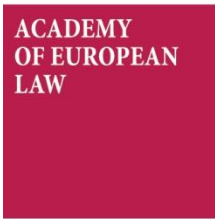




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From Britain and Ireland to Cyprus: Accommodating
'Divided Islands' in the EU Political and Legal Order

Nikos Skoutaris

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Abstract

In the Brexit referendum of 23 June 2016, England and Wales voted to leave the EU, while Scotland and Northern Ireland voted to remain. Following that, there has been a debate about how it would be possible to achieve the continuing EU presence of the UK constituent nations that do not want to be taken out against their will. This paper explores two pathways for Scotland and Northern Ireland to remain in the EU. The first entails the achievement of Scottish independence and the reunification of Ireland through democratic referendums. To this effect, the paper reviews the right of secession of those two constituent nations under UK constitutional law and revisits the debate on the appropriate legal basis regulating Scotland's future EU Accession. The second pathway explores how it would be possible for Scotland and Northern Ireland to remain in the EU even without seceding from the UK. In order to do that, the paper points to the remarkable flexibility of the EU legal order to accommodate the differentiated application of Union law. By focusing on Cyprus, in particular, the paper assesses the possible challenges that such an arrangement would entail.

Keywords

EU law; Constitutional law; Secession; Territorial differentiation.

Introduction*

On 23 June 2016, 52 per cent of the UK citizens that participated in the Brexit referendum voted to leave the EU. Still, Scotland and Northern Ireland, two out of the four UK constituent nations, voted to remain.¹ As a result, the following morning, the First Minister of Scotland, Nicola Sturgeon, made abundantly clear that she intends to ‘take all possible steps and explore all options to give effect to how people in Scotland voted –in other words, to secure [their] continuing place in the EU and in the single market in particular.’² The reason being that ‘Scotland faces the prospect of being taken out of the EU against [their] will.’³ At the same time, Sinn Féin has called for a referendum for the unification of Ireland and thus for Northern Ireland to remain in the EU.⁴ It has even been reported that Gibraltar is in talks with Scotland in order to remain in the EU.⁵ So, the question is how it could be made possible for the two UK constituent nations that voted to remain, not to be taken out of the EU against their expressed will.

The present paper presents two pathways. The first is rather ‘straightforward’ from an EU law point of view. It entails the secession of Scotland and Northern Ireland from the UK through democratic referendums. To this effect, we briefly review their right to secession under UK constitutional law. We note that, while the Northern Ireland Act provides for the right of secession of Northern Ireland, the Scottish situation is more complicated. Unless there is a similar political agreement to the one that led to the 2014 independence referendum (*Edinburgh Agreement*), Holyrood does not have the right to unilaterally organise a second referendum. Assuming that Westminster would allow a second referendum and that Scotland would achieve independence, we analyse the debate on whether Scotland enjoys a right to continuing membership under EU law.

The second pathway explores how it would be possible for Scotland and Northern Ireland to remain in the EU even without seceding from the UK. In order to do that, the paper briefly revisits all those cases where different parts of a Member State may have different relationships with the EU. We note the remarkable flexibility of the Union legal order that has allowed for the differentiated application of EU law within the territory of the Member States. Of course, all those cases to which we refer – including Greenland – are politically, historically and even legally very different from a future arrangement where Scotland and Northern Ireland remain as parts both of the UK and the EU. This is why we also shed light on how the EU has accommodated the other ‘divided island’, Cyprus, within its legal order. Cyprus is the only Member State where the *acquis* does not apply to a significant part of its territory⁶ and where there is a territorial border between the part where it applies and where it does not. This does not mean that the paper suggests in any way that the post-Brexit political situation in the UK bears any resemblance to the historical and political conditions that led to the Cyprus issue. However, the legal arrangements that were used in order to accommodate the Cyprus problem could offer some much needed inspiration if Scotland and Northern Ireland were to decide to remain in the EU without seceding from the UK.

* I would like to thank the EUI Academy of European Law for publishing this Working Paper, professors M Cremona and C Kilpatrick for their comments and Dr C Ní Ghiollarnáth for language editing. The usual disclaimer applies.

¹ In Scotland, 62 per cent voted to remain in the EU, while 56 per cent in Northern Ireland. In England, 53 per cent voted to leave while 52.5 per cent in Wales.

² N Sturgeon’s speech after the referendum result, available at stv.tv/news/politics/1358534-nicola-sturgeon-speech-in-full-after-eu-referendum-result/ (last visited 4 July 2016).

³ *Ibid.*

⁴ See www.businesspost.ie/sinn-fein-seeks-irish-reunification-vote-as-britain-votes-for-brexit/ (last visited 4 July 2016).

⁵ <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36639770>.

⁶ Almost 40 percent.

Seceding from the UK, Remaining in the EU

The first pathway that could ensure that Scotland and Northern Ireland remain in the EU entails their secession from the UK through democratic referendums. This would lead to Scottish independence and the reunification of Ireland respectively. According to section 1 of Northern Ireland Act 1998, Northern Ireland enjoys a right to secede to join a United Ireland if the majority of its people agree to this in a referendum.⁷ On the other hand, Scotland does not enjoy a similar constitutional right under the current devolution arrangement. But even if Holyrood manages to convince Westminster to allow for the organisation of a Scottish referendum as in 2014, still, there is a debate about whether Scotland enjoys a right of continuing EU membership under EU law.

The Internal Constitutional Question

The Scottish Parliament has had the power to enact primary legislation from the very beginning. Its powers are defined negatively. This means that, according to section 29 of Scotland Act 1998, it may legislate in areas that are not considered as ‘reserved’ competences of Westminster. The latter are enlisted in Schedule 5 of Scotland Act 1998, which provides for a list of those ‘reserved matters’ over which the Scottish Parliament does not have legislative authority. According to Lord Hope,

‘The fact that section 29 provides a mechanism for determining whether a provision of an Act of the Scottish Parliament is outside, rather than inside, competence does not create a presumption in favour of competence. But it helps to show that one of the purposes of the 1998 Act was to enable the Parliament to make such laws within the powers given to it by section 28 as it thought fit. It was intended, within carefully defined limits, to be a generous settlement of legislative authority.’⁸

Thus, in a way, Scotland has residual powers over the competences that are not explicitly allocated to Westminster. The latter include: international relations, energy, aspects of road, rail and, more importantly for the purposes of the present paper, issues related to the Constitution of which ‘the Union of the Kingdoms of Scotland and England’ is part.

