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Changing EU internal borders through democratic means

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ABSTRACT

Demands for secession from EU member states create a novel situation for the demarcation of the internal borders of the Union. When combined with withdrawal of the original state from the EU, this adds the complexity of simultaneously re-drawing internal and external borders. Situation differ among the territories in which political actors have voiced desires for independence combined with EU membership and the two basic differentiating criteria refer to the existence of consent/agreement with the original member state and the latter willingness of remaining or not an EU member. The combination of these two criteria produce four scenarios for which EU policy in relation to granting membership should also differ. I argue that the EU should have the most positive attitude in cases combining consent and withdrawal of the original member state whilst cases lacking consent seem incompatible with EU values even though some nuances can be introduced.

KEYWORDS

Secession; EU membership; EU withdrawal; Brexit; EU values

1. Introduction

This contribution looks at one specific process of changing territorial demarcation lines which affect both to the definition of the political community and the external relations with entities outside the community. Secession within the EU illustrates how contestation on the demarcation of the political community becomes simultaneously a question about access to important goods. Proponents of the secession of territories from current member states forcefully make the case for keeping the current status quo as being within the EU in order to retain the large provision of public goods (economic well-being, security, etc.) that the Union affords.

Secession of a territory with simultaneous EU accession implies a re-drawing of EU borders. Whilst the principle of openness to membership of any European state in article 49 makes re-drawing EU's external borders by means of enlargement inherent to the EU's DNA, the so-called internal enlargement (i.e. the emergence of new *member* states resulting from existing EU member states) raises the issue of re-drawing internal borders and creates a new dispute on the routes to become EU member. Actors in several regions and other territorial entities in EU member states have voiced demands for independence from their original states simultaneously to their aspiration to remain within the EU as new member states.

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Politicians (and academics) from Scotland, Catalonia, Flanders, Veneto etc. have speculated with this idea in a more or less articulated way (Closa 2016). At the same time, Brexit has activated a novel process of redefinition of EU borders by means of withdrawal of a current member state. Political discussions in the UK reveal that exiting the EU may become the trigger of a parallel process of Scotland seeking separation from the UK at the same time than remaining within the EU. Thus, discussions on reconfiguration of EU external and internal borders need to take into account both processes of exiting the EU and seeking independence as a new member state of the EU.

This paper explores the normative arguments that link secession of the territory of a current (or, hypothetically) former member state with its accession to the EU. Territories aspiring to acquire independence from existing member states aim simultaneously at securing all the benefits of being within the EU. For this, secession proponents have speculated with the possibility of bypassing the strictness of the accession procedure (i.e. article 49), which involves application, verification of the compliance with membership conditions, negotiations and a specific accession agreement and its approval by unanimity. I argue that the possible cases involving the territories mentioned above differ because of two crucial factors: the consent of the original member state to secession and the eventual renounce to the condition of EU member of the original member state (i.e. withdrawal from the Union). On the basis of these differences, I outline a typology of cases and I argue that cases of consented secession (with or without withdrawal), the EU can offer the prospect of membership. In neither case, though, avoiding the specific accession procedure is possible nor acceptable although secession following an eventual withdrawal has stronger normative support for an easiest path to accession. On the contrary, cases in which consent does not exist create an insoluble opposition with EU values and, in particular, the respect of the rule of law that render unrealizable the aspiration of EU membership. In order to develop this argument, the next Section (2) identifies two criteria (consent and original state continued EU membership) for differentiating among the most prominent cases (those of Catalonia and Scotland). Then, it applies these two criteria to construct a typology including current and hypothetical future scenarios (3). Then, it discusses critically the some of the normative arguments in reference to these four sceneries (4). The conclusion (5) summarizes the argument.

2. Secession within the EU: consent and withdrawal

Despite their apparent similarities, the hypothetical cases of secession within the EU (regions such as Scotland and Catalonia, but also others such as Flanders, Corsica or Trentino in which pro-independence actors have speculated with this possibility) possess significant differences among which two prominent ones stand out. The first refers to whether or not processes of acquiring independence enjoy consent of the original state. The second concerns whether or not independence and gaining statehood may happen as a consequence of a member state withdrawing from the EU, a prospect that Brexit makes more possible.

