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Accommodating Territorial Contestation and National Constitutional Change: The Cases of Cyprus and Ireland

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ABSTRACT

Although Article 3(5) of the Treaty on European Union (TEU) declares that the aim of the EU is 'to promote peace, its values and the well-being of its peoples', its actual record in catalysing conflict resolution is rather mixed. However, it has been particularly successful in accommodating territorial contestation within its borders and in its immediate neighbourhood. The article focuses on the main legal mechanism that has allowed the EU to achieve this aim. Despite the very different political and historical contexts, the Union legal order has managed to accommodate the border disputes in Cyprus and Ireland mainly by extending the application of EU law beyond its territory. This remarkable flexibility will also enable the EU to accommodate

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national constitutional change that a potential reunification of either of the two islands will trigger.

INTRODUCTION

The EU's historical success as a peacemaker between France and Germany has inspired many to wonder whether it may also bring peace to other conflict zones, especially within its borders and in its immediate neighbourhood.[1] This query is even more justified given the aim of the EU 'to promote peace, its values and the well-being of its peoples'.[2] At the same time, the Commission has declared that conflict resolution is a key foreign priority, presenting it as an 'essential aspect of the EU's external action'.[3]

With regard to its immediate neighbourhood, Tocci has pointed out that the 'EU's "structural diplomacy", i.e. the various forms of association and integration offered by the EU, is potentially well tailored to induce long-run structural change both within and between countries'.[4] According to that rationale, the closer the form of association is with the EU, the stronger the potential to achieve the respective conflict resolution goal. As has been argued,

> Europeanisation in the field of secessionist conflict settlement and resolution should be understood as a process which is activated and encouraged by European institutions, primarily the European Union, by linking the final outcome of the conflict to a certain degree of integration of the parties involved in it into European structures.[5]

So, 'The European Union is not in itself the initiator of the peace process in any direct sense. Instead, it serves as an added factor (i.e. a catalyst) that encourages conflict resolution to take place more quickly than might have

[1] See generally Emel Akçali, 'The European Union's competency in conflict resolution: the cases of Bosnia, Macedonia and Cyprus', in Thomas Diez and Nathalie Tocci (eds), *Cyprus: a conflict at the crossroads* (Manchester, 2009), 180–97; Elise Féron and Fatma Güven Lisaliner, 'The Cyprus conflict in a comparative perspective: assessing the impact of European integration', in Diez and Tocci, *Cyprus*, 198–216.

[2] Art 3(5) TEU.

[3] See for instance European Commission, 'European Neighbourhood Policy Strategy Paper', COM(2004)373 final, 12 May 2004, 3.

[4] Nathalie Tocci, *EU accession dynamics and conflict resolution* (Farnham, 2004), 173; see also Nathalie Tocci, 'Comparing the EU's role in neighbourhood conflicts', in Marise Cremona (ed.), *Developments in EU external relations law* (Oxford, 2008), 216–43.

[5] Bruno Coppieters, Michel Huysseune, Tamara Kovziridze, et al. (eds), *Europeanization and conflict resolution: case studies from the European periphery* (Brussels, 2004), 2.

been expected.'[6] It is the impact of conditionality and socialisation that might have a 'catalytic effect' on conflict transformation, thus emphasising both the direct and the indirect forms of EU impact.[7]

However, the accession of the Republic of Cyprus (RoC) to the EU failed to 'catalyse' a settlement of the age-old dispute, shedding doubt on whether the 'catalytic effect' thesis could accurately represent the reality. Equally, the often minimal and mainly indirect involvement of the Union in the settlement of other intrastate conflicts that have taken place within its borders, such as the ones in the Basque country, Catalonia and Northern Ireland, point to the limits of the theory.

In other words, the empirical evidence questions (at the very least) any linear conceptualisation of a 'catalytic effect' of EU integration on border and intrastate conflicts. Instead, it suggests that there is a clear 'break point' in the linearity of enhanced conflict resolution potential on the part of the EU at the moment of the accession of any given state. The EU is better equipped to 'catalyse' the resolution of a conflict before the EU accession of a candidate state rather than after. This is what has been called 'the paradox of the Europeanisation of intra-state conflicts'.[8]

After the accession of any candidate state, the Union tends to accommodate the relevant conflict within its political and legal order rather than mobilise its resources to resolve it.[9] Equally, after the withdrawal of a member state such as in the case of Brexit, the EU strives to absorb the frictions and tensions that such a political decision creates for the relevant border conflict(s).[10] In both instances, it does so mainly by extending the application of EU law beyond the Union's territory to such an extent that the respective territorial borders would experience a significantly lower level of friction.

The present article provides for an account of the legal mechanism of the extraterritorial application of EU law that has allowed the Union to accommodate border disputes by focusing on the cases of Cyprus, which acceded to

[6] James Ker-Lindsay, 'The European Union as a catalyst for conflict resolution: lessons from Cyprus on the limits of conditionality' (London, 2007), available at: http://eprints.kingston.ac.uk/5596/1/Ker-Lindsay-J-5596.pdf (23 May 2025).

[7] Ker-Lindsay, 'The European Union as a catalyst for conflict resolution'.

[8] Nikos Skoutaris, 'The paradox of the Europeanisation of intra-state conflicts', *German Yearbook of International Law* 59 (2016), 223–53.

[9] Skoutaris, 'The paradox of the Europeanisation of intra-state conflicts'.