Following the landslide win of the Scottish National Party in 2011, there was a debate whether Holyrood had the legislative competence to unilaterally organise an independence referendum.⁹ In other words, the question was whether an Act of the Scottish Parliament allowing the organisation of an independence referendum would relate directly to the reserved matter of the Constitution and thus it would be deemed *ultra vires*. The ‘two governments of Scotland’ decided to resolve this important constitutional question with a political agreement,¹⁰ the *Edinburgh Agreement*,¹¹ which underscores the flexible nature of the UK idiosyncratic constitution. According to this agreement, David Cameron and Alex Salmond – as the then heads of ‘Scotland’s two governments’ – agreed to amend the text of Scotland Act 1998 to the effect that a new section 29A was introduced. This new section explicitly conferred the power on Holyrood to organise an independence referendum by no later than 31 December 2014.

⁷ The people of the Irish Republic should also agree to this in a separate referendum.

⁸ *Imperial Tobacco Limited v. The Lord Advocate (Scotland)* [2012] UKSC 61, para 15.

⁹ For an analysis of the debate, see C Mac Amhlaigh, ‘... Yes, But is it legal? The Scottish Independence Referendum and the Scotland Act 1998’, available at ukconstitutionallaw.org/2012/01/12/cormac-mac-amhlaigh-yes-but-is-it-legal-the-scottish-independence-referendum-and-the-scotland-act-1998/ (last visited 4 July 2016).

¹⁰ For an analysis of the legal nature of the *Edinburgh Agreement*, see C Bell, ‘The Legal Status of the Edinburgh Agreement’, available at www.scottishconstitutional-futures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/431/Christine-Bell-The-Legal-Status-of-the-Edinburgh-Agreement.aspx (last visited 4 July 2016).

¹¹ The text of the Agreement is available at <http://www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf> (last visited 4 July 2016).

From this, it is clear that the right of the Scottish legislature to organise another independence referendum is not unlimited. It has a temporal limitation. This means that, in order to have a second independence referendum that is constitutional, a similar political arrangement (*Edinburgh Agreement II*) should be achieved. To this effect, Mac Amlaigh argues that Nicola Sturgeon uses the potential veto power of Holyrood over Brexit legislation as leverage in order for Westminster to allow such a referendum to take place.¹² Differently, an unauthorised referendum might lead to a Unilateral Declaration of Independence.

Unlike the case of Scotland, 'Westminster has formally conceded that Northern Ireland can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this.'¹³ Section 1 of the Northern Ireland Act 1998 is a rare example of a provision of a constitutional statute explicitly recognising the right of secession of a region.¹⁴ In that sense, the organisation of such a referendum faces less constitutional hurdles – at least from a UK constitutional law point of view.¹⁵ This does not mean that it is politically more feasible. In fact, according to Schedule 1 of the Northern Ireland Act, a referendum for the reunification of Ireland can only be organised if 'it appears likely to [the UK Secretary of State] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.' Theresa Villiers, the current Northern Ireland Secretary has made clear that, according to her, 'there is nothing to indicate that there is majority support for a poll.'¹⁶ To this effect, one has to bear in mind that there does not seem to be agreement among the Northern Irish political elites concerning the need to organise such a referendum and that the ethno-religious segment that would be more willing to support the reunification of Ireland i.e. the Republican one, is in the minority.

Article 48 or Article 49: That is the Question

Now let us assume, for the purposes of the present paper, that Whitehall and Holyrood reach a similar agreement to the one that led to the 2014 referendum (*Edinburgh Agreement II*) and that the Scottish electorate votes in favour of independence in that second referendum. The next question we should address is what is the appropriate legal basis in order for Scotland to become a Member State.

¹² C Mac Amhlaigh, 'Scotland Can Veto Brexit (sort of...)', available at <http://verfassungsblog.de/scotland-can-veto-brexit-sort-of/> (last visited 4 July 2016). According to this argument, Westminster would not normally legislate in areas devolved to Scotland without the consent of the Scottish Parliament. This is known as the 'Sewell Convention'. Since its inception, the scope of the convention has evolved so as to require the consent of the Scottish Parliament, not only where the UK Parliament seeks to legislate in devolved policy areas, but beyond that where a UK bill seeks to vary the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers. So, given the way the European Communities Act 1972 (ECA) and EU law in general are embedded in the Scotland Act (see eg section 29 of the Scotland Act 1998), 'a repeal of the ECA to give legal effect to Brexit would trigger the Sewell Convention'.

¹³ J McGarry, 'Asymmetrical Autonomy in the United Kingdom' in Marc Weller and Katherine Nobbs (eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Philadelphia, University of Pennsylvania Press 2010) 148, 156.

¹⁴ Other examples of constitutional provisions that provide for a right of secession include Article 39(1) of the Ethiopian Constitution according to which 'every nation, nationality or people in Ethiopia shall have the unrestricted right to self determination up to secession' and; Article 4(2) of the Constitution of the Principality of Liechtenstein according to which '[i]ndividual municipalities shall be entitled to secede from the union. The decision on whether to initiate a secession procedure shall be made by a majority of the Liechtenstein citizens eligible to vote who reside there. Secession shall be regulated by a law or, as the case may be, by an international treaty. If secession is regulated by a treaty, a second vote shall be held in the municipality after the treaty negotiations have been concluded.'

¹⁵ If one looks at the Irish Constitution, and especially at the text of the revised Articles 2 and 3, s/he would realise that there is nothing that explicitly states that the Taoiseach is obliged by the Constitution, and the duties of his office, to pursue a United Ireland.

