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The Role of the European Union in Secessionist Conflicts

by

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Abstract

Secession in a EU context analysed from a multilevel governance unravels that there is in fact room EU interference in secessionist conflicts. Nevertheless, a balance should be struck between such commitment and restraint in respect of Member State autonomy. Through creative and pragmatic conflict-resolution the EU can and should conjure the political courage to find the limits of potential commitment. To better accommodate such a role, the TEU ought to be adapted

Key-words

Secession, EU accession, EU Membership, multilevel governance, independence

1. Introduction

In the tangled secession debate it is easy to lose sight of the forest through the trees. The conflict arising from a territory aspiring to separate from a EU Member State brings rise to bulks of questions, each in their turn generating even more – often contradictory – answers. The issue of secession in a European context is dominated by gridlocks between state and people, territorial integrity and self-determination, international law and EU law, Article 48 and Article 49 TEU, … in favour or in opposition of secession.

Yet, this essay unravels a clear view: through a frame of multilevel governance it is argued that the EU faces the challenging charge of finding an equilibrium between remaining in the margins and committing in secessionist conflicts. While this essay attempts to maintain a neutral stance in the secession debate, the current status quo results in a state-reinforcing bias. Contrary to popular belief, however, nothing in international or EU law prevents secession or subsequent Membership of the EU. Nevertheless, secession can only occur lawfully provided it occurs through sound consented agreement between seceding and predecessor state and is in complete concordance with the domestic constitution and the rule of law. In such event, it is consequently argued that the EU should exert its influence through creative and pragmatic conflict-resolution. Such a role for the Union gives answers to some of the paradigm issues in secession. For instance, considering both alleged routes to post-secession Membership to the EU in the current political and legal landscape (Article 48 and 49 TEU), this essay establishes that whatever procedure ultimately is deemed the accurate one, both have room for EU commitment – albeit that Article 48 TEU enjoys preference. Nevertheless, politics and emotion still blur the secession debate and constitute a veritable ball and chain for EU action. The EU should conjure the necessary political courage to find the limits of its commitment, without overstepping its predominantly restrained role in internal matters of secession.

In order to better accommodate this EU role, it is argued that the TEU should be adapted. A new provision should be installed including the requirements for lawful secession, the general procedural requirements therefor and a framework for more EU engagement. A final sceptical note is not out of order. In a European context where any consensus for treaty

reform is difficult to negotiate, it is highly unlikely that the Masters of the Treaties will codify anything threatening their sovereignty.

2. EU multilevel governance: reframing the debate

The main questions of this essay is to determine what role the EU can and should play in secessionist conflicts within its Member States. By adopting a multilevel governance frame of reference to answer this question, this article aims to take a step back from the classic gridlocks and stalemates in the secession debate in order to provide a fresh view on the issue. Before tackling the question of the EU's role, the following paragraphs first delineate how the Union fits within the concept of multilevel governance.

The EU is a union of independent states. It consists of a national and a supranational level. Through the EU integration narrative, Member States have increasingly transferred parts of their sovereignty to the supranational tier, thus creating a veritable echelon of power above them and their citizens (Panara 2015: 11). Both tiers are regulated constitutionally. The Member States have their domestic constitutions and the EU is regulated through the constitutional treaties.[I] Still, Member States remain assertive regarding their sovereignty and constitutional identity – *Brexit* being the extreme expression thereof. From an early stage on, however, the ECJ has established that the EU is a new and autonomous legal order in which the Member States have limited their sovereignty for the sake of the Union.[II] In this sense the EU is a constitutional composite, consisting of both a national and supranational constitutional dimension (Panara 2015: 12).

For a long time the EU wore blinkers, only focussing on the constitutional Member States '*monoliths*' (Fasone 2017, 48). The notion of '*regional blindness*' is part of a larger metaphor used to indicate the EU's visual impairment towards regions, neglecting the subnational dimension of Member States. The metaphor is used to analyse the EU's position towards subnational regions and has gradually evolved from regional blindness to 'regional myopia' and finally 'regional visibility' (Bengoetxea 2012: 230-238), now identifying a veritable third level in the EU construct. One might even say that the EU has sent ambiguous signals to subnational

entities – be it intentional or not (Fasone 2017, 51-60). Over the years the EU has significantly reinforced the role of subnational entities – and especially those with legislative powers – in EU governance through *inter alia* the establishment of the Committee of Regions, granting subnational ministerial representation in the Council and the codification of the principle of subsidiarity (Fasone 2017, 51-60). In the context of secession, this could be perceived as seconding the aspirations of seceding entities, who are picturing an independent future along with a safe Member State status within the EU.

The devil's advocate could equally argue that this is the EU's way to keep independence-seeking regions at bay, by way of compromise. Personally, I am of the opinion that the developments attributing more powers to subnational regions are (to a large extent) unrelated to the secession debate. Rather, these empowerments of regions are an answer to larger issues like the alleged democratic deficit in the EU. I also believe it is a question of realism. When it becomes apparent that over 70% of EU law is implemented by subnational entities[III], consistency requires EU governance to correspond to reality, being that subnational entities have significant impact on EU governance and it is therefore rational to operate in close coordination. Legally, too, empowering the regions is an adequate translation of the principle of subsidiarity, consolidated in Article 5 TEU. Finally, justified empowerment of various sublevels is a logical and rational policy choice, when seen from a multilevel governance perspective.

The foregoing indicates that there is more to EU governance than *prima facie* appears, and the latter ferries me seamlessly to the notion of multilevel governance.

Multilevel governance is a notion that is generally linked to the EU, describing it as a '*system of continuous negotiation among nested governments at several territorial tiers—supranational, national, regional and local*' (Hooghe and Marks 2003: 234). According to the Committee of Regions Whitepaper on Multilevel Governance, multilevel governance means '*coordinated action by the European Union, the Member States and local and regional authorities, based on partnership and aimed at drawing up and implementing EU policies.*'[IV]

The EU is a hybrid multilevel governance polity. On the one hand it primarily embodies a rigid structure with a durable institutional design in its constitutional Treaties, which is

reinforced by an exclusive and closed club of EU Membership (Popelier 2019: 38). On the other hand, the EU also features more flexible tendencies within this stable organisation with its vast number of different actors on the different tiers of government (Popelier 2019: 38). While indeed the EU is a union of independent states who form the EU's first point of contact, the Union itself is an entity with far reaching powers, legal personality and has been recognised from an early stage on as an autonomous legal order.

The EU, as a system of multilevel governance, is an intricate interconnected network of different actors, which inevitably means that a secession on a domestic level of the Member States will have repercussions on the supranational level for the EU, the other Member States and their citizens. The EU can therefore not be indifferent in these matters. If it wishes to legitimise itself as a valid player in multilevel governance, the EU ought to minimise the potential socio-economic and political cross-border disruption caused by secession within the EU (Haljan 2014: 15).

At the same time, the EU consists of independent Member States that are rather keen on their sovereignty and constitutional identity. The EU therefore awaits the difficult task to find an equilibrium between respecting state sovereignty as regards the legality of secession ('restraint') and dealing with the supranational and macro consequences of secession ('commitment') (Popelier 2019: 39). After a brief categorisation of pertinent types of secessionism in a EU context, this balancing act will be analysed throughout the following sections. First as regards the position towards secession within a Member State and secondly the EU position when dealing with seceded states aspiring to access the Union.

3. Categorising different types of secession

A territory seceding from a EU Member State and simultaneously acceding to the EU is, while much debated, unprecedented. In the cases of *inter alia* Croatia and Slovenia the secession happened before applying for EU membership. The case of Greenland and Denmark is clearly different since it involved an exit from the EU. The foregoing aims to demonstrate the unknown path down which the secession debate leads us and the (legal)

uncertainty it entails. By categorising secessions into different types, we can establish way-showers in this uncharted territory. The importance of differentiation in types of relevant secessions for the European Union lies in the different manner each secession interacts with the confronted hurdles in the strive for secession.