[10] For an analysis see Nikos Skoutaris, 'Border conflicts and territorial differentiation after Brexit: the cases of Northern Ireland, Gibraltar and the UK sovereign base areas in Cyprus', in Benjamin Leruth, Stefan Gänzle and Jarle Trondal (eds), *The Routledge handbook of differentiation in the European Union* (London, 2022), 680–95.

the EU in 2004, and Northern Ireland, which withdrew from the EU in 2020. It points to the remarkable flexibility that the Union legal order has exhibited in accommodating conflicts that entail territorial contestation.

The remainder of this article is organised as follows. The next section sets those border conflicts in their broader political and historical contexts while the following one analyses the legal arrangements that have allowed their accommodation within the Union legal order. The last part discusses how the flexibility of the EU constitutional order will enable it to accommodate a possible national constitutional change that the potential reunification of either of those islands will entail.

THE CONTEXT

At the heart of every border conflict,[11] there is a territorial contestation marked by a territorial border that is under dispute. In the case of Cyprus, that is the ceasefire line (Green Line) that marks the territorial division of the island, while in Northern Ireland, that is the Irish territorial border. In both cases, there is the open question of the unification of those islands. Having said that, while in the case of Cyprus the EU legal order was asked to accommodate such territorial contestation when the island acceded to the EU, in the case of Northern Ireland the EU mainly faced such a challenge when the UK was withdrawing from the Union.

(Northern) Cyprus

The RoC gained its sovereign independence from the UK by virtue of three treaties—namely the Treaty of Guarantee, the Treaty of Alliance and the Treaty of Establishment—and a Constitution, all of which came into operation the same day: 16 August 1960.[12] In order to achieve a political compromise between the UK, Greece and Turkey and to ensure a balance between the island's two main ethno-religious segments, a complicated power-sharing

[11] For the purposes of the article, a discursive definition of conflict following the work of Diez et al. is used. According to them, 'we observe the existence of a conflict when an actor constructs his or her identity or interests in such a way that these cannot be made compatible with the identity or interests of another actor. Conflict is therefore discursively constructed. This means that … we do not consider violence as a necessary element of conflict.' Thomas Diez, Stephan Stetter and Mathias Albert, 'The European Union and border conflicts: the transformative power of integration', *International Organization* 60 (3) (2006), 563–93: 565.

[12] See generally www.kypros.org/Constitution/English/ (23 May 2025).

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structure was designed.[13] The constitution was drawn up explicitly in terms of the Greek-Cypriot and Turkish-Cypriot communities, while all the principles of consociational democracy—grand coalition, proportionality, autonomy and veto—were elaborately embodied in it. Although the UK, Greece and Turkey guaranteed the state of affairs, this regime was short-lived. Following the first, low-scale intercommunal armed conflict in December 1963, the vast majority of the Turkish Cypriot representatives withdrew from their posts in the executive, legislative and judiciary while others were prevented from assuming their positions.[14] Still, despite the fact that since 1964 the RoC has not operated as a bicommunal state, it is the aforementioned international legal framework that regulates its existence in the international arena.[15]

Having said that, it was the 1974 Turkish military intervention in the aftermath of a coup against the president of Cyprus orchestrated by the military regime in Greece that consolidated the territorial segregation of the two communities. This led in November 1983 to the Turkish Cypriots proclaiming their independence as the Turkish Republic of Northern Cyprus (TRNC). The UN Security Council deplored 'the purported secession of part of the Republic of Cyprus' and called on all states 'not to recognise the purported State of the "Turkish Republic of Northern Cyprus" set up by secessionist acts'.[16]

With regard to EU–Cyprus relations, on 4 July 1990, RoC's then foreign minister, George Iacovou, on behalf of the whole island, presented an application for membership to the European Community. Three years later, the Commission issued its Opinion.[17] There, it considered Cyprus to be eligible for membership[18] but noted that

> the fundamental freedoms laid down by the Treaty … and the universally recognised political, economic, social and cultural rights … would have to be guaranteed as part of a comprehensive settlement restoring constitutional arrangements covering the whole of the Republic of Cyprus.[19]

[13] Nikos Skoutaris, *The Cyprus issue: the four freedoms in a (member-) state under siege* (Oxford, 2011), 15–22.
[14] Skoutaris, *The Cyprus issue*, 22–6.
[15] See UN Security Council Resolution 186 (1964).
[16] UN Security Council Resolution 541 (1983). This was reiterated in UN Security Council Resolution 550 (1984).
[17] *Bulletin of the European Communities*, Supplement 5/93, 'The challenge of enlargement', Commission Opinion on the Application by the Republic of Cyprus for Membership, on the Basis of COM(93)313 final, 30 June 1993.
[18] Commission, 'The challenge of enlargement', para. 48.
[19] Commission, 'The challenge of enlargement', para. 10.

This is the main reason why it concluded that 'Cyprus's integration with the Community implies a peaceful, balanced and lasting settlement of the Cyprus question.'[20] It felt, however, that it was necessary to clarify that in case of a failure to reach a settlement through the intercommunal talks under UN auspices, the situation should be reassessed.[21]

Hoping to use the 'carrots' and 'sticks' offered by the accession negotiations, the then UN secretary-general, Kofi Annan, invited the two communities to relaunch their talks for the comprehensive settlement of the Cyprus conflict. In December 1999, the Helsinki European Council, commenting on those important developments, expressed its 'strong support for the UN Secretary-General's efforts to bring the process to a successful conclusion'.[22] It also underlined that a political settlement would 'facilitate the accession of Cyprus to the European Union' but clarified that, in case a settlement was not reached by the completion of the negotiations, the Council's decisions would 'be made without the above being a precondition. In this, the Council would "take all the relevant factors" into account.'[23] In exchange, Turkey achieved its long-standing aim to be officially declared a candidate state for accession to the EU.

