Paths for Catalonia’s integration in the European Union
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7. Alternatives to non-permanence of Catalonia in the EU or to non-rapid accession under a transitional regime

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Paths for Catalonia’s integration in the European Union

1. Object

This report analyses, first of all, whether a future Catalan state, on being constituted as such\(^1\) and applying for membership of the European Union (hereinafter EU), would be left in or out of the Union and, in the latter case, what ways are open for its readmission. Secondly, it examines what the foreseeable practical consequences of these hypothetical scenarios are, including the scenario of a possible exclusion from the EU *sine die*, and the alternatives the new state might adopt, for example, to guarantee normal development of commercial exchanges with those states forming part of the European economic framework.

2. Hypothetical scenarios

The first question posed allows a plurality of approaches which, for purposes of clarity, can be grouped in the following four scenarios:

**First, permanence scenario:** On being constituted and informing the EU of such, the new Catalan state retains uninterrupted membership of the Union. Since the region in question already forms part of the EU and its population enjoys the benefits of European citizenship and European law, it is not forced to leave the EU and apply for membership from outside\(^2\). The EU institutions select, interpret and apply the procedural rules laid down in the Treaties

\(^{1}\) In other words, on declaring itself an independent state and acting as such, or, more specifically, once it has official bodies capable of imposing their authority on the population living in the territory of Catalonia and of maintaining relations with other international subjects.

\(^{2}\) In this scenario, the EU and its member states, following negotiations with the future Catalan state, would agree to its remaining in the Union because, implicitly or explicitly, they would acknowledge its status as a successor state of the preceding Spanish state in rights and obligations, or, which is far less likely, as a joint continuing state.
in such a way as to allow the adaptations that need to be introduced into the Union's primary and secondary law to take place while guaranteeing permanence of the new state in the EU.

Second, **ad hoc membership scenario**: On submitting its application for membership, the EU does not automatically accept the new state's permanence but, in view of the special circumstances of the case, decides to begin a process of *ad hoc* membership, with specific features to allow rapid accession and, especially, a transitional regime aimed at ensuring that the largest possible number of legal, economic and political relations with the EU are kept open, along with the rights and obligations of citizens and of businesses operating in Catalonia.

Third, **ordinary membership scenario**: The EU agrees to immediately open the procedure for ordinary membership as a third state, without taking any *ad hoc* measures directed at guaranteeing the speed of the process and without establishing specific transitional regimes.

Fourth, **exclusion as a member state scenario**: The EU refuses to open the membership process immediately or to grant candidate status; in other words, it refuses to open the formal procedure for membership and the new state is left out of the EU *sine die*.

In analysing the degree of legal and practical viability of these four scenarios, two premises must be borne in mind:

First of all, that neither international law nor EU law expressly foresee circumstances such as those posed by the Catalan case.

Secondly, that the EU has traditionally taken an extremely flexible and pragmatic attitude in finding solutions for unforeseen problems arising in relation to changes affecting the territory or the territorial organisation of member states that affect the area in which EU law applies and, more generally, in relation to procedures for ratifying the Treaties\(^3\), linked to certain

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\(^3\) Different processes for ratifying the treaties have been held up by referendums in which the citizens of some member countries voted against the reform proposed by the EU. This happened with the Single European Act (SEA) in 1986, with the Maastricht Treaty in 1992 and also, for example, with the Treaty of Lisbon in 2007. In these cases it was necessary to find new agreements laid down in various Protocols in order to reach negotiated solutions for the conflicts arising and thereby obtain the approval of citizens in new referendums convened *a posteriori* or in subsequent reforms of the Treaties.
conflicitive institutional reforms⁴. In the third section of the report we shall analyse these two premises.

However, the fact that neither international law nor EU law expressly foresee membership of a territory already forming part of the Union and the flexibility and pragmatism of the EU when it comes to solving similar problems do not mean we can assume that entry of a new member state is something that operates in a legal vacuum. EU law and, subsidiarily, international law regulate a series of material and procedural conditions and requirements that this future state must respect in order to join the Union, regardless of which scenario eventually arises. This and the practical consequences that might stem from the application of the different scenarios is what we will be analysing in the fourth and fifth sections of this report.

Having established the applicable legal premises and frameworks, in section six we shall analyse the key question of which of the four scenarios described is most likely to be applied in practice, accepting first of all that the option for one scenario or another is not imposed, either explicitly or implicitly, by any of the applicable legal regulations. The decision will depend basically on how the institutions of the EU and its member states evaluate the essentially political and, especially, economic arguments for and against the scenarios mentioned. In this sixth section we shall analyse the persuasive power these different arguments could presumably have and, in consequence, the likelihood of each different scenario applying.

Finally, in the last section, we analyse possible alternatives (bilateral agreements with the EU; membership of European Free Trade Association (EFTA), the European Economic Area (EEA) or the Schengen Area and free trade agreements or customs unions with third states) if the new state does not remain in the EU and is not rapidly accepted as a member with an ad hoc transitional regime.

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⁴ The institutions have had to find new ad hoc procedures to modify some regulations that incorporated commitments foreseen in the Treaties and that were subsequently modified without changing the Treaties, such as the provisions of Article 17.5 of the TEU and Article 244 TFEU relating to the composition of the European Commission.
3. Premises

3.1. The absence of explicit regulation in European law and international law for the case of entry into the European Union of a future independent Catalan state

EU law regulates the entry procedure of third states outside the Union, but it does not explicitly foresee the case of regions which until the actual moment of applying for entry form part of a member state or of citizens who are already European citizens and exercise their rights as such.

It is true that the EU has seen special cases of territorial expansion of some member states – as happened with German reunification in 1998 – and cases in which part of the territory of a member state ceased to be a member of the Union – Greenland, for example, an autonomous region of Denmark which in 1985 decided to leave the European Economic Community (EEC), following a referendum. However, none of these cases can be seen as a real precedent for the Catalan case as they show obvious differentiating characteristics.

The EU’s government institutions have not yet made an official pronouncement on the paths to be taken in a case like the one in hand.

It is true that several members of the European Commission, as well as the present President of the European Council and some officials in the European Parliament, have stated that the European Treaties would automatically cease to be applicable in the territory of a new state resulting from the division of a member state of the Union and subsequently that if this new state wanted to join the EU it would have apply for membership.

We must bear in mind, though, that in making these declarations, they have, at the same time, pointed out that in 2004 the Commission said it would not make an official pronouncement on this question until it was formally asked to by a ‘member state’ in relation to a ‘precise scenario’ and until its services had presented a prior legal report. Of course, as the European authorities making these declarations have repeated, this formal request has
not been made, the legal report has not been issued and, consequently, as we say, there is as yet no official pronouncement from any Union institution.

Even so, it’s also clear that these unofficial pronouncements, which are numerous though not unanimous, carry a lot of weight and are undoubtedly not something to be underestimated in evaluating the likelihood of one or another scenario being applicable. From this perspective, it should also be noted that what these declarations omit is precisely the possibility that the first scenario, that of permanence, would be applicable, but they make no pronouncement regarding the *ad hoc* scenario of rapid entry with a transitional regime.

Among these declarations, which all tend to have similar content, the ones in writing by the President of the Commission in reply to questions from members of the European Parliament stand out. The last declaration of this type was published in the Official Journal of the European Union on November 2013. In this declaration, after remembering the position taken by President Prodi in 2004, according to which: ‘When a part of the territory of a Member State ceases to be a part of that state, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply any more on its territory’, President Barroso adds that: ‘it is not the role of the European Commission to express a position on questions of internal organisation related to the constitutional arrangements of a particular Member State’ and points out once more that ‘The European Commission would express its opinion on the legal consequences under EU law upon request from a Member State detailing a precise scenario’.

What’s more, we must remember that the Commission, despite its duties as promoter and

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5 On 21 January 2014 the European Parliament’s Constitutional Affairs Committee decided to ask the Parliament’s own legal services for their opinion as to the applicability of Article 48 TEU in the case of Scotland’s secession from the United Kingdom (*White Paper on Scotland’s future*). We can therefore look forward to hearing the opinions of the European Parliament’s legal services on the applicability of Article 48 TEU to the Scottish case, AFCO_PV(2014)0120_1.

6 OJEU C 320 E/185 of 6 November 2013.

7 For a more exhaustive analysis of the institutional and doctrinal pronouncements that have been made, see: Alfredo Galán Galán: ‘Secesión de Estados y pertenencia a la Unión Europea: Cataluña en la encrucijada’, *Institución del Federalismo, Rivista di studi giuridici e politici*, No. 1, 2013, p. 111.
‘guardian of the Treaties, is not the only official body with an important part to play in this matter. In fact, the key decision will be in the hands of the European Council and, in particular, of the representatives of each of the member states, without prejudice for the part the European Parliament might also play.

In short, we can say that there are no rules or precedents in EU law that in principle legally impose or reject any of the four scenarios analysed.

The same goes for international law in general, which in these matters acts as a supplementary legal framework for EU law. What’s more, we should also bear in mind that the few provisions in international law that regulate the succession of states from the point of view being analysed here contain more principles and general criteria than mandatory rules.

The main frame of reference in international law is the 1978 Vienna Convention (VC) on the Succession of States in respect of Treaties, which came into force in 1996, but it has only been ratified by 22 states, of which only six are members of the EU, and among which Spain is not included.

In the case of unification or separation of states, the 1978 VC foresees, as a general rule, especially in relation to multilateral treaties, continuity in conventional rights and obligations in order to preserve stability (Art. 34 VC), although exceptions and nuances are foreseen. The main exception is that these rules will not apply if there is agreement between the

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8 The Vienna Convention of 1978 on the Succession of States in respect of Treaties came into force on 6 November 1996. On the other hand, the Vienna Convention of 1983, on the Succession of States in Respect of State Property, Archives and Debts has not yet come into force. In 1987 it was decided to suspend the process of codifying the rules regarding succession as a member of international organisations. Note that these agreements are not the only international regulations on this issue, as different treaties exist to solve problems arising from a particular process of state succession.

9 The six are Croatia, Cyprus, Czech Republic, Estonia, Slovakia and Slovenia.

10 Article 34 VC states that: ‘When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) 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 so formed; (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.’
parties\textsuperscript{11} and the main flexibility clause establishes that the rule of continuity will not apply when “it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation” (Article 35 of the VC).

However, there is a certain tendency in favour of the principle of continuity of multilateral treaties in force on the date of the succession of states (unless the states concerned agree otherwise, if application of the treaty with respect to the successor state is incompatible with the object and purpose of the Treaty or if the conditions for its operation are radically changed). This tendency shows itself above all in certain categories of treaty, in particular territorial treaties, those relative to fundamental rights, disarmament and arms control, as well as clauses affecting respect for rights acquired by individuals and the wish to ensure territorial and international stability. The International Court of Justice has also pointed out that the succession of certain treaties referring to human rights and to wartime humanitarian law is automatic\textsuperscript{12}.

Apart from the Treaties, with relation to entry into international organisations, we must bear in mind that the constituent treaties of each of these organisations is usually what regulates the conditions for membership and the actual entry procedure, which can be either expressly or implicitly established. In fact, Article 4 of the same VC establishes that its rules apply ‘without prejudice to the rules concerning acquisition of membership and without prejudice to any...

\textsuperscript{11} In more delicate situations, such as the case of succession in multilateral treaties of states arising as a result of separation from another state that continues to exist, the flexibility mechanisms prevent drawing general rules that can be applied regardless of the wishes of the parties and of the behaviour of other states. In practice, we see that some countries have followed the ‘clean slate principle’ (like Singapore, Pakistan, Bangladesh), with certain exceptions. Others have followed the ‘continuity principle’, again with certain exceptions.

Practice reveals a certain mixture of ‘pick and choose’ and in many cases, to clarify the situation a statement is required confirming continuity. Indeed, one unusual example is the fact that Spain recognised Russia as sole successor to the former USSR; Spain’s position automatically resulted in the full currency of the agreements of the predecessor state as regards the Russian Federation. Spain also recognised the currency of most of the agreements of the predecessor state in relation to the other successor states.

Practice shows that the rules of the Vienna Convention express a degree of circumstantial consensus that has not been consolidated.

other relevant rules of the organisation\textsuperscript{13}, so that it is each international organisation that decides which entry procedure for new members is best suited to its needs and its particular nature.

In this sphere, there is no international customary law that could be considered binding\textsuperscript{14} and there is no agreement in doctrine when it comes to deciding what the predominant tendencies are among international organisations as regards the succession of states in a case of secession, with casuistry being the general practice.

To sum up, no rule or principle can be inferred from international law that imposes or vetoes any of the four scenarios described for Catalonia’s relations with the EU. Even so, as we have seen and shall repeat later, this premise does not allow the conclusion that the decision the EU and its member states will have to take about these scenarios will have no legal limit. On the contrary, it will have to respect the substantive and procedural requirements established in these legislations and, especially, in EU law. Although, as we shall see, the unusual nature of the Catalan case will increase the margin of freedom the EU usually allows when it comes to selecting, interpreting and applying European law and will mean that, in practice, whether we accept it or not, the choice of one scenario or another will respond to legal criteria as much as to political and, especially, economic, criteria and interests.

3.2. The flexibility and pragmatism of the European Union

The EU has traditionally taken a flexible and pragmatic attitude to complex issues with no

\textsuperscript{13} See K.G. Bühler’s analysis: ‘State succession and membership in international organisations: legal theories versus political pragmatism’, Kluwer Law International, The Hague, 2001, pp. 30-35. This study identifies six categories of answer: continuity of membership, recovery of membership, admission as a member, succession as a member, substitution as a member and amalgamation of membership (p. 287 et seq.)

