

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 4 December 2018⁽¹⁾

Case C-621/18

**Andy Wightman,
Ross Greer,
Alyn Smith,
David Martin,
Catherine Stihler,
Jolyon Maugham,
Joanna Cherry**

v

**Secretary of State for Exiting the European Union,
interveners:
Chris Leslie,
Tom Brake**

(Request for a preliminary ruling from the Court of Session, Inner House, First Division (Scotland) (United Kingdom))

(Question referred for a preliminary ruling — Admissibility — Article 50 TEU — Right of withdrawal from the European Union — Notification of the intention to withdraw — Withdrawal of the United Kingdom (Brexit) — Revocability of the notification of the intention to withdraw — Unilateral revocation — Conditions for unilateral revocation — Agreed revocation)

1. On 29 March 2017, the United Kingdom of Great Britain and Northern Ireland ('the United Kingdom' or 'the UK') notified the European Council of its intention to withdraw from the European Union and the European Atomic Energy Community (EAEC) ('the notification of the intention to withdraw'). ⁽²⁾
2. That notification opened the way, for the first time in the history of the European Union, for the procedure under Article 50 TEU, which (in paragraphs 2 and 3 thereof) provides for the negotiation and conclusion of a 'withdrawal agreement' between the European Union and the departing Member State. In the absence of that withdrawal agreement, the Treaties will cease to apply to that Member State two years after the notification of the intention to withdraw, unless the European Council unanimously decides to extend that period.
3. A Scottish court has requested a preliminary ruling from the Court of Justice so that the latter may, as the supreme interpreter of EU law, dispel the uncertainty regarding an issue which Article 50 TEU has not resolved. The Court must indeed determine whether a Member State, after notifying its intention to withdraw from the European Union, may revoke that notification (possibly unilaterally).
4. As I will set out below, notwithstanding the importance of the question raised both in terms of jurisprudence and for the future, its practical consequences are undeniable, as is its bearing on the main proceedings. If the Court

accepts that the notification of the intention to withdraw may be revoked unilaterally, the United Kingdom could communicate such revocation to the European Council, and thereby remain a member of the European Union. As the United Kingdom Parliament has to give its final approval, both if a withdrawal agreement is reached and in the absence of that agreement, several members of that parliament consider that if the notice of the intention to withdraw were revocable, this would open a third way, namely remaining in the European Union in the face of an unsatisfactory Brexit. The referring court appears to adopt that position, reasoning that the Court's answer will have the effect of clarifying the precise options open to members of the United Kingdom Parliament when casting their votes.

I. Legal framework

A. EU law

5. Article 50 TEU provides:

'1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.'

B. International law

6. The Vienna Convention on the Law of Treaties, adopted in Vienna on 23 May 1969 (3) ('the VCLT'), governs the procedure for concluding treaties between States.

7. Under Article 54 of the VCLT:

'The termination of a treaty or the withdrawal of a party may take place:

- (a) In conformity with the provisions of the treaty; or
- (b) At any time by consent of all the parties after consultation with the other contracting States.'

8. Article 65 of the VCLT ('Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty') states:

'1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in Article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

...'

9. Article 67 of the VCLT provides:

'1. The notification provided for under Article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of Article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.'

10. In accordance with Article 68 of the VCLT ('Revocation of notifications and instruments provided for in Articles 65 and 67'):

'A notification or instrument provided for in Article 65 or 67 may be revoked at any time before it takes effect.'

C. *United Kingdom law. European Union (Withdrawal) Act 2018 (4)*

11. In accordance with section 13:

'(1) The withdrawal agreement may be ratified only if—

(a) a Minister of the Crown has laid before each House of Parliament—

(i) a statement that political agreement has been reached,

(ii) a copy of the negotiated withdrawal agreement, and

(iii) a copy of the framework for the future relationship,

(b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown,

(c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and—

(i) the House of Lords has debated the motion, or

(ii) the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and

(d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

(2) So far as practicable, a Minister of the Crown must make arrangements for the motion mentioned in subsection (1)(b) to be debated and voted on by the House of Commons before the European Parliament decides whether it consents to the withdrawal agreement being concluded on behalf of the EU in accordance with Article 50(2) of the Treaty on European Union.

(3) Subsection (4) applies if the House of Commons decides not to pass the resolution mentioned in subsection (1)(b).

- (4) A Minister of the Crown must, within the period of 21 days beginning with the day on which the House of Commons decides not to pass the resolution, make a statement setting out how Her Majesty's Government proposes to proceed in relation to negotiations for the United Kingdom's withdrawal from the EU under Article 50(2) of the Treaty on European Union.
- ...
- (6) A Minister of the Crown must make arrangements for—
- (a) a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in subsection (4), to be moved in that House by a Minister of the Crown within the period of seven Commons sitting days beginning with the day on which the statement is made, and
 - (b) a motion for the House of Lords to take note of the statement to be moved in that House by a Minister of the Crown within the period of seven Lords sitting days beginning with the day on which the statement is made.
- (7) Subsection (8) applies if the Prime Minister makes a statement before the end of 21 January 2019 that no agreement in principle can be reached in negotiations under Article 50(2) of the Treaty on European Union on the substance of—
- (a) the arrangements for the United Kingdom's withdrawal from the EU, and
 - (b) the framework for the future relationship between the EU and the United Kingdom after withdrawal.
- (8) A Minister of the Crown must, within the period of 14 days beginning with the day on which the statement mentioned in subsection (7) is made—
- (a) make a statement setting out how Her Majesty's Government proposes to proceed, and
 - (b) make arrangements for—
 - (i) a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in paragraph (a), to be moved in that House by a Minister of the Crown within the period of seven Commons sitting days beginning with the day on which the statement mentioned in paragraph (a) is made, and
 - (ii) a motion for the House of Lords to take note of the statement mentioned in paragraph (a) to be moved in that House by a Minister of the Crown within the period of seven Lords sitting days beginning with the day on which the statement mentioned in paragraph (a) is made.
- ...
- (10) Subsection (11) applies if, at the end of 21 January 2019, there is no agreement in principle in negotiations under Article 50(2) of the Treaty on European Union on the substance of—
- (a) the arrangements for the United Kingdom's withdrawal from the EU, and
 - (b) the framework for the future relationship between the EU and the United Kingdom after withdrawal.
- (11) A Minister of the Crown must, within the period of five days beginning with the end of 21 January 2019—
- (a) make a statement setting out how Her Majesty's Government proposes to proceed, and
 - (b) make arrangements for—
 - (i) a motion in neutral terms, to the effect that the House of Commons has considered the matter of the statement mentioned in paragraph (a), to be moved in that House by a Minister of the Crown within the period of five Commons sitting days beginning with the end of 21 January 2019, and

- (ii) a motion for the House of Lords to take note of the statement mentioned in paragraph (a) to be moved in that House by a Minister of the Crown within the period of five Lords sitting days beginning with the end of 21 January 2019.

...'

II. Facts, conduct of the dispute and question referred for a preliminary ruling

12. In a referendum on 23 June 2016, the citizens of the United Kingdom voted in favour (51.9% to 48.1%) of their country's exit from the European Union.

13. The United Kingdom Supreme Court held in the judgment of 24 January 2017, *Miller*, (5) that the United Kingdom Government required the prior approval of Parliament in order to notify the European Council of the intention to withdraw from the European Union. It was not, however, adjudicated upon in that judgment as to whether that notification could be revoked, because revocability was not then in issue: the parties to that dispute agreed that the notification was irrevocable. (6)

14. On 13 March 2017, the United Kingdom Parliament enacted the European Union (Notification of Withdrawal) Act 2017, (7) which empowered the Prime Minister to notify the United Kingdom's intention to withdraw from the European Union pursuant to Article 50(2) TEU.

15. On 29 March 2017, the Prime Minister of the United Kingdom sent the European Council the notification of the intention to withdraw.

16. On 29 April 2017, the European Council (Article 50) adopted the guidelines defining the framework for negotiations under Article 50 TEU and setting out the overall positions and principles that the European Union will pursue throughout the negotiations. (8) On the basis of the Commission's recommendation of 3 May 2017, the Council adopted on 22 May 2017, in accordance with Article 50 TEU and Article 218(3) TFEU, the decision authorising the Commission to commence negotiations with the United Kingdom in order to achieve an agreement for withdrawal from the European Union and the EAEC. (9)

17. On 14 November 2018, the negotiations concluded with a Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. (10) In turn, on 22 November 2018, the Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom was agreed. (11) That Agreement and Declaration were endorsed by the European Council on 25 November 2018.

18. Until the procedures for ratifying that Draft Agreement have been successfully concluded in the United Kingdom and in the European Union, the two possibilities envisaged in Article 50(3) TEU remain.

19. On 19 December 2017, various members of the Scottish Parliament ('MSPs'), the United Kingdom Parliament ('MPs') and the European Parliament ('MEPs') lodged before the Court of Session, Outer House (United Kingdom), a petition for judicial review seeking clarification as to whether the notification of the intention to withdraw may be revoked unilaterally before the expiry of the two-year period under Article 50 TEU, so that, in the event of that revocation, the United Kingdom would remain in the European Union.

20. Permission for the petition to proceed was refused by the Lord Ordinary by a decision of 6 February 2018, (12) on the ground that the petition encroached upon the sovereignty of the United Kingdom Parliament and raised a hypothetical question, given the lack of evidence that the United Kingdom Government or Parliament intended to revoke the notification of the intention to withdraw.

21. The applicants brought an appeal before the Court of Session, Inner House, which granted permission to proceed by a decision of 20 March 2018, (13) remitting the case back to the first-instance court to rule on the substance.

22. By decision of 8 June 2018, (14) the Lord Ordinary of the Court of Session declined to make a reference for a preliminary ruling to the Court of Justice sought and refused the petition. (15)

23. The applicants brought an appeal before the Court of Session, Inner House, First Division, which, after allowing the case to proceed, handed down the decision of 21 September 2018, (16) granting the request for a reference for a preliminary ruling to be made under Article 267 TFEU.

24. In essence, the referring court:

- Considers that it is neither premature nor academic to ask whether the notification could lawfully be revoked unilaterally, so that the United Kingdom would remain in the European Union.
- Emphasises the uncertainty surrounding that issue and understands that the answer will have the effect of clarifying the options open to MPs when casting their votes. In the referring court's view, whatever the interest of MSPs and MEPs, MPs have an interest in seeing the matter resolved.