Regarding the existence or not of consent, an extended normative consensus takes as acceptable (*unconsented*) *remedial* secession (i.e. when secession happens to remediate situations of gross violations of fundamental rights or colonial situations) (Buchanan 1997). Hypothetically, remedial secession might be acceptable within the EU in relation to territorial units in current EU member states. However, this appears an oxymoron: given that the EU

requires its members to respect values in article 2 (including fundamental rights, democracy and the rule of law); given furthermore, that the EU has mechanisms (such as article 7) to monitor member states compliance with certain essential values and the Charter of Fundamental Rights and Freedoms, there exist a priori, a strong assumption on compliance with these. In the hypothetical case in which a member state were not to comply with its obligations (to an extent that this could be constructed as the reason for reclaiming remedial secession by a territorial unit), noncompliance would have to be verified impartially at the EU or international level, rather than unilaterally by the territory claiming independence. Hence, a priori, *unconsented remedial* secession seems to be incompatible with the structure of values on which membership of existing states is constructed.

Beyond *unconsented* remedial secession, a growing consensus has also emerged that *consented secessions* (i.e. those agreed between the original state and the new territory gaining statehood) may be acceptable. In this line, Walker (2017) identifies a more 'generous' Primary Right or Choice theory according to which any community which views itself as a distinct national community and which has a special association with a particular territory possesses a claim to sovereign self-determination (Philpott 1995, 1998; Wellman 1995; Beran 1998). Whether this claim creates a right seems doubtful though: the original state may have an equally valid claim to retain its unity and this claim may equally derive from legitimate and democratic arguments. How to arbitrate between these two competing claims? Seeking a political agreement between the two parties seems the only clear solution to the stalemate. Agreement, though, cannot be imposed and parties may fail to reach it. In the absence of such an agreement, no EU legal resources seem to empower a pro-secession logic. The EU has a mandate, in Article 2 on the Treaty on European Union, to require its member states to comply with the values to which they have committed in the Treaties. This mandate applies to current member states, but it also provides a guideline for any state willing to become a member. Given the manifest desire of prospective seceding territories from a member state to remain in the EU post-secession, compliance with EU values in the process of gaining independence (both of the original state and of the seceding territory) constitutes an essential condition for their ulterior EU membership. Not compliance with some of these values in gaining independence may be considered a criterion for disqualifying prospective EU membership.

A second difference between the cases derives from the position of the original member state in relation to continuing EU membership. Until 2016, all possible cases of secession from a Member State and simultaneous EU membership happened in reference to current members. Brexit has drastically changed this scheme by adding the withdrawal of a member state from the EU as a new dimension to the normative equation. Withdrawal represents an assertion of state sovereignty that (legitimately) questions the basic assumption of the European Union and the European integration project: restricting and pooling sovereignty in favour of the common good (Weiler 2017). This advanced conception of statehood as EU member state (Bickerton 2012) has entered also the conceptions that hypothetically seceding territories, such as Scotland or Catalonia, have of themselves. They conceive themselves as eminently European and as part of the EU (Shaw 2017), either as part of a larger member state or as independent ones. Withdrawal changes drastically and dramatically the context in which these territories define their identities and, consequently, their political projects. Needless to say, withdrawal affects also in very practical ways the rights of the citizens in the territory (and beyond that), for instance, they may lose access to free movement and

market access, etc. The Scottish government clearly identified this logic in November 2016 when it argued that *triggering Article 50 will directly affect devolved interests and rights in Scotland* and *it would also inevitably deprive Scottish people and Scottish businesses of rights and freedoms which they currently enjoy*.[1]

3. A typology of cases of hypothetical secession with EU accession

Combining the two criteria for differentiating secessionist projects produces a two by two classification with two factual cases (Catalonia in 2014 and Scotland in 2014) and two undetermined possible situations which may emerge in future. The classification may accommodate all cases of claims for independence of territorial units in EU member states although a hypothetical secession with dissolution of the original member state (a hypothesis related to the possible independence of Flanders with an eventual disappearing of Belgium) falls out of it (Table 1).

