# The temporal paradox of regions in the EU seeking independence: contraction and fragmentation versus widening and deepening?

## 1. Introduction

This article focuses on the hypothetical issue of a newly independent state (hereinafter: NIS) aspiring European Union (hereinafter: EU) membership, where that state used to be a regional or subnational entity (hereinafter: region) of an existing state already party to the EU Treaties, before the secession of the region in question. It should be noted that the vantage point of this article, the independence of such a region is already quite contentious in itself given the question whether such a secession would be legal under national constitutional and international law. Nevertheless the latter questions will not be dealt with *in extenso* here. The main question of this article may for a large part be hypothetical, but is not inconceivable either as there exist several regional autonomist or independist movements and political parties within the current EU Member States.[[1]](#footnote-1) While some of these political parties have not (yet) expressed a wish to become fully independent from the national state, others have. Curiously, some of the regional political parties that (ultimately) plead for a secession from the national state also plead for continued EU membership of their region (Keating, 2004, 369-370).[[2]](#footnote-2) This leads to the question of how such a move, from being included in the EU as subnational entity of an existing EU Member State to being included in the EU as a Member State in its own right would work out under the EU Treaties.

This is not a straightforward question as the dominant logic in the EU Treaties is one of widening and deepening, only through the amendments brought by the Lisbon Treaty has the possibility of contraction, *i*.*e*. a contraction in the scope *ratione loci* of EU law, of the Union been explicitly mentioned. The notion of fragmentation, i.e. process in which the territorial scope of application of EU law remains constant, but the EU itself being made up of more entities, is completely absent from the Treaties. This should not come as a surprise since fragmentation relates difficultly with the notion of ‘ever closer union’ enshrined in the preamble to the Treaty on the European Union and the very core of European integration. In this sense fragmentation is different from contraction. Contraction simply runs counter to an ever closer union, but this is not necessarily the case for fragmentation if an entity integrated in the EU falls apart into e.g. two entities which retain the same level of integration. In such a case the new entities may still make progress towards an ever closer union, now not only with previously existing entities in the EU framework but also between themselves. The uneasiness of the relation then lies in the fact that these two entities would have rejected a (close) bilateral union but do accept an ever closer multilateral union. In so far as necessary we should point out that the purpose of this contribution is not to solve the numerous issues we raise, but rather to be contentious and provocative in making explicit the different legal problems which would arise if a basic scenario such as the one spelled out above would materialise. For some of these problems we will then put forward our own assessment, without however claimin to hold the absolute truth in a field where legal arguments may be trumped by politics.

The case of Flanders, and the electoral victories of the Nieuw-Vlaamse Alliantie (N-VA) was the initial inspiration for this contribution and will be referred to in the text to illustrate certain points. As was mentioned above there are also other regionalist movements in the EU, some of which are also highly relevant for this contribution, such as the case of Scotland and the Scottish National Party (SNP) which also strives for an independent Scotland as Member State of the EU. The need to pinpoint the legal problems in our hypothetical scenario are more pressing for Scotland than for Flanders, in view of the planned referendum on the former’s independence from the UK in the autumn of 2014. Moreover, there is still no majority within the Flemish population which supports a secession from Belgium.[[3]](#footnote-3)

Flanders and Scotland were the initial inspiration for this contribution. In both of these regions a strong political party has risen, which has set the independence of the region as well as the membership of the EU as (part of) their main political objectives. In Flanders, the separatist N-VA has risen to prominence since the 2009 regional and European elections and has become the biggest Flemish party in the 2010 federal elections. In Scotland the separatist SNP became the biggest party in the Scottish Parliament in 2007, gaining an absolute majority in 2011.

## 2. The right to self-determination

Although the starting point of this article is the independence of a European region, formerly part of the territory of an EU Member State, the question whether such a secession is legally possible cannot be totally ignored either. Yet this question in itself is already a major issue meriting a separate contribution of its own. Therefore it will only be touched upon briefly here.

Can regional peoples living in an EU Member State justify their secession from that state based on the principle of self-determination of peoples under international law? According to the political rhetorics of regionalists, this is the case. Indeed the principle of self-determination of peoples has been firmly established in international law as it is recognised in Article 1 of the UN Charter and defined as ‘an essential principle of contemporary international law’ by the International Court of Justice.[[4]](#footnote-4) But here some of the political discourse also start diverging from legal consensus. The right to self-determination is a collective right and Scharf explains that in order for a group to be entitled to this right it firstly needs a sufficient focus of identity to constitute a people (2003, 379). The traditional test is allegedly two-pronged where in the first part an objective assessment of the group is made and in a second part the supposedly more subjective question whether the members of the group perceive themselves as a people is explored. Whether this test is truly two-pronged may be doubted. Through *hineinterpretierung* any group that sees itself as ‘a people’ will probably be able to produce ‘objective proof’ of its existence as a people.

