



The European Union's Response to the Catalan Secessionist Process

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Abstract

Article 4.2 TEU enshrines the EU's respect for the exclusive right of each Member State to ensure its territorial integrity. No EU Member State allows referendums for part of the population to decide on the national territory. The Commission and European Council have recognized that the effect of a secession in a Member State is to leave the new state outside the EU. Whether or not European citizenship is retained is a matter not of European but national law, as European citizenship is an automatic complement to the nationality of a Member State. The position of the Commission and the European Council regarding the Catalan authorities' illegal referendum and declaration of independence was to support the constitutional mechanism for intervention authorized by the Spanish Senate. Nationalisms erode the integration process by weakening the cohesion of states and undermining the equality of their citizens.

Keywords Catalonia · Scotland · Secession · State continuity · Succession of states

1 Introduction

The European Union (hereinafter, EU) is a union that ensures respect for “the law”—without further qualification—and, thus, for international law, too [Art. 19 of the Treaty on European Union (hereinafter, TEU)]. Accordingly, every state has the right to maintain its national unity and have its territorial integrity respected. As Xavier Pons, a professor at the University of Barcelona, has written, other than

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the cases of decolonization, occupation and racial segregation, “no norms [or] principles have been adopted under the scope of international law that allow for the unilateral secession of a territory, that is, that consider a unilateral declaration of independence as legal”, let alone one that “is also not provided for in [a country’s] domestic legal system”.¹

Comunidades autónomas (literally, autonomous or self-governing communities, the first-level administrative divisions into which Spain is divided), a federal state, cantons, municipalities or regions are all legitimate forms of the exercise of *internal* self-determination. So is the centralist option, provided it is an expression of the people’s will. The right to national unity and territorial integrity in the face of internal or external threats is a well-established principle of customary international law codified in United Nations General Assembly (UNGA) Resolution 2625 (XXV).

As formulated in the statement signed by some four hundred international law professors from Spain (including nearly 50 from Catalonia),

“In keeping with the principle of self-governance, the general rules of international law do not prevent sovereign states from establishing their own legal framework and procedures for the separation of their territorial communities. Nonetheless, the vast majority of States proclaim their unity and territorial integrity to be basic pillars of their constitutional order.”²

As the territorial sovereign, every state can do with its territory as it sees fit: sovereignty is vested in the entirety of the people organized as a state. Dividing the territory requires an agreement (e.g. the former Czechoslovakia) or the granting of a referendum on self-determination (done just once in three hundred years, by the British government and Parliament, for Scotland in 2014), and both are highly circumstantial exceptions. Agreed legal secessions are exceedingly rare. So are states that accept the right of secession.³ Despite the calls for a new referendum in Scotland, four successive British governments have refused to devolve that power again or propose it to the British Parliament.⁴ Neither Quebec,⁵ nor Scotland, nor

¹ See: Pons Rafols (2014), p. 85; Pons Rafols n.d. See also: Remiro Brotóns and Andrés Sáenz de Santa María 2018; Wylér 2018.

² Various Authors (2018). The Spanish-language version of the text and the list of signatories can also be viewed at <http://www.aepdiri.org/index.php/actividades-aepdiri/propuestas-de-los-miembros>.

³ It has been accepted by: Saint Kitts and Nevis, Liechtenstein, Uzbekistan (with regard to a single region), Denmark (with regard only to Greenland since 2009), and Ethiopia (notwithstanding the thirty-year war against Eritrean independence and the war in Tigray that started in 2020). See: Ruiz-Miguel 2022.

⁴ See: BBC (2017); STV News (2019). When the Scottish government unilaterally set a new date for the referendum, the UK Supreme Court unanimously ruled (23 November 2022) that the Scottish Parliament “did not have the power to legislate for a referendum on independence” (BBC News Mundo 2022). For more details, see: <https://commonslibrary.parliament.uk/supreme-court-judgment-on-scottish-independence-referendum/>. The 2014 referendum was based on a prior agreement between the two governments and Westminster’s authorization (Sect. 30 of the Scotland Act 1998).

⁵ The sound reasoning of the Supreme Court of Canada’s rejection of unilateral secession as having no basis in international law and falling beyond the bounds of Canadian constitutionalism and the primacy of law through consensus-based constitutional amendment is well known. Judgment of the Supreme Court of Canada of 20 August 1998 (<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>).

Catalonia is a colonial people, nor are they subject to racial domination or a foreign invasion; their populations face no discrimination and are not prevented from freely participating in political, economic, business, social or cultural activities or the media; they have broad political, economic and cultural self-governance. In short, they enjoy *internal* self-determination guaranteed by their respective national constitutions. There is thus no *basis* for *external* self-determination.⁶

The consolidated territory of a state and its national unity are an objective situation protected by international law. As provided in paragraph seven of UNGA Resolution 2625 on this principle, in such situations, territorial integrity prevails over actions that, under the guise of self-determination—such as those of the Catalan pro-independence parties—seek to violate or undermine the territorial integrity of a sovereign state that respects *internal* self-determination.

European Union law also operates within this international legal logic that regards state territory as an *objective situation*.

2 Territory as the Domain of Each EU Member State

Of course, the EU is not a state but a highly unique international organization. Strictly speaking, there is no Union territory, only the *territorial scope* of EU rules. Only states have territory. The EU cannot organize or arrange its Member States' territory, nor can it authorize the enlargement or loss thereof.

State territory is an objective fact external to the EU, even though this fact has direct consequences for the EU insofar as it delimits the territorial scope of EU law. Because territory is a specific element of the Member States, they can make free use

⁶ In Resolution 5/X, of 23 January 2013, adopting the Declaration of sovereignty and right to decide of the people of Catalonia (<https://www.parlament.cat/document/intrade/7217>), the Catalan Parliament came to consider two mass demonstrations in favour of independence (held on 10 July 2010 and 11 September 2012) to constitute sufficient democratic legitimacy. In 2017, in the wake of the illegal referendum and declaration of independence, the constitutionalists held two mass demonstrations of their own (on 8 and 29 October 2017), rallying more than a million people in support of national unity and featuring a speech by the socialist politician Josep Borrell.

The declaration cites the positive outcome for the pro-independence parties in terms of seats in the regional parliamentary elections. In such elections, seats are deliberately distributed to benefit rural areas and less populated provinces to the detriment of the two most heavily populated and industrialized provinces, Tarragona and Barcelona, which are strongly penalized by this system. However, in both the *municipal* and the *general* elections, the constitutionalist parties won more votes than the pro-independence parties. For example, in the municipal elections of 28 May 2023, the constitutional parties won 45.79% of the votes versus 42.08% for the pro-independence parties; in the general elections of 23 July 2023, the constitutionalists earned 68.03% of the votes versus 30.67% for the pro-independence parties. The will of the people of Catalonia is clear.

in their territory of the rights inherent to their status as states,⁷ including the right to increase⁸ or give up territory *in accordance with international law*. The matter of territory is not a European competence but a competence of each Member State, which may exercise it individually and at their discretion, even if the increase or decrease in question ultimately has consequences for the other Member States.

The Member State may increase or decrease its territory at will, provided it does so through a lawful act in accordance with international or its own constitutional law. When the decrease or increase is predetermined by a lawful territorial change, it is not necessary to amend the scope of the European treaties.⁹

The territory of each Member State is not demarcated or delimited by the European treaties, but by its own national rules and its treaties with third countries; it is the territory that the state has under international law. Hence, EU law does not regulate the secession of parts of a state.