25. In order to reach that conclusion, the referring court took into consideration the fact that on 26 June 2018 the European Union (Withdrawal) Act 2018 received Royal Assent, section 13 of that Act setting out, in detail, the means by which parliamentary approval is to be sought of the outcome of negotiations between the United Kingdom and the European Union under Article 50 TEU. In particular, the withdrawal agreement can only be ratified if it, and the framework for the future relationship between the United Kingdom and European Union, have been approved by a resolution of the House of Commons and been debated in the House of Lords. If no approval is forthcoming, the Government must state how it proposes to proceed in relation to negotiations. If the Prime Minister states, prior to 21 January 2019, that no agreement in principle can be reached, the Government must, once again, state how it proposes to proceed. It must bring that proposal before both Houses of Parliament.

26. Following section 13 of the European Union (Withdrawal) Act 2018, if the House of Commons rejects the withdrawal agreement, the Treaties will cease to apply in the United Kingdom on 29 March 2019, unless the circumstances have dictated otherwise. The same will occur if a withdrawal agreement is not achieved between the United Kingdom and the European Union before that date.

27. In that context, the Court of Session, Inner House, First Division has referred to the Court the following question for a preliminary ruling: (17)

‘Where, in accordance with Article 50 of the Treaty on European Union, a Member State has notified the European Council of its intention to withdraw from the European Union, does EU law permit that notice to be revoked unilaterally by the notifying Member State; and, if so, subject to what conditions and with what effect relative to the Member State remaining within the European Union?’

III. Course of the procedure before the Court

28. The order for reference was received at the Court Registry on 3 October 2018.

29. The referring court requested that the reference for a preliminary ruling be determined pursuant to the expedited procedure, under Article 105(1) of the Rules of Procedure of the Court of Justice, in the light of the urgency of the case, since the consideration and subsequent parliamentary voting on the United Kingdom's withdrawal from the European Union must occur well in advance of 29 March 2019.

30. The President of the Court granted that request, as is apparent in the order of 19 October 2018, justifying the adoption of the expedited procedure on the basis of the need to clarify the scope of Article 50 TEU before the Members of the national Parliament are to take a decision on the withdrawal agreement and on the basis of the fundamental importance of that provision, both for the United Kingdom and for the constitutional order of the European Union. (18)

31. The applicants in the main proceedings (Wightman and Others, and also Tom Brake and Chris Leslie), the United Kingdom Government, the Commission and the Council have submitted written observations in the preliminary ruling proceedings. All those parties appeared at the hearing held at the Court on 27 November 2018.

IV. Admissibility of the question referred

32. The United Kingdom Government denies that the question referred for a preliminary ruling is admissible. The Commission entertains doubts in that regard, although it does not translate those doubts into a formal plea of inadmissibility.

33. The United Kingdom Government contends, in short, that:

- The question is inadmissible, given its hypothetical and theoretical (academic) nature, since there is no indication that the United Kingdom Government or Parliament are going to revoke the notification of the intention to withdraw.
- Declaring that the question referred is admissible would run contrary to the system of remedies provided for by the Treaties, which do not envisage the Court providing advisory opinions on constitutional matters, such as a Member State's withdrawal from the European Union.

34. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling. It follows that questions concerning EU law enjoy a presumption of relevance.

35. In accordance with that same case-law, the Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation, or the determination of validity, of a rule of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted. (19)

36. I am of the view that the present case does not satisfy any of those conditions, which are indispensable in order to reject the preliminary ruling at the outset.

37. First, the Court must assume that the referring court has adopted the order for reference in accordance with the rules governing procedure, jurisdiction and judicial organisation in force in its national law. (20) Specifically, it is not appropriate now to question whether the procedural mechanism of judicial review, as applied in Scotland, (21) permits in this individual case (as in other cases already decided by the Court) (22) both the reference for a preliminary ruling and the subsequent decision of the court making the reference. (23)

38. Secondly, the dispute is genuine and there is a clear contest of opposing legal arguments, defended by the parties. There is indeed a genuine procedural dispute pending, in which opposing arguments and claims are being made:

- The applicants request the referring court to declare that Article 50 TEU allows the notification of the intention to withdraw to be revoked unilaterally, asking that court to seek guidance on that question from the Court beforehand.
- The United Kingdom Government challenges that claim.

39. Thirdly, the question from the referring court is essential in order to resolve the dispute in the main proceedings. It could even be said that that question is the very subject matter of that dispute. The power to interpret Article 50 TEU definitively and uniformly is that of the Court and considerable interpretative work is required in order to determine whether or not that article allows the notification of the intention to withdraw to be revoked unilaterally. Without the support of the Court's authority, the referring court would find it difficult to resolve the dispute which it must decide.

40. Fourthly, the question raised is not merely academic. (24) The Court is being asked to give judgment in order to interpret a provision (Article 50 TEU) which is actually in the course of being applied and the future legal consequences of which are drawing inexorably closer. The purpose of the request for a preliminary ruling is to discern the true scope of that provision in one very uncertain aspect. (25)

41. The practical, and not only theoretical, importance of the Court's answer is obvious, given Brexit's enormous legal, economic, social and political repercussions, both for the United Kingdom and for the European Union, and

also for the rights of British and non-British citizens who will be affected by Brexit. This is a question, I must emphasise, that is not merely a jurisprudential issue, accessible to only a small number of EU-law specialists: the matter referred to the Court may have real significance in the United Kingdom and the European Union itself.

42. Fifthly, I concur with the assessment in the order for reference, and consider that the question is not premature. Furthermore, like the referring court, (26) it seems to me that the relevant time to dispel doubts as to whether the notification of the intention to withdraw is revocable is before, not after, Brexit has occurred and the United Kingdom is inexorably immersed in its consequences.

43. Sixthly, the question cannot be characterised as superfluous or unnecessary either, since the answer will have the effect of clarifying the options open to MPs when casting their votes. (27)

44. In accordance with section 13 of the European Union (Withdrawal) Act 2018, the United Kingdom Parliament must accept or reject before 21 January 2019 any withdrawal agreement reached between the United Kingdom and the European Union and, if no agreement is reached, a statement must be made subsequently on how the United Kingdom Government proposes to proceed. If such an agreement is rejected or there is no agreement, the United Kingdom will cease to be a Member of the European Union on 29 March 2019, unless the European Council, in agreement with that Member State, unanimously decides to extend the period (Article 50(3) TEU).

45. Thus, the answer to the question referred for a preliminary ruling will enable MPs to know whether there is a third way available to them, not only the alternatives open to them at present (rejection or approval of the withdrawal treaty and statement on the United Kingdom Government's course of action in the absence of an agreement). That third way would enable Parliament to call upon the United Kingdom Government to revoke the notification of the intention to withdraw, so that the United Kingdom could remain party to the treaties establishing the European Union and an EU Member. (28)

46. Seventhly, what is being sought from the Court is not merely an opinion, purely advisory in nature, as the Commission (with certain reservations) seems to maintain. In its written observations, it accepts that the answer from the Court is necessary in order for the referring court to be able to issue the 'declarator' (29) sought from it, but that the declarator will be merely advisory and will not produce immediate effects on the parties.

47. I do not share that view since, as I have just indicated, the referring court's ruling may produce legal effects, in so far as it would authorise the litigants who are members of the United Kingdom Parliament to take an initiative, based on EU law, in favour of unilaterally revoking the notification of the intention to withdraw.

48. The United Kingdom Government also states that a consultative opinion is being sought from the Court on a hypothetical revocation, which that government is not itself willing to effect. In its view, the Treaties establishing the European Union do not allow preliminary ruling proceedings to be used in that context, since Article 50 TEU does not envisage the possibility of seeking an opinion from the Court, unlike the provisions of Article 218(11) TFEU. It adds that the legality of that (possible) revocation should be challenged by means of a direct action, for failure to fulfil an obligation or for annulment, once revocation takes place. An advisory opinion from the Court in such a politically sensitive case as Brexit would, according to that government, entail interfering in the adoption of decisions still being negotiated, which must be taken by the United Kingdom's executive and legislature.

49. I do not agree with those arguments. As I have already indicated, the Court is not engaged in issuing an advisory opinion, but rather cooperating with the referring court so that the latter may resolve a *genuine* dispute between two parties with well-defined legal positions and which requires the interpretation of Article 50 TEU. Faced with the uncertainty as to whether the procedure laid down in that provision allows for the notification of the intention to withdraw to be revoked unilaterally, the referring court must give a declaratory judgment, with important ramifications, which, in turn, depends on the interpretation of a provision of the Treaty on European Union.

50. In that context, a reference for a preliminary ruling under Article 267 TFEU is suitable for resolving *ex ante* the uncertainly referred to, that is, without waiting until the revocation takes place. The mere acceptance that such revocation is possible, if upheld by the Court, may of itself produce relevant legal effects, in that it opens the way for the applicant parliamentarians to rely on that possible revocation in order to adopt one position or another.

51. In answering the question referred for a preliminary ruling, the Court will not perform advisory functions, but will give an answer in accordance with its judicial function (namely, that of *stating what the law is*), so that on

the basis of that answer, the referring court may give a ruling, in a judgment with actual legal effect, on the application for a declaration from that court sought by the applicants.

52. In resolving, in those terms, the question referred for a preliminary ruling, the Court does not go beyond the task conferred on it by Articles 19 TEU and 267 TFEU. Its interpretation of Article 50 TEU does not involve an interference in the political process of negotiating the United Kingdom's withdrawal from the European Union. Moreover, that interpretation serves to clarify, from the point of view of EU law, the legal framework for that withdrawal, in which the United Kingdom executive and legislature are active protagonists.

53. Furthermore, as in other cases of special *sensitivity* for the Member States, the Court cannot relinquish its obligations, evading answering a question that is correctly formulated (that is, in accordance with Article 267 TFEU), solely on the ground that that answer may be read from a political, and not a strictly legal, perspective, by one or other party.

54. I must refer, lastly, to the judgment in *American Express*, (30) cited in the order for reference, if only to refute a supposed contradiction between my current position and that which I defended in my Opinion in that case. (31) At the same time as I lauded the flexibility of judicial review proceedings, I also expressed my reservations and criticised the Court's excessive generosity in ruling to be admissible questions referred for a preliminary ruling arising from such proceedings, 'where they concern an issue of validity of provisions of EU law'.

55. In that case, I argued that there was not a genuine dispute between American Express and the United Kingdom authorities: both were before the national court by mutual agreement so that it would refer to the Court the questions the parties themselves had prepared. The absence of opposing positions of the parties highlighted not a genuine dispute, but rather the existence of a procedural device staged between them with the sole aim of obtaining a ruling from the Court.

56. None of those factors are present in this case, as I have emphasised in my comments above. I shall add that, in any event, the Court held that the reference for a preliminary ruling in *American Express* was admissible, even in the conditions which I have just described.

57. For all those reasons, I am inclined to the view that the question referred for a preliminary ruling is admissible.

V. Analysis of the question referred

58. May a Member State (in this case the United Kingdom) revoke the notification of the intention to withdraw from the European Union, once it has been communicated to the European Council?