Based on the differentiations of consent and withdrawal Closa identifies a typology of 4 scenarios within the EU, to which he matches contemporary examples (Closa 2017a: 518):

1. Unconsented secession without withdrawal of the predecessor state (e.g. Catalonia);

From its origin up till now, the Catalan separatist movement has been refuted, fended off and even been declared unconstitutional by the Spanish government. The Catalan secession would without a doubt be a unilateral one – that is, so long as Madrid does not change its mind. Furthermore, Spain has never contemplated an '*Españope'* – by which I mean an equivalent term for *Brexit* for a Spanish withdrawal from the EU.

2. Consented secession without withdrawal of the predecessor state (e.g. Scotland *ante* 2016);

As demonstrated in an example above, the Scottish independence would have occurred lawfully and consensual through the Edinburgh Agreement (2014). The *Brexit* referendum was held only two years later in 2016. So while the *Brexit* might have already been sprouting in 2014, the official volition of withdrawal was not yet expressed.

3. Consented secession with withdrawal of the predecessor State (e.g. Scotland *post* 2021 if it were still within the EU); and 4. Unconsented secession with withdrawal of the predecessor State (e.g. Scotland *post* 2016 until 2021).

Closa initially illustrated the two remaining types with the same example in different hypothesises, varying on the (un)consent of the UK. When this contribution was written in 2016 it was uncertain whether the UK would allow for a renewal of the Edinburgh Agreement. Therefore a new Scottish independence could occur either consensually or unilaterally. Today, however, the deck has been reshuffled. First and foremost, since Brexit, neither the UK nor Scotland are Members of the EU – making the case for Scottish independence significantly less relevant for this essay as it analyses the role of the EU in internal secessionist conflicts.

Moreover, the nature of the Scottish secession has received ambiguous signals since 2016. For the sake of the example, and ignoring the occurrence of Brexit, the categorisation of the Scottish secession would be as followed. In 2020 the prospect of a consented secession was grim after a letter from PM Johnson to Nicola Sturgeon[V] declaring the referendum "a once in a generation vote", making any secession effort unilateral and thus fall within the fourth type. Today, after Secretary for Scotland Alister Jack declared that another independence referendum could be on the table if 60% of the Scottish people votes in favour thereof for "a reasonably long period" we know that, for the time being, prospects of Scottish independence could be consensual and thus fall within the ambit of the third type.

4. The role of the European Union as a system of multilevel governance

4.1. A EU role in secession within a Member State

The first and thorny issue for the EU rising with a territory seceding from a EU Member State is the role the Union should adopt when dealing – or not dealing – with these matters as a system of multilevel governance. Separatist politicians and parties and proponents of secession inventively look for European backing in their endeavours. Member States on the contrary, insist on their sovereignty in this sphere. As the following subsection will demonstrate, the EU's actual position in this context is predominantly restrained, resulting in a state protective orientation.

To deduct the desirable EU position, it should first be determined whether the Treaties prohibit secession or not. Coincidently, the Treaties do not mention secession (neither unilateral, nor consented), let alone a pathway to achieving it. To what extent is this Treaty silence a coincidence? After all the Member States are the *Masters of the Treaties*. Coherently, it is only logical that the Member States want to safeguard their territorial integrity and sovereignty in the Treaties by on the one hand enshrining the protection of territorial integrity (Article 4(2) TEU) and on the other hand refraining from acknowledging secession in the Treaties (Closa 2016: 246). It seems unconceivable that Member States would lay out a "user manual" to achieve secession in the Treaties (Piris 2017a: 79). In line with this reasoning, the Member

States would not deem it necessary to explicitly prohibit secession in the Treaties, since such prohibition is implied through Articles 2, 3 and 4 of the TEU (Closa 2016: 246).

Proponents of secession interpret this Treaty silence as EU neutrality towards how secession is achieved. (Piris 2017a: 79). Treaty silence could accordingly be interpreted as non-prohibition of secession. This alleged Treaty neutrality is in any case not absolute. A great deal depends on how the secession has been achieved, *i.e.* whether the secession occurred unilaterally or consensually.

4.1.1. Predominantly restrained

Regardless of the potential repercussions that secession causes to the outside world, it primarily remains an internal development within a Member State (Popelier 2019: 39). Consequently, there are some factors the EU should take into account when determining its position and role to play. These relevant factors amount to a position and role that is predominated by restraint, yet that has limited room for commitment as well. The following paragraphs shall shed light on which specific legal factors a multilevel EU ought to take in mind when dealing – or not dealing – with internal conflicts of secession.

First of all it goes without saying that any EU position on internal secession ought to be in conformity with the Treaties. In particular, three provisions are relevant for determining a EU position: respect for the rule of law (Article 2 TEU), respect for the territorial integrity of Member States (Article 4(2) TEU) and the respect for the principle of sincere cooperation (Article 4(3) TEU).

Article 2 TEU plays a key role in determining the EU position. It contains the most fundamental values on which the EU is built, amongst which the rule of law and democracy stand out in this context (Kochenov and van den Brink 2016: 13). The rule of law is to be respected by the EU and by the entirety of its Member States, including the levels potentially seeking independence. Adherence to the rule of law requires any credible secessionist movement aspiring a future within the EU to proceed in conformity with the domestic constitutional requirements. According to Kochenov and van den Brink this does not apply if said constitutional requirements are unreasonable and prohibit any chance at successful

secession – an opinion that not so subtly winks at the Spanish government.[VI] Such reasoning may become the mainstay for political idealism and rhetoric, but it does not seem commendable for the EU. The EU as system of multilevel governance, or as a polity even, cannot directly ignore the constitutional requirements of one of its Member States. It would not only disrupt its intricate system of multilevel governance, but would moreover emit an undesirably biased signal to both existing and future candidate Member States.

Adherence to democracy and the rule of law does, however, require a restrained role of the Union in both consensual and unilateral scenarios. Proponents of secession, even of the unilateral variant, proclaim that democracy trumps the need for a legal basis (Closa 2017a: 518). In their view a plebiscitary vote through majority justifies secession, if needed according to some even unilaterally. Notwithstanding the excruciatingly downplayed notion of democracy in that reasoning, the rule of law and democracy require the Union to dismiss, or at least not acknowledge, any secession that has not or does not respect(ed) the constitution of its (predecessor) state. If, on the other hand, a seceded state acquires independence through a process of consent with it its predecessor state and in compliance with its constitution, the EU has no choice but to acknowledge that secession within the multilevel system (Popelier 2019: 44). This does not mean that the EU should feel bound by its effects (Closa 2017a: 524).

More importantly, any position adopted by the EU should take Article 4(2) TEU into account, which reads:

> '2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, **inclusive of regional and local self-government**. It shall respect their essential state functions, including **ensuring the territorial integrity of the state**, maintaining law and order and safeguarding national security.' (emphasis added)

In respect of this Article, the EU cannot interfere with the national identities of the Member States, including regional and self-government. The same goes for territorial integrity (Fasone 2017: 51-52), which is exactly what internal secession threatens. Does this, however, mean that all hazards to territorial integrity of a Member State are to be managed exclusively by the Member State in question?

From a legal point of view there is no doubt that territorial integrity is not conferred upon the Union, and therefore *a priori* excluded from its competence.[VII] The mention of territorial integrity in Article 4(2) TEU does not, however, in strict legal terms constitute a reservation of competence to the Member States. Article 4(2) is not a limitation on the *existence* of competence, it is rather a limitation on the *exercise* of EU competence (Garben and Govaere 2017: 4-5). Meaning that the EU is bound to respect the core areas of national identity – including territorial integrity – when undertaking EU action.