It is difficult to overemphasise the importance of the conclusions of the European Council in Helsinki. The rationale of lifting the conditionality for the Greek-Cypriot-run RoC rested on a realist logic of conflict settlement. According to it, the Turkish and Turkish Cypriot desire to reap the conditional benefits of membership, and the high costs entailed in the absence of a solution before accession, would create 'ripe' conditions for a settlement by generating Turkish incentives to change their positions. In other words, a conditional 'stick' to both Turkey and the breakaway state of TRNC would raise the costs of the status quo. In addition, the EU 'carrot' would encourage the parties, including the Greek Cypriots, to support reunification within the EU.

Such a strategy was effective enough to ensure the support of Turkey, and most importantly the Turkish Cypriots, for the UN-sponsored plan for the comprehensive settlement of the Cyprus problem—commonly known as the Annan Plan.[24] Their community overwhelmingly voted in favour of the reunification of the island in simultaneous referendums in April 2004.

[20] Commission, 'The challenge of enlargement', para. 47.
[21] Commission, 'The challenge of enlargement', para. 51.
[22] Helsinki European Council, Presidency Conclusions, Helsinki, 10–11 December 1999, available at: http://www.europarl.europa.eu/summits/hel1_en.htm (23 May 2025).
[23] European Council, Presidency Conclusions, para. 9.
[24] See 'The comprehensive settlement of the Cyprus problem', 31 March 2004, available at: https://peacemaker.un.org/en/node/8801 (23 May 2025).

However, it failed to foresee the stance of the Greek Cypriots after they signed the Treaty of Accession in 2003, when they had thereby ensured that the RoC would become an EU member state. In fact, the RoC's then president, Papadopoulos, in his dramatic speech on 7 April 2004, asked the Greek Cypriots to say 'a resounding NO on 24 April',[25] pointing out that if the Greek Cypriots rejected the plan, the internationally recognised Republic of Cyprus would still 'become a full and equal member of the European Union'.[26] Indeed, the Greek Cypriot community rejected the Annan Plan in an almost 3:1 ratio. A week later, on 1 May 2004, Cyprus became an EU member despite the fact that it could not control a significant part of its territory. As we will see in the next section, the Union constitutional order managed to accommodate this territorial contestation by partially extending the application of EU law on an area where the *acquis* is suspended.

(Northern) Ireland

Following resolutions by the parliaments in Dublin and London, Ireland was united with Great Britain by the Act of Union 1801. To accommodate deep-seated differences between unionists and nationalists on the island of Ireland, Westminster passed the Government of Ireland Act 1920. This 'was based on partition between the six counties in the North, comprising Northern Ireland with a Parliament in Belfast, and the remainder of Ireland with a Parliament in Dublin'.[27] The Irish resistance, however, during the Irish War of Independence led the UK to sign the Anglo-Irish Treaty with representatives of the self-declared Irish Republic.[28] The treaty provided for the establishment of the Irish Free State and gave Northern Ireland the right to opt out of it.[29] Indeed, Northern Ireland exercised this right and a parliamentary system of devolved government was established in the region, while the rest of the island eventually achieved its independence.

[25] Press and Information Office of the Republic of Cyprus, 'Declaration by the President of the Republic Mr Tassos Papadopoulos regarding the referendum of 24th April 2004', press release, 7 April 2004.
[26] Press and Information Office of the Republic of Cyprus, 'Declaration'.
[27] Peter Leyland, *The constitution of the United Kingdom: a contextual analysis* (2nd edn, Oxford, 2012), 21; for a brief historical account of how partition on the island of Ireland was established, see Diarmaid Ferriter, *The border: the legacy of a century of Anglo-Irish politics* (London, 2019).
[28] See Articles of Agreement for a Treaty between Great Britain and Ireland (Anglo-Irish Treaty), 6 December 1921, available at: https://www.quillproject.net/resources/resource_item/290/16630 (23 May 2025).
[29] Anglo-Irish Treaty, Arts 11–12.

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Having failed to effectively address the needs of the nationalist/republican/Irish/Catholic community, Westminster suspended the devolution arrangements in the North in March 1972. During an era of political violence known as 'the Troubles', Northern Ireland was directly governed by London. It was the 1998 Good Friday/Belfast Agreement (GFA) that put an end to the sectarian violence that had plagued the region for decades. The GFA highlighted that Northern Ireland is an integral part of the UK but established its constitutionally recognised right to secede.[30] Such unique constitutional status was 'accompanied by unusual multi-level governance: regional, north/south and British/Irish'.[31]

Although the text of the GFA does not include many references to the EU,[32] Meehan has explained that EU membership has facilitated the peacebuilding process of the GFA:[33] 'The sharing of sovereignty within the EU has spilled over into some sharing of sovereignty over Northern Ireland.'[34] In a way, the GFA 'was premised on the assumption of common policies and interests across a wide range of policy areas',[35] which the EU membership of both the UK and Ireland had secured. The fact that both the UK and Ireland had been participating in the single market and the EU customs union meant that their land border was by definition invisible and they did not have to negotiate its status.

This is why the decision of the UK to withdraw from the EU put all three strands of the GFA at risk of deep fissures.[36] It challenged 'the narrative of a

[30] The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland, N. Ir.–U.K., Apr. 10, 1998, Cm 3883, art 1; Northern Ireland Act 1998, s 1.

[31] Katy Hayward, '"Specific solutions" & "distinct arrangements": more of the same for post-Brexit NI?', *Slugger O'Toole*, 11 December 2017, available at: https://sluggerotoole.com/2017/12/11/specific-solutions-distinct-arrangements-more-of-the-same-for-post-brexit-ni/ (23 May 2025).