59. As Article 50 TEU does not expressly answer such an apparently simple question, three solutions are possible: (a) no, not in any case; (b) yes, unconditionally; or (c) yes, under certain conditions. The reasoning to justify any of those answers is undoubtedly complex, as shown by the debate there has been in the Member States (especially in the United Kingdom) and in the legal literature. (32)

60. The issue has found its way to these preliminary ruling proceedings, in which:

- The applicants (Wightman and Others) and those intervening in support of them (Tom Brake and Chris Leslie) argue that unilateral revocation is feasible, subject to certain conditions.
- On the other hand, the Commission and the Council oppose unilateral revocation, but contend that Article 50 TEU allows a form of revocation (which I shall describe as *agreed*) approved unanimously by the Council.

61. In fact, the debate echoes a controversy which was already present at the earliest beginnings of the law, as we know it today, concerning the effects of unilateral declarations of intent, when addressed to third parties, and their possible subsequent revocation. Under Roman law, rigid positions in that regard (*optioe facta, ius eligendi consumitur*) (33) coexisted with more flexible ones, which allowed for the retraction or withdrawal of the declarations (*mutatio consilii*), provided that they were not to the harm or detriment of a third party.

62. In dealing with the substance of the issue, my reasoning will be along the following lines:

- I shall examine, first, the rules of public international law on the withdrawal of States from international treaties, including the rules on the revocation of withdrawal. That examination will show whether those rules are applicable to the present case.
- Secondly, I shall undertake the interpretation of Article 50 TEU, as *lex specialis*, in order to determine whether, in accordance with that provision, there is nothing to preclude the notification of the intention to withdraw from being revoked unilaterally. If that is the case, I shall analyse the requirements which Member States must comply with in order to effect that unilateral revocation.
- Lastly, I shall address the possibility, raised by the Commission and the Council, of an *agreed* revocation.

A. *Withdrawal from treaties under international law*

1. *Rules of the VCLT, customary rules and practice of the States on the right of withdrawal*

63. As the basis on which international treaties are regulated is the principle *pacta sunt servanda*, which is enshrined in Article 26 of the VCLT, States have been reluctant to accept the right of unilateral withdrawal of State parties to an international treaty. Consequently, Article 42 of the VCLT provides that ‘the termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention’.

64. The possibility of withdrawing from a treaty is expressly provided for in the VCLT:

- Article 54 allows the withdrawal of a State party ‘in conformity with the provisions of the treaty’ in question (34) or ‘at any time by consent of all the parties after consultation with the other contracting States’. (35)
- Article 56 provides that if a treaty contains no express provision regarding its denunciation or withdrawal, withdrawal is only feasible if it is established that the parties intended to admit the possibility of withdrawal, or a right of withdrawal may be implied by the nature of the treaty. (36)

65. The international practice of unilateral withdrawal from multilateral treaties has not been very prevalent, but there have been examples. That practice has increased in recent years, due to the misgivings of some governments which oppose international treaties and participation in international organisations. (37)

66. There have also been cases of withdrawal from a treaty for a period, followed by later accession to the same treaty. One of the most relevant examples involved the European communist countries withdrawing from the World Health Organisation (WHO) and the United Nations Educational, Scientific and Cultural Organisation (Unesco) at the beginning of the Cold War. Since the constituent treaties of both organisations lacked a withdrawal clause, the western States argued that withdrawal required the consent of the other State parties. In support of their position, the communist countries argued that, as a general principle of international law, States cannot be obliged to continue participating in a treaty against their will. (38)

67. As a result of those events, the constituent treaty of Unesco was amended in order to introduce a provision establishing the right of unilateral withdrawal. (39) That clause has been used by the United Kingdom (which left Unesco on 31 December 1985 and rejoined it on 1 July 1997) and by the United States (which withdrew on 31 December 1984 and rejoined on 3 October 2003). In 2017, the United States once again withdrew from Unesco, as did Israel. (40)

68. As regards revocations of notifications of withdrawal from international treaties, in addition to some historical precedents, (41) there are also recent examples that may be of interest in this case. I shall refer, in particular, to the cases of Panama, the Gambia and the Republic of South Africa. (42)

69. On 19 August 2009, the Government of Panama notified (43) its withdrawal from the Treaty Constituting the Central American Parliament and Other Political Bodies (‘Parlacen’), (44) citing in support of its position Article 54(b) of the VCLT. Faced with the refusal of the members of Parlacen, the Government of Panama requested the Panamanian National Assembly to approve Law 78, of 11 December 2011, which echoed the wording of that notification and proposed the annulment of the Panamanian instruments which ratified that Treaty. However, the Corte Suprema de Justicia de Panamá (Supreme Court of Justice, Panama) declared that law unconstitutional, in that it infringed Article 4 of the Panamanian Constitution (‘The Republic of Panama abides by the rules of

International Law'), since the Parlacen Treaty did not include a clause expressly providing for withdrawal and that withdrawal was not feasible under Articles 54 and 56 of the VCLT. (45) As a result of that judgment, Panama's withdrawal notification was revoked and that country resumed participating in Parlacen. (46)

70. The other two cases relate to the treaty establishing the International Criminal Court (ICC), namely the Rome Statute of 1998: (47)

- In February 2017, after a new president had come to power, the Government of the Gambia revoked the notification of withdrawal that it had made in November 2016. (48)
- The Government of the Republic of South Africa, which had notified its withdrawal from the Statute of Rome in October 2016, (49) notified its revocation of that notification in March 2017, (50) after it was annulled by the South African High Court. (51)

71. In the light of that international practice, it should be asked whether the possibility of revoking withdrawal notifications has acquired the status of a customary rule of international law. Or, in other words, whether Article 68 of the VCLT, according to which a notification or instrument provided for in Article 65 or 67 of the VCLT may be revoked at any time before it takes effect, encapsulates a customary rule of international law.

72. Articles 65 to 68 make up the fourth section of Part V of the VCLT, which contains the procedural rules applicable where grounds relating to the invalidity, termination, withdrawal from or suspension of the operation of a treaty are relied upon.

- Article 65 requires the State wishing to withdraw from a treaty to notify its intention to the other State parties, explaining the measure proposed to be taken with respect to the treaty and the reasons therefor. Those other States must have not less than three months for raising objections to the withdrawal.
- In the absence of objections, Article 67 allows the Member State wishing to withdraw from the treaty to formalise in writing its withdrawal instrument and to communicate it to the other State parties.
- Article 68 states: 'A notification or instrument provided for in Article 65 or 67 may be revoked at any time before it takes effect.'

73. Article 68 of the VCLT was adopted without any dissenting votes of the States that participated in the intergovernmental conference which drafted that convention, on the basis of the draft articles of the International Law Commission, in which again there was no disagreement. (52)

74. That fact might suggest that Article 68 of the VCLT codifies a customary rule. (53) However, that provision, which appears linked to Articles 65 and 67, may be considered, rather, a rule procedural in nature which demonstrates a progressive development and not the codification of an international custom. (54) That was the Court's assessment, with regard to Article 65 of the VCLT, in the judgment in *Racke* (55) and I believe that the same assessment may be extrapolated to Article 68 of the VCLT (although I recognise that there are differing views on this point). (56)

75. In this situation of relative uncertainty, which the States' recent practice on the revocation of notifications of withdrawal from international treaties does not dispel, I find it difficult to see how the Court could declare the content of Article 68 of the VCLT, that is the rule that notifications of withdrawal from a treaty made by a Member State may be unilaterally revoked at any time before they take effect, a *customary rule* in force.

76. However, regardless of whether or not Article 68 of the VCLT is a customary rule of international law, it may be a considerable source of inspiration as regards interpretation, as I shall now explain.

2. Application of the provisions of the VCLT on withdrawal from treaties to the European Union and its Member States

77. Are the rules of the VCLT on withdrawal from international treaties applicable to the withdrawal of a Member State from the European Union? If so, what might be the relationship between the VCLT and the provisions of Article 50 TEU?

78. The Treaty on European Union is an international treaty between States and, at the same time, the constituent instrument of an international organisation (the European Union). As such, it would be subject to the VCLT, in accordance with Article 5 thereof. (57) However, it must be borne in mind that the European Union is not a party to the VCLT, nor are several of its Member States (France, Romania). Accordingly, the provisions of the VCLT on withdrawal from a treaty, and the possibility of revoking that withdrawal, in particular Article 68 of the VCLT, are not applicable in EU law as rules of international conventions.

79. However, the rules of customary international law are binding upon the Member States and the European Union and may be a source of rights and obligations in EU law. (58)

80. Having set out my reservations that the rule of the revocability of notifications of withdrawal from treaties, contained in Article 68 of the VCLT, may be regarded as a rule of customary international law, I do not think that it may plausibly be used as a legal basis allowing a Member State to withdraw from the European Union outside of the procedure set out in Article 50 TEU.

81. The Treaties establishing the European Union contain an express clause on withdrawal (Article 50 TEU), which entails a *lex specialis* in respect of the convention rules (Articles 54, 56 and 64 to 68 of the VCLT) of international law on the subject. Thus, the withdrawal of a Member State from the Treaties establishing the European Union must, in principle, be carried out in accordance with the terms of Article 50 TEU.

82. Having said that, there is no reason that Articles 54, 56, 65 and 67 of the VCLT and, in particular, Article 68 of the VCLT may not be used to provide interpretative guidelines to assist in dispelling doubts about issues that are not expressly dealt with in Article 50 TEU. That is the case as regards the revocability of withdrawal notifications, on which Article 50 TEU is silent.

83. There is nothing unusual in that interplay. The Court has used the provisions of the VCLT on the interpretation of treaties, in particular Articles 31 and 32 thereof, (59) in order to clarify the meaning of provisions of the Treaties establishing the European Union, (60) international treaties between the European Union and third countries, provisions of secondary law (61) and even bilateral treaties between Member States, when a dispute is submitted to it under a special agreement between the parties (Article 273 TFEU). (62)

84. In the present case, it is necessary to interpret Article 50 TEU, which governs the right to withdraw. Withdrawal, as well as revision (Article 48 TEU), accession (Article 49 TEU) and ratification (Article 54 TEU) of the Treaties establishing the European Union, is connected with the origin of those treaties and represents a typical international law issue.

85. Article 50 TEU, the wording of which was inspired by Articles 65 to 68 of the VCLT, (63) is, I reiterate, *lex specialis* in respect of the general rules of international law on withdrawal from treaties, but not a self-contained provision which exhaustively governs each and every detail of that withdrawal process. (64) Thus, in order to fill the lacunae in Article 50 TEU, there is nothing to preclude recourse being had to Article 68 of the VCLT, even though it does not reflect, *stricto sensu*, a rule of customary international law.