\textsuperscript{14} The International Court of Justice has only taken into consideration as an expression of customary law the rules of intangibility of territorial regimes in Article 12 of the 1978 Vienna Convention, and has expressly refused to pronounce on the consuetudinary nature of Article 34 for the case of separation of states, but the Badinter Commission (set up in 1991) underlined the dispositive nature of the principles and rules of international law in matters of state successions. The problems arising from state successions ought to be equitably resolved through agreement of the affected states. See A. Pellet ‘The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples’. ESIL, 1992, p. 182.
explicit answer in its Treaties, in each case searching for the *ad hoc* solution that best combines the interests of the EU –including its foundational wish for integration– and the interests of its member states with the interests and the specific characteristics of the candidate states.

This flexibility and pragmatism has shown itself from the start of the process of construction of what would later be the EU and has continued to this day. One need only remember, for example, that in the first modification of borders to take place in the framework of the ECSC, in 1957, the department of Sarre went from France to Germany (FRG), without any renegotiation of the ECSC Treaty. It was felt that the transfer of this territory from French sovereignty to German sovereignty had no consequences for the application of the European Treaty.\(^\text{15}\)

Another significant example of pragmatism, in this case in relation with a reform of the territorial scope of application of the treaties, is the case already mentioned of Greenland. Its citizens, who in 1979 had obtained a regime of political autonomy within the state of Denmark, voted in favour of leaving the European Communities on 23 March 1982. After a period of negotiations with the Commission, the Council established the conditions for Greenland’s exit on 20 March 1984. Greenland, which ceased to belong to the Communities on 1 March 1985,\(^\text{16}\), adopted a statute of association with the Communities through the formula of ‘overseas countries and territories’ (by a unanimously approved agreement), in keeping with the provisions of Part IV of the TEEC. The agreement meant Greenland could continue to receive European funds and have free access to the European market for fishing produce. The case of Greenland was the result of a political process not foreseen in any article in the Treaties.

\(^{15}\)The case of Algeria, when it became independent from France in 1962, posed a radically different problem, as it was in a colonial situation and on becoming independent it did not fulfil the requirement of being a ‘European state’. Nevertheless, as an example of the EU’s flexibility –in this case the EEC’s–, remember that the TEEC considered Algeria a territory of the European Communities inasmuch as it was part of the French Republic and, furthermore, Article 227.2 of the TEEC expressly established for this territory a special regime for the application of some of the provisions in the Treaties. At the moment of independence the Algerian state asked for application of the measures foreseen in Article 227 to be continued. The EEC did not modify its Treaty or give an explicit answer to the demands of the new state, but transitional bilateral agreements –between member states of the EEC and Algeria– were signed and finally a cooperation agreement between the EEC and the Algerian state was signed in 1996.

\(^{16}\)‘Treaty amending, with regard to Greenland, the Treaties establishing the European Communities’, OJEC L 29, 1 March 1985.
The European Community also showed the same flexibility and pragmatism in relation to the entry of a reunified Germany to the European Communities. The Council of Europe in April 1990 decided that its entry would take effect the moment unification between the two Germanies became legally established, discarding any application of the conditions of entry or revision of the Treaties\(^{17}\). On that date, the European Communities increased their surface area by 108,000 km\(^2\) and the number of citizens by 16 million. There was rapid political negotiation, in which the member states ratified the conditions under which the process of absorbing a new territory complete with its citizens and businesses by another EU member state was to take place, applying the principle of self-determination of peoples foreseen in the Basic Law of the Federal Republic of Germany to justify the reunification of the western and eastern Länders. The formula used shows, at bottom, Germany’s wish to avoid political vetoes by any member state and, in the framework of the Dublin European Council (April 1990), was when consideration was given to the particular political context and an urgent *ad hoc* procedure was begun in order to resolve the technical problems of reunification, without the need to start revising the Treaties\(^{18}\). Before that there were bilateral talks and political agreements, in particular with France and the United Kingdom.

Another paradigmatic case is that of Cyprus, when in 2004 it became a member of the EU as a *de facto* divided island. Faced with the impossibility of reaching an agreement between the Turkish and Greek parts of the island, it was decided that the entire island would belong to the EU, but European law would only apply in the Greek part. In particular, through a safeguard clause in the Treaty of Accession of 2003 and through the incorporation of Protocol 10, application of the Treaties and of EU law in the northern part of the island was suspended. This means, for example, that European customs and fiscal policies are not applied in this part of Cyprus, but, on the other hand, it was decided that this suspension of the Community *acquis* would not affect the individual rights of the population of the north of the island (the Turkish Cypriots), who could be European citizens, even if they lived in the

\(^{17}\) The European Commission argued that the conditions of entry were not applicable (former Article 237 TEEC) because the entry of the GFR was a ‘special case’, although the problems were technically similar to those posed by any accession. See ‘The European Community and German Unification’. *Bulletin of the European Communities*, Supplement No. 4/1990. Luxembourg. 1990’. Also E. Grabits: ‘L’Unité allemande et l’intégration européenne’, *RGDIP*, 3-4, 1991, pp. 423-441.

\(^{18}\) In relation to German reunification, a treaty was signed between the FRG and the GDR which established the continuation of the treaties of the FRG throughout the state territory and an examination of the treaties of the GDR to see if they remained in force, had to be adapted or should expire.
northern part, so long as they maintained or obtained nationality of the Republic of Cyprus, the case of most Turkish Cypriots\textsuperscript{19}.

Another example, which highlights the pragmatism of the EU when faced with complex situations, is the decision taken by the Council of the Union on the start of negotiations to close an Association and Stabilisation Agreement with Kosovo\textsuperscript{20}. In the debate between the representatives of the member states in the Council of the Union, to avoid the need for the agreement to be ratified by all EU member states –and, in short, so that those states that have not yet formally recognised the State of Kosovo do not have to state their position on the ratification of the agreement–, it was decided by consensus of the Council that the future agreement would not be signed as a mixed agreement (EU and member states) but would only be signed by the EU, although the present project affects certain powers of a very disputable nature exclusive to the EU\textsuperscript{21}.

The Union could show greater flexibility and pragmatism in the case of Catalonia, in which, in view of its prior membership of the EU and the absence of explicit regulation for this case, the applicable legal regulations leave even greater room for manoeuvre than in other cases.

\textsuperscript{19} Even so, Turkish Cypriot citizens have certain restrictions when it comes to exercising the right to vote, which derive mainly from the Constitution and the regulations of the Republic of Cyprus.

\textsuperscript{20} The EU and Kosovo began negotiations on 28 October 2013 to close the Stabilisation and Association Agreement with Kosovo, as a prior step to the country becoming a candidate for membership. The formula was agreed by the Council in June 2013 in order to allow Spain, Greece, Slovakia, Romania and Cyprus, who have not recognised Kosovo’s independence, not to oppose the start of negotiations by the Commission to close the Association Agreement between the EU and Kosovo as an exclusively European agreement.

\textsuperscript{21} Some of these powers are: regional cooperation; justice, freedom and security (data protection, visas, borders, asylum, immigration and emigration, money laundering, terrorism financing, drugs, organised crime); economy and trade; statistics; banking, insurance and financial services; financial control and auditing; promoting investments; industry; small and medium business; tourism, agriculture and food sector; fishing; customs; taxes; social cooperation; education; culture; audiovisual media; information society; electronic communications; information and communication; transport; energy; the environment; climate change; civil defence; technological research and development; regional and local development; public administration and financial cooperation.
4. Legal conditions and requirements for forming part of the European Union

As laid down in Article 49 of the TEU, to be a member of the EU it is necessary to be ‘a European state’ and share the fundamental values that inspired the birth of the Union. Among these values, Article 2 of the TEU demands respect and commitment in the promotion of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

Apart from these values in Article 2, membership of the EU also calls for fulfilment of a series of criteria for eligibility of a more economic and legislative and institutional nature, agreed by the European Council and, especially, those established by the Copenhagen European Council (21 and 22 June 1993). The Copenhagen criteria were adopted in prevision of the future accession by the countries of central and eastern Europe and, for this reason, put special emphasis on the need for these countries to share the western economic model (existence of a functioning market economy, as well as the ability to cope with competitive pressure and market forces within the Union; the ability to cope with the Union’s political, economic and monetary aims, and the European Union's political and legal model (stable institutions that guarantee democracy, the rule of law, respect for human rights and the protection of minorities). Although the Copenhagen criteria were directed at the countries of central and eastern Europe, as we have seen, the EU itself considers them generally applicable to subsequent enlargement processes.

It seems obvious that a future Catalan state would easily fulfil these conditions and requirements for entry. In fact, this is borne out by its long prior membership of the EU, though as part of a member state.

The main new requirements the Catalan state would have to satisfy would be those arising from the need to create regulating and coordinating bodies and, in general, certain new

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organisational structures imposed by the EU to implement or manage Union policies, as well as the need to transpose European secondary law to the new Catalan legal system as required.

This work would undoubtedly involve a certain effort, but the future Catalan state would have means and experience enough to cope without too much difficulty, especially if we bear in mind that at first the transposition of the secondary law could take place largely through referrals to Spanish legislation currently in force and, also, that some of the new administrative bodies and structures demanded by the EU could be created by adapting already existing structures.

Apart from these considerations, we must not forget that the Catalan economy is fully integrated in European commercial movements, that Catalan culture forms part of the European cultural, intellectual and artistic tradition and that Catalonia has a deep-rooted European vocation that has always defended strengthening the process of European integration.

In fact, the only condition for entry that calls for comment is precisely the basis for admission: the requirement of being a state and, more precisely, the question of whether before applying for entry to the Union the Catalan state should have been internationally recognised by other states or by international organisations.

To answer this question various factors have to be borne in mind: first, that the birth of a state is, essentially, a matter of fact rather than of law. Secondly, that the reasoning by which other states and international organisations decide to recognise a state as a subject of international law is essentially political; that is, it does not depend on whether or not certain established legal requirements are fulfilled. And thirdly, that this recognition can take place expressly and officially, through a formal ad hoc act—for example through a note of recognition—or else implicitly and tacitly, through the signing of conventions or treaties with

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24 In fact, the EU institutions have not published the list of bodies it considers necessary to ensure that states are able to apply European law. These requirements have to be inferred from so-called screenings of fulfilment of the chapters of the Community acquis to which the EU subjects candidate states. The most recently applied screenings are especially important.

25 See the report of Consell Assessor per a la Transició Nacional (Advisory Council on the National Transition) on Catalonia’s relations with the international community, in which this topic is dealt with.
another state or also accepting its incorporation in an international or supra-state organisation. In all these cases, the signing or acceptance of entry amount to a tacit recognition of the other signer's or applicant’s status as a subject of international law.

From the above we can deduce that, for entry into the EU, there is no *sine qua non* that the future Catalan state should have previously been formally recognised as a state or as an international subject by another state or by particular international organisations –by the UN or the Council of Europe, for example. Therefore, the EU could be the first organisation to implicitly though unequivocally recognise this fact. Nevertheless, there is no doubt that prior recognition by other states or other international organisations would streamline the process of joining the Union\(^{26}\). Whatever the case, it’s important to mention that so long as the EU does not recognise Catalonia as an independent state it will continue to ‘be a member’ of the Union as part of the Spanish state.

The above observation leads to us to assert that the procedures for remaining in or joining the EU could and should be begun by the new Catalan state once it has been constituted as such. The only exception would be in the case of Catalonia’s remaining in the EU at the request of the Spanish state (in a framework of understanding with Catalonia), analysed in this report as a variation of the first scenario.

Finally, mention must be made of two circumstances which, though strictly speaking they do not qualify as conditions of entry, tend to be taken very much into account by international law and, by extension, by European law, when it comes to recognising new states and, secondly, when it comes to accession to certain international organisations. The first is the democratic and peaceful nature of the process followed to become an independent state and the other is whether or not this process has taken place with the agreement of the pre-existing state or, at least, whether or not there has been a clear and repeated attempt to reach agreement. In the next section we shall be analysing this question.

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\(^{26}\) It is true that most of the so-called *screenings* for fulfilment of the provisions of the Community *acquis* to which the EU submits candidate states enquire into the international bodies these states belong to and the international treaties signed by them and they are often encouraged to join particular bodies or to sign particular treaties, offering their help, but these are not prior conditions for entry in to the EU.
5. Procedural rules and practical consequences of the different scenarios

Following a hypothetical result in favour of Catalan independence at a ballot or a plebiscite election, the Generalitat of Catalonia will have to decide which of the possible scenarios best answers its interests and will have to plan and subsequently implement a process of pre-negotiations, unofficial negotiations and formal negotiations with the Spanish state, with the EU institutions and with the other member states, in order for its option to prevail.

Whatever the case, regardless of which scenario is eventually chosen, a series of rules of procedure will have to be followed and the consequences that could arise from applying each of these scenarios will have to be taken into account so that the new state can adopt the right strategies for maintaining the application of European law and the economic and commercial relations that exist today.

5.1. Permanence scenario

This scenario is undoubtedly the one that best suits Catalonia’s interests, as it means it can remain in the Union without interruption –that is, without the need to leave and begin the accession process from outside–.

Should Catalonia and the EU opt for this scenario, the following procedural rules would have to be respected:

First of all, the Parliament of Catalonia would have to adopt a decision making clear the wish to retain membership of the EU. The decision by Parliament would have to include a commitment to European values and ideas; it would also have to show that the new state fulfilled the political, legal and economic requirements the Union demands for member states and, finally, it would have show to the intention to carry out, within an agreed period of time,
whatever internal adaptations were necessary to continue to be part of the EU\textsuperscript{27}.

