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Caught between domestic and international law: Scotland and Northern Ireland in a post-Brexit United Kingdom

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Abstract: The article analyzes the different implications of an "hard Brexit" on Scotland and Northern Ireland, keeping in consideration the obligations deriving from constitutional and international law for the two entities of the United Kingdom. In particular, the feasibility and the main implications of the processes enabling a future reacquisition of the EU membership, as well as several frameworks for a differentiated – and "softer" – Brexit, are separately assessed in order to identify the most prominent effects of the combination of domestic and international provisions in each of the two regions.

Structure: **1.** Introduction; **2.** The future of Scotland between self-determination and European Economic Area accession; **2.1.** Brief overview on self-determination theories; **2.2.** Scottish independence: feasibility and consequences; **2.3.** Acceding to the European Economic Area: a valid compromise?; **3.** Irish unification or differentiated integration: mitigating the effects of an "hard Brexit" in Northern Ireland; **3.1.** The legal framework for a united Ireland; **3.2.** Differentiated integration; **4.** Conclusions

1. Introduction

On 23 June 2016, 51,9 per cent of the voters taking part in the "European Union membership *referendum*" expressed themselves in favor of leaving the European Union (EU). The immediate implications of the ballot have been discussed to a large degree by doctrine[1], analyzing a large spectrum of legal, political and

* Intervento ricevuto in occasione del convegno organizzato da *federalismi "Brexit: ad un anno dal referendum, a che punto è la notte?",* Roma, 23 giugno 2017.

[1] On this issue, from a legal perspective, see *ex multis* T. ĆAPETA, *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); M. GOLDONI – G. MARTINICO, *Il ritiro della marea? Alcuni considerazioni giuridico-costituzionali sul c.d. Brexit*, in *Federalismi.it*, n. 18/2016; 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*

economic issues. Moreover, British courts have been called to rule on the prerogatives of the Government and the devolved institutions in activating the procedure of withdrawal from the EU[2]. Eventually, art. 50 Treaty on European Union[3] (TEU) was triggered on 29 March 2017 and therefore the

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.

[2] See, in particular, HIGH COURT OF NORTHERN IRELAND, QUEEN'S BENCH DIVISION, *McCord, Re Judicial Review and Agnew and Others v. Secretary of State for Exiting the European Union and Secretary of State for Northern Ireland*, [2016] NIQB 85, 28 October 2016; HIGH COURT OF JUSTICE OF ENGLAND AND WALES, *Miller and Dos Santos v. Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin), 3 November 2016; UNITED KINGDOM SUPREME COURT, *R (on the application of Miller and Dos Santos) v. Secretary of State for Exiting the European Union, R (on the application of the Attorney General for Northern Ireland) v. Secretary of State for Exiting the European Union and the Secretary of State for Northern Ireland ex parte Agnew and others, R (on the application of McCord) v. Secretary of State for Exiting the European Union and the Secretary of State for Northern Ireland*, [2017] UKSC 5, 24 January 2017. For further analyses, among the rich doctrinal debate, see G. CARAVALE, *A Family of Nations. Asimmetrie territoriali nel Regno Unito tra Devolution e Brexit*, Naples, 2017, pp. 208-211; 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*, n. 1/2017; D. SARMIENTO, *Miller, Brexit and the (maybe not to so evil) Court of Justice*, in *Verfassungsblog.de*, 8 November 2016; F. SGRÒ, *Il caso "Brexit": qualche considerazione sulla sovranità parlamentare e sul sistema delle fonti nell'ordinamento costituzionale britannico dopo la sentenza della Supreme Court of the United Kingdom*, in *Federalismi.it*, n. 5/2017; J. WILLIAMS, *The Supreme Court's Approach to Prerogative Powers in Miller: An Analysis of Four E's*, in *Ukconstitutionallaw.org*, 25 January 2017.

[3] For an in-depth analysis of art. 50 TEU, see *ex multis* M.E. BARTOLONI, *La disciplina del recesso dall'Unione europea: una tensione mai sopita tra spinte "costituzionaliste" e resistenze "internazionaliste"*, in *Rivista AIC*, n. 2/2016; 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; J. HERBST, *Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?*, in *German Law Journal*, vol. 6, n. 11/2005; 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; F. SAVASTANO, *Prime considerazioni sul diritto di recedere dall'Unione europea*, in *Federalismi.it*, n. 22/2015; A. TATHAM, *"Don't Mention Divorce at the Wedding, Darling!" EU Accession and Withdrawal after Lisbon*, in A. BIONDI – P. EECKHOUT – S. RIPLEY (eds.), *EU Law after Lisbon*, Oxford, 2012; M. VELLANO, *Art. 50 TUE*, in F. POCAR – M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padua, 2014; A. WYROZUMSKA, *Withdrawal from the European*

United Kingdom is destined to leave the continental organization by March 2019, unless the European Council agrees unanimously to extend the negotiation period[4].

Several legal issues of utmost importance have emerged since the *referendum* held in June 2016, both at domestic and EU level: it is noteworthy to mention the *drama* on the prerogative powers in triggering art. 50 TEU[5] – eventually defined by the Supreme Court[6] –, the preservation of the rights acquired by EU citizens as long-term residents in the United Kingdom[7], the contested revocability of art. 50 TEU notification[8], and the consequences of Brexit for Scotland and Northern Ireland.

The aim of this article is to assess the main consequences of the process for the two aforementioned entities of the United Kingdom, analyzing whether and up to which extent a differentiated Brexit – if not the very exclusion from the withdrawal process – might relieve the burden and the uncertainties related to peculiar situation of the two regions. 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 consequent to the 1998 "Good Friday Agreement", composed of an international treaty between the United Kingdom and the Republic of Ireland and a separate agreement involving most

Union, in H.-J. BLANKE – S. MANGIAMELI (eds.), *The European Union after Lisbon*, Heidelberg, Dordrecht, London, New York, 2012.