3.1. No withdrawal of original member state and no consent for secession (Catalonia, 2014)

The Catalonian situation in 2014 and onwards reproduce the conditions of case 'A'. The original state (Spain) has never contemplated the option of leaving the Union. Equally, Spanish central authorities have rejected any possibility of agreement with Catalan ones on an eventual process leading to independence and have contested their unilateral right to seek independence. Pro-secession actors have appealed to democracy as the principle that legitimizes their aspiration to secession regardless the will and law of the original member state. According to these, within the EU, a democratic process (whether a referendum or an election with plebiscitary tones) legitimizes unilateral independence and trumps the need of a pre-existing legal and political foundation of the process and the right itself. A large sector of Catalan pro-independence scholarship has articulated this view arguing that democratic values in article 2 TEU provide enough normative framing to mitigate contrary political/legal considerations concerning unilateral secession. Specifically, these authors construct their argument in reference to democracy. Drawing inspiration on Edward's (2013) thesis on the normative obligation for the EU to accept internal enlargement because of democratic reasons (see below), this line of reasoning sustains that, in compliance with the democratic principles of article 2, the EU is obliged to respect and defend the democratic decisions adopted by a majority of citizens in a part of its territory and this includes a process of secession which results from democratic processes (González Bondía 2014a, 2014b, 123).

The legitimating force of democratic decisions serves to make unilateral (democratic) secession prevail over alternative considerations. Thus, proponents of the legitimacy of unilateral secession because of its democratic foundation argue that if democracy conflicts with other EU values (for instance, rule of law) which could be opposed to democratic unilateral

Table 1. Cases of simultaneous withdrawal and secession.

	Withdrawal	
Consent	No	Yes
No	Catalonia 2014 Flanders? A	Scotland (post 2016)? C
Yes	Scotland 2014 B	Scotland (post 2016)? D

secession, this clash of values does not cancel or even question those decisions. The conflict between democracy and rule of law requires arbitration and, according to those authors, prevalence of rule of law over the majority principle cannot be assumed. In this line, these proponents (González Bondía 2014a, 2014b; Ridao Martín 2014; Ridao and González Bondía 2014) recognize a potential contradiction between the recognition by the EU Treaties of the democratic values in Article 2 TEU and the duty to respect the 'fundamental structures, political and constitutional' of the Member States, 'including ensuring the territorial integrity of the State' under Article 4(2) of the same Treaty. 'Faced with this apparent antinomy a reasonable doubt arises on what the EU should do in a situation in which it would have to abide by the obligations arising from both provisions and where that would not be possible'. They conclude that the Commission could bring proceedings against a Member State before the European Court of Justice for breach of the Treaties under the infringement procedure (i.e. Article 258 TFEU) if that State ignores the fundamental rights of the EU citizens. This reasoning makes the ECJ the interpreter of an internal constitutional settlement by calling it to adjudicate between the alleged democratic character of secession and its simultaneous breach with the rule of law of the member state. But this interpretation only holds on a very vast interpretation of the notion of member states obligations under the treaties to include adjudicating on domestic constitutional issues. Besides, this reasoning also assumes the role of the Court as enforcer of *domestic* democratic decisions. The absurdity of this position could be clearly appreciated through an analogy: would anyone claim for a similar role for the ECJ as enforcer of democratic decisions in the case of the 2015 Greek referendum on the bailout agreement? Clearly no and the same response applies to the suggestion that the Court acts to enforce a democratic decision to secede.

3.2. No withdrawal of original member state and consent for secession (Scotland 2014)

The process that led to the 2014 Scottish independence referendum illustrates the second scenario. Original state consent's removes objections on the legitimacy of secession and, in fact, none contested the right of Scottish citizens to decide on their independence given the agreement with the UK government. In this case, the discussion becomes one about the determination of the effects and consequences of the decision, specifically, the form of obtaining EU membership. The then Scottish First Minister, Alex Salmond rejected objections alleging that separation from the UK would entail exclusion from the EU. Instead, he claimed that the citizens of Scotland, as European citizens, had a democratic right to stay in the Union even if they chose to establish an independent State. O'Neill (2011) elaborated and expanded this political statement from a legal perspective, on the basis of the case law of the EU Court of Justice on the fundamental status of European citizenship. According to him, the decision of the citizens on becoming independent extends to the simultaneous maintenance of their EU citizenship status, so the decision is simultaneously on becoming independent and retaining EU membership privileges. And, in order to acquire a higher moral ground, the case for secession and simultaneous accession is often presented under the (very negative) connotations of the opposite situation: thus, Edward (2013) speaks of EU 'dispossession', Avery (2014) refers to 'automatic ejection', and others (e.g. Kenealy and MacLennan 2014) refer to 'expulsion', arguing that this may be at odds with the general principles and spirit of the EU Treaties. Nicolaidis (2014) argues that a choice (leaving the EU) should not be inferred from

another choice (leaving the UK) and that exclusion followed by uncertainty on membership would not be a tenable option although she does not elaborate on the normative arguments behind her position. The Catalan proponents of independence echo the same argument: the EU has to accept the condition of member of new states and guarantee its membership from the very moment of its constitution (González Bondía 2014a, 123).