The President of the Generalitat of Catalonia, in his or her capacity as the maximum representative of the new state, would be responsible for communicating this decision and the accompanying documentation to the European institutions.

The EU institution best suited to making a statement in response to Catalonia’s request for continuation would be the European Council, in its capacity as the highest political instance among the European institutions and the body whose job it is to provide the Union with the necessary impetus for its development (Article 15.1 of the TEU). As we have seen, this is what happened in the case of the incorporation of reunified Germany, which, despite the obvious differences, shows certain similarities with the Catalan case under analysis.

If this alternative were chosen, the European Council, by consensus\textsuperscript{28}, would have to pronounce in favour of Catalonia continuing within the EU. Having reached this agreement and having therefore initially accepted Catalonia’s permanence in the EU, a process of negotiation would begin so as to adapt the primary law and secondary law to the presence of a new member in the European Union and to establish the internal adaptations Catalonia would have to make in order to continue as part of the EU.

In fact, unlike what happened in the German case\textsuperscript{29}, some of these adaptations would have to materialise in a modification of the Treaties of the Union, though these would be very specific modifications, such as the incorporation of the name of the new member state of the Union in the Treaties, the modification of the precepts establishing the participation of the new state in some of the EU institutions\textsuperscript{30} or the mention of Catalan as one of the languages...
of the Treaties.

These modifications would preferably have to be made in accordance with the procedure for amending the Treaties described in Article 48 TEU since, strictly speaking, the procedure in Article 49 TEU is foreseen for the modification of primary law in the framework of the procedure for accession by new states that have not formed part of the European Union.\(^{31}\) Statements have been made, in this sense, by, among others, David Edward, who has made a detailed analysis of this question\(^{32}\), and the Scottish Government, in its document *Scotland’s future. Your guide to an independent Scotland*.\(^{33}\) Among the procedures foreseen in Art. 48 TEU, the one regulated in sections 2 to 5\(^{34}\) for the ordinary revision of the Treaties would have to apply. This procedure is drawn up in flexible terms\(^{35}\) which do not limit the scope of the topics that can be amended\(^{36}\).

The ordinary procedure for revising the Treaties can be begun by the government of any member state, by the European Parliament or by the Commission by submitting a proposed

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31. Certainly, in view of the flexibility of the EU in these cases, the possibility of using Art. 49 TEU can not be discarded; however, the initial recognition by the European Council of the permanence of the new state in the Union, which characterises this first scenario, does not live up to a close scrutiny of the entry conditions of Art. 49 TEU or with the superior power of veto against the new state by member states, as we shall see below.


33. ‘Article 49 does not appear to be the appropriate legal base on which to facilitate Scotland’s transition to full EU membership. The alternative to an Article 49 procedure, and a legal basis that the Scottish Government considers is appropriate to the prospective circumstances, is that Scotland’s transition to full membership is secured under the general provisions of Article 48. Article 48 provides for a Treaty amendment to be agreed by common accord on the part of the representatives of the governments of the member states.

Article 48 is therefore a suitable legal route to facilitate the transition process, by allowing the EU Treaties to be amended through ordinary revision procedure before Scotland becomes independent, to enable it to become a member state at the point of independence.’ Page 221 of the report.

34. The simplified procedure (Art. 48.6 TEU) can not be considered applicable in the case in hand, insofar as it only allows a revision of the third part of the Treaties on internal policies and actions of the Union.

35. Specifically, Article 48.2 TEU establishes that planned revisions can have as their object, *inter alia*, either to increase or to reduce the competences conferred on the Union in the Treaties.

36. Jordi Matas, Alfonso González, Jordi Jaria and Laura Román (op. cit. pp. 66 and 70) also consider that the ordinary revision procedure in Article 48 TEU would be applicable.
revision of the Treaties to the Council, which forwards it to the European Council and notifies the national Parliaments (Art. 48.2 TEU).

The European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of beginning the amendment procedure. If passed, it orders the Council to convene an Intergovernmental Conference (a conference of representatives of the state governments). This conference has to approve by consensus the amendments to be introduced into the Treaties 37 and these amendments must then be ratified by all the member states.

The procedure, in which the wishes of the EU institutions and the states making it up converge (Art. 48 TEU, sections 3 and 4), is characterised by the margin for manoeuvre it allows. For one thing, no particular qualified majority is set for adopting decisions allowing the start of the amendment process and, for another, it foresees the possibility of finding mechanisms to provide a way out of possible opposition or obstruction on the part of a member state.

In fact, member states express their wishes at two different moments: first of all, together, through their grouping in the Intergovernmental Conference, where they have to approve the proposed amendments by consensus, and later, individually, through the ratification of the proposed amendments by each and every one of the member states 38. However, this article states that if, two years after the signature of a treaty amending the Treaties, four fifths of the member states have ratified it and one or more member states have encountered difficulties in proceeding with ratification, it is foreseen that the European Council will have to ‘examine the question’. The wide open nature of this provision suggests the possibility that the European Council could, if necessary, adopt flexible and pragmatic decisions to achieve –

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37 In view of the limited scope of the amendments that would have to be made to the primary law, it seems most reasonable to be able to avoid the step of holding a convention formed by representatives of the national parliaments, heads of state or government of the member states, of the European Parliament and of the Commission (Art. 48.3, Paragraph 1, TEU). Remember that the TEU foresees that the European Council could decide by a simple majority, following approval by the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the member states. (Art. 48.3, paragraph 3, TEU).

38 The amendments come into force once they have been ratified by all the member states in keeping with their constitutional rules (Art. 48.4, paragraph 2, TEU).
means other than the revision of the Treaties even—the goal pursued by the amendments in the primary law that have not been approved. Remember that in this scenario, at the beginning of the process, the European Council would already have accepted by consensus the permanence of the new Catalan state as a member of the Union. Whatever the case, in the next section we evaluate the likelihood of these vetoes arising and succeeding, in keeping with the arguments for and against resolving Catalonia’s position in the EU.

The amendments that would have to be introduced into European secondary law would also be of limited scope, as they would refer to legislation that could be directly affected by the accession of a new member state (this would be the case, for example, of some of the legislation on agriculture and fisheries policy which establishes quotas for milk production, greenhouse gas emissions and budgetary contributions by states or the distribution of structural funds) and would come about through amendments to the corresponding directives and regulations.

As regards the internal adaptations Catalonia would have to make to be able to continue forming part of the EU, some of these would affect the bodies that would have to be created or adapted and others would affect the regulations required to develop and apply European law and the indispensable transitional measures. It seems clear that all these adaptations would be of limited scope and importance in comparison with what happens in the case of candidate states who have not previously been members of the Union.39

Finally, the EU, honouring its tradition of flexibility and pragmatism, could adopt transitional measures in order to ensure the practical effectiveness of recognising permanence in the EU

39 In fact, some doctrinal contributions that have analysed the case of a possible independent Scotland have shown that changes in the secondary legislation would be very limited in extent. This is highlighted by Graham Avery (Honorary Director General of the European Commission and Senior Advisor at the European Policy Centre) in his study ‘The foreign policy implications of and for a separate Scotland’ (Foreign Affairs Committee, the UK Parliament, 24 September 2012), in which he says: ‘Let us turn now to the secondary legislation. Although a large number of technical adaptations would be needed in order for Scotland to implement EU law, the vast majority of these would be uncontroversial since they would be based on the existing situation. In respect of EU policies and legislation, Scotland’s citizens have a legitimate expectation of the maintenance of the status quo in terms of economic and social conditions. There should be no need, for example, to renegotiate Scotland’s application of European policies in fields such as environment; transport, agriculture, etc.: it would suffice to transpose mutatis mutandis the situation that already exists for Scotland within the U.K. Since the rest of the U.K. could be affected, that process would require discussion and clarification with London, but it would have little interest for other member states who would be content to consider the question of secondary legislation on the basis of a report and proposals from the Commission.’ See the study on: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmfaff/writev/643/m05.htm.
from the moment this recognition takes place and for the duration of the process of amending the Treaties and adapting secondary law and internal law.

On the basis of Art. 15.1 TEU, for example, the European Council could initially and transitionally regulate the relevant measures relating to the different aspects (including institutional aspects) connected with the participation of the new state in the EU. One alternative to this procedure would be to approve these transitional measures through the decisions taken by heads of state and of government meeting in the European Council. Decisions of this type have in the past played a very important part in the adoption of flexible measures in the face of situations not foreseen in the Treaties. However, remember that these decisions require a unanimous vote as their legislative nature comes close to that of a simplified international agreement.

These transitional measures aimed at guaranteeing the practical effectiveness of recognising the permanence of a future Catalan state in the EU would not be necessary if the procedure applied were the same one applied in the Scottish case to guarantee Scotland’s permanence in the EU. In fact, this formula is intended to make the constitution of the new state and its entry into the EU simultaneous. Applied to the Catalan case, after a possible result in favour of independence at a ballot or plebiscite election and following negotiation between the Generalitat of Catalonia and the Spanish state, the latter would begin talks with the EU to design the relevant amendments to the original treaties (which in principle would have to be made according to the procedure laid down in Article 48 TEU) and the modifications of secondary law considered necessary for accession by the new state, for the moment when the new state is formally constituted and expresses the wish to continue in the Union. At that

40 In this respect see Miquel Palomares Amat: ‘Las decisiones de los Jefes de Estado y de Gobierno en el seno del Consejo Europeo como categoría jurídica para regular, transitoriamente, la participación en la Unión Europea de nuevos Estados surgidos de la separación de Estados miembros’, Revista d’Estudis Autonòmics i Federals. No. 17, April 2013.


moment, the list of organisational and legal measures Catalonia would have to implement during the period established would also have to be ready\textsuperscript{42}.

5.2. \textit{Ad hoc} accession scenario

The second scenario is characterised by the fact that Catalonia’s accession to the European Union takes place through the procedure used for accession by third non-member states (Art. 49 TEU), modulated, though, with the adoption of transitional \textit{ad hoc} simplifying measures aimed at speeding entry\textsuperscript{43} and ensuring that the bulk of the European legislation currently applicable continues to be applied to Catalan territory and citizens while the process lasts. During the transitional period, while it is not yet formally a member and is not taking part directly in the European institutions, Catalonia could have a special position in its relations with European institutions, in the institutional, economic and legal spheres, especially in the different material sectors in which European policies operate and, very especially, in relation to the internal market and to maintaining existing commercial relations.

In short, this scenario would oblige the future Catalan state to leave the EU, but would streamline the process of re-accession. In fact, it’s important to note that, according to the speed of this \textit{ad hoc} procedure and according to the content and duration of the transitional regime, in practice the consequences of this entry procedure for the future Catalan state

\textsuperscript{42} A different procedural formula also aimed at achieving simultaneous accession is the one recently proposed by Merijn Chamon and Guillaume Van der Loo based on simultaneous talks between the mother state the breakaway state; between this state –through the mother state–and the EU in the context of the process of separation from the Union foreseen in Article 50 TEU and, finally, between the breakaway state and the EU. One of the problems posed by this complex procedure, though, is the application of Art. 50 TEU to breakaway states. See ‘The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?’ in European Law Journal. Doi:10.1111/eulj.12057.

\textsuperscript{43} Graham Avery, in his study The foreign policy implications of and for a separate Scotland (op. cit.), defends the idea that the European Union ought to adopt a simplified procedure for deciding on and regulating Scotland’s membership of the European Union. Vito Breda (‘La devolucion de Escocia y el referéndum de 2014: ¿Cuáles son las repercusiones potenciales en España?’ UNED. Teoría y Realidad Constitucional, No. 31, 2013, pp. 69-88) points out: ‘In other words, there is a definite possibility that a new state born out of a former region of an EU member state could undergo scrutiny by the EU institutions, but compared to the admission of a new member state this procedure could be less rigorous. This would mean admission without the need to go through the long and detailed process of analysing fulfilment of the Community acquis. (…) In short, there are weighty pragmatic reasons that could favour entry into the EU in the fast lane for Scotland and other wealthy regions of the EU with secessionist political parties’.
could objectively be almost identical to those of the first scenario (which strictly speaking, as we have seen, would not be an ‘automatic’ succession either).

As shown by the practice followed until now by the EU, the Treaties contain several normative and conventional instruments that allow the establishment of an *ad hoc* entry procedure and *ad hoc* transitional regimes.

By way of example, the Protocols, which are part of the Treaties, could regulate specific aspects that individually affect the particular situation of one or more member states. At the same time, there is the possibility that, in order to allow a quick transition in the entry process, the EU could reach cooperation agreements with states that are candidates for accession (Art. 212 TFEU in relation to Art. 218.8 TFEU, which does not require unanimity among the member states). It’s also conceivable that a provisional application of the European Treaties could be established in Catalonia until the *ad hoc* accession procedure had concluded. A provisional application of the new Treaty of Accession following its signature could also be agreed while ratification of the Treaty of Accession by member states was under way. The *ad hoc* accession procedure could be specified in a decision by the European Council, like the one we analysed in referring to the first scenario. This decision could also include the agreement on Catalonia’s status throughout the transitional period or the cooperation agreement *ad casum*.

In this respect, a recent study of the political scientist Kai-Olaf Lang suggests the possibility of applying an *ad hoc* transitional solution consisting in continuing to apply European law throughout Catalonia, even though only the rest of Spain would continue to be a member of the EU. What this thesis really proposes we apply is what is known as the ‘inverted Cyprus solution’. In the case of Cyprus, as we saw earlier, it was agreed that application of the Treaties would be suspended in the north of the island (the Turkish Cypriot part), although it was considered part of the EU, while in the case of Catalonia application of the Treaties and of European legislation could be maintained while it temporarily was not part of the EU.