B. Unilateral revocation of the notification of the intention to withdraw in the framework of Article 50 TEU

86. The procedure under Article 50 TEU, incorporated into the Treaty on European Union by the revision made by the Treaty of Lisbon, is initiated by the decision to withdraw, which must be adopted by the Member State ‘in accordance with its own constitutional requirements’.

87. The subsequent phases of the procedure have been summarised by the Court as follows: ‘... [as] consist[ing] of, first, notification to the European Council of the intention to withdraw, second, negotiation and conclusion of an agreement setting out the arrangements for withdrawal, taking into account the future relationship between the State concerned and the European Union and, third, the actual withdrawal from the Union on the date of entry into force of that agreement or failing that, two years after the notification given to the European Council, unless the latter, in agreement with the Member State concerned, unanimously decides to extend that period’. (65)

88. In order to determine whether, given its silence in that regard, Article 50 TEU allows the notification of the intention to withdraw to be revoked unilaterally, recourse must be had to the interpretative techniques normally used by the Court (66) and, in the alternative, to those provided for in Articles 31 and 32 of the VCLT.

89. I must state at the outset that, in my view, Article 50 TEU allows unilateral revocation by the notifying Member State, until such time as the agreement for withdrawal from the European Union is formally concluded.

1. *Literal and contextual interpretation of Article 50 TEU*

90. In general terms, it is permissible to defend both the proposition that everything which a provision does not prohibit is allowed and the proposition that the silence of the law implies the absence of a right. (67) Given that Article 50 TEU does not present a direct answer to the referring court's question, a literal approach cannot, in fact, be used and Article 50 TEU must be analysed in its context, that is by ascertaining its meaning having regard to its rationale, within the broadest normative framework of which it forms part.

91. Article 50(1) TEU governs the first stage of the procedure, and states that 'any Member State may decide to withdraw from the Union *in accordance with its own constitutional requirements*'. Consequently, that first (national) phase is a matter exclusively for the departing Member State, since withdrawal is a right recognised to every State that is party to the Treaties establishing the European Union.

92. The withdrawal decision, unilaterally adopted in the exercise of the departing Member State's sovereignty, (68) is, according to Article 50 TEU, only conditional upon having been adopted in accordance with that State's own constitutional requirements. The obligation to notify the European Council of the intention to withdraw and the two-year period to negotiate the agreement in which that intention will be embodied are only formal elements and do not limit the unilateral nature of the initial decision to withdraw.

93. As I have already set out, the way in which the right of withdrawal in Article 50 TEU is expressed is based on the rules of international law (especially on Articles 54 and 56 of the VCLT). It seems to me logical that that is so, because withdrawal from an international treaty is by definition a unilateral act of a State party. Like a treaty-making power, the right no longer to be bound (withdrawal or denunciation) by a treaty to which a State is a party is a manifestation of that State's sovereignty. If a State's decision to conclude a treaty is unilateral, so is its decision to withdraw from it.

94. The unilateral nature of the decision to withdraw is conducive to the possibility of unilaterally revoking the notification of that decision, until the moment at which the latter's effects become final. From that perspective, unilateral revocation would also be a manifestation of the sovereignty of the departing Member State, which chooses to reverse its initial decision.

95. Accordingly, the unilateral nature of the first phase extends also, in my view, to the second stage of the Article 50 procedure, that is, the negotiation phase, which begins with the notification of the intention to withdraw to the European Council and culminates two years later, unless there is an extension by unanimous decision of the Council. It is true, however, that in that second phase that unilateral nature appears to be counteracted by the EU institutions' actions, to which I shall return later.

96. The reasons which I set out below, in favour of withdrawal notifications being revocable, can, I believe, be put forward with greater cogency than those against such revocation (although, admittedly, the latter do not lack weight).

97. First, the substantive and procedural obligations imposed by Article 50 TEU on a Member State which decides to withdraw are very limited:

- It has to notify (presumably in writing, although this is not specified) its intention to the European Council, but it is not required to justify that intention, or to set out the reasons which lead it to leave the European Union.
- It has to wait two years from the notification, at the end of which the State may simply leave the European Union, (69) as the conclusion of an agreement is not a prerequisite for the withdrawal to be completed. (70)

98. Those features of the negotiation phase are an initial indication that the State which has notified its intention to withdraw retains, during the two-year period, its *control*, so to speak, of the will expressed in that notification. As occurs in other areas of law, in the absence of an express prohibition or a rule which provides otherwise, whoever has unilaterally issued a declaration of intent addressed to another party, may retract that declaration until the moment at which, by the addressee's acceptance, conveyed in the form of an act or the conclusion of a contract, it produces effects.

99. Secondly, Article 50(2) TEU states that ‘a Member State which decides to withdraw shall notify the European Council of its *intention*’, thereby activating the second phase of the procedure. The provision refers to the notification of the ‘intention’ to withdraw, and not to withdrawal itself, because withdrawal may only occur after the agreement is reached or, in the absence of an agreement, after two years have elapsed.

100. *Intentions* are not definitive and may change. Whoever notifies his intention to a third party may create an expectation in that party, but does not assume an obligation to maintain that intention irrevocably. For that effect to be produced, the communication of that intention would have to refer expressly to its being irrevocable.

101. Admittedly, that argument, rather focussed on the text, is not as compelling as it at first sight appears, since Article 50(2) TEU also uses the term *decision* (the ‘Member State which *decides* to withdraw shall notify ... its *intention*’), as does paragraph 1 (‘Any Member State may *decide*’). However, Article 50(2) TEU could have used the formula ‘shall notify that decision’ (or another similar formula), instead of ‘shall notify its intention’. Some meaning must be attributable to that wording, which is undoubtedly not due to an oversight.

102. It may, therefore, be considered that the use of the word ‘intention’ and of the present tense (‘which decides’ rather than ‘has decided’) in Article 50(2) TEU authorises the State to ‘retract’ during the process and not give effect to its initial intention to withdraw, as long as that is in accordance with its own constitutional requirements. (71)

103. Thirdly, there is an interdependence between the first and second phases of the procedure, which also highlights how the predominance of the unilateral character in the initial phase affects the succeeding phase. The negotiation may only be triggered after notification of the intention to withdraw, for which it is essential that the Member State has acted in accordance with its own constitutional requirements.

104. However, the withdrawal decision may be annulled, if the body having authority (ordinarily the highest courts of each State) holds that that decision was not adopted in accordance with the constitutional requirements. In that context, to my mind there is little doubt that the State which notified its intention must also make known that it unilaterally revokes that notification, as its initial decision lacked the essential precondition.

105. Although not exactly the same situation as that described in the preceding paragraph, if, as a result of action carried out in accordance with its constitutional requirements (for example, a referendum, a meaningful vote in Parliament, the holding of general elections which produce an opposing majority, among other cases), the Member State’s initial decision is reversed and the judicial and constitutional basis on which it was sustained subsequently disappears, I also believe that it is logical, in line with Article 50(1) TEU, that that State can and must notify that change to the European Council.

106. In both contexts, the first phase of the procedure loses its foundation, either because the original decision was invalidly adopted, or because the application of the national constitutional mechanisms have undermined that decision or deprived it of effect. (72) Logically, the second phase of the procedure must also be affected, since the premiss upon which it is based has fallen away. As there is no longer a constitutional basis for the withdrawal, the State must communicate to the European Council that it thereby revokes its previous notification of the intention to withdraw. (73)

107. The international practice set out above (74) supports that conclusion. The precedents which I have cited indicate, clearly, that a notification of withdrawal from an international treaty is revocable, when an infringement of the constitutional requirements of the State is highlighted or when there is a political change that gives rise to a change in the will of the departing State and the latter chooses to remain bound by that treaty.

108. Those precedents follow Article 68 of the VCLT, which, as has been seen, allows for the revocability of withdrawal notifications at any time before the withdrawal takes effect. Irrespective of whether Article 68 of the VCLT expresses a customary rule of international law, what is true is that Article 50 TEU is based on the VCLT, and I find no reason not to apply, by analogy, the same rule in the framework of the procedure for withdrawing from the European Union.

109. To insist on negotiating the agreement for withdrawing from the Treaties establishing the European Union with a Member State which no longer wishes to leave, after activating its constitutional mechanisms in order to reverse the initial decision, seems to me, moreover, a result contrary to common sense, one to which the systematic interpretation of Article 50 TEU should not lead.

110. From another perspective, if those mechanisms include the decision of a national parliament, which thereby contributes to establishing the features of a State's own 'national identit[y], inherent in [its political and constitutional] structures', linking that identity to its membership of the European Union, the principles underlying Article 4 TEU should favour the acceptance of that new decision, as a sign of the 'respect' referred to in Article 4(2) TEU.

111. Fourthly, I concur with the observations of Wightman and Others, in the sense that to deny that notifications of the intention to withdraw are revocable, when the will of a Member State has changed in accordance with its own constitutional requirements and it wishes to remain in the European Union, would de facto entail its forced exit from that international organisation.

112. Indeed, that refusal would be tantamount to an indirect expulsion from the European Union, when nothing in Article 50 TEU suggests that the withdrawal procedure may be converted into a means of expelling a Member State. Moreover, the Convention on the Future of Europe did not agree an amendment which proposed supplementing the Member States' voluntary right of withdrawal with a right of expulsion from the European Union with regard to Member States that persistently infringed the Union's values. (75)

113. Fifthly, the revocability of the notification of the intention to withdraw cannot be denied by arguing that the Member State wishing to remain in the European Union has the possibility (Article 50(5) TEU) of asking to rejoin the Union through the procedure under Article 49 TEU.

114. There is nothing, in my view, in Article 50 which envisages it as a 'one way street with no exits', pursuant to which all that a Member State could do, after notifying its intention to withdraw and subsequently reconsidering its decision, would be to wait two years to leave the European Union and immediately ask to rejoin. (76) It would seem to me equally contrary to the design of Article 50 TEU to negotiate the future membership during the second phase of the procedure, with its two-year time limit, once the will of the Member State has changed and it does not wish to leave the European Union. The systematic interpretation of Article 50 TEU cannot give rise to such illogical (or even incongruous) situations as these, simply because it is believed that the notification of the intention to withdraw cannot be revoked unilaterally.

115. Sixthly, the negotiation phase opened by the notification of the intention to withdraw does not change the notifying State's status as an EU Member State in all respects. That was confirmed by the Court in the *RO* judgment, when it stated that the notification 'does not have the effect of suspending the application of EU law in the Member State that has given notice of its intention to withdraw from the European Union and, consequently, EU law ... continues in full force and effect in that State until the time of its actual withdrawal from the European Union'. (77)

116. Consequently, the Member State which has activated Article 50 TEU in order to withdraw from the European Union may 'deactivate' it when its will changes, in accordance with its own constitutional requirements, since Article 50(1) TEU, now interpreted *sensu contrario*, continues to apply to it. The notification of the intention to withdraw opens a two-year period of negotiations, but does not deprive the notifying State of its status as a Member State with all the inherent rights, except for restricting its participation in the discussions and decisions of the European Council or Council concerning its withdrawal (Article 50(4) TEU).