⁷ The Court of Justice of the EU (hereinafter, CJEU) confirmed this when it ruled that the status of the French overseas departments is primarily defined by reference to the French Constitution (judgment of 10 October 1978, *Hansen v Hauptzollamt Flensburg*, 148/77, para. 9, ECLI:EU:C:1978:173).

As recognized in the legal opinion commissioned by the British government from Professors J. Crawford and A. Boyle before the Scottish referendum, “No treaty amendment is therefore required simply as a result of a change to the borders of a state’s territory” (Crawford and Boyle 2013, para. 159).

⁸ A Member State may increase its territory in the free and sovereign exercise of its will through agreements freely concluded with other non-EU states. Hence, the decision by the Federal Republic of Germany (FRG) in 1990, after the fall of the Berlin Wall, to merge through an internal process governed by its constitutional rules with the eleven *Länder* of the former German Democratic Republic (GDR). These *Länder* requested “re-entry” into the FRG as provided for under the former Art. 23 of the FRG’s Constitution; at the same time, the FRG concluded a unification treaty with the now defunct GDR. Once the eleven *Länder* had joined the FRG, they fell within the scope of the treaties due to the moving-treaty-frontiers rule in the succession of states.

The Union neither could nor should have sought to interfere with or prevent the peaceful unification pursued in accordance with international law, even though that *fait accompli*, decided by Germany, was *not neutral for it*. It had automatic legal consequences for the Union and its Member States (vote on the Council and composition of the European Parliament, significant expansion of its scope to include very poor regions and 20 million more Europeans) and, even, for third states with agreements with the EU.

⁹ The transfer of the Saar region, under French sovereignty, to Germany in 1957 entailed a territorial loss for France and a correlative increase for Germany. However, the effects were relatively neutral as it only affected the responsibility for compliance with community law, which was transferred from France to Germany, and did not involve the exit or disconnection of any territory from what was then the European Coal and Steel Community (ECSC). It did not change the treaties but the party responsible for implementing them in that area.

There is no precedent of secession such as that proposed by the pro-independence minorities in Scotland and Catalonia. The case of Greenland does not apply—it is not assimilable to the separatist hypotheticals—as it remains a region of Denmark but is simply excluded from the Community regime. Greenland ceased to be a territory in which EU rules applied, as had already occurred with other territories with a special status under Art. 355.5 of the Treaty on the Functioning of the European Union (TFEU). Greenland has never ceased to be part of Denmark, nor have Greenlanders lost their Danish nationality or their European citizenship rights. The 1984 “withdrawal” treaty amended the scope of application. Such a change would no longer require a new treaty; under Art. 355.6 TFEU, a unanimous decision by the European Council suffices.

2.1 Territory as Part of the National Constitutional Identity

Territory is a constituent element of a state's existence and one that identifies it; it is part of a state's identity. Article 4.2 TEU enshrines the EU's respect for its Member States' right to ensure their territorial integrity, conserve their essential functions and safeguard their security; these are exclusive responsibilities of the Member State. Performance of the Member States' internal and external responsibilities is not negatively conditioned by their membership in the Union.¹⁰

Therefore, no European treaty has or will be able to regulate changes to the Member States' territory. It is an internal matter for each state. France's decision to transfer the Saar to Germany or recognize the independence of Algeria (a French department until 1962) or the reunification of Germany's territory and population (1990) were unilateral acts exclusive to those Member States. The Union is informed of the increase or loss of territory so that it can take the consequences of that change into account (since, as multiple Commission presidents have recalled, while such a change is an internal matter, it is not neutral for the EU).

It is not that EU law is ambiguous or does not prohibit secessions—as the proponents of independence misleadingly insinuate. The EU lacks the power to regulate or decide on the territorial modification of its Member States and the effects thereof (on nationality and public goods) or the specific consequences of a loss or increase in a Member State's territory. However, the *consequences* of a secession affect the EU rules currently in force, and there is no gap regarding those consequences or effects; there are European rules that apply.

The fact that secession is not regulated by EU law does not mean that anything that is neither regulated nor prohibited is permissible and, thus, secession would be possible within the Union.

Furthermore, Article 4.2 TEU bears detailed witness to the Union's respect for the right of each Member State to ensure its territorial integrity. The EU lacks the competence to order or recommend to its Member States how the state and its territory should be organized. It does not decide each Member State's political or territorial model. And no EU Member State regulates or tolerates referendums for a part of the population to decide on the national territory¹¹; the Scottish case was both

¹⁰ Art. 4.2 TEU: "It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

On the concept of constitutional identity and territory, see: Saiz Arnaiz and Alcobarro Llivina (2013) and Mangas Martín (2013).

¹¹ On 16 December 2016, the *German Constitutional Court* categorically responded to the petition of a German citizen concerning the legality of an independence referendum in Bavaria, noting that Germany:

"alsauf der verfassungsgebenden Gewalt des deutschen Volkes beruhendem Nationalstaat sind die Länder nicht Herren des Grundgesetzes. Für Sezessionsbestrebungen einzelner Länder ist unter dem Grundgesetz daher kein Raum. Sie verstoßen gegen die verfassungsmäßige Ordnung" ("In the Federal Republic of Germany as a nation state based on the constitutional power of the German people, the *Länder* are not masters of the Basic Law. There is therefore no room for secessionist efforts by individual *Länder* under the Basic Law. They violate the constitutional order") (Order 2 BvR 349/16).

limited and an exceptional concession. The forcefulness with which states and societies such as the US, Germany, Italy or France have responded to separatist claims stands in sharp and paradoxical contrast to the laxity with which the foreign media and public opinion regard the illegal unilateral actions of the Catalan pro-independence forces. On the one hand, they ignore the context and identitarian dimension of the Catalan pro-independence movement, which is led by right-wing or far-right parties; on the other, using institutional violence to make demands, twisting or violating the Constitution and the rule of law, is hardly a radical exercise of democracy. Catalan nationalism is archaic, ornery and authoritarian, based on the superiority of a Catalan bourgeoisie that advocates privileges for a single pro-independence people (*un sol poble*), excluding the vast majority of citizens from decision-making.

In a state that has no colonies and is neither occupied nor racially segregated, any secessionist claim is an internal matter that neither international nor European law can settle. Because it is an internal matter, only the state's own constitutional and legal rules and any political agreements that might be reached (in accordance therewith) apply. Consequently, the EU has neither cited nor sought to hide behind international law, as it cannot settle such conflicts either; only the collective will of the national community can do so, through the state's own Constitution or through the amendment thereof via the appropriate channels.

For Guy Verhofstadt, former prime minister of Belgium and president of the Alliance of Liberals and Democrats for Europe (ALDE) European parliamentary group, the Catalan issue.

“is not a European debate in the sense that we should not interfere in the internal affairs of countries or in the decisions that the society of a Member State makes. It is not for Europe to decide what model of state each country has.”¹²

Footnote 11 (continued)

Similarly, the *Italian Constitutional Court* ruled that a law passed by the Regional Council of Veneto was unconstitutional because it referred to an independence referendum. The region held an uncontrolled referendum in 2014 and, on 2 April, was the scene of an attempted assault on St Mark's Square, giving rise to subsequent legal actions. On the referendums in Veneto and Lombardy, see: Arban (2018).

France is a strongly unitary state; it responded resolutely when it learned of a Catalan resolution declaring that “Northern Catalonia” (the French region of Occitania) has “the right to decide its political status”. The French Foreign Affairs Minister sent a note of protest to the Spanish Embassy in Paris, reminding the Catalan Parliament that “it cannot interfere in French internal affairs” (Yárnoz 2016).