[4] According to the provision set by art. 50, par. 3 TEU.

[5] 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*, 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.

[6] See *supra*, note 2.

[7] 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; M.E. BARTOLONI, *La disciplina del recesso dall'Unione europea,* cit.; 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.

[8] 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 Doctrin*e, 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)*, cit.

of Northern Ireland's political parties[9]. Moreover, in both regions several intermediate models have been proposed in order to mitigate the effects of an "hard Brexit"[10]: while their effective practicability – due to legal and political restraints – does not seem to be an easy task, they make a significant starting point for a theoretical analysis on the consequences of the withdrawal process in Scotland and Northern Ireland.

2. The future of Scotland between self-determination and European Economic Area accession

2.1. Brief overview on self-determination theories

Before assessing the Scottish scenario, it is necessary to briefly introduce the legal implications of the principle of self-determination. While an in-depth analysis on the historical and recent evolution of such principle is out of the scope of the present article[11], a brief overview of its most prominent legal elements is, nonetheless, particularly significant.

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[9] 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; G. CARAVALE, *A Family of Nations.*, cit., pp. 117-140; 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 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; C. WARBRICK – D. MCGOLDRICK – G. GILBERT, *The Northern Ireland Peace Agreement, Minority Rights and Self-Determination*, in *International and Comparative Law Quarterly*, vol. 47, n. 4/1998; R. WILFORD (ed.), *Aspects of the Belfast agreement*, Oxford, 2001.

[10] The term commonly indicates a withdrawal arrangement "[…] *in which the United Kingdom stops being a member of the European single market and gets full control of its own law-making and immigration.*" (http://dictionary.cambridge.org/dictionary/english/hard-brexit - accessed on 10 July 2017).

[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; G. ARANGIO-RUIZ, *Autodeterminazione (diritto dei popoli alla)*, in *Enciclopedia giuridica*, Rome, 1988; P. BERNARDINI, *Autodeterminazione e sovranità: un ragionamento critico*, Teramo, 2005; 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; C. CHRISTAKIS, *Le droit à l'autodétermination en dehors des situations de décolonisation*, Marseille, 1999; A. COBBAN, *The Nation State and National Self Determination*, New York, 1970; J. CRAWFORD (ed.), *The rights of peoples*, Oxford, 1988; M. DISTEFANO (a cura di), *Il principio di autodeterminazione dei popoli alla prova del nuovo millennio*, Padua, 2014; 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; G. GUARINO, *Autodeterminazione dei popoli e diritto internazionale*, Naples, 1984; H. HANNUM, *Autonomy, Sovereignty, and Self-Determination*, Philadelphia, 1990; K. KNOP, *Diversity and self-determination in international law*, Cambridge, 2002; G. PALMISANO, *Nazioni Unite e autodeterminazione interna. Il principio alla luce degli strumenti rilevanti dell'ONU*, Milan, 1997; 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; M. STERIO, *The Right to Self-Determination under International Law*, Abingdon, New York, 2015; P. THORNBERRY, *Self-determination, minorities, human rights: a review of international instruments*, in *International and*

The clearest explanation of the manifold implications of the aforementioned principle in the post-decolonization era comes from a domestic court. Answering to a reference question submitted by the federal Government on the existence of a right to self-determination enjoyable by the *Québécois* people – an issue, *mutatis mutandis*, comparable to the Scottish saga[12] –, in 1998 the Supreme Court of Canada had the opportunity to clarify the extension and the invocability of such 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.* […]"[13]

These circumstances are well defined either by international or constitutional law. The first group includes the processes of decolonization[14], any situations where "[…] *a people is subject to alien subjugation, domination or exploitation outside a colonial context* […]"[15] and – although contested by a relevant fraction of the legal doctrine – the so-called "remedial secession" of peoples "[…] *blocked form the meaningful exercise of its right to self-determination internally* […]"[16]. Conversely, the latter category includes any domestic provisions –

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] For an analysis on such parallelism, see G. CARAVALE, *A Family of Nations.*, op. cit., pp. 59-68.

[13] SUPREME COURT OF CANADA, *Reference re Secession of Quebec*, [1998] 2 SCR 217, 20 August 1998, par. 134. For a doctrinal analysis on the milestone advisory opinion 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; T. GROPPI, *Concezioni della democrazia e della constituzione nella decisione della Corte Suprema del Canada sulla secessione del Quebec*, in *Giurisprudenza Costituzionale*, vol. 43, 1998; 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 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. WOEHRLING, *L'avis de la Cour suprême du Canada sur l'éventuelle sécession du Québec*, in *Revue française de droit constitutionel*, vol. 37, 1999.

[14] See SUPREME COURT OF CANADA, *Reference re Secession of Quebec*, cit., par. 132.

[15] *Ibidem*, par. 133.

[16] *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 Cançado Trinidade, 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; A. TANCREDI, *Secessione e diritto internazionale: un'analisi del dibattito*, in *Diritto Pubblico Comparato ed Europeo*, n. 2/2015; S. VAN DEN DRIEST, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?*, Antwerp, 2013; J. VIDMAR, *Remedial Secession in International Law: Theory and (Lack of) Practice*, in *St. Antony's International Review*, vol. 6, n. 1/2010.

generally, but not necessarily, at a constitutional level – enabling a specific people or group of citizens to separate[17] 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[18], but some examples are still present nowadays[19].