In brief, the argument holds that decisions on secession result from democratic processes, and hence that any act of the EU, its member states or its institutions contrary or aloof to the purported effects of such a decision would be a violation of the EU's own values. Thus, Edward (2013) argues that EU doctrine (i.e. automatic non-application of EU law to the seceding territory) means that EU law does not recognize the democratic right of the inhabitants of one part of a member state to dissolve their constitutional union with another part, unless they are prepared to accept automatic loss of the rights they have acquired as citizens of the EU. This argument links democratic decision-making with preservation of EU citizenship rights, and the latter with making a claim for continued membership which other authors (Shaw 2017) have questioned. Walker (2014) forcefully argues that the principles contained in the Preamble of the TEU should commit the EU to full acceptance of such a democratic decision.

In practical, specific, terms, proponents of this line convert the effects of a democratic decision into an obligation for the EU to 'negotiate' with a seceding territory, appealing to a combination of articles 2, 4, 20 and 50 (Tierney 2013; Avery 2014). Thus, Tierney and Boyle (2014) argue that the principle of democracy in article 2, combined with an expressed wish to remain in the EU, creates an even clearer basis for establishing an obligation for the EU to negotiate with a seceding territory. They add that the salience of the concept of citizenship for the EU, along with the growing emphasis on the protection of citizens' rights, suggests that there would be a prima facie duty on EU institutions and Member States to negotiate Scottish accession to the EU in the event of a 'Yes' vote, in order to ensure the continuation of existing rights held by citizens and other private persons as currently deriving from EU law (Tierney and Boyle 2014).

3.3. *Withdrawal and secession with (Case D) or without (case B) consent (Scotland post 2016)*

These two scenarios result at this moment relevant only for the UK and Scotland (with eventual implications for Wales and Northern Ireland) following the Brexit process. The final outcome of the combined withdrawal cum secession process is not yet clear enough: UK withdrawal has not yet happened and the Scottish has demanded to hold an independence referendum in 2018 or 2019. Citing the concerns raised by UK government approach, the Scottish government argued that the rationale for a second independence referendum was to be found in the *significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will*.[2] Initially, the hypothetical approach followed by the Scottish government seems to be a case 'D' type; i.e. withdrawal and consent for secession, in so far as the government has committed itself to find an amicable agreement with the UK government.

Crucially, timing determines two possible different situations. Secession could happen between the notification of withdrawal of 27 March 2017 and effective withdrawal, since the final withdrawal moment could be postponed as long as the European Council so votes

unanimously. In this enlarged time span, the reversibility of article 50 becomes crucial (Closa 2017); it could be envisaged, for instance, a change in government in which the new majority opposes exit. If secession happened in this interim period, it could be argued that the Scottish would have decided to leave the UK on the premise that the latter would withdraw from the EU – but that if the UK decided to remain in the end, then, the decision to secede from the UK would lost its pseudo-remedial character. Moreover, until withdrawal is final, the duty of loyal cooperation bounds the EU and the withdrawing member state towards each other. This means that the EU is legally prevented to directly engage with the seceding territory against the will and interest of the withdrawing state and, moreover, the duty for the EU to respect territorial integrity of member states, as specified in article 4.2 also applies. The last possible scenario in relation to timing presents the least problematic one: secession only happens after the UK has effectively withdrawn from the EU.

4. EU values inspired responses

4.1. Non remedial, non-consented democratic secession within the EU (democracy as majority and its axiological neutrality among EU values)

The thesis favouring automatic EU accession of a seceding territory, even on those occasions when the agreement of the original member state for secession is lacking, appeals to the democratic character of the decision pronounced by *a majority* within the seceding territory via a referendum or a so-called plebiscitary election which excludes the larger citizenry of the original member state) . Pro-independence actors in Catalonia have not explicitly identified what a suitable majority for such a decision would be; thus, unqualified majority from 50% +1 of the votes to unanimity fills the whole spectrum of the decision.

