

Scotland and Catalonia would face very real challenges in making a seamless transition to EU membership after independence

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Independence campaigners in both Scotland and Catalonia have advocated retaining their EU membership post-independence. [Merijn Chamon](#) and [Guillaume Van der Loo](#) assess the legal basis on which subnational entities could maintain EU membership after declaring independence. They write that while the EU treaties make no explicit reference to this situation, it would be difficult for a seamless transition to take place. This is partly because EU accession negotiations could only be concluded with a fully recognised state, which would inevitably entail a gap between the establishment of a region's independence and their ability to conclude negotiations over EU membership.



2014 will be an important year for a number of regions in the EU. Political developments in the UK, Spain and Belgium have seen subnational entities – Scotland, Catalonia and Flanders – become increasingly autonomous. Today, political movements in all three regions are openly calling for independence and, having achieved this, to become established as EU member states in their own right.



One major hurdle to such aspirations is the silence of the EU treaties on the possibility for subnational Member State entities to become individual Member States. Although the Treaties foresee a procedure to join or even withdraw from the Union, they do not provide such EU 'breakaway' regions with a legal basis to join or remain in the EU after secession. In a recent [article](#) we looked at this legal and political hurdle in a more elaborate way.

According to the [European Commission](#) and the [President of the European Council](#), such regions would lose their EU status upon independence and would have to re-apply for membership under Article 49 TEU. Although we have argued that both international and EU law seem to support this position, proponents of the above-mentioned aspirations, like the Scottish Government in its paper '[Scotland in the European Union](#)', raise a number of arguments to refute that thesis. They argue that if the region's independence has been acquired on the basis of a constitutional and democratic process in line with the core values of the EU enumerated in Article 2 TEU, the new country may become an EU Member State on the date of its *de iure* independence. This would avoid any disruption to the continuity of the region's current position in the EU.

Article 2 TEU lays down that the European Union is founded on a number of core values and one could indeed conclude from that provision that the EU would have to respect the outcome of an (internal) political process which complies with those core values. In the present case, this would mean recognising the independence of a



British, Scottish and EU Flags outside Scottish Parliament
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region. However, the obligation to respect core values such as human dignity, freedom, democracy, equality, and the rule of law, would not extend to an obligation to allow a new Member State into the EU following a procedure different from the one provided for by the Treaties. This would hold even if this applicant state has been a regional entity of a current Member State.

Another argument invoked by proponents is of a pragmatic nature. It is indeed true that it would not be in the immediate interest of the existing Member States to keep such a new independent state outside of the EU, given it previously formed part of the EU. However, from an equally pragmatic perspective, there is also a clear desire to prevent a potential balkanisation of the EU. The Member States would also therefore have an interest in preventing a precedent for the erosion of their territorial integrity. As a result, while some pragmatic reasons do exist to grant immediate EU Member State status to such regions, the picture is not unequivocally positive from this perspective.

A third argument which has been invoked is that the leitmotif of the EU is enlargement of its membership, rather than contraction. However, while the EU would indeed contract if a region left the EU, it would also not enlarge if that region became a Member State. Instead the EU would simply fragment. In addition, it is questionable whether enlargement really is the leitmotif of the EU. The main (political) goal of the EU is creating 'an ever closer union among the peoples of Europe', as laid down in the preamble to the TEU. Fragmentation sits uncomfortably with this, since a people would choose to reject and dissolve a bilateral union, but at the same time subscribe to an ever closer multilateral union (within the EU) – including with the very same state from which it had seceded.

As regards procedure, it has been advanced by the Scottish Government that a region would not have to follow the traditional enlargement procedure of Article 49 TEU, but that Article 48 TEU could be used. Article 48 TEU provides for the possibility of an amendment of the EU Treaties, following an inter-governmental conference. The idea would be that the existing 28 Member States would amend the Treaties to secure the post-independence membership of the region.

However, the resulting Treaty would then only be concluded between the 28 existing Member States, whereas a normal accession Treaty is concluded between the existing Member States and the new Member State. The possibility for such a region to become an EU Member State without concluding an agreement with the existing Member States would go against the [CJEU's pronouncement](#) that it is not possible for the EU to comprise a greater number of Member States than the number of States between which it is established.

A solution through Article 48 TEU would of course have an obvious appeal for the regions concerned because it would allow a smooth transition period. Otherwise the region would be confronted with a temporal paradox. Ideally it would want to become both independent and an EU Member State on the same day, but in order to negotiate its accession to the EU on its own behalf, instead of through its original state, it would need to be an internationally recognised independent entity. However, before a state-entity is usually recognised as a subject of international law it needs to have acquired its independence. Indeed, recognition by *all* 28 EU Member States will be a *conditio sine qua non* for the breakaway region to join the Union. However, it is questionable whether all the Member States, especially those who are struggling with such breakaway regions themselves, would be enthusiastic about recognising such a new state.

As a result, there would almost certainly be a gap between a region's formal independence and the start and conclusion of its accession negotiations with the EU. But if the region might rely on its original Member State to negotiate a transitional arrangement for it, this temporal paradox might be overcome. These are only some of the problems which a few years ago were only discussed as an intellectual pastime. However, this year might see those issues gain a very real significance and no doubt upcoming events will be closely followed in all EU capitals.

For a longer discussion of this topic, see the authors' recent article in the [European Law Journal](#)

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Note: This article gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.

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