The position of the *US Supreme Court* in *Texas v White* (1869) is likewise well known:

“When Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.”

That judgment famously declared, “The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States” (<https://supreme.justia.com/cases/federal/us/74/700/>).

¹² Gallego (2014).

In a widely published article, Joseph Weiler recalled and endorsed the opinion of the Supreme Court of Canada in relation to the aims of what he calls the “Euro-tribalism” of the Catalan and Scottish pro-independence parties. He noted that all these territories—Quebec, Scotland and Catalonia—enjoy full individual freedoms and collective rights, which allows them to protect their nationalities and cultural identities in their respective states:

“The Canadian Supreme Court in its careful and meticulous decision on Quebec the reasoning of which remains valid today clearly showed that none of these cases enjoy a right of secession under public international law, since all of them enjoy extensive individual and collective liberties enabling the full vindication of their nationality and cultural identity within their respective States.”¹³

Secession, thus, does not depend on a hypothetical and impossible EU regulation or on the consequences of a unilateral declaration of independence. For the EU to be able to mediate, intervene in or decide in any way on a separatist claim, the European treaties would have to be amended to provide for such a competence and regulate the effects thereof. This is inconceivable, not because of a Spanish veto or refusal; the rejection would be widespread if not unanimous. The European treaties are drafted the way they are for a reason, namely: the right to preserve the state, to conserve its national unity and the stability of peaceful co-existence.

2.2 The Great Debate Over Territory: Catalonia—EU Membership or Third Country?

Since 2012, and at the height of the Catalan pro-independence process, attempts have been made to involve European institutions in issues related to the EU membership of a breakaway territory. The EU institutions, however, have taken pains not to fall into this trap and limited themselves to clarifying certain essential aspects (possibility of remaining in the Union and citizenship). What the pro-independence ranks sought was recognition by the EU, in a hypothetical future, of the breakaway territory’s statehood—although the EU lacks the power to recognize new states—and its transition from region to “remaining” in the EU as a *new member*. Several parliamentary questions on the fate of breakaway territories have also been submitted in relation to Italian regions and Scotland. In all three cases—Scotland, Catalonia and the Italian regions—the debate has always focused on whether or not the potentially newly independent territories would remain in the EU (and, thus, indirectly on the preservation of European citizenship rights; see Sect. 3 below).

2.2.1 International and European Regulations

Although the Vienna Convention on succession of States in respect of treaties of 23 August 1978 regulates this matter, that treaty (in force since 1996) only applies to 23

¹³ Weiler (2012). (The relevant portion is also available as a blog post at <https://www.ejiltalk.org/catalonian-independence-and-the-european-union/>). See also the interesting debate in Weiler (2019).

States Parties.¹⁴ Spain is not a party to it. Therefore, the applicable law is customary and European law.

Accordingly, only EU law applies. Article 52 TEU logically lists the states to which the EU treaties apply *eo nomine*. Consequently, any change in the elements of those states does not affect the treaties' territorial scope. A state remains the same state even if it expands or loses territory: it will have more or less sovereign space, but this will not affect its international legal personality.

Generally, when a state loses part of its territory, the *principle of the continuity of the state* applies to the parent or predecessor state; that state conserves its international legal personality and maintains its rights and obligations, including its membership in the organizations to which it belonged. In the event of a territorial change due to a secession (whether unilateral and illegal or agreed), the affected state's status or membership is maintained in full.

Second, under international law on succession of states, another customary rule applies, namely, the *moving-treaty-frontier* rule. Under that principle, treaties signed by the parent or predecessor state cease to apply in the territory of the *new state*. Consequently, if *part* of a Member State breaks away and becomes a new state, the territorial scope of the membership treaty automatically changes. As the breakaway territory is no longer part of the Member State, the constituent treaties of international organizations cease to apply in it¹⁵—*it no longer belongs to these organizations*—as do other treaties signed by the parent state, except for “localized” or boundary treaties.

Each part of the parent state that becomes an independent state must apply for membership in each international organization and rebuild its own international relations.

Therefore, the constituent treaties of international organizations are not transferable to a new state. The new state *does not inherit the parent or predecessor state's membership*.

2.2.2 The EU Institutions' Answer to the Separatists' Doubts

In keeping with its victim mentality, the pro-independence movement often complained that, if the rules of European law were applied, Catalonia would be expelled from the EU, or they would claim that it was Spain's fault for “vetoing the option for Catalonia to remain”.¹⁶

¹⁴ The solution offered by Art. 4 of this Convention provides that it “applies to the effects of a succession of States in respect of: (a) any treaty which is the constituent instrument of an international organization”, although only in a subsidiary fashion, giving preference to “the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization” in question.

¹⁵ A non-negligible number of universal international organizations are lax and allow, in cases of *colonial* succession, the new state to join by succession. These organizations usually require a simple majority to join. However, this is not the case in organizations such as the UN, regional organizations, military pacts and others, such as those for integration.

¹⁶ Hence, the question put by the pro-independence MP Alfred Bosch i Pascual to the Spanish Foreign Affairs and Cooperation Minister regarding the Spanish government's veto of the continuance of an

You cannot expel someone who is not a member, i.e. the breakaway territory. The Member State that suffers the secession remains a member due to the principle of the continuity of the state, even if the elements of the state are modified. Nor is the principle of the continuity of the parent state an obstacle preventing the new state from applying for membership in international organizations such as the EU, the UN, NATO, the WTO, etc. But that is the new state's sovereign decision; it is its *right to decide* as a state.

No longer bound by the international commitments of the parent state, the new state, as a new subject of international law, is *free to choose* its international undertakings. This “clean slate” principle applicable to the newly independent state is precisely what protects its sovereignty: the new state will now be able to decide its international obligations and rights without being bound in any way. By the same token, however, it must neither piggyback nor rely on the commitments of the state to which it formerly belonged.

The European Commission, under the Italian Romano Prodi, clarified this issue very early on, although many MEPs seem to have forgotten and submitted similar questions related to the United Kingdom, Italy and Spain in the intervening years. The Prodi Commission's response, given in 2004, was as follows:

“The treaties apply to the Member States (Article 299 of the EC Treaty). 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. In other words, 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.”¹⁷

In 2013, the Commission, now under the Portuguese José Manuel Durão Barroso, reiterated:

“The legal context has not changed since 2004 as the Lisbon Treaty has not introduced any change in this respect. Therefore the Commission can confirm its position as expressed in 2004 in the reply to the Written Question P-0524/04.”¹⁸

The Barroso Commission's position regarding the MEPs' questions was likewise clear and unambiguous. In response to a question from a Catalan MEP, the Commission stated:

Footnote 16 (continued)

independent Catalonia in the EU (file number 180/000774). The minister clarified, “It is not that it is excluded, but that it excludes itself, be it Scotland or Catalonia. The EU leaders have been repeating this ad nauseam for more than a year now, and you have continued to deny it to this day” (translation by the author) (*Diario de Sesiones del Congreso de los Diputados*, n. 167, 18 December 2013, p. 13).

¹⁷ Parliamentary question P-0524/2004; answer from the Commission, 1 March 2004, https://www.europarl.europa.eu/doceo/document/P-5-2004-0524-ASW_EN.pdf.

¹⁸ In response to parliamentary questions P-009756/2012 and P-009862/2012; answer of 3 December 2012, https://www.europarl.europa.eu/doceo/document/P-7-2012-009756-ASW_EN.html#def1.

