Chair. We have been here earlier in the discussion. If the composition of the Scottish Parliament changes in May 2016, the consequences which you just set out seem to me to follow.

**Q4154 Pamela Nash:** Salmond's mantra over the currency in recent months has been that sterling is Scotland's currency too. How much truth is there in that, and does it provide the UK with any obligation to enter into a monetary union with Scotland?

**Professor Tomkins:** It is absolutely true that sterling is Scotland's currency too now, because Scotland is currently part of the United Kingdom. Sterling is the UK's currency, ergo

it is currently also Scotland's currency now, but, if Scotland votes to leave the UK, Scotland might very well find that it has also voted to leave the UK pound, as I explained a few moments ago. The consequence of a yes vote in a referendum is that Scotland becomes a new state; the rest of the UK is the continuator state, and UK institutions automatically become institutions of the rest of the UK. The statement in the White Paper that it is Scotland's pound too is technically correct, but it is technically correct only because Scotland is currently part of the United Kingdom, and sterling is the UK's currency.

On currency union, the Cabinet Secretary for Finance got this very badly wrong in the middle of November, just before the White Paper was published, when he intimated, on a BBC television news interview I think, that because the UK Government have agreed to respect the outcome of the independence referendum and because the Scottish Government have made it plain that it was their ambition in the event of independence that Scotland would enter into a formal currency union with the rest of the United Kingdom, the UK is morally obliged, or obliged, not to get in the way of such a currency union. That is absolute nonsense. I do not know whether it is a deliberate or inadvertent misreading of the Edinburgh agreement. You can be the judge of that, but it is certainly a misreading of the Edinburgh agreement.

I have already said this afternoon that the only thing the Edinburgh agreement obliges the UK Government to respect is the outcome of the referendum, yes or no. On the terms of independence, or even the meaning of independence, which is contested, there is no obligation to accept a currency union on the basis of the Edinburgh agreement at all.

**Q4155 Pamela Nash:** You said that it does not have to according to the Edinburgh agreement, but, beyond the Edinburgh agreement, is there any other precedent or reason why the UK Government should enter into a monetary union if Scotland should secede? Even if they do not have to, is there any benefit to the rest of the UK to do so, or would they only be doing it if their arm was up their back?

**Professor Tomkins:** I think I should hand over to the economist to answer this question.

**Professor McLean:** I am not an economist; I am a political scientist, but I will have a go. The Scottish Government have used, as I identify them, at least three arguments. One is that it is an implication of the Edinburgh agreement that Scotland continues to use sterling. I agree with Adam that that is incorrect. The second is that sterling is an asset to be shared, to which the Treasury has just, unusually, flatly said that sterling is not an asset but an institution. Therefore, that Scottish Government argument fails for the reason Adam also gave. The third argument, which is in the White Paper and in a lot of things that are said by the Scottish Government, is that it is in the interests of the rest of the UK to stay in a currency union with Scotland and any reasonable person, say the Scottish Government, will see that, on behalf of the rest of the UK. I am not taking sides here, but I think that it is for the Government of the rest of the UK to decide what is in the interests of the UK. The present Government of the UK are stating very firmly, as we all know, that it is not in the interests of the rest of the UK to be in a currency union with Scotland, and I do not see any lever that the Scottish Government have to shift that.

Furthermore, even were both parties to agree that a currency union is in the interests of both, that does not necessarily mean that it happens. As members will be aware, the currency union between the Czech Republic and Slovakia was created on 1 January 1993 and was dead by 5 January 1993.

**Q4156 Pamela Nash:** You said you could not think of a reason. Am I not right in saying that this could be a negotiating lever?

**Professor McLean:** If everything is with everything else. The sort of negotiation I can envisage is the rather brutal one I envisaged earlier in which the UK Government say, “You cannae have sterling, end of argument,” to which the Scottish Government say, “The boats have got to be out by 2020, end of argument.” The argument cannot stop there, so everything is on the table.

**Professor Tomkins:** To take that a little further, I may have misunderstood or misremembered, but I do not think the Treasury has ruled out a currency union. I think they said it is highly unlikely that they would enter into a currency union on terms that would be satisfactory to the Scottish Government. What the Treasury means by that is that any currency union—surely this is the lesson of the eurozone—would have to be accompanied by a fiscal stability pact. I do not speak for Mr Swinney, but, speaking for myself, I do not think Mr Swinney would accept that, upon independence, he should enter into a fiscal stability pact with the Treasury, because that would make Scotland’s finances not more independent of London but more dependent on London, which is a curious definition. The SNP has lots of curious definitions of independence, but that was a really curious one.

**Q4157 Pamela Nash:** Surely this is something he must have considered before coming up with this policy, or am I being too kind?

**Professor Tomkins:** I cannot remember the page reference and I did not bring my copy, but there is a curious and slightly off-piste reference to fiscal stability agreements in the White Paper, and it is then dropped when you get to the conclusions. I do not know. Speaking for myself, it is wholly conceivable to imagine that an independent Scotland and the rest of the UK would enter into a currency agreement if there was an accompanying fiscal stability pact.

One other issue, which reinforces the answer Professor McLean gave some time ago that these various elements of the negotiation would have to be related to one another, is Scotland’s negotiation in terms of its membership of the European Union. If the European Union were to say to an independent Scotland, “One condition of your membership as the 29th member state is that you take steps to adopt in due course the euro as your currency,” the markets would immediately understand that the currency union between the rest of the UK and an independent Scotland was for the short term only, and was therefore lacking in stability and was vulnerable to market pressures, which is another reason why the Treasury, in my judgment, is very wise indeed to say that it is highly unlikely that it would ever be in the UK’s national interest. These are all “ifs”, but even if we can say that Scotland would not immediately be required to adopt the euro, we cannot say that the European Union would not say to Scotland, “You have to take steps to adopt the euro as your currency somewhere down the track.”

**Q4158 Pamela Nash:** Professor Armstrong, can you envisage a situation where an independent Scotland would not be told that eventually it would have to adopt the euro?

**Professor Armstrong:** The euro is the currency of the EU. For states who join, the assumption is that they would at some stage adopt the euro as currency. If you take the Swedish example, Sweden has been a member state of the European Union for nearly 20 years and still has not adopted the euro. I do not think there is any great political interest in Europe to force states to adopt it. Certainly, in terms of the convergence criteria that would have to be fulfilled, one of them is membership of the ERM for two years, but membership of the ERM is voluntary, so it would be about forcing an independent Scotland into the ERM in the first place, which might be the kind of thing Adam has in mind.

**Q4159 Pamela Nash:** I understand that. The example of Sweden is that it is retaining its own currency and is taking baby steps, as it were, to stave off the euro, but Scotland would be entering an alternative monetary zone if it got what is proposed in the White Paper. Would that not be frowned upon in an application to join the EU?

**Professor Armstrong:** I cannot see why, and I cannot see why there would be any particular desire to push an independent Scotland into it.

**Q4160 Pamela Nash:** I am surprised you say that, because, if I was another EU country who had been under these obligations to join, I would be wondering why Scotland was getting away with this and being allowed to enter into an alternative zone. I am not disagreeing with you.

**Professor Armstrong:** I understand the point. There are two different dynamics in play here. One is to do with the eurozone itself. The desire is that it is open to as many member states as want to join, but it is seen as voluntary rather than, in street jargon, “You’ve gotta be in it.” The other side is that Europe is becoming more differentiated anyway. It has to accept that, for 28 or 29 member states to work together, there has to be a degree of flexibility. The idea of one size having to fit all, which might have been the intellectual force of it some time ago, is not current in Brussels at the moment. There has been political recognition of that.

**Q4161 Chair:** You are saying that it may be that Scotland would have to give a binding commitment to join the euro in due course, but the EU would accept that that was being done in bad faith.

**Professor Armstrong:** I would not put it like that.

**Q4162 Chair:** What is wrong with the way I put it? It is an accurate description, though not necessarily the way you would put it. That is what you are really saying, isn’t it? They would have to join, and, if they were joining, they would have to make a commitment to join the euro, but they wouldn’t actually intend to do it, and everybody would know. It is a bit like making a promise with your fingers crossed, isn’t it—allegedly—not that I or any MP ever does it? It is a bit like saying something and having absolutely no intention of doing it.

**Professor Armstrong:** You would have to apply the same analysis to a country like Sweden, which has in principle the obligation to join the euro but has not voluntarily made the decision to take the steps that would lead to that happening. I do not think that is necessarily being in bad faith. It recognises the political realities.

**Q4163 Chair:** On good or bad faith, the commitment that the EU seeks, as I understand it, is that people agree in principle that in the fullness of time they will join the euro. That is not ifs or buts: in the fullness of time, they will aspire to join the euro. I would have thought that is an indication of faith and intention, but what you are telling us is that they would accept, and Scotland would agree, that actually it wasn’t intending to abide by that at all.

