

SCOTLAND AND NORTHERN IRELAND CAUGHT BETWEEN BREXIT, INTERNATIONAL AND EU LAW: WHY A CUSTOM BARRIER WITHIN THE BRITISH ISLES MIGHT BE UNAVOIDABLE

Mattia Costa¹

Keywords: add keywords

JEL codes: Add JEL codes.

¹ “Fresh Voice” selected by the Academic Committee of the Geneva-Georgetown 2017 Annual Conference on WTO Law following a call for papers restricted to junior scholars. PhD, University of Genoa, Italy

Centre for Trade and Economic Integration (CTEI)

The Centre for Trade and Economic Integration fosters world-class multidisciplinary scholarship aimed at developing solutions to problems facing the international trade system and economic integration more generally. It works in association with public sector and private sector actors, giving special prominence to Geneva-based International Organisations such as the WTO and UNCTAD. The Centre also bridges gaps between the scholarly and policymaking communities through outreach and training activities in Geneva.

www.graduateinstitute.ch/ctei

Abstract

The aim of the paper is to foresee the constitutional and international *status* of Scotland and Northern Ireland following the triggering of the art. 50 Treaty of the European Union's (TEU) mechanism by the British Government, with a special focus on the possible termination of the free movement of goods within the British Isles.

The Scottish scenario seems to be the less troublesome. The local authorities might be successful in calling a new referendum for independency, but – being uncontested the fact that the Scottish people does not enjoy any absolute right to external self-determination – London's assent would still be a necessary element. However, in the unlikely perspective of a Scottish secession, it would be even more complicated for Edinburgh to be readmitted to the EU as an independent State, due to the peculiarities of the legal procedure provided for by art. 49 TEU. Therefore, it can be concluded that a custom barrier within Great Britain – basically between England and Scotland – cannot be excluded in the long term, but it can be considered an unlikely scenario at the moment. Moreover, as a new member State, Scotland might be forced to accept the *acquis communautaire* as a whole, including the Schengen agreement: in this case, immigration controls should be placed as well on the English border.

The situation is totally different for what concerns Northern Ireland. Following the 1998 "Good Friday Agreement", a constitutional procedure aimed at separating the region from the rest of the United Kingdom (UK) and contextually reunifying it with the Republic of Ireland could be easily triggered locally, with no possible interferences from London. If the outcome is positive, the UK would lose a part of its territory to the Republic of Ireland and Northern Ireland would remain part of the EU, with no need to reapply as in the Scottish case. If the outcome is negative, or in the *status quo*, the immediate consequence might be the imposition of a custom barrier between the Republic of Ireland and Northern Ireland, a circumstance likely to create a huge burden on the island's economy.

It is therefore evident how Brexit, International and EU Law put together can create troublesome obstacles to free movement of goods and people within the British Isles, a territory who has enjoyed economic openness for decades.

1. INTRODUCTION

On 23 June 2016, the 51,9 per cent of the voters taking part in the “European Union (EU) membership referendum” expressed themselves in favor of leaving the EU. The immediate implications of the ballot have been discussed to a large degree by doctrine² and even by British courts³, analyzing a large spectrum of legal, political and economic implications. Following the triggering of art. 50 TEU⁴ on 29 March 2017, the UK is

² On this issue, from a legal perspective, see *ex multis* T. ČAPETA, *Brexit and the EU Constitutional Order: A Three Act Tragedy*, in *Croatian Yearbook of European Law and Policy*, vol. 12, 2016; B. CARAVITA, *Brexit: Keep calm and apply the European Constitution*, in *Federalismi.it*, n. 13, 2016; B. DE WITTE, *The United Kingdom: Towards exit from the EU or towards a different kind of membership?*, in *Quaderni Costituzionali*, vol. 36, n. 3, 2016; S. DOUGLAS-SCOTT, *Brexit, Article 50 and the Contested British Constitution*, in *The Modern Law Review*, vol. 79, n. 6, 2016; P. EECKHOUT, E. FRANTZIOU, *Brexit and Article 50 TEU: A Constitutionalist Reading*, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2889254 (accessed on 5 April 2017); A. GREEN, *Why the EU Referendum Might Be Morally Binding – A Partial Response to Yossi Nehushtan*, in *ukconstitutionallaw.org*, 14 July 2016; H. HESTERMEYER, *How Brexit Will Happen: A Brief Primer on European Union Law and Constitutional Law Questions Raised by Brexit*, in *Journal of International Arbitration*, vol. 33, special issue, 2016; T. LOCK, *A Lame Duck for a Member State? Thoughts on the UK’s Position in the EU after the Brexit Vote*, in *Verfassungsblog.de*, 1 July 2016; C. MARTINELLI, *I presupposti del referendum e i cleavages costituzionali aperti dalla Brexit*, in *Diritto Pubblico Comparato ed Europeo*, n. 3, 2016; Y. NEHUSHTAN, *Why the EU Referendum’s Result Is not Morally-Politically Binding*, in *ukconstitutionallaw.org*, 5 July 2016; R.A. WESSEL, *You Can Check Out Any Time You Like, But Can You Really Leave? On ‘Brexit’ And Leaving International Organizations*, in *International Organisations Law Review*, vol. 13, n. 2, 2016; K.J. WRIGHT, *Taking Back Control?: Appeals to the People in the Aftermath of the UK’s Referendum on EU Membership*, in *Costituzionalismo.it*, n. 2, 2016; A. YOUNG: *Brexit, Article 50 and the ‘Joys’ of a Flexible, Evolving, Un-codified Constitution*, in *ukconstitutionallaw.org*, 1 July 2016.

³ See, in particular, [2016] NIQB 85, 28 October 2016; [2016] EWHC 2768 (Admin), 3 November 2016; [2017] UKSC 5, 24 January 2017. For a further analysis, among the rich doctrinal debate, see P. CRAIG, *Miller, Structural Constitutional Review and the Limits of Prerogative Power*, 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955011 (accessed on 5 April 2017); M. DAWSON, *Brexit in the Supreme Court: An Opportunity Missed?*, in *Verfassungsblog.de*, 24 January 2017; M. ELLIOTT, *The Supreme Court’s Judgment in Miller: In Search of Constitutional Principle*, in *University of Cambridge Faculty of Law Research Paper*, n. 23, 2017; O. GARNER, *Conditional Primacy of EU Law: The United Kingdom Supreme Court’s Own “Solange (so long as)” Doctrine?*, in *ukconstitutionallaw.org*, 31 January 2017; J. KING, N. BARBER, *In Defence of Miller*, in *ukconstitutionallaw.org*, 22 November 2016; R. O’CONNELL, *Constitutional Law 101 Lessons: The Brexit Judgment on the Prerogative in R (Miller) v. Secretary of State for Exiting the European Union*, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864224 (accessed on 5 April 2017); F. ROSA, *Westminster first*, in *DPCE online*, vol. 29, n. 1, 2017; D. SARMIENTO, *Miller, Brexit and the (maybe not to so evil) Court of Justice*, in *Verfassungsblog.de*, 8 November 2016; J. WILLIAMS, *The Supreme Court’s Approach to Prerogative Powers in Miller: An Analysis of Four E’s*, in *ukconstitutionallaw.org*, 25 January 2017.