[32] The text of the GFA has three sets of references to the EU. The first aims to ensure 'effective coordination and input by Ministers [from the Northern Ireland Executive] to national [the United Kingdom] policy-making, including on EU issues' (Strand One, para. 32). A second set relates to the work of the North South Ministerial Council (Strand Two, para. 17; Strand Three, paras 5 and 31). The third set underlines the need for the Irish and UK governments 'to develop still further the unique relationship between their peoples and the close cooperation between their countries as friendly neighbours and as partners in the European Union' (British–Irish Agreement, Preamble).

[33] Elizabeth Meehan, 'Britain's Irish question: Britain's European question? British–Irish relations in the context of European Union and the Belfast Agreement', *Review of International Studies* 26 (1) (2000), 83–97.

[34] Sionaidh Douglas-Scott, 'A UK exit from the EU: the end of the *United* Kingdom or a new constitutional dawn?', Oxford Legal Studies Research Paper No. 25/2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574405 (23 May 2025), 9.

[35] David Phinnemore and Katy Hayward, 'UK withdrawal ("Brexit") and the Good Friday Agreement', Study for the Policy Department for Citizens' Rights and Constitutional Affairs, November 2017, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596826/IPOL_STU(2017)596826_EN.pdf (23 May 2025), 7.

[36] The joint report recognises that 'the United Kingdom's withdrawal from the European Union presents a significant and unique challenge in relation to the island of Ireland'. *Joint report from the negotiators of the EU and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the EU*, 8 December 2017, available at: https://commission.europa.eu/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1_en: para. 42 (23 May 2025).

shared and interdependent Northern Ireland'[37] and impeded the sharing of sovereignty across the region, since the UK and therefore Northern Ireland are no longer part of the EU. By definition, this situation changes the balance of powers between the two guarantors: the UK and Ireland. At the same time, there was a question whether Brexit would lead to the loss of EU funding from which the peace process in Northern Ireland had benefited.[38] Finally, the creation of a customs border would have posed a significant threat to the island of Ireland as a single economic area and a safe space. In particular, such a development

> would not only require a massive investment by Ireland, as the EU Member State required to enforce the EU external customs border with the UK at this point, but also bring back painful memories of the times of conflict on the island, when the trade border was not only (ab)used for intimidation through its harsh enforcement, but also had a real impact on livelihoods.[39]

And although all interested parties accepted the importance of the 'Northern Irish question' in the context of the Brexit negotiations,[40] keeping

[37] Stephen Farry and Sorcha Eastwood, 'How to underpin a special deal for Northern Ireland', *UK in a Changing Europe*, 31 October 2017, available at: http://ukandeu.ac.uk/how-to-underpin-a-special-deal-for-northern-ireland (23 May 2025).

[38] On funds see Trevor Salmon, 'The EU's role in conflict resolution: lessons from Northern Ireland', *European Foreign Affairs Review* 7 (2002), 337–58: 353–7.

[39] Dagmar Schiek, 'The island of Ireland and "Brexit" – a legal-political critique of the draft Withdrawal Agreement', *QPol*, 22 March 2018, available at: https://qpol.qub.ac.uk/island-of-ireland-brexit-draft-withdrawal-agreement/ (23 May 2025), 6.

[40] In her letter to President of the European Council Donald Tusk with which she triggered Article 50 TEU, former UK prime minister Theresa May (2016–2019) expressed her intention 'to avoid a return to a hard border'. 'Prime minister's letter to Donald Tusk triggering Article 50', 29 March 2017, available at: www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50 (23 May 2025). This position was broadly in line with the post-referendum letter she received from the first minister and the deputy first minister of Northern Ireland, Arlene Foster and Martin McGuiness, 'Letter to PM', 10 August 2016, available at: www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf (23 May 2025). Enda Kenny, former taoiseach (2011–2017), described Brexit as 'arguably the greatest economic challenge for this island in 50 years', 'Irish Times Brexit Summit keynote address', 7 November 2016, available at: https://merrionstreet.ie/merrionstreet/en/news-room/speeches/irish_times_brexit_summit_-_keynote_address_by_the_taoiseach.html (23 May 2025); Leo Varadkar, former taoiseach (2017–2020) noted that 'every single aspect of life in Northern Ireland could be affected by Brexit', 'Clock is ticking on Brexit talks', 4 August 2017, available at: www.bbc.co.uk/news/uk-northern-ireland-40819687 (23 May 2025). The EU also recognised that 'the unique circumstances and challenges on the island of Ireland will require flexible and imaginative solutions'; see 'EU negotiating directives', 22 May 2017, available at: https://www.consilium.europa.eu/en/press/press-releases/2017/05/22/brexit-negotiating-directives/ (23 May 2025).

the Irish territorial border frictionless proved to be a formidable challenge. In the next section, we will examine how the EU legal order extended the application of EU law to a region of a state that withdrew from the Union in order to accommodate this territorial contestation.

ACCOMMODATING TERRITORIAL CONTESTATION

In the case of Cyprus, the Union legal order had to accommodate the territorial contestation created by the non-consensual secession of the TRNC and the failure to reach a settlement at the moment that the divided island was acceding to the EU. In the case of Northern Ireland, such a challenge became apparent at the moment that the UK decided to withdraw from the EU. Despite this significant difference, the main mechanism that the Union used in both cases was the extraterritorial application of EU law in order to ease the frictions created by those divisions. In the case of northern Cyprus, this was mainly achieved through Protocol No. 10 of the Act of Accession 2003.[41] In the case of Northern Ireland, the fabled Protocol of the UK's Withdrawal Agreement (WA) as amended by the Windsor Framework is the main conduit for the extraterritorial application of EU law in the region.[42]

(Northern) Cyprus

On 24 April 2004 in simultaneous referendums, the Turkish Cypriots approved the Annan Plan while the Greek Cypriot community rejected it. Despite this, a week later, Cyprus as a whole became an EU member state. To accommodate this territorial contestation, the EU legal order had to prove its remarkable flexibility.