2.2. Scottish independence: feasibility and consequences

It is clearly evident how the first group of factors legitimizing self-determination cannot be applied to the Scottish scenario: every pro-independence effort 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 British Parliament maintains its full sovereignty and the Scottish Parliament cannot legislate 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 British Parliament as well as by the Scottish Parliament, London can temporarily devolve additional powers to Edinburgh, empowering its legislative body to legislate for an independence *referendum*. This 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")[20].

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[17] International law discerns between "separation" and "secession" in so far as the first term indicates 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".

[18] In particular, it was granted to each federated republic in the USSR and in the Socialist Federal Republic of Yugoslavia.

[19] *Inter alia*, it 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 J.O. FROSINI – F. RINALDI, *L'avverarsi della "condizione sospensiva" costituzionale per l'esercizio dello* ius secessionis *in Serbia-Montenegro*, in *Diritto Pubblico Comparato ed Europeo*, n. 4/2006; 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.

[20] 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* –

Such a relevant precedent deserves to be taken in great consideration for the purposes of any post-Brexit analyses. While a majority of the voters expressed itself against the separation of Scotland from the United Kingdom, the then perspective of losing EU membership proved to be significant in determining a willingness to keep the *status quo* unaltered. On this issue, the impossibility to maintain the membership of the EU in the event of a separation – and the consequent need to reapply according to the terms provided by art. 49 TEU[21] – has been shared by a relevant fraction of the legal doctrine[22]. On the same terms, moreover, the then President of the European Council Herman Van Rompuy, in relation to the comparable Catalan issue[23], 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*

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.

[21] 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 TUE*, in F. POCAR – M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padua, 2014.

[22] 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; D. EDWARD, *EU Law and the Separation of Member States*, in *Fordham International Law Journal*, vol. 36, n. 5/13.

[23] For a general overview, from a legal perspective, see A. ABAT I NINET, *The Spanish constitution, the Constitutional Court, and the Catalan referendum*, in K.-J. NAGEL – S. RIXEN (eds.), *Catalonia in Spain and Europe: Is There a Way to Independence?*, Baden-Baden, 2015; M. AZPITARTE, *Five Variables of a Catalan Referendum on Independence*, in *Verfassungsblog.de*, 15 June 2017; L. CAPPUCCIO, G. FERRAIUOLO (a cura di), *Il futuro politico della Catalogna*, in *Federalismi.it*, n. 22/2014; J.-M. CASTELLÀ ANDREU, *La secessione catalana, tra politica e diritto*, in *Studi Parlamentari e di Politica Costituzionale*, nn. 3-4/2012; J.-M. CASTELLÀ ANDREU, *The Proposal for Catalan Secession and the Crisis of the Spanish Autonomous State*, in *Diritto Pubblico Comparato ed Europeo*, n. 2/2015; G. FERRAIUOLO, *Le juge constitutionnel face au conflit politique : le cas du processus souverainiste catalan*, in *Cahiers de civilisation espagnole contemporaine*, n. 17/2016; V. FERRERES COMELLA, *The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide'(Comment on the Judgment 42/2014)*, in *European Constitutional Law Review*, vol. 10, n. 3/2014; C. GONZALES, The *Catalan National Identity and Catalonia's Bid for Independence*, in *Connecticut Journal of International Law*, vol. 32, n. 1/2016; G.M. GONZALES, *Catalonia's Independence and the Role of the Constitutional Court: Recent Developments*, in *Tijdschrift voor Constitutioneel Recht*, n. 1/2015; M. PARODI, *Le conseguenze della crisi economico-finanziaria dell'Europa sulle rivendicazioni indipendentiste nello stato spagnolo*, in P. VIPIANA (a cura di), *Tendenze centripete e centrifughe negli ordinamenti statali dell'Europa in crisi*, Turin, 2014; P.J.C. ORTIZ, *Framing the Court: Political Reactions to the Ruling on the Declaration of Sovereignty of the Catalan Parliament*, in *Hague Journal on the Rule of Law*, vol. 7, n. 1/2015.

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 country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory.*"[24]

Discharging any hypothesis allowing the separating State to remain in the EU without 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 the enlargement unanimously; eventually, an admission treaty has to be concluded and 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 number of States[25] – 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* […]"[26], 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.*"[27]

Therefore, it is possible to identify two relevant matters: i) the assent of the parent State and ii) the involvement of other member States dealing with secessionist movements. The first question appeared to be meaningful in 2014 – when Brexit had yet to become a solid option on the table – but it does not seem to be equally significant nowadays. It comes uncontested that an hypothetical sovereign Scotland will not be stopped on its road towards EU membership by the United Kingdom once Brexit is completed. Moreover, the debate about an active role to be played by the EU in preventing and discouraging secessionist claims within member States through blocking the admission of successfully-formed new States, already contested by a fraction of the legal doctrine, is clearly irrelevant in a post-Brexit scenario.[28]

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

[25] 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)

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

[27] *Ibidem*, art. 4.

[28] The non-neutral involvement of the EU in any process aimed at the separation of a part of a member State has been argued, *inter alia*, by the then President of the European Council Herman Van Rompuy (see *supra*, note 24) and the then President of the European Commission José Manuel Barroso (see www.bbc.com/news/uk-scotland-scotland-politics-26215963 accessed on 19 June 2017). While it is appropriate to remark the existence of a codified procedure for accession applicable to every candidate State, it seems deplorable to have the major European institutions involved in domestic issues. For a clear analysis on the necessity of neutrality from the EU in such circumstances, see D. KOCHENOV – M. VAN DEN BRINK, *Secessions from EU Member States: The Imperative of Union's Neutrality*, in *University of Groningen Faculty of Law Research Paper Series*, n. 9/2016; for the opposite thesis, see

Conversely, the latter issue is still crucial, on the ground that several European countries generally maintain a strict approach towards secessionist entities due to domestic or geopolitical factors, no matters whether or not the parent State belongs to the EU. 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 to be unready to welcome an independent Scotland in the so-called "European club", possibly due to the fear of further legitimizing the pro-independence movements in Catalonia, before adopting a more conciliatory position in the last few months[29].