¹⁶ Available at www.theguardian.com/uk-news/2016/jun/24/arlene-foster-northern-ireland-martin-mcguinness-border-poll-wont-happen (last visited 4 July 2016).

Although Article 49 TEU provides for a clear legal basis for the EU accession of new Member States, the Scottish government and a number of experts suggested in 2014¹⁷ that a different legal basis was applicable.

Article 49 TEU provides that '[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union'. After receiving such an application, the Council has to unanimously decide on opening the Accession negotiations after consulting with the Commission and receiving the consent of the majority of the component members of the European Parliament. The negotiations are compartmentalised in chapters and are driven by soft law instruments in the form of bilateral accession partnerships and progress reports.¹⁸ Once there is an agreement that the candidate State has complied with all the relevant conditions contained in all the negotiating chapters, an Accession Treaty is drafted. The Treaty provides for all '[t]he conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails.'¹⁹ The signatories are the Union Member States and the candidate State. The Member States have to ratify the Accession Treaty in accordance with their respective constitutional requirements. Innocuous as it may sound, this might prove a cumbersome process given some recent constitutional developments. For instance, the amended Article 88-5 of the French Constitution provides that the ratification of an Accession Treaty could be submitted to referendum unless the Parliament decides differently with an enhanced majority of three fifths.

Clearly, the procedure under Article 49 TEU can be arduous and cumbersome. However, this has not been the only concern that made the Scottish government explore alternative routes to Union membership. It is mainly the fact that, if Scotland follows that procedure, it will find itself outside the EU between the time of its independence and the time of its Accession to the EU. This might be a significant time period. In fact, in the long hours of the morning of 19 September 2014, the then Spanish Foreign Minister made clear that if Scotland had become independent, it would have had to join the queue of the other candidate States, underlining how time-consuming this might be. More importantly, his statement shed doubt on whether Spain would ever accept Scotland as a Member State, fearing that this would create a dangerous precedent especially for the secessionist movements that exist in Spain.

In any case, the official position of the Commission at the moment was that

'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.'²⁰

Thus, it would have to follow the procedure under Article 49 TEU in order to become an EU Member State.

¹⁷ For the different views on this debate, see <http://verfassungsblog.de/category/focus/scotlands-eu-membership/> (last visited 4 July 2016).

¹⁸ For a brief analysis, see C Hillion, 'EU Enlargement' in P Craig and G de Búrca, (eds), *The Evolution of EU Law* (2nd ed) (Oxford, Oxford University Press, 2011), 187.

¹⁹ Art 49(2) TEU.

²⁰ President JM Barroso's letter of 10.12.2012 to the House of Lords Economic Affairs Committee regarding the status of EU membership for Scotland in the event of independence. In fact, this letter follows almost *verbatim* a similar position expressed by a previous President of the Commission R Prodi in 2004. According to it, '[w]hen a part of the territory of a member-state ceases to be a part of that state, e.g. because the 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...' If the new country wished them again to apply there would need to be ... 'a negotiation on an agreement between the applicant state and the member-states on the conditions of admission and the adjustments to the Treaties which such admission entails. This agreement is subject to ratification by all member-states and the applicant state.' (President R Prodi to the European Parliament Official Journal of the European Union, C84E/422 (3.4.2004))

However, the Scottish Government had a different view. They based their argument²¹ on the fact that the Scottish situation is *sui generis*. It would be the first time that a region would secede from an EU Member State by a consensual and lawful constitutional process. It did so in order to differentiate itself from other secessionist claims in Europe and to ease the concerns of the respective metropolitan States. According to the Scottish position, Article 49 only regulates 'conventional enlargement where the candidate country is seeking membership from outside the EU'.²² But Scotland is part of the EU since 1973. Therefore, the appropriate legal basis that would facilitate Scotland's transition to Union membership is Article 48 TEU, the generic provision on the amendment of the EU Treaties. In other words, the Scottish position has been that the amendment of Article 52 TEU, which provides for the States to which the Treaties apply and the relevant Articles concerning the composition of the EU institutions would be, by and large, sufficient in order for Scotland to become an EU Member State after its independence.

The result of the Brexit referendum has marked a tectonic shift in the constitutional politics of the UK and the EU. Accordingly, Brussels seems to have changed its tone with regard to a possible future Scottish EU membership. Notwithstanding, I would argue that, in the current legal framework, Article 49 TEU is still the appropriate legal basis to regulate Scotland's EU accession. The reason is twofold. 'The choice of the legal basis for a [certain measure and/or action] may not depend simply on an institution's [or Member States'] conviction as to the objective pursued but must be based on objective factors... Those factors include in particular the aim and content of the' action.²³ So, as long as the objective pursued by this treaty amendment will be the accession of a new Member State, the EU Treaties provide for a *lex specialis* rule, i.e. Article 49 TEU. In other words, if the Treaty on European Union is interpreted in accordance with the ordinary meaning to be given to its terms, following the well established rule of Article 31(1) of the Vienna Convention on the Law of the Treaties, it would be difficult to justify the use of the generic provision on the amendment of the Treaties (Article 48 TEU) when there is a special provision regulating the accession of new Member States (Article 49 TEU). Of course, the counterargument is that it would not be the accession of a new Member State but rather a change in status of an entity that is already part of the EU. From a public international law perspective, this is a rather unconvincing argument.²⁴ If Scotland secedes from the UK, it would be considered to be a newly independent country under public international law. It would have to apply to be admitted as the 194th member of the United Nations. In that sense, it would be a new European State that would also have to apply for EU membership under Article 49 TEU.

It is important to note that the EU Treaties, including Articles 48 and 49 TEU, do not make any distinction based on the process of the formation of the States with regard to their EU accession. If the EU and the Member States opted for Article 48 in order to regulate Scotland's EU Accession, they would *de facto* distinguish between European States that have become independent from old Member States through a consensual procedure and the rest. Consequently, they would create a special procedure for the EU accession of the former, although this is not envisaged in the Treaties. Of course, the Member States as Masters of the Treaties could always amend the text in order to provide for such a distinction. But until that happens, Article 49 TEU seems like the more appropriate procedure, also because it allows for the same level of pre-accession scrutiny that all the candidate States have to be subjected to.