⁴ For an in-depth analysis of art. 50 TEU, see, *ex multis*, R. J. FRIEL, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, in *International and Comparative Law Quarterly*, vol. 53, n. 2, 2004; C. HILLION, *Accession and Withdrawal in the Law of the European Union*, in A. ARNULL, D. CHALMERS (eds.), *The Oxford Handbook of European Union Law*, Oxford, 2015; C. HILLION, *Leaving the European Union, the Union way: A legal analysis of Article 50 TEU*, in *European Policy Analysis*, n. 8, 2016; H. HOFMEISTER, *Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU*, in *European Law Journal*, vol. 16, n. 5, 2010; A. ŁAZOWSKI, *Unilateral withdrawal from the EU: realistic scenario or a folly?*, in *Journal of European Public Policy*, vol. 23, n. 9, 2016; A. ŁAZOWSKI, *Withdrawal from the European Union and Alternatives to Membership*, in *European Law Review*, vol. 37, n. 5, 2012; P. NICOLAIDES, *Withdrawal from the European Union: A Typology of Effects*, in *Maastricht Journal of European and Comparative Law*, vol. 20, n. 2, 2013; M. PUGLIA, *Art. 50 TUE*, in A. TIZZANO (a cura di), *Trattati sull’Unione europea*, Milan, 2014; C.M. RIEDER, *The withdrawal clause of the Lisbon Treaty in the light of EU Citizenship: Between Disintegration and Integration*, in *Fordham International Law Journal*, vol. 37, n. 1, 2014; M. VELLANO, *Art. 50 TUE*, in F. POCAR, M.C. BARUFFI (a cura di), *Commentario breve ai Trattati*

destined to leave the continental organization by March 2019, unless the European Council agrees unanimously to extend the negotiation period⁵.

Several legal issues of utmost importance have emerged since the *referendum* held last June, both at domestic and EU level: it is noteworthy to mention the *drama* on the prerogative powers in triggering art. 50 TEU⁶ – eventually defined by the Supreme Court⁷ –, the preservation of the rights acquired by EU citizens as long-term residents in the UK⁸, the contested revocability of art. 50 TEU notification⁹, and the constitutional consequences of Brexit for the peculiar *status* of Scotland and Northern Ireland.

The aim of this paper is to assess whether and up to which extent the political ambition of a differentiated Brexit – if not the very exclusion from the withdrawal process – might implicate the imposition of barriers limiting the free circulation of goods and people within the British Isles, or else preventing the imposition of systematic border checks. Therefore, the specific situations arising in Scotland and Northern Ireland will be separately assessed. The first scenario is deeply interconnected with the long-dated political struggle for a Scottish independence and, as such, must consider the issues deriving from self-determination theories, as well as the domestic devolution provisions; the latter, conversely, is linked with the *lex specialis* regime implemented by the 1998 “Good Friday Agreement”, composed of an international treaty between UK and the Republic of Ireland and a separate agreement between most of Northern Ireland’s political parties¹⁰.

dell’Unione europea, Padua, 2014; A. WYROZUMSKA, *Withdrawal from the European Union*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The European Union after Lisbon*, Heidelberg, Dordrecht, London, New York, 2012.

⁵ According to the provision set by art. 50, par. 3 TEU.

⁶ See K. ARMSTRONG, *Push Me, Pull You: Whose Hand on the Article 50 Trigger?*, in *ukconstitutionallaw.org*, 27 June 2016; P. CRAIG, *Miller, Structural Constitutional Review...*, op. cit., R. CRAIG, *Casting Aside Clanking Medieval Chains: Prerogative, Statute and Article 50 after the EU Referendum*, in *The Modern Law Review*, vol. 79, n. 6, 2016; G. PHILLIPSON, *A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament*, in *The Modern Law Review*, vol. 79, n. 6, 2016; L. VIOLINI, *L’avvio di brexit nella contesa tra Parliamentary Sovereignty e Royal Prerogative Powers*, in *Rivista AIC*, n. 1, 2017.

⁷ See above, note 2.

⁸ See P. ATHANASSIOU, S. LAULHÈ SHAELOU, *EU Citizenship and Its Relevance to EU Exit and Secession*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: the Role of Rights*, Cambridge, 2017; S. DOUGLAS-SCOTT, *What Happens to Acquired Rights in the Event of Brexit?*, in *ukconstitutionallaw.org*, 16 May 2016; D. KOCHENOV, *Brexit and Citizenship*, in *Verfassungsblog.de*, 20 June 2016; P. MINDUS, *European Citizenship after Brexit. Freedom of Movement and Rights of Residence*, 2017; P. SANDRO, *Like a Bargaining Chip: Enduring the Unsettled Status of EU Nationals Living in the UK*, in *Verfassungsblog.de*, 13 July 2016.

⁹ The notification seems to be revocable according to a relevant share of doctrine; however, such possibility has been clearly denied by the Supreme Court (see *supra*, note 2). For further analysis, see C. CLOSA, *Interpreting Article 50: exit and voice and what about loyalty?*, in *RSCAS Working Paper*, n. 71, 2016; C. CLOSA, *Is Article 50 Reversible? On Politics Beyond Legal Doctrine*, in *Verfassungsblog.de*, 4 January 2017; A. MIGLIO, *La revocabilità della notifica ex art. 50 TUE*, in *Federalismi.it*, n. 18, 2016; E. PISTOIA, *Sul periodo intercorrente tra la notifica del recesso e la cessazione della partecipazione del Regno unito all’Unione europea*, in *diritticomparati.it*, 27 April 2017; P. SANDRO, *Of course you can still turn back! On the revocability of the Article 50 notification and post-truth politics*, in *Verfassungsblog.de*, 19 April 2017; A. SARI, *Reversing a Withdrawal Notification under Article 50 TEU: Can the Member States Change Their Mind?*, in *Exeter Law School Working Paper*, n. 1, 2016; D. SARMIENTO, *Miller, Brexit and the (maybe not to so evil)...*

¹⁰ Both agreements are available at <http://peacemaker.un.org/uk-ireland-good-friday98> (accessed on 15 May 2017). For a doctrinal overview, see C. BELL, K. CAVANAUGH, *‘Constructive Ambiguity’ or Internal Self-Determination? – Self-Determination, Group Accommodation, and the Belfast Agreement*, in *Fordham International Law Journal*, vol. 22, n. 4, 1999; B. HADFIELD, *The Belfast Agreement, Sovereignty and the State of the Union*, in *Public Law*, n. 4, 1998; R. MAC GINTY, *Constitutional referendums and ethnonational conflict: the case of Northern Ireland*, in *Nationalism and Ethnic Policies*, vol. 9, n. 2, 2003; C. MCCRUDDEN, *Northern Ireland, the Belfast Agreement, and the British Constitution*, in J. JOWELL, D. OLIVER (eds.), *The Changing*

Both situations – taken in combination with the legal implications of Brexit – are likely to deeply impact on the free circulation regime within the British Isles. Specifically, a new border might emerge in the future between Scotland and England, while Brexit negotiations or even the application of an *ad hoc* self-determination clause might avoid severe restrictions on the existing border between Northern Ireland and the Republic of Ireland.