The question remains whether Article 4(2) TEU harbours an implicit exclusive competence for Member States regarding territorial integrity or not. After all, the enigmatic Article 4(2) does not explicitly reserve this competence for the Member States (De Witte 2017: 70) While granted, *prima facie* this existence of said exclusive competence is debatable, the Committee on Constitutional Affairs of the European Parliament was very clear on the matter when the predecessor provision of Article 4(2) was drafted stating that

> 'internal territorial organisation and the division of competences within each Member State to be matters to be decided upon by the Member States alone' and 'It is important that there should be no ambiguity about the fact that each Member State is entirely and exclusively competent to define the level, geographical scope, powers and status of its regional and local authorities.'.[VIII]

There is thus no doubt that territorial integrity, including regional self-government, is a matter to be managed and regulated exclusively by the Member States (Fasone 2017: 248). Moreover, the EU should respect the territorial integrity of its Member States in any undertaken action and in general refrain from interpreting, let alone arbitrate internal secessionist conflicts (Closa 2016: 249). It therefore goes without saying that Article 4(2) TEU significantly suggests the EU remains on the side-lines in conflicts of internal secession, which constitutes the second indicator for a restrained EU role, even as a multilevel governance actor.

The operational effect of Article 4(2) TEU is significantly different depending on the (un)consensual character of the secession. In the scenario of a unilateral secession, Article 4(2) TEU requires the EU to respect the reigning state-oriented bias (Popelier 2019: 44). The EU

ought not to recognise the seceded state, since the secession occurred in contravention of Article 4(2) TEU. If, however, the secession occurred consensually the situation is different. According to Tierney and Boyle respect for territorial integrity would no longer be at issue if the secession occurred consensually, provided the EU wants to cooperate with the seceding territory (Closa 2016: 249). Granted, the EU ought to acknowledge the secession in respect of Article 2 TEU, but from the moment that a Member State consents to a change in its territory there is no way for the EU to violate the territorial integrity of the predecessor state – at least as regards the secessionist conflict in question.

Article 4(3) TEU harbours the principle of sincere cooperation. In this specific context, Article 4(3) TEU functions as an enforcer of Article 4(2) TEU in favour of the (potential) predecessor state. By invoking the principle of sincere cooperation the Member State in question can essentially force both the Member States and the EU to follow its stance. This is particularly relevant for unilateral secessions, that violate the principle of territorial integrity from Article 4(2) TEU. Pursuant to the principle of sincere coordination, the Member State at hand can force the arm of other Member States and the EU to essentially "have its back". Thus, other Member States and the EU would not be able to recognise, let alone support any unilateral secession that runs counter to the constitutional structure of another Member State (Piris 2017b: 90). As was the case for Article 2 and Article 4(2) TEU, the principle of sincere cooperation is less an issue in the case of consensual secession. In fact, it would even be out of the question. In no case could a Member State deploy sincere cooperation on other Member States or the EU with the aim to force recognition of the newly seceded state – even though that seems an unlikely occurrence.

So far the EU has to a large extent upheld that restraint regarding the centrifugal secessionist forces threatening certain Member States. Whether that corollary means that the EU has thus far upheld a neutral or agnostic position in the secession debate and in particular in regard to seceding territories is questionable at best. High-ranking EU officials have indeed shown reluctance to interfere through their Statements by remarking it '*is not their place*' to determine the (legality or) fate of a seceded territory.[IX] Up to this point this corresponds with the restrained approach that is expected of the EU. Paradoxically both the then-President of

the Council of the EU H. Van Rompuy and the then-President of the Commission M.J. Barroso proceeded with gloomy statements on continuing EU membership as universally worshipped by secessionist territories, blowing secessionist dreams of independence out of the water in several succinct sentences. That being said, separatist politicians and activists tend to be relentless and perseverant in sticking to their nationalist ideals and this is mainly an issue for the next subsection.

In the present political and legal landscape of multilevel governance *per contra*, this "neutral" position results in a state-protective orientation, indirectly weighing in favour of the Member States. Can the Treaties' silence on secessionism and the Union's (debatably) agnostic stance regarding secession be labelled as categorical neutrality? It is to some extent to be understood as '*conservative neutrality'*, the product of political cowardice and complacency, resulting from deflected responsibility (Walker 2017: 40), as part of a larger trend of honouring internal constitutional structures as if they were monoliths.

Perhaps there is some wisdom in conservative neutrality from the EU as regards secession considering its salient, delicate and emotional character. Furthermore everything examined above *does* indicate that the preferable EU position within the multilevel governance system would be characterised by restraint. In that sense one could argue that, rather than conservative neutrality, the EU upholds '*considered neutrality'* (Walker 2017: 41) towards internal secessionist conflicts. Walker recognises considered naturality to entail situations in which it would be unwarranted for the EU to take a categorical stance one way or another. Given the delicacy and salience mentioned above in conjunction with the earlier legal analysis of Articles 2, 4(2) and (3) TEU, there is certainly an argument to be made that the EU *should* not intervene in matters of secession, resulting in restrained neutrality. Yet, considered neutrality does not necessarily entail an absence of any influence.

It was demonstrated earlier that the EU is increasingly engaging in cooperation with subnational entities for EU governance. This is a logical consequence of its multilevel character. Still, matters of internal secession are a matter to be dealt with by the Member State in question, pushing the EU to the side-lines. It seems unwarranted for the EU to engage in an internal secessionist conflict. This is true for a direct interference, but also for apparently

neutral accommodation. If by example the EU would try to mediate as a negotiator without favouring one party over the other, that could be perceived as legitimising the secessionist movement or applying unsolicited pressure on either party (Haljan 2014: 14). The EU should therefore adopt a position dominated by restraint. If, however, the Member State in question is able to bring up the political maturity for working out a consensual process of secession, there is more room for the Union than *prima facie* appears. Once a secession process is occurring democratically, with adherence to the rule of law (and thus the domestic constitutional requirements) and with consent of the soon-to-be predecessor state, the indicators of restraint lose their binding effect. The EU *can* then engage in different areas of a secession, but the most important one is without a doubt the potential EU Membership of the seceding or already seceded state. Moreover, the EU *should* then engage in said areas to prevent negative spill-over effects, as befits its status of a multilevel governance actor.

4.2. A EU role in post-secession Membership

All the aspiring secessionist territories from EU Member States as we know them today unequivocally picture their independence within the EU as prospective Member States – be it automatic or through procedure. The occurrence thereof would be unprecedented, and just as the seceding territories, the EU finds itself in uncharted territory when deciding on how to deal with applications from within. The Membership question has been raging for close to a decade now, with no categorical answer in the foreseeable future. The debate has mainly been held on a procedural level, causing a clash between Article 48 and Article 49 TEU.

This section aims to show that whichever procedure is eventually deemed the adequate one, there is room for EU engagement in either of them. Nevertheless, it is argued here that Article 48 TEU is the desirable route under the current political and legal system, considering the EU multilevel structure. Before tackling the Membership question from a EU frame of reference, the following subsection first examines succession from an international point of view.

4.2.1. An international sidestep to state succession

When it comes to state succession there simply is no categorial answer (in either EU or) international law (de Waele 2014: 34). In this sense international law, just as EU law, seems to be neutral towards how secession is achieved, which is mainly a domestic issue (Conolly 2013: 67). The consequences of secession, on the contrary, is a topic that has caused a lot of ink and words to flow on the international scene. International law scholarship seems to acknowledge that in the event of secession the predecessor state takes up the role of the 'continuator state' and the seceded state goes *tabula rasa* as the 'successor state' (Crawford and Boyle 2017: 71). Concretely this means that through a strong presumption of continuity[X] the predecessor state will retain the legal personality of the former state, despite the changes in its territory and population. The seceded state, on the other hand, goes *tabula rasa*, which in practice results in the disapplication of the treaties and all other obligations (or perks for that matter) – unless negotiated otherwise.[XI]

This reasoning makes twofold sense. Firstly, if we are to accept that indeed the self-determining unit does all the self-determination (and thus the remainder of the country is allowed no say in it), it seems only logical that the independence of the seceding territory cannot have pejorative consequences for the predecessor state. If that would not be the case, a consented secession would be even more unlikely than it already is. It is one thing to conjure the political maturity to accept a territory separating from a nation's territory, but if that separation has negative repercussions on the remainder of that territory it requires something closer to political altruism. Secondly, the newly seceded state was not party to the treaty in question and therefore cannot be bound by it, at the same time other treaty partners cannot be forced into accepting the newly seceded state's participation (Athanassiou and Shaelou 2014: 361).