117. I believe that the arguments which I have just set out following this analysis of Article 50 TEU have greater weight than those which, in the opposite direction, are propounded by the Commission and the Council in their written observations, as well as in a section of the legal literature. (78)

118. If I have correctly understood the Commission's and the Council's reasoning, which basically coincides, both institutions interpret Article 50 TEU in a manner which ascribes radically different characteristics to the initial phase and the intermediate and final phases of the withdrawal procedure.

119. In their view, the initial phase is wholly unilateral and remains under the Member State's control. By contrast, the intermediate phase (the negotiation) is bilateral or multilateral in nature, so that the powers of the EU institutions take precedence. As soon as the second phase is activated, the notifying Member State loses control over the procedure, with the result that it cannot revoke its withdrawal notification unilaterally. Revocation would only be feasible if agreed, by a unanimous decision of the European Council.

120. I do not share that interpretation.

121. It is true that the institutions intervene in a significant manner in the second phase of negotiating the withdrawal procedure:

- The European Council receives the notification of the intention to withdraw, which the departing Member State communicates to it.
- The EU institutions are empowered to negotiate the withdrawal agreement with the departing Member State, taking account of the framework for its future relationship with the European Union.
- The procedure includes the negotiation in accordance with Article 218(3) TFEU and the (possible) conclusion of the agreement on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. Whether or not the two-year negotiation period may be extended is a matter for the European Council, in agreement with the Member State concerned.

122. However, those powers of the EU institutions, which render multilateral the withdrawal procedure, do not completely eliminate unilaterality in the second phase, since, on the one hand, the premiss on which that stage is based is the notification of the decision (or more correctly, of the intention) to withdraw, by the Member State, the invalidity or unilateral reversal of which deprives the subsequent stages of their basis. On the other hand, that State is not under an obligation to reach an agreement on withdrawal from the Union and could simply allow the mandatory two-year negotiation period to elapse in order to complete its withdrawal, which reinforces the unilateral component in that stage of the process also.

123. The period of two years (a maximum if not extended) to negotiate withdrawal conditions is normal in the clauses contained in other international treaties. (79) It cannot be inferred from the existence of such a period that the notification of the intention to withdraw cannot be revoked unilaterally. Moreover, that period serves not only to prepare the withdrawal, but also as a ‘cooling off period’ so that the departing Member State may, if necessary, reconsider its initial intention and change its position. (80)

124. Nor does the fact that the European Council has the power to extend the period referred to mean that that extension is outside the notifying State’s control and leads it inevitably to have to leave the European Union, even though it has changed its view. The extension of the two-year period, in accordance with Article 50(3) TEU, is decided unanimously by the European Council, but ‘in agreement with the Member State concerned’. In other words, the European Council may not impose the extension on the Member State, which has both the power to make its withdrawal from the Union effective at the end of the period and the possibility of revoking its notification before the withdrawal agreement is formally concluded.

125. The Council also contends, as an argument against unilateral revocability, that the notification of the intention to withdraw begins to produce certain legal effects from the beginning of the second stage of the procedure and during that stage. (81) I consider, however, that the legal acts adopted by the European Union during the negotiation stage are not, strictly speaking, *effects* of the withdrawal notification, but measures concerned with the negotiation (hence the United Kingdom’s absence from the formations of the European Council and the Council discussing the negotiation process or the guidelines to direct that process) or agreements adopted *with a view to* the future withdrawal (the relocation of the seats of certain agencies, in order to ensure continuity without disruption). (82)

126. Those EU acts, the majority of which are of a formal nature, are, I reiterate, linked to the negotiation process (83) and their existence is no reason for precluding the notification of the intention to withdraw from being revoked. The related acts, such as those concerning the relocation of EU agencies, would not be affected by that revocation and only the possible financial costs they have engendered could give rise to disputes.

127. Indeed, the preparation and application of the formal acts connected with the United Kingdom’s withdrawal negotiations and of the related acts have generated a financial cost for the European Union, as has the establishment of a negotiating team devoted exclusively to Brexit. The Council argues that the European Union would have to bear those costs in the event of a unilateral revocation, which is in its view an argument against such an eventuality.

128. I do not find such reasoning convincing. The problem of who bears the costs (in the form of ‘collateral damage’) does not have as its only solution that which the Council seems to advocate. The negotiation of the conclusion of, or withdrawal from, any international treaty generates costs to be borne by the State parties and that rule should not have to be modified by the unilateral revocation of a withdrawal notification. Ultimately, I do not

believe that I am mistaken in stating that the financial costs (for the European Union and its citizens) arising from a Member State's withdrawal would far exceed the (minimal) costs generated by the revocation.

2. *Teleological interpretation of Article 50 TEU*

129. The second paragraph of Article 1 TEU provides that 'this Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe ...'.

130. As noted above, the European Union is required, under Article 4(2) TEU to respect the national identities of the Member States, 'inherent in their fundamental structures, political and constitutional'. The third paragraph in the preamble to the Charter of Fundamental Rights of the European Union ('the Charter') states that, in its action, the Union is to respect the national identities of the Member States.

131. Article 50(1) TEU is, in fact, an important sign of respect for the national identities of the Member States, acknowledging their right to withdraw from the European Union in accordance with their own constitutional requirements. In the same way that a Member State may, at a particular time, consider that its national identity is incompatible with membership of the European Union, there is no reason that that identity (which should not be understood as an unchanging, fossilised concept) may not become linked to its integration into the European Union.

132. I have explained above how the principle of respect for the constitutional identity of the Member States reinforces the systematic interpretation of Article 50 TEU that I am proposing. A teleological analysis leads to the same result. I consider an interpretation of Article 50 that is conducive to the revocability of the intention to withdraw to be more consistent with the design inherent in that principle, since it allows a change in the sovereign will of the Member State, adopted in accordance with its constitutional requirements,⁽⁸⁴⁾ to be taken into account, in order to halt a process of withdrawal from the European Union which that Member State has decided to reverse.

133. The objective of achieving 'an ever closer union among the peoples of Europe' also supports the interpretation of Article 50 TEU which accommodates the revocability of the notification of the intention to withdraw. That objective favours an interpretation of the rules of EU law which tends to strengthen, and not dissolve, the European Union. Not placing obstacles in the way of the continued EU membership of a Member State that decides to leave the European Union, but then changes its stance, in accordance with its constitutional requirements, and wishes to continue being a member, therefore appears, in my view, to be an especially appropriate interpretative approach.

134. By contrast, the withdrawal of a Member State is invariably a failure as regards the objective of integration. Where there are arguments of similar weight on both sides, the doctrine of *favor societatis* (in favour of society) has been regarded as a key element in determining the solution most consonant with the survival, and not the (partial) disintegration, of any association in which very strong links have been forged.

135. That interpretation is, in addition, the most favourable to the protection of the rights acquired by EU citizens, which the withdrawal of a Member State will inevitably restrict. The revocation of the notification to withdraw, by halting the notifying Member State's departure from the European Union, ensures that the citizens of that Member State, as well as those of the other Member States, continue to enjoy the rights of citizenship set out in the FEU Treaty and in the Charter.

136. The irrevocability of the notification, where the Member State has decided to reverse course, would lead, by contrast, to the *forced* exit of that Member State, with the ensuing reduction or loss of citizenship rights for the nationals of the departing Member State residing in the European Union and for the nationals of the other Member States residing in the departing Member State.

137. In short, the interpretation of Article 50 TEU that I propose (unilateral revocability of the notification of the intention to withdraw) is the interpretation which best reconciles the respect for the constitutional identities of the Member States with the objective of advancing the process of integration, ⁽⁸⁵⁾ in addition to supporting the protection of the rights of EU citizens.

3. *Historical interpretation of Article 50 TEU*

138. Article 50 TEU was preceded by Article I-60 of the unratified Treaty establishing a Constitution for Europe, the preparatory work ⁽⁸⁶⁾ for which was carried out by the Convention on the Future of Europe.

139. I believe that that preparatory work bears out the unilateral nature of the right of withdrawal and supports the interpretation of Article 50 TEU that I propose. The comments on Article 46 of the draft of the Convention *Praesidium* (87) confirm the predominance of unilaterality in the withdrawal procedure, including during the negotiation phase, by indicating that reaching an agreement (often called a *divorce agreement*) should not be a condition for withdrawal, since otherwise the concept of voluntary withdrawal would be deprived of its substance.

140. In addition, various amendments were proposed to the Convention on the Future of Europe that sought to make the decision to withdraw subject to substantive conditions, or to make that withdrawal dependent upon the conclusion of an agreement between the departing Member State and the Union. (88) All those amendments were rejected, which demonstrates the importance of unilaterality in the procedure laid down in Article 50 TEU.

141. The preceding literal, contextual, purposive and historical analyses of Article 50 TEU lead me to conclude that it allows a Member State to unilaterally revoke the notification of the intention to withdraw, until the withdrawal agreement is formally concluded.

4. *Conditions and limits applicable to the unilateral revocation of the notification of withdrawal*

142. If it is accepted that the notification of the intention to withdraw may be revoked unilaterally under Article 50 TEU, it remains to be determined whether that unilateral revocation is subject to certain conditions and limits, as I believe it is.

143. The first condition is a formal one. Like the notification of the intention to withdraw, the revocation of that notification must be carried out by means of a formal act of the Member State addressed to the European Council (Article 50(2) TEU). The revocation, like the notification of withdrawal, is a formal act relating to the life of a treaty and there must be a procedural parallel between the two. (89)

144. The second condition consists in respecting national constitutional requirements. The Member State's constitutional law requirements which applied to the adoption of the decision to withdraw, subsequently notified to the European Council (Article 50(1) TEU), should also be respected if the Member State decides to revoke that notification.

145. While this is an issue which falls to be determined by each Member State, if the national constitutional requirements include, for example, prior parliamentary authorisation for the notification of the intention to withdraw from the European Union (as is the case in the United Kingdom, according to the *Miller* judgment), (90) it is logical, in my view, that the revocation of that notification also requires parliamentary approval. This prevents a Member State from notifying spurious revocations, or ambiguous or unclear revocations (91) from which the position of the Member State cannot be clearly understood.

146. As regards the need to justify the revocation of the notification of withdrawal, if Article 50 TEU does not require such justification for the notification of the initial intention, nor is it indispensable for the revocation. Nevertheless, it would be reasonable for the Member State to explain to the other EU Member States the reasons for its change of position, which, since it runs counter to its previous actions, calls for an explanation.