2. THE FUTURE OF SCOTLAND BETWEEN SELF-DETERMINATION AND EEA ACCESSION

2.1. Brief overview on self-determination theories

Assessing the Scottish scenario, it is necessary to briefly introduce the legal implications of the principle of self-determination. An in-depth analysis on the historical and recent evolution of such principle is out of the scope of the present paper¹¹, but some sources might reveal to be particularly significant.

Evaluating the existence of a right to self-determination enjoyable by the *Québécois* people – an issue, *mutatis mutandis*, comparable to the Scottish saga – in 1998 the Supreme Court of Canada had the opportunity to clarify the extension and the applicability of the aforementioned right. It

[...] is normally fulfilled through internal self-determination — a people's pursuit of its political, economic, social and cultural development within the framework of an existing [S]tate. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. [...]¹²

Constitution, Oxford, 2004; A. MORGAN, *The Belfast Agreement: A practical legal analysis*, Belfast, 2000; J. MORISON, *Constitutionalism and Change: Representation, Governance and Participation in the New Northern Ireland*, in *Fordham International Law Journal*, vol. 22, n. 4, 1999; B. O'LEARY, *The Nature of the Agreement*, in *Fordham International Law Journal*, vol. 22, n. 4, 1999; R. WILFORD (ed.), *Aspects of the Belfast agreement*, Oxford, 2001.

¹¹ On this issue, see G. ARANGIO-RUIZ, *Autodeterminazione dei popoli e diritto internazionale: Dalla Carta delle Nazioni Unite all'Atto di Helsinki (CSCE)*, in *Rivista di Studi Politici Internazionali*, vol. 50, n. 4, 1983; Y. BLUM, *Reflections on the Changing Concept of Self-Determination*, in *Israel Law Review*, vol. 10, n. 4, 1975; A. CASSESE, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge, 1995; J. CASTELLINO, *International law and self-determination*, The Hague, 2000; A. COBBAN, *The Nation State and National Self-Determination*, New York, 1970; J. CRAWFORD (ed.), *The rights of peoples*, Oxford, 1988; D. FRENCH (ed.), *Statehood and Self-Determination*, Cambridge, 2015; E. GAYIM, *The principle of self-determination: a study of its historical and contemporary legal evolution*, Oslo, 1988; H. HANNUM, *Autonomy, Sovereignty, and Self-Determination*, Philadelphia, 1990; M. POMERANCE, *Self-Determination in Law and Practice*, The Hague, 1982; A. RIGO SUREDA, *The evolution of the right of self-determination: a study of United Nations practice*, Leiden, 1973; P. THORNBERRY, *Self-determination, minorities, human rights: a review of international instruments*, in *International and comparative law quarterly*, vol. 38, n. 4, 1989; C. TOMUSCHAT (ed.), *Modern Law of Self-Determination*, Dordrecht, 1993; O.U. UMOZURIKE, *Self-Determination in International Law*, London, 1972; M. WELLER, *Escaping the Self-determination Trap*, Leiden, Boston, 2008.

¹² [1998] 2 SCR 217, par. 134. For a doctrinal analysis on the milestone judgment on self-determination, see P. DUMBERRY, *Lessons Learned from the Quebec Secession Reference Before the Supreme Court of Canada*, in M.G. KOHEN, *Secession: International Law Perspectives*, Cambridge, 2006; J.T. MCHUGH, *Making Public Law, 'Public': An Analysis of the Quebec Reference Case and its Significance for Comparative Constitutional Analysis*, in *International and Comparative Law Quarterly*, vol. 49, n. 2, 2000; W.J. NEWMAN, *The Quebec Secession Reference: The Rules of Law and the Position of the Attorney General of Canada*, Toronto, 1999; P. OLIVER, *Canada's Two Solitudes: Constitutional and International Law in Reference re Secession of Quebec*, in *International Journal on Minority and Group Rights*, vol. 6, n. 1, 1999; P. PASSAGLIA, *Corte Suprema del*

Such circumstances are well defined either by international or constitutional law. In the first case, they include the processes of decolonization¹³, any situations where ‘[...] a people is subject to alien subjugation, domination or exploitation outside a colonial context [...]’¹⁴ and – although contested by a relevant fraction of the legal doctrine – the so-called “remedial secessions” by peoples ‘[...] blocked from the meaningful exercise of its right to self-determination internally [...]’¹⁵. Conversely, the latter case includes any domestic provisions – generally, but not necessarily, at a constitutional level – enabling a specific people or group of citizens to separate¹⁶ from the rest of the parent nation in order to establish a new State in the territory where they are settled. Such right was typically granted – although often only *de jure* – in the constitutional systems of several socialist States, but a few examples are still present nowadays¹⁷.

2.2. Scottish independence: feasibility and consequences

It is clear how the first group of factors legitimizing self-determination cannot be applied to the Scottish scenario: every pro-independence stance must, therefore, be founded on domestic law. On this purpose, the 1998 Scotland Act includes the Union of Scotland and England among the so-called “reserved matters”, on which the UK Parliament maintains its full sovereignty and the Scottish Parliament cannot legislate

Canada, *Parere 20 agosto 1998, Pres. Lamer, Renvoi relatif à la sécession du Québec*, in *Il Foro Italiano*, vol. 122, n. 6, 1999; D. SCHNEIDERMAN (ed.), *The Quebec Decision. Perspectives on the Supreme Court Ruling on Secession*, Toronto, 1999; G. VAN ERT, *International Recognition in the Supreme Court of Canada's Reference*, in *Canadian Yearbook of International Law*, vol. 35, 1998; J. WOEHLING, *L'avis de la Cour suprême du Canada sur l'éventuelle sécession du Québec*, in *Revue française de droit constitutionnel*, vol. 37, 1999.

¹³ See [1998] 2 SCR 217, par. 132.

¹⁴ *Ibidem*, par. 133.