**Professor Armstrong:** In due course, an independent Scotland could decide to leave an alternative currency union and join the euro.

**Q4164 Lindsay Roy:** Professor McLean, could you elaborate on the failure after five days? What were the reasons for it?

**Professor McLean:** The analogy is far from perfect, because the former Czechoslovak crown was not an internationally convertible currency. Nevertheless, before the break-up everybody who thought about it anticipated that the Czech economy would be stronger than the Slovak economy. Therefore, small firms and private households moved all they could of

their deposits into banks in what became the Czech Republic. The old Czechoslovak crowns were stamped for use in the Czech Republic or in Slovakia. Even though these were at the time very newly emerging market economies, the market instantly determined a rate, which was about 10 to eight Czech to Slovak. As soon as there was a market rate, it was a mug's game to attempt to defend the Slovak currency at par. That was recognised by central bankers and politicians on both sides. From the evidence we have had, in this case "we" being a British Academy working group, which asked Czech and Slovak experts to report on this—I can give the Clerks the details—we found that, although the currency nominally lasted five weeks, four weeks of that was devoted to an orderly dismantling of it behind the scenes.

**Q4165 Chair:** Surely that was not a currency union in the sense of a single currency. It was actually two currencies with a fixed exchange rate, was it not?

**Professor McLean:** Czechoslovak crowns were denominated on 1 January as either Czech crowns or Slovak crowns and stamped accordingly. That was the physical currency. It was the intention of the joint institutions and both member states that that should be held at par, but very quickly that proved impossible.

**Q4166 Chair:** That is right. I am just trying to clarify whether or not this is a parallel. If you have two currencies with a fixed exchange rate, it is different presumably from what the Scottish Government are suggesting, which is simply a single currency—a sterling zone. It is not a question of having a UK pound and a Scottish pound stamped and an exchange rate of one to one; it is a unitary currency, and therefore the parallel is not exact.

**Professor McLean:** It is not exact.

**Q4167 Chair:** In a single currency area, there would not be a possibility of speculating against Scottish pounds because there would be no such thing.

**Professor McLean:** If it was a single currency area. That is in the event that the UK Treasury did not sustain the stance it currently says it is minded to take. If, on the other hand, it was the other option that Scottish Ministers have occasionally spoken of, which is Scotland using sterling without asking anybody's leave, it is somewhat closer to the Czech-Slovak situation. It is not identical. If members want to look at this in more detail, they had better call monetary economists rather than any of the three of us to give evidence.

**Chair:** But you are the ones who are here, and you made the mistake of mentioning it, if I may say so.

**Q4168 Pamela Nash:** If this is not a question for you, please tell me.

To avoid that situation, the Yes campaign has now focused on arguing that the Bank of England would be able to set monetary policy across what it calls the new sterling area—the existing UK. Would there be any benefit to the residual UK to do that and put that power into Scotland's hands, or the Bank of England, and would that require significant legislative change?

**Professor Tomkins:** As I understand it, the Scottish Government's proposals on Bank of England governance are those which have been derived by the Fiscal Commission established by the Scottish Government. As I understand the Fiscal Commission's proposals, they are that there would be a 10% Scottish share of the Bank of England somehow, and distinct Scottish representation on the key boards and committees of the Bank of England, including the Monetary Policy Committee. Members of the Monetary Policy Committee currently come from all over the United Kingdom, but do not sit on that committee in their capacity as representatives of particular regions within the British economy. This is not a trivial thing; it would be a very significant change to the way the MPC works.

The most in-depth inquiry into these proposals was undertaken last year by the House of Lords Economic Affairs Committee. It produced a report in April or May last year on the basis of quite a prolonged inquiry in which a lot of evidence had been taken. Its unanimous conclusion was that what the Fiscal Commission proposed was “devoid of precedent and entirely fanciful.” I agree.

I was a bit distressed when I read the White Paper to find that all you have in it is a meagre restatement of these proposals, which are devoid of precedent and entirely fanciful, without even an attempt to explain why they are not entirely fanciful or might not be devoid of precedent. The thing is simply restated. That is where the matter rests. The most recent word on this is the word that was given by the House of Lords Economic Affairs Committee, and it said it was fanciful. There has been no attempt by the Scottish Government, as far as I can see—certainly, there is no attempt in the White Paper—to explain why that conclusion is wrong or mistaken.

**Q4169 Pamela Nash:** The impression I’ve got from all of you is that this is not a realistic proposition for an independent Scotland. We are going to have a very short negotiating period of 18 months post the referendum, if Scotland decides to vote for independence. What effect do you think that will have on those negotiations? Is there an adequate alternative? No? That’s fine.

**Professor Tomkins:** Those of us who have studied this and have read things like reports of House of Lords Select Committees are familiar with the detail of the argument and also the politics of this, but most voters in the referendum are not. If and in so far as they think about the currency issue at all, most voters in the referendum probably just think that some games are being played between politicians called George and John, and it will all be all right on the night. Between now and the referendum, I would like to see a much greater degree of clarity and certainty about exactly how unlikely, and exactly why it is so unlikely, it is that there would be a currency union in the event of independence, and that, if Scotland wants to keep the pound as an independent country, it will be doing so in the manner that Panama uses the dollar, not in the manner envisaged in the work of fiction that Professor McLean has in front of him.

**Q4170 Pamela Nash:** Do you have anything to add, Professor McLean?

**Professor McLean:** Apart from wincing slightly at the description of the White Paper as a work of fiction, I cannot disagree with anything that Professor Tomkins has just said.

**Q4171 Chair:** I think you mentioned that the Scottish Government sought a 10% involvement in the Bank of England. Is that seen to be the standard Scottish share of things—10% of the national debt, 10% of this and 10% of that—or is it just a number plucked out of the air on the basis that it is round, rather than being 9.81 or any other figure? Should we attach any significance to the 10% figure?

**Professor Tomkins:** It is either a rounded-up share of population—the Scottish share of population is something like 8.5%—or a share of GDP.

**Q4172 Mr Reid:** Professor Tomkins referred to Scotland using the pound in the same way that Panama uses the dollar. For lay people, would you give a brief description of what the defects are of using the dollar the way Panama does?

**Professor Tomkins:** You have absolutely no control over your monetary policy. A foreign power sets your interest rates and determines your monetary policy, and you have no influence over it.

**Q4173 Mr Reid:** Are you able to borrow money?

**Professor Tomkins:** Now you have lost me. I do not know.

**Professor McLean:** It is possible for an economy to function in that way. Another example is Ecuador. There have been times when Argentina was an example, though not a very happy one. There is the example of Montenegro adopting the euro, but none of these is a major financial services country in its own right, which makes extrapolating from those experiences to Scotland under that condition very perilous.

**Q4174 Mr Reid:** For example, would mortgages be likely to be at higher interest rates as a result?

**Professor McLean:** It is impossible for any of us to say. Despite the chiding I had from the Chairman recently, I would rather not go any further.

**Q4175 Chair:** Feel free. You just have to expect us to respond to these sorts of points.

**Professor Tomkins:** The political and constitutional point would be that, whether mortgage rates are higher or lower, they would be set by a foreign power over whom you would have no control. The voters in an independent Scotland would have no means of holding their Government to account in respect of interest rates or mortgage rates because the setting of those rates would have been surrendered to a foreign power. I go back to the point that this is a very curious definition of independence. It is not a definition of independence; it is a definition of dependence. It would make Scotland more dependent on the decisions of what would have become a foreign power.

**Q4176 Chair:** How would it make Scotland more dependent, because presumably the argument would be that it retains what it has at the moment, with interest rates being set in London?

**Professor Tomkins:** Because at the moment, when interest rates are set by the Monetary Policy Committee, they are set with the whole of the UK economy taken into account as the relevant consideration, but they wouldn't be upon Scottish independence. They would be set taking into account the considerations relevant to the economy of the rest of the UK, leaving Scotland to one side because it was an independent state.

**Sir James Paice:** May I point out that for a woeful 13 years we had a Scottish Chancellor?

**Chair:** No, I do not think you need to point that out.

**Sir James Paice:** We are up against time, but I just want to ask about the issue of assets and liabilities. This week it is particularly pertinent because of the Treasury's announcement about UK debt. Can you explain to us precisely what you think the UK Government have announced, and how that affects the debate about whether Scotland would take on a share of that debt?

**Chair:** I have just noticed that a vote has been called in the Chamber. Given that the question has been asked, maybe you can talk quietly among yourselves and consider your answer while we go to vote. We will be back as quickly as we can.