147. A temporal limit on the revocation of notifications of the intention to withdraw may be inferred from Article 50(3) TEU: it is possible only within the two-year negotiation period that begins when the intention to withdraw is notified to the European Council. Logically, once the withdrawal agreement has been formally concluded, which implies the agreement of both parties, it is no longer possible to revoke the notification, since that notification has by that time already taken full effect.

148. A further limit on the exercise of the right of unilateral revocation arises from the principles of good faith and sincere cooperation (Article 4(3) TEU). (92)

149. The Commission and the Council have indeed highlighted that to allow unilateral revocation could give rise to abuse of the procedure laid down in Article 50 TEU. In their view, revocability would enable the Member State to negotiate its withdrawal agreement from an advantageous position with respect to the EU institutions and the other Member States, since it could revoke its notification and halt the negotiations if they were not favourable to it.

150. Moreover, according to the Commission and the Council, the Member State could resubmit its notification of intention to withdraw, thus triggering a new two-year negotiation period. According to the Council, the Member State could in this way prolong the negotiation period, circumventing Article 50(3) TEU, which grants the

European Council the power to decide, unanimously, to extend that period. The possibility of tactical revocations would, according to the Commission, run counter to the logic of the procedure laid down in Article 50 TEU.

151. Those arguments (especially the second) are actually the most substantial arguments in support of the position that unilateral revocation is not possible. I do not believe, however, that they are decisive to that extent.

152. In the first place, the possibility that a right may be abused or misused is, generally speaking, not a reason to deny the existence of that right. Rather, the abuse must be prevented through the use of the appropriate legal instruments.

153. In the second place, the antidote to the misuse of the right of withdrawal can be found in the general principle that abusive practices are prohibited, established by the Court, according to which EU law cannot be relied on for abusive or fraudulent ends and the application of EU legislation cannot be extended to cover abusive practices by economic operators. (93) That general principle could be applied in the context of Article 50 TEU, if a Member State engaged in an abusive practice of using successive notifications and revocations in order to improve the terms of its withdrawal from the European Union.

154. As regards the *tactical* revocations, mentioned by the Commission and the Council, there are two reasons why I do not attach the same importance to such revocations as those institutions.

155. The first reason is that there is nothing in the question referred – which is the only question that the Court of Justice has to answer – to suggest the misuse (in the sense of a misuse of powers, as a ground of invalidity of an act adopted by a public authority, referred to in Article 263 TFEU) of the power to revoke the initial decision. Moreover, any abuse could occur only when a *second* notification of the intention to withdraw is submitted, but not by unilaterally revoking the first.

156. The other reason is that it appears to me that, in practice, it would be extremely difficult for tactical revocations to proliferate, undermining a possibility which undoubtedly has serious consequences. The revocation is a decision that the departing Member State has had to adopt in accordance with its constitutional requirements. Since it entails the reversal of a previous decision of a constitutional nature, the change would require an alteration of the governing majority, the holding of a referendum, a ruling by the highest court of the country annulling the withdrawal decision or some other action that would be difficult to implement and would require the use of protracted and complex legal procedures. The obligation that a revocation must be carried out in accordance with the Member State's constitutional requirements is thus a filter which acts as a deterrent in order to prevent the abuse of the withdrawal procedure laid down in Article 50 TEU through such tactical revocations.

C. Agreed revocation of the notification of the intention to withdraw in the framework of Article 50 TEU

157. The referring court only asks the Court of Justice for an interpretation of Article 50 TEU in order to determine whether it allows a *unilateral* revocation of the intention to withdraw. It therefore does not ask for a ruling on the compatibility of an *agreed* revocation with that article.(94)

158. Nevertheless, the Commission and the Council, after denying in their written observations that Article 50 TFEU allows a unilateral revocation, have raised the possibility that that provision allows a revocation following a unanimous decision of the European Council.

159. If the Court accepts unilateral revocation, it will not need to respond to the arguments of the Commission and the Council. I shall nevertheless examine those arguments for the sake of completeness.

160. According to the Commission, if a Member State wished to revoke its notification of the intention to withdraw and remain a member of the European Union, it would be necessary to seek a mechanism to accommodate its wish, since unilateral revocation is not possible.

161. Since Article 50 TEU does not explicitly provide such a mechanism, the Commission and the Council submit that the revocation is feasible following a unanimous decision of the European Council. Given that Article 50(3) and (4) TEU grants the European Council the power to extend the negotiation phase, by unanimity and without the participation of the departing Member State, the revocation of the notification of the intention to withdraw should also be approved by unanimity by the European Council.

162. The Commission adds that the European Council must have that power, because it would not be viable to require the approval of all the Member States in accordance with their constitutional requirements, in view of the need to decide expeditiously on the acceptance of the revocation. In the event that the withdrawal has already taken place and the State wishes to rejoin the European Union, Article 50(5) TEU indeed leaves its re-entry in the hands of the Member States, through the accession procedure laid down in Article 49 TEU.

163. I accept that Article 50 TEU authorises a revocation by mutual consent of the departing Member State which changes its position and the EU institutions with which it is negotiating its withdrawal. If the stronger form (unilateral revocation) is accepted, the weaker form (agreed revocation) must also be accepted. That agreed revocation is, moreover, in line with the principle that inspired Article 54(b) of the VCLT, according to which the withdrawal from a treaty may take place 'at any time by consent of all the parties after consultation with the other contracting States'.

164. The possibility of that agreed revocation therefore would not prejudice the unilateral revocation of the notification of the intention to withdraw, which the departing Member State always maintains under Article 50 TEU.

165. That said, I do not believe that it is compatible with Article 50 TEU that the notification of the intention to withdraw may be revoked solely through a unanimous decision of the European Council (Article 50 format), as the Commission and the Council appear to propose, excluding the unilateral revocation.

166. In order to be agreed, the revocation by unanimous decision of the European Council would have to be sought by the departing Member State, with the result that, if the latter did not agree, the European Council could not impose the revocation, even by unanimous decision.

167. Article 50(3) TEU does not allow the second phase of negotiations to be extended, 'unless the European Council, *in agreement with the Member State concerned*, unanimously decides to extend this period'. By analogy, I believe that a request from the departing Member State is necessary, as a prerequisite of the European Council unanimously accepting the revocation of its notification.

168. That safeguard ensures the unilaterality of the revocation of the withdrawal decision. If the acceptance of the revocation of the notification of the intention to withdraw depended solely on a vote in the European Council, in Article 50 TEU format and by unanimity, the right to withdraw from (and, conversely, to remain in) the European Union would no longer be subject to the control of the Member State, its sovereignty and its constitutional requirements, and would be solely in the hands of the European Council.

169. To accept that the European Council, acting by unanimity, should have the last word on the revocation of the notification of the intention to withdraw would increase the risk of the Member State leaving the European Union against its will. It would suffice for one of the remaining 27 Member States to block the unanimous decision of the European Council (in Article 50 format) to frustrate the will of the Member State that has given notice of its desire to remain in the European Union. That State would leave (be expelled from) the European Union within two years of the notification of the intention to withdraw, against its will to remain a member of that international organisation.

VI. Conclusion

170. In the light of the foregoing considerations, I propose that the Court of Justice should answer the question referred by the Court of Session, Inner House, First Division (Scotland) as follows:

When a Member State has notified the European Council of its intention to withdraw from the European Union, Article 50 of the Treaty on European Union allows the unilateral revocation of that notification, until such time as the withdrawal agreement is formally concluded, provided that the revocation has been decided upon in accordance with the Member State's constitutional requirements, is formally notified to the European Council and does not involve an abusive practice.

¹ Original language: Spanish.

[2](#) Prime Minister's letter to Donald Tusk triggering Article 50, 29.3.2017. Full text at <http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>.

[3](#) *United Nations Treaty Series*, Vol. 1155, p. 331.

[4](#) The 2018 Act for the United Kingdom's withdrawal from the European Union.

[5](#) *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[6](#) *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, paragraph 26. Lord Neuberger stated: 'In these proceedings, it is common ground that *notice under Article 50(2)* (which we shall call "Notice") cannot be given in qualified or conditional terms and that, *once given, it cannot be withdrawn*. Especially as it is the Secretary of State's case that, even if this common ground is mistaken, it would make no difference to the outcome of these proceedings, *we are content to proceed on the basis that that is correct, without expressing any view of our own on either point ...*'

[7](#) European Union (Notification of Withdrawal) Act 2017, c. 9, section 1.

[8](#) Document EUCO XT 20004/17, of 29 April 2017, European Council Guidelines following the United Kingdom's notification under Article 50 TEU (<http://data.consilium.europa.eu/doc/document/XT-20004-2017-INIT/en/pdf>).

[9](#) Decision (EU, Euratom) XT 21016/17 of the Council of the European Union, of 22 May 2017, authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union (<http://data.consilium.europa.eu/doc/document/XT-21016-2017-ADD-1-REV-2/en/pdf>). A group of British citizens resident in various EU countries brought an action for annulment of that decision, with that action being held to be inadmissible by the General Court by judgment of 26 November 2018, *Shindler and Others v Council* (T-458/17, EU:T:2018:838).

[10](#) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. The text must undergo legal revision and is available only in its English-language version at https://www.consilium.europa.eu/media/37099/draft_withdrawal_agreement_incl_art132.pdf

[11](#) Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom. Text in English, at <https://www.consilium.europa.eu/media/37100/20181121-cover-political-declaration.pdf>.

[12](#) [2018] CSOH 8, <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csoh8.pdf?sfvrsn=0>.

[13](#) [2018] CSIH18, <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csih18.pdf?sfvrsn=0>.

[14](#) <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2018csoh61.pdf?sfvrsn=0>.

[15](#) See a critical analysis of that decision in Taylor, R. and Wilson, A., 'Brexit, the revocation of Article 50, and the path not taken: Wightman and Others for Judicial Review against the Secretary of State for Exiting the European Union'

Edinburgh Law Review, 2018, Vol. 22, pp. 417-422.

[16](#) The Opinions of the judges comprising the Division are attached to the decision [2018] CSIH 62 [http://www.bailii.org/scot/cases/ScotCS/2018/\[2018\]_CSIH_62.html](http://www.bailii.org/scot/cases/ScotCS/2018/[2018]_CSIH_62.html).

[17](#) On 19 October 2018, the defendant (the Secretary of State for Exiting the European Union) lodged an application at the referring court for permission to appeal to the United Kingdom Supreme Court against the reference for a preliminary ruling. The application was dismissed on 8 November 2018 by the Court of Session, Inner House, First Division, and on 20 November 2018 by the United Kingdom Supreme Court.

[18](#) Order of the President of the Court of 19 October 2018, *Wightman and Others*, C-621/18, EU:C:2018:851, paragraphs 9 and 11.