¹⁵ *Ibidem*, par. 134. On the admissibility of remedial secession, see also INTERNATIONAL COURT OF JUSTICE, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinion of Judge Caçado Trindade, in I.C.J. Reports 2010, par. 175-176. For a doctrinal analysis, see K. DEL MAR, *The myth of remedial secession*, in D. FRENCH (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law*, Cambridge, 2013; C. GRIFFIOEN, *Self-determination as a Human Right: The Emergency Exit of Remedial Secession*, Utrecht, 2010; T. W. SIMON, *Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo*, in *Georgia Journal of International and Comparative Law*, vol. 40, n. 1, 2011; S. VAN DEN DRIEST, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?*, Anversa, 2013; J. VIDMAR, *Remedial Secession in International Law: Theory and (Lack of) Practice*, in *St. Antony's International Review*, vol. 6, n. 1, 2010.

¹⁶ International law discerns between “separation” and “secession” in so far as the first term implies a process leading to the creation of a sovereign independent entity consensually recognized by the parent State, while the latter term is to testify unilateralism in place of the aforementioned consensual element. On this issue, see J. CRAWFORD, *State practice and international law in relation to secession*, in *The British Year Book of International Law*, vol. 69, 1998, pp. 85-86; J. CRAWFORD, *The Creation of States in International Law*, Oxford, 2006, distinguishing – in the same legal terms – between “devolution” and “secession”.

¹⁷ Such right, *inter alia*, was granted by the 2003 Constitution of the Union of Serbia and Montenegro to both entities and has been effectively exercised by Montenegro in 2006. A similar right to separation is still recognized by the Uzbek Constitution to the Autonomous Republic of Karakalpakstan and by the Ethiopian Constitution to each people and nationality settled in the State. For a general analysis, see A. HABTU, *Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution*, in *Publius*, vol. 35, n. 2, 2005; S. MANCINI, *Costituzionalismo, federalismo e secessione*, in *Istituzioni del Federalismo*, n. 4, 2014; S. MANCINI, *Il Montenegro e la democrazia della secessione*, in *Quaderni Costituzionali*, n. 1, 2007; M. SUKSI, *On the Voluntary Re-definition of Status of a Sub-state Entity: The Historical Example of Finland and the Modern Example of Serbia and Montenegro*, in *Faroese Law Review*, vol. 45, n. 4, 2004; J. VIDMAR, *Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition*, in *Hanse Law Review*, vol. 3, n. 1, 2007.

for. However, Section 30(2) of the aforementioned act reads: ‘Her majesty may by Order in Council make any modifications of Schedule 4 or 5 [reserved matters] which She considers necessary or expedient.’ It implies that, following a specific order issued by HM Privy Council and previously approved by both Houses in the UK Parliament as well as by the Scottish Parliament, London can temporarily devolve additional powers to Edinburgh, enabling it to legislate for an independence *referendum*. Such was the framework enabling the *referendum* held in 2014, following the 2012 “Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland” (“Edinburgh Agreement”)¹⁸.

Such a relevant precedent deserves to be taken in further consideration for the purposes of post-Brexit analysis. While the voters expressed a clear majority against the separation of Scotland from the rest of the UK, the then perspective of losing EU membership proved to be relevant in determining a willingness to keep the *status quo* unaltered. On this issue, the impossibility to maintain the *status* of EU member State in the event of a separation from the UK – and the consequent need to reapply according to the terms provided for by art. 49 TEU¹⁹ – has been shared by a relevant fraction of the legal doctrine²⁰. On the same terms, moreover, the then President of the European Council Van Rompuy, addressing the situation in Catalonia, stated that

[t]he 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. If a part of the territory of a Member State ceases to be part of that [S]tate because that territory becomes a new independent [S]tate, the treaties will no longer apply to that territory. In other words, a new independent [S]tate would, by the fact of its independence, become a third

¹⁸ The full text of the Edinburgh Agreement is available at <http://www.gov.scot/About/Government/concordats/Referendum-on-independence> (accessed on 9 April 2017). For further analysis, see *ex multis* E. C. ADAM, *The Independence Referendum and Debates on Scotland's Constitutional Future*, in *Tijdschrift voor Constitutioneel Recht*, n. 2, 2014; A. MCHARG, *The Legal Effects of the Edinburgh Agreement – Again*, in *scottishconstitutionalfutures.org*, 8 November 2012; S. TIERNEY, *Legal issues surrounding the referendum on independence for Scotland*, in *European Constitutional Law Review*, vol. 9, n. 3, 2013.

¹⁹ For a general analysis on art. 49 TEU, see D. BIFULCO, *Com'è facile dirsi europei...Spunti di riflessione circa l'art. 49 del Trattato UE e l'allargamento dell'Unione europea agli Stati dell'Europa centro-orientale*, in *Rassegna di diritto pubblico europeo*, n. 1, 2005; S. FORTUNATO, *Article 49 [Accession to the Union]*, in H. J. BLANKE, S. MANGIAMELI (eds.), *The Treaty on European Union (TEU): A Commentary*, Berlin, Heidelberg, 2013; A. LANG, *Adesione all'Unione europea*, in S. CASSESE (a cura di), *Dizionario di diritto pubblico*, Milan, 2006; A. LANG, *La politica di allargamento dell'Unione europea*, in *Studi sull'integrazione europea*, n. 5, 2010; M. VELLANO, *Art. 49*, in F. POCAR, M. C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padua, 2014.

²⁰ See, *ex multis*, P. ATHANASSIOU, S. LAUHLÉ SHAELOU, *EU Accession from Within? An Introduction*, in *Yearbook of European Law*, vol. 33, 2014; M. CAMPINS ERITJA, *The European Union and the Secession of a Territory from a EU Member State*, in *Diritto Pubblico Comparato ed Europeo*, n. 2, 2015; M. CHAMON, G. VAN DER LOO, *The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?*, in *European Law Journal*, vol. 20, n. 5, 2014; C. CLOSA, *Secession from a Member State and EU Membership: the View from the Union*, in *European Constitutional Law Review*, vol. 12, n. 2, 2016; S.F. VAN DEN DRIEST, *Secession within the Union: Some Thoughts on the Viability of EU Membership*, in C. BRÖLMANN *et al.*, *Secession within the Union: Intersection Points of International and European Law*, *Amsterdam Law School Legal Studies Research Paper*, n. 39, 2014. Conversely, for the opposite thesis, see S. DOUGLASS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, in *Oxford Legal Studies Research Paper*, n. 46, 2014.

country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory.²¹

Discharging any hypothesis allowing the separating State to remain in the EU with no discontinuity, the very essence of art. 49 TEU acquires a central role: it is, as a matter of facts, crucial to remember that in order to admit a new member, *inter alia*, the Council of the EU is called to approve unanimously and, eventually, an admission treaty has to be ratified by all States involved (the parties to the Treaties and the acceding State).