At the very centre of the EU's pragmatic approach lies Protocol No. 10 on Cyprus of the Act of Accession 2003, which describes the terms of RoC's accession. It allows the Union's legal order to manage the unprecedented (for an EU member state) situation of not controlling part of its territory

[41] Act Concerning the Conditions of Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the Adjustments to the Treaties on Which the European Union is founded—Protocol No 10 on Cyprus, 2003 OJ L 236, 46.

[42] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland/Northern Ireland, 2020 OJ L 29, 102.

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without recognising the respective breakaway entity. In the preamble of the Protocol, the EU member states and the acceding states considered that in the absence of a comprehensive settlement, it was necessary to provide for the terms under which EU law would apply to northern Cyprus. So, Article 1(1) Protocol No. 10 provides that the application of the *acquis* is suspended there. The main scope of this provision is to limit the responsibilities and liability of Cyprus as a member state under EU law. Although Cyprus joined the Union with its entire territory, its government cannot guarantee effective implementation of EU law north of the Green Line.[43] In fact, according to the European Court of Human Rights, it is Turkey that exercises effective control in those areas.[44] However, the scope of the suspension is territorial. This means that the Turkish Cypriot citizens of the Cyprus Republic residing in the northern part of the island should be able to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such.[45]

Following a possible future solution of the Cyprus issue, the Council of the EU, acting unanimously on the basis of a proposal from the Commission, may eventually decide to withdraw the suspension in full or in part.[46] Until the withdrawal of the suspension takes place, Article 2 allows the Council to define the terms under which the provisions of EU law apply to the territorial 'border' between the government-controlled areas and northern Cyprus. As such, it provided the legal basis for the adoption of the Green Line Regulation.[47] This legislative device has allowed the partial application of the EU *acquis* in northern Cyprus. In particular, it has made it possible to establish some free movement of goods and persons with an area outside the territorial scope of EU law despite the fact that an unrecognised state lies there. It has done so without recognising the breakaway state. It is a prime example of 'engagement without recognition'.[48]

Concerning the free movement of persons, Article 2(1) of the Green Line Regulation provides that the RoC has the responsibility to carry out checks on all persons crossing the ceasefire line with the aim of

[43] European Court of Justice, Case C-420/07, *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams*, Opinion of AG Kokott, 2009 ECR I-3571, paras 40–1.
[44] European Court of Human Rights, *Cyprus v. Turkey*, judgment of 10 May 2001, RJD 2001-IV, para. 77.
[45] Max Uebe, 'Cyprus in the European Union', *German Yearbook of International Law* 46 (2004), 375–400: 384.
[46] Protocol No. 10 on Cyprus, Art 1(2).
[47] EC Regulation 866/2004 of 29 April 2004, OJ 2004 L 161, 128 (Green Line Regulation).
[48] Nikos Skoutaris, 'Accommodating secession within the EU constitutional order of states', *Virginia Journal of International Law* 64 (2024), 293–348: 318–21.

combating illegal immigration of third-country nationals and to detect and prevent any threat to public security and public policy.[49] With regard to the free movement of goods, the challenge that the EU had to face was to establish trade relations with a territory where there is an unrecognised government without actually recognising it. In order to do so, the Union, in agreement with the RoC, authorised a Turkish Cypriot NGO, the Turkish Cypriot Chamber of Commerce, to issue accompanying documents so that goods originating in northern Cyprus may cross the line and be circulated in southern Cyprus and the rest of the Union market as EU products.[50]

It is clear from the above that the intention of the drafters of Protocol No. 10 was never 'to exclude the application of all provisions of [Union] law with a bearing on areas under the control of the Turkish Cypriot community'.[51] In fact, Article 3 of Protocol No. 10 allows measures with a view to promoting the economic development of northern Cyprus. This provision clarifies that the division of the island should not rule out economic assistance of the Union to its more impoverished part. Indeed, on 27 February 2006 the Council unanimously adopted the Financial Aid Regulation, which establishes an instrument for encouraging the economic development of the Turkish Cypriot community.[52]

Undoubtedly, the existence of this legal framework highlights the flexibility of the EU constitutional order that allows it to accommodate territorial contestation. Because of this flexibility, the Union can even engage with an unrecognised entity that has been established as a result of a non-consensual secession.

Of course, this accommodation was made possible through the consent of the metropolitan state and primary legislation in the form of an accession treaty. If RoC had not consented to it, it would have been impossible for the EU legal order to engage with the regime in northern Cyprus to such an extent. An effort from the EU and the other member states to build economic and political relations with the breakaway entity unilaterally and without RoC's explicit consent would have led to a breach of the duty of loyal cooperation.[53] This is one of the arguments that the Cypriot government has put forward to

[49] Green Line Regulation, Art 2(2).
[50] Green Line Regulation, Art 4(5).
[51] See *Meletis Apostolides*, AG Kokott, para. 40.
[52] EC Council Regulation 389/2006 of 27 February 2006, OJ 2006 L 65, 5.
[53] Art 4(3) TEU.

block the proposal for a Regulation that would establish direct trade relations between the Union and the unrecognised TRNC.[54] In particular, it emphasised that due to the duty of loyal cooperation, the EU and its member states should respect the closure of the ports in northern Cyprus and not build direct economic relations between the breakaway state and the rest of the EU without the explicit consent of the Republic.[55]

This points to the limitations of the EU's pragmatic approach and the mechanism of extraterritorial application of Union. It has not led to the complete normalisation of the relations between the EU and northern Cyprus. It has merely eased the frictions created by the territorial division of the island. Still, it is important to highlight that without formally recognising the breakaway entity that lies within its borders, the Union engages with it regarding trade, free movement of people and economic assistance—accommodating this territorial contestation.