It is now evident how the perspective of maintaining or 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 –, holding a repetition of the unsuccessful 2014 *referendum* and – if and when sovereignty is acquired – apply for EU accession, joining the queue of several candidate States. On the last condition, it is important to remark that, while Scotland is in a privileged position for what concerns the adaptation of domestic law to the *acquis communautaire*, it would be unreasonable to expect a "fast track" on the procedure provided by art. 49 TEU. Moreover, according to the evolution of the conditionality recorded in the enlargement processes started in the last two decades[30], new member States are not allowed to exercise opting-out clauses on several elements of the *acquis*: such is the case, *inter alia*, of the Schengen agreement[31].

D. EDWARD, *EU Law and the Separation*, cit.; J. WEILER, *Catalonian Independence and the European Union*, in E*jiltalk.org*, 20 December 2012.

[29] See *Spain says it will not impose veto if Scotland tries to join EU*, in www.theguardian.com/politics/2017/apr/02/spain-drops-plan-to-impose-veto-if-scotland-tries-to-join-eu (accessed on 19 June 2017).

[30] It has, however, to be observed that such theory has been implemented with variable strength in each enlargement round. On this issue, *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; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law*, The Hague, 2008; 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.

[31] For a doctrinal overview on Schengen agreement, *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.

2.3. Acceding to the European Economic Area: a valid compromise?

The obstacles for an independent Scotland on the road to the EU are evident and they are likely to stand still even in the long term, when Brexit will be a *fait accompli*. Aware of the situation, the Scottish Government drafted last December a plan for a territorially differentiated Brexit, allowing the entity to remain within the European Single Market (ESM). In brief, the document advocated the adoption of an *ad hoc* solution – the so-called "Norwegian option" – for Scotland: the region, while remaining part of the United Kingdom, would autonomously adhere to the European Free Trade Area (EFTA) and eventually to the European Economic Area (EEA)[32].

The technicalities related to the achievement of such project are out of the scope of the present article[33], but it is necessary to highlight how it would be up to the British Government to negotiate and, eventually, to allow the implementation of the Scottish plan. Specifically, the United Kingdom should apply for EFTA membership and, eventually, restrict the territorial application of the EEA Agreement to the sole Scotland[34]. 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 level[35].

Anyway, it is important to remark how such solution would allow the ESM provisions to be still 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 rest of the United Kingdom – "[…] *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.*"[36] Moreover, the administrative border between Scotland and England would not become an international nor an EU external border.

However, the Scottish plan is not exempt from critics. First of all, it is not explained how it is possible to determine whether or not a specific person is eligible for the free movement regime. If it is uncontested that workers coming from a State part of the ESM could freely move to Scotland – while restrictions are likely to apply for any post-Brexit movements towards the rest of the United Kingdom –, how can the Scottish workers allowed to reestablish in a State part of the ESM be properly qualified? Objective criteria are necessary in order to prevent abusive situations (i.e. a British citizen changing his legal residence to Scotland immediately before exercising the right of free movement to an EEA or EU member State), but

[32] See SCOTTISH GOVERNMENT, *Scotland's Place in Europe*, 20 December 2016, ch. 3, par. 119-121.
[33] For a general overview on the United Kingdom – 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; A. ŁAZOWSKI, *Withdrawal from the European Union*, cit.
[34] See SCOTTISH GOVERNMENT, *Scotland's Place in Europe*, cit., par. 138.
[35] See *ibidem*, par. 123.
[36] *Ibidem,* par. 126.

the proposal is silent on this issue. Anyway, the imposition of temporary restrictions on British citizens resettling in Scotland and acquiring the "Scottish citizenship", a framework comparable to what has been implemented in Finland in relation to the Åland Islands[37], appears to be an unavoidable prerequisite for the actualization of the plan. Similarly, controls efficient enough to prevent EU workers coming into Scotland with the sole purpose of crossing the internal border with England and, therefore, circumventing the more restrictive immigration discipline to be enforced in the rest of the United Kingdom, would be equally necessary.

Lastly, the effective implementation of the Scottish proposal would require a huge shift of competences from Westminster to Holyrood, allowing the region to enter into international relations with foreign States[38] and to acquire the necessary jurisdiction to deal with the obligations deriving from ESM membership. While several models can be found even in the European legal space – Flanders and Wallonia in Belgium, as well as the German *Lander*, are noticeable examples –, such arrangement would deeply impact on the constitutional order of the United Kingdom, transforming the State in a sort of asymmetric federation[39].

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[37] 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.

[38] 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; A. AZZENA, *Competenze regionali nei rapporti internazionali e accordi fra Regioni a statuto speciale ed enti autonomi territoriali esteri*, in *Le Regioni*, 1983; M. BUQUICCHIO (a cura di), *Studi sui rapporti internazionali e comunitari delle Regioni*, Bari, 2004; E. CANNIZZARO, *La riforma "federalista" della Costituzione e gli obblighi internazionali*, in *Rivista di Diritto Internazionale*, n. 4/2001; 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; A. LA PERGOLA, *Note sull'esecuzione degli obblighi internazionali nelle materie di competenza del legislatore regionale*, in *Giurisprudenza costituzionale*, 1960; Y. LEJEUNE, *Le statut international des collectivités fédérées à la lumière de l'experience Suisse*, Paris, 1984; H. MOSLER, *Réflexions sur la personalité juridique en droit international public*, in *Mélanges A. Rolin*, Paris, 1964; M. OLIVETTI, *Il potere estero delle Regioni in prospettiva comparata*, in *Scritti in memoria di Livio Paladin*, Naples, 2004; 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; C. STARCK, *I Länder tedeschi ed il potere estero*, in A. D'ATENA (a cura di), *Federalismo e regionalismo in Europa*, Milan, 1996.