“[It] is not [the Commission’s] role to express a position on questions of internal organisation related to the constitutional arrangements of a particular Member State. [...] If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.”¹⁹

Neither the constitutionalist nor the Catalan pro-independence MEPs seemed to have read the detailed 2012 statement issued by the then President of the European Council, the Belgian Herman Van Rompuy:

“I just want to recall some of the principles that would apply in such a scenario. The separation of one part of a Member State or the creation of a new State would not be neutral as regards the EU Treaties. The European Union has been established by the relevant treaties among the Member States. The treaties apply to the Member States. If a part of the territory of a Member State ceases to be a part of that state because that territory becomes a new independent state, the treaties will no longer apply to that territory. In other words, a new independent state 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. [...] Third and more personally, I am confident that Spain will remain a united and reliable Member State of the European Union.”²⁰

The separatist populists have repeatedly shown a disregard for logic and reasoned, rules-based arguments. The EU’s position, as expressed by the European Commission, has been known since 2004 and was reiterated in 2012–2013. Nevertheless, they persisted. In response to a question from a Spanish People’s Party (PPE) MEP on whether the Commission would recognize an independent Catalonia, the Commission, this time under the Luxembourgier Jean-Claude Juncker, wrote, “It is not for the Commission to express a position on questions of internal organisation related to the constitutional arrangements in a particular Member State.”²¹

¹⁹ Answer given by President Barroso on behalf of the European Commission on 20 November 2013 to the question from Ramón Tremosa (E-011023/13) (*Official Journal (OJ) C 208* de 03.07.2014, p. 218 (English version), p. 2017 (Spanish version)). Similar answers had previously been given to other parliamentary questions (for example, E-008133/2012, answer in *OJ C 308 E*, 23 October 2013; P-009756/12, P-009862/12, answer in *OJ C 310 E*, 25 October 2013).

The then president of the European Council, the well-respected and soft-spoken Belgian Herman Van Rompuy, also acknowledged at a press conference and in subsequent published remarks: “it is not for me to express a position on questions of internal organisation related to the constitutional arrangements in a Member State”. (12 December 2013 EUCO 267/13 PRESSE 576 PR PCE 241, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/140072.pdf).

²⁰ *Ibid.*

²¹ Parliamentary question E-011776/2015; answer of 15 April 2016, https://www.europarl.europa.eu/doceo/document/E-8-2015-011776-ASW_ES.html. The Commission also refers the MEP to its replies to

At the height of the Catalan independence bid of 2017, President of the European Parliament Antonio Tajani warned that “any action against a Member State’s Constitution is an action against the legal framework of the EU” and that respecting the rule of law “is an obligation”.²² Elsewhere, Tajani said: “We are close to Spain, a democratic country, that operates within a specific framework. It is not Europe’s responsibility to try to mediate. We are in favour of dialogue, but there is a legal framework that must be respected. By everyone.”²³ Tajani’s letter to an MEP was equally expressive:

“I have already publicly stated that the constitutional framework[s] of individual Member states are part of the legal framework of the European Union. Their respect must be guaranteed at all times. They are a fundamental pillar of our system of liberties and the values upon which the Union is founded, as listed in article 2 of the TEU. Any action against the constitution of a Member State is an action against the European Union’s legal framework. This is precisely because the rule of law is the backbone of modern, pluralist societies and constitutional democracies. Respecting the rule of law and the limits it imposes on those in government is not a choice but an obligation. As for the European Union, the Treaties are clear, it must respect the constitutional arrangements of the Member States and the essential State functions deriving from them.”²⁴

The European Union need not prohibit, regulate, encourage or condemn changes in the territory of a Member State, but the effect of a secession is to be left *outside* it. The European Commission confirmed this the day after the illegal referendum of 1 October: “If a referendum were to be organised in line with the Spanish Constitution it would mean that the territory leaving would find itself outside of the European Union.”²⁵

Certainly, in some international organizations, it would not be impossible or difficult to apply for membership, as they require smaller majorities. The pro-independence Catalans’ bugbear was the requirement of unanimity in the EU for a country to become a candidate and, later, be accepted, a unanimity that must be maintained over the course of several hundred votes and the lengthy negotiation of the 35 chapters that every EU accession process entails.

Footnote 21 (continued)

parliamentary questions E-008133/2012, P-009756/2012, and P-009862/2012.

Between 2004 and 2018, presidents, vice-presidents, commissioners and spokespersons spoke on at least 22 occasions about the exclusion of an independent Catalonia from the EU. Pablo Pérez, head of the European Commission’s Communication and Social Media Department, posted a video with all the statements here: https://twitter.com/PabloPerezA/status/957624623725793281?ref_src=twsrc%5Etfw%7Ctwamp%5Etfw%7Ctwterm%5E957624623725793281%7Ctwgr%5Eedfd023848a85492d8272fd321bc9949f93a4af3%7Ctwcon%5Es1_&ref_url=https%3A%2F%2F

²² Abellán 2017.

²³ Ruiz Mantilla (2017).

²⁴ https://estaticos.expansion.com/opinion/documentosWeb/2017/09/07/carta_tajani.PDF.

²⁵ https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_17_3626/STATEMENT_17_3626_EN.pdf.

Some years earlier, the regional government of the Basque Country expressed its desire to join the EU as part of the territory of Spain. This was somewhat disconcerting. The TEU says nothing about parts of a state's territory that might become direct members of the EU alongside the states themselves. Of course, nor does the treaty expressly exclude parts of a state from becoming members; it does not legislate in the negative, as is legally logical. It does not lay down who *cannot* join the EU.

Article 49 regulates positively, establishing criteria for who can join and the conditions to do so. It provides that the applicant must be a *state* (it goes without saying, sovereign and independent), as well as European, and that it must respect the values of Article 2 TEU. In short, *parts* of a state cannot join separately and in parallel. But Catalonia did not wish to join as part of Spain but rather to remain in the EU as a new member, using *the core Spanish state's existing membership* as a side- or back-door entrance, contrary to international and European law and in disregard of the rules for accession applicable to any new state. These were curious goals on the part of the Basque and Catalan secessionists, counter to all legal logic.

The Catalan regional authorities (as opposed to “the Catalans”) were frivolous and manipulative in their explanation of the consequences of a secession. They claimed that independence would be achieved within the “European framework”. Yet the “legal-political framework” of the EU treaties is beyond the secessionists’ control or, indeed, that of any state acting unilaterally: it is governed by rules of the European treaties and international law jointly agreed by all 27 Member States. The pro-independence forces have no “right to decide” unilaterally whether or not to be part of the European Union or impose themselves on the other Member States.

It would be grotesque if the breakaway territory could unilaterally take a separate seat at the table and act autonomously without applying for membership in the international organization. International life still retains procedures of respect for the established rules as an expression of civilized peoples.²⁶ Populism denies reality, creating instead a made-up parallel reality.

3 Another Debate with an Answer from Europe: Citizenship Status

Closely linked to the debate over whether Catalonia could remain in the EU was that regarding the fate of the status of Catalan citizenship and whether Catalan citizens would conserve their European freedoms. The answer is basically the same: there are no acquired rights—for the breakaway territory or its population—when a territory becomes independent and leaves the EU Member State.

²⁶ Readers may wish to refer to “Chapter 2: What independence would mean: law and practice” in the aforementioned legal opinion on Scotland (see *supra* n. 7).

