



Policy Proposal on Independence of Regions in the EU

Assuring continuity: The protection of rights derived
from EU citizenship

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Content

Executive Summary	3
Introduction.....	3
Assumptions	4
Current Legal Situation and the Commission's Position.....	4
Problematic Issues	5
Policy Options.....	6
Policy Option 1: Swifter accession process through treaty amendment.....	6
Policy Option 2: Swifter accession process based on the current EU legal framework.....	7
Conclusion	8



Executive Summary

This proposal deals with the ever more probable situation of a region of an EU Member State becoming an independent State. Since many uncertainties arise from such a secession, providing a legal framework is of utmost importance to assure the continuity of rights and freedoms of current EU citizens. EU citizenship is attached to the nationality of a Member State, thus the loss of the latter causes the loss of all guarantees derived from the former.

Therefore this paper introduces two possible policy alternatives to tackle the issue.

The first one consists of an amendment to the Treaty of European Union (TEU), in order to provide for a legal basis for negotiations to take place before the official declaration of independence. The suggested provision would also contemplate the situation whereby the State would not want to remain in the EU.

The second solution offers a fast-track application process for the new independent State, in light of the current legal EU framework. In this case, a preliminary assessment of the eligibility of the seceding region to accede the Union shall take place as well.

Introduction

Regions seeking independence or greater autonomy are increasingly visible in Europe, and have become an important and controversial issue not only for the involved states but for the entire European Union. Though the recent referendum in Scotland returned a "No" vote, this does not diminish the actuality of the issue since there are more European regions - for different reasons - seeking independence. It is likely that the contentious issue will return to the agenda in Europe repeatedly.

All regions seeking independence have in common that they expressed their wish to stay part of the EU. Any membership process will necessarily involve political considerations that cannot be anticipated by a general legal framework. The EU has demonstrated political flexibility and a strong willingness to develop pragmatic solutions in the past, as in the cases of the withdrawal of Greenland in 1985 and the reunification of Germany in 1990. But it is not enough to rely on flexibility; since the rights of European citizens are at stake, the subject demands an answer.

This policy proposal addresses the issue of EU membership in case of the independence of a region which was previously part of a Member State, focusing both on the process of accession and the issue of protection of the rights and freedoms attached to EU citizenship. In case a region of a Member State of the European Union becomes an independent state, what would the process look like for the integration of this new state in the Union? And what would be the implications for the different groups of citizens of



and living in the newly created state, especially considering rights and freedoms linked to EU citizenship?

The Treaties of the European Union do not provide a legal framework for such a case, nor has the Commission articulated specific ways to address the problem. This proposal elaborates on two policy alternatives. The first one consists of a treaty amendment in order to allow for accession negotiations to take place before an official declaration of independence. The second solution previews a fast-track application process for the new independent state based on Article 49 TEU.

Assumptions

The EU does not interfere in domestic constitutional arrangements of the Member States, but in this case the Commission, as “guardian of the Treaties”, has a responsibility towards EU citizens and must articulate a solution. This proposal is relevant in case the new State has obtained independence through a negotiated secession, with mutual agreement of the predecessor State, through a peaceful and democratic process. In this case, the other Union Member States are assumed to signal their will to negotiate with the new state concerning membership. The EU will maintain respect for international law and the sovereignty of all Member States.

Current Legal Situation and the Commission’s Position

Although the Commission has not frequently given official statements on the topic, it has given insight about the current legal framework by replying to parliamentary inquiries. According to European Union law, the Treaties will no longer apply to a part of a Member State that ceases to be part of that State. While the case of withdrawal from membership of the Union is addressed in Article 50 TFEU, there is no legal basis for an automatic accession to the Union. Therefore, a newly independent state would have to apply and follow the procedure as do countries outside the Union, in accordance with Article 49 TEU. However, the Commission has pointed out that the decision on the procedure for joining the European Union relies entirely on the discretion of the Member States. Considering that any such State would not be a member of the Union, and that having the citizenship of a Member State is a prerequisite for obtaining European citizenship, the citizens of this newly created State could be at risk of losing their status as EU citizens.