*Sitting suspended for a Division in the House.*

*On resuming—*

**Q4177 Chair:** We are quorate again. You have had time to consider your responses and co-ordinate your replies.

**Professor McLean:** Can I clarify that Sir Jim’s question largely refers to the document *UK Debt and the Scotland Independence Referendum*, issued by HM Treasury at the start of the week?

**Sir James Paice:** Yes.

**Professor McLean:** My answer is that this document is addressed to the money markets rather than to domestic UK politics, and it is designed to give an assurance to the money markets that UK debt will be honoured on the existing terms by the existing counterparty. I said in evidence a little while ago that I am not sure they are able to make that assurance watertight, because people will be going behind the assurances in this little document to say, “Is that credible?”, but I do not think it has any direct bearing on potential negotiations with Scotland in the event of a yes. In particular, I do not think it makes the Scottish Government’s bargaining position either stronger or weaker. I am tempted to tell a story about Victorian politics—no, I won’t, because it would not be very helpful.

**Q4178 Sir James Paice:** As I understand it, the Government have said they will guarantee payments on the debt up until the date of the referendum, but they will still expect Scotland to pay the Government its share—the Scottish share.

**Professor McLean:** Yes.

**Q4179 Sir James Paice:** Having made the guarantees, is there not an argument that, where it does not affect the Scottish position, plus or minus, the UK Government are giving something away to the Scots? The Scots could now argue, if they wish to, “We will not take the debt because you have guaranteed you will underwrite it anyway. You’ve made that guarantee, so, if it means anything, regardless of what we in Scotland do, why should we then take the debt?”

**Professor McLean:** People in the press and so on have said that. The reason why I do not think it is credible is that an independent Scotland has to start issuing its debt on independence day, and any such threats from the Scottish Government directed at the Government of the rest of the UK would be noticed by people who might, or might not, want to buy Scottish debt. I do not think it would be at all wise for Scottish negotiators to say that.

**Professor Tomkins:** It would also, arguably, be contrary to international law. As I said quite a while ago, international law does not take you very far in terms of how assets and liabilities should be apportioned, but it does say that they should be equitably apportioned. For an independent Scotland to turn round to the rest of the UK and say, “We’re not going to pay off our portion of the debt,” would be contrary to those principles of international law.

**Q4180 Chair:** The Scottish Government have said they will not pay or take on any share of the debt liability if they do not get the share of the asset which is sterling. You are saying that that would be illegal under international law.

**Professor Tomkins:** I am saying that would be contrary to principles of international law, yes. My reading of the White Paper strongly encourages me to suspect that the Scottish Government do not have legal advice on the question of institutions’ assets and liabilities. If they had legal advice on that question, numerous of the legal mistakes made in the White Paper would not have been made. I think there is a lot of gamesmanship and rhetoric about this, but not much, if any, of it is supported on the Scottish Government side by legal analysis or opinion.

**Q4181 Chair:** Would you mind dropping us a paper indicating where you believe there is evidence in the document that no legal advice has been taken because it is contrary to

what would be normally accepted legal principle? None of us here is a lawyer. Therefore, we would not necessarily spot that. It would be helpful if it was drawn to our attention.

**Professor Tomkins:** I can do that. One example is that the Fiscal Commission says that ownership and governance of the Bank of England could be undertaken on an agreed shared basis reflecting Scotland's current implicit and historical share of the existing Bank's assets as a UK institution. Legally, that is nonsense. It does not make any sense at all, because it blurs the distinction between institutions and assets. I think that both the Fiscal Commission and the Scottish Government are proceeding on the basis that there is no distinction between institutions and assets, when international law shows you that, in the context of a state succession of this nature, there is every difference between institutions and assets. Institutions of the UK become institutions of the rest of the UK, but assets of those institutions fall to be apportioned equitably. I am not sure that the Scottish Government are aware of that. I am not sure that the Scottish Government were aware of that when they drafted their White Paper.

**Q4182 Chair:** If you let us have a paper, we would be willing to draw their errors to their attention.

**Professor Tomkins:** It will be very short.

**Q4183 Sir James Paice:** That would be helpful. Let's take this much wider than just the issue of national debt to the whole division of assets and liabilities. Is there any legal basis—established international law, constitutional law, or any other law—on which all the assets and liabilities of the UK would be divided up, whether it is based on location, population share or whatever? Are there any criteria?

**Professor Tomkins:** I have looked into this. My view, which would be part of any paper that I send you, is that what "equitable apportionment", which is the phrase I have been using, would mean in practice is a matter determined principally by political negotiation, but a number of legal presumptions may apply. The nature of legal presumptions is that they may be rebutted, but they would perhaps be among the default positions from which the negotiators might start. First, fixed property in Scotland, such as Government buildings, would become the property of the new Scottish state. Secondly, movable property and other assets in Scotland that are specifically for local use would likewise become the property of the new Scottish state: for example a fleet of ambulances that is there to serve a hospital in Glasgow. Even though those ambulances could be driven over the border, it wouldn't be contrary to that legal presumption.

**Q4184 Sir James Paice:** But not a warship because it is not for local use.

**Professor Tomkins:** That is right. Other assets and liabilities would fall to be divided between the rest of the UK and the new Scottish state. The default position on that division would appear to be that this would be calculated primarily by reference to population share, so Scotland would acquire about 8.5% of the UK's assets and liabilities.

It further appears from my legal research into this that the origin or initial financing of state assets and liabilities is irrelevant, so the UK could not say, "UK taxpayers paid for that hospital or fleet of ambulances; therefore it is ours." The question of historical share and financial input seems to be irrelevant. Again, these are all rebuttable presumptions of international law, as far as I understand them.

Also irrelevant as a matter of international law, although perhaps not as a matter of practical politics, is how the institution was organised before independence. Whether or not the institution is devolved, as a matter of international law, if it is a UK institution, it becomes an RUK institution. As far as I can see, that is about as far as the law will take you.

**Q4185 Sir James Paice:** Does that lead you to see any particular asset class or liability that would be more intractable than others to resolve?

*Professor Tomkins:* Apart from the national debt and currency, one that would be very difficult is defence. On this, the Scotland analysis paper on defence, published in October, is quite useful. One of the claims made in that paper—it is probably right as a matter of law—is that defence assets physically located in Scotland would not necessarily become Scottish upon independence, even though they are physically located in Scotland, if it could be shown that they were not specifically for local use. If they were integral to the defence or security of the United Kingdom as a whole, it could be argued that they are part of a UK institution that would become an institution of the rest of the UK and would not become Scottish, even if they were physically located in Scotland. I am not talking about bases and immovable real property, but movable property that is based in Scotland at the moment. That is without getting into the issue of personnel and the contracts of employment of civil servants and members of Her Majesty's armed forces, which are contracts of employment with the Crown in right of the United Kingdom, not the Crown in right of Scotland. Even without the personnel issues, we have some quite difficult negotiations to undertake.

**Q4186 Sir James Paice:** You will not be surprised that that fits with what we were told when we looked into specific defence issues. What about the other side of this? Would Scotland have any claim on any assets outside Scotland, either within the UK or internationally, that belonged to the UK?

*Professor Tomkins:* I will have to go away to check that and write to you. I think there are specific rules in international law with regard to embassies. One of the claims made in the White Paper repeatedly—every claim in the White Paper is made repeatedly, which is one of the reasons why they managed to make it such a long document—is that Scotland would have a right to a share of UK embassies. I am not sure whether in international law that is correct. I need to study this, but it may be that there are specific provisions of international law that deal with the question of embassies. I think that the diplomatic corps of the United Kingdom is an institution of the United Kingdom and, in the event of Scottish independence, it would become an institution of the rest of the United Kingdom. It would then be a question of negotiation as to whether, as it were, the rest of the United Kingdom wanted to rent space to a newly established independent Scottish diplomatic corps.

**Q4187 Chair:** That is certainly one of the areas where no legal advice seems to have been taken. The constant assertions seem to be at variance with what would seem to be established legal practice, do they not?

*Professor Tomkins:* Yes. I stress that there is very little legal practice on this; the principles of international law are general and are best expressed as rebuttable presumptions. Law will only take you so far. The core of this will have to be resolved through political negotiations, but political negotiations that, hopefully, take place within the framework of international law. That framework of international law is no more than that—it is just a framework.

**Q4188 Sir James Paice:** As the Chairman said, I do not think any of us on this Committee are lawyers. When international law of this type is challenged, where is the remediation? Where can you go for it to be resolved?

*Professor Tomkins:* It may be that there are specific international tribunals on this question. It may also be that those tribunals would be accessible only by states parties to the relevant treaties. My understanding—I am very happy to be corrected if I am wrong—is that

the default position, absent a specific treaty resolution procedure, would be that these would fall within the jurisdiction of the International Court of Justice.