²¹ See Scottish Government's blueprint on Scotland's Future 216-224 available at www.gov.scot/resource/0043/00439021.pdf (last visited 4 July 2016).

²² *Ibid.*, 21.

²³ Case C-300/89 *Commission v Council* [1991] ECR I-2898.

²⁴ Equally unconvincing from a public international law perspective is the suggestion that Scotland could also be seen as representing the continuing UK membership (A O'Neill 'England's Difficulty; Scotland's Opportunity', available at <http://verfassungsblog.de/englands-difficulty-scotlands-opportunity/> (last visited 4 July 2016)). To this effect, see J Crawford and A Boyle, 'Opinion: Referendum on the Independence of Scotland – International Law Aspects', available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf (last visited 4 July 2016).

Finally, concerning Northern Ireland, the situation again seems to be simpler from an EU law point of view. If Northern Ireland secedes from the UK, it would join the Republic of Ireland and not become an independent State. This means that it could follow the precedent of the German reunification where the application of the *acquis* was extended to East Germany without an amendment of the primary legislation.²⁵ The difference is that, in the case of Germany, the *acquis* did not apply at all in the East before the reunification, something that is very different with the situation in Northern Ireland.²⁶

Remaining in the UK, Remaining in the EU

From an EU law point of view, for Scotland and Northern Ireland to remain in the EU as a result of their secession from the UK is relatively ‘straightforward’. There is a debate concerning the appropriate procedure that has to be followed in the case of Scotland, but there is not much need for legal ingenuity. Such ingenuity would be desperately needed if Scotland and Northern Ireland decide to remain in the EU without seceding from the UK.

In order to explore how this might be possible, I will, first, briefly review all those cases where different parts of a Member State may have different relationships with the EU. Arguably, those different parts are small territorial exceptions because of certain historical and political circumstances or even insularity. More importantly, in all the cases, the metropolitan State fully participates in the political and constitutional life of the EU, something that would not apply to the case of the UK in the future. Despite the differences, it is important to revisit them in order to appreciate the remarkable flexibility of the Union legal order to accommodate territorial differentiation. Such flexibility is particularly evident in the case of Cyprus. The Union legal order managed to regulate the ‘territorial border’ between the territory of a Member State where the *acquis* applies and the territory where it does not. In that sense, Cyprus might provide some inspiration for the legal arrangements that have to be found if England and Wales leave the EU while Scotland and Northern Ireland remain in the EU without seceding from the UK. It can also serve as a reminder of how difficult (but not unmanageable) such a task may prove to be.

Territorial Differentiation

Territorial/geographical exceptions to the application of EU law are more common than conventional wisdom might suggest.²⁷ For instance, the UK has opted out from the main part of Schengen and has not adopted the euro. But those are derogations that apply to the whole territory of the Member State. For the purposes of the current paper, we should focus on those cases where different parts of a Member State may have different relationships with the EU. Indeed, in many Member States, there are special territories which for either historical, geographical or political reasons have differing relationships with their national Governments – and consequently also the European Union – than the rest of the Member State’s territory. Many of these special territories do not participate in all or any EU policy areas and programs. Some have no official relationship with the EU, while others

²⁵ For an analysis of the Community law implications of the German reunification see generally C Tomuschat, ‘A United Germany within the European Community’ (1990) 27 *Common Market Law Review* 415; CWA Timmermans, ‘German Unification and Community Law’ (1990) 27 *Common Market Law Review* 437.

²⁶ The relationship of the DDR with the then Community was clarified in the judgment of the Court of Justice in Case C-14/74. In that decision, the Court held that the relevant rules exonerating West Germany from applying the rules of EEC law to German Internal Trade ‘does not have the result of making the German Democratic Republic part of the Community, but only that a special system applies to it as a territory which is not part of the Community’.

²⁷ For a comparative approach of the suspension of the *acquis* in northern Cyprus see generally N Skoutaris, ‘The Status of Northern Cyprus under EU Law. A Comparative Approach to the Territorial Suspension of the *Acquis*’ in D Kochenov (ed), *On Bits of Europe Everywhere. Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (The Hague, Kluwer Law International, 2011).

participate in EU programs in line with the provisions of European Union directives, regulations or protocols attached to the European Union treaties and especially the relevant Treaties of Accession.²⁸

First of all, there are seven regions of EU Member States called the Outermost regions,²⁹ where the *acquis*, generally speaking, applies by virtue of Article 355(1) TFEU. However, the Council, 'taking account of the structural social and economic situation' of these regions and 'their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development', has adopted 'specific measures aimed, in particular, at laying down the conditions of application' of the Treaties to those regions, including common policies.³⁰ So, in practical terms, while EU law applies fully there, there are derogations to its application.³¹

Apart from the Outermost regions, there are some other territories that enjoy *ad hoc* arrangements in their relationship with the EU. In most of those cases, their status is governed by protocols attached to their respective countries' accession treaties. The rest owe their status to European Union legislative provisions which exclude the territories from the application of the legislation concerned.

According to Article 355(3) TFEU, the Treaty applies to 'the European territories for whose external relations a Member State is responsible'. In practice, Gibraltar is the only territory covered by this clause. Gibraltar, a British overseas territory, is part of the EU, having joined the European Economic Community with the UK in 1973. By virtue of Article 28 of the UK Accession Treaty, Gibraltar is outside the Customs Union and VAT Area and is excluded from the Common Agricultural Policy.