In response to a parliamentary question—related to a rejected European citizens' initiative²⁷—Commission President Barroso gave a clear answer on the loss of European citizenship for the breakaway territory:

“[I]n accordance with Article 20 of the Treaty on the Functioning of the European Union (TFEU), EU citizenship is additional to and does not replace national citizenship (that is, the citizenship of an EU Member State). [The Commission] also confirms that in the hypothetical event of a secession of a part of an EU Member State, the solution would have to be found and negotiated within the international legal order. Any other consideration related to the consequences of such [an] event would be of a conjectural nature.”²⁸

According to a CJEU judgment:

“the answer to the question referred is that Article 20 TFEU, read in the light of Articles 7 and 24 of the Charter, must be interpreted as not precluding legislation of a Member State such as that at issue in the main proceedings, which provides under certain conditions for the loss, by operation of law, of the nationality of that Member State, which entails, in the case of persons who are not also nationals of another Member State, the loss of their citizenship of the Union and the rights attaching thereto...”²⁹

It reiterated this position in relation to Brexit in 2022:

“...possession of the nationality of a Member State is an essential condition for a person to be able to acquire and retain the status of citizen of the Union and to benefit fully from the rights attaching to that status. The loss of nationality of a Member State therefore entails, for the person concerned, the automatic loss of his or her status as a citizen of the Union.” It later concluded, “[A]s from 1 February 2020, United Kingdom nationals no longer hold the nationality of a Member State, but that of a third State...”, adding, “they lost the status of a citizen of the Union as from that date.”³⁰

²⁷ In addition to refusing to register the initiative, in her response, the Secretary General of the Commission recalled that only nationals of a Member State are citizens of the European Union. SG-Greffé (2012) D/8977, C(2012) 3689 final. (<https://www.vozbcn.com/extras/pdf/20120602iniciativa-ue.pdf>).

²⁸ Question (E-2012, 007453) from Northern League MEP Mara Bizzoto (https://www.europarl.europa.eu/doceo/document/E-7-2012-007453-ASW_ES.html?redirect). On the debate over citizenship, see: Fromage 2019, p. 22.

²⁹ CJEU (Grand Chamber), judgment of 12 March 2019 (*M.G. Tjebbes*, C-221/2017), para. 48, ECLI:EU:C:2019:189.

³⁰ CJEU (Grand Chamber), judgment of 9 June 2022, (*EP v Préfet du Gers*, C-673/20), para. 56–58, ECLI:EU:C:2022. Again in the CJEU judgments of 15 June 2023, in the cases C-499/21 P | *Silver and Others v Council*, C-501/21 P | *Shindler and Others v Council*, and C-502/21 P | *Price v Council*: “Furthermore, since possession of the nationality of a Member State constitutes, in accordance with Article 9 TEU and Article 20(1) TFEU, an essential condition for a person to be able to acquire and retain the status of citizen of the European Union and to benefit fully from the rights attaching to that status, the loss of that nationality therefore entails, for the person concerned, the loss of that status and of those rights” (para. 44, C-499/21; ECLI:EU:C:2023:479).

The retention of European citizenship thus depends not on European law but on national law, as European citizenship is an automatic complement to the nationality of a Member State. The treaty does not regulate how it is lost; it does not need to. European citizenship is linked to membership and to national citizenship and so runs its course and ends.

Retaining Spanish citizenship in addition to Catalan citizenship, in the hypothetical case of a unilateral secession, would only be possible through a dual nationality agreement, which would take many years to conclude in the wake of an illegal secession. Dual nationality agreements are unlikely following a unilateral secession; when they are concluded, it is after some time and for specific situations.

Naturally, the new state is a separate market with the ability to impose tariffs, trade quotas, etc.; it is outside both the unified economic area and the currency. Although small third states (the Vatican, Andorra, etc.) have been allowed to use the euro as a single common currency, such an agreement would be quite unlikely for some time to come.

4 The Catalan Referendum and Disconnection Laws: The EU's Response to the Illegality of the Independence Process and the Defence of the Rule of Law in Spain

In September 2017, the Catalan Parliament passed two laws to accelerate its unilateral process of illegal secession.³¹ The Spanish central government challenged them both before the Constitutional Court, requesting precautionary suspension measures. The Spanish Constitutional Court ordered the suspension of both the referendum law and the transition law. The referendum could not be held and independence could not be declared.

Nevertheless, the Catalan regional government called a referendum for 1 October 2017, defying the suspension ordered by the Spanish Constitutional Court. Neither the Catalan law on the referendum nor the referendum's organization in practice met the minimum standards for holding referendums established by the European Council's Venice Commission in its "Code of Good Practice on Referendums".³² First, the Constitutional Court itself ordered the law's suspension in view of its likely incompatibility with the Constitution; it subsequently confirmed that the law was indeed contrary to the Spanish Constitution and declared it null and void.³³ The

³¹ Law 19/2017 of the Catalan Parliament, of 6 September, on the self-determination referendum, *Official Gazette of the Catalan Government* (hereinafter *DOGC* from the Catalan), of 6 September 2017. And Law 20/2017 of the Catalan Parliament, of 8 September, on legal transition and founding of the Republic, *DOGC*, 8 September 2017.

³² Council for Democratic Elections and the Venice Commission, *Code of Good Practice on Referendums* (CDL-AD(2007)008rev-cor, [https://www.venice.coe.int/webforms/documents/CDL-AD\(2007\)008rev.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2007)008rev.aspx)).

³³ The full bench of the Constitutional Court unanimously found the self-determination referendum law null and void in judgment 114/2017, of 17 October 2017, *Spanish Official Gazette* (hereinafter, *BOE* from the Spanish) of 24 October 2017 (<http://hj.tribunalconstitucional.es/docs/BOE/BOE-A-2017-12206>).

same thing happened with the law on the transition, which was likewise initially suspended and subsequently declared null and void (unconstitutional).³⁴

The secession that the pro-independence parties proposed in these two laws did not adhere to the Council of Europe Code, which requires full compliance “with the legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament’s exclusive jurisdiction” (point III.1 of the Code). Furthermore, “Texts submitted to a referendum must comply with all superior law (principle of the hierarchy of norms)” (point III.3 of the Code).³⁵

The Catalan government opened polling stations at makeshift venues, on street corners and in churches, in addition to at the schools traditionally used in elections. It moreover did so without an official census, without voting booths, in some cases without envelopes—voters could cast ballots at multiple locations—and without any guarantees regarding how the poll workers would be designated (without scrutineers and representatives of all the political parties), all in disregard of parts I and II of the European Code for referendums.³⁶ Turnout was only 42%, including repeat voters.

Compounding the lack of guarantees, citizens were deprived of objective information to counter the official propaganda’s claim that Catalonia would remain in the EU and NATO. The consequences of leaving Spain—in terms of the economy, the massive debt, the currency, exiting the EU, etc. —were never clearly laid out for the people during the campaign. The pro-independence authorities acted unilaterally and excessively in favour of independence, in violation of the required political neutrality. Nor were they transparent in the media used for their election campaign, excluding opponents from the official government media. The Spanish Civil Guard and National Police prevented some polling stations from opening, resulting in unpleasant and disproportionate incidents in relation to some of the people inside them (who were forcibly dragged out). But these incidents were few and far between and gave rise to only a small number of minor injuries amongst the population. In contrast, more than 400 state law enforcement officers were injured, including several whose injuries were so serious that they resulted in permanent work disabilities.

Footnote 33 (continued)

pdf). The reasoning and judgment are available in English at https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2017_074/JUDGMENT%202017-4334STC_EN.pdf.

³⁴ The full bench of the Constitutional Court unanimously found that the law on legal transition and founding of the Republic was null and void in judgment 124/2017, of 8 November. *BOE* of 16 November 2017 (<http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-A-2017-13228.pdf>). A summary in English is available at https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2017_085/PRESS%20RELEASE%2085-2017.pdf.