This would not mean that while the EU did not guarantee maximum application of European legislation in Catalonia the Generalitat would not be able to adopt unilateral legal measures.

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incorporating European regulations in Catalan legislation. It would also be possible to negotiate a bilateral agreement with the EU, something we look at in section seven.

Whatever the case, it is worth remembering that the procedure laid down in Article 49 TEU, making abstraction of the modulations the EU might introduce in applying it to a case like the Catalan one, begins with the application for entry submitted to the Council, who would have to accept it unanimously after consulting with the Commission and with the European Parliament. Should this be agreed in the Council, a process of negotiation of uncertain duration would open, even though, objectively, in comparative terms, it seems that it would have to be shorter than the process followed up till now with other countries recently incorporated into the Union, precisely because of the more limited amendments required by the provisions of primary law and secondary law and the reduced demands arising for Catalonia.

The legal instrument in which this negotiation would materialise would be the Treaty or Deed of Accession of Catalonia to the EU, which would have to include the principles governing the accession, adaptations of an institutional nature, technical adaptations of secondary law, secondary measures in the different material spheres and the actual rules for applying the Deed.

The procedure applied at this stage is normally as follows: the Commission directs the negotiations and duly informs the Parliament and the Council. The terms agreed for the different matters under negotiation are described in the Treaty of Accession and, before proceeding to sign it, it must have a statement of approval from the Parliament –adopted by an absolute majority of its members– and the unanimous agreement of the Council. Once this Treaty has been signed by the member states and by the candidate country, it undergoes the corresponding ratification according to internal constitutional rules.45

Unlike the procedure in Article 48 TEU, no mechanism is foreseen here for a response on the part of the EU in the face of possible obstruction.

45 By way of example, for the case of Croatia the Official Journal of the European Union, OJEU L112 of 24/4/2012 can be consulted.
5.3. Ordinary accession scenario

The procedural rules applicable to this third scenario for entry are also the ones foreseen in Article 49 TEU, which has already been analysed in the previous section, but in this case, unlike the previous scenario, they would be applied without any modulation allowing the process to be speeded up or momentarily guaranteeing that pre-existing legal situations would be maintained.

In an initial stage, then, the EU would evaluate the Catalan candidacy’s fulfilment of the requirements foreseen and the criteria for eligibility and, in the case of being accepted as a candidate, talks would begin to establish the conditions of accession, following the procedure we have just described.

In this case, Catalonia would be treated as a third state; in other words, as a state outside the Union. This procedure would not take into account the fact that Catalonia and its citizens have belonged to the Union for almost thirty years and would subsequently place Catalonia in the same position as those states now officially declared candidates for entry, such as Iceland, Turkey, Macedonia, Montenegro or Serbia. In the Catalan case, as we shall see, this option would undoubtedly have a clear element of punishment or dissuasion.

However, even in this case, during the negotiations for entry, transitional measures could be taken to allow continuity of the application, at least in part, of European law. In fact, the application of transitional regimes is common in most entry processes. These alternative paths are analysed in section seven.

5.4. Scenario of exclusion as a member state

The fourth scenario consists in the refusal by the EU to begin talks for entry by the new Catalan state, either because it is unwilling to acknowledge Catalonia as a state or because negotiations for membership of the Union have been blocked.

This exclusion scenario raises many uncertainties and even paradoxes. In particular, we shall highlight the case in which Spain does not recognise Catalan Independence. This non-recognition would prevent modification of the area of application of the EU Treaties in
Catalan territory and would therefore mean that European law would be in force and applicable for Catalonia and the Catalans, even though Catalonia might already have declared independence and might have started to act as an independent state.

From the point of view of procedure, it is highly disputable whether Article 50 TEU (introduced with the Treaty of Lisbon) would be directly applicable in the case of a hypothetical blockade of Catalonia’s accession to the Union. Strictly speaking, this article, which for the first time includes a procedure for withdrawal from the EU in the constituent Treaties, is only applicable in the case of voluntary withdrawal by a member state. It would apply, for example, in the case that the United Kingdom decided to leave the EU, but as it can only be applied in response to an application for voluntary withdrawal presented by a member state, it hardly seems as if application of this procedure could be demanded in the Catalan case. Nevertheless, leaving aside this debate and the possibility that in practice the EU might use it, it’s very significant that this precept calls for talks prior to the withdrawal of a member state, establishes the framework for future relations with the Union and allows a period of two years before European law ceases to be applicable. Article 50 TEU shows how complicated it is, both for the territory concerned and for the whole of the EU, for a region that has belonged to the Union up till now to leave.

6. Chances of application of the different scenarios: arguments to ponder

Fulfilment of the conditions of entry by a candidate country is not enough for entry into the Union to take place. The Union has plenty of room for manoeuvre when it comes to accepting accession by a new state or not. The only legal limits arise basically from the values proclaimed in Article 2 TEU and, especially, those of the prohibition of arbitrariness and of abuse of authority, which form part of the rule of law, though we must accept that, in practice, the latter tend to have a reduced likelihood in cases like those analysed here.

The same goes for the use of one channel of entry to the EU or another. The procedural laws just analysed leave the Union plenty of room for manoeuvre when it comes to taking decisions about which scenario to apply.
Each and every one of the member states have this same freedom to decide and they can exercise it especially in the entry procedures requiring a unanimous vote in favour by all the members of the EU institutions –for example the European Council– or the final ratification of certain agreements, like the Treaties for admission in Article 49 TEU by all the member states.

The reasons the European institutions and the member states could allege in taking one decision or another are not legally defined or established. In principle, they can be of any kind (legal, political, economic, among others) and the likelihood that the EU and the member states will go for one or another of the four scenarios mentioned will depend basically on the persuasive power exerted on them by the various arguments –especially economic– that can be put forward in the debate that will take place when the future Catalan state applies for membership of the EU. Therefore, when it comes to trying to foresee the likelihood of one or another of the four scenarios mentioned above applying, we must analyse the persuasive power of the arguments and counter-arguments and of the objectives that might guide decision taking on the part of the European institutions and on the part of the States.

This analysis would have to take place not with the object of making a normative proposal as to the solution or the procedure that from the legal perspective must necessarily be adopted, but with the object of calculating the chances that one or another solution will eventually prevail. It needs to be considered in terms of probability, as it’s impossible to foretell with any certainty which arguments will prevail and subsequently which scenario will eventually materialise.

Among the main arguments which presumably will be used to try and justify a refusal to apply the scenarios based on permanence or rapid accession under transitional regimes of a future Catalan state in the EU, the following can be mentioned:

First of all, the argument that managing the EU will be difficult with the entry of a new state to be added to the already considerable number of 28 member states currently forming part of the EU. It’s true that the Union has established that before deciding on the incorporation of a new state consideration must be given, among other things, to what it calls its ‘absorption
In fact, this absorption capacity has implicitly been used to prolong some negotiations for accession to an extraordinary degree and even to stop them, relating them to problems of an economic type (arising from structural differences and differences in the degree of development of candidates’ economic systems), in politics (differences over respect for certain fundamental values or rights) or of a social nature (for example those relating to the fear of large-scale immigration into the Union) that are posed in relation to the accession of certain candidates.

Another argument against permanence or at least against rapid accession under a transitional regime could be the unspoken but latent fear of some European states in which there are territorial demands that could lead to the start of separation processes. To put it another way, the fear that the admission of a new Catalan state could produce a copycat effect.

It has also been argued, in a disputable interpretation as we shall see later, that the incorporation of a future independent Catalan state in the EU, if the separation had taken place without the agreement of the Spanish State and outside current Spanish law, would violate the principle of national identity and, especially, the principle of territorial integrity foreseen in Art. 4.2 TEU. This article establishes, first of all, that the EU must respect the equality of the member states under the Treaties, as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. In addition, it is foreseen that the Union must respect the essential functions of states, particularly those whose object it is to guarantee their ‘territorial integrity’, maintaining law and order and safeguarding national security. Finally, this article also states that national security remains the sole responsibility of each member state.

Similarly, the argument used to refuse application of the first scenario is that a future Catalan state would not have been party to the EU’s constituent Treaties and would therefore have to apply for entry as though it were a third state, outside the Union.

Bearing in mind the above, when it comes to trying to predict the chances of one or another scenario prevailing in practice, there is no need to analyse the theoretical solidity of the

[46]: The Brussels European Council on 15 and 16 June 2006 spoke not only of the candidate’s real capacity to integrate but also of the EU’s own absorption capacity, ie the capacity to absorb new members, without losing the impetus of European integration.
arguments laid out, so much as to wonder if they will eventually hold more power of persuasion for the European institutions and the member states than the arguments in favour of the scenarios of permanence or of rapid accession under a transitional regime.

From this perspective, we would venture to say, while acknowledging the difficulty of this sort of prediction, that the arguments in favour of the scenarios for permanence or, especially, rapid accession under a transitional regime, which we have laid out below, will have a greater persuasive power than the arguments laid out about ‘absorption capacity’ (especially taking into account Catalonia’s degree of economic development, its acceptance of the fundamental values of the EU and the fact that it has been a part of the Union for almost three decades); and those relating to the hypothetical copycat effect and the difficulties for managing the Union with a new member (especially if we bear in mind that one of the main founding objectives of the EU has always been to achieve the greatest possible integration of the states geographically located in the continent of Europe and that so far the Union has integrated new member states without many problems for its operation).

With regard to Article 4.2 and the principles of national identity and territorial integrity, it should be understood that this provision does not forbid any process of internal secession in a member state, but merely establishes the Union’s commitment to maintain a neutral status before territorial disputes in its member states, as this sphere comes under the competences exclusive of the member states. Of course, respect for the principle of territorial integrity also forms part of international public law and affects relations between states but not situations that may arise within a given state. Only an act taking place with the use of undue force or violating other obligatory rules of international law could be considered contrary to this legislation.

As for the argument that Catalonia was not a party to the Union’s constituent Treaties, among other arguments, when it comes to choosing which scenario to apply, we must bear in mind the legal and political unreasonableness of not considering the incontrovertible fact that Catalonia is part of the EU and its citizens are not only European citizens but have for some time been able to exercise the rights arising from it and from European legislation itself. From a legal point of view, it would not be reasonable for the EU to ignore this in choosing the applicable scenario. A decision of this type that considered this fact irrelevant would hardly pass the test of legal rationality, or of proportionality. And, as we shall see, from the political
perspective, in all likelihood this fact would not in practice be indifferent to anyone.

But rather than refute specific arguments, it is more revealing to lay out the arguments that will foreseeably be taken most into account in the debate that will take place when it comes to taking a decision, in view of the different interests at stake.

From this perspective, among the arguments in favour of permanence or of rapid accession and, especially, under a transitional regime, there are two types of argument: those that are more closely related to the values pursued by the EU and those based on economic interests which will undoubtedly carry far more weight.

Among the arguments most closely related to values, we might mention the fact, already touched on earlier, that one of the main founding objectives of the EU has always been to achieve the maximum possible integration of states geographically located in Europe. Rather than an organisation for cooperation, the EU is an organisation for integration and it would be going against its own objectives and nature to exclude, even if only temporarily, a state like the Catalan state, which fulfilled—as it would—all the requirements for admission, and, what’s more, had already formed part of the EU.

We must also remember, halfway between the arguments concerning values and the more pragmatic ones, that refusing entry to the European Union to a future Catalan state or prolonging the process of accession amounts to excluding seven and a half million people from European citizenship who have enjoyed this status for decades. The citizens of Catalonia, being Spanish citizens, have the rights derived from European citizenship, in the same way that many other European citizens—investors, immigrant workers, students, etc.—also have rights in Catalonia and before the Catalan authorities, which they might lose or which might be affected if Catalonia were left out of the EU temporarily or for good. In fact, the principles and values that govern the EU would not allow their institutions to neglect the rights of people, of business, to maintain economic and commercial relations and, especially, the rights included in the EU Charter of Fundamental Rights. What’s more, in relation to all this, we must also take into account that recent jurisprudence by the Court of Justice of the European Union (CJEU) links citizenship and fundamental rights, allowing the development
of an incipient autonomous statute of citizenship unconnected with the acts of states\textsuperscript{47}, at the same time as it insists on the fact that the subjects of European law are no longer just states but also ‘European citizens’.

From a strictly economic perspective, it seems clear that the permanence of a future Catalan state in the EU or its rapid accession under a transitional regime would offer more advantages, for the Union and for the present member states, than its definitive expulsion or suspension for a long period of time while accession took place in the ordinary way. The non-application in Catalonia of the Treaties and of EU law, the restoration of trade tariffs and the suspension of freedom of circulation of people, goods, services and capital would have a detrimental effect for the EU and all the member states and, very especially, for investors and businesses in these states with industrial and financial interests in Catalonia\textsuperscript{48}. We must also not forget that a very considerable proportion of goods transport between Spain and the rest of Europe takes place over Catalan territory. We must also bear in mind that one of the main aims presiding the process of European construction has been to promote the well-being of its people through the search for economic growth bringing social progress, an objective that is the basis of the internal market and the current Europe 2020 strategy. Economic growth and stability justify the main decisions of the EU and it is difficult to imagine that in this particular case decisions could be taken and agreements reached that could jeopardise economic growth and stability within the Union.