**Q4189 Mr Reid:** What about intangible assets? I am thinking, for example, of computer software that is owned by HMRC or the DWP. We know from the Government's attempts to bring in universal credit how complicated it is and how long it takes to rewrite computer software. Does Scotland have any rights to that computer software?

**Professor Tomkins:** Intellectual property is an asset. Therefore, it would fall to be equitably apportioned, but I am not quite sure how you can apportion copyright or a patent. It is hard to imagine how that would work. We fall back on the mantra that these questions would have to be politically negotiated between the parties, but, to go back to what we started talking about at the beginning of the session, all of these are illustrations of just how complicated this thing would be. They are reasons why even with the best political will in the world—and we have talked about how there might not be the best political will in the world—it is unrealistic to expect that all of these matters could be concluded within an 18-month window. We have only been talking about this for two hours and already we are at this level of detail, sophistication and difficulty. It is an extraordinarily complex task.

**Q4190 Mr Reid:** Say the main principles have been agreed, and Scotland becomes an independent state in March 2016. Would it be possible for Scotland and the rest of the UK to continue sharing some services, such as HMRC or Jobcentres, for a limited period? Is that a feasible solution?

**Professor Tomkins:** Yes, but subject to two difficult issues, both of which would have to be negotiated. The first is costs, and the second is to whom are these organisations accountable? You can see that it would be very difficult to share some organisations. It would be very difficult to share the Security Service, and as far as I understand it, the Scottish Government are not suggesting that we do share the Security Service. Even for those institutions the Scottish Government are suggesting we should share in the event of independence, these questions about cost and accountability arise. This is another area where the White Paper is rather blasé. The White Paper talks as if the distribution of welfare benefits and social security payments can be shared, at least in a transitional period. Indeed, there are already civil servants working in offices in Motherwell, Hamilton or somewhere in Scotland who could do that task, but they could do that task only if the benefits they had to distribute were exactly the same as the benefits distributed by the UK, because of the limitations of the software. We know that the Scottish Government want to have a welfare policy which is substantively different from that pursued by the rest of the UK. As soon as those differences emerge, the possibility of shared services becomes much more difficult because of the limitations of the infrastructure.

**Q4191 Mr Reid:** Effectively, you are saying that, unless Scotland was able completely to rewrite the DWP benefits software by independence day, in practice they would not be able to abolish the bedroom tax, for example.

**Professor Tomkins:** I am going to leave questions about the details of particular welfare benefits to those who understand much more about them than I do. My understanding of the position is that it is plausible to think about shared services in the context of social security payments only if three conditions are met: first, that there is agreement about costs, and that is a matter of politics; secondly, that there is agreement about accountability, if and in so far as that arises in a context such as this, and that is a matter of politics; and, thirdly, that the payments to be administered by the shared services are identical north and south of the border, which again is a curious definition of independence.

**Q4192 Mr Reid:** Does the fact that at present it is the UK Government who hold the HMRC and DWP software give the UK Government leverage within the negotiations?

**Professor Tomkins:** I have not thought about that question. My instinct is that, yes, it would give the UK leverage within the negotiations, but I will see if that is right and come back to you.

**Q4193 Lindsay Roy:** Professor Tomkins, in effect we are not really talking about one negotiating team but a plethora of negotiating teams. You mentioned earlier the Royal Mail and the BBC. What are the principal UK organisations outside government that would need to be involved in negotiations?

**Professor Tomkins:** That is a good question. I am sure there are a number of other public bodies established by statute or royal charter, as in the case of the BBC. That would need to be considered. I do not have an exhaustive list. I suspect that the list is longer rather than shorter. In one of the Scotland analysis papers, the UK Government said that there are about 200 public bodies working in Scotland on behalf of the UK as a whole. Royal Mail, the Post Office and the BBC are examples of public bodies that would have to be involved at some level in the negotiations. It is unlikely to be an exhaustive list.

**Q4194 Graeme Morrice:** I want to touch on membership of the European Union. I think we are saying that if an independent Scotland secedes from the rest of the UK it would cease to be a member of the EU, and, as a new state, it would need to apply. We are obviously aware of what is in the White Paper in terms of the aspirations of a future SNP independent Scottish Government. What would be the process and timeline for an independent Scotland joining the EU, or at least applying and attempting to join the EU? I think that is for you, Professor Armstrong.

**Professor Armstrong:** That's definitely for me. The White Paper sets out two potential routes, one of which it favours and one of which it disfavors. The route it disfavors is the article 49 accession route; the route it favours is the article 48 treaty revision route. Very different procedures are involved in both of them, and therefore that may have an impact on the nature and length of the negotiation process.

**Q4195 Graeme Morrice:** I was going to ask about article 48, but for the record can you explain a little about what articles 48 and 49 are and what they mean?

**Professor Armstrong:** The normal process for accession is governed by article 49. That is the key provision of the treaty. Essentially, its function is to allow other member states and EU institutions to verify that an applicant state can politically and legally undertake its obligations under the treaties. That is its function. The candidate state applies; the Commission reviews the application and enters into negotiations; and then an agreement is concluded, which would then be ratified.

The article 48 process regulates the operation of the treaties as between existing member states. The process is instigated by a member state itself or one of the institutions. That leads to a treaty amendment, which again would require ratification. The key procedural difference, which is really crucial, is that under article 49 it would be an independent Scotland that would be the state making the request and in that sense opening the negotiations and conducting them. If the attempt is made—I don't think it can be made—to use article 48—

**Q4196 Graeme Morrice:** The SNP's preferred option.

**Professor Armstrong:** Yes. If that is used, in effect Scotland would be dependent upon probably the United Kingdom opening up the treaty revision process and, to that extent, the

negotiations—at least at the beginning—would be in the hands of the UK Government, not directly in control of the Scottish Government. It is paradoxical that the process favoured in the White Paper is the one that seems to give the Scottish Government the least control, at least at the level of initiating it.

**Q4197 Graeme Morrice:** Is that not a more dangerous road to go down if, as you have described, under article 48 an independent Scottish Government would be very reliant on the machinations of the Government of the remainder of the UK?

*Professor Armstrong:* One of the deep problems of the White Paper is the lack of candour about the risks involved in the use of the article 48 process. Straightforwardly and legally, I do not think it is plausible. It is a mechanism by which existing member states regulate their relationships. There is a huge difference between that and article 49 and other provisions of the treaty by which existing member states organise their relationships with non-member states or international organisations, so straightforwardly and legally it is implausible to use article 48.

More specifically in terms of the risks, the most obvious risk is the idea that it would be the UK Government who would be initiating and managing the process. From what we know about current politics, it is hardly conceivable that a UK Government would seek to open a treaty revision process solely to provide for Scotland's membership of the EU without dealing with the issues that have arisen from the Conservative party about wholesale renegotiation of the treaties. The danger of issue linkage between Scottish membership of the EU and the UK's relationship with the EU is massive, and not evident in the White Paper itself.

**Q4198 Sir James Paice:** Can you answer the point about the time scale for the two different routes?

*Professor Armstrong:* There is a particular risk with the article 48 process. If that issue linkage happens, so that the issue of Scottish membership of the EU plus all the other things that a UK Government might want to get out of any renegotiation become linked, that is likely to create a drag on the process. I imagine that other member states would be reluctant actively to engage in a process of negotiation, if they felt this was the UK's opportunity to reopen a whole series of agendas that they would not want to see opened. The danger is that the process 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.

**Q4199 Sir James Paice:** To take that point forward—this is a crucial issue—you seem to be implying that there is every likelihood that in the event of a yes vote, and in the event that they met their timetable as far as independence from the UK was concerned, there would be a period of at least some months when Scotland was independent but outside the EU.

*Professor Armstrong:* Under either route, whether the article 48 or article 49 route is used, I think there is a risk of that hiatus—a gap—emerging, and the White Paper does not address what would happen.

**Q4200 Sir James Paice:** Would you go as far as to give us the odds on that happening and the period? Are we talking about a small number of months or years? Would there be a transition period? That is a secondary question.

**Professor Armstrong:** If you go down the article 49 route, it is clear that there will be a gap—that's for sure—because an independent Scotland could only formally make the request to accede once it was independent. It could carry out all the background negotiations and all the rest of it beforehand; it could substantively have done the deal, but it could only formally trigger the article 49 process once it was an independent state, at which point the treaty could be negotiated relatively quickly, but there would then be a ratification process among all the other member states.

If you look at the last accession, which was Croatia, the ratification process took 18 months. If you go back to the accession of Austria, Sweden and Finland, it was done more rapidly; it was done in six months. It could well be that an accession treaty would, for example, set a six-month deadline for ratification, but there would be a gap. That seems to me to be why the Scottish Government want to go down the article 48 route; they think they can sign, seal and deliver everything within the 18-month period, but they would have had to conclude all the negotiations. Those negotiations could not have bled into any other issue that came up when a treaty revision process was initiated, and the ratification process would also have to be conducted within that period. I think that is highly implausible. Under either route, you are looking at the risk of a gap, which could be as little as six months.