³⁵ See *supra* n. 32; the text of the Code is available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)008rev-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)008rev-cor-e).

³⁶ It was not the first time that the regional Catalan government had been warned by the Venice Commission. In 2008 (when Spain also had a *Partido Popular*, or People’s Party, central government), the Venice Commission formally notified the regional Catalan government that the referendum that they had called did not comply with the Code of Good Practices on Referendums adopted by the Council for Democratic Elections in Venice (2006) and the Venice Commission (CoE Doc. CDL-AD (2007) 008). The same thing happened with another referendum in 2014.

The Catalan police (i.e. the *Mossos d'Esquadra* or *Mossos*) refused to engage entirely. Video images were manipulated (Russian hackers are known to have been involved and have ties with the pro-independence movement) and doctored photos of police involved in serious incidents in other countries were shared. The populist Catalan government itself widely spread false and manipulated images in an effort to sway public opinion against the democratic Spanish state.³⁷

There was a measured response from the European institutions to some of the shocking images.³⁸ The Commission's chief spokesperson, Margaritis Schinas, remarked:

“Under the Spanish Constitution, yesterday’s [1 October] vote in Catalonia was not legal. [...] We call on all relevant players to now move very swiftly from confrontation to dialogue. Violence can never be an instrument in politics.”³⁹

The president of the European Council, Donald Tusk of Poland, who until then had said nothing, spoke with Spanish Prime Minister Mariano Rajoy, calling on him to find means to avoid escalation and the additional use of force. British Prime Minister Boris Johnson tweeted:

“The Catalonian referendum is a matter for the Spanish govt & people. Imp that Spanish constitution respected & the rule of law upheld. Spain is a close ally and a good friend, whose strength and unity matters to the UK.”

Verhofstadt, the leader of the European liberals, noted that the so-called referendum had been prohibited by the Spanish Constitutional Court and ran contrary to the will of the 60% of the population who did not want separation. Nevertheless, he acknowledged, “In the European Union we try to find solutions through political dialogue and with respect for the constitutional order.”⁴⁰

In general, the Member States were reluctant to weigh in on these purely internal and, on the whole, minor events. French President Emmanuel Macron expressed his “attachment to the constitutional unity of Spain”, making no mention of the issue of violence. In contrast, the Belgian government, then led by Charles Michel, focused on the violence (the forcible removal of people) and doctored images, tweeting, “La violence n’est pas la réponse, nous condamnons toute forme de violence et réitérons notre appel au dialogue politique” [Violence is not the answer. We condemn all forms of violence and reiterate our call for political dialogue]. The Slovenian prime minister and first minister of Scotland also expressed concern for the scenes of violence.⁴¹

³⁷ On Russian interference, see: Schwirtz and Bautista (2021) and The Objective (2023); https://elpais.com/agr/la_injerencia_rusa_en_cataluna/a; EFE (2023), Europa Press Nacional 2023, Riera Bosqued (2019).

³⁸ Also in the international press, see: Dennison (2017).

³⁹ https://ec.europa.eu/commission/presscorner/api/files/document/print/en/statement_17_3626/STATEMENT_17_3626_EN.pdf.

⁴⁰ All these statements are available in DW (2017).

⁴¹ Data available at the website cited *supra* in n. 40 and at EUROACTIV France (2017).

The European Parliament held a wide-ranging debate in the wake of the failed referendum entitled “Constitution, rule of law and fundamental rights in Spain in the light of the events in Catalonia”,⁴² featuring speeches that were highly critical of the pro-independence movement and advocated respect for the Spanish Constitution and laws. Frans Timmermans maintained that one cannot violate the constitution and criticize judges, nor can the supporters of independence unilaterally decide what constitutes the rule of law. He stressed that, for the EU, respect for the rule of law is fundamental and that this principle protects the weak from the powerful and ensures equal treatment of all citizens. He accused “populist nationalism” of weaponizing democracy against the rule of law and recalled that the national governments and parliaments of the Member States had undertaken to respect the rule of law in the treaties. To widespread applause in the European Parliament, he affirmed that the referendum of 1 October (2017) was not held within the remit of the rule of law and that the Spanish institutions are independent and act in accordance with the law.⁴³

The violations of the Constitution by the Catalan Parliament and government, in disregarding the Constitutional Court’s suspension order, were clear proof of the lack of legality of their actions (the referendum and the declaration of independence, carried out under two unconstitutional laws). Needless to say, for many countries, this was proof enough that such an act of rebellion could not be supported with recognition of statehood. Furthermore, recognition is usually based on the strength and effectiveness of the new authorities.

In view of the manipulated reporting on the events of 1 October, several prominent figures in Spain wrote to Commission President Juncker as members of the civil-society platform ¡Basta ya!, the 2000 recipient of the European Parliament’s Sakharov Prize. In their letter,⁴⁴ they recalled that the Statute of Catalonia does not empower the Catalan Parliament or government to hold referendums or to wildly amend or repeal the Statute itself. They also noted that, in preventing the opposition from exercising their parliamentary rights to table amendments and debate the unconstitutional laws passed on the referendum and transition in the parliamentary sessions of 6 and 7 September 2017, the separatist regional authorities had behaved

⁴² The video of Vice-President of the European Commission Frans Timmermans’s excellent speech and the parliamentary debate is available at: https://multimedia.europarl.europa.eu/en/video/01-ep-plenary-session-constitution-rule-of-law-and-fundamental-rights-in-spain-in-the-light-of-the-events-of-catalonia-opening-statement-by-by-frans-timmermans-first-vice-president-of-the-ec-1506-1514_1144556_01.

⁴³ A summary of his post-debate remarks can be found at: <https://www.youtube.com/watch?v=fi39iGc34xo>.

⁴⁴ <https://www.elasterisco.es/letter-to-eu-leaders/>. The response to the debate prompted additional remarks from Timmermans, in which he brilliantly defended the Constitution and respect for the law as the basis of democracy in all states and, therefore, in Spain, too. These remarks can be found at: https://multimedia.europarl.europa.eu/en/video/11-ep-plenary-session-constitution-rule-of-law-and-fundamental-rights-in-spain-in-the-light-of-the-events-of-catalonia-closing-statement-by-by-frans-timmermans-first-vice-president-of-the-ec-1556-1600_1144556_11.

The remarks by the leaders of the parliamentary groups in favour of respect for the law and the Constitution were likewise clear. See: <https://www.europarl.europa.eu/news/es/press-room/20171003IPR85246/cataluna-jefes-de-los-grupos-del-pe-discutieron-la-situacion-con-timmermans>. Those by Guy Verhofstadt, Manfred Weber, Ska Keller and Antonio Tajani, in particular, stand out.

in a way reminiscent of the factious dictatorial systems so infamously etched in the memory of Europeans and, especially, Spaniards during the Franco regime.⁴⁵

As is well known, there were two declarations of independence: one made on 10 October 2017—and suspended 43 s later, including 34 s of applause—by the president of the Catalan government himself⁴⁶ and another on 27 October 2017. The latter declaration prompted the Spanish Senate to approve measures that same day to impose direct rule on Catalonia, including the dismissal of the Catalan government and dissolution of the Catalan Parliament and the calling of new regional elections, all in accordance with Article 155 of the Spanish Constitution.

