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## Independence and the European Union

*Graham Avery*

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Independence<sup>1</sup> is a live issue in Europe today. In the European Union separatist parties have gained votes in Scotland, Catalonia, Flanders and elsewhere<sup>2</sup>, and referendums are in prospect. In Eastern Europe Crimea's referendum has led to an international crisis.

This note addresses some basic questions raised by these developments:

- What is the European Union's policy on independence?
- Is the division of a member state into two states bad for the EU?
- How is the organisational structure of the EU relevant to independence?

### BACKGROUND

The situation on the ground in the EU today may be summarised as follows:

Scotland: a referendum on independence will take place in Scotland on 18 September 2014. The Scottish National Party, which won a majority of seats in the Scottish elections of 2011 and formed a government, is campaigning for 'yes'. Although the British parliament agreed to the referendum, the main political parties in London are campaigning for 'no'. Opinion polls show that 'no' has more supporters than 'yes', but the gap has diminished, many voters are undecided, and the result may be close.<sup>3</sup>

Catalonia: in regional elections in 2012 the alliance Convergence and Union (Convergència i Unió) won 31% of the vote and formed a coalition government, which has announced a referendum on independence for 9 November 2014. Since Spain's Parliament has declared it unconstitutional, the referendum may not take place. But the next regional elections may effectively become a substitute for a referendum.

Belgium: the New Flemish Alliance (Nieuw-Vlaamse Alliantie) gained ground in national elections in 2010 on a platform of independence for Flanders. It won 28% of the vote in Flanders and 17% of the national vote, becoming the largest party both in Flanders and in Belgium. But there is no immediate prospect of the separation of Belgium, partly because of the difficulty of resolving the status of its capital city Brussels.

The debate on independence in these regions takes place in different historical and constitutional contexts. An important signifier of identity for Catalonia and Flanders is language (Catalan & Flemish), which is not the case for Scotland. But despite the differences, they are similar in the sense that their independentists wish to remain in the European Union.

### STATE OF PLAY

#### Independence in Europe

Independence is not a new phenomenon in Europe. Since 1945, and particularly since 1990, many new states have emerged. Initially outside the EU, most have decided to seek EU membership. Estonia, Latvia and Lithuania regained their independence after the collapse of the Soviet Union; the Czech Republic and Slovakia were created

by Czechoslovakia's 'velvet divorce'; seven states emerged from the disintegration of the Federal Republic of Yugoslavia. Other countries in Eastern Europe that were formerly in the Soviet Union have gained independence but are not yet in the process of joining the EU.

Independence is not new within the EU itself. Parts of the national territories of France and Denmark have gained independence – Algeria from France in 1962, Greenland from Denmark in the 1980s – but chose not to remain in the European Communities. What the EU has not yet experienced is the division of one of its member states into two states, both of which wish to remain within the EU. Thus Scotland, and with it Catalonia and Belgium, pose a question for which the EU has no direct precedent. Although the basic Treaties have always provided for countries to join the EU (the procedure for accession is in Article 49) and more recently to leave (the procedure is in Article 50), there is no provision in the Treaties for transforming an existing member into two member states.

### **Independentism: the EU's policy**

So what is the European Union's policy on independentism? Not much can be said in direct reply to this question, which has never been addressed by the EU's institutions. The Treaty on European Union, in its list of basic principles in Article 4.2, says: '...the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

But this does not fix in perpetuity the geographical definition of the member states. The Treaty simply says that territorial integrity is considered to be a function of the member state, and that the EU respects this. In fact the EU has on a number of occasions accepted the re-definition by member states of their geographical territory. That was the case not only for the independence of Algeria and Greenland, but for various changes concerning dependent territories of member states, and for the reunification of Germany in 1990.

One of the basic principles of the EU is to respect the constitutional arrangements of its member states, a principle that been scrupulously observed by the main EU institutions (Council, Parliament, Commission). One may say, in fact, that on the question of independentism in member states, the policy of the European institutions is not to have a policy, but to respect the constitutions of member states.