In some cases this presumed continuity may still encounter practical problems. Take for instance the secessionist trend in Flanders. If Flanders were to secede from Belgium, the Walloon region would continue as Belgium in all its obligations, notwithstanding that Belgium has just lost over half of its GDP and population. In practice it would not be possible for Wallonia to uphold all treaty obligations on its own, possibly resulting in a dissolution of

Belgium – this is notwithstanding that it would be highly unlikely for such a secession to occur consensually.

In any case, dual secession seems to be out of the question (Piris 2017b: 92). Dual secession is the scenario in which a country divides into two states, who both retain their treaty obligations. Within a EU context this reasoning neglects important issues to be negotiated such as opt-outs, European Parliament seats and Council votes which are inherently matters of accession rather than succession (Piris 2017b: 92). If the result is a dissolution and dual secession it is highly unlikely that the predecessor state would have given its consent in the first place (Armstrong 2017: 117).

In international law, however, continuity precedes succession (Crawford and Boyle 2013: 72), which means that revision of the predecessor state is unnecessary. This might be a theoretically sound notion, but in practice it lacks realism and pragmatism. Which is why problems of succession are often dealt with through tailor made agreements.

Still there are those who say that answers should not be searched in international law, but in the law of the autonomous legal order that constitutes the EU. Yet, answers may be searched there, but will not always be found there – at least not in the current legal and political framework. Public international law therefore remains an important frame of reference. In any case, secession and succession are often resolved through intensely political and tailor-made agreements, thereby overshadowing rules and custom (de Waele 2014: 35). Once again parties in a secessionist conflict are confronted with a great deal of uncertainty. For seceding territories it is consequently in their best interest to try to engage in the necessary negotiations towards a solution for instance through a 'devolution compact'. It is argued below that the EU can and should play an important role as tailor of such pragmatic solutions.

4.2.2. The EU exists

> 'Feeding this frenzy for secession and independence in Europe is the premise that all these new States will somehow find a safe haven as Member States of the EU. Absent that assumption, appetite for independence would be significantly muted, the rough seas of "going it alone" far more threatening.' (Weiler 2012: 212).

This quote of Weiler concisely and accurately describes the problem at hand. The EU's very existence alters the stakes of separatism and opens the way to secession just by providing a (potential) safe haven for seceded territories (Walker 2017: 45). The EU is – at least partly and probably involuntarily – responsible for the resurgence of separatist trends in Europe merely by existing and indirectly offering the possible prospect of Membership (Piris 2017a: 76). Whether the EU should take blame for that is a different matter. Personally, I find it questionable to point fingers or blame the EU for merely existing and for being a possible – yet contested – safety net for seceding territories. That is a harsh oversimplification of the situation. As Kochenov and van den Brink say "blaming the EU for making secessions from the Member States premised upon joining the Union easier, would be an absurd move" as challenging sovereignty and the *status quo* is inherent to the EU's very nature (Kochenov and van den Brink 2016: 20). Still, objectively there is no going around the EU being one of the causes of the secessionism resurgence and an important new factor in the calculus of independence seeking regions within EU Member States (Closa 2016: 242). That being said, for secessionist spirits the cause is usually premised on a different *Leitmotiv*, ranging from historical, economical, linguistic to political motives, the existence of the EU is surely not all-decisive (Piris 2017a: 78).

The EU has – or at least could have – great influence over secessionist conflicts, even more so as concerns the Membership question. It is argued here that the EU should exert that influence in a way that befits its multilevel structure. The EU cannot legitimise itself as a multilevel supranational organisation if it keeps ignoring the political reality that secessionist conflicts have repercussions outside of the Member State in question (Popelier 2019: 45). Traditionally speaking secession is deemed to run counter to the very idea of European integration, therefore subsequent Membership ought to be off the table. Seen from a multilevel perspective, however, the interaction and flexibility of different tiers is considered inherently trivial to EU governance. There is no apparent reason why the EU should not accept a newly seceded state into its order, especially those that result from a consented secession. '*The 'carrot' of current EU membership, […] , should be its own incentive, without the 'stick' represented by the raw threat of future exclusion*' (Walker 2017: 46). In any case a clear EU position is overdue, ideally a more

proactive role in secessionist conflicts is adopted instead of the *ad hoc* deflecting statements it has conjured up till now (Haljan 2014: 15). There *is* room for EU commitment in consensual processes of secession, the question remains on how to occupy it.

4.2.3. Room for commitment

Internal secessions have non-negligible influence on the outside world, ranging from indirect encouragement of other secessionist movements to direct effect on the structure of the EU. Besides that the Membership application of a seceded state also has an effect on the institutional composition, decision-making and policies of the EU. This is often mistakenly dismissed as a mere mechanical modification of EU structure, but entails difficult matters such as adoption of the Euro, redistribution of seats in Parliament and votes in Council, adjustment to the Commission composition just to name a few (Closa 2017a: 524).

Furthermore, even though proponents' arguments in this context lack convincingness, it could be argued that the EU ought to prevent or appease the (temporal) disapplication of EU law and citizenship. To be sure, more store ought to be set to the fact that these applicants have been former constituents of a Member State, but more importantly of European integration. Whether it is through negotiations prior to independence, securing access to certain policies or other pragmatic solutions, there is room for commitment – to the extent that it is not hindered by politics.

This subsection aims to demonstrate that, irrespective of which procedure is ultimately deemed the appropriate one for accession of consensually seceded states, there is room for EU commitment. It is further argued here that the EU should make use of that room, be(ne)fitting its multilevel structure.

Internal enlargement and accession from within

'Internal enlargement', 'enlargement from within' or 'accession from within', while perhaps slightly different in nuance, in scholarship all refer to the scenario in which a seceded state from a EU Membership retains or acquires EU Membership (Athanassiou and Shaelou 2014: 336). Retained Membership would occur through negotiations prior to independence to

provide a seamless transition of Membership upon the moment of independence. The traditional modem for that is found in Article 48 TEU. A doctrinal majority, however, prefers a route of reacquiring Membership through Article 49 TEU. Before discussing the potential routes, one scenario ought to be excluded from further consideration, namely any scenario of an automatic right to Membership, which seems unfeasible.

Initially separatist politicians presented continued EU Membership as automatic, it was a question of a right to remaining a EU Member (Piris 2017a: 77). Over time secessionists had no choice but to concede that some form of procedure is impossible to bypass.

When we study continued Membership through the lens of international law, Article 34 Vienna Convention on Succession of States in Respect of Treaties stipulates a presumption of continuity. Based on Article 34 alone, one could presume that a newly seceded state would at least inherit some of its previous international obligations (Chamon and Van der Loo 2014: 618). In the EU context however, Article 4 of that same Convention puts a stop to this by laying down that

> 'the present Convention applies to the effects of a succession of states in respect of: a) any treaty which is the constituent instrument of an international organization **without prejudice to the rules concerning acquisition of membership** and without prejudice to any other rules of organization;' (emphasis added).