Pursuant to Article 355(4) TFEU, the Treaties also apply to the Åland Islands, a group of Swedish-speaking Finnish islands off the Swedish coast, in accordance with Protocol No 2 of the Finnish Act of Accession 1994. There, derogations to the free movement of people and services, the right of establishment and the purchase or holding of real estate are provided.³²

²⁸ For a comprehensive analysis of the application of Union law to Overseas Countries and Territories (OCTs) and to Outermost Regions see generally D Kochenov (ed), *On Bits of Europe Everywhere. Overseas Possessions of the EU Member States in the Legal-Political Context of European Law* (The Hague, Kluwer Law International, 2013); D Kochenov, 'Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions of European Union Member States' (2008) 17 *Michigan State of International Law* 195; D Kochenov 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories within the European Community' (2009) 36 *Legal Issues of Economic Integration* 239; F Murray, *EU and Member State Territories, The Special Relationship under Community Law* (London, Sweet & Maxwell, 2004); J Ziller, 'Flexibility in the Geographical Scope of EU Law: Diversity and Differentiation in the Application of Substantive Law on Member States' Territories' in G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility* (Oxford, Hart Publishing, 2000) 113; J Ziller, 'Les collectivités des outre-mer de l'Union européenne' in JY Faberon (ed), *L' Outre-mer Français: La nouvelle donne institutionnelle* (Paris, Documentation française, 2004); J Ziller, 'L' Union européenne et l'outre-mer' (2005) 113 *Pouvoirs* 145; J Ziller, 'The European Union and the Territorial Scope of European Territories' (2007) 38 *Victoria University Wellington Law Review* 51.

²⁹ The Outermost regions are French Guadeloupe, French Guiana, Martinique, and Réunion, Saint-Barthélemy, Saint-Martin, the Spanish Canary Islands and the Portuguese Azores and Madeira.

³⁰ Article 349 TFEU. In June 2001 the Council adopted two sets of Regulations based on the priorities identified in the Commission Report on the measures to implement Art 299(2) TEC: the Outermost regions of the European Union, COM(2000) 147, 14 March 2000. The first set of Regulations (Council Regulations 1447/2001, 1448/2001, 1449/2001, 1450/2001, 1451/2001, [2001] OJ L198/1) aimed to take fuller account of the specific nature of the Outermost regions, under the Structural Funds, as defined in Article 349 TFEU, while the second set (Council Regulations 1452/2001, 1453/2001, 1454/2001, [2001] OJ L198/11) aimed to amend the CAP in order to take greater account of the specific local conditions of the region.

³¹ For a comprehensive analysis of the application of the *acquis* in the Outermost Regions see generally Kochenov, 'Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions' (above n 28) 227–244 and 268–286.

³² Act concerning the condition of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded [1994] OJ C 241/21.

The EU Treaties apply to the Channel Islands and the Isle of Man as well but to the extent necessary to ensure the implementation of the ‘arrangements for those islands set out’ in Protocol No 3 of the Act of Accession 1972.³³ This effectively means that they are part of the Union only for the purposes of customs and the free movement of goods and in relation to some aspects of the Common Agricultural Policy.

In contrast to the formerly mentioned areas, the Treaties do not apply in the Faeroe Islands pursuant to Article 355(5)(a). They have, however, the status of a third country enjoying preferential treatment with respect to the Union. That status is regulated by two basic agreements, one concerning fisheries³⁴ and the other trade.³⁵

Another category of differentiated integration concerns the Overseas Territories. Each one of them has a special relationship with one of the Member States of the Union.³⁶ Part Four of the TFEU Treaty governs their relationship with the EU. They were invited to form association agreements with the EU³⁷ and may opt-in to EU provisions on the freedom of movement for workers³⁸ and freedom of establishment.³⁹ They are not subject to the EU’s common external tariff⁴⁰ but may claim customs duties on goods imported from the EU on a non-discriminatory basis.⁴¹ They are not part of the EU and EU law applies to them only insofar as is necessary to implement the association agreements.⁴² Concerning the Union citizenship status of the inhabitants of the OCTs, we could argue that, although the OCTs fall *de jure* outside the territorial scope of the Treaties, their inhabitants are considered Union citizens.⁴³

Finally, for the sake of completeness, we could also refer to the special status of the German enclave town of Büsingen am Hochrhein and the Italian enclaves of Campione d’Italia and Livigno which are all fully surrounded by Switzerland and the Spanish enclaves of Ceuta and Melilla on the Moroccan coast. All those enclaves and the German island of Heligoland, despite their different locations, are excluded from the Customs Union⁴⁴ and the VAT area.⁴⁵

³³ Article 355(6)(c) TFEU.

³⁴ Council Regulation (EEC) No 2211/80 of 27 June 1980 on the conclusion of the Agreement on fisheries between the European Economic Community and the Government of Denmark and the Home Government of the Faeroe Islands [1980] OJ L226/1.

³⁵ Council Decision 97/126/EC of 6 December 1996 concerning the conclusion of an agreement between the European Community, on the one part, and the Government of Denmark and the Home Government of the Faeroe Islands, on the other [1997] OJ L53/1.

³⁶ Twelve with the UK: Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and the Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands and Bermuda (Bermuda, although formally an OCT listed in Annex II, does not benefit from the EU-OCT Association); Six with France: New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands (known collectively as ‘*Territoires d’outre mer*’) and Mayotte, Saint Pierre and Miquelon; Two with the Netherlands: Aruba and the Netherlands Antilles (Bonaire, Curaçao Saba, Sint Eustatius and Sint Maarten); and one with Denmark: Greenland.

³⁷ Article 198 TFEU.

³⁸ Article 202 TFEU.

³⁹ Article 199(5) TFEU.

⁴⁰ Article 200(1) TFEU.

⁴¹ Article 200(3) and (5) TFEU.

⁴² Article 355(2) TFEU.

⁴³ See Case C-300/04 *Eman and Sevinger v College van Burgemeester en Wethouders van Den Haag* [2006] ECR I-8055.

⁴⁴ Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1992] OJ L302/1.

⁴⁵ Article 6 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, [2006] OJ L 347/1.