Therefore the requirement for a group to constitute ‘a people’ will not be that problematic. What will be is the fact that self-determination does not necessarily mean a people has the right to form its own independent state, which is called external self-determination. Because of the principles of state sovereignty and territorial integrity, preference is given to the exercise of the right to self-determination through internal self-determination, within the mother state. For a people that has not been colonised, secession is then only possible when that group is being collectively denied civil and political rights and when it is subject to egregious abuses by the mother state (Scharf, 2003, 381), *i*.*e*. when internal self-determination has proven to be an unviable option. In such cases the group has a ‘remedial’ right to secession. Given the political and human rights requirements which states have to meet to be eligible for EU membership, it is unlikely for a subnational group in an EU Member State to be in such a position. From an international law point of view it will therefore be hard for such groups to lay claim to a right to secession.

In the well-known Quebec case before the Canadian Supreme Court in which it had to rule on the possibility of a unilateral secession by that province, the same issue had to be resolved. The court ruled that the Quebecers were not a colonial people, nor were they oppressed, but it equally acknowledged that even if there was no right to unilateral secession under international law, the success of such an attempt would ultimately depend on the international recognition, of the resulting *de facto* secession, by the international community.[[5]](#footnote-5) As Sterio notes, whether a people will ultimately have a meaningful right to (external) self-determination depends on whether it has garnered the support of the most powerful states (2010, 140), more than whether its situation meets certain objective requirements.

From a national constitutional point of view, secession is problematic as well. Again one could refer to the ruling of the Canadian Supreme Court, in which it laid down that Quebec could not unilaterally secede if this meant the terms of the secession would be dictated by Quebec to the other parties in the Canadian federation, regardless of how strong a majority of Quebecers favouring secession would be. But it also clarified that if such a majority would be found, it would constitute a signal which could not be ignored by the other provinces and the federal Canadian government. Both sides would then have to negotiate on the act and terms of secession.[[6]](#footnote-6) A reasoning similar to the one set out by the Canadian Supreme Court could be applied to our present case as well. As Mnookin and Verbeke point out, the Belgian Constitution does not allow unilateral secession and the Belgian Constitutional Court may find a Flemish act declaring Flanders’ independence in breach with article 143 § 1 of the Constitution, which lays down the principle of federal loyalty (2009, 180).[[7]](#footnote-7)

As a result Flanders would be obliged to negotiate a secession with the other entities in Belgium. However, a negotiated secession should not be seen as an additional obstacle since in any case only such a succession would be acceptable to the international community and it would likewise help the new state receive international recognition. Still, recognition would not be guaranteed. Flanders’ independence would create a precedent for other regions. Furthermore, Flanders is at the very core of Europe and its territory completely surrounds the territory of Brussels, which is the seat of several international organisations and especially several institutions of the EU. A negotiated solution to the issue of Brussels and its periphery would therefore have to be found. This would appear to be so even if the Badinter Borders Principle would be invoked. This principle states that the former internal borders of a state become the international borders of the states arising out of a split up of the former (Arbitration Committee, 1992, 1500). It is not clear however whether the principle only applies in cases of dissolution of a state or also in cases of secession and whether it actually is a rule of international law or not (Radan, 2000, 54-57).

## 3. Independent Regions as EU Member States

Taking the independent region as our true vantage point, the next question is how the newly independent region’s relationship with the EU would be. Could it remain a member? Or would it have to re-apply for membership? These issues will be addressed in the following part.

First it should be noted that there are a number of scenarios preceding the existence of a NIS. Thus, the predecessor state may continue to exist as the only successor state, the NIS making *tabula rasa*. Because of the international interdependence in a globalised world, it is noted that the international community is moving towards a presumption of continuity as regards multilateral obligations, also for the secessionist NIS.[[8]](#footnote-8) On the other hand the predecessor state may also cease existing, as happened in the case of Czechoslovakia, with the NIS(s) succeeding to the predecessor or making *tabula rasa*. In what follows it will be assumed that the Member State from which a region secedes continues to exist.

### 3.1 Continued Membership of the EU through International Law

Some EU-minded regionalists might argue that the NIS would simply remain an EU Member State, without a ‘gap’ in membership, because of the new state succeeding to the obligation of the predecessor state, Member State of the EU. The issue of state succession in general and state succession in respect of membership of international organisations is a contentious and moving subject. In order not to lose focus we refer to other contributions on this general problem (Majzub, 1999; Eiseman & Kosekiennieme, 2000; Bühler, 2001), instead going straight to the core of the problem at hand, *i*.*e*. how continued membership of the EU would be possible under international law. Article 34 of the Vienna convention on succession of states in respect of treaties[[9]](#footnote-9) indeed lays down a presumption of continuity. As a result, in respect of some of Belgium’s international obligations, Flanders would probably take on further responsibility after it acquired its independence. However, and keeping things brief, this is not convincing in the case of the obligations (and privileges) under the EU Treaties as Article 4 of the Convention equally provides:

*The present Convention applies to the effects of a succession of States in respect of:*

1. *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 relevant rules of the organization;*

Therefore, international law ultimately refers the question back to the constituent instrument of the international organization in question. The international law commission remarked in this regard that international organisations take different forms and that if membership of an organisation, other than original membership, is subject to a formal process of admission, it is established practice in international law that a new state is not entitled automatically to become a party to the constituent treaty (1974, 177-178). This is very relevant to the EU which probably has the most stringent procedure for admission of all international organisations. Furthermore, the Court of Justice already in the beginning of the EU integration process remarked that by contrast to ordinary international treaties, the EU Treaties created their own legal order. Whether regions such as Flanders or Scotland could simply remain member of the EU, will therefore depend on EU law itself.