(Northern) Ireland

The UK's withdrawal from the EU posed a significant challenge to the progress that had been achieved in Northern Ireland—one of the most impoverished areas in Europe. Brexit could cause significant friction along the territorial border between the two parts of Ireland, and for its all-island economy. If the UK had decided to remain in the single market and the EU customs union after Brexit, the vast majority of the challenges would have been avoided.

In her Lancaster House speech, however, former Prime Minister May clarified that the UK's aim was to leave both the single market and the EU customs union.[56] She reaffirmed this message in her Florence speech,[57] in her Mansion House speech[58] and on numerous other occasions. Similarly her successor, Boris

[54] Commission Proposal for a Council Regulation on Special Conditions for Trade with Those Areas of the Republic of Cyprus in Which the Government of the Republic of Cyprus Does not Exercise Effective Control, COM (2004) 466 final (7 July 2004).

[55] Skoutaris, *The Cyprus issue*, 151–3.

[56] Theresa May, 'The government's negotiating objectives for exiting the EU: PM speech', 17 January 2017, available at: www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech (23 May 2025).

[57] Theresa May, 'PM's Florence speech: a new era of cooperation and partnership between the UK and the EU', 22 September 2017, available at: www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu (23 May 2025).

[58] Theresa May, 'PM speech on our future economic partnership with the European Union', 2 March 2018, available at: www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union (23 May 2025).

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Johnson, never moved from the position that the UK should not take part in the single market and the customs union after the end of the transition period.

This position made the challenge of keeping the Irish border free of any physical infrastructure significantly harder. In order to achieve this elusive aim, the UK as a whole could have opted for a relationship with the EU that was much closer than the one described in its red lines. Alternatively, the UK could accept that Northern Ireland would have a closer relationship with the EU than the rest of the country.

This dilemma was described in the December 2017 Joint Report. According to the infamous Paragraph 49:

> the United Kingdom remains committed to protecting North–South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU–UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North–South cooperation, the all-island economy and the protection of the 1998 Agreement.[59]

In other words, the overall aim of the negotiations was to address the challenge of the Irish border through the overall EU–UK relationship. If this was to prove impossible, then specific 'technological' solutions would be applied to Northern Ireland. Should the two sides fail to reach agreement on these specific solutions, then Northern Ireland at a minimum or the UK as a whole should remain aligned to the single market and the EU customs union.

The first time that this arrangement was legally codified was in a Protocol on Ireland/Northern Ireland contained in the draft Withdrawal Treaty published by the EU on 28 February 2018. According to this, a common regulatory area comprising the EU and Northern Ireland would be established, and the region would remain part of the EU customs territory. As a result of the British objections, the EU significantly amended the Protocol on Ireland/Northern Ireland in the November 2018 draft WA. This provided for a UK-wide

[59] *Joint report*, para. 49.

'backstop' solution. Barring a deal on free trade that would secure a frictionless border, the UK as a whole would remain in a 'bare bones' customs union with the EU. Additionally, Northern Ireland would remain aligned to the single market rules necessary to maintain the free movement of goods across the Irish border. However, the then prime minister failed to secure Westminster's consent in three consecutive attempts. After that, it was patently obvious that her position had become untenable. The following summer she resigned, and her successor, Boris Johnson, was elected. Johnson's declared aim was to renegotiate the post-Brexit arrangement applying to Northern Ireland.

Indeed, in October 2019, an agreement on a revised WA was achieved. The new and final Brexit deal is almost identical to Theresa May's except for one significant change: the fabled backstop (and the changes in the non-legally-binding political declaration). The new arrangement for Northern Ireland is no longer an insurance policy that would kick in should the future UK–EU relationship prove unable to keep the Irish border open. Instead, it is a differentiated arrangement for the region that could only collapse should the regional parliament decide so or if a future arrangement superseded it.

The major difference from the February 2018 EU proposal for a Northern Ireland-specific arrangement is that the current deal recognises that de jure Northern Ireland remains within the UK customs union.[60] This amendment was considered necessary not least because in the meantime section 55 of the Taxation (Cross-Border Trade) Act 2018 was introduced. According to it, Northern Ireland should not be in a separate customs territory from the rest of the UK. From a substantive point of view, the fact that the region would remain de jure part of the UK customs territory in accordance with Article XXIV:2 GATT ensures that it has access to the free trade agreements to which the UK is a signatory party. However, EU customs legislation continues to apply to the region even after the end of the transition period.[61] Similarly, Articles 30 and 110 of the Treaty on the Functioning of the European Union (TFEU),[62] which prohibit customs duties and discriminatory internal taxation on imported goods from EU member states, and a significant part of the EU *acquis* on the free movement of goods remain applicable with regard to Northern Ireland,[63] as is the case for EU law provisions concerning VAT and

[60] Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Art 4.
[61] Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Art 5(3).
[62] Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Art 5(5).
[63] Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Art 5(4).

excise.[64] This makes the region de facto part of the EU customs territory in the sense that this crucial part of the law of the EU internal market enjoys extraterritorial application over this area.