[39] For a general overview on asymmetric federalism, see Y.P. GHAI, *Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy*, in A. REYNOLDS (ed.), *The Architecture of Democracy. Constitutional*

3. Irish unification or differentiated integration: mitigating the effects of an "hard Brexit" in Northern Ireland

3.1. The legal framework for a united Ireland

Introducing the domestic legal sources enabling a people to exercise the external dimension of the right of external self-determination[40], a *sui generis* legal source 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*"[41]. Basically, a *referendum* should be organized "[…] *if at any time it appears likely to* [the Secretary of State for Northern Ireland] *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.*"[42]

As a consequence of the agreement, *inter alia*, two articles of the Irish Constitution were amended: the new article 3 is of utmost importance for the scope of the present analysis, as it clarifies 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.*"[43] Therefore, the Northern Irish people holds a domestically recognized right to separate from the United Kingdom. Such right, however, is not unconditioned: the outcome of the process cannot consist in the creation of a new independent State but, necessarily, either in the entity being annexed to the Republic of Ireland or in the preservation of the *status quo*; moreover, the annexation also has to be approved by the Irish people, through a separate *referendum*.

It is uncontested that the successful conclusion of such procedure would implicate a simple acquisition of territory to the advantage of the Republic of Ireland, while every thesis arguing the creation of a new State following the merging of the two sides of the island is manifestly unfounded. This because a "[…] *presumption of continuity is particularly strong where the constitutional system of the State prior to acquisition* […] *continues*

Design, Conflict Management, and Democracy, Oxford, Ney York, 2002; F. PALERMO, *Federalismo asimmetrico e riforma della Costituzione italiana*, in *Le Regioni*, nn. 2-3/1997; F: PALERMO, *La coincidenza degli opposti: l'ordinamento tedesco e il federalismo asimmetrico*, in *Federalismi.it*, n. 3/2007; G. ROLLA, *The Development of Asymmetric Regionalism and the Principle of Autonomy in the New Constitutional Systems: A Comparative Approach*, in J. COSTA OLIVEIRA – P. CARDINAL (eds.), *One Country, Two Systems, Three Legal Orders - Perspectives of Evolution*, Berlin, Heidelberg, 2009; M. SAHADŽIĆ, *Federal Theory on Constitutional Asymmetries: Revisited*, in *Queen Mary Law Journal*, special conference issue, 2016; M. WELLER – K. NOBBS (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, Philadelphia, 2010.

[40] See *supra*, par. 2, note 19.

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

[42] *Ibidem*, Annex A, Schedule 1, par. 2.

[43] *Ibidem*, Annex B, Article 3.

in force."[44] From an international law perspective, the annexation of Northern Ireland would be comparable, *mutatis mutandis*, to the German reunification[45], the sole relevant difference being the incorporation of a territorial entity of a third State rather than the entire territory of a sovereign State. Anyway, as in the 1990 precedent, the outcome would clearly consist in the enlarged continuation of an existing State, rather than in the creation of a successor State.

Therefore, taken into consideration such theoretical analysis, the call made by the former *Taoiseach*[46] Enda Kenny for a specific provision in any Brexit agreement allowing Northern Ireland to be easily readmitted to the EU should the island be unified[47] appears nothing but a pleonastic declaration. This because the Treaties would be applicable to the entire Irish territory immediately after the incorporation of the northern entity – in conformity with the German precedent[48] – according to the provision set by art. 52 TEU[49]. Consequently, it seems inappropriate to regulate the post-Brexit relations between Northern Ireland and the EU through the so-called "Cypriot model"[50], and to provide a legal framework for an

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[44] J. CRAWFORD, *The Creation of States in International Law*, cit., p. 673. For a detailed study on the issue, see *ex multis* K. MAREK, *Identity and Continuity of States in Public International Law*, Geneva, 1955.

[45] For a general legal overview, see J. CRAWFORD, *The Creation of States in International Law,* op. cit., pp. 673-675; 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 fur Auslandisches Offentliches Recht und Volkerrecht*, vol. 51, 1991; D. PAPENFUB, *The Fate of the International Treaties of the GDR within the Framework of German Unification*, in *The American Journal of International Law*, vol. 92, n. 3/1998; P.E. QUINT, *The Constitutional Law of German Unification*, in *Maryland Law Review*, vol. 50, n. 3/1991.

[46] Head of Government of the Republic of Ireland.

[47] 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).

[48] The most noticeable difference 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 fur Auslandisches Offentliches Recht und Volkerrecht*, vol. 51, 1991; J.-P. JACQUÉ, *German Unification and the European Community*, in *European Journal of International Law*, vol. 2, n.1/1991; C.W.A. TIMMERMANS, *German Unification and Community Law*, in *Common Market Law Review*, vol. 27, n. 3/1990; 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, COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, *Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-Jonas – Ausfuhrerstattung*, C-14/74, 1 October 1974, Law, par. 8.

[49] For a doctrinal analysis on art. 52 TEU, 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).

[50] In brief, while the whole island is *de jure* part of the EU, an *ad hoc* annexed 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 on a specific proposal of the Commission, the Council of the EU will be able to lift the aforementioned restrictions, *de facto* amending primary law. On this issue,

immediate applicability of the Treaties in the entity should a unification of the island happen in the future[51].