### 3.2 Continued membership of the EU under EU law

From a reading of the Treaties, continued membership of the EU seems impossible, since there is only one way for a state to become Member of the EU. All candidate countries have to go through the same procedure and have to meet the same basic requirements. The fact that a region was formerly part of a Member State does not mean it automatically meets all these requirements (*cf. infra*). Furthermore, an Accession Treaty is also necessary to make the necessary amendments to existing primary law as regards the decision-making process within the EU. Even if the accession negotiations could be finalised speedily there remains the requirement of a formal Treaty between the candidate state and the existing Member States.

Quite the contrary to being able to remain in the EU, it seems that a breakaway from the mother state, also means a breakaway from the EU, since any subnational entity that forms part of the EU does so by virtue of being an integral part of the national Member State. From the perspective of EU law, it is only this national Member State that exists. The fact that the regional entities making up this state, no matter how autonomous they may be under national public law, do not have special status under EU law is a recurring feature in the case law of the Court of Justice. In one of these cases, the Court even remarked that ‘[i]*t is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.*’[[10]](#footnote-10)

Although this statement was made in another context than the one at issue, the possibility for a region to become independent and yet remain part of the EU as a Member State in its own right, seems totally precluded by this observation of the Court and the dominant logic of its case law. Furthermore this is also confirmed by the European Commission’s answer to a parliamentary question by MEP Eluned Morgan, who queried about the precedential value of the Algerian case (*cf. infra*) for a division of a Member State following a sub-national entity’s independence and whether the region in question would be forced to leave the EU and have to renegotiate an accession treaty to get back in. The Commission replied that ‘*When a part of the territory of a Member State ceases to be a part of that state, e.g. because that territory becomes an independent state, the Treaties will no longer apply to that territory.* [Thus]*, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the Treaties would, from the day of its independence, not apply anymore on its territory*.’[[11]](#footnote-11)

*3.2.1 Historic precedents of widening without accession*

The only historic precedent of a territorial widening of the EU without there having been an accession in accordance with the Treaty provisions on accession of new Member States was the case of German reunification. The reunification posed a number of legal problems under constitutional, European and international law. The problems relating to international public law were largely resolved through the Treaty on the Final Settlement with Respect to Germany.[[12]](#footnote-12) From a constitutional point of view the Federal Democratic Republic simply absorbed the East-German *Länder.* This ‘internal’ solution to reunification under national constitutional law had its repercussions on the solution adopted at EEC level, since it allowed the institutions to take the position that the *de facto* enlargement was possible under the ‘moving treaty boundaries’ rule (Frowein, 1992, 157-159).[[13]](#footnote-13) But this was only the first of two issues which had to be solved in order to allow the integration of East Germany into the EEC. The other was the dramatic change to the post-WW II balance which had existed in Western Europe: the economic and demographic equilibrium between the Federal German Republic and France would cease to exist. An important consequence of this was the changes to the German representation in the EEC institutions which had become necessary. Following its increase of 30% in population, Germany had a strong case in demanding a greater say in the institutions. However, Germany chose to create goodwill amongst its EEC partners and did not pursue such an aggressive policy. Indeed, changing the votes in the Council or the membership of the Commission would have needed a Treaty change, but Germany also decided against demanding a bigger representation in the Parliament, which would have been possible even without a Treaty change, following Article 137 EEC (now Article 14 TEU) (Spence, 1993, 142-144).

However, this historic precedent of EU enlargement without a formal accession procedure is not such a useful precedent for independent regions wishing to remain within the EU after their independence. Even apart from the historic event of German unification, it should be noted that the absorption of East-Germany did not lead to a fragmentation of the EU, whereas Member States breaking up into different entities would. The only way for breakaway regions to rely on the German precedent would be to break away from one Member State, only to accede to another. Furthermore, the breakup of a Member State would require immediate changes to the Treaty provisions on national representation within the EU. In contrast with the German case, where the other Member States were glad to accept the Germany’s underrepresentation following its reunification.

### 3.3 Contraction of the EU

Because a breakaway region not only breaks away from its mother state but also from the EU, the legal framework for a contraction of the EU, *i*.*e*. a shrinkage in the scope *ratione loci* of EU law, will be looked at in the following section. Of course the central question in this article relates not to contraction but to fragmentation. Yet, following the above analysis both phenomena are linked. If a NIS indeed has to reapply for EU membership, then contraction forms an integral part of fragmentation.

