**CASE C-621/18**

**IN THE EUROPEAN COURT OF JUSTICE**

REQUEST FOR A PRELIMINARY RULING

FROM THE COURT OF SESSION, SCOTLAND:

***ANDY WIGHTMAN MSP and others***

 ***Petitioners***

***and***

***SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION***

***Respondent***

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**SPEECH**

**ON BEHALF OF THE PETITIONERS**

**AT THE ORAL HEARING**

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Grande Salle Palais - Niveau 2 - Full Court

27 November 2018, 9am

**Mr President, Advocate General, Members of the Court:**

1. *No* party before this Court argues that a Member State *cannot* *revoke* its Article 50 TEU notification of intention to withdraw from the Union
2. The Council and the Commission both *agree* with the petitioners, *and* with the additional parties, that such a revocation *is*, indeed, *possible*.
3. However, the Council and the Commission go on to say that a Member State’s revocation will be *effective*, *only* if it is *accepted* by a *unanimous* decision of the European Council.
4. But this has *no basis* in the terms of the Treaties.
5. The Petitioners’ case, by contrast, is that it is *fundamental* to the Treaties - and to the values of the European Union - that a Member State *can* choose to revoke its withdrawal from the Union, *without* the need for the unanimous agreement of all the *other* Member States.
6. If the Council and Commission were *correct* that *unanimity* in the European Council is required, then a Member State which had decided in accordance with its constitutional requirements to revoke its notification could still be forced out of the EU - against its wishes and those of its people - by the vote of just one *other* Member State.
7. Such a veto might be exercised for that *objecting* State’s *own* immediate and purely internal political reasons, rather than in the wider interests of the EU, and its citizens, as a whole.
8. The possibility of the *expulsion* of a State from the EU in these circumstances runs *counter* to the spirit of the Treaties, and finds no basis in the wording, purpose or intent of Article 50 TEU.
9. And it is *contradicted* by the *travaux préparatoires* to Article 50 TEU.
10. Amendments allowing for the expulsion of a Member State from the EU were *expressly rejected* by the drafters. [[1]](#footnote-1)
11. Inserting a requirement of unanimity in the European Council to make a Member State’s revocation of its withdrawal *effective*, would constitute a wholly unwarranted re-drafting of the Treaty.
12. It would curtail one of *the* most significant rights of a State and its peoples - to decide democratically whether *or not* to remain in the European Union.
13. And it would ride roughshod over the constitutional principles which the EU protects and holds dear, namely:
* *respecting* human dignity, freedom, equality and solidarity *within* the Union;
* *upholding* democracy and the rule of law *across* the Union, and
* *placing* the rights of the individual EU citizen at the very heart of the Union.

1. It is striking that the Council and Commission have said almost *nothing* about these principles. Instead, *they* base their request for this Court to write a wholly *new* provision *into* the Treaties, on the following six arguments.
2. ***First***, the *Council* says that the notification of a State’s intention to *withdraw* requires the Council and Commission to take *action* in response to the notification, and to incur *costs* in facilitating the consequent negotiation process. [[2]](#footnote-2)
3. This is true - but it is *irrelevant* to the question of law before this Court.
4. Actions are required from - and costs may be incurred by - the institutions, in response to a *variety* of unilateral actions taken by an individual Member State under the Treaties - for example, where a Member State maintains or introduces national provisions which derogate from harmonising internal market measures, [[3]](#footnote-3) or if it imposes *new* national technical standards for products. [[4]](#footnote-4)
5. But the fact that costs *are* incurred by the institutions in responding to these actions, does *not* mean that that Member State is then to be *forbidden* - except with the agreement of the institutions and/or all of the other Member States - from *withdrawing* its proposed measures.
6. In any event, the relative costs incurred by the institutions, or by the other Member State, is *not* the issue before the court.
7. And, for all we know, *greater* costs may result to the EU and to the other Member States in the event of a Member State *withdrawing from the EU,* rather than its deciding to revoke its withdrawal and *remaining in the EU*.
8. ***Secondly*** the Council says that the Article 50 TEU withdrawal notification produces immediate *legal* effects, for example the exclusion of the withdrawing State from meetings of the Council when discussing that State’s withdrawal. [[5]](#footnote-5)
9. But this is simply to recognise that, *for the purposes of the exit negotiations only*, the fact of notification puts the notifying State in a different position from that of the other members of the Council.
10. And just the same thing happens when *a group of* Member States invokes the Treaties’ provisions on “enhanced co-operation”. [[6]](#footnote-6) Participation and voting rights within the Council are *temporarily* altered for the purposes of, and only of, that enhanced co-operation.
11. In all other respects, the Article 50(2) TEU notification - just like the invocation of Article 20 TEU enhanced co-operation procedure – leaves the legal obligations of the Member States under the Treaties unchanged.
12. The *Commission accepts* this. [[7]](#footnote-7)
13. Indeed this *Court* has expressly ruled that EU law - and, in particular, the principles of mutual trust and mutual recognition – all continue in full force and effect in, and in relation to, a notifying Member State, until the time of its *actual withdrawal* from the European Union. [[8]](#footnote-8)
14. The ***third*** argument from the Council [[9]](#footnote-9) and from the Commission [[10]](#footnote-10) is that, *although* the notification of an intention to withdraw is *unilateral*, the negotiation *process* is *multilateral*. And Article 50(3) TEU provides that this *negotiation process* can *only* be extended *beyond two years* at the request of the withdrawing State, and on the basis of a unanimous decision of the European Council.