But the sheer reference to the mere majority (dominant in Catalan pro-independence discourse) builds a very thin notion of democracy associated with the majoritarian principle. By this logic, if a majority of voters of a pre-defined body so decides upon something, that decision – even such a serious one as to become independent – is thereby legitimate. This conception echoes Thomas Paine's and Jefferson's conception of democracy as not bounding future generations: existing law, understood as rule of law and/or constitutionalism, cannot limit the sovereign will of the people expressed through democratic means. Madison [1790] 1981 already criticized this notion as a cause of anarchy and economic collapse and later on Arendt rejected it as 'too fantastic … to be taken seriously' (Arendt 1990, 234).

This purely majoritarian conception of democracy somehow contradicts the predominant one in Europe and the EU. After the horrendous experiences of Nazi Germany, a richer conception of democracy tightly linked to other values, such as respect for fundamental human rights and observance of the rule of law, making the former dependent on the latter. Consequently, democracy amounts to much more than mere aggregation of the preferences of the majority: democratic decisions must respect fundamental human rights and obey the rule of law. These contextual requirements are particularly stringent in the EU, which expects the legal framework of any given member state to conform to the rule of law principle as a basic condition of EU membership. Thus, the Commission, in its 2014 Communication on the rule of law argued that the rule of law is the backbone of any modern constitutional democracy and, hence, respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental

rights without respect for the rule of law and vice versa.[3] The value of the argument stands, regardless of the feebleness of EU actions in this regard. A (majoritarian) unilateral process, which did not respect the existing framework of the rule of law in a given member state, would in fact violate article 2 of TEU. This article does not just advocate democratic rights, but also makes clear that the rule of law is an integral part of the value schema to which every member state must conform. Unilateral secession would therefore be radically illegitimate on any plausible interpretation of this provision. Indeed, even some of those defending secession concede that *rule of law is one of the values of the Union, and we all ought to be troubled by a too-casual disregard for the prevailing constitutional and legal order* (Waters 2016). Certainly, the meaning of 'rule of law' may be disputed but even in its shallower conception, it involves respect for existing legality and this obligation cannot merely by-passed by creating a new tailor-made legality.

In fact, EU policy towards secession in non-member states has pivoted in practice on the principle of the rule of law (understood as legality) rather than the majoritarian principle. Thus, the EU has inquired firstly on the constitutional validity of the process (i.e. a legality control) in cases of newly gained statehood in Europe. In this vein, the EU accepted Montenegrin independence since it resulted from the valid provisions in the constitution of the Union of States of Serbia and Montenegro and the validly enacted constitution of Montenegro. On the other hand, while the Kosovan bid for independence had a strong remedial character, the original state (i.e. Serbia) did not accepted it and this led a number of EU member states (Cyprus, Greece, Romania, Slovakia and Spain) to refuse recognizing the new state. As a consequence of these differences, Kosovo (in contrast to Montenegro) is not an official candidate for accession. In the case of Crimea, the European Council declared in March 2014 that it did not recognize the illegal referendum on the incorporation of the territory into the Russian Federation, since it clearly violated the Ukrainian Constitution.

4.2. Consented democratic secession and EU accession (no obligation for third parties to take into account democratic decisions)

Case B (i.e. Scotland in 2014) arguments face critiques concerning the derivation of an obligation for third parties (i.e. the EU) of assuming the consequences of the democratic decision taken by the seceding territory. More precisely, the argument sustains that a democratic decision on secession from a territory already enjoying the benefits of membership as part of a member state should also logically enjoy the benefits of automatic membership or, at least, a seamless transition. This will avoid the specific requirements of the accession process for which article 49 requires fulfilling conditions, a negotiation process and unanimity of all member states. The narrative on 'dispossession'; 'ejection' or 'deprivation' mentioned above aims at creating a situation in which the EU and its member states are put in the position of being morally obliged to assume the consequences that such a decision externalizes onto them; that is, to uncritically accept and assume the consequences that those taking such a democratic decision impose unilaterally upon third parties. At its extreme formulation, the obligation is to accept the new state as an EU member and in its softer formulation, the obligation to negotiate membership in a specific manner.