Historically, there have been two cases of contraction of the EU. The first was the result of the Algerian secession from France in 1962, the second was Greenland’s decision to leave the EU in 1985. These cases of contraction raised a number of issues, which had to be dealt with in an ad hoc manner, since no framework for contraction existed at the time. Today, following the Lisbon Treaty, such a framework exists. As a result the Algerian and Greenlandic cases will not be dealt with, instead we will focus on the current procedure in Article 50 TEU.

*3.3.1 The situation post-Lisbon*

Article 50 TEU has made a withdrawal from the EU subject to a specific procedure, inspired by the Greenland case. This procedure could therefore also apply following a declaration of independence by a region of an EU Member state.

It is acknowledged that such an argument may be subject to critique since Article 50 TEU only deals with Member States wishing to withdraw from the Union whereas in the present case it would only be a region withdrawing from the Union. However such a critique only makes sense from a literal reading of the provisions of Article 50 TEU, whereas the present argument is more in line with the objective served by Article 50 TEU.

The true purpose of Article 50 TEU is not simply to regulate an exit of a Member State from the EU but to provide for a framework, catering for a shrinkage in the scope of application *ratione loci* of the Union *acquis*. In the absence of such a framework the scope of application of EU law might change from one day to the next, disrupting existing (economic) relations within the integrated internal market, without anything to follow up on this rupture. Economic operators and EU citizens would be confronted with the old existing barriers which 50 years of European integration had progressively done away with. Such a contraction already posed some problems when it happened in the early phases of European integration regarding peripheric regions. The effects and the ensuing problems of such a contraction, if it were to occur in the current state of integration, regarding a core (or less peripheric) region within the EU are hardly imaginable.

Article 50 TEU therefore deals with these scenarios of contraction and foresees a transitional period of two years in which the legal situation post-withdrawal needs to be agreed upon. The fact that a withdrawal cannot be stopped following this two year period even in absence of an agreement needs to be explained from the perspective of the *effet utile* of the possibility provided in Article 50 TEU. The reason why Article 50 TEU only refers to the withdrawal of Member States is then twofold. For one, only the Member States are the constituent entities of the EU within the EU legal order (cf. *supra*). Secondly if the Member States had acknowledged a possibility for sub-state entities to make use of the procedure of Article 50 TEU they would have undermined their own territorial integrity. Obviously such a possibility would be politically unacceptable. Still this does not alter the fact that Article 50 TEU provides a framework for the contraction of the EU, regardless whether this contraction is the result of an entire Member State exiting the EU or only part of that Member State.

From this it follows that if a region such as Flanders or Scotland would want to proclaim its independence it would need to start a procedure which would be analogous to the one provided for under Article 50 TEU by virtue of the hypothesis that a secession from the mother state implies a withdrawal from the EU (*cf. supra*).

### 3.4 (Re-) Applying for membership

This section will not analyse the EU accession procedure in detail, but will try to identify the legal problems that could arise during the accession procedure of a NIS which used to be a regional entity of an EU Member State. Due to the hypothetical character of this scenario, clear-cut legal solutions to these problems cannot be offered, especially considering that *ad hoc* political decisions may be formulated with the aim to circumvent these legal obstacles. Moreover, even though numerous problems might be raised, it is also unthinkable that these regional entities could be left out of the EU indefinitely.

*3.4.1 Meeting the Copenhagen Criteria*

The EU’s accession procedure is laid down in Article 49 TEU which, together with the conditions spelled out by the European Council, defines the political, legal, economic and procedural requirements which a country must fulfill to be eligible for EU membership. The non-Treaty based accession rules of the European Council are better known as the Copenhagen Criteria, named after the June 1993 European Council which defined the economic and political criteria for the Central and East European Countries and which gradually became standard accession criteria (Hillion, 2004, 16). It is only since the Lisbon Treaty that Article 49 TEU indirectly refers to the Copenhagen Criteria and the role of the European Council by adding that “[T]he conditions of eligibility agreed upon by the European Council shall be taken into account”. These conditions are not fixed and can be modified or extended by the European Council. Indeed, the Copenhagen Criteria were in a later stage supplemented and modified to take into account the specificity of the incoming Member States and to take account of the Union’s own stage in integration (cf*. infra*) (Inglis, 2010, 57). Because an exhaustive list of strictly defined accession criteria does not exist, as observed by the ECJ in *Mattheus* v. *Doego,*[[14]](#footnote-14) the EU institutions, especially the European Council, are “in a comfortable position” to define additional criteria (Maresceau, 2001, 10). Applying this to our hypothetical scenario, one could argue that the pragmatic approach of the European Council as regards accession conditions may result in new criteria, tailor-made for the applying NISs.