[19](#) Judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), paragraphs 24 and 25; of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324), paragraphs 15 and 16; of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514), paragraph 19; of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874), paragraph 54; of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236), paragraphs 50 and 155; and of 7 February 2018, *American Express* (C-304/16, EU:C:2017:524), paragraphs 31 and 32.

[20](#) In particular, it is not for the Court to engage in the discussion — reflected in the order for reference — on the conditions in which judicial review in the main proceedings is acceptable, nor on the assessment of the facts undertaken by the referring court for the purpose of applying the criteria laid down by Scots law. See, by analogy, the judgments of 16 June 2015, *Gauweiler and Others* (C-62/14, EU:C:2015:400), paragraph 26, and of 7 February 2018, *American Express* (C-304/16, EU:C:2018:66), paragraph 34.

[21](#) A general description of judicial review proceedings may be consulted in Harvie-Clark, S., ‘Judicial Review’, *SPICe Briefing* 16/62, Scottish Parliament, 2016.

[22](#) The Court answered the questions referred for a preliminary ruling in the context of a Scottish ‘judicial review’, without objecting to admissibility, in the judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845). Advocate General Bot also expressly adopted that position in his Opinion (C-333/14, EU:C:2015:527), points 19 to 24.

[23](#) The Court has already held admissible several requests for preliminary rulings concerning the interpretation or validity of secondary legislation made in judicial review claims, in particular in the cases that resulted in the judgments of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco* (C-491/01, EU:C:2002:741); of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312); of 8 July 2010, *Afton Chemical* (C-343/09, EU:C:2010:419); of 4 May 2016, *Pillbox 38* (C-477/14, EU:C:2016:324), and *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325); and of 7 February 2018, *American Express* (C-304/16, EU:C:2018:66).

[24](#) In accordance with the Court’s settled case-law, the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law (see, to that effect, judgments of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 41; of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 42; of 27 February 2014, *Pohotovost’*, C-470/12, EU:C:2014:101 paragraph 29; and of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 130).

[25](#) Order of 14 March 2013, *Loreti and Others* (C-555/12, EU:C:2013:174), paragraph 20; judgments of 16 November 1981, *Foglia* (244/80, EU:C:1981:302), paragraph 18, and of 12 June 2008, *Gourmet Classic* (C-458/06, EU:C:2008:338), paragraph 26.

[26](#) Opinion of Lord Drummond Young, in annex to the order for reference, paragraph 59: ‘... departure from the European Union using the mechanism in Article 50 involves venturing into completely new territory. In these circumstances, ascertaining the legal principles that apply to the use of Article 50 and its consequences are a matter of great practical importance; to suggest otherwise appears to me to be manifestly absurd. The present situation should be contrasted with the position before Article 50 was invoked, when the consequences of that act and the possibility of revoking it were truly hypothetical. Furthermore, many of the consequences of the Article 50 declaration will become material as soon as the two-year time limit specified in that declaration comes into effect, on 29 March 2019. After that, the possibility of revocation will plainly be hypothetical. If the rights and powers of interested parties cannot be determined before that date, the country, and its legislature and executive, will be, metaphorically, sleepwalking into the consequences. That is plainly an impractical and undesirable result.’

[27](#) Order for reference, paragraph 10.

[28](#) See paragraphs 7 and 27 of the Opinion of Lord Carloway, in annex to the order for reference.

[29](#) ‘Declarator’ means the judicial ruling issued in response to the claim of the party seeking a declaration favourable to his rights or status.

[30](#) Judgment of 7 February 2018, C-304/16, EU:C:2018:66.

[31](#) Opinion of 6 July 2017, *American Express* (C-304/16, EU:C:2017:524), points 42 to 47.

[32](#) For authors favourable to revocability of the notification of the intention to withdraw, see Craig, P., ‘Brexit: A Drama in Six Acts’, *European Law Review*, 2016, Vol. 41, pp. 447 to 468; Eeckhout, P., and Frantziou, E., ‘Brexit and Article 50 TEU: A constitutionalist reading’, *Common Market Law Review*, 2017, Vol. 54 (3), pp. 695 to 734; Edward, D., Jacobs, F., Lever, J., Mountfield, H., and Facenna, G., ‘In the matter of Article 50 of the Treaty on European Union’ (‘The Three Knights’ Opinion’), 2017; Sari, A., ‘Reversing a withdrawal notification under Article 50 TEU: can a Member State change its mind’, *European Law Review*, 2017, Vol. 42, pp. 451 to 473; Tridimas, T., ‘Article 50: An Endgame without an End?’, *King’s Law Journal*, 2016, Vol. 27, pp. 297 to 313.

For authors favourable to irrevocability, see Gatti, M., ‘The Article 50 Procedure for Withdrawal from the EU: A Well-Designed Secession Clause’, Paper presented at the EU Studies Association (EUSA) Conference, Miami, 4-6 May 2017. Panel 3I – *Brexit: Impact upon European Law and Integration*, p. 10 (<https://www.eustudies.org/conference/papers/download/431>); Papageorgiou, I., ‘The (ir-)revocability of the withdrawal notification under Article 50 TEU’, *Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament*, 2018; Ostendorf, P., ‘The withdrawal cannot be withdrawn: the irrevocability of a withdrawal notification under Article 50(2) TEU’, *European Law Review*, 2017, Vol. 42(5), pp. 767 to 776.

[33](#) ‘Once the choice has been made, the right to choose is exhausted’ (*Digest* 33.5.2.2 to 3).

[34](#) This is precisely the case of Article 50 TEU.

[35](#) Articles 64 to 68 of the VCLT lay down the rules of the procedure to be followed for withdrawing from a multilateral treaty, pursuant to Articles 54 and 56 of the VCLT.

[36](#) In the latter case, the party must give not less than 12 months' notice of its intention to withdraw from the treaty.

[37](#) See the reference work of Helfer, R.L.: 'Exiting treaties', *Virginia Law Review*, Vol. 91, November 2005, pp. 1579 to 1648; Brölmann, C., Collins, R., El Droubi, S., and Wessel, R., 'Exiting International Organisations. A brief introduction', draft to be published in *International Organisations Law Review*, 2018, No 2; and Bradley, C., and Helfer, R.L., 'Treaty Exit in the United States: Insights from the United Kingdom or South Africa?', *AJIL*, 2018, Vol. 111, pp. 428 to 433. The African Union has warned of mass withdrawals from the International Criminal Court: *Decision on the International Criminal Court*, AU Doc Assembly/AU/Dec. 622, (XXVIII), 31 January 2017, and *Annex-Withdrawal Strategy Document* to the *Decision on the International Criminal Court*, AU Doc Assembly/AU/Dec.672 (XXX) (29 January 2018).

[38](#) Dock, M.C., 'Le retrait des membres des organisations internationales de la famille des Nations Unies', *Annuaire français de droit international*, 1994, p. 111.

[39](#) Article II(6) (paragraph approved at the 8th session (1954) of the General Conference (8 C/Resolutions, p. 12)) of the Constitution of the United Nations Educational, Scientific and Cultural Organisation, signed in London on 16 November 1945, provides: 'Any Member State or Associate Member of the Organisation may withdraw from the Organisation by notice addressed to the Director-General. Such notice shall take effect on 31 December of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the Organisation on the date the withdrawal takes effect. Notice of withdrawal by an Associate Member shall be given on its behalf by the Member State or other authority having responsibility for its international relations'.

[40](#) <http://www.unesco.org/new/en/member-states/member-states-information/>.

[41](#) Spain left the League of Nations in 1926, but revoked its decision in 1928 and participated actively in its ninth session.

[42](#) Papageorgiou, I., op. cit. in footnote 32, pp. 9 and 10.

[43](#) <https://www.mire.gob.pa/index.php/es/noticias-mire/4755->

[44](#) The text of that Treaty, which lacks a clause expressly providing for withdrawal, can be consulted at <http://www.parlacen.int/Informaci%C3%B3nGeneral/MarcoPol%C3%ADticoJur%C3%ADdico/TratadoConstitutivo.aspx>

[45](#) Judgment of the Corte Suprema de Justicia (Pleno) (Supreme Court of Justice, Panama (Plenary session)), of 2 February 2012, https://vlex.com.pa/vid/accion-inconstitucionalidad-sala-pleno-375091942?_ga=2.13901559.115975578.1539971406-1717765214.1539971406.

[46](#) <http://www.parlacen.int/Actualidad/Actualidad/tabid/146/EntryId/369/Reintegro-de-Panama-al-PARLACEN.aspx>

[47](#) The text of the Rome Statute was circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. More recently, the African Union has threatened the ICC with mass withdrawals (*Decision on the International Criminal Court*, AU Doc Assembly/AU/Dec. 622 (XXVIII) (31 January 2017); and *Annex-Withdrawal Strategy Document* to the *Decision on the International Criminal Court*, AU Doc Assembly/AU/Dec.672 (XXX) (29 January 2018)).

[48](#) *Assembly of States Parties President welcomes Gambia's decision not to withdraw from the Rome Statute*, ICC (Press Release), 17 February 2017, at <https://www.icc-cpi.int/Pages/item.aspx?name=PR1274>.

[49](#) The reason for this was the refusal to arrest and surrender Sudan's President Al Bashir to the International Criminal Court during his attendance of the African Union summit held in South Africa in June 2015.

[50](#) *Assembly of States Parties President welcomes the revocation of South Africa's withdrawal from the Rome Statute*, ICC (Press Release), 11 March 2017, at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1285>.

[51](#) The Government had notified the withdrawal without the prior approval of the South African Parliament, which, according to the High Court, constituted an infringement of the South African Constitution, and that Court therefore ordered the Government to revoke that notification. Judgment of the High Court of South Africa (Gauteng Division, Pretoria), Case No 83145/2016, of 22 February 2017, *Democratic Alliance v. Minister of International Relations and Cooperation*, 2017 (3) SA 212 (GP).

[52](#) The draft was approved by 94 votes in favour, none against and eight abstentions. See the 28th Plenary Meeting (16 May 1969), in United Nations, Official Records of the United Nations Conference on the Law of Treaties, Second Session (New York: United Nations, 1970), p.157.

[53](#) Against that proposition, see Tzanakopoulos, A., 'Article 68 of the 1969 Vienna Convention on the Law of Treaties', in Oliver Corten, and Pierre Klein, eds., Oxford University Press, Vol. II, p. 1565. Krieger, H., 'Article 68', in Dörr, Oliver, Schmalenbach, Kirsten, (eds.), *Vienna Convention on the Law of Treaties – A Commentary*, 2nd ed., Springer, Berlin, 2018, p. 1259, adopts a position more favourable to the customary nature of Article 68.