**Q4201 Sir James Paice:** Can we define precisely what the implications for an independent Scotland would be during that gap? I assume—please correct me if I am wrong—it means that they would not be in receipt of any EU funding; they would not be required or obliged to meet any EU regulations; and, on specific issues that I am interested in, they would not be in receipt of any common agricultural policy money for their farmers. On the common fisheries policy, presumably they would be outside it and therefore they would have control of their own waters, but part of these negotiations would be to renegotiate their entry into the common fisheries policy, with all the implications for the Spaniards and others who might have different views.

**Professor Armstrong:** The treaties would cease to apply to the territory that would form part of an independent Scotland. If the article 49 accession route was being pursued, and let's imagine that the accession treaty had been agreed but was not yet in force because it was pending ratification, 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 the 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. I think that under the accession route there is potential for some degree of managing what might be a short hiatus. If you go down the article 48 route, the treaty amendment process, it is much less clear how you would manage the hiatus than it would be if you used the article 49 route, because you might build it into the treaty of accession itself.

**Q4202 Sir James Paice:** I do not want to put words into your mouth, but would managing the hiatus, to use your words, include the fact that, because it is outside the treaty, they could be not in receipt of funds—let's not be specific—that they are currently in receipt of by virtue of being part of the UK?

**Professor Armstrong:** In the absence of any other arrangement, whether it was politically agreed or in an accession treaty that was in force, an independent Scotland would simply be outside the EU at that point and not in receipt of any of those funds.

**Q4203 Sir James Paice:** Forgetting agriculture and fisheries, how would that affect general trade? Presumably, it would mean that Scotland would not have tariff-free entry into the rest of the European market.

**Professor Armstrong:** It would then be open to set up an international agreement between the EU and an independent Scotland. Perhaps that could be done relatively quickly, but it would be as a non-member state—an entity outside the EU at that point—which is clearly not what would be desired. There would be ways of negotiating that, but that would be the case with any other state within the European neighbourhood more generally.

**Q4204 Graeme Morrice:** That has been very helpful. I was going to touch on the initial question about what happens if there is a gap between independence day and Scotland not being a full member of the EU. I think we all accept that the likelihood of there being a substantial gap is a relevant issue of concern. This creates a whole range of uncertainties. We know that a number of businesses located in Scotland, which are not necessarily indigenous, have expressed both public and private concern. If Scotland became independent and, more importantly to them, ceased to be in the single market, that would be a real concern, because there would be barriers to their trading not just south of the border with the rest of the UK but obviously within the EU. I also recognise that there would be a whole range of funding issues, which Jim touched on, not least the selective funding that comes to Scotland through parts of Scotland being assisted area status zones. It will be interesting to see what would happen there. You are saying that all treaties would come to an end and there may be transitional or provisional arrangements put in place. Professor Armstrong, you are the expert in this area, but I was wondering what Professor Tomkins and Professor McLean think about the different routes of pursuing accession in terms of articles 48 and 49.

**Professor Tomkins:** I know that the Chairman wants the witnesses to disagree with one another, but I am going to disappoint him again. I strongly agree with everything that Kenneth has just explained to the Committee, but I want to throw a spanner into the works. What we have been talking about is the easy bit. The easy bit is whether Scotland would become a member state of the European Union and how Scotland might become a member state of the European Union. The difficult bit is what would be the terms of its membership? As we all know, the UK has over the course of the last four decades negotiated terms of membership for itself which are different from those of several other member states. We have the rebate, the euro opt-out and the protocols with regard to the charter of fundamental rights, and we are also not part of Schengen. Even if Scotland were smoothly, expeditiously and seamlessly—the word used in the White Paper—to negotiate its way into the European Union as a member state, that says nothing about the terms of that entry. We have already talked a bit this afternoon about the euro, but we have not mentioned Schengen.

**Graeme Morrice:** I was going to mention that in due course, but that is helpful.

**Professor Tomkins:** I am sorry if I pre-empted you. I think that Schengen is the really important one. Schengen is a bit of jargon. What does it mean? It means that those member states of the European Union that are part of the Schengen area—Kenneth, please correct me where I go wrong—are part of a free movement area within which there are no border checks on passports and the like. The United Kingdom is part of a common travel area, but a different common travel area from Schengen. It is part of a common travel area with Ireland, and it is the policy of the Scottish Government that, upon independence, Scotland would continue to be part of the common travel area with the rest of the United Kingdom and with Ireland and would not join Schengen. But that is not within its gift; that requires to be negotiated with two sets of parties. First, it requires to be negotiated with the rest of the United Kingdom and with Ireland. I do not think that will be very difficult. But it would also require to be negotiated with Scotland's new European partners, the other member states of

the European Union, and why should the rest of the European Union readily and without any kind of quid pro quo agree to Scotland, as a new member state, being exempt from Schengen?

Membership of Schengen is incompatible with membership of the common travel area between Britain and Ireland. You cannot be a member of both. What guarantees are there? I very strongly echo what Professor Armstrong said a few moments ago about the silences in the White Paper—the things that are not said in the White Paper. This is a risk of Scotland's accession to the European Union. Irrespective of whether it goes down the 48 or 49 route, this is a risk of Scotland's membership of the European Union that is just brushed away in the pages of the White Paper as if it does not even exist.

**Professor Armstrong:** There is the more specific hurdle in article 7 of protocol 19 on Schengen which makes membership of Schengen obligatory for new states. It is not just that there would have to be negotiation on not joining; there would have to be negotiation away of a very specific legal provision which obliged new member states to join.

**Q4205 Chair:** Is the obligation to join Schengen different from the obligation about the euro? Is it much tougher? We discussed earlier whether or not it was possible to make a commitment to the euro and not really do it.

**Professor Armstrong:** It is much more explicit, in the sense that what the treaty recognises, in a world where there is more differentiated integration and certain things apply to some member states and not others, is that it has to be clear for states joining the EU what things they really are obliged to sign up to and what they are not. On a case-by-case basis, if member states agree, there is what is called enhanced co-operation on things like a financial transaction tax and so on. That is not viewed as part of the corpus of EU law which an accession state would need to sign up to. That is why this protocol is clarifying, saying that in this area where there is co-operation among a group of member states, but not all, that is part of the corpus of European law that a new member state is expected to sign up to. It is to give specific legal clarification that in this area of co-operation, among a large group of member states, but only a group, it is understood that that forms part of the corpus of European law that a new state has to sign up to.

**Q4206 Chair:** Presumably, Scotland could negotiate its way out of that.

**Professor Armstrong:** It would have to. Things would have to be negotiated, but I was trying to illustrate, as Professor Tomkins was saying, that this is not just a negotiation in the absence of something; it is a negotiation in the presence of something—a legal provision that says you would be obliged to sign up to it.

**Q4207 Graeme Morrice:** Before I bring Professor McLean back in on the general point, as Schengen has been raised, maybe Professor Armstrong could explain the practical difficulties or the practical issues of an independent Scotland being in Schengen, on the basis that it has not negotiated an opt-out.

**Professor Armstrong:** Clearly, it is not necessarily wholly desirable for an independent Scotland to be in Schengen. Would you really want to see border controls between Scotland and the rest of the UK? I do not think anybody necessarily thinks it is a good thing that Scotland should be in Schengen.

**Q4208 Graeme Morrice:** But the implications would involve things like border controls between Scotland and England and myriad other issues. Are there any other high-profile issues you could give examples of? I am keen to get this on the record.

**Professor Armstrong:** Not off the top of my head.

**Professor Tomkins:** One closely related issue is that the Scottish Government have said in a series of publications, including the White Paper, that they want to pursue an independent immigration policy. Pursuing an independent immigration policy is incompatible with being a member of either Schengen or the common travel area. Ireland does not pursue a wholly independent immigration policy. It is not as if Ireland's immigration policy is set by London, but there are agreements, as part of the operation of the common travel area between London and Dublin, about immigration. The Scottish Government have said, "We don't want to pursue the same immigration policy as is pursued in London. We want our own independent and substantively different immigration policy," and that is incompatible with membership of the common travel area, at least as it currently operates. These are blithe assertions that you find in the White Paper that are incompatible with a proper understanding of the obligations that come with membership of these organisations or arrangements, whatever they are.

**Q4209 Pamela Nash:** On Schengen, would Scotland be fully obliged to fund the border controls between Scotland and the rest of the UK, or would that be split between the two countries?