A former region of an EU Member State such as Flanders or Scotland would no doubt fulfill the Copenhagen Criteria more easily than the CEECs or the countries in the Western Balkans at the time of their application for EU membership. Therefore, the accession process could proceed rather swiftly, but this does not mean that Flanders or Scotland would be exempted from the accession criteria, nor that they would benefit from a ‘fast-track’ procedure. The latter was rejected by European Commissioner for enlargement Füle in relation to Iceland’s EU-membership application (Füle, 2010), even though Iceland has already adopted a large part of the internal market *acquis* as a member of the European Economic Area (EEA) and participates in EU decision-making. In the following paragraphs, the most problematic issues will therefore be highlighted.

Compliance with the Copenhagen political criteria is a prerequisite for opening any accession negotiations, while the other criteria must be assessed “in a forward-looking, dynamic way”.[[15]](#footnote-15) The political Copenhagen Criteria dictate that a candidate country must achieve “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”.[[16]](#footnote-16) Especially the reference to minorities may prove itself be a thorny issue, although it was inserted to guarantee the rights of the various minority groups in the applying CEECs. If a region which separates from its mother state and applies for EU membership, this would add a new dimension to ‘minorities’ condition. In the Flemish case for example, what rights would French speaking people who are living in Flanders have? This is not just a hypothetical issue. For example, up until this day, the Flemish government refuses to ratify the Council of Europe’s Framework Convention for the protection of National minorities (FCNM)[[17]](#footnote-17) following its fears that this could lead to additional rights for the francophones in Flanders and that this would subvert the fragile institutional and constitutional balance between the two main linguistic communities in Belgium.[[18]](#footnote-18)

At the EU level however, the implementation of the FCNM is one of the minimum standards put forward by the European Commission to monitor the minority rights in applicant countries (Van Elsuwege, 2008, 208). Following its application, Iceland was indeed urged by the European Commission to ratify the FCNM (European Commission, 2011, 81).[[19]](#footnote-19) This does not mean that the ratification of the FCNM would be a *conditio sine qua* *non* for Flemish EU membership. As Van Elsuwege notes, the European Court of Justice in its case law has not invoked the FCNM –in contrast to the European Convention on Human rights or the International Covenant on Civil and Political Rights-, neither did it form a specific source for the drafting of the Charter of Fundamental Rights of the European Union (2008, 209). In addition, although Latvia was also urged to ratify the FCNM during its pre-accession process, it joined the EU without doing so.[[20]](#footnote-20)

The ‘good neighbourly relations’ criterion which was added to the Copenhagen Criteria at the 1994 Essen European Council, is another issue which should be highlighted. ‘Good neighbourly relations’ implies that any border disputes that could result from a secession would need to be settled. However, in the past, non-compliance of the ‘good neighbourly’ condition has not automatically impeded a candidate’s accession bid. The EU approach towards Cyprus for instance illustrates the flexibility of this criterion as the EU was enlarged only with the Greek Cypriot part of the island, despite the EU’s support for the reunification of the entire island in view of the 2004 enlargement.[[21]](#footnote-21) The case of Flanders would be quite different since its neighbours would be EU Member States which could block the accession process, much like Croatia found itself in following its border dispute with Slovenia.

Lastly the economic criteria (*i*.*e*. “*the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union*”) and the legal criteria (*i*.*e*. the “*ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union*”) would probably be less problematic for regions such as Flanders and Scotland, since they have been dealing with the “competitive pressure and market forces” for a couple of decades.

*3.4.2 Meeting the procedural requirements*

Analysis of the Copenhagen Criteria seems to suggest that the NIS would already comply to a large extent with the Copenhagen Criteria due to its status as a former EU region and the flexible nature of the criteria. The key challenge for the NIS would instead lie in the procedural requirements of Art. 49 TEU. According to this provision, the applicant must address its application to the Council, “*which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members.*” As a result, *all* the Member States would have to agree on the application. Moreover, the conditions of admission and the adjustment to the Treaties are subject to an accession agreement between the Member States and the candidate state which must be ratified by *all* contracting States “*in accordance with their respective constitutional requirements.*” Therefore, any Member State, including the Member State from which the newly independent region seceded, would have the possibility to block the NIS’s bid for membership on numerous occasions throughout the accession process. Any outstanding dispute between the NIS and the EU Member State from which it has seceded might therefore be cause for a veto against the former’s accession process. Not only the successor EU member state could have reasons to block the accession process but also other EU Member States. Especially EU Member States which have their own regions seeking autonomy or independence would be hesitant to recognise the NIS and allow it to join the EU out of fear to create a precedent for their own separatist regions.[[22]](#footnote-22)

## 4. Cushioning a case of fragmentation

Numerous legal hurdles therefore exist before a region may actually become a Member State in its own right. Apart from these problems which primarily relate to the NIS itself, it is clear that a fragmentation of the Union would also have its repercussions on the EU’s own functioning. How may a case of fragmentation then be ‘cushioned’? This question relates to the one which lies at the basis of the new Article 50 TEU, which in essence aims to cushion a case of contraction. The following section will therefore focus on these issue.