Thus no EU institution, and no EU member state, has challenged the decision of London to allow a referendum on Scottish independence. No EU institution, and no EU member state, is likely to challenge the view of Madrid that the independence of Catalonia is contrary to the national constitution, which refers to 'the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards'. Although Catalonians would argue that this does not prevent the holding of a referendum, other EU member states will not wish to challenge Madrid's interpretation of the Spanish constitution; after all, they do not want other member states to interpret their own constitutions.

### **Independentism: the EU's response**

Although the EU has no explicit policy on independentism, one may nevertheless deduce an implicit policy from its actions and reactions in relation to cases of independence. Outside the EU, as we have noted, numerous new states were created in the last 25 years, and have subsequently joined the EU; in fact the EU, through the incentive of membership, has contributed notably to the successful pursuit of democratic stability and economic progress by newly independent European countries.

As a generalisation, one may say that the initial response of the EU – or at least, many of its members – has been to resist or discourage the division of other European states into smaller units. This reflects a natural preference in diplomacy for the status quo, and an apprehension that political change may create uncertainty and lead to instability. This attitude was evident at the time of the disintegration of the Soviet Union, and later of Yugoslavia, which generated processes of independence that most European governments hesitated at first to accept.

But when independence is imminent or has become an established fact, the reaction of the EU and its member states has been to come to terms with it, and to try to find remedies for problems that may result. This was the case for the newly independent countries in the Balkans that emerged from the break-up of Yugoslavia, and later Serbia from which Montenegro declared independence in 2006 and Kosovo in 2008.

The EU's reaction to these two episodes is instructive. When Montenegro decided to hold a referendum on independence, the EU was unenthusiastic until Serbia agreed (reluctantly) to accept it as a constitutional process. Then the EU, together with the Council of Europe, supervised the referendum and fixed the parameters for its validity. After a narrow majority for 'yes', Montenegro's independence was immediately recognised by all EU members.

But when Kosovo held a referendum and Serbia refused to accept it, the EU was in disarray. Although most EU members recognised the new state, five – Spain, Slovakia, Romania, Cyprus, and Greece – did not. They refused, and continue to refuse, to recognise Kosovo's unilateral declaration of independence because they consider that this could create a precedent for independentists in their own counties (in Spain, Catalonians and Basques; in Slovakia and Romania, Hungarians; for Cyprus and Greece, Turkish Cypriots).

These cases demonstrate how the question of constitutional validity has been a key factor for the EU's response to independentism. Even in Kosovo, despite its non-recognition by several EU members, and therefore by the EU itself, the process of stabilisation, reconstruction and preparation for membership has been engaged by the EU. For its part, Serbia has understood that the normalisation of its relations with Kosovo is a precondition for the success of its own EU accession process, and in the light of such normalisation, one may expect all EU members eventually to recognise Kosovo.

In summary, the implicit policy of the EU in relation to independentism in Europe consists of initial reluctance followed by pragmatic acceptance, provided that the process can be considered as constitutional. That the constitutionality of an independence referendum is a key factor for the EU was illustrated recently by Crimea's referendum of February 2014: the European Council declared in March 2014 that it 'does not recognise the illegal referendum in Crimea, which is in clear violation of the Ukrainian Constitution'

## PROSPECTS

### **The division of EU member states into smaller units**

Let us turn now to the question 'is the division of one member state into two member states good, or bad, for the EU as such?' – The question here is not 'is a particular case of independence (such as Scotland, or Catalonia) good for individual EU member states?' it is a question of a more general nature.

It can be argued that any increase in the number of member states tends to make the functioning of the EU's institutions and their decision-making more complicated. But successive enlargements of the EU have increased its membership from 6 to 28 states without paralysing its decision-making. Although it may be more complicated with additional members, it is not necessarily more difficult for the EU's decision-making institutions (Council & Parliament) to decide by majority vote, or by qualified majority. Some game-theorists even argue that with more actors it can be easier to find majority solutions. Naturally, in areas where the EU decides by unanimity, there is a greater risk of paralysis, but experience has shown that it is the big member states who are tempted to exercise vetoes, while small and medium-size members use them rarely.