Moreover, such interpretation is confirmed by general international law. While art. 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties – although ratified by a limited amount of States²² – confirms that ‘[...] any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State [...]’²³, art. 4 of the same Convention specifies that it applies ‘[...] without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.’²⁴

Therefore, it is possible to identify two relevant issues: i) the assent of the parent State and ii) the involvement of other member States dealing with secessionist movements. The first scenario appeared to be meaningful in 2014 – a time when Brexit was not a solid option on the table – but it does not seem to be equally relevant nowadays. It comes uncontested that an hypothetical sovereign Scotland will not be stopped on its road towards EU membership by the UK, given the fact that Brexit is going to be completed by then. Conversely, the second issue introduced above deserves further considerations, on the ground that several European countries are keen to adopt a strict approach towards secessionist entities due to domestic or geopolitical factors. A clear example is the official recognition of Kosovo, whose statehood is still contested, almost ten years after its unilateral declaration of independence, among others by five EU States – namely Cyprus, Greece, Romania, Slovakia and Spain. Madrid, in particular, proved in several circumstances to be unready to welcome an independent Scotland in the so-called “European club”, possibly aimed by the fear of further legitimizing the pro-independence movements in Catalonia.

It is now evident how the perspective of maintaining or even reacquiring the *status* of EU member State for an independent Scotland is particularly challenging: in brief, it would require finding a majority in Westminster in favor of a new Section 30 order – and the current ruling party does not seem available to reconsider the Scottish issue before completing the negotiations with the EU –, obtaining a popular majority at a repetition of the unsuccessful 2014 *referendum* and, eventually, joining the queue of the candidate States for EU accession. On the last condition, it is relevant to remark that, while Scotland would be in a privileged situation for what concerns the adaptation of domestic law to the *acquis communautaire*, it is unreasonable to expect a “fast track” on

²¹ COUNCIL OF THE EUROPEAN UNION, *Remarks by President of the European Council Herman Van Rompuy on Catalonia*, 12 December 2013.

²² An updated ratification table is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en (accessed on 14 May 2017)

²³ *Vienna Convention on Succession of States in Respect of Treaties*, art. 34, par. 1.

²⁴ *Ibidem*, art. 4.

the procedure provided by art. 49 TUE. Moreover, the evolution of the conditionality recorded in the enlargement processes started in last two decades – although implemented with variable strength²⁵ – does not allow new member States to exercise opting-out clauses on several elements of the *acquis*: such is the case, *inter alia*, of the Schengen agreement²⁶.

2.3. EEA accession: a valid solution?

The obstacles to the prospect of quickly regaining EU membership are evident and they are likely to stand even in the long term, when the Brexit process will have been fully implemented. Aware of the situation, the Scottish Government even proposed last December a plan for a territorially differentiated Brexit, allowing Scotland to remain part of the European Single Market (ESM). In brief, the document advocated the adoption of an *ad hoc* solution, the so-called “Norway option”, for Scotland: the region, while remaining part of the UK, would autonomously adhere to the European Free Trade Area (EFTA) and eventually to the European Economic Area (EEA)²⁷.

The technicalities related to the achievement of such project are out of the scope of the present paper²⁸, but it is necessary to highlight how it would be up to the UK Government to negotiate and eventually allow Scotland to reach such outcome. This because, in the absence of any Scottish sovereignty, it would be up to the UK to become an EFTA member State as a whole and, eventually, restricting the territorial application of the EEA Agreement to the sole Scotland²⁹. As admitted in the proposal, it is evident that a positive conclusion would require the willingness to compromise from all sides involved, both at a domestic and a European level³⁰.

Anyway, it is important to remark how such solution would allow the ESM provisions to still be applicable *ratione loci* in Scotland. For what concerns the free movement of goods, while the region would be outside the EU customs union – altogether with the entire UK – ‘[...] remaining within the single market would give Scottish businesses a comparative advantage over those in other parts of the UK that would be outside both the customs union and the single market.’³¹ Moreover, the administrative border

²⁵ *Ex multis*, see T. CERRUTI, *L'Unione europea alla ricerca dei propri confini. I criteri politici di adesione e il ruolo dei nuovi Stati membri*, Turin, 2010, p. 57; E. DE RIDDER, D. KOCHENOV, *Democratic Conditionality in the Eastern Enlargement: Ambitious Window Dressing*, in *European Foreign Affairs Review*, vol. 16, 2011, p. 605; G. SASSE, *Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?*, in G. N. TOGGENBURG (ed.), *Minority Protection and the Enlarged European Union: The Way Forward*, Budapest, 2004, p. 69.

²⁶ For a doctrinal overview on Schengen agreements, *ex multis* see M. DEN BOER, L. CORRADO, *For the record or off the record: comments about the incorporation of Schengen into the EU*, in *European Journal of Migration and Law*, vol. 1, n. 4, 1999; P.-J. KUIJPER, *Some legal problems associated with the communitarization of policy on visas, asylum and immigration under the Amsterdam Treaty and incorporation of the Schengen acquis*, in *Common Market Law Review*, vol. 37, n. 2, 2000; B. NASCIMBENE, *Da Schengen a Maastricht: apertura delle frontiere, cooperazione giudiziaria e di polizia*, Milan, 1995.

²⁷ See SCOTTISH GOVERNMENT, *Scotland's Place in Europe*, 20 December 2016, ch. 3, par. 119-121.

²⁸ For a general overview on the UK – or some of its entities – acceding to the EFTA and to the EEA, see C. BURKE, Ó.Í. HANNESSON, K. BANGSUND, *Life on the Edge: EFTA and the EEA as a Future for the UK in Europe*, in *European Public Law*, vol. 22, n. 1, 2016.

²⁹ See SCOTTISH GOVERNMENT, *Scotland's Place in Europe*, par. 138.

³⁰ *Ibidem*, par. 123.

³¹ *Ibidem*, par. 126.

between Scotland and England would not become an international nor an EU external border.

However, the Scottish plan is not exempt from critic issues. First of all, it is not explained how it would be possible to determine whether or not a specific person can enjoy the free movement regime. Several situations can arise: if it is uncontested that EEA nationals could freely move to Scotland – while in the future restrictions are likely to apply for any movements towards the rest of the UK –, how would it possible to properly qualify the Scottish citizens allowed to reestablish in an EEA member State? Objective criteria are necessary in order to prevent abusive situations (i.e. a British citizen moving his residence to Scotland immediately before exercising the free movement to an EEA State), but the proposal is silent on this issue. It would, anyway, imply restrictions to UK citizens in acquiring the “Scottish citizenship”, similarly to what has been implemented by Finland in relation to the Åland Islands³². Moreover, the effective implementation of the plan would require a huge shift of competences from Westminster to Holyrood, allowing the region to enter into international relations with foreign States. While several models can be found even in the European legal space – Flanders and Wallonia being a relevant example –, such arrangement would deeply impact on the UK constitutional order, transforming the State in a sort of asymmetric federation³³.