**Professor Tomkins:** As I understand it, imposing border controls on the land frontier between England and Scotland would be remarkably easy. A very small number of roads cross that border. Imposing border controls between England and Wales, or between Northern Ireland and Ireland, would be much more difficult than imposing border controls on road and rail links between England and Scotland. Only about 18 major roads go across the two.

**Q4210 Pamela Nash:** Yes, but there are lots of flights between Scotland and England so that would incur increased border controls at airports. You also referred to rail. Would there not have to be people looking out for those running over the hills in Cumbria?

**Chair:** No walkers on the Cheviots.

**Professor Tomkins:** If Scotland cannot negotiate its way out of Schengen, or finds that membership of the common travel area is incompatible with what it wants to do with its own immigration policy, I do not think the UK Government will have any hesitation in saying that the consequence of these things would be that we would have no option but to impose controls on the border and at airports. If the RUK chose to do that, I think the RUK would be paying for it.

**Q4211 Pamela Nash:** Earlier you said that a country could not be a member of both, so would it not be Scotland's fault, for want of a better word, that this situation was in place? It would have to implement the border controls, rather than the UK. The UK would not have a choice in it. Would Scotland not have to do that if it was part of Schengen?

**Professor Tomkins:** I have not thought about that. This is a scenario where the rest of the UK and Ireland say, "Come and be part of the common travel area. Stay in the common travel area," and Scotland says, "Yes, great, and by the way, this is what we are proposing to do with regard to non-EU immigration." London and Dublin say, "You can't do that because it's incompatible with the agreements we have reached under the common travel area, so you have to choose. Either you pursue your independent immigration policy, which is incompatible with ours, or you can be in the common travel area. It's your choice, but, if you aren't in the common travel area, the consequence is that we, the rest of the UK, will have no choice but, very reluctantly, to impose border controls." That is ultimately the choice that the RUK would take on the basis of a decision taken in Edinburgh not to participate in the common travel area, so it would be difficult for the rest of the UK to bill Scotland for that, attractive as that proposition might otherwise be.

**Q4212 Chair:** I was under the impression that part of the commitment you entered into when signing up to Schengen was that you had to be responsible for external border controls. Therefore, there would be an obligation upon Scotland as part of Schengen to have external border controls. In addition to what the UK might wish to put in at the English border, the commitment from the EU, in being part of Schengen, is that the member state has to have border controls; otherwise why would Greece bother, or the Italians? Anybody could just decide not to have border controls and be part of a common travel area, which would then allow people to come in from outside. My understanding is that the obligation would be on Scotland. Am I right in thinking that for those queued up at Calais and elsewhere seeking to enter the United Kingdom illegally at the moment by climbing on to Eurostar, lorries and so on, all they would need to do is get on a boat in France, Belgium or anywhere that would take them to Leith, Rosyth or anywhere similar? There would be no restrictions on them. They would be able to travel quite freely to Scotland, and then it would be simply an issue of walking across the Cheviots under this scenario. The only barrier would be the Cheviots, because if they want to get to London that is the way round. There are no restrictions under Schengen on moving between France or Belgium and Scotland. If they wanted to get to London, the barrier would then be the Scotland-England border. Is that correct? I am afraid that nodding does not cut it.

**Professor Armstrong:** The Scottish border at that point is part of the external border of the Schengen frontier, so Scotland would be responsible for policing it.

**Q4213 Chair:** All the camps we see built up outside Calais could quite easily be transferred to Coldstream. Is that correct?

**Professor Armstrong:** That is not something I would speculate on.

**Q4214 Chair:** Let me clarify. It would make logical sense, would it not, for somebody in a camp in Calais who was trying to get into the UK to travel to Scotland, on the basis that the Scotland-England border was a less protected one than the UK-France border is at the moment?

**Professor Armstrong:** You are envisaging that people inside the Schengen area at the moment would travel to Scotland and then seek to enter the UK.

**Q4215 Chair:** If they were wishing to get to London. That is the point. Those illegals are trying to jump on to lorries in France and Belgium to get across the channel to get into the UK, and to London and the midlands. Having paid smugglers to get them into Europe, rather than them being dumped in France and being left to find their own way across, or paying smugglers for that, presumably it would be entirely open to them to pay a legitimate ferry to get to Scotland, and then cross at Coldstream, the Cheviots, Gretna Green or somewhere similar.

**Professor Armstrong:** That is conceivable, but you can imagine that, within the Schengen area, there are obligations on individual states as part of the responsibility not to create incentives for that kind of displacement of people to create pressures at particular borders.

**Q4216 Chair:** What does “not to create incentives” mean?

**Professor Armstrong:** Not to facilitate that process.

**Q4217 Chair:** But Scotland would not necessarily facilitate it. France could be said to facilitate it at the moment by allowing the camps to exist, but they find themselves the

prisoner of circumstance. These people turn up and wait to try to get across. Instead of coming to France to try to cross into the UK, they could simply get themselves to Scotland. There would be no legal barriers to stop them travelling from France or Belgium to Scotland and then coming over the border there.

**Professor Tomkins:** Hypothetically, all of that is true, but, with respect, it seems to me that the greater problem, if our focus is on the White Paper, is an internal inconsistency within the White Paper. It is there in black and white. In the White Paper, the Scottish Government say that they do not want to be part of Schengen and they do want to be part of the common travel area; and they say, “And, by the way, we want to pursue our own independent immigration policy, which is substantively different from yours.” Those two statements are mutually incompatible. You cannot be in the common travel area with the rest of the UK and Ireland and, at the same time, pursue an immigration policy that is aggressively and substantively different from the immigration policies pursued in London and Dublin. That is a much more immediate, real and less speculative problem.

**Q4218 Chair:** I had understood that. I just wanted to explore a point that I thought we had not adequately covered.

Can I come back to the 48 and 49 question? I want to be absolutely clear about the position. On article 49, you are saying that, if the referendum decides yes, there will be a system whereby there is an opportunity for negotiations to take place with the European Union structures in parallel with any negotiations with the United Kingdom structures. How do you know that is the case? It has never happened before. Would there be international recognition for a devolved Parliament conducting international negotiations? Is there a precedent for this?

**Professor Armstrong:** You are absolutely right, in that there is no way of directly knowing that this would happen, but there is no particular reason why EU institutions would not seek to facilitate a process by which the EU would enlarge to include another member state as part of its ethos and ambitions.

**Q4219 Chair:** I understand. If a member state was not happy with negotiations taking place before independence had been achieved, surely that would act as an inhibitor, a brake or indeed a veto upon the Commission or its institutions having those negotiations with part of a member state.

**Professor Armstrong:** That is absolutely right, and that risk is all the greater were the article 48 route to be used.

**Q4220 Chair:** I will come to 48 in a moment. I want to pursue 49 first. For the sake of argument, let us take Spain. Given what they have been saying already, surely the Spanish would object to the European institutions conducting negotiations with part of a member state with a view to joining the EU before independence had been achieved.

**Professor Armstrong:** That is probably correct.

**Q4221 Chair:** In those circumstances, surely the odds are that those negotiations would not take place in parallel, before independence had been achieved.

**Professor Armstrong:** If one member state or more than one member state wished to put that pressure on the EU institutions, it may well be the case that that is correct; the negotiations would not get off the ground.

**Q4222 Chair:** Given that the Spanish, Belgians and, from discussions I have had elsewhere, at least one other state are saying that they would object to that, is it fair to say that

it is more likely than not that negotiations with the European Commission and its institutions would not take place until independence for Scotland had been achieved?

**Professor Armstrong:** An argument has been presented—Sir David Edward has presented it in his writings on this—that there is an obligation on the other parties to sincerely co-operate, which is the phrase used, to facilitate the negotiation process. It is a bit like the parallel Adam was talking about earlier—the way that moments of secession require some kind of constitutional response that allows negotiations in good faith to occur. One might imagine that under the article 49 route that spirit of co-operation would be used to try to prevail upon states like Spain that, for example, might have reasons—

**Q4223 Chair:** One might imagine efforts would be made to say to the Spanish, “Be more reasonable in these circumstances.” One might also imagine that that would not be successful, since Spain has a direct vested interest in not making breakaways easy.

**Professor Armstrong:** That is absolutely correct.

**Q4224 Chair:** In these circumstances, it is not unreasonable to expect that there will be no parallel negotiations.

**Professor Armstrong:** I think the argument would be, “If that is your view, none the less the treaty empowers you as a member state, who does not view this as being in your own national interest, to veto formally any treaty amendment or accession treaty.” In the final analysis, it is always for any member state to exercise its veto, but until that occurs, the negotiations should none the less be allowed to be conducted in good faith, at which point the member state involved will have its say and can veto the arrangement, if it so chooses.