In practice, this hybrid regime meant that after the end of the transition period, trade between the two shores of the Irish Sea would not be frictionless anymore. According to Article 263 of the Union Customs Code, goods that are taken out of Northern Ireland and sent to Great Britain would have to be covered by a pre-departure declaration. The situation would be significantly more complicated for trade flows in the opposite direction, from Great Britain to Northern Ireland. Apart from complying with EU import formalities, including entry summary declarations and customs declarations, traders would also face tariffs if the relevant goods were not wholly obtained in the UK. More importantly, when it came to live animals, animal products and plants, systematic sanitary and phytosanitary checks would be required to take place at entry points to secure the integrity of the Union's single market.[65]

Initially, those unavoidable frictions were largely addressed by allowing for grace periods. With regard to food, for instance, major retailers did not need to comply with all the EU's usual certification requirements when importing goods from the rest of the UK. However, once those grace periods expired, there was the fear that the systems of those supermarkets and other retailers would be overwhelmed by complex bureaucratic requirements.

Realising the significant risks this could entail for the economy and the politics of the region, the EU and the UK reached a compromise in agreeing the Windsor Framework. This 'permits the partial disapplication of EU rules for goods provided their final destination is in Northern Ireland'.[66] Following this agreement, the amended Article 6(2) of the Protocol allows

> specific arrangements for the movement of goods within the United Kingdom's internal market, consistent with Northern Ireland's position as part of the customs territory of the United Kingdom in accordance with this Protocol, where the goods are destined for final consumption or final use in Northern Ireland

[64] Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Art 8.
[65] Withdrawal Agreement, Protocol on Ireland/Northern Ireland, Art 5(4).
[66] Colin R.G. Murray and Niall Robb, 'From the Protocol to the Windsor Framework', *Northern Ireland Legal Quarterly* 74 (AD1) (2023), 1–21: 6.

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> and where the necessary safeguards are in place to protect the integrity of the Union's internal market and customs union.

In essence, this arrangement creates a 'green lane' through which goods coming to Northern Ireland from the rest of the UK are moved with greater ease than those that are at risk of moving to the EU.[67] 'The latter transit the Irish Sea on the basis of "red lane" arrangements, to be applied at the Irish Sea border as if the goods were entering the Single Market from' a third country.[68]

Overall, as in the case of Cyprus, the EU legal order managed to accommodate the territorial contestation on the island of Ireland by applying a significant part of EU law extraterritorially.

ACCOMODATING NATIONAL CONSTITUTIONAL CHANGE

The extraterritorial application of EU law has allowed the Union to accommodate territorial contestation in those divided islands. However, such territorial division might end in the future. The remarkable flexibility of the EU legal order will enable it to accommodate not only territorial contestation but also the national constitutional change that a potential unification of either of the two islands will entail.

(Northern) Cyprus

In the event of a settlement, Article 4 of Protocol No. 10 provides for a simplified procedure that enables the Union to accommodate the terms of the relevant unification plan. In particular, it allows the EU, via a unanimous Council Decision, to alter the terms of Cyprus's EU accession, which are contained in the Act of Accession 2003. In other words, it allows the Council to amend primary law (i.e. Act of Accession 2003) through a unanimous decision to ease the transition of northern Cyprus within the Union.[69]

Indeed, if the April 2004 referendums had approved the new state of affairs envisaged in the Annan Plan, the Council of the European Union would have adopted on the basis of Article 4 the Draft Act of Adaptation of the Terms

[67] Joint Committee Decision 1/2023, Art 7.
[68] Murray and Robb, 'From the Protocol to the Windsor Framework', 6.
[69] See Marise Cremona and Nikos Skoutaris, 'Speaking of the de … rogations: accommodating a solution of the Cyprus issue within the Union legal order', *Journal of Balkan & Near Eastern Studies* 11 (2009), 381–95: 387–94.

of Accession of the United Cyprus Republic to the European Union as a Regulation.[70] What is particularly interesting is that the accommodation of any settlement of the Cyprus issue that is based on the agreed parameters (i.e. bizonal, bicommunal federation with political equality) would entail significant derogations from EU law. The reason for that is that if the bizonality of the future unified federal Cyprus were to be reflected in the fact that each 'federated state would be administered by one community which would be guaranteed a clear majority of the population and of land ownership in its area',[71] it is almost definite that certain permanent restrictions to the free movement of persons and capital would be deemed necessary. This is why the aforementioned Draft Act included restrictions on the right of non-residents in the federal Greek-Cypriot and Turkish-Cypriot states to purchase immovable property; restrictions on the right of Cypriot citizens to reside in a federal state of which they do not hold the internal federal state citizenship status; restrictions on the right not only of Greek and Turkish nationals but also of Union citizens to reside in Cyprus, after the comprehensive settlement takes place, in order for the demographic ratio between permanent residents speaking either Greek or Turkish as mother tongue not to be substantially altered. So, the Article 4 provision underlines the willingness and the flexibility of the Union to accommodate the terms of a solution of the Cyprus issue even if it entails derogations from EU law.

Overall, Article 4 of Protocol No 10 contains an enabling clause that would allow the Union to accommodate a solution to the Cyprus issue despite possible frictions with EU law. This is far from unexpected given the declared aim of the EU 'to promote peace, its values and the well-being of its peoples'.[72] Still, it is another reminder of the flexibility of the Union legal order that allows it to accommodate national constitutional change as well.

(Northern) Ireland

'Westminster has formally conceded that Northern Ireland can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this.'[73] Article 1 of the legally binding

[70] Annan Plan, Appendix D.

[71] Report of the Secretary-General of 3 April 1992, S/1992/23780, para. 20.

[72] Art 3(5) TEU.

[73] John McGarry, 'Asymmetrical autonomy in the United Kingdom', in Marc Weller and Katherine Nobbs (eds), *Asymmetric autonomy and the settlement of ethnic conflicts* (Philadelphia, 2010), 148–82: 156.