Problematic Issues

Citizenship

In a States' succession scenario within the EU, three key groups of EU citizens would be affected: nationals of the successor state residing in the newly independent region, EU citizens from other Member States residing in the successor state and nationals of the new state residing in another EU country. For the latter the consequences might be particularly drastic: all rights of free movement would be affected, but also Regulation 883/2004 with respect to social security would no longer apply to them, which would cause their status to be "solitary, poor, nasty, brutish and short".

This proposal emphasizes the citizenship aspect because under the EU umbrella individuals enjoy certain rights and freedoms that they have come to rely on and reasonably expect to continue in the future.

Union citizenship was established in Article 20 (1) TFEU and is derived from Member State citizenship. The Treaty provision clearly states that it is to be considered "additional to and not replace national citizenship." Hence, in case the nationality of a Member State is lost, so is EU citizenship. Given the fact that EU citizenship confers a number of considerable rights and freedoms to its holder, it is of crucial importance to determine how the issue of citizenship should be addressed in case of the secession of a region from a Member State.

In *Grzelczyk* the European Court of Justice ruled that Union citizenship is the fundamental status of the nationals of the Member States¹. In *Rottmann*, it was confirmed that a situation that involves the loss of EU citizenship as a consequence of deprivation of nationality of a Member State falls under the scope of EU law². Nevertheless, EU citizenship cannot be advanced as an argument for uninterrupted or automatic EU membership of the seceding region. The rationale behind this is that the individual rights of Union citizenship cannot be transferred to a new state which is a political organization that has not acquired any rights in that regard.

Other consequences

In addition to the protection of individual citizenship rights, there are several important elements of this scenario that suggest the need for a fast-track membership process for a newly independent state. The territory and population of the new state have already been a part of the EU, and there are obvious incentives for the other Member States for minimizing disruption, including but not limited to free trade arrangements and business relations that would be very difficult to put on hold or abolish entirely. Concerning the *acquis communautaire*, it is in the interest of the EU for the new state to

¹ C-184/99 *Grzelczyk v CPAS* [2001] ECR I-6193.

² C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449.



implement constitutional and civil laws that are in harmony with the regulations of the predecessor state and with European values. While it is likely that the region has already complied with most of these policies, quick harmonization would be advantageous.

The democratic principles of the EU, as enshrined in Article 2 TEU, indicate that the EU should accept the outcome of a democratic and constitutional secession process led by EU citizens and authorized by a Member State government. Further, the principle of sincere cooperation as established in Article 4 TEU demands that the Member States respect the newly independent state's membership re-application and refrain from intentionally obstructing the process.

Policy Options

Though the subject remains hypothetical, the recent case of the Scottish referendum indicates that the independent statehood of a region currently part of an existing Member State may become a reality, which the EU has to address in the near future. Within its existing legal framework, the EU institutions also have the ability to make the membership transition period for a newly independent EU state as smooth as possible.

This policy brief offers two solutions to the problem at hand, and both include a preliminary assessment. The aim of this initial evaluation is to instigate a negotiation process before the official declaration of independence, in order to allow a fast-track accession to the EU. The results of the assessment will not be legally binding, but it must be taken into account by the European Institutions when evaluating the possibility of membership of the new State. The assessment shall be conducted by the European Commission and be based on the Copenhagen criteria and on the 35 Chapters of the *acquis*. It is assumed that certain economic aspects prove themselves difficult to evaluate before independence. Therefore, further negotiations will take place after the new State declares independence, since the preliminary assessment does not intend to replace the regular process as described in Article 49 TEU.