### 4.1 Ensuring the functioning of the EU, the Internal Market, the Customs Union and the Currency Union

Firstly, the EU itself would be in need of an updating of its functioning. This is immediately apparent as regards the composition of its main institutions. Although the Lisbon-qualified majority within the Council is defined in relative terms the Nice-qualified majority is defined based on the number of votes allotted to each Member State. Since the Lisbon Treaty provides a possibility to use the Nice rules up until 2017,[[23]](#footnote-23) any case of fragmentation before that date would necessitate an amendment to Article 3 (3) of Protocol no. 36. Following Article 14 (2) TEU, the European Council would also need to take a decision by unanimity, changing the number of MEPS allocated to the Member State from which a region seceded. The question what would happen to the MEP’s originally elected by the citizens of the NIS is a different matter. Since the European Parliament is composed of representatives of the Union’s citizens and the citizens of the NIS would no longer be EU citizens (cf. *infra*) it should be concluded the MEP’s in question would lose their legitimacy and their status as MEP. For the Commission, no changes are needed since Article 17 (5) provides the total number of Commissioners is either equal to the number of Member States or to two thirds the number of Member States.

Secondly, it is clear the NIS is faced with a Herculean task in that it will have to negotiate three major agreements simultaneously in order to guarantee a smooth transition from its status as a region within the EU to a Member State within the EU. The path of these negotiations will be dependent upon the good will of other parties, at the national level and the European level and is fraud with uncertainty because of the precedent it would create for other regions aiming for independence. An important element during this transition would be to secure the continued application of the *acquis* of the EU in the NIS. This may be provided for in the agreement on the NIS’s withdrawal from the EU but could also be attained by diverting part of the attention from future EU membership to membership of the European Economic Area (EEA). EEA Membership would be much less politically sensitive to other EU Member States than EU membership. At the same time the EU Member States would also have important incentives to support the NIS’s membership of the EEA as this would allow a continuation of economic relations under roughly the same terms, *i*.*e*. those of the Internal Market. If EU membership would appear problematic for the NIS, EEA membership could be a partial alternative.

Another important consequence of a region becoming a Member State in its own right is the effective end to the possibility of reverse discrimination. For instance, discrimination by the federal entities in Belgium, vis-à-vis Belgian citizens belonging to the other federal entity so far has escaped EU scrutiny.[[24]](#footnote-24) It is clear that should Flanders become an independent EU Member State any discriminatory policies vis-à-vis the ‘remaining’ Belgian citizens could not escape EU scrutiny anymore.

However, membership of the EEA would only secure that the same Internal Market rules remain applicable in the NIS, while the EU’s *acquis* covers other important economic areas as well. One important factor in this would be the EU customs union, another might be the Common Agricultural Policy. As regards the EU’s customs union it should be noted that it has in the past been extended to cover third countries which are not Member States of the EU. Thus, Turkey, Andorra, San Marino and Monaco are in a customs union with the EU.[[25]](#footnote-25) The NIS could use these precedents to secure its trade flows, which would be negatively affected since if it would fall outside the Customs Union its air and naval ports would suffer from trade deflection as incoming goods from outside the EU’s customs union would not benefit from the common tariff and concomitant custom duty free traffic to the EU anymore. For Flanders for instance, being left out of the Customs Union would be disastrous for the position of the Port of Antwerp.

EEA membership does not address the issue of EU citizenship either. In the ECJ’s case law it is well established that EU citizenship is the fundamental status of the nationals of EU Member States. As a result, EU citizenship is not merely a symbolic affair but the basis of important very tangible material rights. Since citizens of the NIS would lose their qualification as citizen of an EU Member State, they would also lose their fundamental status of EU citizen and the concomitant rights associated with it. In this regard it is unclear what would happen to those citizens which have already acquired the right of permanent residence under the Citizens’ Directive.[[26]](#footnote-26) Would these citizens lose this right since they would no longer fulfil one of the basic pre-conditions? Would they automatically qualify for the status of long-term resident as a third-country national under Directive 2003/109?[[27]](#footnote-27) Legal uncertainty would be rampant in the core of the livelihoods of these migrant ex-EU citizens.

A fifth issue concerns the new currency of the NIS, especially if it had been part of a Eurozone member. From a strict legal reading of the Treaties, the region would lose its status as member of the Eurozone because a continued membership of the EU is impossible following a secession from an EU Member State. Indeed, the Treaties do not provide for the possibility to be a member of the EMU without being an EU member.[[28]](#footnote-28) Therefore, the NIS would need to accede to the EMU following its accession to the EU, as this is *de iure* obligatory for all Member States, except for those that have negotiated opt-outs. To become a full member of the EMU, the NIS would first have to meet the convergence criteria.[[29]](#footnote-29) It is temporally impossible for the NIS to meet these criteria at its date of EU accession since a State needs to have participated for at least two years, as an EU Member State, in the exchange-rate mechanism of the European Monetary System (ERM II) without devaluing against the euro.