Indirect but highly significant confirmation of the difficulties the EU and its member states might come up against in a scenario of sudden and radical non-application of European law in Catalonia is made clear, as we have seen, in the important Article 50 of the TEU, which, to mitigate the harmful effects for the EU of the voluntary withdrawal of a member state,

\textsuperscript{47} In this sense we could mention the judgement of 7 July 1992, case C-369/90, Micheletti and others; the judgement of 20 February 2001, case C-192/99, Kaur; the judgement of 11 July 2002, case C-224/1998, D’Hoop; the judgement of 2 March 2010, case C-135/2008, Rottmann, among others.

imposes a series of conditions.

In addition, we must not belittle the fact that, according to present calculations, a future Catalan state would not be a ‘receptor’ state, but a ‘net fiscal contributor’ to the EU budget⁴⁹. This is one of the things that tends to be taken into consideration in negotiations for entry.

There are still other arguments that could be added, such as those arising from the fact that even today—and despite the changes that have taken place in this field as a result of the economic crisis—Catalonia is still a receptor country for immigration from other European states, and these groups could be inconvenienced if the future Catalan state were left out of the EU or were obliged to undergo a long-drawn-out process of accession. Catalonia is also a tourist destination and a place of residence or retirement for many Europeans who could also be prejudiced if the future state remained outside the EU.

In short, as we mentioned earlier, when it comes to deciding on the incorporation of an independent Catalonia in the EU and the procedure to follow, it’s likely that, for the EU and its member states, the evaluative and, especially, the ‘pragmatic’ arguments in favour of permanence or, at least, rapid accession under a transitional regime would hold greater persuasive power than arguments about the difficulty of managing an EU enlarged by the incorporation of a state such as Catalonia or arguments based on hypothetical copycat effects or with a disproportionate interpretation of the principle of territorial integrity of states.

If this were so, it would also seem clear that, seen from the perspective of elementary pragmatism, the arguments in favour of permanence (first scenario) would have to prevail over arguments for quick accession under a transitional regime (second scenario), as it makes no sense to make a territory and the citizens forming part of the Union leave it and then readmit them, even if this is done quickly and under transitional regimes.

At the same time, it seems obvious that if Catalonia went through the process of separation in agreement with the Spanish state, it would have no difficulty when it came to joining the EU via the fast lane and under a transitional regime or even remaining in it under the permanence scenario. But it also seems clear that if this agreement did not exist and the

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⁴⁹ According to the Ministry of Economy and Knowledge of the Government of Catalonia, Catalonia’s average yearly fiscal balance with the EU for the period 2007-2013 amounted to 0.72% of the GDP, the equivalent of approximately 1,400 million euros.
legal channels had not been followed, but Catalonia could reliably demonstrate that it had tried for agreement with the Spanish state repeatedly and in good faith, having urged the application of legal channels and followed a scrupulously democratic procedure, this fact would not be ignored by the EU and its member states.

In fact, in the absence of an agreement between Catalonia and Spain, the European institutions would have to analyse the conduct of the two parties in the light of democratic principles, loyal cooperation, good faith and proportionality.\(^{50}\)

Certainly, in practice, these arguments in favour of scenarios of permanence or rapid accession under a transitional regime may not be enough to avoid a veto by the mother state or some other state, as a deterrent or punishment. But it is very unlikely that the interests of the Union or of the rest of member states would not eventually prevail. As Professor Andreu Olesti stated recently, ‘the EU has reached such a level of economic and legal integration that it’s unthinkable that one country, individually, could take decisions that endanger the combined achievements of the whole process of European integration’.\(^{51}\)

The hypothetical veto by the Spanish state could obstruct and delay the incorporation of the new state in the EU, but it would not foreseeably cause a very significant delay, because the disadvantages for the EU and the other member states of a slow or postponed entry would be much more significant than the meagre benefits it might mean for them. In fact, everything seems to indicate that an independent Catalan state could, if it wanted, join the EU on a relatively brief time-scale. It is difficult to imagine Catalonia as a sort of island, between France and Spain, outside the Union.

The dilemma, in fact, is not therefore whether or not Catalonia will ever come to form part of

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\(^{50}\) In this respect, judge David Edward states that, in fulfilment of the democratic principle recognised in the TEU, the Union would be obliged to respect and defend the decisions taken democratically by a majority of the citizens of a part of its territory, and this would also include a process of secession occurring as a result of a democratic process. David Edward: Scotland and the European Union, 17/12/2012: [http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/ articlId/852/David-Edward-Scotland-and-the-European-Union.aspx](http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articlId/852/David-Edward-Scotland-and-the-European-Union.aspx), see also the article by the same author ‘EU Law and the separation of Member States’, 36 Fordham Int’l L. J. 1151, 2013, pp.1151-1168.

And as regards negotiation, he refers to ‘… the obligation of all parties, including the member State in the process of separation, to negotiate in good faith in accordance with principles of sincere cooperation, full mutual respect and solidarity’, in the article ‘EU Law and the separation of Member States’, 36 Fordham Int’l L J, op cit, p. 1167.

\(^{51}\) Interview in the magazine Actualitat Parlamentària, No. 26, p. 99.
the EU, but when and how it will do so. And if this is so, although logic and pragmatism might seem to favour the permanence scenario, in case of a punishing or deterrent veto, the most plausible scenario would be that of rapid accession under transitional regimes, which nevertheless, as we have repeatedly stated, has almost exactly the same practical consequences as the permanence scenario.

Even so, as it is impossible to foresee with any certainty whether the greater power of persuasion of the arguments in favour of permanence or, at least, of rapid entry under a transitional regime will eventually prevail, it’s important to analyse the alternatives Catalonia would have to mitigate the harmful effects that might arise from accession by the ordinary channels or from exclusion *sine die*. This is the object of the next section.

7. Alternatives to non-permanence of Catalonia in the EU or to non-rapid accession under a transitional regime

Although the wish of the great majority of the citizens and the political institutions of Catalonia is to remain in the EU and the euro area⁵², we must ask what the different alternatives would be in the case of a transitional period with a break in Catalonia’s relations with the European Union. One obvious point of reference is the situation of some European countries, such as Switzerland, Norway or Iceland, who have opted voluntarily not to form part of the EU and to develop their own strategies for internationalisation. We know, through different indicators, that Catalonia, as well as being located in a highly attractive geographical area, arouses great interest. The fourth scenario described above could be an incentive for Catalonia to push through an ambitious plan to internationalise its commercial, political and socio-economic relations, which would have to be reconsidered not only with regard to the EU itself, but, very especially, with regard to other states outside the EU.

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⁵² The implications of Catalonia’s membership or not of the euro area and the chances of keeping the euro as the country’s currency in any of the scenarios, are the subject of a special report by the Consell Assessor per a la Transició Nacional (Advisory Council on the National Transition) on the euro and on European monetary policy.
In connection with the EU, however, there are certain possibilities which we will now explore, such as the possibility of establishing a bilateral agreement with the EU which, as regards its content, could deal with trade, cooperation or association. Secondly, there is the possibility of joining EFTA and, eventually, the EEA, as well as the decision to form part of the Schengen Area. Finally, we consider the possibility of establishing free trade agreements or of setting up customs unions with third states. These various options are not incompatible among themselves. Bilateral agreements could be signed with the EU, for example, and, at the same time, with states not belonging to this organisation, or membership of EFTA could be combined with membership of the Schengen Area.

7.1. Conclusion of a bilateral agreement between Catalonia and the European Union

This type of agreement could be established in two ways: first, Catalonia and the EU could decide unilaterally but reciprocally not to impose duties on the circulation of goods manufactured and commercialised in their respective territories; second, the two could sign a bilateral agreement to guarantee free trade in products and services and to define a common framework for cooperation.

After the reform of the Treaty of Lisbon greater coherence was introduced into the EU’s capacity for reaching international agreements. Although some doubts still linger and will foreseeably require later legal clarification, one notes the importance of enlarging the Union’s exclusive exterior competences, having integrated in Article 216 TFEU the complex jurisprudence of the CJEU on parallelism in internal and external competences.53

In this way, on the basis of its external competences, the EU closes a wide range of international agreements with third states and with international organisations. Without any pretence at being exhaustive, an initial distinction can be drawn between European agreements, drawn up solely by the EU, and mixed agreements, drawn up by the EU and by__

53 Article 216.1 TFEU states: ‘The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.’
the member states. Due to the difficulty of drawing the precise limit between the external competences of the EU and those of its member states, the use of mixed agreements has been common practice in the Union.

In fact, the EU has in recent decades established a large number of bilateral agreements with third states. These agreements are of three types, depending on the content and the subjects they include: trade agreements, association agreements and cooperation agreements. The constituent treaties only refer to association agreements, but in practice so-called cooperation agreements have also proliferated.

Although trade agreements are the sole competence of the Union and cover the sphere of common commercial policy foreseen in Article 207 TEU, their particular drafting procedure has been integrated in the general procedure for concluding international agreements in Article 218 TFEU. The trade clauses can be included among other types of agreement, ie we can find them either in cooperation agreements or in association agreements.

Cooperation agreements, for their part and depending on the content, can be the exclusive competence of the Union or a shared competence (EU and states). These agreements make for closer collaboration in various spheres going beyond the framework of trade policy. The scope of the cooperation can vary; for example, it can be commercial, economic, financial, technical, for research, fishing or development, and the agreements are adopted by the Council and the European Parliament in accordance with the ordinary legislative procedure (Article 218 TFEU), which requires only a qualified majority.

The most ambitious exterior agreements the EU concludes are the association agreements (Art. 217 TFEU) which also follow the procedure in Art. 218 TFEU and require the consent of the European Parliament in order to be adopted by the Council by a qualified majority. Special and privileged cooperation established by agreements of this type is made manifest in the content and aims and in its degree of institutionalisation. One example of an association agreement is the one drawn up between the EU and the EFTA countries (1992) to create the European Economic Area (EEA)\(^{54}\).

Practice has shown that association agreements have usually been concluded as mixed

\(^{54}\) Agreement on the European Economic Area, OJEC L 001 of 03/01/1994, pp. 3-36.
agreements, the contracting parties being the EU and the member states, and their coming into force tends to be delayed by the requirement of parliamentary ratification by each state at an internal level.

An association agreement must therefore be adopted as a mixed agreement if its content exceeds the scope of EU competences, i.e. if it includes a competence belonging to the member states and at the same time, in this case, practical coordination procedures will have to be foreseen for the Union’s external representation. Its conclusion requires the approval of the Council by a qualified majority or unanimously, and the consent of the European Parliament in the framework foreseen in Article 218 of the TFEU.

Since the Treaty of Lisbon came into force, Community association agreements can be concluded, in other words, agreements concluded exclusively by the EU and not by its member states. If they were only Community agreements they could be concluded only by a qualified majority (if the spheres dealt with did not call for unanimity). This seems to be the object of the association and stabilisation agreement currently being negotiated with Kosovo. As has been mentioned above, to avoid ratification by states that have not yet formally recognised this state, the Council agreed by consensus that the future agreement would not be signed as a mixed agreement but only by the EU. This decision is based on the consideration that it would only affect competences that are exclusive to the Union, even though, as has already been pointed out, the initial mandate for negotiation is very broad and their consideration as competences exclusive to the Union could be disputable.

If a bilateral agreement (one for cooperation or association), therefore, includes a single provision on a topic requiring unanimity, the whole agreement will require the unanimous decision of the Council, and if it includes a provision that affects a competence of the member states it will have to be adopted as a mixed agreement, which will have to be accepted both by the EU and by the different member states.

As we said earlier, the EU now enjoys extended exclusive competences. It can, for example,

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55 On 28 October 2013, the EU and Kosovo began talks to conclude the association and stabilisation agreement as the first step towards the country becoming a candidate for accession. The formula was agreed in the Council of June 2013 in order to allow Spain, Greece, Slovakia, Romania and Cyprus, who have not recognised Kosovo’s independence, not to oppose the start of talks to conclude the association agreement as an exclusively European agreement.
adopt European agreements covering the entire scope of trade policy, i.e. tariff modifications, trade agreements on goods and services, commercial aspects of intellectual and industrial property, direct foreign investment, uniformity in liberalisation measures, export policy, etc. Consequently, it can include provisions on most favoured nation treatment with regard to taxes and internal regulations, as well as on the suppression of unnecessary obstacles to free trade. Similarly, the EU has sole competence over the area of services, a competence including access to and liberalisation of certain investments in relation to third country markets.

Decision-making by qualified majority is the general norm, but the TEU foresees specific, exceptional cases in which the Council has to pronounce by unanimity. This happens in the sphere of trade in cultural and audiovisual services, and also when these agreements could prejudice the cultural and linguistic diversity of the Union. Unanimity is also required in the sphere of social, educational and health services, in those cases where these agreements could seriously disturb the national organisation of these services and undermine the responsibility of member states providing them.

The procedure by which these agreements are adopted is as follows: the Commission, having submitted its recommendations to the Council, receives a mandate from the Council to negotiate the proposal with the third state. The Commission carries out the negotiations with the commitment to keep the Council (more specifically, a special Trade Committee) and the European Parliament duly informed regarding the progress of the talks. When the negotiations have ended, the Council concludes the trade agreement and, if its content can be approved by a qualified majority, no state can place obstacles to its conclusion.

In a possible context of disagreement between the governments of Catalonia and the Spanish state, it’s essential to know what instruments could make it possible to maintain links with the Union without requiring unanimity among member states. In this respect, it would be necessary to analyse all those matters on which the EU can conclude agreements using the qualified majority. Certainly, the qualified majority has in the course of time become the most frequent rule for adopting agreements and decisions in the different spheres of competence of the Union.