1. Again, this is true, [[11]](#footnote-11) but it does *not* answer the question before this Court. The negotiation period requires the consent of the European Council for it to be extended, precisely *because* *negotiation* is a multilateral process.

1. But deciding whether or not to *revoke an earlier notified intention to withdraw* is a decision *of the individual Member State* alone.
2. So Article 50(3) TEU tells us *nothing* about procedures applicable to when a Member State wishes to revoke its intention to withdraw.
3. ***Fourth,*** the Commission [[12]](#footnote-12) and the Council [[13]](#footnote-13) say that, once triggered, Article 50 TEU is designed to defend the “interests of the institutions” and *not* to further the interests of the withdrawing State.
4. We do not agree. Article 50 TEU *of course* affects the institutions. But the purpose of Article 50 TEU is to *regulate* the *process* of a Member State’s withdrawal, and to uphold the interests of the EU *as a whole*.
5. It is *not* there to serve *just* the interests of the EU’s institutions, or indeed *just* the interests of the remaining Member States.
6. Yet the Council and Commission treat Article 50 TEU as if it *were* simply a provision of *international* law, which creates mutual obligations among the *Governments* of the Member States and *with* the Institutions of the EU.
7. But, as *van Gend & Loos* reminds us:
* the preamble to the Treaties refers not only to *Governments* but to *Peoples*;
* the Union has established “a new legal order, the subjects of which comprise not only Member States but also their *nationals*”;

and

* that, EU law “is also intended to confer upon them rights which become part of *their legal heritage*”. [[14]](#footnote-14)
1. It *cannot* be in the interests of the EU as a whole to *force* a Member State to leave the EU against the wishes of the people. The Union’s wider interests lie in States *remaining* in the EU, when their peoples wish to do so.
2. The Council and Commission are strikingly silent when it comes to these wider interests of the Union.
3. They say *nothing* about how withdrawal from the Union *removes and diminishes* the rights of individual EU citizens.
4. They fail to acknowledge that the *revocation* of a Member State’s intention to withdraw from the EU will, in fact, *preserve and protect* those individual citizens’ rights.
5. *That* should be a *compelling consideration*, in determining where the balance of any interests lies in Article 50 TEU.

1. *Our* interpretation of the Treaty - which results in the *better protection* of individual citizens’ EU law rights – should, *on those grounds*, be preferred.
2. ***Fifth,*** the Council [[15]](#footnote-15) and the Commission [[16]](#footnote-16) say that unilateral revocation of an intention to withdraw would *create legal uncertainty* for the EU institutions, and for the remaining Member States, because the duration of the withdrawal process would then be in the hands *solely* of the withdrawing Member State.