The European Commission's position, some days prior to the second illegal declaration of independence and the ensuing same-day adoption of these measures by the Spanish government, was one of clear support for the constitutional direct-rule mechanism provided for under Article 155 of the Spanish Constitution. Its use was approved by a broad majority in the Spanish Senate on 27 October 2017, with support from the two major parties (the PP and the Socialists (PSOE)), as well as various minority parties. The EU was thus openly critical of the pro-independence actions that violated the rule of law in Spain.⁴⁷

European Council President Tusk likewise affirmed, once the illegal declaration had been made, that nothing had changed and that Spain and the Spanish government would remain the EU's only interlocutor.⁴⁸ Meanwhile, President of the European Parliament Tajani reiterated that the referendum was illegal and that the triggering of Article 155 of the Spanish Constitution had restored the rule of law: "No one will ever recognize Catalonia as an independent country. The referendum was illegal [...] The [rule] of law should be restored."⁴⁹ Tajani also rejected that the dialogue required a mediator or that the EU itself could be one. Commission President Juncker categorically affirmed that the EU wanted "to respect the Spanish constitutional and legal order". There was no international recognition of the illegal declaration of independence and several countries—including, representatively, the far-left government of Greece—expressed their rejection of the illegal act and support for Spain's territorial integrity.⁵⁰

In short, the EU understood the scope of the decision of the Spanish Senate and government to sack the Catalan president and his cabinet, dissolve the Catalan Parliament, impose direct rule on the region, and call snap elections. And it rejected the separatist authorities' sham referendum and illegal declaration of independence.

⁴⁵ The Spanish Constitutional Court declared that the actions of the separatist president and Catalan Parliament were a violation of the right to exercise representative functions, in relation to the right of citizens to participate in public affairs through their representatives (STC 115/2022, of 27 September 2022).

As one French historian wrote, "In what European democracy did we see the rights of the parliamentary opposition trampled? In Catalonia, on 6 and 7 September 2017" [translation by the author] (Pellestrendi 2023).

⁴⁶ Several governments (including, among others, those of the United States, Italy and Mexico) are known to have expressed their support for the Spanish government (Cristancho 2017).

⁴⁷ Pérez (2017a).

⁴⁸ Pérez (2017b).

⁴⁹ AP (2017).

⁵⁰ *Ibid.*

5 Neutrality of the EU Institutions and Non-neutral Consequences of a Secession

The Commission's position—that the Catalan crisis was a matter to be settled internally—was not always understood by Spanish public opinion. The Commission never crossed that threshold of influencing or deciding for Spain.

For one thing, as I have noted from the start of this contribution, it is not supposed to meddle in the constitutional debate of a Member State or any possible internal agreements for co-existence.

The Commission issued no statements or warnings when the United Kingdom exceptionally agreed to the 2014 referendum in Scotland. It considered it an internal British matter; it did not set a precedent. It limited itself to the strict interpretation of the treaties regarding the consequences for Scotland and the Scottish people of leaving the United Kingdom.

That the Commission chose to abstain completely from the Brexit referendum campaign is likewise indicative of its deep commitment to strict neutrality. Nevertheless, in my view, this EU policy of abstention was questionable, as it allowed the lies of the British populists, nationalists and xenophobes⁵¹ and reactionary Catalan separatists to go unchecked.

I believe that Europe could be destabilized by the emergence of right- and left-wing totalitarianisms—nationalism, protectionism, xenophobia. The Commission should not have shirked its duty to “promote the general interest of the Union” (Art. 17 TEU). Admittedly, the statements issued by EU institutions such as the Commission and Council do not usually get into internal matters. They tend to be concise (such as those cited in Sects. 2.2.2 and 3 above), deliberate, very technical and related to internal debates only when they have a sectarian bias, include false content or have effects for the rights and obligations undertaken by the Member State and its institutions. Often, they seek to shed light on specific and essential issues such as those dealt with here (the new state as a third country, loss of European citizenship) or to clarify mistaken beliefs or opinions manipulated by backwards-looking nationalists (the main pro-independence parties belong to the reactionary right) that distort the debate and people's positions. This type of action was taken frequently, as seen here.

However, any move to go further and advocate for Catalonia to remain in Spain or help the Spanish government—which was engaging in *legal quietism*, i.e. sitting back and waiting, Constitution and Criminal Code in hand, for independence to be declared—would have been highly objectionable. Of course, the Commission was also reproached for not making an effort to bridge the gap between the positions, helping to defuse the tension and initiate talks in search of a new path forward.⁵² There was also a very unfortunate statement from Commission President Juncker,

⁵¹ I argued this in Mangas Martín 2016, p. 429.

⁵² Fromage *supra* n. 28, p. 9.

who, in vaunting the Commission's supposed neutrality, suggested that whether Catalonia achieved independence was indifferent.⁵³

In political and journalistic circles close to the Spanish government, as well as in a confused public opinion, there was hope that the EU could stop or deter the Catalan government or even that it "would not tolerate" independence. This is a very Spanish attitude: not dealing with the situation ourselves and leaving it for others to handle. These people expected Europe to come out strongly and explicitly against the pro-independence movement even as the Spanish government and opposition refused to use constitutional means to end the tension and instead allowed the separatist forces to dig in deeper and deeper until they crossed the line of the Criminal Code.

The EU cannot interfere in the dialectics and issues between a central government and its regions, as they fall outside the scope of the EU treaties and EU secondary law. The EU and its institutions do closely follow the political-regulatory activity of the Member States and regions, as well as the private sector, which they address by various means; naturally, they have the duty to prevent, advise and, if necessary, initiate infringement procedures against Member States or to authorize, prohibit or impose sanctions on companies. In internal matters, domestic policy, the EU, and, more precisely, the Commission, should intervene and speak out when the matter affects obligations undertaken by the Member State, its components, or companies: for example, the values common to the EU and its Member States (democracy, human rights, rule of law, equality, etc.). It must also respond to any action or omission entailing a violation of EU law. But the EU institutions do not have to protect national unity, which is a primary competence of the government and the national society as a whole.

An internal debate on the separation of parts of a state falls well outside the EU's competence. Of course, beyond the European rules, there is discreet diplomacy and loyal cooperation with Member States. A contemporaneous article in the *New York Times* called Catalan nationalism an expression of populism akin to those on display in Hungary or Brexit and argued that the EU was failing to address the underlying problem, even as it proliferated across the continent. *Where*, it asked, *was the EU in the Catalan crisis*:

"Catalonia is just the latest battle in the European Union's war with populism — a war that it seems to be losing. [...] In recent years, referendums have become the populists' weapon of choice. They have been used increasingly over the past few years to give 'the people' the chance to answer direct questions. These referendums give an impression of democracy, but it is unclear

⁵³ They were made on 15 September 2017 on the *Euronews* TV channel (<https://www.youtube.com/watch?v=JcylrPxCXGM&t=3s>); their ambiguity lay in the following sentences: "La Commission Prodi, la Commission Barroso et la mienne avons toujours dit qu'en la matière nous respecterions les arrêts de la cour constitutionnelle espagnole et du parlement espagnol [...] mais il est évident que si un oui à l'indépendance de la Catalogne voyait le jour, nous respecterions ce choix" (Gotev 2017). They were later clarified by Vice-President Timmermans to mean that, were a legal referendum to be held and independence to be the will of Spain, then that decision would be respected (<https://www.youtube.com/watch?v=zSTxtk1CwqE>).

that they really are an expression of the people's will rather than a way for populist movements to force democratically elected governments' hands."⁵⁴

Separately, unilateral secession ultimately affects the EU; it is not neutral for it, as recognized in the answers to the MEPs' questions. A territorial change has limited consequences for the Member State's status (number of votes or the composition of some institutions, such as the Council, Parliament, Committee of the Regions, or Economic and Social Committee). Its contributions to the capital of the EIB, ECB and ESM would likely be adjusted, taking advantage of any subsequent reform of the treaties.