Consequently, there exists no right to automatic EU accession, some form of negotiation or procedure has to be complied with before acceding (Kenealy and MacLennan 2014: 599). There is no legal impediment for seceded territories to join the EU. EU accession is, however, premised on some form of examination of how the independence came to be and whether that process complies with the values of the Union on the one hand (Armstrong 2017: 121-122), but on the other hand the EU should also examine whether the applicant ticks off the requirements of Article 49 TEU – not necessarily through that procedure.

Whatever the sentiment granted to continued Membership for reasons of previous enjoyment of EU law or citizenship, automatic continued Membership is not possible. Just as in international law, the EU position as regards predecessor state is clear: the predecessor state is the continuator state (Athanassiou and Shaelou 2014: 342). As regards the seceded state, the

– debatably – legitimate expectation of seceded states and their citizens could nevertheless in theory take form through negotiations (Closa 2017a: 524). Which procedure ought to be seen through and what forum is used for negotiations remains open for debate, that classically revolves around Article 48 and 49 TEU.

The '48-49 debate' has been raging for the better part of a decade now, without a conclusive answer. At least not in regard of consented secessions. For a unilaterally seceded state, there is no doubt that the only route to accession would be Article 49 TEU. A long route, considering the obligations on the EU and other Member States from Article 4(2) and (3) TEU (Popelier 2019: 46). Nevertheless, in the long run all parties may decide to make peace with the political reality by recognising the seceded state. In that scenario, the only route is the official accession procedure enshrined in Article 49 TEU. In a scenario of consensual secession, however, there is no clear pathway to accession, albeit that in doctrine Article 49 TEU seems to have preference over Article 48 TEU.

While doctrine may favour Article 49, much is left to the way of timing and terms of negotiation (de Waele 2016: 7). In both procedures, there is a risk of a temporal vacuum between independence and Membership (Dermine 2014: 46). This will be demonstrated in the subsequent respective subsections on Article 49 and 48 TEU, but it is important to already denote that such a temporal void – of disapplication of EU law and citizenship – is a valid reason for the EU to be more engaged in the accession procedure of seceding states and accompanying negotiations, irrespective of which procedure is ultimately deemed the appropriate one.

"All roads lead to Article 49 TEU"

Similar to the well-known proverb "*all roads lead to Rome*", the majority opinion for the road to EU accession for seceded states seems to point towards the accession procedure enshrined in Article 49 TEU. It is after all, the obvious route.

Proponents of the Article 49 TEU route to accession dismiss the argument based on the fact that the applying seceded state was formerly a constituent of the EU. They do so by arguing that may well be the case, but that former constituency does not exempt seceded

territories from the requirements in Article 49 TEU. For some seceded territories indeed, it may accelerate the procedure, but that does not mean that any seceded region would automatically comply with the stringent conditions of Article 49 TEU (Piris 2017a: 83). Moreover it is not a question of fact, it is rather a question of principle.

In order to qualify for accession in the first place, an aspiring accessor must comply with two general requirements. Not only does the accessor have to be a 'European' state (the so-called 'political criterion'), furthermore it is mandatory that the country in question respects and is willing to promote the European values enshrined in Article 2 TEU ('general policy criterion') (de Waele 2017: 157). The fact that Article 49 TEU requires aspiring accessors to be a European *state*, for me has two implications: firstly that indeed only lawful, *consensually* seceded states can join the EU. Without the consent of the predecessor state, Member States might not be inclined or even allowed to recognise the seceded territory as a state. In that case the seceded territory will not be eligible for accession. Secondly, the aspiring accessor would not be a state until after the fact of a successful secession. In one way, an application for EU membership would constitute an important and powerful signal to the outside world from a newly independent state in its own right (Armstrong 2017: 123). The other side – and downside – of the coin, however, entails that there would be a temporal void or vacuum between the moment of independence and EU accession (Athanassiou and Shaelou 2014: 349), considering that Article 49 TEU is a lengthy procedure, this is not ideal. Some have nevertheless argued that the negotiations required under Article 49 TEU could already be initiated in advance of official independence, albeit informally (Armstrong 2017: 124; Athanassiou and Shaelou 2014: 350). How that would translate into practice is a more complex matter and furthermore the Turkish have taught us that negotiations too, can be long-lasting. Nothing prevents the newly seceded state to uphold EU law *proprio motu*, but how commendable that attitude may be, it will not grant access to the rights and obligations of EU law which is only guaranteed through official Membership.

The political and general policy criteria have been further detailed and developed in the 'Copenhagen Criteria'.[XII] Which, in summary, require an aspiring accessor to provide the necessary institutions able to protect democracy and fundamental rights (political criterion), to

dispose of a functioning market economy that is able to cope with the market forces of the Union (economic criterion), and finally the capability of taking on the various obligations that come with EU Membership (administrative criterion). Furthermore the aspiring accessor must create conditions for its integration through adjustment of its administration[XIII], guarantee effective implementation of EU law and maintain 'good neighbourliness' with its neighbouring countries.[XIV] The latter essentially requires accessors to solve any outstanding disputes with bordering countries. Seeing as how the predecessor state would be a neighbouring country after a secession this might be delicate, but there should not be any conflict if the secession occurred lawfully and consensually.

Needless to say, no seceded territory by definition complies with the conditions set out above, which reinforces the earlier statement that there is no automatic right to continued Membership.

Expedition and simplification: festina lente*?*

Article 49 TEU is notoriously known to be a somewhat lengthy and extensive procedure. Which is only logical. After all, the EU cannot afford to just allow any state join the EU without any form of control. EU Membership comes with many benefits, but with great benefits…, comes great responsibility. Therefore, the EU has to diligently ensure that certain criteria are met. The following paragraphs aim to demonstrate that certain aspects of the procedure in Article 49 TEU can be simplified or expedited for territories aspiring to join the EU after a secession from a Member State. Expedition or simplification in this procedure is not merely a consideration of emotion or morality, it is foremost a consideration of fact (Athanassiou and Shaelou 2014: 344). The aspiring accessor in this case has already been part of the EU and is therefore familiar with EU integration. Evidently, some aspects of the accession procedure will progress more smoothly than it would for third countries. On top of that factual expedition, it is argued here that even more store might be set for seceded territories through more flexibility in the accession procedure – that is of course, if the EU deems this to be the adequate procedure.

Once the first criterion of the Copenhagen Criteria (the political criterion) is met, the aspiring accessor is granted the official candidate status. This might seem a rather symbolic milestone, but it also gives the greenlight to the Commission to engage in preliminary screenings to determine the adequate moment for opening negotiations (de Waele 2017: 159). Custom dictates that the Commission will issue its positive advice on this transition once the economic criterion has been fulfilled. Considering that seceding territories are often economically superior regions (*e.g.* Catalonia, Scotland, Flanders and Veneto) (Piris 2017a: 78), there *would be* room for the Commission to speed things up in this part of the procedure if that is the case – whether it would be willing to is another question (which I will tackle later on). It seems that what by opponents of secession is usually labelled as 'regional egoism' (Piris 2017a: 78), might for once play to the advantage of secessionists.

The Commission *would be* able to speed things up, but in practice the Commission awaits the Council's request for the opinion. Concretely this means that any Member State can delay or downright veto the initiation of the procedure, since the Council votes by unanimity in the accession procedure. In case of a consensual, lawful secession I would think that all the institutions and Member States would be on the same level concerning the lawfulness of the secession. Whether they would be willing to accept a new Member State is another matter – some Member States might veto in fear of motivating centrifugal forces in their own territory.

Once the Council has decided (by unanimity) to open negotiations, the accession procedure can proceed. The negotiations play a vital role in the accession procedure. They ensure smooth integration into the EU and serve as a barrier to protect both the accessor and the Union from negative consequences of enlargement. Simply put the negotiations aim to verify the Europeanisation (Athanassiou and Shaelou 2014: 344) and compliance with the *acquis communautaire* of the accessor state by ticking off the different chapter in which the *acquis* has been divided. It is undeniable that certain aspects of future Membership must be negotiated. Nevertheless, the familiarity with the EU acquired by seceded territories from EU Member States can provide for a more expedient progress in some chapters of the *acquis* (Chamon and Van der Loo 2014: 623). This is *a fortiori* true for subnational regions that have

participated in the EU subnational representation and governance and those regions with legislative powers (*e.g.* Flanders) (Fasone 2017: 134).