This brief study shows, in the most emphatic way, that the application of the *acquis* has been influenced on many occasions by certain historical, political or even geographical conditions. The width and breadth of the subject matter of those territorial exceptions cannot be overstated. Having said that, only in the case of Greenland was the territorial differentiation a result of the decision of the people to withdraw from the EU in a referendum. More importantly, in all those cases, the metropolitan State takes full part in the political and constitutional life of the EU. Notwithstanding, it is important to note for the purposes of our paper that the EU legal order allows for the differentiated application of the *acquis* within different parts of the same Member State.

'Reverse Greenland'

As we mentioned, the only historical precedent of a territory that voted to withdraw from the EU is Greenland. Greenland is an autonomous territory under the Danish sovereignty. In 1982, Greenlanders voted against being subject to the EEC Treaty. After three years of negotiations, the Member States concluded the Greenland Treaty on its new status under EU law. According to this Treaty, Greenland became an associated territory under Article 204 TFEU. As a result, Part Four of TFEU on the Association of the Overseas Countries and Territories applies to Greenland. Notwithstanding, Greenlanders are still Union citizens.⁴⁶

The fact that Greenland is the only historical precedent of a partial territorial withdrawal from the EU has led a number of experts to discuss whether a 'Reverse Greenland' model could be used if Scotland and Northern Ireland decide to remain both in the EU without seceding from the UK.⁴⁷ According to this model, the Treaties would be amended to the extent that Union law would not apply to England and Wales but would fully apply to the other two constituent nations.

Theoretically speaking, this could be possible. However, there are certain legal and practical issues that would have to be dealt with not least because –unlike Greenland and Denmark – Scotland and England share a territorial border. This would mean, for instance, that, – if England and Wales leave the customs union – there might be an internal customs border. Equally, if free movement of people does not apply to England and Wales, there is a question to be posed about how this may influence people crossing between the two sides of the internal border. This is exactly why checking the 'Cyprus model' is important. Cyprus is the only Member State where the *acquis* does not apply to a significant part of its territory and there is a territorial border between the part where it applies and where it does not. Therefore, in the next section we will briefly analyse the legal toolkit that was used in order to accommodate this unprecedented situation.

The 'Cyprus Model'

On 16 April 2003 in Athens, the then President of the Republic of Cyprus (RoC) signed the Treaty of Accession of the Republic to the European Union. RoC became an EU Member State on 1 May 2004, although, according to international courts, Turkey exercises effective control over northern Cyprus.⁴⁸ The unprecedented (for an EU Member State) situation of not controlling part of its territory is

⁴⁶ Treaty Amending, With Regard to Greenland, the Treaties Establishing the European Communities, [1985] OJ L29/1; F Weiss, 'Greenland's Withdrawal from the European Communities', (1985) 10 *European Law Review* 173.

⁴⁷ See for instance T Lock, 'A European Future for Scotland?', available at verfassungsblog.de/a-european-future-for-scotland/; <https://www.opendemocracy.net/uk/adam-ramsay/reverse-greenland-letting-scotland-stay> (last visited 4 July 2016).

⁴⁸ *Cyprus v Turkey* (Application No 25781/94) (judgment 10 May 2001), ECHR Reports 2001-IV, para 77.

acknowledged in Protocol No 10 of the Treaty of Accession 2003 that provides for the suspension of the application of the *acquis* in northern Cyprus.⁴⁹

Until the withdrawal of the suspension takes place,⁵⁰ Article 2 of the Protocol allows the Council to define the terms under which the provisions of EU law apply to the ‘Green Line’ i.e. the *de facto* ‘territorial border’ between northern Cyprus, where EU law is suspended, and the Government Controlled Areas, where EU law applies. This provision provided the legal basis for the adoption of the Green Line Regulation.⁵¹ For the purposes of our research, this is an interesting piece of legislation because it regulates the free crossing of people and goods between an area of a Member State where the free movement *acquis* applies and is within the customs union and one where the free movement *acquis* does not apply and is outside the customs union. In that sense, we will examine whether this legislative device could be seen as a useful legal tool that could provide for some inspiration if Scotland and Northern Ireland decide to remain in the EU without seceding from the UK while England and Wales withdraw from the EU.

Crossing of persons

Given the suspension of the *acquis*, Article 21 TFEU, according to which every EU citizen has the ‘right to move and reside freely within the territory of the Member States’ applies only South of the Green Line but not in northern Cyprus. By the same token, it could apply only in Scotland and Northern Ireland but not in England and Wales.

In order to deal with the situation in Cyprus, where free movement of people is suspended only in part of its territory, the Council unanimously agreed on the Green Line Regulation. This legislative device defines *inter alia* the terms under which the free movement of persons applies to this ‘territorial border’ between an area of Cyprus where the *acquis* applies and where it does not. The central provision is Article 2(1). According to it, the Republic of Cyprus has the responsibility to carry out checks on all persons crossing the Green Line with the aim of combating illegal immigration of third-country nationals and to detect and prevent any threat to public security and public policy. All persons crossing the line should undergo at least one such check in order to establish their identity.⁵²

If a similar measure were to be applied in the territorial border between England and Scotland, it would be the Scottish authorities that would have to police this ‘EU border’. It is interesting to note that the Cypriot authorities carry out checks on all persons crossing the borders including their own citizens and other EU citizens, not least because Cyprus is also not part of the *Schengen* Area. By analogy, this would mean that the Scottish authorities would be faced with the tantamount task of policing a border that tens of millions cross every year. Of course, this problem would not arise if free movement of people would apply to the whole UK territory in the future as well. However, given the pledges of the Leave campaign to significantly restrict (if not abolish) the free movement of people, which they consider to be a toxic dimension of the Single Market, this seems highly unlikely.

⁴⁹ Article 1(1) of Protocol No 10 of the Act of Accession 2003.

⁵⁰ Pursuant to Article 1(2) of Protocol No 10 of the Act of Accession 2003, the suspension of the *acquis* could be withdrawn (even partially) if the Council, acting unanimously on the basis of a proposal from the Commission, eventually decides so.

⁵¹ For a comprehensive analysis of the Green Line Regulation regime see N Skoutaris, ‘The application of the *acquis* communautaire in the areas not under the effective control of the Republic of Cyprus: The Green Line Regulation’, 45 *Common Market Law Review* (2008) 727.