However, applying these rules to the letter would not serve their since they are designed to test the monetary stability of an EMU candidate which, in the case of a former region of a Eurozone Member, should normally not be problematic. As a result, it is not inconceivable that a region such as Flanders could benefit from a special derogation, which would be the result of a political compromise between the region and the other Eurozone Members. Otherwise the NIS would join the EU ‘with a derogation’ from adopting the Euro under Article 139 (1) TFEU.

A special case of a former EU region acceding to the EU, from the perspective of the EMU, would be Scotland. Today, the UK (and consequently also Scotland) is not obliged to adopt the Euro as a result of the opt-out the UK obtained in the Maastricht Treaty. As indicated above, if Scotland would secede from the UK, the Treaties would cease to apply to it. This would mean that it would also lose the opt-out (House of Commons, 2001). If an independent Scotland would chose to apply for EU membership, it would also be obliged to adopt the euro when it meets the criteria (cf. *supra*).

### 4.2 A temporal paradox

Above it was noted that the NIS would need to engage in three rounds of negotiations simultaneously in order to secure a smooth transition from ‘region of an EU Member State’ to ‘Member State in its own right’. Ideally the interim arrangements preceding its actual membership of the EU would be in place the day it becomes officially independent from its mother state. At that moment the negotiations on EU membership should ideally be already well advanced so that the interim-period could be kept to a minimum. However, here the NIS would be confronted with what could be called a temporal paradox: the negotiations on its EU membership may only be formally initiated following its recognition as an independent state, which will largely depend on the conclusion of an agreement with the other entities of the mother state. But in order for that NIS to be assured of a smooth transition to its own EU membership, EU accession negotiations should ideally already be finalised at the moment of the conclusion of its agreement on independence. To illustrate this further, it would be very difficult to imagine the 27 EU Member States to engage in negotiations aimed at EU membership, with an entity whose legal status is unclear. The fact that that entity is situated ‘within’ the EU and is (at that time) still part of an EU Member State itself of course further complicates the matter.

How the three negotiations, (i) those on its independence, (ii) the negotiations with the EU partners on its withdrawal from the EU (including possible interim-arrangements) and (iii) the negotiations with the EU partners on its accession to the EU, should all follow up on each other from a temporal perspective is a crucial issue, but also very unclear at that. The NIS would obviously want to compact these negotiations as much as possible, which will require creative jurists to reconcile this with principles of international and EU law.

## 5. Conclusion

Whether a NIS which was formerly a region of an EU Member State may remain part of the EU but as a Member State in its own right, figured as the starting point for this contribution. Based on the distinctive character of the EU and the fact that through the Rome Treaties, the Member States have created a new legal order, distinct from the international legal order, the answer to this question has been answered in the negative. This conclusion triggers numerous other issues which all find their origin in the question how such a NIS may then become an EU Member State in its own right, while avoiding a major rupture between the rights it holds under EU law as a region of an EU Member State and the rights it would hold under EU law as an EU Member State itself.

One major element in the approach such a region should take was identified in the necessity to engage in at least three rounds of preferably simultaneous negotiations: a first at the national level between itself and the remaining entities of the mother state, secondly (through its mother state) at the European level to fulfil the requirements of Article 50 TEU and thirdly on behalf of itself at the European level to regain entry into the EU. These findings raised numerous questions, which could only be commented upon but could not be resolved because they would be highly determined by as of yet unknown facts and the context in which a region secedes and subsequently applies for EU membership. What is clear, on the other hand, is that should these events actually materialise, the situation in which such a region would find itself, would be of a hardly imaginable complexity. Perhaps the most fundamental of problems which may already be identified in theory is the problem, from a temporal perspective, of reconciling a smooth transition, without the loss of prerogatives under EU law, with the seizure of independence. The shock which the independence of the region creates needs to be cushioned in an EU framework, but access to that framework seems to depend on that shock having materialised, resulting in an, in theory, unavoidable period of uncertainty in between the two periods of EU membership or EU membership and EU association.[[30]](#footnote-30)