Once all requirements are met, the negotiations are closed when the Commission grants its blessing through an opinion. Subsequently, it is finally time for the accession agreement. This might feel like a relief for the mainstream accessor, but in the case of a seceded territory this is an additional hurdle to surpass – well actually it would have to sit by, wait and cross its fingers. The required Parliamentary consent for the adoption of the agreement is overshadowed through the fact that the agreement has to be ratified in all Member States, once again granting the Member States the possibility to veto the accession in its entirety.

Praising Article 49 TEU as the only adequate procedure for accession, does not mean that pragmatism is out of the question. Athanassiou and Shaelou argue that because of that same familiarity with the EU that is set out above, the 49 TEU process could be 'simplified' and that 'special arrangements' could be possible provided that it enjoys unanimous support of the Member States and that any adjustment to the accession procedure fits 'within the fabric of Article 49 TEU' (Athanassiou and Shaelou 2014: 245). According to Article 49 TEU, 'the conditions of eligibility agreed upon by the European Council *shall be taken into account'* (emphasis added the authors). In their view, this European Council adjustment of the accession procedure could even translate into a '*bilaterally negotiated process leading to accession*' – so long as it complies with unanimous Member State support and remains within the fabric of Article 49 TEU. Others too have argued that even though Article 49 TEU must be seen through, the EU must strive for pragmatic solutions such as initiating accession negotiations prior to independence to ensure a ready-to-sign accession upon independence and installing continuity mechanisms in case of a temporal problem between independence and accession, especially in regard of the Single Market and EU citizenship (Armstrong 2017: 124; Schmitt 2014: 25). In practice such measures could result in a seamless transition of EU Membership, yet a lot depends on politics and timing – once again the Turkish never-ending example comes to mind.

In a recent proposal the Commission advocates a more credible, more dynamic and more predictable accession procedure with a stronger political steer.[XV] Although the proposal

primarily aims to facilitate Balkan EU enlargement, there are some interesting intentions to be deducted. The proposal pursues more credibility for the accession procedure of Article 49 TEU by focussing on the necessary fundamental reforms of the applicant, which *nota bene* would not (or at least to a lesser extent) be necessary for applying seceding territories. More importantly, the proposal endeavours to render the accession procedure more dynamic through grouping the negotiation chapters in 6 thematic chapters.

This newly pursued flexibility for EU enlargement makes me wonder whether the EU would extend a similar flexibility towards seceding states aspiring to join the EU family. If grouping the thematic chapters is an option for the Balkans, it is conceivable that a similar approach can be adopted for seceded territories aspiring to accede. A distinction could than by example be made between those chapters wherewith the accessor is (presumably) familiar because of earlier constituency of EU integration, and those chapters that would require more negotiation. Such dynamic and flexibility could provide for momentum, expediting the entire process. Once again it is obvious that the EU would only be prepared – or even allowed – to assign such flexibility if the secession occurred lawfully. Finally the Commission proposal will particularly focus on predictability, which if you ask me is a welcome addition since EU enlargement is '*unhelpfully obscure*' (de Waele 2017: 162) on which countries might one day have the honour to join our ranks, this is *a fortiori* true for seceding territories who are all the more manoeuvring in uncharted territory.

If Article 49 TEU is ultimately deemed the appropriate procedure for accession of consensually seceded states, I have one advice for EU policy makers and negotiators: *festina lente*. Make haste, slowly. The accession procedure is a delicate one, especially considering the double-veto possibility allowing any Member State to torpedo the entire procedure at its initiation and conclusion. Even in consensually occurred secessions, Member States might have an incentive to veto accession of a seceded state to avoid legitimation of their own domestic secessionist movements. Notably Spain is often singled out, especially since its refusal to recognize Kosovo (van den Driest 2014: 31). But a Spanish '*no*' is certainly not the only threat to a successful accession of a seceded state.

Nevertheless, there is reason for the EU to be more engaged in the Article 49 TEU procedure. There is no going around the fact that seceded states from within are in a different position than third countries. Their familiarity with EU integration *will* speed up the procedure as matter of fact. Moreover, the impact of such a difficult and contested accession procedure on the seceding territory, its inhabitants and the EU multilevel structure itself puts a moral (and debatably legal) obligation on the EU to be more committed in the process (Closa 2017a: 523). Nothing prevents the EU to engage itself from the moment a secession occurs consensually and democratically. In that light the EU should endeavour a seamless transition be it through pre-independence negotiations for accession, interim measures to avoid temporal and legal vacuum or a combination thereof. Pragmatism does not, however, equal negligence. It is important to underline that expedition and simplification are advised, yet it should not be prioritised at the expense of diligence, substance and the fabric of Article 49 TEU. In reiteration: EU, *festina lente.*

Article 48 TEU, too easily dismissed?

Article 48 TEU embodies the treaty amendment clause. Proponents of secession see in this provision the potential prospect of a seamless transition of EU Membership. To which they would have a right, seeing as how they find themselves in a different situation than third countries applying for EU Membership, *i.e.* they were already a constituent of a EU Member State. From a multilevel governance view, they were moreover a constituent of EU integration.

Negotiation and prevention of abrupt dislocation is according to some integrated in the fabric of the EU constitutional order, since even the most extreme separation, Article 50 TEU containing the possibility to withdraw from the Union, stipulates that '*the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal*' (Kenealy and MacLennan 2014: 600). On first sight, this argument might look abstract and it might appear to be a forced outcome of *Vangendeology* (Armstrong 2017: 116) to resort to speech based on "the spirit" of Article 50 TEU (de Waele 2014: 37). That may well be the case, but nowadays *Brexit* has shown the vital role of negotiations in the withdrawal process. Moreover is it that unusual in policy or law making to find inspiration in existing provisions? The real question is

whether the EU has an equal incentive to negotiate in a post-secession scenario as it has for a withdrawal. As is true for withdrawal of an entire Member Sate, the partition of even a part of a Member State from the EU potentially entails far-stretching consequences for the EU as a whole, this is *a fortiori* the case for economically strong regions that moreover have played a role in EU governance and implementation of EU law – not to mention the difficult case of Flanders and Brussels (Popelier 2019: 49). Thus, from a multilevel governance perspective not only ought the seceded state be able to secure transition through negotiation, *vice versa* the EU ought to have a say in its partition as well, if only to prevent negative repercussions on its structure.

Critics of Article 48 TEU have raised a number of concerns with its application for a seceded state accession procedure. First of all, the right to initiative of Article 48 TEU is reserved to Member States, which the seceded is not (Piris 2017a: 81) – that is obviously the problem in the first place. This would require the rump state to initiate negotiations, which in turn requires a significant amount of good will – in addition to the good will granted for a consensual secession. This creates '*a multilevel political structure for negotiations*' (Armstrong 2017: 125). The solution for this intricate multilevel structure is according to secessionists to be found within the principle of sincere cooperation from which they would derive a right to negotiate with the EU (Kenealy and MacLennan 2014: 599). What has not been taken into account is that the EU might want to have a say as well and that the Parliament and the Commission equally have a right to initiate the procedure for treaty amendment. While a multilevel political structure for negotiations is labelled as a bad thing, it is actually an accurate representation the EU's multilevel structure. Granted, a proposal coming from a EU institution for the accession of a seceding state through treaty amendment is not very impartial, but let us not forget that if a secession occurs consensually, nothing prevents the Union of interfering. Furthermore, impartiality *de facto* results in a state-protective orientation. Then again, EU involvement to that extent might go down the wrong way with certain Member States – notably and recurrently Spain comes to mind.