The obligation to automatically accept a new member state is simply not credible but the softer version of the obligation to negotiate deserves a critique. Certainly, a duty to negotiate on good faith exists for the EU: the new state would be a European one and, hence,

it will be entitled to EU membership, but this duty may not be enough (Kenealy and MacLennan 2014) in order to secure a seamless transition. Commitment to negotiate does not secure, by itself, a positive result as the never-ending negotiations with Turkey show. Alternatively, the argument in favour of the automatic accession 'right' of the seceding territory and the EU's parallel obligation to satisfy that right seeks also to create a kind of 'assurance' on the terms of accession. An implicit but seldom stated concern refers to the possible veto by an existing member state and Spain is usually singled out in this connection because of the alleged fears of contagion on its own territories with independence ambitions. In this line, Nicolaidis (2014) argues that a Spanish anti-Scottish veto would be against the interest of member states and this could not be justified although she does not expand her argument. Procedurally, whether accession happened under the specific mechanisms for this (i.e. article 49) or by means of the procedure for the reform of the treaties (article 48), the Treaty requires unanimity and this legitimately entitles any member state to veto. Now, whether a veto is contrary to the interests of member states is a question to elucidate empirically in each case, not a normative a priori. Beyond that, the essence of unanimity (veto) resides in the recognition of the sovereign capacity of each member state to determine (freely) what considers a vital interest such as, for instance, the Greek governments' rejection to open accession talks with Macedonia because of the disputes on the name of the country. Under this assumption, arguments seeking an assurance on the final result of the negotiations seek to pre-empt the potential clash of legitimate as opposed to merely democratic decisions: demooi in other jurisdictions may take democratic decisions that precisely oppose the objective of simultaneous membership of a seceding territory. Let's remember that the French President subjected UK accession to an approval referendum (1972) or that the Dutch voters rejected the agreement with Ukraine (2016). Ironically, those advocating the acquisition of sovereignty by a territory commence by requesting other states to limit their own.

Normative foundations for the claim of the obligation of other states to accept the consequence of the decision (i.e. seamless transition or automatic accession) seem thin. Generally speaking, democratic theory does not ascribe an obligation to those outside the demos to accept or assume the consequences of a decision taken within the demos. In order to respect decisions taken within a democratic polity, outsiders to that polity must recognize those decisions as legitimate and authoritative for and within the demos in question. For instance, outsiders must accept as legitimate the democratic election of a new government in a given country. But outside recognition of the legitimacy and authority of such decisions within the demos does not mean that demos can project the effects of its decisions, however democratic, on to third parties. Truly, democracies sometimes impose externalities (i.e. unintended consequences) on other states whose interests they do not factor into their decision-making (Maduro 2012). But these cannot be considered fair and just: actively and purposively seeking to impose the effects of democratic decision-making on third parties goes beyond 'unintended consequences' and amplifies the perception of unfairness and injustice. Unless international law regulates the conditions for the acceptance of these externalities, no argument provides a convincing response as to why other states ought to obey these decisions. Moreover, imposing decisions on third parties contradicts precisely one of the inspirations behind the EU project: that of containing externalities and factoring third parties interests' into national-level decision-making (Maduro 2012, 50; Somek 2010a, 2010b).

Pragmatic considerations add weight to these normative arguments. From the EU's point of view, the question is whether it is possible or desirable for the EU and its member states

to automatically grant membership to a new state without any interim period of non-membership. Appealing to the democratic virtues of a territory's decision to secede does not provide a response to this question. The EU has built an enlargement policy around the set of the Copenhagen principles that, together with the geographical delimitation of article 49 (i.e. being 'European'), define its external borders. The function of these procedures is to secure compliance with EU principles and values which cannot be assumed and requires checking (Hillion 2017). Conditionality on accession permits also the EU to regulate its self-preservation: adding just a new member to the Union transforms it. Given that simultaneous secession and accession will add also a transformative effect, linking secession to automatic accession would create an unjustified bypass of EU instruments serving its own goals.