British–Irish Agreement recognises such a right in no uncertain terms. In particular, the UK and Ireland:

> (ii) recognise that it is for the people of the island of Ireland alone … to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland …
>
> (iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish.

Those international legal obligations concerning the status of Northern Ireland have also been enshrined in UK legislation. Section 1 of the Northern Ireland Act 1998 is a rare example of a provision of a constitutional statute explicitly recognising the right of secession of a region. Schedule 1 of the Northern Ireland Act describes under which circumstances a referendum for the reunification of Ireland can and should be called by the UK secretary of state. In *Re McCord*, the High Court of Justice in Northern Ireland discussed and clarified the aforementioned Northern Ireland Act provisions.[74] It held that the secretary of state has:

> a discretionary power to order a border poll under Schedule 1 paragraph 1 even where she is not of the view that it is likely that the majority of voters would vote for Northern Ireland to cease to be part of the United Kingdom and to become part of a united Ireland.[75]

However, if it appears to her that a majority would be likely to vote for a united Ireland, then, she is under a duty to call a poll.[76]

From an EU law point of view, a national constitutional change that would entail a reunification such as in the case of Ireland could follow the precedent

[74] *In re Raymond McCord* [2018] NIQB 106.
[75] *In re Raymond McCord*, para. 18.
[76] *In re Raymond McCord*, para. 20.

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of the German reunification. In this, the application of the Union *acquis* was extended to East Germany without any amendment to the primary legislation, as agreed upon in a special meeting of the European Council in Dublin in April 1990. 'The necessary acts of secondary law were adopted on the basis of delegation of powers to the Commission, in order to avoid that the EU legislative process was overtaken by the speed of historical events.'[77] The difference is that in Germany's case the *acquis* did not apply at all in the East before reunification.[78] In Northern Ireland, even after the UK's withdrawal from the EU, a substantial part of EU law continues to enjoy extraterritorial application due to the Protocol on Ireland/Northern Ireland attached to the UK's Withdrawal Agreement.

Former taoiseach Enda Kenny asked for a special provision in any Brexit deal to allow Northern Ireland to rejoin the EU should it be united with the Republic.[79] At the time of that request, the question was focused on what such a provision would look like. There is only one EU law provision that explicitly regulates the (re)unification of a (member) state: the aforementioned Article 4 of Protocol No. 10 on Cyprus of the Act of Accession 2003. However, a similar provision was not included. Instead, European Council acknowledged:

> that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means; and, in this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union.[80]

[77] Dagmar Schiek, '"Hard Brexit"—how to address the new conundrum for the island of Ireland?', Queen's University Belfast School of Law Research Paper 2018-02, available at: https://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,743693,en.pdf (23 May 2025). On how the EU legal order accommodated German reunification, see Christian Tomuschat, 'A united Germany within the European Community', *Common Market Law Review* 27 (1990), 415–43; see also Christiaan W.A. Timmermans, 'German unification and Community law', *Common Market Law Review* 27 (1990), 437–49.

[78] The German Democratic Republic's relationship to the then European Economic Community (EEC) was clarified in the Court of Justice's judgment. See Case 14/74, *Norddeutsches Vieh- und Fleischkontor GmbH v. Hauptzollamt Hamburg-Jonas – Ausfuhrerstattung*, 1974 E.C.R. 899. The court held that the relevant rule exonerating West Germany from applying the rules of EEC law to German internal trade 'does not have the result of making the German Democratic Republic part of the Community, but only that a special system applies to it as a territory which is not part of the Community'.

[79] Daniel Boffey, 'Irish leader calls for United Ireland provision in Brexit deal', *The Guardian*, 23 February 2017.

[80] European Council, 'Statement in the minutes to the agreement on the Brexit negotiating guidelines on 29 April 2017', 23 June 2017, 4.

The examples of both Germany and Cyprus show that the EU legal order is flexible enough to accommodate a national constitutional change that the reunification of Ireland would entail. In Germany, the relevant adaptations took place through secondary legislation. In the case of Cyprus, they will be enshrined as amendments to primary legislation. In the absence of a specific provision either in the UK's Withdrawal Agreement or in the Trade and Cooperation Agreement, the re-accession of Northern Ireland to the EU would probably follow the precedent of German reunification.

CONCLUSION

For a multi-level constitutional order of states whose raison d'être has been the promotion of peace between its members, the ability to accommodate territorial contestation is of critical importance. In the cases of Cyprus and Ireland, the Union managed to accommodate those border disputes mainly by extending the application of EU law in areas beyond its territorial scope. Protocol No. 10 of the Act of Accession 2003 allows the partial application of EU law in northern Cyprus without recognising the breakaway entity. Similarly, the Protocol on Ireland/Northern Ireland as amended by the Windsor Framework ensures the frictionless nature of the territorial border in Ireland by extending inter alia the application of EU customs law. In none of those cases did those legal arrangements manage to comprehensively resolve the underlying dispute. But they did ease the frictions on the borders created by the territorial division.

The flexibility of the EU legal order is such that it may even allow it to accommodate the potential reunification of those islands in the future. In the case of Cyprus, there is a bespoke primary law provision that will regulate this transition. In the case of Northern Ireland, the paradigm of German reunification offers a clear pathway to address the potential challenges. None of those legal mechanisms will resolve the underlying disputes over the constitutional future of those regions, but their existence will ease the tensions and fissures that the potential reunifications might raise. It is up to the communities living in those parts of Europe to decide their constitutional and European futures and the EU has the toolbox to accommodate those decisions.

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