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1. Scotland, Wales and Cornwall in the UK; Flanders in Belgium; Padania in Italy; Catalonia and the Basque Country in Spain (and France); Corsica and Brittany in France; etc. [↑](#footnote-ref-1)
2. For the N-VA in Flanders see paragraph 1.1 of the Party Statutes of the NVA, see <http://www.n-va.be/statuten> (last accessed 2 April 2012). For the SNP in Scotland, see SNP Manifesto 2011, <http://manifesto.votesnp.com/independence>, (last accessed 2 April 2012). [↑](#footnote-ref-2)
3. For one of the latest surveys see: Sofie Vandenhouwe, ‘Vlaming ziet toekomst in (hervormd) België’, De Standaard, 09/10/2010, p. 7. [↑](#footnote-ref-3)
4. East Timor (Portugal v. Australia) [1995] I.C.J. Reports 90, 102. [↑](#footnote-ref-4)
5. Reference *re Secession of Quebec*, [1998] S.C.R. 217, para 154-155. [↑](#footnote-ref-5)
6. Ibid., para. 151. [↑](#footnote-ref-6)
7. On the competence of the Belgian Constitutional Court to examine the acts of the federal entities on their compliance with the principle contained in Article 143 § 1 of the Constitution see J. Vande Lanotte & G. Goedertier, *Handboek Belgisch Publiekrecht*, Brugge, Die Keure, 2010, pp. 1003-4. [↑](#footnote-ref-7)
8. Although according to Shaw it is still too early to declare that the presumption of continuity is now the established norm. See M. Shaw, *International Law*, Cambridge, Cambridge University Press, 2008, p. 977. [↑](#footnote-ref-8)
9. Although only 22 States are party to the Convention, five of which are EU Member States and it cannot be regarded as codification of customary international law, recent state practice is evolving in line with the certain of its provisions. See Anthony Aust, 'Succession to treaties', in Aust (ed.), *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2007. [↑](#footnote-ref-9)
10. Case C-95/97, *Région wallonne v. Commission of the European Communities*, [1997] ECR I-1787. [↑](#footnote-ref-10)
11. Written Question P-0524/04 by Eluned Morgan (PSE) to the Commission, O.J. 2004 C 84E/421. It should be noted that in response to later similar questions, the Commission in its reply has refused to comment “on matters which, as things stand, are purely hypothetical”, Response of the European Commission to Written Question H-1086/06 by Catherine Stihler (SPD), 20 December 2006. [↑](#footnote-ref-11)
12. *United Nations Treaties Series*, Volume 1696, I-29226. [↑](#footnote-ref-12)
13. According to Jacqué however this theory did not completely apply to German reunification, see Jean-Paul Jacqué, 'German Unification and the European Community', (1991) 2 *European Journal of International Law* 1, pp. 5-6. [↑](#footnote-ref-13)
14. ECJ, Case 93/78, *Mattheus v. Doego*, para. 7. [↑](#footnote-ref-14)
15. Luxembourg European Council conclusions, para. 25. [↑](#footnote-ref-15)
16. Copenhagen European Council conclusions, p. 12. [↑](#footnote-ref-16)
17. Framework Convention for the protection of National Minorities, Council of Europe, ETS No. 157, 1 February 1995. [↑](#footnote-ref-17)
18. The Flemish government committed itself not to ratify the FCNM, see Vlaamse Regering, Vlaams Regeerakkoord 2009-2014, Een daadkrachtig Vlaanderen in beslissende tijden, p. 93. [↑](#footnote-ref-18)
19. References to the FCNM are also included in the Accession Partnership with Turkey and in the European Partnerships with Croatia, Albania, Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia. [↑](#footnote-ref-19)
20. Latvia finally ratified the FCNM in October 2005. [↑](#footnote-ref-20)
21. Copenhagen European Council conclusions, para. 10. For a detailed analysis of the Cyprus Problem, see F. Hoffmeister, ‘Legal Aspects of the Cyprus Problem’, 2006, Leiden, Martinus Nijhoff Publishers. [↑](#footnote-ref-21)
22. The situation is not clear cut however, see for instance: Newsnetscotland.com, ‘Spanish Foreign Minister confirms that Spain would accept Scottish independence’, 26 February 2012. [↑](#footnote-ref-22)
23. See Article 3 (2) of Protocol No 36 to the Lisbon Treaty on transitional provisions. [↑](#footnote-ref-23)
24. See for instance the case on Flemish care insurance discussed in Peter Van Elsuwege & Stanislas Adam, ‘The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination’, (2009) 5 *European Constitutional Law Review* 2. [↑](#footnote-ref-24)
25. For a more extensive analysis of the EU’s relations with these three micro-states see M. Maresceau, ‘The relations between the EU and Andorra, San Marino and Monaco’, In: A. Dashwood & M. Maresceau (eds.), *Law and Practice of EU External Relations*, Cambridge, Cambridge University Press, 2010, pp. 270-308. [↑](#footnote-ref-25)
26. Directive (EC) 2004/38, O.J. 2004 L 158/77. [↑](#footnote-ref-26)
27. Directive (EC) 2003/109, O.J. 2003 L 16/44. [↑](#footnote-ref-27)
28. Likewise, the Treaties do not provide a clause that allows a country to leave the EMU without at the same time leaving the European Union. For more on this topic, see Athanassiou, ‘Withdrawal and expulsion from the EU and EMU. Some reflections’*, ECB Legal working paper series*, No 10, December 2009. [↑](#footnote-ref-28)
29. Art. 140(1) TFEU and Protocol No 13 on the convergence criteria. [↑](#footnote-ref-29)
30. Here ‘association’ should be understood in a general sense and not in its narrow sense under Article 212 TFEU. [↑](#footnote-ref-30)