While an alteration of the international *status* of Northern Ireland according to the provisions of the "Good Friday Agreement" would clearly bring the entity back within the sphere of application of the Treaties, it is, however, necessary to report that the former Secretary of State for Northern Ireland Theresa Villiers, in response to a call made by the Irish nationalist party Sinn Féin, declared that "[…] *there is nothing to indicate that there is a majority support for a pool*"[52].

Anyway, the severe impact of an "hard Brexit" on the economy in Northern Ireland is quite evident, as the area might suffer from trade restrictions and customs barriers on the border with the Republic of Ireland like no other regions of the United Kingdom, for obvious geographical reasons. In brief, economic analyses reported that the imposition of a physical barrier within the island is likely to be a huge burden on both sides: in particular, the Republic of Ireland is the first market for Northern Irish goods, accounting for more than thirty-four per cent of the entity's total export and twenty-six per cent of the entity's total import[53], and severe trade restrictions might cause as much as a three per cent yearly reduction in the region's GDP in the short term[54]. Moreover, systematic border checks would greatly affect the work market, as it is reported that more than thirty thousand workers commute cross-border every day to reach their workplace[55]. Lastly, with due regard to the negative effects on the communities

see in particular 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, 2011. For further analyses, see K. AGAPIOU-JOSÉPHIDÈS – J. ROSSETTO, *Chypre dans l'Union européenne*, Brussels, 2006; F. DRAGO, *Non cade l'ultimo muro d'Europa. I greco-ciprioti bocciano la riunificazione e Cipro si appresta ad entrare dimezzato nell'Unione europea*, in *Federalismi.it*, n. 9/2004; 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 Rjin, 2011; 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*, in *Common Market Law Review*, vol. 45, n. 3/2008; 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.

[51] The "Cypriot model" as a framework to regulate 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.

[52] *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).

[53] See HM REVENUE AND CUSTOMS, *Regional Trade Statistics 2015*, p. 20 and 22, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/480945/RTS_Q3_2015.pdf (accessed on 21 June 2017).

[54] See A. STENNET, *The EU referendum and potential implications for Northern Ireland*, in *Northern Ireland Assembly Research and Information Service Research Paper*, NIAR 32-16, 21 January 2016, p. 19.

[55] See HOUSE OF LORDS EUROPEAN UNION COMMITTEE, *Brexit: UK-Irish relations*, in *House of Lords Paper* n. 76/2016, p. 18.

living close to the boundary, while it seems inappropriate to fear any security-related consequence, the effects of an "hard Brexit" are likely to be considered as a step back on the normalization of the relations between nationalists and unionists.

3.2. Differentiated integration

Due to the aforementioned reasons, the paradigm of differentiated integration might become an useful tool to handle the Northern Irish issue. The necessity to find an agreement on the future *status* of the entity has also been acknowledged by the British Government 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.*"[56]

Several models could be drafted and applied to Northern Ireland in order to achieve such goal. An immediate solution could consist in the implementation of a paradigm inspired to the historical precedent of Greenland, an autonomous country 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. In brief, following the outcome of a *referendum* held in the entity in 1982, the 1985 "Treaty Amending, with Regard to Greenland, the Treaties Establishing the European Communities" removed the autonomous country from the range of application *ratione loci* of the Treaties and listed it as an associated territory (now under article 204 TFEU)[57].

However, there are several good reasons explaining how the application of a similar framework is unfeasible in the present case. Firstly, it would be the negative of the historical precedent, as only a marginal fraction of the United Kingdom – in terms of population and economic output – would remain within the EU: coherently, the model has been defined as "reverse Greenland"[58]. Moreover, politically

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[56] HM GOVERNMENT, *The United Kingdom's exit from and new partnership with the European Union*, par. 4.4., p. 21, February 2017, available at 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).

[57] 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. PRAM GAD, *Greenland projecting sovereignty – Denmark protecting sovereignty away*, in R. ADLER-NISSEN – U. PPRAM 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.

[58] *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. PRAM GAD, *Could a 'reverse Greenland' arrangement keep Scotland and Northern Ireland in the EU?*, in *Europpblog*, 7 July 2016; A. RAMSEY, *A reverse Greenland: the EU should let Scotland stay*, in *Opendemocracy.net*, 24 June 2016; N. SKOUTARIS, *Reunifying Ireland: An EU law perspective*, in *Skoutaris.eu*, 27 March 2017.

speaking, such 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. Consequently, there would still be British representatives in every EU institution, such as in the European Council and in the Council of the EU – likely to be, respectively, the First Minister of Northern Ireland and a member of his executive –, as well as some members of the European Parliament elected in the entity. Moreover, from a legal perspective, art. 50 TEU is not the appropriate provision to implement a model that formally consists in a revision of the Treaties – regulated by art. 48 TEU[59] – rather than the withdrawal of a member State from the EU. This would imply, *inter alia*, reopening the discussion on the revocability of the art. 50 TEU notification once transmitted to the European Council[60].

Acknowledging that the effective implementation of the "reverse Greenland" framework is little more than utopia, it is, however, important to highlight how it should be able to guarantee the free movement of goods and persons on the border between the Republic of Ireland and Northern Ireland. Moreover, the rest of the United Kingdom 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. Benefiting from the *status* of autonomous country within of the Kingdom of Denmark[61], 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 in the country, since the latter joined the European Communities in 1972; any further exportation from Denmark to other member States was subjected to customs duties[62]. Since then,

[59] 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; M. VELLANO, *Art. 48 TUE*, in F. POCAR – M.C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padua, 2014.

[60] See *supra*, note 8, for additional considerations on this issue.

[61] For a political and 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; A. OLAFSSON, *International Status of the Faroe Islands*, in *Nordisk Tidsskrift for International Ret*, vol. 51, nn. 1-2/1982.