Put simply, in so far as it enlarges EU membership, the decision to secede affects institutional composition, decision-making and policy. The tendency to dismiss these issues, as if they require only a mechanical adjustment of the composition of institutions, cannot be upheld. On the contrary, the range of issues involved is large and by no means irrelevant. It involves the status of the new state in relation to the adoption of the euro (as raised in the Scottish debate); the adjustment in the composition of the Commission, which was shown to be rather more than a minor issue by the transitory solution adopted in light of the demands made by the Irish government in order to secure ratification of the Lisbon Treaty[4] and the redistribution of seats in the European Parliament and votes in the Council, which affects the relative distribution of power among states and coalitions of states. Accession has implications for EU internal differentiation as to the adoption of certain policies (mainly associated with increased membership) and it involves re-settlement of distributive and re-distributive issues. Moreover, the secession process affects the rights of the citizens living in the seceding territory, and not only those holding the nationality of the original state: equally relevant is the question of the rights and conditions of citizens holding the nationality of a different member state, whose position – and the effects of secession on them – are unknown.

In summary, recognition of democracy does not mean that a polity can project upon third parties the effects of its democratic decisions. In the face of a decision on (consensual/agreed) independence, the EU can only take note of that decision; it should not necessarily feel bound by its effects. Moreover, from the EU member states' point of view, the question is whether it is possible or desirable for them to proceed automatically to grant membership to a new state without any interim period of non-membership. Appealing to the democratic virtues of a territory's decision to secede does not respond this question.

An exception among the arguments raised by proponents of the right and EU obligation to abide to a seamless transition or automatic accession concerns the eventual deprivation of the rights of EU citizenship for citizens of a newly independent territory if they did not retain EU membership. Certainly, democratic decisions (such as going independent) may have negative consequences for those taking them. Arguing that others should take care of the effects for those who have made this decision seems incoherent with the very notion of self-determination inherent to sovereignty. In any case, it could be argued that the EU has a moral (and even *legal* duty) to protect EU citizens even if they take decisions which implicitly mean depriving themselves of such a status. Importantly, the EU obligation to care for the citizens of a seceding territory does not derive from a-critically accepting those citizens' democratic decisions but they derive from EU values and principles themselves. Equally, none of EU values or principles could be interpreted as instruments to offset precisely the effects of sovereign democratic decisions. Rather, in this situation, the EU should arbiter

remedial mechanisms which could (and should) be adopted by means of discretionary EU legislation. This could even secure access to some EU programs and policies (such as Erasmus, for instance). But granting these remedial mechanisms to citizens does not mean recognizing the privileges of statehood in the EU (for instance, representation in institutions or exemptions from certain policies such as Schengen or single currency). Certainly, the EU, given the past links of the territory with the Union, is bound to fast track and smooth as much as possible the former membership negotiations but within existing legal procedures. Equally certain, politics may trump legality and a different solution may prevail but not because this find a solid normative construction backing it.

4.3. Withdrawal from the EU and consent for secession (with simultaneous EU membership)

This case 'D' situation partially modifies the scenario of case B. Consent grants legitimacy to the decision to secede and, simultaneously, seek EU membership. Whilst this resembles the 2014 Scottish case, the differentiating factor refers to whether the context of withdrawal modifies the *effects and consequences* of the decision to secede. As mentioned, this situation can be described as depriving of access to the single market and, more importantly, of most EU rights to the citizens of the withdrawing state. The scenario of renunciation to the single market and freedom of movement waved by the UK government (the so-called 'Hard Brexit' approach) makes this situation more probable. In this context, accession to the EU of the newly independent territory may have a *pseudo-remedial* character (loss of EU rights inherent to democratic decisions should not be equated to the situations in which individuals are despotically deprived of fundamental rights) both for Scottish and EU citizens residing in Scotland. Accessions also has the effect of offsetting some of the externalities that withdrawal imposes on EU citizens across the continent. Since secession seeks eminently to secure permanence in the Union, this circumstance nuances the absence of obligation for the EU which characterized scenario B. Appealing to EU values, it could be argued that the EU should provide mechanisms to alleviate the effects of withdrawal for these seceding territories. Chalmers and Menon (2016) have suggested an alternative which neutralizes the reasons for a pseudo-remedial secession at the same time that falls short of full membership: the UK would not repeal EU laws insofar as the affect Scotland. The Scottish authorities would secure the full application of EU laws (including free movement of persons and fisheries) and the territory would contribute to the EU Budget. Institutionally, the Scottish government would have a seat on the Committee of Permanent Representatives, although these authors do not extent representation to other EU bodies (i.e. Commission and EP). This proposal does not take into account practical problems (e.g. how to manage the internal border between the UK and Scotland in relation to the free movement of goods services and persons or the jurisdiction of ECJ in relation to the – post withdrawal- UK legal order) and, additionally, a hypothetical settlement might involve issues which may crop up later on. But if technically feasible and politically agreed, with all mechanisms preventing free-riding from the authorities and citizens in the territory, this form of associated territories' status could be explored. Alternatively, Scotland could aim for independence *because of* the combined effect of UK withdrawal and an unsatisfactory settlement in UK negotiations with the EU. In this case, secession becomes pseudo-remedial (in the sense mentioned above) and it may call for a more expedient accession process. Whilst avoiding article 49 seems difficult, once the