Another significant aspect is the fact that the Council voting system has been modified to make it easier to take decisions. The qualified majority system (triple majority: votes, states
and population) established in the Treaty of Nice has been replaced by a double majority 
system (states and population) established in the Treaty of Lisbon. Under the new system, 
voting is simpler and more transparent, does not require the results to be weighted and it is 
considered that there is a qualified majority when agreement is reached among 55% of 
member states (currently 15 states) and 65% of the European population. It is foreseen that 
this system of voting will come into force on 1 November 2014, but from then until 31 March 
2017 a transitional regime is allowed, by virtue of which any state can ask for the present 
triple-majority system to be applied. We can therefore expect that the new double-majority 
system will be applied in full from 1 April 2017 and will allow approval by a qualified majority, 
among other acts, of a wider range of bilateral agreements on the part of the EU.

In the case of Catalonia, we need to weigh up the possibility of extending adoption of an 
agreement on trade, cooperation or association with the EU as far as possible, but at first, if it 
were necessary to avoid vetoes, matters requiring a unanimous decision or that are the 
competence of member states could not be included.

A typical example of a country maintaining close cooperation and far-reaching trade relations 
with the EU is Switzerland, but this is a very specific model. The EU and Switzerland have a 
large number of bilateral agreements and, although it’s true that the Swiss model could serve 
as a reference in some areas, in the context of Catalonia it would be best to take a different 
approach and prepare two proposals for agreements covering every sphere that could be of 
interest both to Catalonia and to the Union, taking into account the possibility of first adopting 
an agreement requiring a qualified majority, while planning another, wider agreement that 
might require unanimity, depending on the different areas of competence affected.

The bilateral relations the EU maintains with Switzerland means the latter can benefit from 
the market without being a member of the EU and at the same time maintain a high degree 
of economic and political autonomy, especially as regards the economy, taxes, trade and 
agriculture. Switzerland is a member of EFTA, but does not form part of the EEA. Its relations 
with the EU are not therefore based on one ample agreement, but on multiple bilateral

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56 Articles 16 TEU and 238 TFEU along with Protocol 36 added by the Treaty of Lisbon.

57 We must also bear in mind different instruments already used in order to get around certain legal problems, 
such as the application by a qualified majority of the Euro-Mediterranean interim agreement on trade and 
cooperation between the EC and the PLO (1997), the basis on which a joint EU-Palestinian Authority committee 
acts in adopting programmes and plans of action in the area.
agreements that spawn a whole range of mixed commissions to manage them.

Swiss citizens, on the basis of their agreements, can reside in any EU or EFTA country with equal rights alongside the respective nationals. A transitional period was foreseen before EFTA and EU citizens could also reside in Switzerland in equality of conditions, but they are nevertheless required to have a valid contract of employment or sufficient economic resources.

Switzerland has various monetary agreements with the EU, as well as a Central Bank that is one of the most independent in the world. The EU insisted strongly on the adoption of a protocol to establish the procedure for the exchange of information among the Swiss administrations in case of tax evasion, and this protocol acknowledges the application of Community treatment to Swiss businesses as regards dividends, interests and other payments between parent and daughter companies.

The agreements concluded do not foresee a harmonisation either of taxes nor of customs tariffs towards third countries. In other words, Switzerland is left out of European trade policy and this means it can conclude whatever agreements it considers convenient with third countries.

7.2. Accession of Catalonia to EFTA, the EEA and the Schengen Area

Another alternative for the future Catalan state would be to apply for entry to EFTA (European Free Trade Association) and be included in the numerous agreements signed with third countries in this framework. At present, Iceland, Liechtenstein, Norway and Switzerland are members of EFTA. In order to join EFTA unanimous agreement by these members is needed (in practice, Norway has traditionally played a key role in the negotiations for entry of new states).

EFTA was created in 1960 with a philosophy of favouring free trade – at that time this was the

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58 For example, in June 2002 seven bilateral agreements came into force: free circulation of people, air transport, goods and passenger transport by rail and road, trade in agricultural products, mutual recognition in matters of evaluation of conformity, public contracting, scientific and technological cooperation and freedom of movement.
option defended by the United Kingdom—, and became an essential instrument for its members’ economic development. Today it is the world’s fifth largest commercial organisation in services and the twelfth in trade. EFTA countries have one of the highest per capita incomes in the world and make up one of the great markets in investment flows. The EFTA Treaty, since the modification of the Vaduz Convention (2001), covers the spheres of free circulation of persons and services, movement of capital and protection of industrial and intellectual property. EFTA is not, therefore, a customs union, but a free trade or free market area. This means that its member states have a certain measure of freedom to conclude other complementary free trade agreements (FTAs) with third states.

There are currently 24 trade agreements concluded by EFTA with third states that affect the following countries: Albania, Canada, Chile, Colombia, Egypt, Hong Kong, China, Israel, Jordan, Korea, Lebanon, Macedonia, Mexico, Montenegro, Morocco, Palestinian Authority, Peru, Serbia, Singapore, Tunisia, Turkey and Ukraine and also the Gulf Cooperation Council and the Southern African Customs Union (SACU).

These agreements establish a free trade area between the contracting parties, with access to the respective markets of industrial and agricultural products, as well as regulations, commercial disciplines and customs rules; they also include provisions that regulate services and investments, as well as rules on public purchases and on the protection of industrial and intellectual property. At the moment, agreements are being negotiated with the economies of emergent countries, all in a framework of respect for the rules and agreements forming part of the World Trade Organisation (WTO), which foresees conditions of compatibility of free trade agreements or customs unions with their multilateral agreements.

Catalonia’s participation in EFTA would mean having to make a smaller economic contribution than to the EU, maintaining greater freedom to negotiate economic and commercial agreements. In view of the characteristics of Catalonia, it does not seem that there could be too many obstacles to its membership of this organisation. In fact, EFTA shows a preference for small or medium-sized states, with a similar level of development and a wish to open up to the exterior, characteristics already present in Catalonia today.

Leaving EFTA’s functioning to one side, it’s worth mentioning that, except for Switzerland, the other three members of EFTA (Norway, Iceland and Liechtenstein) are parties to the agreement with the EU to form the EEA, signed in May 1992 and in force since 1 January
1994, having been ratified by all the contracting parties. Through the EEA, these three states have access to the EU’s internal market, but without taking part in decisions about the rules governing this single market. Various indicators show that its functioning can be considered satisfactory.

The EEA therefore makes up the Community acquis on the internal market (the four freedoms of movement) and some European policies, like free competition, a series of social rules, consumer protection and a series of environmental measures. It also incorporates instruments for cooperation in areas of research, development, tourism and civil protection. The EEA does not include regulate the origin of products and does not affect indirect taxes. Neither does it make up a customs union nor include monetary policy, agricultural policy, foreign policy or community security policy, nor the area of freedom, security and justice.

In order to become part of the EEA, one must first be a member of EFTA (the first step would be to submit a formal entry application to the EFTA Secretariat). Although, as has been noted, the country exerting the most significant leadership within EFTA is Norway, entry would require talks with the four member states forming the organisation. Once Catalonia joined EFTA, it would then be time to consider possible subsequent accession to the EEA by application to the EEA Council.

Catalonia’s talks in relation to the EU could lead to negotiation to maintain the single market link through the EEA if rapid entry into the EU were not feasible. We must bear in mind, though, that the EEA is a mixed agreement that requires not just the approval of the European Parliament and a qualified majority of the Council, but also ratification by the 28 member states, although interim or provisional formulas for applying this Treaty could be found.

The EEA’s institutional system is quite complex and requires participation in the different institutions set up in this framework: the EEA Council, the EEA Joint Committee, the EFTA Surveillance Authority and the EFTA Court. The EEA model is based on two pillars: on one hand, the 28 EU member states and, on the other, the three EFTA countries forming part of the EEA. The EEA Joint Committee, along with the Secretariat, is the body that works to apply EU rules to the other three members of EFTA. In this way, countries taking part in the EEA apply European rules on the internal market and enjoy economic freedom without taking part in decision-making processes at EU level.
At the same time, all EFTA members form part of the Schengen Area, an area in which internal border controls have been eliminated and community rules are applied in the control of external borders. There is a commitment among members to adopt, develop and apply communal rules for control, entry, visas, information exchange and creation of the technology needed to manage external borders, at the same time as cooperation is guaranteed in matters affecting customs, policing and justice.

The Schengen Area at present consists of 26 countries (soon to be 28 with the accession of Bulgaria and Romania), with the particularity that whereas four EU states do not belong to it (Ireland, United Kingdom, Cyprus and Croatia), the four members of EFTA (Iceland, Liechtenstein, Norway and Switzerland) are all part of the Schengen Area.

Forming part of the Schengen Area might be of interest for Catalonia, but even more so for the other EU members and for the EU itself, in view of the enormous interest there is in relation to common surveillance and management of external borders in order to control irregular immigration, organised crime networks, drug routes and every kind of corrupt practice. Ensuring that external borders are suitably protected is of the greatest interest for all the members of the Schengen Area.

The case of separation of part of the territory of a member state of the European Union that is part of the Schengen Area could be extremely complex, not just because of matters relating to EU law, but also because of legal issues arising from the regime derived from the 1990 Convention applying the Schengen agreement, which became Community _acquis_ when the Treaty of Amsterdam came into force. We must not forget, then, that the free movement regime delimited by the Schengen external borders has its origin not only in the application of primary and secondary law but also in conventional rules.

At the same time, it must be foreseen that there is a whole evaluation system to guarantee that every country applies the agreed rules correctly, especially in relation to shared management of external borders and data bases created around the Schengen Information System. So any new state wanting to form part of the Schengen Area has to be approved by the members, but a particular case like that of Catalonia has not been foreseen here either.

Without being a member of the EU, Catalonia could be a member of the Schengen Area, especially if it were a member of EFTA, but first of all it would have to fulfil a series of
requirements in relation to external borders, it would have to demonstrate to other members that it can maintain efficient control over its borders and correct application of the Schengen regulations, and it would also have to put into operation the different data bases that have been set up for the integrated management of external borders and the corresponding instruments for cooperation with the different European agencies connected with the operation of the Schengen system.

7.3. Conclusion of free trade agreements or customs unions with third states

In the event of obstructions being placed to Catalonia’s rapid entry into the EU under a transitional regime, an alternative strategy would have to be established to internationalise the Catalan economy and allow access to international markets. Catalonia’s commercial strategy would therefore have to be reconsidered, as it would be entitled to conclude bilateral and multilateral trade agreements with those countries interested in maintaining commercial, economic and financial relations.

In this context, it would be wise to adopt a streamlined procedure for being able to negotiate, conclude and ratify free trade agreements with third states and set up the bases of a very active strategy towards those markets which it would be of interest to have easy access to. The international framework which would have to be respected in order to be able to conclude this type of agreement would also be that of the multilateral agreements managed by the WTO (especially GATT, GATS), which establish the conditions for being able to conclude free trade agreements or customs unions without having to extend the benefits

59 The GATT (General Agreement on Trade and Tariffs) was originally (1947) the forerunner of the WTO, because despite being an agreement on trade and tariffs, it acted in fact as a commercial organisation on the international level. In 1994, with the creation of the WTO, the GATT was modified and integrated as one of the essential areas for the regulation of international trade in goods.

60 The 1994 GATS (General Agreement on Trade in Services) is a multilateral trade agreement in the area of services, adopted in the Uruguay Round, which is integrated in the framework of the WTO.

61 A Customs Union is understood to be the replacement of two or more customs territories by a single customs territory, in such a way as to eliminate duties and restrictive trade regulations between members, applying common trade and customs regulations to third countries. A free trade agreement, on the other hand, only
(rights and obligations) of the bilateral agreements to all the other members of the WTO. Bearing in mind that Catalonia would have to join the WTO as soon as possible\(^{62}\), it would have to respect the conditions and procedures of Articles XXIV GATT and V of the GATS (in the framework of the WTO) to be able to adopt regional agreements on free trade or customs unions with third countries, in line with the aims of achieving greater liberalisation of trade at the international level.

8. Summary and conclusions

1. Object

This report analyses, first of all, whether a future Catalan state, on being constituted as such and applying for membership of the European Union (hereinafter EU), would be left in or out of the Union and, in the latter case, what ways are open for its readmission. Secondly, it examines what the foreseeable practical consequences of these hypothetical scenarios are, including the scenario of possible exclusion from the EU *sine die*, and the alternatives the new state might adopt, for example, to guarantee normal development of commercial exchanges with those states forming part of the European economic framework.

2. Hypothetical scenarios

The first question posed allows a plurality of approaches which, for purposes of clarity, can be grouped in the following four scenarios:

**First, permanence scenario:** On being constituted and informing the EU of such, the new Catalan state retains uninterrupted membership of the Union. Since the region in question

\(^{62}\) Forecasts are laid out in the reports by the Consell Assessor per a la Transició Nacional (Advisory Council on the National Transition) on relations with the international community and on commercial relations between Catalonia and Spain.
already forms part of the EU and its population enjoys the benefits of European citizenship and European law, it is not forced to leave the EU and apply for membership from outside.

**Second, ad hoc membership scenario:** On submitting its application for membership, the EU does not automatically accept the new state’s permanence but, in view of the special circumstances of the case, decides to begin a process of *ad hoc* membership, with specific features to allow rapid accession and, especially, a transitional regime aimed at ensuring that the largest possible number of legal, economic and political relations with the EU are kept open, along with the rights and obligations of citizens and of businesses operating in Catalonia.

**Third, ordinary membership scenario:** The EU agrees to immediately open the procedure for ordinary membership as a third state, without taking any *ad hoc* measures directed at guaranteeing the speed of the process and without establishing specific transitional regimes.