⁵² Article 2(2) of the Green Line Regulation.

Crossing of goods

From an EU law point of view, finding a way to normalise EU trade relations with northern Cyprus was more challenging than regulating the crossing of people over the Green Line. The reason being that the Union had to establish trade relations with the Turkish Cypriot community without recognising any authority on the island other than the only internationally recognised Government of the Republic. Clearly, this is very different from the possible future situation in the UK discussed in this paper. The UK in our scenario remains one internationally recognised State under public international law. However, only part of this State would be also part of the EU customs union. In that sense, let us see how the EU managed to regulate its trade relations with this part of Cyprus which is outside the customs union and where free movement of goods does not apply.

The main hurdle that the EU had to surpass in order to establish trade relations with a part of its territory where there is an unrecognized government was exactly to avoid any form of recognition of it. In order to do so, the EU, in agreement with RoC, authorised a Turkish Cypriot NGO, the Turkish Cypriot Chamber of Commerce,⁵³ to issue accompanying documents so that goods originating in northern Cyprus may cross the line and be circulated in South Cyprus and the Union market. More importantly, those goods are deemed as originating in Cyprus/EU and thus they are not subject to customs duties or charges having equivalent effect when they are introduced in the Government Controlled Areas.⁵⁴

In Cyprus, there are two competing claims of legitimate rule. This is very different from the possible future situation in the UK where there would be no recognition conflict. However, the existence of a customs border between England and Wales and the rest of the UK would mean the following. English and Welsh traders would face the Union common external tariff even when they 'export' to Scotland and Northern Ireland. Of course, if the UK signs a Free Trade Agreement with the EU, goods that would be wholly obtained or have undergone their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, in England and Wales⁵⁵ would not be subject to customs duties or charges having equivalent effect.⁵⁶ All the other goods would face Union common external tariff unless all four UK constituent nations are part of the EU customs union. Although at the moment it is difficult to know what the negotiating position will be of the new British government on the future relationship between the UK and the EU,⁵⁷ it seems that all the major figures of the Leave campaign favour some kind of free trade agreement. At the same time, most of them have made clear that they do not want the UK to be bound by the EU common commercial policy. Therefore, the customs union option seems rather unlikely. In that sense, one has to wonder how the existence of different external tariffs – the EU one for Scotland and Northern Ireland and the UK one for England and Wales – would impact the economy of the State as a whole.

Finally, Article 5 of the Green Line Regulation provides for the rules that apply with regard to goods sent to northern Cyprus. According to paragraph 1 of that Article, goods which are allowed to cross the line should not be subject to export formalities. A similar arrangement could be easily applied to 'exports' of goods originating in Scotland and Northern Ireland to England and Wales.

⁵³ Article 4(5) of the Green Line Regulation; Commission Decision 2004/604/EC of 7 July 2004 on the authorisation of the Turkish Cypriot Chamber of Commerce according to Article 4(5) of Council Regulation (EC) No 866/2004, [2004] OJ L 272/12.

⁵⁴ Article 4(2) of the Green Line Regulation.

⁵⁵ Council Regulation (EEC) No 2913/92 establishing the Union Customs Code [1992] OJ L 302/1.

⁵⁶ A similar arrangement applies to goods originating in northern Cyprus, Article 4(2) of the Green Line Regulation.

⁵⁷ For a brief discussion of the possible alternatives to EU Membership see among others N Skoutaris, 'The Day after the Referendum Before: Possible Alternatives to EU Membership' available at www.uea.ac.uk/about/media-room/eu-referendum/possible-alternatives-to-eu-membership?p_p_id=56_INSTANCE_hM0H24dkbVUi&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1 (last visited 4 July 2016).

The 'Cyprus Model' 2.0

By focusing on how the Union legal and political order has accommodated the Cyprus issue, we managed to appreciate some of the issues that would have to be addressed if Scotland and Northern Ireland are to remain in the EU without seceding from the UK. All those issues relate one way or another to the differentiated application of the fundamental freedoms. However, in such a scenario, the representation of Scotland and Northern Ireland in the EU would also have to be settled. The reason being that, if England and Wales withdraw from the EU, it would be practically impossible and politically not prudent for the UK government to represent the two constituent nations that have remained in the EU to the Union institutions. So, the question is what other arrangements would have to be found in order Scotland and Northern Ireland to remain part of both the UK and the EU.

During the accession negotiations that led to the Big-Bang Enlargement, the European Council stressed that Member States 'need to speak with a single voice and ensure proper application of European Union law'.⁵⁸ This reflects both the pragmatic and the legal demands of Union membership as it affects the 'interface' between the Member State and the Union.

With regard to the 'single voice' requirement, we note that it is relevant for many kinds of decision-making procedures. Ways will need to be found to ensure that Scotland and Northern Ireland are represented in various EU *fora*, such as the European Council.⁵⁹ Moreover, although Article 16 TEU provides that the Council consists 'of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote', it is not prescribed to which internal level of government that representative shall belong. A number of paradigms arising from EU Member States practices exist.⁶⁰ So it would be for the two regions to decide which minister of which regional government would represent them each and every time.⁶¹ To this effect, it is important to note that an EU Member State is free to cast a positive or negative vote or to abstain from voting in the EU decision-making process. Thus, if the governments of the two UK constituent nations cannot adopt a common position in some EU matters, that would not be in conflict with Union law.

The conclusions of the Seville European Council also underlined that Member States need 'to... ensure proper application of European Union law'.⁶² This is a reference to Article 4 TFEU, according to which an EU Member State should 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the EU Treaties or resulting from the acts of the institutions of the Union'. With regard to that, firstly, note that since the 1964 *Costa v ENEL* judgment⁶³ of the Court of Justice, EU law enjoys supremacy over national law, including constitutional law.⁶⁴ Member States, however, are free to decide on how to integrate this principle into their national law.⁶⁵ In fact,

⁵⁸ Council of the European Union, Seville European Council 21 and 22 June 2002, Presidency conclusions (13463/02), para 24.