**Q4225 Chair:** That seems to be contradictory to what you were saying earlier, when I thought you indicated that, if at least one state, and possibly more, objected to these negotiations beginning and being pursued vigorously, there was likely to be at the very least a brake put on them, and possibly no negotiations at all.

**Professor Armstrong:** I am saying there is a range of options for what might happen, and a range of scenarios. One scenario is that those member states are powerful enough simply to stymie the whole idea of opening negotiations. The second argument is that they are not powerful enough to do that; they are responsive to the argument, “Ultimately, you can exercise your veto but, pending that decision, we should in all good faith begin to enter into negotiations, because that is part of the spirit and ethos of an ever-closer union in Europe.” These are different potential scenarios.

**Q4226 Chair:** But we do not know which one is going to apply.

**Professor Armstrong:** Correct.

**Q4227 Chair:** This is a great unknown.

**Professor Armstrong:** It is a failure in the White Paper that it does not canvas inconvenient political and legal truths.

**Q4228 Lindsay Roy:** To what extent would a decision by the UK Government to seek an in/out referendum have an influence on the negotiations?

**Professor Armstrong:** That is particularly difficult were it the case that the article 48 route was being used, precisely because the in/out referendum, as it has been set up at the moment, is premised upon a prior renegotiation of the treaties. That was why I said in response to an earlier question that, if you go down the article 48 route, there is a very significant risk that, with the UK piloting the treaty amendment, it would simultaneously be

trying to seek amendments for its own purposes, which would then lead to the in/out referendum.

**Q4229 Chair:** To return to 49, we have discussed the question of negotiations. In the event that the negotiations do not start until independence is achieved, and if we have the timetable that the SNP has agreed, even if the negotiations took an afternoon, I am not clear how long ratification could take at a minimum. Can you give us some guidance?

**Professor Armstrong:** It is extremely hard to give you any clear guidance. With respect to the most recent accession, of Croatia, it took 18 months.

**Q4230 Chair:** Eighteen months from what to what? From application?

**Professor Armstrong:** No, from the conclusion of the accession treaty.

**Q4231 Chair:** Say it was done in an afternoon.

**Professor Armstrong:** If it was done in an afternoon, the process thereafter was 18 months. However, if you go back to the Austria, Sweden and Finland example, which may be more relevant given that those countries had intense familiarity with European integration through their membership of EFTA and, through that, the European Economic Area, you would say that Scotland has had the vast experience of being part of a member state of the European Union and therefore the process might be faster. It was six months in the case of Austria, Sweden and Finland between conclusion of the accession agreement and entry into force of that agreement.

**Q4232 Chair:** Was that in the days when France, for example, had to have a referendum? Were the rules the same then as now?

**Professor Armstrong:** The really crucial difference is that that was an enlargement from an EU 12 to an EU 15. Now you are talking about ratification in 28 or, as it might then be, 29 member states.

**Q4233 Chair:** What is the answer?

**Professor Armstrong:** The answer is that you would imagine the treaty ratification process will be longer the more member states there are who have to ratify it.

**Q4234 Chair:** Not necessarily. If everybody adopted the pattern of doing it at the speed of the fastest, it would not make any difference. I am not clear about whether things like the French having a referendum on it, or the Irish propensity to have referendums, were in operation at the time of the Swedish joining, and whether these changes make things much longer and more drawn out.

**Professor Armstrong:** That is particularly important if the article 48 route is used rather than the article 49 one.

**Q4235 Chair:** Let me come back to that in a minute. I am trying to deal first with article 49.

**Professor Armstrong:** All I would say is that the more member states you have, the more you have political risks—domestic political crises, for example, holding up the ratification process. You are absolutely right; if they can all move as fast as the fastest, maybe you can get it done in six months. All I am saying is that the more member states you have, the more you multiply the potential for risks that would delay the process.

**Q4236 Chair:** Is it correct that in these circumstances any one country, to take Spain for the sake of argument, would be able to veto it?

**Professor Armstrong:** It could fail to ratify.

**Q4237 Chair:** That means there is no joining.

**Professor Armstrong:** Correct.

**Q4238 Chair:** Can I now come back to 48? I am not clear whether the involvement of the UK is restricted in these circumstances to firing the starting gun, as it were, making the application for ratification, and then Scotland takes all of it on itself, so they only agree once and the process just goes forward, or whether they remain in control of the process, able to turn the tap on and off as they wish, depending on how negotiations are going in other areas.

**Professor Armstrong:** The article 48 process post-Lisbon is now much more complicated. The European Council would have to make a decision to open up the treaty renegotiation process, at which point a convention would be convened, which would not just include member states. It is not just a case of whether the UK would be involved; all the member states would be involved. The European Parliament would be involved, and representatives of national Parliaments would be represented in the convention. All the parties would be involved in the negotiation of the treaty amendment at that stage.

**Q4239 Chair:** On the question of ratification, you said there was a difference under 48 compared with 49.

**Professor Armstrong:** The difference might be substantive, in the sense of what they are ratifying. If it is a single issue question of Scottish membership, it will probably look identical to accession, but the point I was trying to make is that it is going to be very difficult to keep this as a single issue, because the UK Government will want to open up the treaty renegotiation process for all sorts of reasons, and other member states may want to put in something else that they want to see in the treaty, at which point you start triggering substantive issues that may require referendums.

**Q4240 Chair:** Even if the UK Government did this in absolute good faith and said, “We will on this occasion restrict it entirely to the question of Scottish accession,” they have absolutely no control over what anybody else among the 28 might want to do, and they would then be able to add amendments that had absolutely nothing to do with the question of Scottish accession.

**Professor Armstrong:** Absolutely.

**Q4241 Chair:** And that would have to be dealt with as part of that convention mechanism.

**Professor Armstrong:** It would potentially become pork barrel treaty revision change at that point.

**Q4242 Chair:** In that case, why do you think that the Scottish Government have chosen route 48 rather than route 49?

**Professor Armstrong:** The logic seems to be the setting of the deadline. There is the erroneous belief that this would somehow be quicker. I do not think it would be. I think it was as simple as that. The deadline was set—“This is when we want independence, and we want synchronicity between independence and EU membership”—and the belief was that maybe through article 48 they could do a bit of movement around. They took Greenland as an example of revision of the treaties to change the territorial scope of application of the treaties

in the belief that that would be done quickly, but it is not just about territorial scope; it is about creating a new member state, and that is why I think it is wrong.

**Q4243 Chair:** Is there anything in relation to the EU and EU negotiations that we have not touched on? I said to you informally before you came in that at the end we always ask whether or not there are answers you have prepared to questions we have not asked. Given that we are coming to the end of the Europe section, it may be appropriate to ask you now.

**Professor Armstrong:** This Committee will probably go into the issue of tuition fees at a later date.

**Chair:** Yes.

**Professor Armstrong:** But it is worth pointing out that, if the purpose of the article 49 process is to verify that an applicant state would be willing to abide by its obligations under the treaties, one of the areas where the European Commission might want to look very closely is the attempt to impose tuition fees only on students coming from one particular member state, and the discriminatory nature of that. You might imagine that significant pressure would then be put on the Scottish negotiators to drop that.

**Q4244 Chair:** It would not be unreasonable to expect that the United Kingdom would seek to clarify that point with Scotland before proceeding down any article 48 route. They themselves would look after that, but the Commission might very well pick it up as well. That is helpful. We are coming to the last three hours of this, and we only have a couple more questions. Are changes to UK legislation required for Scotland to become a separate nation, or could Scotland just declare independence unilaterally? Am I right in thinking that something has to go through the House of Commons and the House of Lords and be signed into law saying that there are all these changes?

**Professor McLean:** That is really one for the lawyers. It seems to me that a repeal of the Act of Union is required, which is primary legislation.

**Professor Tomkins:** Legislation in the United Kingdom Parliament is clearly required in order for Scotland to become independent in a manner that is compatible with constitutional law.

**Q4245 Chair:** How long would that take, and where does that come in the process?

**Professor Tomkins:** I do not know.

**Chair:** Okay. That has the benefit of clarity.

**Professor Tomkins:** How long does legislation take to pass through these Houses? That is not a question for me but for the Members of these Houses.

**Q4246 Chair:** Dangerous dogs did it in a day, didn't it?

**Professor Tomkins:** This is no Dangerous Dogs Act.

**Q4247 Chair:** No, but, if good will is there, it can be done.

**Professor Tomkins:** If good will is there.

**Q4248 Chair:** The SNP has set a date for independence. I am assuming that legislation will have to take place before that, which presumably reduces the amount of time available for negotiation. That is what I am trying to clarify.