**Fourth, exclusion as a member state scenario:** The EU refuses to open the membership process immediately or to grant candidate status; in other words, it refuses to open the formal procedure for membership and the new state is left out of the EU *sine die*.

### 3. Premises

In analysing the degree of legal and practical viability of these four scenarios, two premises must be borne in mind:

First of all, that neither international law nor EU law expressly foresee circumstances such as those posed by the Catalan case.

Secondly, that the EU has traditionally taken an extremely flexible and pragmatic attitude in finding solutions for unforeseen problems arising in relation to changes in the territories or the territorial organisation of member states that affect the area of application of EU law and, more generally, in relation to procedures for ratifying its treaties.
4. Legal limits

However, it can not be concluded from these two premises that the entry of a new Catalan state is something that operates in a legal vacuum. EU law, and, subsidiarily, international law, regulate a series of material and procedural conditions and requirements that this future state would have to respect in order to join the Union, whatever scenario eventually prevails. As we shall see, however, the unusual nature of the Catalan case will increase the margin for manoeuvre the EU tends to give itself when it comes to selecting, interpreting and applying European law and will mean that in practice, whether it is acknowledged or not, the choice of one scenario or another answers less to legal criteria than to political and, especially, economic criteria.

5. Conditions and requirements for EU membership

To be a member of the EU it is necessary to be ‘a European state’ and fulfil the values of respect and commitment in the promotion of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. In addition, the conditions laid down by the European Council in Copenhagen must be fulfilled: the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; ability to take on the aims of political, economic and monetary union, stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

It seems obvious that a future Catalan state would easily fulfil these conditions and requirements for entry. This is borne out by its long prior membership of the EU.

The main new requirements the Catalan state would have to satisfy would be those arising from the need to create regulating and coordination bodies and, in general, certain new organisational structures imposed by the EU, as well as the need to transpose secondary European law to the new Catalan legal system as required. Certainly, these tasks would require a certain effort, but the future Catalan state would have sufficient means and experience at its disposal to take them on without too much difficulty.
It is not a *sine qua non* for entry into EU that a future Catalan state should already have been formally recognised as a state or international subject by another state or by certain international organisations such as the UN or the Council of Europe. The EU could be the first organisation to recognise this fact. However, there is no doubt that prior formal recognition on the part of other states or other international organisations could streamline the process of accession to the Union.

6. Procedural rules and practical consequences of the permanence scenario

6.1. Procedure

In the event that Catalonia and the EU opted for this scenario, which would be the one best suited to Catalonia’s interests, the following procedural rules would have to be respected:

First of all, the Parliament of Catalonia would have to adopt a decision clearly expressing the wish to continue belonging to the EU. This decision would have to contain the commitment to European values and ideas; it would also have to show that the new state fulfilled the political, legal and economic requirements demanded by the Union from member states. Finally, it would have to mention the intention to undertake, in a period of time to be determined, the internal adjustments necessary in order to continue forming part of the EU.

The President of the Generalitat of Catalonia, in his capacity as maximum representative of the new state, would be responsible for communicating this decision by Parliament and the accompanying documentation to the European institutions.

The EU institution most suited to making a statement in response to Catalonia’s request for continuation would be the European Council, in its capacity as the highest political instance among the European institutions and the body whose job it is to provide the Union with the necessary impetus for its development (Article 15.1 of the TEU).

If this alternative were chosen, the European Council, by consensus, would have to pronounce in favour of Catalonia continuing within the EU. Having reached this agreement
and having therefore initially accepted Catalonia's permanence in the EU, a process of negotiation would begin so as to adapt the primary law and secondary law to the presence of a new member in the European Union and to establish the internal adaptations Catalonia would have to make in order to continue as part of the EU.

These adaptations, even though the modifications they involved would be few and of limited scope, would have to materialise in a modification of the Treaties of the Union.

The modifications of the Treaties would preferably have to be made in accordance with the procedure for amending the Treaties described in Article 48 TEU (Sections 2 to 5), since, strictly speaking, the procedure in Article 49 TEU is foreseen for the modification of primary law in the framework of the procedure for accession by new states that have not formed part of the European Union.

The ordinary procedure for revising the Treaties can be begun by the government of any member state, by the European Parliament or by the Commission by submitting a proposed revision of the Treaties to the Council, which forwards it to the European Council and notifies the national Parliaments (Art. 48.2 TEU). The European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of beginning the amendment procedure. If passed, it orders the Council to convene an Intergovernmental Conference (a conference of representatives of the state governments). This conference has to approve by consensus the amendments to be introduced into the Treaties and these amendments must then be ratified by all the member states.

The procedure, in which the wishes of the EU institutions converge, is characterised by its flexibility in that, for one thing, no particular qualified majority is set for the decisions adopted by the European institutions and, for another, it foresees the possibility of finding mechanisms providing a way out of possible opposition or obstruction on the part of a member state (Art. 48.5 TEU).

6.2. Amendments to secondary European law

The amendments that would have to be introduced would also be of limited scope and would be undertaken by modifying the relevant directives and regulations in force.
6.3. Internal adaptations

As regards the internal adaptations Catalonia would have to make to be able to continue forming part of the EU, some of these would affect the bodies that would have to be created or adapted and others would affect the regulations required to develop and apply European law and the indispensable transitional measures. It seems clear that all these adaptations would be of limited scope and importance in comparison with what happens in the case of candidate states who have not previously been members of the Union.

6.4. Transitional measures

The EU, honouring its tradition of flexibility and pragmatism, could adopt transitional measures in order to ensure the practical effectiveness of recognising permanence in the EU from the moment this recognition takes place and for the duration of the process of amending the Treaties and adapting the secondary law and the internal law. On the basis of Art. 15.1 TEU, for example, the European Council could initially and transitionally regulate the relevant measures relating to the different aspects (including institutional aspects) connected with the participation of the new state in the EU. One alternative to this procedure would be to approve these transitional measures through the decisions taken by heads of state and of government meeting in the European Council.

6.5. Prior negotiation between the Spanish state and the EU

These transitional measures aimed at guaranteeing the practical effectiveness of recognising the permanence of a future Catalan state in the EU would not be necessary if the procedure applied were the same one applied in the Scottish case to guarantee its permanence in the EU. In fact, this formula is intended to make the constitution of the new state and its entry into the EU simultaneous. Applied to the Catalan case, with a possible result in favour of independence at a ballot or plebiscite election and following negotiation between the Generalitat of Catalonia and the Spanish state, the latter would begin talks with the EU to design the relevant amendments to the original treaties (which in principle would have to be
made according to the procedure laid down in Article 48 TEU) and the modifications of secondary law considered necessary for accession by the new state, for the moment when the new state is formally constituted and expresses the wish to continue in the Union. At that moment, the list of organisational and legal measures Catalonia would have to implement during the period established would also have to be ready.

7. Procedural rules and practical consequences of the *ad hoc* membership scenario

7.1. A scenario with almost identical practical consequences to those of the permanence scenario

This second scenario is characterised by the fact that Catalonia’s accession to the European Union takes place through the procedure used for accession by third non-member states (Art. 49 TEU), modulated, though, with the adoption of transitional *ad hoc* simplifying measures aimed at speeding entry and ensuring the bulk of the currently applicable European law continues to be applied to Catalan territory and citizens while the process lasts.

In short, this scenario would oblige the future Catalan state to leave the EU, but would ease the process of re-accession. In fact, it’s important to note that, depending on the speed of this *ad hoc* procedure and depending on the content and duration of the transitional regime, in practice the consequences of this entry procedure for the future Catalan state could objectively be almost identical to those of the first scenario (which, strictly speaking, as we have seen, would not be an ‘automatic’ succession either).
7.2. Instruments for establishing the *ad hoc* conditions

As has been amply shown by the practice followed until now by the EU, the Treaties contain several normative and conventional instruments that allow the establishment of a rapid entry procedure and *ad hoc* transitional regimes: protocols, cooperation agreements, provisional application of the European Treaties in the territory of Catalonia until the *ad hoc* accession procedure is over, provisional application of the new Treaty of Accession by member states, adoption of a decision by heads of state and government meeting in the European Council, etc. During this transitional period, Catalonia, for its part, would be able to adopt unilateral measures and legal decisions in order to ensure maximum stability in commercial relations with the EU and the benefit of freedom of movement. Nevertheless, even in this case, while the negotiations for entry lasted, transitional measures could be adopted to allow continuity in the application, at least in part, of European legislation. In fact, the application of transitional regimes is common in most entry processes.

7.3. The procedure under Article 49 TEU

The procedure laid down in Article 49 TEU, making abstraction of the modulations the EU might introduce in applying it to a case like the Catalan one, begins with the application for entry submitted to the Council, who would have to accept it unanimously after consulting with the Commission and with the European Parliament. Should this be agreed in the Council, a process of negotiation of uncertain duration would open, even though, objectively it seems that it would have to be shorter than the process followed up till now with other countries recently incorporated into the Union, precisely because of the more limited amendments required by the provisions of primary law and secondary law and the reduced demands arising for Catalonia.

The legal instrument in which this negotiation would materialise would be the Treaty or Deed of Accession of Catalonia to the EU, which would have to include the principles governing accession, the adaptations of an institutional nature, the technical adaptations of secondary law, the transitional measures in the different material spheres and the actual rules of application of the Deed.
The procedure applied at this stage is normally as follows: the Commission directs the negotiations and duly informs the Parliament and the Council. The terms agreed for the different matters under negotiation are described in the Treaty of Accession and, before proceeding to sign it, it must have a statement of approval from the European Parliament approved by an absolute majority of its members and the unanimous agreement of the Council.

Finally, these amendments to the Treaties are the object of an agreement between the member states and the candidate state. The Treaty of Accession must be ratified by all the member states as well as by the candidate state, following the respective internal constitutional rules. Unlike the procedure in Article 48 TEU, no mechanism is foreseen here for a response on the part of the EU in the face of possible obstruction.

8. Procedural rules and practical consequences of the ordinary accession scenario

The procedural rules applicable in this third scenario for entry are also the ones foreseen in Article 49 TEU, but in this case, unlike the previous scenario, without any modulation allowing the process to be speeded up or momentarily guaranteeing that pre-existing legal situations would be maintained.

This procedure would ignore the fact that Catalonia has belonged to the Union for almost thirty years and would subsequently place Catalonia in the same position as those states now officially declared candidates for entry, such as Iceland, Turkey, Macedonia, Montenegro or Serbia. In the Catalan case, this option would undoubtedly have a clear element of punishment or dissuasion.
9. Procedural rules and practical consequences of the scenario of exclusion as a member of the EU

The fourth scenario consists in the refusal by the EU to begin talks for entry by the new Catalan state, either because it is unwilling to acknowledge Catalonia as a state or because negotiations for membership of the Union have been blocked.

This exclusion scenario raises many uncertainties. In the event that it was Spain who failed to recognise Catalan independence, this would make it impossible to modify the area of application of the EU Treaties in Catalan territory. The result would be continuity in the application of European law in Catalonia and for Catalans, even though Catalonia might already have declared independence and might have started to act as an independent state.

From the point of view of procedure, it is highly disputable whether Article 50 TEU (introduced by the Treaty of Lisbon) would be directly applicable in the event of a hypothetical obstruction of Catalonia’s entry to the Union. Strictly speaking, this article applies exclusively in the case of voluntary withdrawal by a member state. Nevertheless, leaving aside this debate, it’s very significant that this precept calls for talks prior to the withdrawal of a member state, establishes the framework for future relations with the Union and allows a period of two years before European law ceases to be applicable. Article 50 TEU shows how complicated it is, both for the territory concerned and for the whole of the EU, for a region that has belonged to the Union up till now to leave.
10. Chances of application of the different scenarios: arguments to ponder

10.1. Room for manoeuvre in the EU and member states. Persuasive force of the various political and, especially, economic arguments

The EU institutions and the member states have plenty of room for manoeuvre when it comes to accepting accession by a new state or not and, in the event of doing so, when it comes to deciding which scenario to apply.

The reasons the European institutions and the member states could allege in taking one stand or another are not legally defined or laid out. In principle, they can be of any kind (legal, political, economical, among others) and the likelihood that the EU and the member states will go for one or another of the four scenarios mentioned will depend basically on the persuasive force exerted on them by the various arguments –especially the economic arguments– that can be put forward in the debate that will take place over applications for entry or permanence. Therefore, when it comes to trying to foresee the likelihood of one or another of the four scenarios mentioned above applying, we must analyse the persuasive force of the arguments and counter-arguments and of the objectives that might guide decision taking on the part of the European institutions and on the part of the member states.

10.2. Considerations in terms of probability

This analysis would have to take place not with the object of making a normative proposal as to the solution or the procedure that must necessarily be adopted, but with the object of calculating the chances that one or another solution will eventually prevail. It needs to be considered in terms of probability, as it’s impossible to foretell with any certainty which arguments will prevail and subsequently which scenario will eventually materialise.
10.3. Arguments against the application of the permanence scenario or the scenario of rapid accession under a transitional regime

Among the chief arguments that will presumably be used to try and justify the refusal to apply these scenarios the following can be mentioned:

First of all, the EU ‘absorption capacity’ argument; which refers to the difficulty of managing a Union with the entry of a new state to be added to the already considerable number of 28 member states currently forming part.

Another argument against could be the unspoken but latent fear of some European states affected by territorial demands that the admission of a new Catalan state could produce a ‘copycat effect’.