⁵⁹ Art 15 TEU.

⁶⁰ For different models of representation at the various institutions see N Skoutaris 'The Role of Sub-State Entities in the EU Decision-Making Processes: A Comparative Constitutional Law Approach' in E Cloots, G De Baere and S Sottiaux (eds), *Federalism in the European Union* (Oxford, Hart Publishing, 2012) 210.

⁶¹ For some suggestions of how this can happen see B O'Leary 'Detoxifying the UK's exit from the EU: a multi-national compromise is possible' available at <http://blogs.lse.ac.uk/brexitvote/2016/06/27/de-toxifying-the-uks-eu-exit-process-a-multi-national-compromise-is-possible/> (last visited 4 July 2016).

⁶² Seville European Council conclusions (above n 58), para 24.

⁶³ Case C-6/64, *Costa v ENEL* [1964] ECR 585.

⁶⁴ Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125; Case C-473/93 *Commission v Luxembourg* [1996] ECR I-3207.

⁶⁵ German (Art 23 of German Basic Law) and Italy (Art 11 of the Italian Constitution) have interpreted their respective constitutional provisions, relating to the EU or international relations, as embodying the supremacy of EU law by a 'material change' of the constitution. France (Arts 54 and 55 of the French Constitution) requires a formal change of the specific constitutional provisions before ratifying a Treaty that would otherwise entail obligations that are not compatible

both the Scotland Act 1998 and the Northern Ireland Act 1998 already provide that the Acts of the devolved legislatures should not be incompatible with EU law.⁶⁶

In addition to respecting the supremacy of EU law, the two regions would also have to establish a mechanism to ensure compliance with Union law in the case of a regional 'blocking' i.e. the inability of one of the two to comply with a certain piece of EU legislation. This is particularly important for our case because the ECJ has repeatedly held that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time limits laid down in a directive.⁶⁷

It goes without saying that, in order to achieve such an arrangement, there needs to be a fundamental constitutional amendment of the relevant Devolution Acts, not least in order for the devolved administrations to possess the relevant competences to take decisions at the EU level. The flexible nature of the idiosyncratic UK constitution suggests that the hurdle will not be insurmountable from a legal point of view. Having said that, such an amendment to the devolution arrangement would mark the complete transformation of the UK state to one of the most decentralised in the world. The government of the United Kingdom would have to at least share its competences with the devolved administrations, even in the area of external relations and defence, to the extent that Scotland and Northern Ireland might want to participate in the Common Foreign and Security Policy and the Common Security and Defence Policy. Moreover, their ministers would need to be able to sign international agreements, such as multilateral conventions that are concluded as mixed agreements. In that sense, Scotland and Northern Ireland would be arguably the regions with the highest legislative autonomy in the world, making it hard to see the difference between their status and independence.⁶⁸

Conclusion

This paper explores two pathways for Scotland and Northern Ireland to remain in the EU. The reason for this intellectual exercise is that – unlike England and Wales – the other two UK constituent nations voted to remain in the EU. More importantly, their political leaderships have declared that they do not wish the regions to be taken out of the EU against their will. The first pathway entails their secession from the UK. However, we noted that, while Northern Ireland enjoys such a constitutional right, Scotland has to reach a similar arrangement such as the one that led to the organization of the 2014 independence referendum. But even if an *Edinburgh Agreement II* is reached, there is a question whether the relevant provision regulating Scotland's EU accession would be Article 48 or 49 TEU.

The second pathway does not entail their secession from the UK. Instead, England and Wales will withdraw from the EU while Scotland and Northern Ireland will remain. Although, the Union legal order is characterised by remarkable pragmatic flexibility, as is evident from a number of cases of territorial differentiation, the case of Cyprus shows that there are a number of issues that have to be addressed in order for such an arrangement to be achieved. Those issues relate to the fact that such a solution would entail the existence of a hard customs border and border checks within the territory of the UK. In addition, a dramatic constitutional amendment to the devolution arrangement would have to take place in order for both regions to take part effectively in the political and constitutional life of the EU.

Having said that, the biggest hurdle to the achievement of such arrangement – that could be reached via Article 48 TEU – is that it would mean that formally, at least, the UK will not withdraw from the EU. In the current political constellation this is almost unthinkable. Given the dramatic changes that

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with those provisions. Art. 29(5) of the Irish Constitution has expressly incorporated the principle of supremacy to the Constitution.

⁶⁶ Scotland Act 1998, section 29(2)(d); Northern Ireland Act 1998, section 24.

⁶⁷ Case C-107/96 *Commission v Spain* [1997] ECR I-3193; Case C-323/97 *Commission v Belgium* [1998] ECR I-4281.

⁶⁸ I would like to thank professor Cremona for pointing this out to me.

such an arrangement would also mark to the constitutional status quo of the UK, one has to wonder why the UK government would opt for such a solution. Equally, there is a question why the two constituent nations and especially Scotland would settle for something less than their secession from the United Kingdom.

For the UK government, the biggest incentive to offer such a solution to Scotland and Northern Ireland would be that it represents a tangible alternative to secession. The United Kingdom might become almost a confederation but it will still be one recognised State under international law. In other words, it could save the Union, which at the moment seems to be in grave danger. On the other hand, the devolved administrations could inherit at least some of the privileges of the UK's EU membership such as keeping the sterling. They could also avoid the tensions and divisions that could be caused because of their secession. In particular, such a solution presents less threats to the fragile Belfast Agreement than Brexit itself or a referendum for the reunification of Ireland.

Even if neither the UK nor the devolved administrations opt for such an arrangement, it could still prove useful. It could be used transitionally until there is a renegotiation and a resettlement of the constitutional status of those two constituent nations, ensuring that they do not find themselves outside the Union legal order even for a minute.

In any case, both the current UK and EU constitutional frameworks somehow seem to be unable to accommodate the very different aspirations of the UK constituent nations. In this sense, their significant amendment is almost unavoidable.