What could give rise to problems, however, is that nothing obliges the other Members States to participate in these negotiations, resulting in a veto for any state. Which means that,

similar to the double veto in Article 49 TEU, the procedure can be blocked by any Member State.

Furthermore, Article 48 TEU would not be convincingly faster than proponents have us believe. The technicalities and formalities of Article 48 TEU require an Inter-Governmental Conference to be convened that is presumably preceded by a Convention before the Treaties can be amended (Piris 2017a: 80). Presumably, because it is unlikely that the European Parliament would consent to bypass a Convention on an issue with such gravitas. The Scottish *anno* 2014 envisaged an independent Scotland as part of the EU within a timeframe of 18 months through Article 48 TEU. Indeed that might be a tad optimistic, but seeing as how the average accession procedure takes about a decade[XVI] I would argue that Article 48 TEU has some margin for being more expedient than Article 49 TEU.

Two risks also come to mind when evaluating Article 48 TEU as an accession route for seceded states. First of all seeing as how the initiative for proposals in Article 48 TEU lies with several actors, engaging it could open Pandora's Box for creeping treaty amendment attempts forwarded by the Member States, Commission or Parliament (Piris 2017a: 81). Secondly the EU has already been accused of double-heartedness as regards accession in the past (de Waele 2017: 160), consequently the EU should be extra mindful when being more flexible towards internal enlargement through Article 48 TEU.

For its highlighted defaults and while the Article 48 TEU route does not necessarily provide more – or less for that matter – prospect of success than Article 49 TEU[XVII], it at least acknowledges the differences between an applicant that has already been part of European integration and secondly shows more promise for closing the temporal gap between independence and accession. Finally, as was the case for commitment in Article 49 TEU through expedition or simplification, using Article 48 TEU as the appropriate pathway to accession must not go at the expense of diligence and scrutiny.

In conclusion of this section I would like to point out that both procedures have defaults as regards accession from within. Article 49 TEU, and *a fortiori* Article 48 TEU were not designed to deal with such an occurrence, which is abundantly reflected in the debate. Yet, both procedures can be modified, simplified and accelerated to accommodate an internal

enlargement and that should be what you derive from this section. Moreover, the EU has room to do so and should use that room to commit to the accession or non-accession of a seceded territory. Whatever the outcome, the EU cannot permit itself to remain on the side-lines in an event that drastically impacts its entire multilevel structure. Instead, the EU should face the political reality at hand and cooperate with all parties involved to find pragmatic solutions to these very real problems. In the current legal framework I personally find Article 48 TEU to be the adequate procedure to accommodate the role of the EU within its system of multilevel governance, as it acknowledges the very real difference between internal and external accessors and to my mind has more potential and room to close the temporal gap between secession and accession. In the end it is up to the EU to decide which procedure is the better fit: Article 48 or Article 49 TEU. Or should there be a new provision altogether?

5. An institutional framework on secession

5.1. Necessity of a (European?) framework

All the foregoing has demonstrated how much (legal) uncertainty and unclarity rains in the uncharted waters of secession. Unclarity *an sich* would be a sufficient argument to advocate clear rules on secession, yet there are plenty arguments to substantiate a (European) framework on secession. Research shows that an implicit prohibition of secession or silence thereon, as is the case within the EU and a lot of its Member States, results in a diminished chance on actual secession, that can count on less popular support, but causes secessionist movements to be more prone to violence (Ginsburg and Versteeg 2019: 259). In contrast, a right to secession makes actual secession more likely, yet reduces the chance of violence. Although secession within EU Member States has remained – more or less[XVIII] – peaceful up till now, it is always better to prevent than to cure.

Of course we cannot expect the EU to regulate a manual or pathway to secession that would lead to its fragmentation, and would run counter the very first provision of its Treaty of creating an ever closer Union. Nevertheless, a clear set of rules on how lawful secession can occur and relevant procedural requirements are not inconceivable. Be advised that legal clarity

and legal certainty are two different notions. While legal clarity may provide for a clear set of rules on secession, this does not mean that the outcome of following those rules will always achieve the desired result (Walker 2017: 35).

If one acknowledges the need for a framework, the question remains on what level such a framework should take form. The international level? The EU level? The domestic level? It is argued here that the EU is (one of) the adequate level(s) to establish a framework on secession, keeping in mind the multilevel governance system that it constitutes. This evidently does not necessarily preclude regulation on the domestic or even international tier. On the contrary, the regulation of secession in terms of legality on the domestic (constitutional) level could play a pivotal role in matters of secession.[XIX] The unclarity on secession and the fact that for a significant part of reasoning scholars and parties are forced to defer to international law, however, '*surely is a harrowing abdication, flying right in the face of the celebrated Van Gend & Loos judgment and its progeny*' (de Waele 2014: 35).

Another reason to regulate a framework on the EU level is that this thesis has shown that EU resources (Articles 48 and 49 TEU) seem to be more susceptible to seamless transition of Membership than the resources of public international law (rules on state succession) (Walker 2017: 118).

Finally finding and regulating a common stance within the EU will already prove to be a Herculean task, I sincerely doubt finding a universally agreed stance on the international level will prove to be any easier.

As said above, there are various arguments for a codification of a EU stance on secession besides legal clarity and prevention of violence. Firstly all contemporary secessionist movements in the EU include the Union and prospects of Membership in their calculus on whether to strive for secession or not (Closa 2016: 242). More importantly, and as largely covered above, internal secessionist conflicts have a significant spill-over effect on the outside world and in particular the EU. As a system of multilevel governance the EU cannot stand idly by when secession has (negative) repercussions on the EU and or the Member States. Finally, another sometimes overlooked party potentially affected by secession and in particular subsequent Membership is the third states currently engaged in an ongoing accession

procedure (Closa 2016: 242). We have seen that opponents of secession already invoke an argument on the structural overload of the EU. One could indeed wonder where the limits of the absorption-capacity of the EU lie. Remarkably enough, the Juncker-Commission stated in 2014 that no new accessions would take place under its steer, yet this would not have applied to Scotland.[xx] Closa argues that a normative framework is thus necessary to prevent unequal treatment as regards state accession (Closa 2016: 242). I , however, partly disagree. Similar scenarios indeed ought to be treated equally, whereas on the contrary, different scenario's – which is the case for internal applicants – warrant different treatment. As pointed out earlier, internal accessors have been part of European integration and are consequently *de facto* different from external applicants which in turn justifies differential treatment. Nevertheless, that does not mean that there is no longer need for an institutional framework.

Of course, not everyone agrees with the need for a legal framework. Haljan for instance prefers a '*wait-and-see*' attitude over '*damn the torpedoes and full speed ahead*' (Haljan 2014: 17). Given the political salience and delicacy of secession he argues there might be wisdom in patience, since time and trial-and-error might exactly be what all parties need to grasp the gravity of the situation. If uncertainty and conflict are the price to pay for a long-term solution, so be it. Still, I am of the opinion that a clear view on the EU position is overdue and that ideally it takes shape through an institutional framework. In summary and to put it bluntly in the words of de Waele:

> 'in light of the contemporary EU's sheer incapability to offer parameters for determining the veracity of many opinions expressed, in political as well as academic circles, its legal order seems hardly worthy of the autonomous epithet it was so happily endowed with over fifty years ago.' (de Waele 2014: 39),

a statement made seven years ago, but still painfully accurate today.

5.2. Adapting the TEU

The question remains whether a new Treaty provision is the adequate way to stipulate a clear EU multilevel role in matters of secession. After all, this thesis has shown that under both current available routes to accession there is already room for EU commitment. Moreover,

amending the Treaties to explicitly acknowledge secession may not be able to count on the desired and more importantly required support from all Member States. In a context where consensus on *any* Treaty reform is difficult to find, it seems highly unlikely that the Masters of the Treaties will regulate anything that (in)directly threatens their national sovereignty and constitutional traditions. To add to the injury, the success of a framework on secession is dependent on politics, veto possibilities and the nationalism of the states that already enjoy a strong biased position in matters of secession.