As for the region that has become a third country, it has already been clarified that accession is far from automatic, even if it already applies the EU *acquis* or meets the requisite conditions (Art. 49 TEU). To be admitted as a candidate, the new state requires prior recognition of its statehood. However, as far as its potential application for EU membership is concerned, the fact that unilateral secession violates the internal law of a democratic state makes the new state's recognition by the EU Member States and, thus, consideration of its candidacy *de facto* impossible.

A state not recognized by all the EU Member States cannot be a candidate for accession. It is implicit in Article 49 TEU that a third state applying to join the EU must be recognized by all Member States. The decision to recognize a state is a unilateral and discretionary act of each Member State. No rule of EU or international law requires recognition of a new state. This is not a competence conferred on the EU institutions in the treaties. Only in the (highly unlikely) case of the agreement of all the Member States could this recognition be done collectively within the Council. But such a scenario is inconceivable in the medium term.⁵⁵ All the votes needed to become a candidate and for the point-by-point negotiation for accession (more than a thousand votes) are unanimous; each Member State has discretion in casting its vote and that act cannot be appealed before any judicial body.

It would be naive to think that, even as the ground was being laid for independence, the new state's entry into the EU would be facilitated. The United Kingdom experienced this in the Brexit withdrawal agreement. Secessionism and fragmentation of the EU cannot be encouraged; the accession process cannot be seen as an attractive red-carpet stroll for anyone who would provoke such an internal crisis and put the EU's governability at risk.

⁵⁴ See *supra* n. 38. Similarly, another article noted that Catalonia's enemy was not Spain, but populism (Jiménez 2021).

⁵⁵ In contrast to simplistic views, the British opinion on Scotland (see *supra* n. 7) recognizes that the new Scottish state would have to undertake tough and unpredictable negotiations to join the EU. Furthermore, those negotiations would depend on the EU institutions and the, at the time, 28 Member States (*Executive Summary*, p. 8 para. XX, and p. 40, para. 2.38-2.39).

6 Conclusions: Secession as a Failure and a Risk for Integration

There are no precedents for the separation of part of an EU Member State, whether agreed or unconstitutional (the case of Algeria was not secession but self-determination vis-à-vis the colonial power, France, while the Saar was transferred between two states that were already members (see Sect. 2.1 above)). Consequently, it is impossible to ascertain how the EU institutions would view a secession and the process as a whole.

The EU embodies the recognition by states of their inadequacy to solve economic and social problems and overcome the risks that nationalism had posed to Europe since the second half of the nineteenth century and, in particular, in the tragic twentieth century. The states' individual shortcomings were offset by common institutions and policies. In the face of the supremacism, xenophobia and identitarianism that populism represents, the integration process advocates common values and shared institutions and policies. Nationalism, as the expression of populism (two sides of the same coin), divides and confronts societies, violates the principle of equality of citizens and is discriminatory by nature (in language, education,⁵⁶ access to public- and private-sector jobs,⁵⁷ etc.). The Commission has received information and complaints about the exclusion of Spanish from education in Catalonia or the discrimination and violence exercised in various ways by the pro-independence institutions against individuals and groups.⁵⁸ To my knowledge, there have been no relevant pronouncements from the Commission on this matter and only a few timid actions by the European Parliament.

Nationalism and populism represent divided societies and states. The EU is based on cohesive societies and states that share and tolerate each other, on societies of equals. Nationalism and populism thus feed off each other and chip away at the integration process, undermining states' internal cohesion, as well as that between them

⁵⁶ The letter, written by the renowned civil society platform ¡Basta ya! (see *supra* n. 44), stated, "Education in Catalonia, under regional control, has been used systematically to indoctrinate in hatred of Spain, to spread Catalan supremacism and to discriminate against Spanish-speaking students (more than 50%). The schoolchildren have been used by the Catalan government for demonstrations and public events in favour of independence, and schools and universities have even been closed by decision of the regional government in order to encourage their attendance in certain demonstrations" as in the demonstrations of the fascist systems of Nazi Germany, Il Duce's Italy or Francoist Spain.

⁵⁷ As noted by the brilliant lawyer and director of the independent Hay Derecho Foundation (<https://www.hayderecho.com/>), "The expulsion of Spanish from official Catalonia successfully protects the official labour market—that is, jobs in the public sector, including, of course, those in healthcare and education—from competition from professionals from other parts of Spain, regardless of their accumulated merits and even though it is perfectly possible to communicate with the citizens whom they are attending in Spanish" (De la Nuez 2023; translation by the author). She was referring to the shocking case of an Andalusian nurse who had been working in Catalonia for some time. After posting a video to social media about the stringent Catalan language requirements to continue working as a nurse, she was sacked and had to leave Catalonia, as in the times of the Nazis. In addition to being the shared official language in Spain, Castilian (Spanish) is also the co-official language in Catalonia and there is a constitutional obligation to know it (Art. 3). Persecution of the Spanish language is common in Catalonia. (See the contribution by Arenas García in this special issue).

See *supra* n. 50.

⁵⁸ See Arenas García (2024), footnotes 82 and 83.

and their citizens, by establishing separate rights for the supremacist groups. They are driven by electoral opportunism as opposed to the stable aims and objectives that guide European policies. As the European Commission's chief spokesperson said, "Beyond the purely legal aspects of this matter, the Commission believes that these are times for unity and stability, not divisiveness and fragmentation."⁵⁹

The nationalists' unrestricted, no-holds-barred right to decide clashes with the value of democracy as processes of elections and decisions *with rules* and *equality* of all citizens, without privileges based on language or membership in xenophobic parties or for living in certain provinces that are more Catalanist than others (which are allotted more MPs in the Catalan Parliament). Nationalism—a pure expression of the most retrograde populism—is not subject to common values and does not accept respect for the established rules or their reform by the agreed means.

European integration recognizes a plural, open and diverse society of equal citizens. And the respect of all for the rule of law and its legality. Nationalism, the most visible face of populist extremism, aspires to a linguistically, politically and culturally homogeneous nation and society.

The fragmentation of the Member States or the mere risk thereof—through concentration on their essential state functions, i.e. their security and integrity—is a real and imminent threat to the very process of European integration. As the European Commission stated in response to the declaration of independence, "There isn't room in Europe for other fractures or other cracks—we've had enough of those. [...] We are not in favour of letting Europe develop so that tomorrow we'd have 95 member states. Twenty-eight is enough for now."⁶⁰

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Declarations

Conflict of interest Araceli Mangas Martín is a member and vice-president of the Spanish Royal Academy of Moral and Political Sciences, a public corporation that selectively brings together 44 specialists in economics, philosophy, the social sciences and law from Spain (<http://www.racmyp.es>). She is also a member of the Board of Trustees of the Elcano Royal Institute of International and Strategic Studies (<https://www.realinstitutoelcano.org/en/about-elcano/corporate-governance/board-of-trustees/>), a leading global and European think tank. The Board of Trustees is the Elcano Royal Institute's highest governing body and is tasked with ensuring the fulfilment of the institution's mission and goals. She is a member of Círculo Cívico de Opinión (<https://www.circulocivicodeopinion.es/>), an association founded in 2011 as an open, plural, cross - party and independent civil-society forum for generating concrete proposals and suggestions, subject to public scrutiny through the media.

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⁵⁹ See *supra* n. 39.

⁶⁰ See *supra* n. 50.

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