[54](#) In the judgment of 3 February 2006, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda) (new application: 2002)*, I.C.J. Reports, 2006, p. 6, paragraph 125, the International Court of Justice held that Article 66 of the VCLT was not declarative of international law. However, the same court, in the judgment of 25 September 1997, *Gabčíkovo – Nagymaros Project (Hungary v Slovakia)*, I.C.J. Reports 1997, p. 7, paragraph 109, held that Articles 65 and 67 of the VCLT if not codifying customary law, at least reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith.

[55](#) Judgment of 16 June 1998 (C-162/96, EU:C:1998:293), paragraph 59: 'the specific procedural requirements ... laid down [in Article 65 of the VCLT] do not form part of customary international law'. Advocate General Jacobs was even clearer in his Opinion in that case (EU:C:1997:582), in point 96, stating that 'Article 65 of the Vienna Convention lays down the relevant procedural requirements but those requirements do not seem precisely to reflect the requirements of customary international law. It seems that, as might be expected, the provisions of the Vienna Convention concerning procedural requirements are more specific and more concrete than the rules of customary international law'.

[56](#) On this issue, see the opposing views defended by Sari, A., op. cit. in footnote 32, No 3, pp. 466 to 469, in favour of Article 68 being regarded as evidencing a customary rule, and Papageorgiou, I., op. cit. in footnote 32, pp. 13 to 16, in whose view Article 68 is a progressive development rule.

[57](#) Article 5 of the VCLT, concerning treaties constituting international organisations and treaties adopted within an international organisation, provides that that convention 'applies to any treaty which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation without prejudice to any relevant rules of the organisation'.

[58](#) Judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118), paragraph 47: 'the European Union is bound, in accordance with settled case-law, when exercising its powers, to observe international law in

its entirety, including not only the rules and principles of general and customary international law, but also the provisions of international conventions that are binding on it (see, to that effect, judgments of 24 November 1992, *Poulsen and Diva Navigation*, C-286/90, EU:C:1992:453, paragraph 9; of 16 June 1998, of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 291; and of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 101 and 123)'.

[59](#) Article 31(1) of the VCLT provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 32 of the VCLT recognises, as supplementary means of interpretation, in particular, the use of the preparatory work of the treaty and the circumstances of its conclusion.

[60](#) The judgment of 15 September 2011, *Commission v Slovakia* (C-264/09, EU:C:2011:580), paragraph 41, states that 'according to settled case-law, the purpose of the first paragraph of Article 307 EC is to make clear, in accordance with the principles of international law, as set out in, inter alia, Article 30(4)(b) of the Vienna Convention on the Law of Treaties of 23 May 1969, that the application of the EC Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder'. See also the judgment of 14 October 1980, *Burgoa* (812/79, EU:C:1980:231), paragraph 8.

[61](#) Judgments of 25 February 2010, *Brita* (C-386/08, EU:C:2010:91), paragraph 43; of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461), paragraph 291; of 24 November 2016, *SECIL* (C-464/14, EU:C:2016:896), paragraph 94; of 21 December 2016, *Council v Frente Polisario* (C-104/16 P, EU:C:2016:973), paragraph 86; and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118), paragraph 58. The judgment of 11 July 2018, *Bosphorus Queen Shipping* (C-15/17, EU:C:2018:557), paragraph 67, states: 'In order to interpret the provisions of the Montego Bay Convention it is necessary to refer to the rules of customary international law reflected by Article 31 of the Vienna Convention, which are binding on the EU institutions and are part of the EU legal order ..., and from which it is clear that a treaty must be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[62](#) Judgment of 12 September 2017, *Austria v Germany* (C-648/15, EU:C:2017:664), paragraph 39.

[63](#) This is clear from the preparatory work of the European Convention, which formed the basis for the wording of Article 50 TEU. See the document CONV 648/03, *Title X: Union Membership*, 2 April 2003, Annex II, p. 9, <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00648.en03.pdf>, according to which: 'This provision does not appear in the current Treaties. It establishes the procedure to be followed if a Member State were to decide to withdraw from the European Union. *The procedure laid down in this provision draws on the procedure in the Vienna Convention on the Law of Treaties*' (emphasis added).

[64](#) Contrary view of Odermatt, J., 'Brexit and International law: disentangling legal orders', *Emory International Law Review*, Vol. 31, 2017, p. 1065.

[65](#) Judgment of 19 September 2018, *RO* (C-327/18 PPU, EU:C:2018:733), paragraph 46.

[66](#) According to the Court's settled case-law, for the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgments of 25 January 2017, *Vilkas*, C-640/15, EU:C:2017:39, paragraph 30, and of 16 November 2016, *Hemming and Others*, C-316/15, EU:C:2016:879, paragraph 27).

[67](#) ‘*Ubi lex voluit dixit, ubi noluit tacuit*’ (when the law wanted to regulate the matter further, it did so; when it did not want to regulate the matter further, it remained silent).

[68](#) The Commission acknowledges that ‘the right of withdrawal from the Union is a unilateral right of each Member State’ (written observations, paragraph 17).

[69](#) It has, therefore, been stated that the right of withdrawal in Article 50 TEU is unilateral and unconditional, but not immediate. See Closa Montero, C., ‘Interpreting Article 50: exit and voice and ... what about loyalty?’, *EUI Working Paper RSCAS 2016/71*, pp. 12 to 16, and Mariani, P., *Lasciare l’Unione Europea. Riflessioni giuridiche sul recesso nei giorni di Brexit*, Egea, Milan, 2018, pp. 94-101.

[70](#) At most, the principle of sincere cooperation would oblige the departing State to commence negotiations with the European Union in order to set the terms of withdrawal, although this as an obligation as to conduct, and not as to the result to be achieved.

[71](#) Edward, D., Jacobs, F., Lever, J., Mountfield, H., and Facenna, G., op. cit. in footnote 32, pp. 18 and 19.

[72](#) To that effect, Craig, P., op. cit. in footnote 32, p. 464, and Eeckhout, P., and Frantziou, E., op. cit. in footnote 32, pp. 712 and 713.

[73](#) I am unconvinced by the argument that once the intention to withdraw has been notified to the European Council, the procedure starts and can in no case be reversed, so that any change in the State’s initial decision, in accordance with its own constitutional requirements, is irrelevant and cannot stop the course of the withdrawal procedure, as revocation of the notification is unfeasible (Gatti, M.: op. cit. in footnote 32).

[74](#) Points 68 to 70 above.

[75](#) Only the possibility of suspending certain of the Member States’ rights in the cases provided for under the current Article 7 TEU was agreed. See <http://european-convention.europa.eu/docs/Treaty/pdf/46/global46.pdf>, p. 5.

[76](#) Derrick Wyatt QC describes that possibility as not making sense in the *House of Lords European Committee*, 11th Report of Session 2015-16, ‘The Process of Withdrawing from the European Union’, May 2016, paragraph 10, available at <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldcom/138/138.pdf>.

[77](#) Judgment of 19 September 2018, *RO* (C-327/18 PPU, EU:C:2018:733), paragraph 46.

[78](#) See, inter alia, the authors cited in footnote 32.

[79](#) For example, Article II(6) of the Constitution of the United Nations Educational, Scientific and Cultural Organisation.

[80](#) Closa Montero, C., op. cit. in footnote 69, p. 15.

[81](#) The Member State ceases to participate in the discussions and decisions of the European Council and the Council concerning its withdrawal (an ‘Article 50’ format was created for the meetings and decisions of the European Council, the

Council, Coreper and the working groups on Brexit). The negotiating guidelines, issued by the European Council, and the Council's decisions in order to carry out the negotiations with the departing Member State are also necessary.

[82](#) See Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines Agency (OJ 2018 L 291, p. 3), and Regulation (EU) 2018/1717 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EU) No 1093/2010 as regards the location of the seat of the European Banking Authority (OJ 2018 L 291, p. 1).

Council Decision (CFSP) 2018/1083 of 30 July 2018 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (OJ 2018 L 194, p. 142) has also provided for the Headquarters of that EU operation to be transferred from Northwood (United Kingdom) to Rota (Spain), with the exception of the Maritime Security Centre Horn of Africa, which will be located in Brest (France).

[83](#) The same can be said of the Proposal for a Regulation of the European Parliament and of the Council on the apportionment of tariff rate quotas included in the WTO schedule of the Union following the withdrawal of the United Kingdom from the Union and amending Council Regulation (EC) No 32/2000, contained in Document COM(2018) 312 final, of 22 May 2018.

[84](#) In the history of the European Union there have been (unilateral) changes in approach to the integration process. The Danish referendums on ratification of the Maastricht treaty and the referendums in Ireland on ratification of the Nice Treaty and the Lisbon Treaty are good illustrations of this.

[85](#) Sari, A., op. cit. in footnote 32, p. 472.

[86](#) It should be noted that, under Article 32 of the VCLT, 'the preparatory work of the treaty and the circumstances of its conclusion' are a supplementary means of interpreting treaties.

[87](#) See document CONV 648/03, Title X: *Union Membership*, 2 April 2003, Annex II, p. 9, <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00648.en03.pdf>, in which it is stated that: 'This provision does not appear in the current Treaties. It establishes the procedure to be followed if a Member State were to decide to withdraw from the European Union. The procedure laid down in this provision draws on the procedure in the Vienna Convention on the Law of Treaties.

The Convention's attention is drawn to three points:

- while it is desirable that an agreement should be concluded between the Union and the withdrawing State on the arrangements for withdrawal and on their future relationship, it was felt that such an agreement should not constitute a condition for withdrawal so as not to void the concept of voluntary withdrawal of its substance; ...'

[88](#) Document CONV 672/03, of 14 April 2003, Summary sheet of proposals for amendments concerning Union membership: Draft Articles relating to Title X of Part One (Articles 43 to 46), <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00672.en03.pdf>.

[89](#) In the case of the United Kingdom, since the notification of withdrawal was carried out by means of a letter from the British Prime Minister, a similar instrument would suffice to communicate the revocation to the European Council.

[90](#) See footnote 5.

[91](#) Benrath, D., 'Bona fide and revocation of withdrawal: how Article 50 TEU handles the potential abuse of a unilateral revocation of withdrawal', *European Law Review*, 2018, No 2, pp. 243 to 245.

[92](#) In accordance with the principle of sincere cooperation, enshrined in the first paragraph of Article 4(3) TEU, the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties (judgments of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 42, and of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 109). According to the Court, 'that principle does not authorise a Member State to circumvent the obligations that are imposed upon it by EU law' (judgment of 18 October 2016, *Nikiforidis*, C-135/15, EU:C:2016:774, paragraph 54).

[93](#) See, inter alia, judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881), paragraph 27.

[94](#) The academic literature has, in general, been favourable to accepting the agreed revocation of the intention to withdraw, when agreed between the notifying State and the other Member States of the European Union. See, inter alia, Edward, D., Jacobs, F., Lever, J., Mountfield, H., and Facenna, G., op. cit. in footnote 32, p. 19.