withdrawal process is completed and UK-Scottish negotiations on independence commence, the EU could signal a speedier negotiation process. On the assumption that consent exist, withdrawal transforms the case for accession into a more normatively acceptable one.

4.4. Withdrawal from the Union and non-consented secession

The proper EU normative position results particularly tricky in this case 'C' scenario. Lack of consent brings back the criticism raised against case A (i.e. democratic decisions must respect the rule of law) assuming that the withdrawing state remains a democratic, law-abiding one. The approach followed on Montenegro, Kosovo and Crimea may well inspire the EU position: should the EU encourage secession in any form in non-remedial situations, this would contradict the very values it cherishes (Weiler 2017). However, on the other hand, this scenario shares with the previous one (withdrawal and consent for secession) its pseudo-remedial character since secession seeks to offset the effects of withdrawal. Can the EU reward unilateral secession decisions in this hypothetical case? Even accepting the pseudo-remedial character of this situation, unilateral secession seems still not acceptable under the prism of EU law/values. As Chris Lord writes in this volume, a demoi-cratic exit from the EU should not jeopardize the withdrawing state capacity for self-government. And stimulating secession of a territory of a withdrawing member state, even in passive form, may be interpreted as such a threat. The circumstances of unilateralism barely nuance this basic normative assumption: even if the final withdrawal agreement is detrimental for the withdrawing state and the seceding territory, the normative grounds to claim a right to EU membership in the absence of consent from the original state do not exist.

5. Conclusions

This paper has discussed the contestation of the boundaries (borders) of existing member states and how this affects the internal demarcation of boundaries within the EU. Additionally, contestation of belonging to the EU involved in the Brexit process adds complexity by including also the issue of re-drawing EU external borders. Both in secession and withdrawal, disputes on the access or renunciation to the goods provided by the EU occupy a central place. EU values, even though themselves to dispute and contestation, provide, nevertheless enough normative content to orientate EU position in cases of secession from a current member state.

Consent and withdrawal of the original state from the EU establish a clear difference among the circumstances in which secession of a territory from a current member state and its immediate membership of the Union has been argued. Using these two factors to create a classification, four possible cases emerge. EU values provide enough normativity to discuss the implications of (hypothetical) EU policy in relation to the new territories gaining statehood and seeking Union membership. Among these cases, consented secessions in the case of withdrawal of the original member state from the Union provide the more solid grounds for an EU policy that reaches beyond the strict legal construction of the ordinary accession procedure (i.e. article 49) because of its pseudo-remedial character. Consented secession from a current member state does not have that pseudo-remedial character although it calls for remedial instruments for protecting EU citizens' rights in the seceding territory albeit falling short of accommodating the new state as a full member state. Non consented secessions (assuming that the state either as a member of a withdrawn one respect democracy,

rule of law and fundamental rights) seems incompatible with EU values. Even though pragmatic considerations may inform EU policy on specific cases, EU values contain sufficient normative indications as to suggest proper courses of action.

Notes

1. Nicola Sturgeon's statement on Article 50 court case intervention, 8 November 2016 Available at: http://news.gov.scot/speeches-and-briefings/first-ministers-press-conference-1 Accessed on 21st November 2016.
2. Ibidem page 1.
3. European Commission (2014) Communication from the Commission to the European Parliament and the Council *A new EU Framework to strengthen the Rule of Law* Brussels, 11.3.2014 COM(2014) 158 final.
4. The Lisbon Treaty foresaw initially a reduction on the number of Commissioners and not all member states would have the right to appoint one Commissioner. Following the negative result in the Irish ratification referendum (2008), the European Council decided come back to the formula of one Commissioner per member state.

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