1. With respect, this argument makes *no* sense. Article 50 TEU is clear that withdrawal from the EU only becomes definitive *after* the negotiating period has ended. The outcome of any process of negotiation is *never* going to be certain.
2. But allowing for a Member State, in the course of the negotiating period, to be able to decide unilaterally *against* withdrawal restores and enhances legal certainty. An *effective* revocation means that the situation in law is *restored* to what it was before notification. So a*ll* concerned (institutions, Member States and individual EU citizens) again know their respective rights and obligations.
3. Mr President, Members of the Court: the *reality* is that the Commission and Council are asking this Court to insert an *entirely new subsection* in Article 50 TEU. And it is a provision which, if read into the Treaty, would *increase* arbitrariness and uncertainty in the process around the (non-)withdrawal of a Member State from the Union.
4. The Treaty makes *express* provision in Articles 50(2) and 50(4) TEU that a withdrawal agreement may be *concluded* by the Council (after the consent of the European Parliament is obtained) on the basis of a specifically quantified Qualified Majority Voting (QMV) (at least 72%, rather than just 55% of the representatives of the EU-27 Member States on the Council). [[17]](#footnote-17)
5. Yet without explaining why, the Council and the Commission *suggest* that the *lesser step* of a Member State *revoking* its withdrawal notice can only be done by *unanimity* in the European Council, and yet *without any involvement* of the European Parliament.
6. Given the care which the drafters of the Treaty took in specifying just what kind of qualified *majority* is required for *concluding* a withdrawal agreement it seems *highly unlikely* that the drafters of the Treaty envisaged that *unanimity* in the European Council would be required *not to conclude* *any* withdrawal agreement because the Member State no longer wished to withdraw.
7. Re-writing and inserting into the Treaty a procedural provision of such *specificity* goes beyond all and any proper canon of construction.
8. With respect, the Council and the Commission are inviting this Court to act *unconstitutionally* and in contravention of the *rule of law* by re-writing the Treaty. The petitioners submit that this invitation should be declined.
9. The ***final*** argument from the Commission [[18]](#footnote-18) and the Council [[19]](#footnote-19) concerns abuse of rights. These institutions express the concern that if the right to unilateral revocation were recognised, this would permit a Member State to engage in “strategic manipulation” and “purely tactical revocation” in order to try to *change* the EU’s policies or give the withdrawing State more breathing space.
10. The institutions are, of course, *assuming* that a revocation not only causes the two year countdown clock to *stop*, but automatically *re-winds it back to the beginning*. But that is an interpretation of these Treaty provisions which would need to be argued for, rather than simply *assumed.*
11. This question remains to be determined by the court were there ever to be any attempt by a Member State, which seems highly unlikely, to submit a second notification of withdrawal after revoking its first.
12. In any event, the possibility for a right to be *abused* is not an argument for saying that right does not *exist*.
13. If the right of revocation exists as a matter of EU law - as it *undoubtedly* exists in the international law of Treaties - it *must always* be exercised by Member States in accordance with EU principles of sincere cooperation.
14. The right of revocation will be *ineffective* *as a matter of EU law* if it is exercised in *less than good* faith, or in *abuse* of that right.
15. These principles are sufficient to prevent any Member State from benefitting from a “purely tactical revocation” of its intended withdrawal.
16. Happily this question of abuse is one which *is* truly hypothetical at this stage. It is *not* one which this Court need determine in this case.
17. Finally, on the issue of the *admissibility* of this reference, the petitioners note that the *relevance of*, and *necessity for*, the reference are matters which the referring Court has *already* fully considered and ruled upon *against* the UK Government.
18. The Court of Session could not have been clearer about this.
19. Courts in Scotland do *not* entertain hypothetical or merely academic questions. The Court of Session has ruled that this Court’s answer to the question referred is *necessary* to allow it to determine the case before it.
20. The Commission misunderstands [[20]](#footnote-20) and the UK Government misrepresents, [[21]](#footnote-21) UK constitutional law. No court in the UK can *force* the Crown or Parliament to obey the law. The courts have no *coercive* power over them.
21. What the courts do, instead, is to pronounce declarators - declarations of the law - on the basis of the constitutional doctrine that the other two branches of Government *will comply* with the law, as it has been declared to them by the courts.
22. In accordance with its duty of sincere co-operation, the Court of Session has sought the assistance of this Court on a matter of interpretation of the Treaty in order to ensure the uniform interpretation of EU law throughout the Union.
23. If this Court declines to answer, the Court of Session will be forced to give its *own* answer on the proper interpretation of Article 50 TEU.
24. This creates a risk of an undesirable divergence of views across the EU on a matter “of fundamental importance ….for the constitutional order of the European Union.” [[22]](#footnote-22)
25. Votes will be held imminently in each of the legislatures, from which six of the petitioners are drawn.
26. These petitioners need to know the options for revocation which are open to withdrawing Member States *now*, to allow them - properly and in a fully informed way - to carry out their duties as democratically elected representatives, accountable to the people.
27. For all these reasons, and for those more fully set out in our written observations, the petitioners ask this court to answer the question in the terms we have proposed in those observations.
28. My Lords, my Ladies: thank you.
1. See Tab 14 of the Petitioner’s appendix re the EPP Convention Group proposed but ultimately unsuccessful amendment to Article I-59 on this point. [↑](#footnote-ref-1)
2. See the Council’s Written Observations at §§ 33-36, 38. [↑](#footnote-ref-2)
3. See Article 114(4) and (5) TFEU [↑](#footnote-ref-3)
4. See the procedure set out in Articles 5 and 6 of the consolidated Technical Standards Directive (EU) 2015/1535 [↑](#footnote-ref-4)
5. See the Council’s Written Observations at §§ 29-32, 39-40 [↑](#footnote-ref-5)
6. See Article 20 TEU and Articles 326 to 334 TFEU on enhanced co-operation procedures. [↑](#footnote-ref-6)
7. See the Commission’s Written Observations at § 24 [↑](#footnote-ref-7)
8. Case C-327/18 PPU *RO v. Minister for Justice and Equality* ECLI:EU:C:2018:733 - First Chamber, 19 September 2018 at § 45 [↑](#footnote-ref-8)
9. See the Council’s Written Observations at § 22 [↑](#footnote-ref-9)
10. See the Commission’s Written Observations at § 17 [↑](#footnote-ref-10)
11. For confirmation, if needed, see Case T‑458/17 *Harry Shindler v. Council of the European Union* ECLI:EU:T:2018:838 (General Court Ninth Chamber, Extended Composition - 26 November 2018) at §§ 56-7:

“56. It is clear from the wording of Article 50 TEU that the possibility for a Member State to withdraw from the Union is based on a unilateral decision by that Member State pursuant to its own constitutional requirements. Article 50(1) TEU thus provides that a Member State may ‘decide’ to withdraw from the EU. Article 50(2) TEU also states that the Member State ‘decides’ to withdraw from the EU and is to notify the European Council of its intention to withdraw from the Union, not to make a request to withdraw.

57      Article 50(3) TEU confirms that the possibility for a Member State to withdraw from the EU is not subject to authorisation from the EU institutions …”. [↑](#footnote-ref-11)
12. See the Commission’s Written Observations at §§ 16, 45 [↑](#footnote-ref-12)
13. See the Council’s Written Observations at §§ 19-20 [↑](#footnote-ref-13)
14. Case 26/62 *van Gend & Loos* EU:C:1963:1 [1963] ECR 3 at page 12 [↑](#footnote-ref-14)
15. See the Council’s Written Observations at §§ 24-6 [↑](#footnote-ref-15)
16. See the Commission’s Written Observations at § 24 [↑](#footnote-ref-16)
17. See Article 238(3) TFEU. Whatever method QMV is adopted it still requires that those voting a particular way account at least 65 % of the aggregate population of the EU [↑](#footnote-ref-17)
18. See the Commission’s Written Observations at §§ 22-3 [↑](#footnote-ref-18)
19. See the Council’s Written Observations at § 41 [↑](#footnote-ref-19)
20. See the Commission’s Written Observations at §§ 8-9 [↑](#footnote-ref-20)
21. See the United Kingdom Government’s Written Observations at §§ 3 and 33 [↑](#footnote-ref-21)
22. Case C-621/18 *Wightman v Secretary of State for Exiting the European Union* ECLI:EU:C:2018:851, Order of the President of the Court (19 October 2018) that the case be determined pursuant to the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the European Court of Justice at § 11 [↑](#footnote-ref-22)