3. Differentiated integration or Irish unification: is there an EU readmission prospect for Northern Ireland?

3.1. The legal framework for a united Ireland

Introducing the domestic legal sources enabling a people to exercise the right of external self-determination³⁴, a *sui generis* provision has been purposely omitted. According to the already mentioned “Good Friday Agreement”, the parties commit themselves to recognize “[...] whatever choice [...] freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland”³⁵. Basically, a *referendum* should be organized “[...] if at any time it appears likely to [the Secretary of State] that a

³² The 1991 Act on the Autonomy of Åland requires the possession of the so-called “regional citizenship” – achievable by birth or following a five-year uninterrupted residence in the islands and a proven fluency in Sweden language – as a prerequisite for exercising several economic activities, owning properties and acquiring voting rights in local elections. An *ad hoc* protocol attached to the accession treaty of Finland to the EU makes the “regional citizenship” compatible with EU law. On this issue, see N. FAGERLUND, *The Special Status of the Åland Islands in the European Union*, in L. HANNIKAINEN, F. HORN (eds.), *Autonomy and Demilitarisation in International Law: The Åland Islands in a Changing Europe*, The Hague, 1997; N. JÄÄSKINEN, *The Case of the Åland Islands – Regional Autonomy versus the European Union of States*, in S. WEATHERILL, U. BERNITZ (eds.), *The Role of Regions and Sub-National Actors in Europe*, Oxford, 2005; D. KOCHENOV, *Regional Citizenships and EU Law: The Case of the Åland Islands and New Caledonia*, in *European Law Review*, vol. 35, 2010; S. SILVERSTRÖM, *The Competence of Autonomous Entities in the International Arena – With Special Reference to the Åland Islands in the European Union*, in *International Journal on Minority and Group Rights*, vol. 15, n. 2, 2008.

³³ For a general overview on asymmetric federalism, see M. WELLER, K. NOBBS (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, Philadelphia, 2010.

³⁴ See *supra*, par. 2, note 16.

³⁵ *Agreement Reached in the Multy-Party Negotiations*, Constitutional Issues, par. 1(i). See *supra*, note 9, for relevant bibliography.

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.’³⁶

The agreement, *inter alia*, amended two articles of the Irish Constitution: the new article 3 acquires a particular relevance for the scope of the present analysis, clarifying that ‘[...] a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.’³⁷ Therefore, as a consequence of the agreement, the people of Northern Ireland has a domestically recognized right to separate from the UK. Such right, however, it is non unconditioned: the outcome of the process cannot consist in the creation on an independent State but, necessarily, in the entity being annexed to the Republic of Ireland; moreover, the Irish people should approve the process as well, by mean of a separate *referendum*.

It is uncontested that the outcome of such procedure would be a simple acquisition of territory to the advantage of the Republic of Ireland, while the theory of the creation of a new State by merging of the two existing entities is manifestly unfounded. On this issue, a ‘[...] presumption of continuity is particularly strong where the constitutional system of the State prior to acquisition [...] continues in force.’³⁸ From an international law perspective, the creation of a united Ireland would be comparable, *mutatis mutandis*, to the reunification of Germany in 1990³⁹, the sole relevant difference being the incorporation of a territorial entity rather than an entire State.

In an hypothetical post-Brexit scenario of reunification, taken in consideration such theoretical analysis, the call made by the Taoiseach Enda Kenny for a specific provision in any Brexit agreement allowing Northern Ireland to be easily readmitted to the EU should the island be unified⁴⁰ appears nothing but pleonastic. This because the Treaties would be applicable to the entire Irish territory immediately after the incorporation, as it happened in Germany almost three decades ago⁴¹, according to the provision set by

³⁶ *Ibidem*, Annex A, Schedule 1, par. 2.

³⁷ *Ibidem*, Annex B, Article 3.

³⁸ J. CRAWFORD, *The Creation of States in International Law*, p. 673. For a detailed study, see *ex multis* K. MAREK, *Identity and Continuity of States in Public International Law*, Geneva, 1955.

³⁹ For a general legal overview, see J. CRAWFORD, *The Creation of States in International Law*, pp. 673-75; J.A. FROWEIN, *The Reunification of Germany*, in *American Journal of International Law*, vol. 86, n. 1, 1992; K. HAILBRONNER, *Legal Aspects of the Unification of the Two German States*, in *European Journal of International Law*, vol. 2, n. 1, 1991; S. OETER, *German Unification and State Succession*, in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 51, 1991.

⁴⁰ See *Irish leader calls for united Ireland provision in Brexit deal*, available online at <https://www.theguardian.com/politics/2017/feb/23/irish-leader-enda-kenny-calls-for-united-ireland-provision-in-brexit-deal> (accessed on 20 May 2017).

⁴¹ The most noticeable difference with the German precedent is due to the fact the *acquis communautaire* had never applied to the Eastern *lander* before the reunification. On this issue, see T. GIEGERICH, *The European Dimension of German Reunification: East Germany's Integration into the European Communities*, in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 51, 1991; C. TOMUSCHAT, *A United Germany within the European Community*, in *Common Market Law Review*, vol. 27, n. 3, 1990. The exclusion of the former German Democratic Republic from the applicability *ratione loci* of the Treaties had been confirmed by the Court of Justice of the European Communities case-law: see, in particular, C-14/74, *Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-Jonas – Ausfuhrerstattung*, 1 October 1974, Law, par. 8.

art. 52 TEU⁴². Consequently, it appears inappropriate to propose the so-called “Cypriot model”⁴³ to rule the post-Brexit relations between Northern Ireland and the EU, and to provide a legal framework for a future unification of the island⁴⁴.

While an alteration of the international *status* of Northern Ireland according to the provisions of the “Good Friday Agreement” seems to be a feasible option – both from a domestic and a European perspective – to prevent the creation of an hard custom barrier within the island, it is necessary to report that the former Northern Ireland Secretary Theresa Villiers, in response to a call from the Irish nationalist party Sinn Féin, argued that “[...] there is nothing to indicate that there is a majority support for a pool”⁴⁵.

However, the impact of an “hard Brexit” on the economy in Northern Ireland is quite evident, as the area might suffer from trade restrictions and custom barriers on the border with the Republic of Ireland – due to become an EU external border in absence of any *ad hoc* agreement during the negotiations – like no other regions of the UK, for obvious geographical reasons.