Policy Option 1: Swifter accession process through treaty amendment

Due to the lack of a legal framework on this matter, the ideal solution would be an amendment of the TEU. This would be a long-term solution for all future cases of secession, and it would demand the help and recognition of the predecessor state. Our draft suggestion covers both the hypothesis in which the new State's citizens want to remain in the Union and the case in which they want to withdraw from it, and it reads the following:

Article 49-bis:

1. In case of independence of a region which was previously part of a Member State, and in order to protect the interests of the citizens of the new State, the citizens of the Union



and third-country nationals, a fast-track procedure to enter the Union may apply, provided the independence process meets the following criteria:

- a) Official recognition of the new State by the predecessor State;
- b) Accordance with the constitution of the predecessor State.

2. Previous to the declaration of independence, the concerned Member State shall notify the European Council of the situation in order to induce the fast-track procedure. During this period, which must not exceed two years, the European Commission shall conduct a preliminary assessment, in consideration of the conditions of eligibility of the future State agreed upon by the European Council. The parties involved can agree to extend this time span only insofar as it is considered strictly necessary to conclude final negotiations about the entrance in the Union.

3. After the declaration of independence, the new State may become a member of the Union, according to the requirements of article 49. The admission of the new State shall be concluded as promptly as possible, taking into account the preliminary assessment and the negotiations concluded before independence.

4. In case the region which intends to become independent does not want to remain in the Union, paragraph 2 applies with the necessary adaptations.

Policy Option 2: Swifter accession process based on the current EU legal framework

If a Treaty amendment cannot be reached within a reasonable time span, another option is proposed. This solution, which will follow Article 49 TEU, provides for a fast-track procedure within the current EU legal framework.

The procedure would start with a preliminary assessment of the seceding region based on the principle of good-faith and solidarity among Member States, as laid down in Article 3 (3) TEU. In addition, this provision sets "the well-being of its peoples" as one of the aims pursued by the Union. Moreover, Article 17 (1) TEU states that "the Commission shall promote the general interest of the Union and take appropriate initiatives to that end", giving it the competence to carry out the above mentioned preliminary assessment.

Article 49 TEU, in which the accession procedure is described, neither defines its time frame nor the detailed steps that need to be conducted, it merely presents a guideline for the accession process. Based on the procedures described in this provision and in analogy to the guidelines for withdrawal of Member States described in Article 50 TEU, a fast-track procedure of accession should be allowed for the newly independent State. According to Article 50 TEU, a two-year period is provided to reach an agreement between the withdrawing State and the other Member States, in order to establish a base for future relations. In the case of establishment of a new independent State within the EU, also a certain period of time should be allowed to negotiate future arrangements

and conditions for the EU membership. This fast-track procedure should be supported by the preliminary assessment, carried out as described above.

International Agreement

The rights of people living in the successor State (citizens of the new State, the citizens of the Union and third-country nationals), should be protected in the period after the declaration of independence and before the accession to the EU. After the preliminary assessment, certain rights will be preserved by an international agreement between the EU and the State.

An International Agreement should bear in mind the following:

For the benefit of citizens of the new State, the citizens of the Union and third-country nationals during the interim period, the objective of this agreement is to preserve:

- the right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties;
- the facilitation of the provision of services in the territory of the Contracting Parties, and in particular to liberalise the provision of services of brief duration;
- the right of entry into, and residence in, the territory of the Contracting Parties to persons without an economic activity in the host country
- the same living, employment and working conditions as those accorded to nationals.

The EU has entered into similar bilateral agreements with third countries, including Switzerland, which could serve as a model. This international agreement could also be considered a feasible outcome in the case of the negotiations process established by the aforementioned Treaty revision.

Conclusion

Due to the lack of a EU legal framework on the matter and the urgency to find an answer to the issue of the independence of regions, the working group has come up with two proposals in line of a fast-track accession to the EU. The first one entails an amendment of the Treaties (long-term solution) and the second suggests an “enlargement from within”. Nevertheless, it is important to stress that the EU must prepare for the case of independence of one of its regions in order not to violate acquired basic rights of its citizens. Remaining silent cannot be an option.

This two-pronged proposal minimizes negative effects on individuals in the newly independent region during the process of negotiations and re-accession. It is recommendable to develop more clarity on this issue by establishing the basis for an expedited membership process.