[62] 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.

taking advantage of extensive autonomy in international trade issues, the Faroese managed to conclude several trade agreements with the EU so that, presently, all EU goods but dairy products and sheep meat are allowed duty-free into the Faroe Islands; conversely, a large share of Faroese export is allowed duty-free into the EU, the only notable exception being related to the agricultural sector.[63]

For what concerns the movement 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 – holding Danish citizenship – could still bypass such restriction by moving their residence into mainland Denmark before exercising the freedoms granted by EU law. Moreover, while a valid travel document is compulsory for all foreigners landing in the archipelago, persons travelling between the Faroe Islands and any other country part of the Nordic Passport Union are not subjected to systematic border checks by the local immigration authorities[64].

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 United Kingdom and the EU[65]. Recognizing the importance of the aforementioned study, in the opinion of the person writing the "Faroese model" would be much more appropriate to inspire a feasible accommodation for 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 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.*"[66] For what concerns Northern Ireland, the aforementioned "positive influence" could be identified in the special relation – reinforced by the "Good Friday Agreement" – with the Republic of Ireland, clearly an EU member State.

It is noteworthy to report that Northern Irish citizens are entitled to hold both British and Irish citizenship: according to the 2011 census, almost twenty-one per cent of the entity's residents had an Irish passport[67] and the application *ratio* has boosted in the aftermath of the Brexit *referendum*[68].

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[63] For a brief analysis, see J. HARTMANN, *The Faroe Islands*, cit., p. 10.

[64] See *ibidem*, pp. 11-12. However, it is necessary to highlight that there is no reciprocity on such facilitation, as systematic border checks are enforced by all other members of the Nordic Passport Union – belonging to the "Schengen Area" – on passengers arriving from or departing to the Faroe Islands.

[65] See J. HARTMANN, *The Faroe Islands*, op. cit., pp. 12-14.

[66] *Ibidem*, p. 13.

[67] See the official outcome of the 2011 census in relation to passport held by individuals residing in Northern Ireland, available at www.ninis2.nisra.gov.uk/Download/Census%202011/QS209NI.ods (accessed on 22 June 2017).

[68] See the statistics of the Republic of Ireland's Department of Foreign Affairs and Trade, available at www.dfa.ie/passporttracking/passportstatistics/ (accessed on 22 June 2017).

Concerning the free movement of persons, the preservation of the *status quo* – namely the Common Travel Area[69] – is at first glance a guarantee against the imposition of immigration controls between the two sides of the island. However, it is necessary to highlight that, while the permanence of the Republic of Ireland in the regional free-travel agreement should not be at risk, Dublin's authorities might be called to perform extended checks even on EU citizens in order to avoid any circumvention of the British immigration provisions through the Irish territory. This last issue, anyway, is likely to be incompatible with the Treaties unless a *lex specialis* regime is introduced into EU primary law by the recession treaty[70].

For what concerns 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) a more extensive agreement with the EU in the framework of art. 50 TEU negotiations, possibly through EEA membership[71], allowing the entity to remain within the ESM.

The first solution is the closest to the Faroese model: the entity, once acquired devolved powers in international trade and an autonomous international subjectivity, could negotiate with the EU the implementation of a free movement regime for goods produced or destined to final consumption in the entity, avoiding the imposition of an "hard border" with systematic customs checks on travelers and commuters. A challenging issue would be, in this regard, to implement a mechanism aimed at preventing any frauds on the effective origin of British goods.

The latter option might incur the same criticism reported above in relation to the Scottish Government's proposal. However, it is important to remember the peculiarities of the Northern Irish situation: while the Scottish plan was inspired solely by political motivations, a specific arrangement for the Irish entity is necessary due to its uniqueness in geographical – being the only part of the United Kingdom, apart from Gibraltar, sharing a land border with another EU member State and being detached from the rest of the State –, economic, and socio-political terms; moreover, the fact that its devolution arrangement – underpinned in a binding bilateral treaty between London and Dublin – assumes that the two countries

[69] For a general overview, see *ex multis* T. MCGUINNESS – M. GOWER, *The Common Travel Area, and the special status of Irish nationals in UK law*, in *House of Commons Briefing Paper* n. 7661, 9 June 2017; B. RYAN, *The Common Travel Area between Britain and Ireland*, in *The Modern Law Review*, vol. 64, n. 6/2001.

[70] For a complete assessment on how and up to what extent Brexit can affect the Common Travel Area, see S. DE MARS – C.R.G. MURRAY – A. O'DONOGHUE – B.T.C. WARWICK, *The Common Travel Area: Prospects After Brexit*, available online at http://dro.dur.ac.uk/20869 (accessed on 23 July 2017); T. MCGUINNESS – M. GOWER, *The Common Travel Area*, cit.

[71] For a doctrinal proposal advocating the accession of Northern Ireland to the EEA, see B. DOHERTY – J. TEMPLE LANG – C. MCCRUDDEN – L. MCGOWAN – D. PHINNEMORE – D. SCHIEK, *Northern Ireland and Brexit: the European Economic Area Option*, in *European Policy Centre Discussion Paper*, 7 April 2017, available at http://epc.eu/documents/uploads/pub_7576_northernirelandandbrexit.pdf (accessed on 7 July 2017). For an in-depth analysis of the academic proposal, see E. STRADELLA, *L'Irlanda del Nord: lo specchio del centralismo britannico dalla repressione alla Brexit, attraverso la* devolution *"intermittente"*, in *Federalismi.it*, n. 12/2017, pp. 33-37.

are members of the EU is equally a key element of the issue not to be disregarded.[72] For these reasons, a greater exercise of flexibility from all actors involved should be necessary in order to overcome the harsh effects of an "hard Brexit" on the entity.