3.2. Differentiated integration

Due to the aforementioned reasons, the paradigm of differentiated integration might show its relevance for the post-Brexit Ireland. The necessity to find an agreement on the future *status* of Northern Ireland has also been recognized by Westminster in its “Brexit White Paper”, recognizing

[...] that for the people of Northern Ireland and Ireland, the ability to move freely across the border is an essential part of daily life. When the UK leaves the EU we aim to have as seamless and frictionless a border as possible between Northern Ireland and Ireland, so that we can continue to see the trade and everyday movements we have seen up to now.⁴⁶

⁴² For a doctrinal analysis on art. 52 TUE, see F. MURRAY, *The Lisbon Treaty and the European Constitution on Article 299: A Comparison*, The Hague, 2012; L. JIMENA QUESADA, *Article 52 TEU [Territorial Scope of the Treaties]*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The Treaty on European Union (TEU). A Commentary*, Heidelberg, New York, Dordrecht, London, 2013; D. KOCHENOV, *European Union Territory from a Legal Perspective: A Commentary on Articles 52 TEU, 355, 349, and 198–204 TFEU*, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956011 (accessed on 16 May 2017).

⁴³ In brief, while the whole island is *de jure* part of the EU, an *ad hoc* protocol to the admission treaty restricts the range of application *ratione loci* of the *acquis communautaire* the sole area controlled by the Republic of Cyprus. Once the island is reunified, by a unanimous decision, the Council of the EU will be able to lift the aforementioned restrictions, *de facto* amending primary law. For further analysis, see K. AGAPIOU-JOSÉPHIDÈS, J. ROSSETTO, *Chypre dans l’Union européenne*, Brussels, 2006; S. LAULHÈ SHAELOU, *The Principle of Territorial Exclusion in the EU: SBAs in Cyprus – A Special Case of Sui Generis Territories in the EU*, in D. KOCHENOV (ed.), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*, Alphen aan den Rijn, 2011; N. SKOUTARIS, *The Cyprus Issue. The Four Freedoms in a Member State under Siege*, Oxford, 2011; ; J. VILLOTTI, *EU Membership of an internally divided State – the Case of Cyprus*, in *Archiv des Völkerrechts*, n. 1, 2012.

⁴⁴ The “Cypriot model” as a framework to rule a possible future reintegration of Northern Ireland into the EU has been proposed, *inter alia*, in N. SKOUTARIS, *Reunifying Ireland: An EU law perspective*, in *eulawanalysis*, 28 March 2017.

⁴⁵ EU referendum: Theresa Villiers rules out Sinn Féin’s border poll call, available online at <http://www.bbc.com/news/uk-northern-ireland-36622120> (accessed on 20 May 2017).

⁴⁶ HM GOVERNMENT, *The United Kingdom’s exit from and new partnership with the European Union*, par. 4.4., p. 21, February 2017, available at

Several models could be drafted and applied to Northern Ireland in order to achieve such goal. An immediate solution would be the implementation of the historical precedent of Greenland, a territory that opted to withdraw from the then European Communities in spite of being subjected to the sovereignty of a member State – the Kingdom of Denmark – even though enjoying an extensive range of autonomy. In brief, following the 1982 *referendum*, the 1985 “Treaty Amending, with Regard to Greenland, the Treaties Establishing the European Communities” removed the entity from the range of application *ratione loci* of the Treaties and listed it as an associated territory (now under article 204 TFEU)⁴⁷.

However, there are several good reasons explaining how the application of a similar framework is unfeasible. Firstly, it would be the negative of the historical precedent, as only a marginal entity of the UK – in terms of territorial extension, population, and economic output – is deemed to remain part of the EU: coherently, the model has been defined as “reverse Greenland”⁴⁸. Moreover, politically speaking, the model is incompatible with the slogan “Brexit means Brexit”, as the UK would formally remain an EU member State, the Treaties not being open for ratification by sub-State entities and Northern Ireland lacking of any capacities to enter into international relations with foreign States nor international organizations. In this case, there would still be UK representatives in every EU institution, such as the Council and the European Council – likely to be, respectively, a member of the executive and the First Minister of Northern Ireland –, as well as MEPs elected by the citizens of the entity. Lastly, from a legal perspective, art. 50 TEU is not the appropriate provision to implement such model, as it would formally consist in a revision of the Treaties – regulated by art. 48 TEU⁴⁹ – rather than the withdrawal of a member State from the EU. It implies, *inter alia*, reopening the discussion on the revocability of the art. 50 TEU notification, once transmitted to the European Council⁵⁰.

Notwithstanding that the effective implementation of the “reverse Greenland” model is little more than utopia, it is, however, important to highlight how it should be able to

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf (accessed on 17 May 2017).

⁴⁷ For an in-depth analysis, see F. HARHOFF, *Greenland's withdrawal from the European Communities*, in *Common Market Law Review*, vol. 20, n. 1, 1983; H. R. KRAMER, *Greenland's European Community (EC)-Referendum, Background and Consequences*, in *German Yearbook of International Law*, vol. 25, 1982; U.P. GAD, *Greenland projecting sovereignty – Denmark protecting sovereignty away*, in R. ADLER-NISSEN, U.P. GAD (eds.), *European Integration and Postcolonial Sovereignty Games. The EU Overseas Countries and Territories*, Abingdon, New York, 2013; F. WEISS, *Greenland's withdrawal from the European Communities*, in *European Law Review*, vol. 10, 1985.

⁴⁸ *Ex multis*, see J. HARTMANN, *The Faroe Islands: possible lessons for Scotland in a new post-Brexit devolution settlement*, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909543 (accessed on 17 May 2017); U.P. GAD, *Could a 'reverse Greenland' arrangement keep Scotland and Northern Ireland in the EU?*, in *Europblog*, 7 July 2016; N. SKOUTARIS, *Reunifying Ireland: An EU law perspective*, in *skoutaris.eu*, 27 March 2017.

⁴⁹ For a doctrinal analysis, see *ex multis* E. DENZA, *Article 48 TEU*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The Treaty on European Union (TEU). A Commentary*, Heidelberg, New York, Dordrecht, London, 2013; B. DE WITTE, *European Treaty Revision: a case of Multilevel Constitutionalism*, in I. PERNICE, J. ZEMANEK (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, Baden-Baden, 2005; L. JIMENA QUESADA, *The Revision Procedures of the Treaty*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The European Union after Lisbon*, Heidelberg, Dordrecht, London, New York, 2012.

⁵⁰ See above, note 8, for further considerations on this issue.

guarantee the free circulation of goods and persons on the border between the Republic of Ireland and Northern Ireland. Moreover, the rest of the UK would enjoy a preferential access to the ESM, with no duties on the goods originally produced in that part of the State, according to the provision set by art. 200 TFEU.