**Professor Tomkins:** Yes. It is even more complicated and time-consuming than that. The Scottish Government have proposed that independence will be achieved in two stages. First, there will be what they call a constitutional platform, which will be a transition that will,

among other things, grant to Scottish Ministers and the Scottish Parliament all the powers they need to negotiate and deliver independence. That can be done only while Scotland is still part of the UK and it can only be done by Act of the United Kingdom Parliament. I do not know whether that legislation has even been drafted, but it certainly has not been published. It certainly has not been subject to any pre-legislative scrutiny, and it certainly has not been debated in either House of Parliament. I would have thought that certain Members of both Houses of Parliament are likely to have interesting things to say about that legislation. You are right that legislation can pass through the United Kingdom Parliament incredibly quickly, with fast-track procedure and all of that, but only if the Government are fully behind it and there are sufficient numbers in both Houses to acquiesce.

After the constitutional platform has been legislated for and delivered, as I understand it—all of this is pretty foggy—there would be a requirement for a second round of legislation that would bring into legislative effect that which had been negotiated in order to deliver independence. It seems to me that that second round of legislation is likely to be easier to deliver than the first, because it will be said, “This is what has been negotiated and agreed between the Governments. All we now need is legislation to bring it all into effect.” There would not be very much opportunity to amend anything in either House. It would be a very simple piece of legislation bringing into effect, in essence, a treaty.

The difficulty is with the first step of this. There has been very little independent legal or constitutional analysis of this idea of the constitutional platform and what would be required of the UK Parliament in delivering it. What are all these powers that Scottish Ministers and the Scottish Parliament would need to negotiate independence? As far as I know, that legislation has not even been drafted. It has certainly not been subject to any pre-legislative scrutiny, and it certainly has not been introduced or published.

**Q4249 Chair:** Are you not being unduly difficult? Presumably, if there was a yes vote in the referendum and therefore an understanding that, in line with the Edinburgh agreement, there would be discussions in good faith, even though they would perhaps be hard, allowing the Scottish First Minister the power to have those negotiations, while it might be technically complex, in principle would be relatively straightforward. Even while the legislation was being progressed, the negotiations could effectively begin.

**Professor Tomkins:** The Scottish Parliament is a Parliament of limited legislative competence. Scottish Ministers have limited executive competencies, and they are limited by the relevant provisions of the Scotland Act 1998, as amended. As soon as the Scottish Parliament or Scottish Ministers purport to exercise powers beyond those limited competencies, they are acting unlawfully, and anybody could go to court to say, “This is unlawful.” It is not beyond the realms of possibility that somebody might take a look at this and think, “I didn’t vote for independence, but, now that it is going to happen, I would like it to happen in an orderly, peaceful and lawful manner that complies not only with international legal norms but also constitutional legal norms.” For the time being, even though independence is going to come, it remains a matter of legal fact that the Scottish Parliament and Scottish Ministers have limited legislative and executive competencies. In order to do that which they have a political mandate to do, there needs to be a change in the law. The only place that can change that law is this place.

**Q4250 Chair:** You mentioned the exercise of powers. Maybe this is again a matter of legal terminology that I do not quite understand. They would not actually be doing anything; they would just be talking about it. Therefore, they would just be conducting negotiations that need not, for the sake of argument, be finalised. They could just agree that, when they did get the powers to conduct negotiations, this would be what they would agree. Therefore, this need

not be a legal obstruction. I am looking for clarification as to whether the legal issues in the parliamentary permission element at the beginning and the legal issues in the parliamentary permission at the end would mean in real terms that there was less time available for negotiations, or whether with good will this is just crossing the t's and dotting the i's—it is just a formality and with good will it can be expedited.

**Professor Tomkins:** I am sure there will be good will on the part of both Governments, but Governments are accountable to Parliaments, not the other way round. The Government will introduce legislation, presumably into the Commons and then it will come to the Lords, in the ordinary way with good will, but Parliament is not bound by the Edinburgh agreement, and Parliament is sovereign. Parliament will take its time, do its job and hold the Government to account for the way they are transferring powers to the Scottish Ministers to negotiate the separation of the United Kingdom into two sovereign states. As a good Parliament man, I could not possibly say anything else. That is the job of Parliament.

**Q4251 Chair:** Given that we have already agreed that there will not be any meaningful negotiation until the general election, we have a fair amount of time to play with, don't we?

**Professor Tomkins:** If you think about the parliamentary timetable, first somebody has to draft this legislation.

**Chair:** I am sure there are little men in a cupboard somewhere at this very moment who have standard phrases they can just trot out.

**Professor Armstrong:** I just want to pick up Adam's point about the role of Parliament. There is a particular role for Parliament when it comes to Scotland's membership of the EU, in the sense that the UK will have to ratify an accession treaty or an amendment to the treaties, because the European Union Act now requires an Act of Parliament for that to occur. You may imagine circumstances in which the UK Government decide that they will only open a treaty revision process on a single issue of Scottish membership of the EU, but other parliamentarians might feel aggrieved that the UK Government did not include other issues, and when it came to ratifying that amendment, which is within the power of Parliament, they might choose to become problematic during the ratification process.

**Q4252 Chair:** Apart from that, everything should proceed okay. Is that a reasonable way of putting it? I am a bit worried for the three of you, because I suspect that you will be denounced as scaremongers, adherents of Project Fear and anti-Scottish. If you have not had tides of abuse from Cybernats, I suspect you are likely to in the near future. None the less, can I clarify one final point? What happens if the negotiations between Scotland and the UK reach an impasse, say on the question of currency and Trident, and no agreement is reached? What happens? Is there somebody to whom things can be appealed? Who resolves this?

**Professor Tomkins:** Were there to be an impasse in separation negotiations, I suspect there would be an impasse about specific issues, and they could be handed either to an ad hoc body of lawyers or jurists, or to an established court of international justice. It is the role of international law to resolve disputes between states.

**Q4253 Chair:** This would not be between states; the state would not have been created yet.

**Professor Tomkins:** It might be. This could get very complicated, but my answer to your question is that that is when you call in the lawyers.

**Q4254 Chair:** Would it require the agreement of the states to take that route? If there was a disagreement, say, on the use of sterling and there was no meeting of minds and both

sides were absolutely resolute, would it have to be agreed? I can see why each would refuse to take it to international arbitration or anything else. How would it be resolved in these circumstances?

**Professor McLean:** May I come in with a more political answer? I have been thinking for quite some time that we may be making a mountain out of this. It is not a mole hill, but it may not be as much of a mountain as some of the questions have supposed. If and in so far as the analogy with Ireland in 1921-22 holds, in that case those countries had been at war and the differences were far greater. Within the island of Ireland, between a third and a quarter were bitterly opposed to the settlement, yet the Irish Free State Act was enacted without difficulty by the British Parliament in 1922. The difficulties were mostly in the Irish Parliament. It was ratified there.

What is it about the present situation that makes it more difficult than negotiating a peace treaty and subsequent Acts between two nations that have been in a guerrilla war? My answer is that, in the Irish case, British civil government in most of Ireland had collapsed. Therefore, the trickiest situations, which Adam has been mentioning, where a private litigant might say Scottish Ministers are acting *ultra vires*, did not arise because British justice had already collapsed in Ireland before December 1921 when the treaty was signed. That leads me to the paradoxical conclusion that an act of separation between nations which have been at war is easier than an act of separation between nations whose Governments are bound by the Edinburgh agreement.

**Q4255 Chair:** That is very droll, but there was some disruption afterwards. If I remember correctly, Michael Collins, who was one of the negotiators, was killed. It was not quite the case that the agreement settled everything; there was still substantial internal difficulty.

**Professor McLean:** There was severe disruption in Ireland, but remarkably there was no disruption in the United Kingdom.

**Professor Armstrong:** Bearing in mind the external dimension, and that an independent Scotland might want membership of the EU, how the Scottish Government had conducted their internal negotiations might well form part of how their application would be viewed. Therefore, more direct pressure could probably be placed by EU institutions and personnel on the Scottish Government to avoid the creation of an impasse, precisely because it is holding out the offer of membership.

On your other point about what we are doing here, hopefully we are simply putting a range of questions that are simply not answered in the White Paper. It is not my intention to make the case against the White Paper, but simply to ask the questions that do not appear to have been asked or canvassed in it.

**Q4256 Chair:** Our role is to ask you to raise questions that we then ask them so that the Scottish people can be fully aware of the options that face them. Can I ask the two witnesses we have not already asked whether they have any answers prepared for questions we have not asked, or whether there are any final points they want to leave with us that we have not adequately covered so far?

**Professor Tomkins:** No.

**Professor McLean:** No. My final point is essentially the same as Kenneth's. I am not taking sides on Scottish independence, but there are questions for Scottish Ministers to which the citizens of Scotland deserve an answer. If this Committee is one of those in a position to pose them, I am all in favour of that.

**Chair:** On that consensual note, I thank you very much for coming along this afternoon.