4. Conclusions

The models recalled in this article 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 might be viable – once obtained the necessary *consensus* in Westminster – but, even in case of a positive outcome, it does not imply an easy road back to Brussels. Pragmatically, it is has to be noticed that the Scottish Nationalists (SNP) lost as much as twenty-one seats in the House of Commons following last June's general elections[73] and their pro-independence efforts do not seem to be particularly successful, as recent opinion polls predict a solid majority in favor of the *status quo* should the 2014 *referendum* be hypothetically repeated[74]. Nonetheless, it will not be an easy task to find a new agreement between Edinburgh and London on a framework for Scottish independence, unless the seats held by the SNP are necessary to a major party – such as the Labour – in order to form a majority in Westminster upholding a coalition Government after the next general elections. In such an unlikely circumstance, a new *referendum* in Scotland might be the necessary trade-off for upholding the executive; conversely, any ruling party is not to be blamed for vetoing such perspective, as the territorial integrity of a sovereign State is not a matter to be questioned every other year.

Moreover, for the scope of the present article it is necessary to remind that an immediate consequence of independence 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 seems that a similar policy is equally unable to gather the necessary political *consensus* in Westminster and therefore its feasibility is yet to be demonstrated. Until then, Edinburgh should settle for the preservation of the *status quo* and possibly trying to increase its devolved matters following the

[72] See B. DOHERTY – J. TEMPLE LANG – C. MCCRUDDEN – L. MCGOWAN – D. PHINNEMORE – D. SCHIEK, *Northern Ireland and Brexit*, cit., pp. 1-3.

[73] Data available at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7979 (accessed on 24 July 2017).

[74] Data from a recent post-general elections pool are available at http://survation.com/wp-content/uploads/2017/06/Final-Record-Post-Election-Poll-090617DCCH-1c0d3h7.pdf (accessed on 24 July 2017). The trend is confirmed by almost every other pre-election opinion poll.

"repatriation" of competences from the EU to the United Kingdom. Such a framework might be the most effective solution to handle the "Scottish issue". Else, the cure seems to be worse than the disease. This is not the case in Northern Ireland. Contrary to the Scottish situation, mostly confined within the boundaries of domestic law and policy, here the issue acquires an international dimension. The absence of barriers between the entity and the Republic of Ireland is a crucial political matter: 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 should not be at risk, the negotiation between the United Kingdom and the EU has to produce an acceptable outcome 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 might sound attractive to a larger share of population in the long term.

It is, however, impossible to disregard the recent political agreement between the Conservatives and the Democratic Unionists (DUP) to form a parliamentary coalition in Westminster[75], as the DUP's main political point is "to strengthen the Union". While the agreement mostly concerns economic support for the entity and it is rather vague on the post-Brexit *status* of Northern Ireland, only binding the signatories parties to fully adhere to their commitments set out in the "Good Friday Agreement", it reaffirms that the ultimate responsibility for maintaining political stability in the region rests with the British Government.[76] Moreover, DUP's policy of strengthening the Union is apparently incompatible with every program aimed at achieving a differentiated Brexit for Northern Ireland, as it would be unrealistic to argue the absence of negative effects on the relations between the entity and the rest of the United Kingdom should an *ad hoc* solution be effectively implemented. Therefore, it is quite obvious how the ultimate meaning of such political understanding is to prioritize the domestic concern of avoiding possible restrictions on the relations between the entity and the rest of the United Kingdom over the international concern of preventing the imposition of an "hard border" between the two sides of Ireland. Lastly, the issue is exacerbated by the absence of a devolved Government due to the persistent failure of the talks between the DUP and the *Sinn Féin* to form a new shared Northern Ireland Executive[77] following

[75] *Agreement between the Conservative and Unionist Party and the Democratic Unionist Party on support for the Government in Parliament*. The full is available at https://www.theguardian.com/politics/2017/jun/26/tories-and-the-dup-reach-deal-to-prop-up-minority-government (accessed on 7 July 2017).

[76] See *ibidem*, p. 2.

[77] According to the 1998 Northern Ireland Act, the executive of the entity has to be formed under a power-sharing system, by applying a specific formula (the so-called "D'Hondt method") allocating to each party a number of ministerial positions proportional to the number of seats held in the Assembly. Furthermore, the First Minister and the Deputy First Minister must respectively belong to the largest and to the second largest political party in the Assembly, so that both Unionists and Nationalists can hold an office each. On this issue, *ex multis*, see G. CARAVALE, *Verso una nuova sospensione della devolution nord-irlandese?*, in *Nomos*, n. 2/2015; J. MCEVOY, *The*

the snap election of the Northern Ireland Assembly held last March. As a consequence, the entity is currently unable to speak with one voice on its post-Brexit priorities in London and with the EU negotiating counterparts.

While Brexit has clearly introduced new frictions between Unionists and Nationalists, there is clear evidence that the *status quo* might imply a severe uncertainty in both political and economic terms from 2019 onwards. Therefore, all parties involved – from Belfast through London and Dublin to Brussels – should exercise a great deal of flexibility and openness while addressing the issue, in order to find a generally acceptable compromise capable of giving satisfactory answers to what is otherwise likely to evolve into an institutional – and international – stalemate.

Institutional Design of Executive Formation in Northern Ireland, in *Regional and Federal Studies*, vol. 16, n. 4/2006; J. MCGARRY – B. O'LEARY, *Consociational theory, Northern Ireland's conflict, and its agreement. Pt. 1: What consociationalists can learn from Northern Ireland*, in *Government and Opposition*, vol. 41, n. 1/2006; S. SANTOLI, *Irlanda del Nord: l'adozione e la difficile vita di una forma di governo a* power-sharing, in *Diritto Pubblico Comparato ed Europeo*, n. 2/2003; E. STRADELLA, *L'Irlanda del Nord*, cit., pp. 18-25.