An alternative model of differentiated integration could be inspired by the legal framework regulating the relations between the Faroe Islands and the EU. As an autonomous country within of the Kingdom of Denmark⁵¹, they are excluded from the range of application *ratione loci* of the Treaties, according to the provision set by art. 355, par. 5 TFEU. As a consequence, the archipelago is not part of the ESM, the four EU “fundamental freedoms” cannot be unconditionally exercised in relation to the entity, and Danish citizens residing in the Faroe Islands do not qualify for EU citizenship. However, the Faroese have been allowed to trade duty-free with Denmark, on the condition that the goods are destined to final consumption, since the latter joined the European Communities in 1972; any further exportation from Denmark to other member States was subjected to customs duties⁵². Since then, benefitting from extensive autonomy in international trade issues, the Faroese managed to conclude several trade agreements with the EU so that, presently, all EU products except for dairy products and sheep meat are allowed duty-free into the Faroe Island; conversely, a large share of Faroese exports are allowed duty-free into the EU, the only notable exceptions being related to the agricultural sector.⁵³

For what concerns the circulation of persons, the archipelago does not belong to the so-called “Schengen area”, but it is part of the Nordic Passport Union (altogether with Norway, Sweden, Finland, Iceland and Denmark): it implies no preferential rights for the Faroese to establish into the EU and vice-versa, with the notable exception of the aforementioned Nordic countries and their citizens. However, Faroese – bearing Danish citizenship – could still bypass such restriction by moving their residence into mainland Denmark before exercising the freedom of movement provided by EU law. Moreover, while a valid travel document is compulsory for foreigners landing in the archipelago, persons travelling between the Faroe Islands and the “Schengen area” are not subjected to systematic border checks⁵⁴.

Relevant doctrine analyzed the Faroese situation in order to draw a valid model to assess the post-Brexit relations between Scotland, the rest of the UK and the EU⁵⁵. Recognizing the importance of the aforementioned study, in the opinion of the person writing, the Faroe Islands model would be much more appropriate to inspire a feasible accommodation to the issue of Northern Ireland. Such assertion rests on a critical element identified in the original proposal: “[a]fter Brexit, Scotland will no longer be part

⁵¹ For a constitutional overview, see *ex multis* R. ADLER-NISSEN, *The Faroe Islands: Independence dreams, globalist separatism and the Europeanization of postcolonial home rule*, in *Cooperation and Conflict*, vol. 49, n. 1, 2014; J.A. JENSEN, *The Position of Greenland and the Faroe Islands Within the Danish Realm*, in *European Public Law*, vol. 9, n. 2, 2003.

⁵² According to the provisions set by Regulation EEC n. 2051/74 of the Council on the customs procedures applicable to certain products originating in and coming from the Faroe Islands, 1 August 1974.

⁵³ For a brief analysis, see J. HARTMANN, *The Faroe Islands: possible lessons for Scotland in a new post-Brexit devolution settlement*, available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909543 (accessed on 18 May 2017), p. 10.

⁵⁴ See *ibidem*, pp. 11-12.

⁵⁵ See *ibidem*, pp. 12-14.

of a union which is an EU member state. Conversely the fact that Denmark is an EU member state is likely to have had a positive influence in the EU's relations with the Faroes.⁵⁶

In the case of Northern Ireland, the aforementioned "positive influence" could be identified in the special relations – following the "Good Friday Agreement" – with the Republic of Ireland, an EU member State. For what concerns the free movement of persons, the preservation of the *status quo* – namely the Common Travel Area – is a guarantee against the imposition of immigration controls between the two sides of the island. On this issue, moreover, the absence of any territorial overlapping with the "Schengen area" – conversely to the Nordic Passport Union – makes the situation easier. Conversely, in relation to the movement of goods, two options might be taken into consideration: i) an in-depth revision of the competences of Northern Ireland, allowing the entity to enter into international agreements autonomously or ii) an agreement with the EU in the framework of art. 50 negotiations, allowing the entity to remain within the ESM and the customs union.

The first solution is the closest to the Faroese model: the entity, once acquired devolved powers in international trade and given international subjectivity⁵⁷ could negotiate with the EU the implementation of a free circulation regime for goods produced or destined to final consumption in the entity, allowing the avoidance of an "hard border" with systematic checks on travelers and commuters. A challenging issue would be, in this regard, to implement a mechanism aimed at preventing any frauds on the origin of British goods. The latter option would implement a differentiated Brexit, simply keeping Northern Ireland within the ESM and the customs union: it would imply keeping the land border open but, simultaneously, imposing customs checks between the entity and the rest of the UK.

4. Conclusion

The models recalled in this paper make only a few of the several legal frameworks available to accommodate the requests for a differentiated Brexit arising in Scotland and Northern Ireland. It is, however, necessary to always consider the limits and procedures deriving from international and domestic law. Therefore, a repetition of the 2014 independence *referendum* in Scotland is feasible – once obtained the necessary *consensus* in Westminster – but, even in case of a positive outcome, it does not imply an easy road towards Brussels. Moreover, in such an unlikely perspective, the immediate consequence would be the imposition of an "hard barrier" between England and Scotland, with systematic customs checks and possible immigration controls as well. The implementation of some models of differentiated integration – such as the EEA membership – might prevent those negative effects, but it is clear how the preservation

⁵⁶ *Ibidem*, p. 13.

⁵⁷ For a general overview on international subjectivity, with a special focus on sub-State entities, see *ex multis* G. ARANGIO-RUIZ, *Gli enti soggetti dell'ordinamento internazionale*, Milan, 1951; S.M. CARBONE, P. IVALDI, *La partecipazione delle Regioni agli affari comunitari e il loro potere estero*, in *Quaderni Regionali*, 2005; B. CONFORTI, *La personalità internazionale delle Unioni di Stati*, in *Rivista di Diritto Internazionale*, 1964; J. CRAWFORD, *The Criteria for Statehood in International Law*, in *British Year Book of International Law*, 1977; H. MOSLER, *Réflexions sur la personnalité juridique en droit international public*, in *Mélanges A. Rolin*, Paris, 1964; C. PANARA, *In the name of cooperation: the external relations of the German Länder and their participation in the EU decision-making*, in *European Constitutional Law Review*, vol. 6, n. 1, 2010.

of the *status quo* should be the most effective solution to avoid the creation “hard barriers” within Great Britain.

This is not the case of Northern Ireland, affected by the only section of land border with the EU. The absence of barriers between the entity and the Republic of Ireland is a crucial political issue: keeping the border open has become, apart from an obvious economic priority, part of the pacification process started with the 1998 “Good Friday Agreement”. While the free movement of persons is not at risk, the Common Travel Area non being affected by Brexit, the negotiation between the UK and the EU should produce an acceptable solution in order to avoid, at least, systematic checks at the border. Conversely, the perspective of reunifying the island according to the “Good Friday Agreement” provisions and, as a consequence, virtually moving the customs barrier along the Irish Sea might gather a greater amount of consensus in the long term.