Reward sweetens labour. Adapting the TEU for a (procedural) framework on secession would not be a self-sailing enterprise. Yet, the benefits of such a framework are considerable. First of all, it would put an end to the inconsistent, unofficial whispers of secession in the coulisses of the EU and vague unpromising statements lacking official status.[XXI] Furthermore, a provision on secession would constitute an adequate arbiter for differentiation between secessions and subsequent accessions. The principle of equality requires internal and external accession to be treated differently, but we can extend this consideration within internal enlargement as well. Not all internal secessions are alike. A general procedural entrenchment in the TEU could make a distinction between for instance unilateral and consensual secession and provide an *ad hoc* basis for different situations of internal disruption of territory (Fasone 2017: 61) (*e.g.* the difficult situation of Flanders). Lastly, a general provision could allow the EU to impose procedural requirements that reflect its role in matters of secession. Drawing inspiration from Article 50 TEU, Walker for instance points out that a timeframe for accession procedures is not uncalled for (Walker 2017: 44). Nevertheless, for all the potential benefits a general (procedural) provision might conceive, the anchorage of politics and self-interest of Member States still bears heavy weight.

Even though agreeing on and adopting regulation in the EU Treaties is without a doubt a difficult task, Fasone points out that a set of common principles for lawful secession can already be deducted within the EU Member States (Fasone 2017: 51). This is in concordance with the observations made throughout this essay. A secession can be lawful, to the extent that it occurs on a consensual basis with a sound agreement between seceding and predecessor state, it respects democracy and adherence to the rule of law and finally it be in accordance

with the domestic constitutional provisions. The latter of course poses a problem for certain secessionist movements, such as Catalonia and Veneto, considering there is no way for them to secede in a constitutionally sound way – and there do not seem to be significant change in that respect on the horizon. Nevertheless, this article has shown that these matters are to be dealt with internally by the Member States and the EU should adopt a restrained position on the side-lines.

Notwithstanding the Member States' competence and based on these shared principles, Fasone has worked out a proposal for an *ad hoc* provision on secession (Fasone 2017: 66). She stipulates two requirements by which the EU could not only ensure respect of its core values, but also provide a solution for the temporal vacuum between independence and accession. First of all, any secession within the EU ought to occur in correspondence with the common constitutional traditions of the Member States, meaning that unilateral secession is out of the question. Secondly, a procedure should be installed (and of course respected) which requires Member States and seceded states in conflict to submit all relevant intel to the European Council, but moreover to wait a predetermined number of years before gaining independence. The latter would grant enough time for EU commitment – whatever the chosen procedure – to prevent a legal limbo between independence and accession. The combination of these requirements would to her mind constitute a valuable EU contribution towards cooperation in matters of secession and to some extent even repress groundless attempts of secession.

This is a provocative proposal with valid insights and solutions. Yet, Popelier adds other key concerns that should not be omitted in the regulation of a (European) framework: the event that a seceded state does not wish to join the EU, a reassessment of the predecessor state and the scenario in which negotiations remain inconclusive in the given timeframe (Popelier 2019: 50).

There is an apparent need for clarity in matters of secession within the European Union. If the EU wants to be worthy of titles as a structure of multilevel governance or an autonomous legal order, such legal limbo cannot fly. Ideally the EU fills this void by adapting a new provision in the TEU that gives pragmatic answers to problems such as *inter alia* the ambiguity on lawful secession, the temporal paradox and the adequate accession route. In particular the

provision should be able to better accommodate a more engaged EU role. Nevertheless, the political context of secession will cause change to be time and effort consuming.

6. Conclusion

The aim of this essay was to research what role the European Union should play when dealing – or not dealing – with secessionist conflicts. Adopting a multilevel frame of reference enabled this thesis to step aside from the traditional gridlocks and assert that the political reality of internal secessions entails a non-negligible spill-over effect on the outside world, and more importantly the EU. The EU should thus without question deal with secessionist conflicts. It is true that internal secessions are in principle to be managed and regulated by the Member States, and that consequently the EU should largely remain on the margins by adopting a restrained role. Yet, it was equally established that once a secession progresses to a consensual process, room is created for the EU to commit.

Where there is room, the EU can and should commit by finding pragmatic solutions to traditional paradigm issues such as negotiation, a temporal vacuum and EU accession irrespective of the chosen route – albeit that under the current legal and political landscape it was established that Article 48 TEU is the way to go as it acknowledges the difference between internal and external accessors and shows more promise of closing the temporal gap. To better accommodate such EU commitment, the TEU should be adapted or complemented by a new provision. A provision that acknowledges Member State competence, but also recognises EU engagement in order to cooperate with all parties towards a smooth secession and accession, provided it is in accordance with all the necessary requirements of lawful secession, as enshrined in this brand new provision.

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[1] ECJ Case C-294/83, *Les Verts*, 1986 ECR-1339.

[II] ECJ Case C-26/62, *Van Gend & Loos*, 1963 ECR-1.
[III] Committee of Regions, *Opinion on Guidelines for the application and monitoring of the subsidiarity and proportionality principles*, 2006/C 115/08, C 115/35, 2.17.
[IV] Committee of Regions Opinion, *White Paper on Multilevel Governance*, 2009, C-211/1, 1.
[V] Letter from PM Boris Johnson to Scottish First Minister Nicola Sturgeon: 14 January 2020.
[VI] An argument reminding me of Waters' warning as to any regulation prefiguring all possible outcomes (Waters 2016: 18-19).
[VII] According the principle of conferral enshrined in Articles 4(1) and 5(2) TEU.
[VIII] Report of the Committee on Constitutional Affairs of the European Parliament on the division of competences between the European Union and the Member States, A5-0133/2002 final, 24 April 2002, §34 and 4.3.2.
[IX] Herman van Rompuy: Council of the EU, '*Remarks by the President of the European Council on Catalonia*', 12 December 2013, EUCO/267/12, PRESS 576.; Romano Prodi, President of the Commission, 1 March 2004, OJ C84 E/422, 3 April 2004.; José Manuel Barroso, President of the Commission, OJ C208, 3 July 2014 ; Jean-Claude Juncker E-011776/2015 .; (Viviane Reding, Vice-President of the Commission, 4 October 2012, in a letter to the Spanish Secretary of State for European Affairs (in Spanish) .
[X] UN General Assembly, *Vienna Convention on Succession of States in respect of Treaties*, 6 November 1996, Article 34.; This is, however, not an universally accepted codification (De Waele 2014: 35).
[XI] Vienna Convention, Article 2(1), b).
[XII] *Presidency Conclusions, Copenhagen European Council*, 21-22 June 1993, paragraph 7.
[XIII] *Presidency Conclusions, Madrid European Council*, 15-16 December 1995, III-A.
[XIV] *Presidency Conclusions, Helsinki European Council*, 10-11 December 1999.
[XV] Commission Proposal on Enhancing the accession process – A credible EU perspective for the Western Balkans, 5 February 2020.
[XVI] Some states have enjoyed speedier accession, *e.g.* Sweden, Finland and Austria.
[XVII] Both procedures rely on unanimous consent of all the Member States.
[XVIII] Not taking into account for instance the violent repression by police forces in Barcelona during pro Catalan independence manifestations.
[XIX] For interesting contributions thereon see: Weill 2018; Ginsburg and Versteeg 2019.
[XX] J.-C. Juncker, *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change Political guidelines for the next European Commission* Opening Statement in the European Parliament Plenary Session Strasbourg, 22 October 2014; Candidate for President of the European Commission Strasbourg, 15 July 2014.
[XXI] *Supra* endnote nr. X.

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