In the scenario that we are considering – where one member state divides into two – the resulting increase in the number of member states is accompanied by no change in the population of the EU, or its economic size. By definition, they remain the same. Thus, the dimension of the internal market is not affected, and the EU's external influence in fields such as trade is not diminished. Indeed, it can be argued that the EU's weight in international affairs is marginally increased, since it gains an additional seat and votes in the United Nations and other international organisations.

The EU expresses no preference for bigger or smaller states; it simply 'respects the equality of member states'. However, its system of decision-making does have an inbuilt bias in favour of smaller states. For seats in the European Parliament and votes in the Council by qualified majority, smaller states are over-represented in relation to their population, and have relatively more voting power than bigger ones. This 'degressive proportionality' is a constitutional principle of the EU, designed to reassure smaller states that they will not be dominated by the others.

In conclusion, the division of member states into smaller units cannot be considered good or bad for the EU as such. It is, on balance, neutral. Naturally, for individual member states, such a development may be good, or bad, and may be opposed for various reasons. But it can hardly be opposed on the grounds that it weakens the EU, or is contrary to the EU's basic principles and interests.

## Independentism and the EU's organisational structure

Let us develop this reflection further, and examine the question 'which aspects of the EU's organisational structure are relevant to the question of independentism?'

The EU is a multinational, multilevel system of governance, with elements of supranationality and of intergovernmentalism. It has allowed member states to 'upload' various national functions to the European level, starting with competition policy and international trade policy, and continuing with environment policy, macroeconomic policy, foreign policy, etc. Initially it had only two levels of governance – European and national – but since the 1980s the situation has developed as a result of devolution within member states, with more autonomy being given to regions. In fact the EU's principle of subsidiarity (Article 5.3 of the Treaty): now identifies four different levels of governance European; national; regional; and local. Local and regional entities have enjoyed increased opportunities for freedom of action and negotiation in European affairs. The realisation that the regions wanted a voice in the EU's institutional framework resulted in the creation of the Committee of Regions as an EU institution in 1994. But it is a talking-shop, not an instance of decision, and has not satisfied their aspirations.

Meanwhile, although the European Parliament has obtained more power, the Council of Ministers and the European Council remain the focus of decision-making in the EU. In other words, most power still lies with the member states. If we add to this the fact that 'degressive proportionality' in decision-making gives smaller states an advantage, we can understand how independentists are motivated to seek statehood and EU membership. Without the EU, it would be more difficult to transform a subnational entity into a nation state. A state has to perform complex functions in fields such as international trade, macroeconomic management, currency, foreign affairs and security. Membership of the EU does not eliminate the need for these functions, but allows important aspects to be uploaded to the supranational level.

These characteristics of the EU were progressively developed by the member states to deal with the political and economic challenges posed for them by international markets and globalisation. The classic work of Alan Milward, a leading historian of European integration, was his book *The European Rescue of the Nation-State* in which he argued that the relationship between European integration and the nation state has been mutually beneficial and supportive.

In handling the question of independentism today, member states are fully entitled to insist that the principles of democracy and constitutionalism should be respected. But they must also realise that, in relation to the EU, independentists are entitled to follow the logic of the structure that member states themselves invented.

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*This text expresses his personal views. A longer version of it has been published by Scottish Global Forum <http://www.scottishglobalforum.net>*

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- 1 Independentism is the appropriate term for regions that aspire to become independent states; other terms, with different shades of meaning, are separatism, secession, self-determination, autonomy.
  - 2 Independence movements exist elsewhere in the EU, such as South Tirol and Veneto in Italy, Corsica in France, the Basque Country in Spain, the Székely Land in Romania, Wales in the United Kingdom, etc. But movements in these regions have not generated a strong case for independent statehood.
  - 3 A recent survey in Scotland showed 46% 'no', 41 % 'yes', 14 % 'don't know' (Panelbase/Wings over Scotland, 28/3-4/4/2014).

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