It has also been sustained, with disputable arguments, that the incorporation of a future independent Catalan state in the EU, if the separation had taken place without the agreement of the Spanish State and outside current Spanish law, would be a violation of the principle of territorial integrity foreseen in Art. 4.2 TEU.

Similarly, the argument used to refuse application of the first scenario is that a future Catalan state would not have been party to the EU’s constituent Treaties and would therefore have to apply for entry as though it were a third state, outside the Union.

10.4. The persuasive power of the arguments exposed in the face of those in favour of permanence or, at least, rapid access under a transitional regime

When it comes to trying to predict the chances of one or another scenario prevailing in practice, there is no need to analyse the theoretical solidity of the arguments laid out, so much as to ask if they will eventually have more power of persuasion for the European institutions and the member states than the arguments in favour of the scenarios of
permanence or of rapid accession under a transitional regime.

While acknowledging the difficulty of this sort of prediction, the arguments in favour of the scenarios for permanence or rapid accession, especially under a transitional regime, will have a greater persuasive power than the arguments laid out about ‘absorption capacity’ (especially taking into account Catalonia’s degree of economic development, its acceptance of the fundamental values of the EU and the fact that it has been a part of the Union for almost three decades); and those relating to the hypothetical copycat effect and the difficulties for managing the Union with a new member (especially if we bear in mind that one of the main founding objectives of the EU has always been to achieve the greatest possible integration of the states geographically located in the continent of Europe and that so far the Union has integrated new member states without many problems for its operation).

With regard to the principles of national identity and territorial integrity (Article 4.2), it should be understood that this provision does not forbid any process of internal secession in a member state, but merely establishes the Union’s commitment to maintain a neutral status before territorial disputes between its member states, as this sphere comes under the competences exclusive of the member states. The principle of territorial integrity also forms part of international public law and affects relations between states but not situations that may arise within a given state. Only an act taking place with the use of undue force or violating other obligatory rules of international law could be considered contrary to this legislation.

As for the argument that Catalonia was not a party to the Union’s constituent Treaties, when it comes to choosing which scenario to apply we must bear in mind, alongside other arguments, the legal and political unreasonableness of not considering the incontrovertible fact that Catalonia is part of the EU and its citizens are European citizens and exercise the rights arising from membership. From a legal point of view, it would not be reasonable for the EU not to take this into account in choosing the applicable scenario. A decision of this type that considered this fact irrelevant would hardly pass the test of legal rationality, or of proportionality. And from the political perspective, this fact would in all likelihood not be indifferent to anyone in practice.
10.5. Arguments in favour of the permanence (first) scenario and the (second) scenario of *ad hoc* membership

Among the arguments most closely related to values, we might mention the fact, already touched on earlier, that one of the main founding objectives of the EU has always been to achieve the maximum possible integration of states geographically located in Europe. Rather than an organisation for cooperation, the EU is an organisation for integration and it would be going against its own objectives and nature to exclude, even if only temporarily, a state like the Catalan state, which fulfilled—as it would— all the requirements for admission and, what’s more, had already formed part of the EU.

We must also remember that refusing entry to the European Union to a future Catalan state or prolonging the process of accession would amount to excluding seven and a half million people from European citizenship who have enjoyed this status for decades. The citizens of Catalonia, being Spanish citizens, now have the rights derived from European citizenship, in the same way that many other European citizens—investors, immigrant workers, students, etc.—also have rights in Catalonia and before the Catalan authorities, rights they might lose or which might be affected if Catalonia were left out of the EU temporarily or for good. In fact, the principles and values that govern the EU would not let their institutions neglect the rights of people, of business, to maintain economic and commercial relations and, especially, the rights included in the EU Charter of Fundamental Rights. In relation to all this, we must also take into account that recent jurisprudence by the Court of Justice of the EU (CJEU) links citizenship and fundamental rights, allowing the development of an incipient autonomous statute of citizenship unconnected with the actions of states, at the same time as it insists on the fact that the subjects of European law are no longer just states but also ‘European citizens’.

From a strictly economic perspective, it seems clear that the permanence of a future Catalan state in the EU or its rapid accession under a transitional regime would offer more advantages, for the Union and for the present member states, than its definitive expulsion or suspension for a long period of time while accession took place in the ordinary way. The non-application in Catalonia of the Treaties and of EU law, the restoration of trade tariffs and the suspension of freedom of circulation of people, goods, services and capital would have a
detrimental effect for the EU and all the member states and, very especially, for investors and businesses in these states with industrial and financial interests in Catalonia. We must also bear in mind that one of the main aims presiding the process of European construction, apart from guaranteeing peaceful solutions to controversies, has been to promote the well-being of its people through the search for economic growth bringing social progress, an objective that is the basis of the internal market and the current Europe 2020 strategy. Economic growth and stability justify the main decisions of the EU and it’s difficult to imagine that in this particular case decisions could be taken and agreements reached that might jeopardise economic growth and stability within the Union.

The difficulties the EU and its member states might come up against in a scenario of sudden and radical non-application of European law in Catalonia are made clear, as we have seen, in the important Article 50 of the TEU, which, to mitigate the harmful effects for the EU of the voluntary withdrawal of a member state, imposes a series of conditions.

In addition, we must not forget that, according to present calculations, a future Catalan state would not be a ‘receptor’ state, but a ‘net fiscal contributor’ to the EU budget. This is one of the things that tends to be taken into consideration in the negotiations for entry.

Even today –and despite the changes that have taken place in this field as a result of the economic crisis– Catalonia is still a receptor country for immigration from other European states, and these groups could be inconvenienced if the future Catalan state were left out of the EU or were obliged to undergo a long-drawn-out process of accession. Catalonia is also a tourist destination and a place of residence or retirement for many Europeans who could also be prejudiced if the future state remained outside the EU.

10.6. Prevalence of the arguments in favour of the first and second scenarios and, out of these, of the first for reasons of pragmatism

The above allows us to conclude that, when it comes to deciding on the incorporation of an independent Catalonia in the EU and the procedure to follow, it’s likely that, for the EU and its member states, the evaluative and, especially, the ‘pragmatic’ arguments in favour of permanence or, at least, rapid accession under a transitional regime would hold greater
persuasive power than arguments about the difficulty of managing an EU enlarged by the incorporation of a state such as Catalonia or arguments based on hypothetical copycat effects or with a disproportionate interpretation of the territorial integrity of states.

If this were so, it would also seem clear that, seen from the perspective of elementary pragmatism, the arguments in favour of permanence (first scenario) would have to prevail over arguments for rapid accession under a transitional regime (second scenario), as it makes no sense to force a territory and the citizens forming part of the Union to leave it and then readmit them, even if this is done quickly and under transitional regimes.

10.7. The process without agreement with the Spanish state

At the same time, it seems obvious that if Catalonia went through the process of separation in agreement with the Spanish state, it would have no difficulty when it came to remaining in the EU under a transitional regime by ad hoc means. But it also seems clear that if this agreement did not exist but Catalonia could reliably demonstrate that it had tried for agreement with the Spanish state repeatedly and in good faith, having urged the application of the corresponding legal channels and following a scrupulously democratic procedure, this fact would not be ignored by the EU and its member states.

In fact, in the absence of any agreement between Catalonia and the Spanish state, the European institutions would have to analyse the conduct of the two parties in the light of democratic principles, loyal cooperation, good faith and proportionality.

10.8. Tension between arguments in favour of permanence or rapid integration under a transitional regime and the possible veto by some member state

In practice, these arguments in favour of scenarios of permanence or rapid accession under a transitional regime may not be enough to avoid a veto by the mother state or some other state, as a deterrent or punishment. But it is very unlikely that the interests of the Union or of
the rest of member states would not eventually prevail. As Professor Andreu Olesti stated recently, ‘the EU has reached such a level of economic and legal integration that it’s unthinkable that one country, individually, could take decisions that endanger the combined achievements of the whole process of European integration’.

The hypothetical veto by the Spanish state could obstruct and delay the incorporation of the new state in the EU, but it would not foreseeably cause a very significant delay, because the disadvantages for the EU and the other member states of a slow or postponed entry would be much more significant than the meagre benefits it might mean for them. In fact, everything seems to indicate that an independent Catalan state could, if it wanted, join the EU on a relatively brief time-scale. It is difficult to imagine Catalonia as a sort of island, between France and Spain, outside the Union.

The dilemma, in fact, is not therefore whether or not Catalonia will ever come to form part of the EU, but when and how it will do so. And if this is so, although logic and pragmatism might seem to favour the permanence scenario, in the event of a punishing or deterrent veto, the most plausible scenario would be that of rapid accession under a transitional regime, which nevertheless, as we have repeatedly stated, could have almost exactly the same practical consequences as the permanence scenario.

11. Alternatives to non-permanence and no rapid access under a transitional regime

Some European countries, such as Switzerland, Norway or Iceland, who have opted voluntarily not to form part of the EU, provide an obvious point of reference in the event of a transition period with an interruption of Catalonia’s relations with the European Union. Some alternatives for this period would be as follows.

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63 Interview in the magazine Actualitat Parlamentària, No. 26, p. 99.
11.1. A bilateral agreement between Catalonia and the EU

This type of agreement could be established in two ways: first, Catalonia and the EU could decide unilaterally but reciprocally not to impose duties on the circulation of goods manufactured and commercialised in their respective territories; second, the two could sign a bilateral agreement to guarantee free trade in products and services and to define a common framework for cooperation.

On the basis of its external competences, the EU concludes a wide range of international agreements with third states not belonging to the EU and with international organisations. The EU concludes European agreements and mixed agreements (EU and member states) with third states and the subjects they include are of three types: trade agreements, association agreements and cooperation agreements. The Treaty of Lisbon facilitates the conclusion of bilateral Community agreements, ie those concluded solely by the EU and not by its member states. What’s more, this Treaty has modified the voting system in the Council to make it easier to reach a decision with a qualified majority, replacing the qualified majority system established by the Treaty of Nice (a majority of states, weighted votes and population) with a double majority system (states and population) that does not require votes to be weighted but establishes a qualified majority of 55% of member states (currently 15 states) and 65% of the European population.

In the case of Catalonia, we need to weigh up the possibility of extending adoption of an agreement on trade, cooperation or association with the EU as far as possible, using decision-making by a qualified majority. The EU and Switzerland, for example, have a large number of bilateral agreements thanks to which the latter can enjoy the benefits of the single market without being a member of the EU and, at the same time, maintain a high degree of economic and political autonomy, especially as regards the economy, taxes, trade and agriculture.
11.2. Accession of Catalonia to EFTA, the EEA and the Schengen Area

Another possibility for an independent Catalonia would be to apply for admission to European Free Trade Association (EFTA) and be included in the numerous agreements with third countries that have been signed in this framework. At present, Iceland, Liechtenstein, Norway and Switzerland are members of EFTA and this treaty covers the spheres of free circulation of persons and services, movement of capital and protection of industrial and intellectual property. EFTA is not, therefore, a customs union, but a free trade area and members have a certain measure of freedom to conclude free trade agreements of their own with third states.

Catalonia’s participation in EFTA would mean having to make a smaller economic contribution than to the EU, maintaining greater freedom to negotiate economic and commercial agreements. In view of the characteristics of Catalonia, it does not seem that there could be many obstacles to its membership of this organisation. In fact, there is a preference for small or medium-sized states, with a similar level of development and a wish to open up to the exterior, characteristics Catalonia already possesses today.

Except for Switzerland, the other three members of EFTA (Norway, Iceland and Liechtenstein) are parties to an agreement with the EU to form the European Economic Area (EEA). The EEA makes up the Community acquis on the internal market and some European policies such as free competition, a series of social regulations, consumer protection and a series of environmental measures. It also incorporates cooperation instruments in areas of research, development, tourism and civil protection. In order to become part of the EEA, one must first be a member of EFTA and countries taking part in the EEA apply European rules on the internal market and enjoy economic freedom without taking part in decision-making processes at EU level.

At the same time, all EFTA members form part of the Schengen Area, an area in which internal border controls have been eliminated and community rules are applied in the control of external borders. The Schengen Area at present consists of 26 countries (soon to be 28 with the accession of Romania and Bulgaria), while four EU states do not belong to it (Ireland, United Kingdom, Cyprus and Croatia). Forming part of the Schengen Area might be
of interest to Catalonia, but even more so for the other EU members and for the EU itself, in view of the enormous interest there is in relation to common surveillance and management of external borders in order to control irregular immigration, organised crime networks, drug routes and every kind of corrupt practices.

Without being a member of the EU, Catalonia could be a member of the Schengen Area, especially if it were a member of EFTA, but it would have to fulfil a series of requirements. First of all, in relation to external borders, it would have to demonstrate to other members, for example, that it can undertake efficient control over its borders and correct application of the Schengen regulations, and it would also have to properly manage the different data bases that have been set up for the control and integrated management of external borders and put in place the corresponding instruments for cooperation with the different European agencies connected with the operation of the Schengen system.

11.3. Free trade agreements or customs unions with third states

In the event of obstructions to Catalonia’s rapid entry into the EU under a transitional regime, an alternative strategy of internationalisation would have to be established. In this case, Catalonia would recover the power to conclude bilateral and multilateral trade agreements with those countries interested in maintaining commercial, economic and financial relations. The international framework which would have to be respected in order to be able to conclude this type of agreement is that regulated by the WTO (World Trade Organisation), which allows its members to reach greater commercial liberalisation by establishing free trade agreements or customs unions.
This report on the Paths for Catalonia’s integration in the European Union has been prepared by the Consell Assessor per a la Transició Nacional (Advisory Council on the National Transition), which is composed of the following members:

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